UNIWERSYTET W BIAŁYMSTOKU
WYDZIAŁ PRAWA

BIAŁOSTOCKIE STUDIA PRAWNICZE

BIAŁYSTOK 2008 ZESZYT 4

REAL ESTATE
IN CZECH AND POLISH LAW

Scientific Editorial Team

Grzegorz Liszewski
Michal Radvan

Białystok 2008

ISBN 978–83–89620–43–9

Reviewed by:
Nadežda Rozehnalová

Typeset by:
Jerzy Banasiuk

Cover design:
Bauhaus

Technical Editorial Team:
Jerzy Banasiuk

Proofread by:
Ewa Wyszczelska–Oksień

Published by: Wydział Prawa Uniwersytetu w Białymstoku, Temida 2

Contents

INTRODUCTION

We are presenting the fourth issue of "Białostockie Studia Prawnicze". This publication has been created in cooperation with scientists employed at the Law Faculty of the T.G. Masaryk University in Brno and is devoted to the issues connected with real estate.

The subject matter of real estate possession – purchase, sale and limitation with restricted rights in rem, etc. – is not an exclusive domain of civil law (even though it seems to occupy the greatest part of this law) but appears in other branches of law starting from constitutional and administrative law and finishing with criminal law. Such extensiveness of the subject matter forced the adoption of a special structure of this study that is divided into private law (mainly civil law) and public law (administrative and financial).

A limited framework of this study has not allowed to present the subject matter comprehensively. The main purpose of the Authors was to explain basic institutes of private and public law that govern a widely understood concept of real estate possession against a comparative background. The study includes problem texts too, however, their aim is to signal a multitude and variety of debatable issues connected with the subject matter.

Each part of the study has been an attempt to compare the institutes of Czech law with their Polish equivalents. A conclusion that has been drawn from this comparison is that there are no essential differences between the legal systems of both countries. On the other hand, however, both in Poland and the Czech Republic some solutions may be suggested for the other party as models to be used in the process of improving some regulations concerning real estate.

Grzegorz Liszewski

Michal Radvan

Chapter I

REAL ESTATE IN PRIVATE LAW

Czech Private Law

Josef Fiala, Jan Hurdík, Zdeňka Králíčková, Markéta Selucká

REAL ESTATE IN CIVIL LAW

Basic Legal Concepts

Since the concept of 'real estate' ("nemovitost") is derived from the wider notion of a 'thing' ("věc"), the conception of the latter in the Czech law needs to be described first. European legal systems differentiate between those systems that use the concept of a 'thing' in the wide sense of the word, i.e. including movable and immovable (and real estate) objects and rights (e.g. in Austria, France, Belgium, Italy, Spain, Portugal, Great Britain, etc.)[1], and those that use the concept in the narrow sense of the word, i.e. including only movable objects (Germany, Greece)[2]. The Dutch Civil Code has adopted a different position which operates with the general category of 'estate' (property), subsuming things and property rights including intellectual ownership[3].

The current Czech law is based on a general notion of 'objects of legal relations'. These are further subdivided, under the legal definition in Section 118(1) of the Civil Code, into things and, if their nature allows, into rights and other property values. Real estate thus forms a part of the definition of a thing in the narrow sense. Czech law does not operate with the term of 'law of construction', which simplifies the categorization of buildings within the individual objects of legal relations.

1 "Anything that may become an object of legal relations is called 'a thing'" (Article 202, section 1 of the Portuguese Civil Code of 1966).
2 Cf. generally Section 90 of the German BGB or Article 947, Section 1 of the Greek Civil Code.
3 Cf. Article 3:1 of the Dutch Civil Code.

The Civil Code accords a special regime to flats and non-residential premises, which can, under the special regime[4], be considered as (relatively) independent objects of legal relations, although they do not, from the point of view of the general conception of a thing, meet the requirements of being assessed as 'independent things' in the legal sense[5]. In such a case, their regime is subservient to the regime of immovable objects.

Objects of legal relations are constituted, above all, by things. Under the Czech law, things in the legal sense of the word are considered to be controllable movable objects and natural elements that are useful (i.e. they serve the needs of humans).

Things can be classified according to various criteria, with the most important division being into movable and immovable things (cf. Section 119(1) of the Civil Code, Act No. 40/1964 Sb., as subsequently amended). Section 119(2) of the Civil Code provides a definition of immovable things such as plots of land and buildings connected to the land by a solid foundation. All other things constitute movable things. The separation of movable and immovable things plays a role in, for instance, the acquisition of ownership title.

a) A Plot of Land ("pozemek")

A plot of land is considered to be an individualized part of the surface of the Earth regardless of what substance it is covered with (agricultural land, built-up area, watercourses, etc. Section 27 of the Act No. 344/1992 Sb. defines a plot of land as a part of the surface of the Earth separated from its neighboring parts by a boundary of a regional administrative unit or a cadastral area, a boundary of ownership, a boundary of possession, a boundary of types of plots of land, or a boundary constituted by the manner in which the plots of land are used.

The expression 'lot' ("parcela") is often used, especially in common usage. A lot is a plot of land which is determined by its position and geometry, depicted in a cadastral map and identified with a lot number (cf. Section 27 of the Act No. 344/1992 Sb.). A 'building lot' ("stavební parcela") is a plot of land identified within the category of 'built-up area and courtyards', while a 'plot-of-land lot' ("pozemková parcela") is a plot of land that is not identified as a building lot. The 'lot area' ("výměra parcely"), rounded to whole square meters, is the expression of the overlap of a plot of land into the plane of depiction in surface measure. The size of the lot area is based on the geometric delimitation of a plot of land. Such a numerical statement of the lot area, however, does not constitute binding data for the purpose of the real estate registry.

4 Ownership under the Act No. 72/1994 Sb. on the Ownership of Apartments, or Lease.
5 Cf. Section 118(2) of the Civil Code.

b) Construction ("stavba")

Legal regulations use the concept of a 'construction' on the basis of two distinct conceptions originating in civil law on the one hand and building law on the other. The two conceptions are frequently confused, which gives rise to numerous misunderstandings and conflicts, ultimately based on the crucial problem of defining what 'a construction' actually is.

The provisions of the building law can be divided into two groups:

ba) First, there are regulations governing the construction and the steps involved in the process of construction. These, however, do not define the notion of a 'construction' itself. These regulations provide the procedures for the establishment, use, change or removal of a construction, regulate the situation when a construction is in a different place than it should be or is different from what it should be, when it is not authorised, when it threatens something, etc. The Construction Act No. 183/2006 Sb. (effective from 1 January 2007) characterizes a 'construction' as all building objects created by means of construction or assembly technologies, regardless of the following: their structural and technical design; the structural products, materials and constructions used; the manner of their use and the length of their use (a 'temporary construction' ("dočasná stavba") is any structure whose period of use is pre-limited by the building office, while an 'advertising construction' ("stavba pro reklamu") is any structure that serves the purpose of advertising). In this connection, it needs to be pointed out that when the Construction Act uses the notion of a 'construction', this may variously be also meant to refer to a part or a modification of a finished construction.

bb) Second, there are regulations stipulating categories of constructions, e.g. main and auxiliary constructions, surface and underground constructions, simple constructions, line constructions, as well as permanent and temporary constructions. This group of regulations also includes provisions on certain types of constructions requiring special duties in their design, placement and realization (cf. the abolished Regulation No. 132/1998 Sb. on the General Technical Requirements for Building). However, these provisions do not offer any definition of a 'construction' either. As regards to this group, it is worth noting that until 31 March 1964, the division of constructions into permanent and temporary ones was linked to civil law provisions in the following manner: permanent constructions were classified as immovable things while temporary constructions were classified as movable things (from the point of view of the present situation).

Nevertheless, civil law regulations do not contain any specific delimitation of the notion of a 'construction' either, although they do operate with this term on several

occasions. This concerns, above all, the aforementioned division into movable and immovable constructions ("movité a nemovité stavby"; Section 119(2) of the Civil Code), and, importantly, the issue of 'component (integral) parts of a thing' ("součásti věci"; Section 120) and 'accessories to a thing' ("příslušenství věci"; Section 121). The conceptions of a 'construction' are not identical in civil law and in building law, although it appears from the character of the civil legal relationships that such relationships can apply only to constructions that form a thing in the legal sense (Section 118). Any construction not constituting a thing in the legal sense cannot be an independent thing and, consequently, it cannot have its own legal life.

Regarding the notion of 'construction' in civil legal relationships, it is not decisive whether the creation of the construction was subject to a building permission or whether is has been officially approved after its completion by means of issuing an occupancy permit. Any construction object needs to be considered as a construction if it is at such a building stage when the layout of at least the first ground floor is apparent in a clear and unmistakable manner. From such a moment on, any subsequent building work is aimed at the completion of a thing that has already come into existence, i.e. a thing that is owned by someone and may constitute an object of legal relationships.

Building regulations understand the notion of a 'construction' in a dynamic sense as an activity or a set of activities aimed at the realization of a product (and sometimes even the product itself). By contrast, a 'construction' needs to be understood in a static sense for the purposes of civil law – as a thing in the legal sense, i.e. as the result of a certain building activity which may constitute an object of legal relationships.

An independent thing in the civil law conception is not constituted by annexes (or loft extensions) ("přístavby" and "nástavby") and building modifications (such as make-overs and built-in constructions) ("přestavby" and "vestavby"). Similarly, it is not decisive who the building permission is issued to, since all these are parts of an existing construction. However, the simple act of identifying a construction as an 'annex' (from the point of view of the building law) does not mean that the construction built forms a part of some other constructions because what needs to be judged is the completion of the characteristic features of a 'component part of a thing' (see below).

A 'licensed construction' ("povolená stavba") is any construction built on the basis of a building permission in which the building office had specified certain binding conditions for the realization and use of a construction. Any construction that was built without a building permission or in conflict with a building permission is an 'unlicensed construction' ("nepovolená stavba"). The consequences linked to unlicensed constructions are specified in Section 178 and subsequent sections of the

Building Act (in case of a wrong or an administrative infraction) and Section 129 and subsequent sections of the Building Act (with the possibility of ordering a removal of such a construction). An 'unlicensed construction' ("nepovolená stavba") needs to be distinguished from an 'unauthorized construction' ("neoprávněná stavba") – the latter occurs when a builder builds a construction without having, from the point of view of civil law regulations, the relevant authority to do so (i.e. lacking the relevant right to the plot of land which would enable the builder to erect a structure on the plot of land). The consequences of unauthorized constructions are provided in Section 135(c) of the Civil Code and their regime is decided upon by the court.

c) Component Parts of a Thing ("Součást věci")

Under Section 120(1) of the Civil Code, a component (integral) part of a thing is anything that pertains to a thing by its nature and cannot be separated from it without reducing the value of the thing (i.e. the principal thing). Judicial practice unequivocally stresses that a component part of a thing cannot constitute an object of independent agreements or civil legal relationships. A component part is always in the ownership of the owner of the principal thing and therefore it shares the legal life of such a thing. Since a component part of a thing (albeit initially independent) becomes a part of some other thing (the principal thing) as a result of their physical connection, the ownership of a part of a thing is acquired by the owner of the principal thing even in those cases where the expenses connected with the incorporation or the purchase of the component part of the thing are borne by a person different from the owner. The legal prerequisite for a component part of a thing is its inseparability without the simultaneous devaluation of the principal thing, without any regard to whether the component part itself becomes devalued as a result of the separation. The devaluation of a thing cannot be understood in the narrow sense of the word, i.e. as a destruction of or a substantial damage to the principal thing as a result of removal of the component part; by separating a part of a plot of land, the plot of land as the principal thing does not typically suffer any physical damage (devaluation), but its price decreases. The devaluation can thus be understood as the reduction of the value and, typically, the price of a thing. The devaluation may also mean that a thing will perform its function on a lower level ('functional devaluation') and even that its appearance will be debased ('aesthetic devaluation').

Under the current Czech law (as opposed to some legal regulations in the past), a construction is not a part of the plot of land (i.e. the principle of '*superficies solo non cedit'* is applied). A construction is always an independent thing, but only from the moment when it becomes a thing in the legal sense. Component parts of a construction are constituted by its annexes, extensions and building modifications – built-in constructions. Component parts of a plot of land are, in the sense of Section 120 of the Civil Code, also exterior modifications – support walls, pavements,

curbs, water and sewage pipes, flower ponds, exterior stairs, etc. In individual cases (depending on the manner in which the construction is made), judicial practice considers the following as component parts of some other real estate: melioration devices, terraces, exchange stations, some roads and, e.g. deposits of unclaimed minerals.

Component parts of plots of land, however, also include their vegetation cover, unless special regulations provide that the ownership of such vegetation cover is different from the ownership of plots of land.

d) Accessories to a Thing ("Příslušenství věci")

The term 'accessories to a thing' is generally delimited in Section 121(1) of the Civil Code. This provides that accessories constitute independent things that are not component parts of a thing. Accessories are characterized as things that belong to the owner of the principal thing and are designated by the owner to be used permanently together with the principal thing.

The principal thing and accessories to the thing are owned by the same entity.

For a thing to be considered as an accessory to a thing, it is not decisive whether it is connected to the principal thing in a technical way or not. This criterion is important mainly when considering constructions of various types (e.g. barns, fences, greenhouses, sheds), and various devices (water and sewage pipe lines, etc.)

Some constructions can be classified in both ways (e.g. an independent garage): they can constitute both an accessory to a principal construction and an independent thing.

If a thing is classified as an accessory, it shares the legal life of the principal thing and is transferred together with the principal thing to a person acquiring its ownership. In case of any doubt, especially when transferring real estate, accessories to a thing need to be individually stated and sufficiently identified in an agreement.

Under Section 121(2), appurtenances to a flat are auxiliary rooms and premises designated to be used together with the flat. Auxiliary rooms include, above all, chambers, bathrooms, toilets, larders, dressing rooms, as well as kitchen nooks and entrance halls that are separated in their structural design. Auxiliary premises are considered to be, among others, cellar boxes.

Ownership Title

Ownership title is one of the most significant kinds of property rights. It has an absolute nature and is characterized by its elasticity (when ownership title is

limited, e.g. by an easement, it comes to assume its original extent upon the removal of the limitation). Ownership titles of all owners have the same legal content and protection (cf. Article 11 of the Charter of Fundamental Rights and Freedoms) and are uniform (modern legal regulations do not any longer distinguish kinds and forms of ownership; in the past, ownership was structured into various kinds and forms and classified into, e.g. personal, private and social ownership; this distinction was applied in the process of evaluating things). The basic regulation of ownership is included in the Civil Code.

The content of the subjective ownership title is constituted by a set of specific entitlements belonging to the owner of a thing. This set is traditionally known as the 'ownership triad':

a) the right to use a thing and enjoy its fruits and proceeds;

b) the right to dispose of a thing;

c) the right to hold a thing.

The content of the ownership title includes certain obligations on the part of the owner. The construction of the legal regulation is based on the notion that ownership entails obligations (cf. Article 11, section 3 of the Charter of Fundamental Rights and Freedoms). All owners are obliged to respect the prohibition of exercising their ownership titles to the detriment of the rights of others, as well as the prohibition of any conflict of such rights with general interests protected by law. The exercise of one's ownership title must not harm human health, the nature and the environment beyond limits set by law.

Ownership title may be limited only with the approval of an owner, otherwise only on the basis of a law and mainly in the public interest (under Section 128 of the Civil Code, an owner is obliged to allow use of a thing to the extent necessary and for the necessary period of time, and for compensation, in the case of emergency or urgent public interest, where the purpose cannot be attained otherwise. A thing may be expropriated or ownership title may be restricted in a public interest where the purpose cannot be attained otherwise, but only on the basis of law, solely for the said purpose, and for compensation).

Restrictions of ownership that are applicable under certain conditions to all owners and arise directly from legal regulations constitute certain internal limitations and tend to be identified as 'conceptual restrictions'. Restrictions of ownership that are connected with certain specific legal relationships of ownership originate outside of the ownership relation and arise mainly from the conflict of a specific ownership title and other legal relationships (mainly other ownership titles) may be identified as real limitations of ownership title. The latter group includes also those limitations

that arise from the regulation of the so-called 'neighborhood law' (cf. Section 127 of the Civil Code).

There is the rule, above all, that every owner of any movable or immovable thing must abstain from anything that might cause annoyance to an unreasonable extent to another person or seriously jeopardize the latter's exercise of his rights. This general principle is specified by the Civil Code by enumerating the kinds of interference (the owner may not, above all, put at risk his neighbor's building or plot of land by making alterations to his own plot of land or to any building erected on such land without having taken adequate measures in respect of proper reinforcement of his building or other appropriate measures in respect of his plot of land; the owner may not vex his neighbors to an unreasonable extent by noise, dust, ashes, smoke, gases, fumes, odors, solid or liquid waste, light, shadows and vibrations (so-called 'imissions'); the owner may not let any breeding animals enter adjacent land; and he may not, inconsiderately or in an inappropriate season, remove tree roots from his soil or cut tree branches that overhang his plot of land (so-called 'undergrowth' and 'overhang')). The Civil Code also regulates the possibility of imposing the duty to fence off one's plot of land (where necessary and where it does not obstruct effective use of plots of land and constructions, the court may decide, after first establishing the opinion of the competent building authority, that the owner of a certain plot of land is required to fence it off); as well as the duty to provide access (owners of adjacent plots of lands are obliged to provide, for the necessary time and to the extent necessary, access to their plots of land or, as the case may be, the constructions located in such plots of land, if such access is necessary for the maintenance and management of adjacent plots of land and constructions; where any damage to the plot of land or the construction occurs, the person who caused the damage is required to compensate it, such person cannot relieve himself of this liability; the civil law regulation of entry to a plot of land does not concern the regulation of similar authorizations included in special regulations).

Acquisition of Ownership

Ownership title may be acquired in various ways (called legal reasons) that are subject to various classifications. First of all, the original acquisition needs to be distinguished from derivative acquisition. The ground for this distinction is whether the person acquiring the right derives his or her ownership title from a previous owner or not – either because the right is acquired independently of such an owner / the ownership title is created for the first time (original acquisition), or because the new owner enters into the rights and obligations of his precursor, i.e. derives his legal position from the previous owner (derived acquisition). Original acquisition includes confiscation, separation of fruits, creation of a new thing (including the creation of

a new construction), etc. Derived acquisition includes, among others, inheritance, purchase and sale, donation, exchange, etc. Another criterion distinguishes between the transfer ("převod") and the passage ("přechod") of ownership (in common speech, these terms are frequently misused). A transfer refers to the acquisition of ownership title on the basis of a manifestation of one's will (e.g. by means of a purchase agreement), while a passage refers to the acquisition of ownership title on the basis of some other legal facts (on the basis of a law, by decision of an official body). A transfer of ownership title is regulated by the principle that no one can transfer more rights to any other person that he or she actually has. This means that ownership may be acquired only from an owner of a thing and, together with the transfer; any faults on the thing itself, such as easements, rights of lien, etc. are transferred as well. Ownership title may be acquired only in the extent to which the original owner held it (the Civil Code breaks this principle in Section 486 with respect to the acquisition from a so-called 'sham heir'). Forms of acquisition of ownership are specified in Section 132 of the Civil Code, which provides that ownership may be acquired on the basis of a purchase agreement, contract of donation or some other contract, by inheritance, by decision of a state authority or on the basis of other facts laid down by law.

Acquisition on the Basis of Contract

As regards the acquisition of ownership on the basis of contract, it is important to distinguish whether the legal system accords the effect of transfer or the effect of obligation to the contract. In the former case, the transfer of ownership is realized by the contract itself (its effect). In the latter case, the contract is merely a legal title giving rise to the obligation to transfer the ownership title, while the actual transfer occurs only on the basis of some other legal fact (this fact is then called 'the manner of acquisition'). This is, above all, the hand-over and the take-over of a thing, and 'intabulation' (i.e. entry into public records) in the case of immovable things. Under the Czech legal system, contracts typically have only the effect of obligation.

Where an immovable thing (real estate) is transferred, ownership title is acquired upon the entry into the real estate registry, unless provided otherwise by a separate act (the exception applies in the case of a transfer within the so-called 'large privatization'). The entry is made on the basis of a decision issued by the land registry office after inspecting the relevant agreement as regards certain specified criteria. The legal effects of the entry come into existence on the basis of a final and conclusive decision on the entry of the right as of the day the motion for the entry is delivered to the land registry office. An entry is constituted by a record in the real estate registry. However, in the event of a transfer of real estate which is not subject to registration in the real estate registry, ownership is acquired at the moment when the relevant agreement takes effect.

Purchase Contract

The most frequent manner of acquiring ownership to real estate is by purchase contract. If the purchase contract concerns real estate, then the regulation in Sections 588 to 600 of the Civil Code is applied even in cases where the contract is signed by entrepreneurs.

A purchase contract for real estate must be in writing and the declarations of the wills of the contracting parties must be on the same document. Any deficiencies in the legal form of a purchase contract result in the nullity of such a contract.

The contract must identify the parties by means of designations required by cadastral regulations, specify the subject matter of the purchase (also by means of identification features used for registering the real estate in the real estate registry), and agree on the purchase price. The subject matter and price represent the essential elements of a purchase contract and are obligatory in such a contract. Other data are optional: a purchase contract for real estate may include some auxiliary understandings corresponding to its nature, such as the pre-emptive right of purchase (of material as well as obligation nature) or the right of a back purchase.

The contents of a purchase contract consist, above all, of the duty of the seller to hand over, properly and in time, the subject matter of the purchase to the buyer, and the corresponding duty on the part of the buyer to take over the subject matter of the purchase. The buyer is obliged to pay the purchase price properly and in time. The seller is obliged to inform the buyer, when signing the contract, of any faults on the thing that the seller is aware of. If any fault that the seller did not inform the buyer of becomes subsequently apparent, then the buyer is entitled to a discount from the price of the real estate. If this concerns a fault that makes the thing unusable, the buyer has the right to withdraw from the contract. However, if the seller assures the buyer that a thing has certain properties or that a thing is without any faults, and such a statement subsequently turns out to be false, then the buyer may always withdraw from such a contract.

Apart from a purchase contract, a **contract of exchange** may be concluded concerning a mutual exchange of real estate. Such a contract is reasonably regulated by similar legal regulations as the purchase contract.

Pre-emptive Right of Purchase

Real estate is often subject to pre-emptive right of purchase. It is generally described in the Civil Code (Section 602 and subsequent sections).

The pre-emptive right of purchase may be characterized as a legal relation of obligation, whose subjects are constituted by the obligor and the obligee. The content of this relation is mostly the right of the obligee to be offered by the obligor a certain object for purchase should he wish to alienate it, and the obligor's obligation corresponding to this right. The purpose of the pre-emptive right of purchase is to secure the superior position of the obligee for the acquisition of the subject matter of the pre-emptive right of purchase. Such acquisition, however, does not occur automatically – it is dependent on the volitional behavior of both subjects. The first requirement is the obligor's will to alienate the subject matter of the pre-emptive right of purchase, while the second requirement is the obligee's will to acquire the thing.

According to its effect, it is suitable to distinguish the following kinds of pre-emptive rights: personal pre-emptive right of purchase ("osobní předkupní právo") and material pre-emptive right of purchase ("věcné předkupní právo"). They may be briefly characterized as follows: Personal pre-emptive right obliges and binds only the parties to the contract, while material pre-emptive right does not place the obligation to offer the subject matter for purchase only on the person signing an agreement on the pre-emptive right of purchase but also its legal successor.

The pre-emptive right of purchase may arise mainly on account of the following legal reasons:

a) on the basis of a contract,

b) by operation of law.

The content of the legal relation is mainly the obligation to offer the subject matter for purchase and the right to buy such a subject matter. Both the first and the second rights are correlative: what corresponds to them is the right to be offered the subject matter and the obligation to suffer the purchase of a thing or, as the case may be, the obligation to sell the thing. The duty to offer the thing for purchase is both on the part of the person who promised to make such an offer (cf. Section 603(1) of the Civil Code) and on the part of a person who is a subject of the ownership title with which this obligation is connected (if the obligation has material legal character, i.e. it is attached to a thing). The obligation arises at the moment when such a subject decides to sell the subject matter of the pre-emptive right of purchase, and its content is the obligation to make an offer. The offer must have certain elements; it may, basically, be stated that it must contain all conditions under which the purchase agreement should be concluded, including the written form if it concerns the pre-emptive sale of real estate (cf. the 3rd sentence in Section 605 of the Civil Code). The extent of such conditions will also depend upon the original agreement which may have previously specified some of these conditions (e.g. the price). The offer is a unilateral, addressed act by the obligor and becomes perfect upon its delivery to

the obligee. It is from such a moment that time limits for the implementation of the sale commence to run. If the offer fails to meet the requirements specified, it cannot cause its legal effects; this concerns, above all, the failure of the commencement of the time limit for realization of the pre-emptive right of purchase.

Acquisition by Inheritance

The Civil Code specifies inheritance in its Part VII (Section 460 and subsequent sections). What is essential, as regards the acquisition of ownership title, is that the passage of ownership to heirs occurs upon the death of the deceased. This is the so-called 'principle of descent' (as opposed to the decedent's estate *hereditas iacens* where inheritance is acquired by its transmission).

Acquisition by Means of a Decision of a State Authority

This concerns a decision issued by a court, a land registry office, a building office, etc. According to Section 132(2) of the Civil Code, in such cases, i.e. where ownership is acquired by a state authority's decision, it is acquired on the day stated in that decision. If the day is not stated, then ownership is acquired on the day when the decision comes into legal effect. The Civil Code regulates some special cases of acquisition of ownership title by a state authority's decision, e.g. as regards the judicial decision to cancel and settle common property (Section 142), the order to transfer ownership title to an unauthorized construction (Section 135c(2) – only if the ownership of construction transferred to the owner of the plot of land), and the sale of real estate and movables ordered by a court in the execution of judgment, etc.

Acquisition on the Basis of Other Facts Specified by Law

The facts, on the basis of which ownership title is acquired, are provided in both the Civil Code and other legal regulations.

a) The Civil Code regulates the acquisition of ownership title to **accretions of a thing** ("přírůstky věci"; Section 135a). This is an entitlement arising from the content of ownership title. In this connection, accretions form an independent subject of ownership title only after they become separated from the original thing. If they are not separated, they form a part of the principal thing. The ownership title itself is acquired only upon separation. A similar nature is shared by acquisition through accession, i.e. to everything that was

subsequently connected with the principal thing (at present, this manner of ownership acquisition is not regulated in the Czech legal system, but it could occur in the case of real estate in connection with, e.g., objects washed up by water).

b) A special form of acquisition of ownership title is constituted by **prescription** (usucapio, acquisitive prescription, "vydržení"). The requirements for prescription are, according to Section 134 of the Civil Code, as follows:

– a competent subject (prescription can result in the acquisition of ownership title in the case of both natural and legal persons),

– a competent subject matter (any object may be acquired by prescription that is subject to the right of ownership except for things that may be only in the ownership of the state or legal persons specified by law),

– lawful possession (disposition of a thing in the same way as of one's own, with view to all the circumstances that the thing belongs to its holder),

– the passage of the period of prescription period, which is:

– 3 years in the case of possession of movable things,

– 10 years in the case of possession of immovable things,

– the possession must be uninterrupted for the entire length of the prescription period; any relevant loss of possession means the termination of the prescription period; the prescription period may include the time for which the legal predecessor had the thing in his or her lawful possession.

Where all the above-mentioned criteria are met, original acquisition of ownership title by law occurs. Because the ownership is acquired by law, no assertion or decision is necessary and any potential judicial statement has only a declaratory nature. In the case of immovable things, the person acquiring his right by prescription will be entered in the real estate registry as the owner.

c) One of the forms of acquisition consists of **processing** ("zpracování"; Section 135b of the Civil Code).

d) In connection with the changes in the area of regulation of the civil law, the role of acts (statutes) as a direct form of acquisition has increased. Under the Act No. 509/1991 Sb. (effective from 1 January 1992), the right of personal use of plots of land existing as of that date was transformed into the right of ownership. What was decisive for the precise determination of ownership to a plot of land was the state of the relationship of use and the nature of the plot of land (built-up area or land without any construction). Where a plot of land was in the personal use of an individual, the ownership title arose only

for that particular individual. Where a plot of land was commonly used by several persons, what mattered was whether the plot of land was built-up or not: plots without constructions gave rise to apportioned common property of a plot of land (with identical shares), while built-up plots of land gave rise to apportioned common property of a plot of land with shares corresponding to the individuals' shares to the construction (in case of doubt, the size of shares is determined by mutual agreement; in the absence of any agreement, the size of shares is determined by courts). Where a plot of land was in the common use of spouses, this gave rise to unapportioned (joint) common property of spouses (joint property ownership, "bezpodílové spoluvlastnictví") if their relation continued. If their joint property ownership terminated, then spouses became common co-owners of a plot of land with identical shares.

The law as a form of ownership acquisition was likewise applied in the case of some transformation and restitution regulations, such as the acquisition of property by municipalities (the Act No. 172/1991 Sb., as subsequently amended).

e) Acquisition titles play a role when dealing with the regime of unauthorized constructions. The Civil Code considers the owner of a construction to be its builder, but certain sanctions may be applied which modify such a principle. Such sanctions are decided by the court and may be as follows:

   – the order to remove the construction at the expense of the owner (the ownership title will terminate),

   – the order to assign the ownership to the owner of the plot of land in return for a compensation, as long as the owner of the plot of land agrees with such a solution – this procedure is possible only if the removal of the construction is not practical.

It needs to be stated, for the sake of completeness, that if a court fails to apply any of the two sanctions mentioned above, the ownership title to a construction stays with the builder. The court has the opportunity to regulate the relations between the owner of the plot of land and the owner of the construction, above all establishing, in return for compensation, an easement necessary for the exercise of one's ownership title to a construction, or, as the case may be, create the right of entry and access.

Termination of Ownership Title

Ownership title may be extinguished as a result of various legal facts that may be sorted out according to specific criteria. One of the basic distinctions concerning the termination of ownership title is the difference between:

– absolute termination; and

– relative termination.

Absolute termination occurs when ownership title to a thing terminates without anybody else acquiring it. This group of ownership title termination includes, above all, the cessation of existence of a thing either as a result of its destruction (a demolition of a construction) or its consumption. Relative termination includes situations when ownership title terminates for the former owner with someone else acquiring the right at the same time. In such situations, the legal reasons for the termination of ownership title correspond to the legal reasons for the acquisition of ownership title. Thus, for example, the ownership title of the original owner (donor) is terminated on the basis of a contract of donation (a purchase contract, a contract of exchange). At the same time, the ownership title to the same thing is acquired by the donee (the buyer, or the other party to the exchange, as the case may be).

The Civil Code does not contain any express regulation of individual kinds of termination of ownership title. In spite of that, the following specific kinds can be listed:

a) Termination on the Basis of a Manifestation of the Will of the Existing Owner

aa) By contract – the individual forms of termination of ownership title correspond to the forms of acquisition of ownership title on the basis of contract (see above). The contracts can have various forms – purchase agreements, contracts of donation, agreements on the transfer of a co-owned share, agreements on the termination and settlement of common property, agreements on the surrender of a thing (in restitution matters), etc.

ab) By dereliction of a thing – this is a unilateral manifestation of the existing owner's will, whereby he expresses his will not to continue as the owner of a thing. Dereliction needs to be distinguished from a loss, which constitutes an event. The consequences of dereliction are regulated by Section 135 of the Civil Code, under which dereliction brings about the termination of the owner's ownership title to the derelict thing (regardless of whether the owner of the derelict thing is known or not), and, the same time, ownership title is created for a municipality. The application of dereliction in the case of real estate is highly problematic and contestable.

ac) By destruction of a thing – this is a legal act by the owner, whereby ownership title is terminated because the owner causes the material substrate of a thing to be unusable as a result of his action (in the case of real estate, the destruction of a thing is constituted by its demolition).

ad) By consumption – i.e. by exhausting the use value, regardless of whether the owner benefits from it or not. This is practically impossible in the case of real estate.

b) Termination Independent of the Will of the Existing Owner

Within this category, two subtypes can be distinguished – termination of ownership independent of the will of the owner in the narrow sense, and termination of ownership against the owner's will.

ba) By cessation of existence of a thing – Although the result is the same as in the case of the destruction of a thing by its owner (i.e. the cessation of existence of the material substrate of a thing), this concerns the cessation of existence of a thing as a result of an event (fire, earthquake).

bb) By loss of a thing – Unlike real estate, which cannot be lost, the loss of movable things results in the termination of ownership title if the thing is not returned to its owner or if the owner fails to claim it within the set period of one year. Upon the expiration of this time limit, the ownership of the thing passes to the state.

bc) By death of the owner – this terminates the owner's ownership title, which passes to his successors or passes to the state as escheat (if no heir succeeds to the inheritance).

bd) By prescription – this terminates ownership title when certain conditions for its acquisition by a lawful holder are met (there may not be two different subjects holding ownership title to a thing, unless this concerns common property).

be) By decision of a state body (by a judicial decision on the termination and settlement of common property; by a decision of an administrative body on expropriation – cf. the relevant chapters; by a judicial decision in a criminal matter where the court imposes the final and conclusive punishment of forfeiture of property or forfeiture of a thing or a protective measure (injunction) of a confiscation of a thing; during the sale of things in the process of enforcement of a decision – execution; by a judicial decision on an unauthorized construction with the court assigning the construction to the owner; by a judicial decision on ownership to a processed thing).

Protection of Ownership Title

Ownership title is protected by a whole range of legal instruments. The fundamental legal protection always consists of the legal instrument of the highest

legal power – the Charter of Fundamental Rights and Freedoms. In addition, protection is provided by almost all branches of law (both public and private). General instruments can be used for the protection of ownership title, i.e. such that the legal order affords for the protection of all subjective rights (e.g. the possibility to seek compensation for damage to a thing, the possibility of seeking protection with the relevant municipal office if an obvious breach of peaceful state occurs – cf. Section 5 of the Civil Code). Special instruments are those that are meant exclusively for the protection of ownership title, including so-called possessive actions ("vlastnické žaloby") provided for in Section 126 of the Civil Code. These actions can have two forms:

a) Action for the Recovery of a Thing (Real Action) ("Žaloba na vydání věci (žaloba reivindikační)")

This action is meant for the protection of ownership title in case of an unauthorized retention of a thing. An action for recovery seeks the release of both movable and immovable things. In the event of immovables, the expression 'action to evict a thing' is used ("žaloba na vyklizení věci"), which arises from the nature of the thing and is also emphasized in other legal regulations, e.g. in Section 340 of the Civil Court Procedure as well as in judicial practice.

b) Action to Repel a Claim (Actio Negatoria) ("Žaloba zápůrčí (negatorní)")

This action may be used for the protection of ownership title in all other cases where ownership title is infringed in some other way than an unlawful retention of a thing.

Common Property ("Spoluvlastnictví")

A thing which is subject to the right of ownership may be owned by a single entity or belong to several entities at the same time, without being separated among them. The latter case describes a situation of common property (co-ownership) where all co-owners are considered as a single owner of a common thing; the same rights that belong to an owner in the case of individual ownership are held by several individuals in the case of common property.

As regards the delimitation of shares, common property is divided into two kinds:

- 'apportioned' common property ("podílové"),
- 'unapportioned' (joint) common property ("bezpodílové").

These categories were distinguished on the basis of the Civil Code, but from 1 August 1998, the Civil Code provides only for the former since the latter was replaced by the institute of matrimonial property of spouses ("společné jmění manželů", cf. Section 136 and subsequent sections).

As regards their nature, the individual types of 'apportioned' common property are distinguished into:

– ideal common property,

– real common property.

In the case of ideal common property, there are no actual parts of the common thing specified for the individual co-owners; the co-owners merely have certain rights and obligations (cf. 'apportioned' common property). By contrast, in the case of real common property, co-owners have rights to precisely delimited parts of an inseparable thing (similar to real common property is the ownership of apartments and non-residential premises, which is a combination of real common ownership to a certain part of a construction, i.e. an apartment, non-residential premises and 'apportioned' common ownership of shared parts of the construction).

'Apportioned' Common Property ("Podílové spoluvlastnictví")

The defining feature of 'apportioned' common property is a share (an ownership interest) representing the degree to which co-owners participate in the rights and obligations ensuing from their co-ownership of a common thing (Section 137(1) of the Civil Code). The share does not delimit a certain part of a thing with respect of which a co-owner is authorized to exercise his ownership title; it expresses the legal position of a co-owner towards the other co-owners, determining how the individual co-owners participate in the proceeds of a thing, what expenses they bear, etc. The co-ownership share plays an important role in the final stage of the co-ownership relation: during its termination and settlement.

The size of one's share may be expressed as a fraction or percentage. Its specific amount depends, above all, on the agreement of co-owners, legal regulations (cf. Section 150(4) of the Civil Code) or a decision by a relevant body (e.g. a court ruling on the settlement of matrimonial property of spouses). If the size of one's share is not specified, then it holds that the shares are equal (Section 137(2) of the Civil Code). The share in common property may be subject to inheritance, execution of a decision, right of lien in the case of a share in both movables and immovables, etc.

'Apportioned' common property comes into existence in the same manner as ownership title (see above).

The content of 'apportioned' common property covers those rights and duties that are subject of individual ownership on the one hand, and, on the other, those rights and duties that are specific for the relation of co-ownership. These specific rights and duties have been traditionally classified into three groups according to what subjects they pertain to:

- the mutual relationship between co-owners,
- the relationship of all co-owners towards third persons concerning the common thing,
- the relationship between one co-owner towards other co-owners concerning his co-ownership share.

What is decisive in the mutual relationship between co-owners are the sizes of shares of individual co-owners, which determine the degree to which the co-owners participate in the rights and obligations ensuing from their common property. It is logical that when using and disposing of the thing, the co-owners will depend in their mutual relationship mostly on their mutual agreement. The Civil Code, however, does not require unanimous consensus, favoring the majority principle (Section 139(2) of the Civil Code). This means that not all co-owners need to arrive at an agreement in matters concerning the management of the common thing; what matters is the decisive majority calculated according to their shares. It follows from this that the actual number of co-owners and their numerical majority are not relevant; what matters is the majority of shares. At the same time, the Civil Code deals with the situation of those who are defeated in the vote as follows: if the decision concerns a major change of a common thing (e.g. reconstruction, change in the purpose of a plot of land), the outvoted co-owners may file a petition with a court seeking a ruling on such a change (Section 139(3) of the Civil Code). The Civil Code further deals with those situations where it is impossible to reach a majority, e.g. because some of the co-owners refuse to participate in decision-making or a balance of votes is reached. In such cases, matters of management with the common thing will be decided on by the court upon the motion of any of the co-owners. It must be stressed that management of the common thing does not include such dispositions that might lead to the termination of the co-ownership relation. Consequently, a transfer of a common thing cannot be decided on by a majority calculated according to the size of the shares but requires the agreement of all co-owners.

In their mutual relations towards third parties, all co-owners are considered together as a single entity. Therefore all co-owners have rights and obligations jointly and severally from legal acts concerning the common thing. Their mutual

relation is one of active or passive solidarity provided for by the law (Section 139(1) of the Civil Code).

The relationship between a single co-owner and others concerning their shares in common property is most clearly manifested during a transfer of a share in common property. Since the change of a co-owner is undoubtedly a significant change, the legal order provides a guarantee for the legal certainty of other co-owners. At present, the institute of a pre-emptive right of purchase is applied (for details, see a special chapter). During the transfer of a share in common property, two situations may arise depending on who is to acquire the share in common property:

- if the co-owner is transferring the share to his next of kin, i.e. persons related to him in the direct line, siblings, spouse or other persons in a familial or some similar relationship and if the harm that one of them would suffer might be reasonably felt as his own harm, then the co-owner may transfer his share to such persons without any further limiting conditions;
- if the co-owner is transferring a share in common property to some other persons (natural and all legal persons), then the pre-emptive right of purchase to such a share arises to the other co-owners. This pre-emptive right of purchase arises as a consequence of the co-owner's intention to transfer his share. The content of the pre-emptive right needs to be judged according to the provisions in Section 602 and subsequent sections of the Civil Code. The exercise of the pre-emptive right of purchase will be unequivocal if the authorized co-owner is a single person. In other cases, an agreement is assumed to exist among the other co-owners, especially concerning which of them will exercise the pre-emptive right of purchase. If no agreement is arrived at, then co-owners have the right to buy the share according to the sizes of their own shares. A violation of the pre-emptive right during the transfer of a share in common property gives rise, in addition to the usual consequences of the violation of the pre-emptive right (cf. Section 603 of the Civil Code), to other consequences as well: any agreement under which a co-owner transfers his share to another person without respecting the legal pre-emptive right of the other co-owners is voidable (Section 40a of the Civil Code – the party affected by such an act must raise a defense based on the invalidity of the act, otherwise the legal act is considered as valid).

Common property may cease to exist similarly to the cessation of existence of individual ownership (e.g. all co-owners transfer the common thing to the ownership of a single owner). However, the nature of the co-ownership relation also gives rise to the possibility of its cancellation. Common property may be terminated:

- by agreement (Section 141 of the Civil Code),

– by a judicial decision upon the motion filed by any of the co-owners (Section 142 of the Civil Code).

The termination of common property is the first step. This needs to be followed by its settlement as the second step.

Out of the above-mentioned ways of terminating common property, the Civil Code prefers termination by agreement which makes it possible to deal with the situation on the basis of a common will of the co-owners. Where common property concerns real estate, the agreement must be in writing and must be followed by an entry of the ownership title into the real estate registry.

If common property is not terminated and settled by agreement, then termination and settlement will be performed by the court upon a motion filed by one of the co-owners (Section 142(1) of the Civil Code).

Matrimonial Property of Spouses ("Společné jmění manželů", hereinafter abbreviated to MPS)

In its original wording (the Act No. 40/1964 Sb.), the Civil Code used to regulate only apportioned common property and 'unapportioned' (joint) common property' that could arise only between husband and wife and which could, with view to the overall conception and nature of ownership title, affect only things (cf. also the systematic placement of the regulation within the second part on rights in rem). The original text of the Civil Code thus did not include an overarching institute for the property rights of spouses, which was rectified by legislators by the adoption of the amendment No. 91/1998 Sb. By means of mandatory norms, this act removed the modified institute of unapportioned common property with a very limited scope, and replaced it with the institute of matrimonial property of spouses, whose scope is much broader, allowing a significant contractual freedom to both spouses and fiancés.

The purpose of the institute of matrimonial property of spouses is to limit individualism in favor of matrimonial and familial solidarity. This is apparent from many individual provisions (cf., for instance, the rebuttable presumption of existence of matrimonial property in Section 144 of the Civil Code; the rules for the settlement of terminated matrimonial property in Section 149 (2) and (3) of the Civil Code; the legal presumption for the settlement of matrimonial property in Section 150 of the Civil Code; and the institute of things forming customary furnishment of their common household in Sections 143(a) and 148 of the Civil Code).

Matrimonial property of spouses may be conceptually created ex lege *only between spouses*, regardless of whether they actually live together or not. It is also

created in such a marriage that is subsequently declared by a court to be void, e.g. due to bigamy. It does not arise in a putative marriage because this does not cause any effects to status or property. Matrimonial property of spouses does not arise in the case of registered partnership, although the legal system of the Czech Republic provides for this form of cohabitation of persons of the same sex (cf. the Act No. 115/2006 Sb. on Registered Partnership). Matrimonial property of spouses does not arise between male and female cohabitees, although their cohabitation may be very stable. Neither registered partners nor any other partners – regardless of their sex – may establish any kind of a property union for the event of the continuation, cancellation or termination of their cohabitation, including their deaths.

As regards the *subject matter* of matrimonial property of spouses, the property includes all assets and liabilities acquired except for certain statutory exceptions. The law provides that the subject matter of MPS includes, ex lege, the following:

a) assets: property acquired by any of the spouses or both of them together during their marriage (anything that may be assessed in terms of money, including, for instance, a business share), with the exception of:
   - property acquired by inheritance
   - property acquired by donation
   - property acquired by one of the spouses in exchange for property in the exclusive ownership of that spouse (the theory of transformation)
   - property which by its nature serves the personal needs of one of the spouses (excluding, however, things serving for the performance of one's vocation)
   - property which on the basis of restitution legislation was restituted to one of the spouses after 1989 (cf., e.g. the Acts Nos. 403/1990 Sb., 87/1991 Sb., and 229/1991 Sb.),

b) liabilities incurred by one or both spouses during their marriage, with the exception of:
   - liabilities related to property in the exclusive ownership of only one of the spouses and
   - liabilities taken over by one of the spouses without the approval of the other where their extent exceeds a level commensurate to the property of the spouses.

Since MPS may, with view to its very wide definition, include a business share, Section 143 (2) of the Civil Code provides that where one of the spouses becomes a partner of a business company, a shareholder or a member of a co-operative the

other spouse does not become a partner, a shareholder or a member of the co-operative (except in the case of membership in a housing co-operative). As stated in the introduction, Section 144 of the Civil Code provides, in case there is any doubt about the scope of the subject matter of MPS, a statutory presumption for the benefit of matrimonial property. This is a rebuttable presumption which may be disproved by evidence.

The 1998 amendment of the Civil Code loosened the rigidity of matrimonial property law mainly by allowing the conclusion of a relatively *wide range of agreements (covenants)*, whereby spouses or fiancés may *modify the statutory extent of MPS* – they may agree on the extension or restriction of their matrimonial property, modify the statutory manner of its *management*, or, as the case may be, modify the *creation* of MPS as an institute by deferring it to the day of termination of marriage (*deferred community, Zugewinngemeinschaft, comunione differita, coaquisita coniugum*). Things forming customary furnishing of a common household of spouses constitute a statutory *limitation* of the freedom of contract. Where the scope of MPS is being restricted, such things must always constitute the subject matter of MPS. The form is mandatorily set by the law to be a notarial deed.

The effects of a contractual regulation of the subject matter of MPS towards third parties are, however, significantly limited because they apply against a third party only if this third party is aware of the contents of the agreement (cf. Section 143(a), subsection 4 of the Civil Code). Where the modification agreement concerns real estate, the effects arise upon its entry into the real estate registry.

The 1998 amendment, however, *did not allow for the possibility of signing pre-marital* or marital (familial) agreements in the traditional sense of the word, as it was possible in Bohemia under ABGB. Neither spouses nor fiancés may thus contractually form some other type of a property arrangement different from MPS and cannot terminate it as such upon mutual agreement either. They cannot legally include – within the so-called 'modification agreement' – any common provisions for the event of death, etc.

A specific kind of a change in the subject matter of MPS, leading to a modification of its statutory extent, comes as a result of *a judicial decision*, under which MPS is restricted down to things forming customary furnishings of a common household. The restriction is decided on by a court upon the petition of one of the spouses by issuing a judgment. This situation may occur under the following two conditions:

– on account of serious reasons (e.g. alcoholism, cf. Section 148(1) of the Civil Code),

– if at least one of the spouses obtains authorization to carry on business activity or becomes a partner in a business entity with unlimited liability. (cf. Section 148(2) of the Civil Code).

The contents of MPS consist of rights and obligations of spouses. Each of the spouses has the same rights and obligations as any other co-owner, co-debtor or co-creditor and his or her rights are exercised together with the other spouse. It is desirable, in order to determine the specific content, to distinguish rights and obligations common to all categories of MPS on the one hand, and rights and obligations different for each category of MPS on the other. The law provides expressly that both spouses are entitled and liable *jointly and severally* from acts in law relating to their matrimonial property (Section 145(4) of the Civil Code). This means that if one of the spouses concludes a purchase agreement, the duty to pay the purchase price arises to both spouses, both also have the right to acquire the thing into their ownership once matrimonial property of spouses is created with respect to the purchased thing as a result of the required procedure (e.g. in the case of immovables recorded in the real estate registry upon the entry of such a real estate into the registry – even though this may be for the benefit of one of the spouses only).

Both spouses use and maintain jointly property forming their matrimonial property.

The routine *management* of property being part of matrimonial property may be carried out by either of them. In other matters, the consent of both spouses is required, otherwise the relevant act in law is voidable. The Civil Code does not specify the form of such a consent; as a result, the consent may be implied, i.e. carried out in such a way that one may adduce, from the behaviour of the spouse, that he or she had agreed with dealing with some matter in a certain way. The consent may be subsequent. As stated above, this provision of the law may be modified by agreement.

The law provides special rules for *business activities*. Property included in matrimonial property may be used by one of the spouses for his or her business activity with the other spouse's consent. This consent is to be granted when such property is to be used for the first time. There is no specific form prescribed for this consent and it may be implied. This is a general consent; the other spouse's consent is not subsequently required for other individual acts in law related to the business activity.

The existence of matrimonial property of spouses is possible only for the duration of marriage. That is why MPS *terminates* no later than the termination of marriage (Section 149(1) of the Civil Code), i.e. upon the death of one of the

spouses, his or her declaration as dead, divorce and the declaration of the marriage as null and void.

Exceptions are provided for by special laws, under which MPS terminates during the term of the marriage (cf. the punishment of the forfeiture of one's property according to Section 52(2) of the Act No. 140/1961 Sb. – the Criminal Code, and the declaration of bankruptcy according to the Act No. 182/2006 Sb. on Bankruptcy and Forms of its Settlement).

MPS may, after its termination or judicial restriction, be renewed only by a court decision issued upon the petition of one of the spouses (Section 151 of the Civil Code). No renewal as a result of a mutual agreement is possible.

All cases of termination of MPS or its contractual or judicial restriction must be followed by the *settlement* of matrimonial property. Settlement is understood to be such an arrangement of property relations between the spouses concerning property included in matrimonial property at the time of its termination or cancellation. The Family Act (No. 94/1963 Sb.), as amended by the amendment No. 91/1998 Sb., provides for the possibility, in case of so called uncontested divorces, of a settlement, with a deferring condition, of matrimonial property of spouses that is to terminate in the future as a result of a divorce (cf. Section 24(a) of the Family Act). This new regulation allows spouses to settle all their property relations arising from their marriage in their entirety (i.e. not only MPS but also apportioned common property, common housing and, as the case may be, the maintenance duty for the divorced spouse).

In the case of settlement of MPS, the law prefers the spouses' or the divorced spouses' *agreement*. If the property involves an immovable thing, the legal effects arise upon its entry into the real estate registry.

If there is no agreement, however, any of the divorced spouses may file a suit for the settlement of MPS with the relevant court. The legal rules are both *quantitative and qualitative*. The basic principle is that the ownership interests of both spouses whose the matrimonial property has terminated are equal. Either spouse is entitled to claim reimbursement for whatever he/she has spent on the matrimonial property from his/her own funds, and must pay compensation for whatever he/she has taken from the matrimonial property for the benefit of his/her other property (cf. Section 149(2) of the Civil Code). During settlement, the needs of minor children shall be particularly taken into consideration, as well as the quality of care contributed by each spouse to the family, and the efforts that each spouse put into the acquisition and maintenance of matrimonial property (cf. Section 149(3) of the Civil Code).

Where within three years of termination of matrimonial property, no agreement on settlement has been reached, or where within three years of the said termination no petition is filed with the court seeking settlement of matrimonial property by

a court ruling, then the so-called *irrebuttable presumption* shall be applied. Due to the need to guarantee legal certainty for spouses as well as third parties, the law provides the following rules:

c) movable things, originally included in MPS, come ex lege into the individual ownership of that former spouse who uses such a thing for his/her need, the need of his/her family and household exclusively as the owner

d) other movable and immovable things, originally included in the matrimonial property of spouses, come ex lege into apportioned co-ownership, the shares (ownership interests) of each co-owner being equal (i.e. one half each with respect of the total of each individual thing),

e) the same shall apply to other joint property rights, claims and liabilities – they become ex lege apportioned in the same way (i.e. one half each with respect of each individual claim or liability).

The special rules are provided by special acts concerning the settlement of MPS as a result of the death of one of the spouses, declaration of bankruptcy, and the punishment of the forfeiture of one's property.

Easements – Rights to Another Person's Things

Rights to another person's thing constitute a group of subjective rights which enable the use of a thing of another person in a specified manner. The characteristic feature of these rights is their nature as rights in rem, which represents the link between their contents (rights and obligations arising from them) and a certain subjective right to things (traditionally and most frequently the ownership title).

Rights to another person's things constitute, in the objective sense, a set of several legal institutes performing independent functions. Easements enable the use of the utility value of a thing in the ownership of some other entity, while right of lien ("právo zástavní (podzástavní)") and right of retention (possessory lien, "právo zadržovací") are instruments for establishing security.

Easements

The institute of easements was created on the basis of servitude and burdens pertaining to things under the Civil Code No. 141/1950 Sb. This is a set of legal norms regulating relations which come into existence during the partial restriction of the possible use of the utility value of another person's things in favor of individualized subjects in order to achieve a more effective social and economic use of a thing. The current legal regulation of easements is contained mainly in the Civil Code (Section

151(n) and subsequent sections), as well as in some other regulations governing specific aspects of individual easements (mainly their creation and contents, e.g. in the case of so-called 'line buildings'). The legal delimitation of the notion of 'easements' is linked to all these characteristics: under Section 151(n), subsection 1 of the Civil Code, easements restrict the owners of real estate in favor of another person in such a way that the owner is obliged to tolerate something, refrain from doing something or perform something. The rights arising from an easement are either attached to ownership of a specific immovable asset (real estate), or pertain to a particular person. Further legal characterization is contained in Section 151(n), subsection 2, which provides that easements pass together with ownership title to the transferee.

Types

The legal delimitation of the notion of 'easements' indicates their basic division. One of the possible divisions is according to the determination of the entity authorized:

- easements effective in rem (the authorized entity is always an entity with an ownership title to a thing. A change of this entity is not legally relevant for the further existence of the easement and any successor to the original owner obtains the right corresponding to the easement.)
- easements effective in personam (these easements satisfy the interests of an individual subject, while easements in rem satisfy interests held by any holder of a subjective right to a thing because they are related to the objective possibility of implementing its utility value.)
- Another division of easements results from their different content, with an emphasis on differences in the duties of the obliged person. According to this differentiating criterion, easements may be divided into:
- easements with the duty to perform (e.g. to provide certain acts)
- easements with the duty to suffer (e.g. to suffer the behavior of another person)
- easements with the duty to refrain (e.g. to refrain from performing the usual content of ownership title).

Creation

In the formation of individual easements, what needs to be considered is their original creation only rather than acquisition in situations where an easement had

existed before and where merely a change in some of its subjects has occurred. Within the sense of Section 151(o), subsection 1 of the Civil Code, the following ways can be distinguished for the original formation of easements:

- on the basis of a written contract,
- on the basis of a last will (testament) in connection with the results of inheritance proceedings,
- on the basis of an approved agreement of heirs,
- a ruling of the competent administrative authority,
- by operation of law,
- by the exercise of one's right (acquisitive prescription).

The conclusion of the agreement – which must be in writing – is regulated by the general provisions of the Civil Code on legal acts. The agreement may be signed by the owner of real estate or some other person vested with this right by the law. The agreement on the establishment of easement may be independent or it may exist as a collateral provision in, e.g. a contract of donation, a purchase agreement, etc. The acquisition of the right corresponding to an easement is conditioned by its entry into the real estate registry.

An easement arises on the basis of a last will upon the death of the testator. The testator's authorization to establish an easement on the basis of a last will comes as the result of the exercise of his/her ownership title.

The establishment of an easement under (c) above depends on the agreement of heirs on the settlement of inheritance, concluded by heirs during inheritance proceedings. An agreement that does not conflict with the law or good morals will be approved by the court.

Where a legal regulation enables the establishment of an easement on the basis of a ruling of a competent administrative authority, the easement arises upon the legal effect of such a ruling. An easement may be established, above all, by a decision on the expropriation, a decision of a land office (under Section 9 of the Act No. 229/1991 Sb. on Land) and a court ruling (e.g. as the result of a termination and settlement of divided community property – cf. Section 142; when deciding on the regime of an unauthorized construction – cf. Section 135c; and the easement of the 'right of access' – cf. Section 151(o), subsection 3).

An easement is established directly on the basis of facts stated in legal regulations. Such regulations typically regulate certain limitations of ownership or some other similar right with its contents corresponding to easements (e.g. in the case of some

line buildings under the Act No. 79/1957 Sb., and regulations establishing the right to place a building in a plot of land – cf. Section 21(5) of the Act No. 72/1994 Sb.).

The Civil Code likewise allows for the acquisition of a right corresponding to easements by the exercise of right with a reference to Section 134 of the Civil Code (i.e. the conditions for acquisitive prescription of the ownership title). It follows from this that the beneficiary of the right corresponding to easements will become any person exercising the right for himself and in the good faith, with view to all the circumstances, that such person has such a right. The right is established upon an uninterrupted exercise in the length of ten years.

Contents

The subjective duties follow the delimitation of the concept, i.e. they concern the extent of one's obligation, imposed by law, to perform, suffer or refrain from something. Subjective rights enable the person benefiting from the easement (the beneficiary) to demand the specified behavior of the obliged entity and, in the case of positive easements, also act in a certain manner. The specific content of an easement is determined by legal facts constituting the legal reasons for its creation.

The content of easements also includes the obligation to bear reasonable costs for the subject matter of an easement (cf. Section 151(a), subsection 3). Unless provided otherwise by the agreement of participants, the reasonable costs for the maintenance and repair of a thing must be borne by the person (the beneficiary) who benefits from the right corresponding to easements and enabling him to use a thing of another person. Where such a thing is also used by its owner, the costs are shared according to the extent to which they use it.

Termination

It follows from Section 151(p) of the Civil Code that easements terminate by operation of law, by a relevant decision ruling by the competent administrative authority, or by a written agreement. The law also specifies some types of termination. Certain facts that generally cause the termination of legal relations may be applied as well.

Easements terminate by operation of law where there are facts specified directly in the legal norm. This includes, among other, the situation specified in Section 151(p), subsection 2 of the Civil Code, where an easement automatically terminates if such permanent changes occur which prevent the real property from any longer serving the needs of the person benefiting from the easement (the beneficiary) or

from allowing more advantageous use of the real property. However, an easement does not terminate if it is only temporarily impossible to exercise it.

Easements may terminate as a result of a constitutive decision by a competent administrative authority. If, due to a change in the circumstances, a gross disparity arises between an easement and the benefit accruing to the beneficiary (the entitled person), the court may decide to terminate such easement (cf. Section 151(p), subsection 3 of the Civil Code).

The Civil Code also makes it possible to conclude an agreement on the termination or cancellation of an easement. Such agreement must be in writing and may be considered as a specific kind of dissolution (cf. Section 574(1) of the Civil Code). The right corresponding to an easement is terminated upon its entry into the real estate registry.

Section 151(p), subsection 4 provides that if a right corresponding to an easement belongs to a particular individual (i.e. it is effective in personam), it shall terminate no later than upon the death of the individual or dissolution of the legal entity.

It follows from the nature of easements that they terminate by confusion (i.e. the merging of the entitlement and obligation in a single person); where an easement is established for a temporary period of time, it terminates upon its expiration. Similar effects arise from the performance of a condition subsequent where the effect of the easement is bound to such a condition.

The Civil Code expressly provides for the statutory bar of the right corresponding to an easement. This occurs where the right is not exercised for the period of ten years (under Section 109). The statutory bar, however, does not lead to the termination of such easement; the entitlement merely becomes conditional.

Lien ("zástavní právo")

The right of lien performs its role mainly by forcing, from the moment of its inception until its realization, the debtor to fulfill his/her obligation (i.e. it performs a securing function) and, in the event of any failure to meet such obligation, it allows for the satisfaction of an unpaid claim straight from the proceeds of realization of the thing encumbered by lien (i.e. it performs a payment function) – cf. Section 152 and subsequent sections of the Civil Code. The right of lien relates also to appurtenances, accretions and inseparable fruits of the thing which is encumbered by lien.

The legal relationship of lien has an accessory character with respect to the encumbered principal obligation; the right of lien is existentially related to the principal obligation because it exists only where there exists or will exist a principal

obligation. The termination of the principal obligation likewise terminates the right of lien. This accessory nature is also reflected in the delimitation of subjects. That is why we may distinguish between subjects of a contractual legal relationship, which is being secured by the right of lien, and the legal relationship of lien itself. The subjects are:

- creditor (lien creditor),
- obligation debtor (i.e. the debtor in the main contractual relationship),
- lienee (i.e. the owner of the pledge).

The obligation debtor and the lienee may be one and the same person (mainly where the obligation debtor establishes the right of lien to things in his/her ownership). Another subject may be the pledgor (mortgagor), i.e. the person who establishes the right of lien (during the first phase, this person is simultaneously the lienee).

The subject matter of lien may be all things that may become subject to property relationships under civil law, have property value and are convertible into money. A thing being subject to a lien may be movable or immovable (including a flat or non-residential premises delimited according to the Act No. 72/1994 Sb.), an enterprise or another collective thing, or a set of things, a receivable or another property right if its nature so admits, a business share, securities or a certain industrial property right. If there are several things being subject to a lien, this is called simultaneous lien ("vespolné (simultánní) zástavní právo").

A characteristic feature of lien is its nature as a right in rem. The Civil Code expresses this in Section 164 by providing that the right of lien is effective against any subsequent owner of any encumbered thing, a set of things, a flat or non-residential premises owned, unless provided otherwise by the law (an exception may occur, for instance, in the event of a sale of the pledge during an execution, or its realization in bankruptcy proceedings). The same applies to any subsequent creditor of a receivable subject to a lien, any subsequent beneficiary of some other property right or industrial property right encumbered by a lien and any subsequent owner of a business share or securities subject to a lien.

Establishment

The right of lien distinguishes between the title under which the lien is established, and the manner in which it is established. The Civil Code provides for several ways in which a lien can be established. Lien can arise on the basis of:

- a written contract,
- a court ruling approving an agreement on the settlement of inheritance,

– some other judicial decision,
– a decision by an administrative authority,
– by operation of law (ex lege).

The essential elements of a contract of lien include the designation of the thing encumbered by such lien and the receivable which is thereby secured. A contract of lien must be signed in writing. Where the right of lien is established upon the entry into the Lien Register, it must be in the form of a notarial deed. A contract of lien may not (under the sanction of it being declared null and void) include certain provisions (cf. Section 169 of the Civil Code). They may not be included in independent agreements or inheritance agreements. The manner of establishment of the right of lien on the basis of a contract differs according to whether the thing subject to lien is movable or immovable or if it is a set of things or a collective thing. The right of lien to real estate registered in the real estate registry is established exclusively upon the entry of the lien. A lien to movable things is established upon the occurrence of one of the following three facts:

– the handing over of a thing to the lien creditor,
– the placing of such a thing into a third party's custody or storage,
– the entry into the Lien Register kept by the Chamber of Notaries of the Czech Republic.

A lien on real estate which is not subject to record-keeping in the real estate registry, as well as to a collective thing and a set of things, may be established solely on entry into the Lien Register. The lien to a receivable is established already upon the signing of a contract (unless the legal effect is agreed otherwise). This lien has a specific nature because the pledge is a receivable that the debtor (in the legal relationship of lien) has – as the creditor – against the debtor from the encumbered receivable (i.e. a subdebtor). A lien on a receivable is effective against the subdebtor of such encumbered receivable as of the date when he receives written notification of this lien from the lien debtor, or when the lien creditor proves to the subdebtor that such lien was established. Where an encumbered receivable is itself encumbered by a lien, a sub-lien (submortgage) right is established.

A concluded inheritance agreement constitutes the title, while the right of lien arises only upon the court ruling whereby the inheritance agreement is approved. Such agreement may be concluded only by heirs, while the pledge may only be property values constituting the subject matter of the inheritance.

The court may, on the basis of its ruling, establish the so-called judicial lien ("soudcovské zástavní právo") (cf. Section 338(b) and subsequent sections of the Rules of Civil Court Procedure), which is considered as the manner of execution

of a ruling. The establishment of the judicial lien, however, does not result in the satisfaction of a claim; the claim is merely being secured. What is decisive for the order of the judicial lien is the date on which the court receives a petition for the establishment of such judicial lien.

A classic example of such establishment of lien by an administrative authority is the procedure of financial offices under Section 72 of the Act No. 337/1992 Sb. on the Administration of Taxes and Fees. Such lien is used to secure a tax claim. Customs offices may act in an analogous manner.

In many cases, the law directly specifies facts under which the right of lien is established. This is the case, for instance, with Section 672 of the Civil Code, under which a lien arises to the lessor (landlord) to movable things of the lessee (tenant) or persons who share his/her household (with the exception of things excluded from the execution of judgment) and which are located in the leased thing. This right of lien is used to secure a claim on rent payments. Similar cases are regulated, for instance, by the Commercial Code (Sections 535, 605, 628, and 707).

Contents

The rights and duties of parties involved in the legal relationship of lien have various contents in the individual stages of the development of the lien, mainly prior to the due date of the secured claim and after its due date.

In the first stage, the right of lien performs a preventive securing function. If the lien creditor has been handed over a pledge, he is entitled to hold it for the entire duration of the period to which such lien applies. He is obliged to take a proper care of the pledge, in particular to protect it from damage, loss and destruction. The lien creditor is entitled to require the lien debtor to reimburse him for any expenses which he effectively incurred when taking care of the pledged thing. The lien creditor may use the thing delivered in pledge and acquire its accretions, fruits and benefits only with the pledgor's consent. If during the period of time when the lien creditor holds a pledged thing, the thing is lost, destroyed or damaged, the lien creditor shall be liable for this damage. The lien debtor must refrain from any act which impairs a thing delivered in pledge to the detriment of the lien creditor. Where the price (value) of a thing delivered in pledge (subject to a lien) is reduced to such an extent that a receivable is insufficiently secured, the lien creditor is entitled to ask the debtor to replenish the securement to the necessary extent without undue delay. If the latter fails to do so, the part of the receivable which is not secured will become immediately due.

The second stage is characterized by the payment function of the right of lien, arising as the consequence of the maturity of a receivable and the debtor's delay with its payment. In such a case, the lien creditor is entitled to satisfy his receivable from the proceeds of realization (liquidation) of the thing being subject to a lien. At present, there are two possible ways in which satisfaction may be obtained from the thing being subject to a lien:

- realization by a public auction (cf. Section 36 and subsequent sections of the Act No. 26/2000 Sb. on Public Auctions); this is the so-called "involuntary auction" carried out upon the request of the auctioning creditor,
- realization by a judicial sale (cf. Section 200(y) and subsequent sections of the Rules of Civil Court Procedure).

Certain kinds of pledges may be governed by special regulations (e.g. the sale of securities of a business share).

The legal relationship of obligation is determining also for the right of lien. That is why the lien creditor has the option of choosing whether to seek performance against the debtor from the obligation or to seek satisfaction from the pledge. The selection will, in some cases, be limited, especially where the value of the pledge is not sufficient to satisfy his claim.

Extinguishment

The individual kinds of termination of the right of lien may be divided into two groups:

A lien will be extinguished where the secured receivable is discharged; this kind of termination arises from the accessory nature of the right of lien. A receivable may be extinguished in various ways, most often by its performance. Since the right of lien cannot exist independently, the necessary consequence is also the extinguishment of the right of lien.

The actual extinguishment of the right of lien, regardless of the existence of the secured receivable, occurs:

- where the thing subject to a lien ceases to exist (due to destruction or consumption),
- where the lien creditor waives his lien by a unilateral written statement,
- upon the expiry of the time for which the lien was established (where the right of lien was established for a definite period of time; the same effect is achieved by meeting a condition subsequent),

- where the amount of money equal to the market price of the thing subject to lien is deposited,
- on the basis of a written agreement concluded by the lien creditor and the lien debtor,
- in cases defined by special regulations (e.g. during a court execution, realisation during bankruptcy proceedings, in some cases of acquisition of ownership title to the thing subject to a lien by the state).

Ownership of Flats

The specific regulation of ownership of flats and non-residential premises (in the Act No. 72/1994 Sb., abbreviated as "ZOVB") follows the prerequisites set by the Civil Code, which refers, in Section 125(1), to a separate act governing ownership of flats and non-residential premises. Another point of departure is contained in the provision of Section 118(2), under which flats and non-residential premises may be the objects of civil legal relationships. Both provisions are based on the fact that neither flats nor non-residential premises are, despite being delimited as material parts of buildings, factually independent and actually separable parts of buildings. Consequently, flats and non-residential premises may not, as regards their technical construction, be disposed with in the full extent as independent things (i.e. be destroyed). As a result, a certain legal fiction of flats and non-residential premises as independent things – and thus objects of the property right – was created. ZOVB uses the term "unit" as a legislative shortcut for a flat or a non-residential space as a specifically delimited part of a building.

The previous legal regulation of ownership of flats (the Act No. 52/1966 Sb. on Personal Ownership of Flats) was based on the monist theory, under which the object of ownership is the flat. The building, or its shared parts to be more precise, were not considered as the object of ownership of flats but the object of co-ownership, while the co-ownership titles were merely accessory in relation to ownership of flats. Since, however, this co-ownership was not considered as a content part of ownership title, the building or its shared parts did not constitute the object of ownership of flats due to this title either.

The present conception of ownership of flats is different. The first difference appears in the name of the act itself. The new regulation expresses a dualist theory preferring the conception of co-ownership. In this conception, the building is the main object, while the flat is an accessory object, both on the level of ownership title. The entitled entity is thus a co-owner of the building, to which the ownership of a flat accedes. At the same time, however, the ownership of a unit consists of the

connection between the ownership of a building or a non-residential space, and the divided co-ownership of shared parts of the building.

The nature of flats and non-residential premises as inseparable parts of the same real estate requires that their ownership be limited by law to a greater extent than usual and that their legal regulation expresses mainly the fact that they are physically inseparable parts of a building whose use has to respect the need to administer the building as a whole.

The ownership of units is established on the basis of various legal facts. These include, among other, those that generally lead to the establishment of ownership title. However, the special nature of ownership of flats also allows for the application of special legal facts. The establishment of ownership of flats needs to distinguish between its creation itself and its acquisition.

A typical example of establishment of ownership on the basis of original acquisition is the construction of a house. For practical reasons, the original ways of acquisition are understood to include acquisition from a previous owner of the house. For the most part, acquisition from the house owner is a secondary acquisition, but the transfer of the first flat (or a non-residential space) is, without any doubt, an original establishment. This is because previously, the owner of units was the original owner of the house, but it is only upon the transfer of the ownership title to the first unit that co-ownership of the house and ownership of the unit is established. The transfers of other units from the previous owner of the house then constitute standard transfers of ownership title, although they are not different from the transfer of the first unit.

Section 5(1) of ZOVB provides for the establishment of co-ownership of the house represented by co-ownership shares in the shared parts of the building and ownership of a unit, i.e. ownership of flats in the current legislative construction, in the following ways:

- on the basis of an entry of a declaration by the owner of the building into the real estate registry,
- by construction performed on the basis of an agreement on construction.

Acquisition of Ownership Title to a Unit from a Previous Owner of the House

The owner's declaration and the transfer of the first unit need to be understood as two successive facts where the owner's declaration on the delimitation of units within the building serves as the prerequisite for the subsequent transfer of ownership

title to such units. On the basis of the declaration, the existing owner of the house becomes the owner of each individual unit while remaining the exclusive owner of the shared parts of the house. It is only upon the transfer of ownership to the first unit that the ownership of the shared parts changes into their co-ownership.

It is the possibility of the transfer of the ownership title to a unit that is actually the main point of the whole act. The prerequisite for the transfer of the ownership title to a unit is the 'division' of the house into individual flats. Prior to such a division, the object of ownership is the whole house. After the declaration becomes effective, a plurality of objects arises. The division of a house into units occurs upon the entry into the real estate registry of the owner's declaration that the owner delimits units within the building under this act. The act specifically provides the content of such a declaration. The effects of the entry arise as of the day the motion for the entry of the declaration is filed. The second necessary legal fact is an agreement on the transfer of ownership of a unit. The content of such an agreement is similar to the declaration on the delimitation of units; the difference is, above all, that while a declaration concerns all units, an agreement concerns only the unit that is being transferred. However, the agreement need not include rules specifying how the co-owners of the house are to contribute towards expenses related to the administration, maintenance and repair of the shared parts of the house, or the house as a whole, because such rules are already included in the declaration.

Declaration of the Owner of the House

The declaration is a unilateral legal act on the part of the owner addressed to the locally relevant cadastral office. The basic effect of the declaration is that, upon its entry into the real estate registry, the declaration 'divides' the building into individual flats and non-residential premises (the declaration must always concern the whole building, not only its real or ideal part); prior to that, the entire building is the object of ownership title. Although the declaration is a prerequisite for the transfer of ownership, it is not absolutely necessary that the transfer actually follows the declaration.

The declaration may be made both by the exclusive owner of the building (both natural and legal persons), and co-owners of the building. Co-owners having the building in their apportioned common property will become, upon the entry of the declaration, co-owners of all units. Each of them will have an ideal share in a unit in the amount corresponding to their previous shares in the building, retaining an ideal share in the shared parts of the house. Co-owners having the building in their unapportioned (joint) common property (matrimonial property of spouses) will become, upon the entry of the declaration, co-owners of all units and shared parts.

The essential elements concerning the contents follow from the general requirements on the one hand and the special requirements stated in Section 4(2) of ZOVB on the other.

Agreement on Transfer

An agreement on the transfer of ownership of a unit is a legal fact that either culminates the establishment of ownership of flats as a supplement to the declaration of the owner of the house delimiting its units, or leads independently to the acquisition of ownership title to a unit from its previous owner (in the case of transfers of the second and all other units). This agreement is described by ZOVB as a new contractual type, although it needs to be realized that the agreement can have various forms depending on several circumstances:

- purchase agreement – in the event of a transfer of ownership of a unit where the consideration is a financial payment,
- exchange agreement – in the event of a transfer of ownership of a unit where the consideration is in the form of something else (e.g. an exchange of ownership title to various units, or an exchange of a unit for some other thing),
- contract of donation – in the event of a free transfer of ownership of a unit,
- agreement on the transfer of a co-ownership share to a unit (for a consideration or without a consideration),
- agreement on the termination and settlement of common property,
- agreement on the settlement of common property of spouses to a unit (this agreement has a special position because it does not result in the transfer of ownership title but only the termination of ownership title of one of the spouses, unless such an agreement does not establish undivided co-ownership),
- mixed agreements (e.g. a combination of a purchase and a donation, or a combination of an exchange and a donation)

Naturally, the type of agreement governs some of the essential elements of such an agreement. In the case of a purchase agreement, for instance, the essential elements will include the price of the unit and the agreement will typically specify the due date for such a payment and means securing the performance of the assignee's duties (e.g. the right of lien securing the transferor's receivable). The collateral provisions will most typically include the possibility to withdraw from an agreement and the pre-emptive right of purchase. A similar provision, in the case of contracts

of donation, specifies the donor's possibility to seek the cancellation of the contract under Section 630 of the Civil Code.

An agreement on the transfer of a flat will always be at least a bilateral legal act (multilaterality cannot be ruled out, especially where 'multi-exchanges' and transfers of flats and non-residential premises to several assignees are concerned). Its conclusion is regulated, among other, by general provisions on contracts, as well as on offer and acceptance (Section 43(a) and subsequent sections of the Civil Code). Thus, for instance in connection with the fulfillment of the obligation under Section 22 of ZOVB, it will be decisive for the determination of the moment on which the six-month period for acceptation begins to run, the determination of the moment of acceptance, etc.

An agreement arises when the parties reach a contractual consensus. This includes, above all, the will of the contracting parties to conclude the agreement and their will to agree on the contents of the agreement. An agreement is concluded upon the effect of the acceptance of the offer to conclude an agreement. A timely acceptance of an offer becomes effective at the moment when the declaration of assent to the contents of such offer reaches the offeror (Section 43(2), subsection 2 of the Civil Code). Silence or inaction do not, in themselves, constitute an acceptance of an offer. The same holds for the establishment of multilateral contracts, where declarations of will of more than two parties are involved and whose essential element is likewise the consent of all contracting parties.

However, in order to cover certain situations, the law provides that an agreement on the transfer of a unit constitutes a so-called 'combined legal act', which arises on the basis of declarations of will of two or more parties supplemented with some other fact (cf. Sections 22(5) and (7) of ZOVB). The required consents form a prerequisite for the conclusion, i.e. the formation of a contract. Without such consents, no agreement is established and no performance can, consequently, be sought.

Lease

The fundamental features of a lease are:

- the letting of a thing for use, which may include the taking of proceeds,
- the definiteness of a thing,
- temporariness,
- consideration (unlike, e.g. a loan).

Based on its subject matter, lease may be divided into:

– lease of a thing (general lease including movable things) – Section 663 and subsequent sections,
– lease of a flat – Section 685 and subsequent sections,
– lease of residential premises - Section 717 and subsequent sections,
– lease of non-residential premises – Act No. 116/1990 Sb. on Lease and Sublease of Non-Residential Premises, as subsequently amended,
– business lease of movable things (Section 721 and subsequent sections),
– time-sharing (Section 58 and subsequent sections).

Lease of a Flat

The object of the lease of a flat may be **only a flat**. The Civil Code does not offer any precise definition of 'a flat' and the definition for the purposes of ownership title is not applicable. Reference thus may be made only to judicial decisions (the Supreme Court, file No. 2 Cdon 1010/97). 'A flat' is neither a non-residential space nor any real estate, or its part, intended for recreation. The basic prerequisite for considering some real estate or its part as a flat is the existence of a final and conclusive occupancy permit defining such a part of real estate as a flat.

A lease contract must be in writing; otherwise it is null and void (Section 40).

The lease of a flat may be agreed for an indefinite period of time, a definite period of time or for the time during which the lessee performs work for the lessor.

The lease contract must specify:

– a description of the contracting parties,
– a description of the flat,
– the extent of its use,
– the amount of rent or the manner of its calculation, as well as other payments for services related to the use of the flat or the manner in which they are to be calculated.

The description of the flat must specify the identity of the flat without any doubt. The amount of rent is agreed by the lessor and the lessee. The amount of regulated rent may be increased unilaterally in keeping with the Act No. 107/2006 Sb.

The lessor may increase the amount of rent once a year starting from 1 January 2007 on 1 January of each subsequent calendar year until 31 December 2010. The lessor may also increase the amount of rent later, e.g. from 1 March 2007, but he

cannot do so retrospectively (e.g. increasing rent in March 2007, stating that the increase is applicable from 1 January 2007).

The lessor must deliver a written notification to the lessee on the increase of rent. This notification must include an explanation (proving that the increase occurs in harmony with the law). The duty to pay rent arises as of the day stated in the notification but no later than the first day of the calendar month following three months after the delivery of the notification to the lessee.

The lessee may seek protection against the increase of rent by filing a petition for the declaration of nullity of such rent increase.

When agreeing on the contents of the lease agreement, **the lessor may require from the lessee to deposit pecuniary means as securement for rent** and expenses for supplies and services related to using the flat and for payment of other expenses connected to lease of the flat ("security deposit"). The amount of pecuniary means required as a deposit may not exceed three times the monthly rent and advances for supplies and services provided in connection with using the flat. The lessor must keep such pecuniary means in a special bank account. The account is common for all lessees.

The lessor is entitled to use the pecuniary means for the settlement of the lessee's liabilities and the lessee is obliged to top up the pecuniary means of the deposit in the bank account to the original amount provided that the lessor has lawfully withdrawn the pecuniary means from the said account.

The lessor is obliged to hand over the flat to the lessee in a condition suitable for its proper use and to ensure that the lessee is able to exercise the rights related to using the flat in full and without disturbance.

The lessor may not perform construction work without the lessee's approval.

The lessor has the right:

– to require the lessee to remove, without any delay, any adaptations and alterations made without the lessor's consent,

– to demand a late charge if the lessee is default with the payment of rent more than five days after its due date,

– to remedy, after having first notified the lessee, any defects and repair any damage caused by the lessee (or those living with him), and demand compensation from the lessee.

The lessee and persons living with him have the right to use the flat and common spaces of the building and its facilities, as well as the right to make use of the services rendered in connection with using the flat.

The lessee is entitled to:

- demand a reduction of the rent if the lessor, despite the lessee's notification of defects in the flat or building, fails to remedy such defects which, substantially, or completely, impair its use;
- demand a reduction of rent if supplies and services related to using the flat have been rendered defectively, which deteriorated the conditions for using the flat (e.g. the water supply is turned off);
- a reduction from the payment of supplies and services connected to using the flat, if such supplies and services are not properly and timely rendered;
- where the lessor fails to fulfill his obligation to remedy defects which inhibit proper use of the flat, the lessee has the right to remedy such defects to the extent necessary, and to demand from the lessor compensation for the expenses expediently incurred provided that he has informed the lessor thereof in advance;
- withhold his consent to building adaptations that the lessor wishes to make (only on serious grounds – e.g. a serious illness, old age, etc.).

The lessee is obliged:

- to properly use the flat, common spaces and facilities of the building;
- to make proper use of services and supplies relating to use of the flat;
- to notify the lessor of a change in the number of persons living with the lessee in a flat within 15 days of such a change;
- to see to it that, in exercising his rights, a milieu is created in the building which enables the other lessees to exercise their rights;
- to inform the lessor, without undue delay, of the need for repairs the costs of which are to be borne by the lessor;
- to enable the lessor to make such repairs;
- to carry out minor repairs and routine maintenance of the flat at his own expense;
- to enable access to the flat, after prior written notification thereof, for the purpose of installing and maintaining meters measuring and regulating heating and hot and cold water;
- to enable the reading (recording) of the data shown on the meters of heating and hot and cold water, etc.

The lessee may not carry out any building adaptations without the lessor's consent.

The lease of a flat terminates:

- by agreement;
- upon expiry of a period of time;
- as a result of a destruction of the flat;
- by the merger of the lessor and the lessee;
- by a notice of termination by the lessee;
- by a notice of termination by the lessor;
- by a withdrawal from the agreement.

What deserves special attention is the termination of the lease by a notice of termination by the lessor and the lessee.

The lessee may terminate the lease by a written notice of termination without specifying any reasons for such a legal act. A notice may terminate lease for a definite period of time, lease for an indefinite period of time, as well as lease for a time agreed to perform work for the lessor. The period of notice may not be shorter than three months and must terminate at the end of a calendar month. The act of the lessee's moving out of a flat cannot be considered as a notice of termination of a lease of a flat.

The lessor may terminate the lease of a flat by a written notice of termination, which must specify the reasons for such a legal act. The lessor may give notice terminating the lease of a flat only due to reasons laid down by law. The notice of termination must be served on the lessee.

The notice of termination must include:

- termination period, which cannot be shorter than three months and must be set in such a way that the lease terminates on the last day of a calendar month;
- the reason for the termination;
- the advice that the lessee may file a lawsuit with the court within 60 days asking the court to nullify the lease termination (if the notice is given without the court's approval);
- the obligation of the lessor to provide the lessee with a housing substitute (if the lessee is entitled to such housing substitute under the law).

The lessor may terminate the lease contract **without the court's approval**:

- if the lessee or those who live with him, despite a written warning, grossly breach good morals in the house (Section 711(2)a of the Civil Code);
- if the lessee grossly breaches his obligations arising from the lease of the flat, especially by not paying the rent and charges for supplies and services related to the use of the flat, where such amounts in arrears are equal to three times his monthly payments (Section 711(2)b of the Civil Code);
- if the lessee has two or more flats, unless he cannot justly be required to use only one flat (Section 711(2)c of the Civil Code);
- if the lessee fails, without serious reasons, to use the flat or if he uses the flat, without serious reason, only occasionally (Section 711(2)d of the Civil Code);
- if it concerns a flat of special designation or a flat in a building of special designation, and the lessee is not a handicapped (disabled) person (Section 711(2)e of the Civil Code).

Where the lessee does not agree with the notice of termination (e.g. disputing the reasons for the notice), he may file an action with the locally relevant court within 60 days of the service of the notice for the court to nullify the lease termination.

The lessee is not obliged to vacate the flat if:

- a house substitute has not been arranged for him (in case he is entitled to it);
- the dispute for the determination of nullity of the notice has not been concluded by a final and conclusive judgment.

In the case of a notice of termination without the court's approval, the lessee is generally entitled only to a **shelter** (a temporary solution until the lessee arranges his own proper accommodation and a space for the warehousing of his furnishings and other personal and household items).

The lessor may terminate the lease contract **only with the court's approval** in the following cases:

- where the lessor needs the flat for himself, his spouse, children, grandchildren, son-in-law or daughter-in-law, parents or siblings (Section 711(a), subsection(1)a of the Civil Code);
- where the lessee has stopped to do the work for the lessor and the lessor needs this service flat for another lessee who will work for the lessor (Section 711(a), subsection(1)b of the Civil Code);

- where it is necessary due to a reason of public interest to dispose of the flat or building so that the flat or building cannot be used or where the flat or building requires such repairs that the flat or building cannot be used for a prolonged period of time (Section 711(a), subsection(1)c of the Civil Code);
- where it concerns a flat which is structurally connected to premises designated for operation of a shop or some other business activity and the lessee or the owner of such non-residential premises wants to use the flat (Section 711(a), subsection(1)d of the Civil Code).

In the case of a notice of termination with the court's approval, the lessee is generally entitled **to a substitute flat or, as the case may be, an essentially equivalent substitute flat**. Where a flat with a regulated rent is being vacated, a substitute flat with an unregulated rent must be considered as an essentially equivalent substitute flat as long as it otherwise meets the requirements for an essentially equivalent substitute flat (IV. ÚS 524/03).

The court may rule, with regard to reasons which merit special consideration, that the lessee is entitled to a substitute flat which has a smaller floor space than the one he is vacating. Where the lease is terminated under the provision of Section 711(a), subsection 1(b) of the Civil Code and the lessee stops to do the work for the lessor without a serious reason, it is sufficient to provide the lessee on his vacating the flat with a 'shelter'. The court may, however, rule that for reasons that merit special consideration the lessee has the right to a substitute flat of a smaller floor area, etc., or to substitute accommodation.

Streszczenie

W opracowaniu przedstawiono w zarysie czeskie uregulowania prawne dotyczące pojęcia nieruchomości. Poruszono również problematykę działek (parceli), lokali i budynków będących odrębnymi od gruntu przedmiotami stosunków prawnych niepodlegających reżimowi zasady „superficies solo cedit". Autorzy omawiając prawo własności nieruchomości charakteryzują sposoby nabycia, zbycia (w tym - utraty) i ochrony tego prawa; poruszają również zagadnienie obciążania nieruchomości ograniczonymi prawami rzeczowymi. Osobne miejsce poświęcono tematyce współwłasności nieruchomości.

Pavel Salák

THE PRINCIPLE "SUPERFICIES SOLO CEDIT" IN CZECH LAW

The origins of the contradiction between res immobiles and res mobiles were found in the Justinian law for the first time[1]. Although the term "immovables" was not used originally in the Roman law, the basic difference between the things that can be moved and the other things that were affixed to the land was well known, terms "land, building"[2] were used for immovables contrary to "other things"[3].

The fact that the expressions for a piece of land or a ground were in the Roman law a substitute for any immovables is not accidental. In the Roman law, there was a basic principle used – all immovables that were affixed to the land became the part of it. This means that the possessor/owner of the land owned also all the planting on his land and all the buildings standing on his land even if they were not built from his material. His property continued even in the case that these affixed things were separated (e. g. if the tree was removed). The term "land" was thus equal to the term "immovables" or "real estate". This principle has been expressed by the Latin sentence: "superficies solo cedit", which means that "the surface steps back from the substance (ground)" [4], meaning here that "the building is a part of the land".[5] Although there were also the exceptions to this principle in the Roman law, its applicability was general and it was brought to the codifications made in the 19th century. With respect to the length of my paper, I will focus only on the development of this principle in the last century and merely on the legal regulation valid on the

1 E. g. I 2, 6pr., see M. Bartošek, Encyklopedie římského práva. Praha 1981, p. 277, 278.

2 Terms such as: soli, fundus, praedia, ager or aedes – mean land, ground. For more terms see M. Bartošek, Encyklopedie římského práva. Praha 1981.

3 The Law of XII Tabulas describes the different time essential to acquire the right of ownership by prescription in case of the land /fundus/ and in the case of other things /ceterae res/. Gaius designates these other things by the term mobilia – this means movable thing, i.e. movables., J. Vážný, Vlastnictví a práva věcná. Brno 1937, p. 12,13.

4 "...id, qoud in solo nostro ab aliquo aedificatus est, quamvis ille suo nomine aedificaverit, iure naturali nostrum fit, quia superficies solo cedit." /Gai 2, 73/, "Semper superficiem solo cedere." /Ulp., D 43, 17, 3,7/.

5 The question of the ownership to the material was solved differently. The important is that it was a theoretical question because the Law of XII Tabulas bans destroying the building with intend to take back the building material. The owner of the land had to pay damages to the owner of the material. J. Vážný, Vlastnictví a práva věcná, Brno 1937, p. 58.

territory of the Czech Republic at present[6]. The practical application of this principle is the most obvious from the relationship – "land and building".

The regulation in Section 297 ABGB enacted this principle for the Austrian law and since the formation of the independent Czechoslovakia in 1918 also for the Czechoslovakian law. The things that were established on the land with an intention to stay there permanently, e. g. houses and other buildings, became a part of the real estate[7]. This didn't happen only in case of the temporary, volatile purpose of the real estate. According to this regulation, the building was not a stand-alone thing, it was a part of the land and the owner of the land was also the owner of the real estate, no matter who was the developer of it. There was only one exception in the provision of Section 418 ABGB, the third sentence. This describes the situation when the developer can be the owner of the building, even if he is not the owner of the land. It could happen only in the case when an honest developer (a developer who supposed that the building was being built on his piece of land) built on the land of another person, in fact, and this person, a real owner of the land, knew about it and despite this he didn't prohibit/stop the construction of the building immediately.

In the epoch after the year 1948, when the communist regime was established in the Czechoslovakian Republic, the whole legal system of principles regulating the institution of ownership was changed. There was no real individual ownership, the character of the ownership was based on "The Declaration" ("Prohlášení"), in The Constitution of 9th May (The Constitutional Act No. 150/1948 Sb.)[8]. The private ownership was considered to be a terminating form. There was a new ownership of the means of production that should be used not for the "accumulation of the possession" but for the satisfying of the immediate needs of individuals[9]. The planned collectivization, establishment of agricultural cooperatives and also a construction of new buildings/houses came into a confrontation with the basic jural principle "superficies solo cedit". According the principle mentioned above, the new buildings built on the private land would be in the ownership of the owner of the land. This was not acceptable for the new regime (if the owner would not be

6 To find the details in the question of the legal regulation in the Slovak state see Novohradský, V. Opustienie zásady „Superficies solo cedit" a jeho dosledky, "Právny obzor" 1951, no. 4, p. 346, etc. To the reception of the Roman Law in general, see O. Horák, Problematika recepce a občanské zákoníky. In: Vývoj právních kodifikací. Brno 2004, p. 150-164. To the Roman Law sources of the modern private law (to the concepts of "things") briefly (bibliography ibidem) see O. Horák, N. Štachová, Dědičné lóže a dělené spoluvlastnictví. in: Res - věci v římském právu, Olomouc 2008, just being printed.

7 "Rovněž tak patří k nemovitým věcem ty, které byly na zemi a půdě zřízeny s tím úmyslem, aby tam trvale zůstaly, jako: domy a jiné budovy se vzduchovým prostorem v kolmé čáře nad nimi; rovněž: nejen vše, co do země je zapuštěno, ve zdi upevněno, přinýtováno a přibito, jako: kotle na vaření piva, na pálení kořalky a zazděné skříně, nýbrž i takové věci, které jsou určeny, aby se jich při nějakém celku stále upotřebovalo: např. u studní okovy, provazy, řetězy, hasicí nářadí a podobně." Section 297 ABGB, cited from ASPI.

8 "Hospodaření v našem státě slouží lidu a je vedeno tak, aby vzrůstal blahobyt, aby nebylo hospodářských krizí a aby národní důchod byl spravedlivě rozdělován.", cited from ASPI.

9 Compare with V. Knapp, Vlastnictví v naší společnosti, "Právník" 1949, p. 303, etc.

the state but private persons)[10]. This was the reason why the communist regime had to remove the principle from the Czechoslovakian law. Therefore the Civil Code – Act no. 141/1950 Sb. in the second sentence of Section 2 said that the land and the building standing there are two different, separate things[11].

It is quite strange that contemporary jural literature found fundamentals of the change of this principle also in the Roman law,[12] in the term „superficies"[13]. Superficies is an easement to property of another and de facto by its extension, it substituted the ownership. On the other hand, we can say that this was not an exception to the principle "superficies solo cedit", when the right of building was terminated, the property was automatically given back to the original owner. The term "right of building" was also known in the Austrian rule of law and in the Czechoslovakian rule of law before the World War II[14]. But the legal regulation of the right to build was according the new Czechoslovakian Civil Code (Section 159 of the Act No. 141/1950 Sb.) rather different. Firstly, the real estates built according to this right of building did not pass to the owner of the land even not later[15]. The influence of the "communist law" caused that the right to building could be created by the law, by the decision of an administrative authority or by a contract – this had to be a written contract with the consent of the District People's Committee. Moreover, the socialistic organizations, which permanently used the land of other owners, could build on the land without the need of the right of building (Section 158 of the Act. No. 141/1950 Sb.). It might be useful to mention that the term "right of building" was not related only to construction of the building, either overground or underground but it was also possible to establish the right even for a better utilization of the land (i. e. garden, yard…)[16].

In 1964, a new codification of the civil law occurred by the Act. No. 40/1964 Sb[17]. The need of this codification was aroused by the fact that a new constitution was issued in 1960. It was politically justified by the statement that the development of socialism was boisterously quick and that it was necessary for the law to develop quickly as well[18]. Differently from the previous law regulation, the principle of "superficies solo cedit" was not disconfirmed explicitly but it was only inferred from the grammatical interpretation of the term "real estate" (Section 119 (2) of the Act.

10 V. Novohradský, Opustienie zásady "Superficies solo cedit" a jeho dosledky, "Právny obzor" 1951, no. 4 p. 348.
11 The law came into force on 1.1.1951, it is described as „střední občanský zákoník" – "the Middle Civil Code". For the text with the explanatory note see Občanský zákoník, Praha 1950.
12 V. Novohradský, Opustienie zásady "Superficies solo cedit" a jeho dosledky, "Právny obzor" 1951, no. 4, p. 346.
13 M. Bartošek, Encyklopedie římského práva. Praha 1981 p. 304.
14 In the period between the two world wars, the right of building was obeyed to the Act No. 86/1912 Sb. and later by the Act No. 88/1947 Sb. V. Novohradský, Opustienie zásady "Superficies solo cedit" a jeho dosledky, "Právny obzor" 1951, no. 4., p. 347.
15 http://pravniradce.ihned.cz/c4-10078260-18556070-F00000_d-vlastnictvi-pozemku-a-stavby ,12. 12. 2007.
16 V. Novohradský, Opustienie zásady „Superficies solo cedit" a jeho dosledky, „Právny obzor" 1951, no. 4, p. 347.
17 This Civil Code was distincly amended in the 1990s and it has been in force until these days.
18 V. Knapp, Proměny času. Vzpomínky nestora české právní vědy, Praha 1998, p. 123.

No. 40/1964 Sb). The explicit refusal of this principle returned into the Civil Code in 1992 (Section 120 (2))[19]. The new Civil Code also cancelled the term "right of building", which was substituted by so called "private use of property" (Section 198 of the Act No. 40/1964 Sb.)[20]. Since 1992, the private use of property has been changed to the owners' right.

By the denial of the Roman law principle, a lot of problems occurred arising mainly from the fact what can be considered to be a separate building. In the judgment of the Constitutional Court of 24th May 1994 sp. Zn. P1. Ús 16/93, provision of Section 120 (2), it is explained in such a way that the building is not a part of the land in case that it is a separate real estate, or if it is a chattel building without any purpose of a physical bonding to the land and if it is possible to detach it without any devaluating of the land. The judicature of the courts was very casuistical, mainly in the restitution cases in the 1990s – they arbitrated the cases of tennis courts, supporting walls, pools, ameliorative mechanisms, ponds, etc[21].

There were also resolved the issues of car parking places and tertiary roads. The Supreme Court has decided that "a car park represented by the land whose surface has been hardened in order to enable parking of cars is not a construction/building from the viewpoint of the civil-law relations"[22]. Neither the roads are considered to be separate buildings but just a kind of adjustment of the land and the owner of the road can not be different from the owner of the land[23]. But a quite different situation can occur in case of a well, for example[24]. There also appears a disputable issue since a building can be considered to be an object of civil relationships. According to the established praxis of the Supreme Court, it occurs since the moment when the first overground floor obtains its evident and unchangeable dispositional order[25].

The issues written above are just some of the reasons for returning to the principle of "superficies solo cedit"[26] in the prepared novelization of the Civil Code (Section 424 of the prepared Civil Code). But there appears another question if

19 It became by a novelization No. 509/1991 Sb., in force from 1st January 1992.

20 This law was used to enable people to build a house, weekend house, garage or a garden in the lands, for this purpose the law was established. The buildings then were in their personal possession.

21 V. Vlk, Vlastnictví pozemní komunikace vs. vlastnictví pozemku. Conference paper "Real Estate Market", Autumn 2005. http://www.stavebni-forum.cz/detail.php?id=5655, 28.11.2007.

22 The decision of the Supreme Court of 26th October 1999, sp. Zn. 2 Cdon 1414/97.

23 Such a conception is expressed, i. e. in the decission of the Supreme Court of the Czech Republic of 10th July 2004, sp. Zn. 22 Cdo 314/2004, published in the Soudní rozhledy magazíne 2005, No. 1, quotation according to V. Vlk, Vlastnictví pozemní komunikace vs. vlastnictví pozemku, Conference paper "Real Estate Market", Autumn 2005. http://www.stavebni-forum.cz/detail.php?id=5655, 28.11.2008.

24 P. Dostalík, Součást věci a příslušenství v soukromém právu římském a moderním. Conference paper "Naděje právní vědy", Býkov 2007, just being printed.

25 P. Baudiš, Zápis nových staveb do katastru nemovitostí, "Právní rozhledy" 2004, no. 6, p. 224-227.

26 Návrh občanského zákoníku, p. 80, http://portal.justice.cz/ms/ms.aspx?j=33&o=23&k=381&d=40461, 28.11.2008.

a hasty introduction of this principle will not cause again chaos in the proprietary relationships[27] related to the long period of no usage of it.

27 Petr Dostalík proposes it to be enacted temporarily so that it is not possible to dispose of the building if the disposal of the land has not been made at the same time. A duality of owners will be superseded by the long term application of it and the principle of “superfcies solo cedit“ would be established more easily. P. Dostalík, Součást věci a příslušenství v soukromém právu římském a moderním. Conference paper “Naděje právní vědy“, Býkov 2007, just being printed.

Streszczenie

Opracowanie poświęcone jest zagadnieniu zasady „superficies solo cedit". Ta klasyczna zasada prawa cywilnego obecna była w czeskim ustawodawstwie przedwojennym. Niestety, na skutek zmian społeczno–politycznych początku lat pięćdziesiątych, od zasady tej odstąpiono. Jej ponowne wprowadzenie przygotowywane jest w związku ze zbliżającą się kodyfikacją prawa cywilnego.

Karel Marek

THE CONTRACT FOR SALE OF COMPANY

It is a type (absolute) business according to the Section 261(3) CC. The contract for sale of company[1] became a standard contract type in the Czech contractual business law. During its conclusion it is needed to proceed in a qualified way and not superficially.

The legal regulation (the provisions of Sections 476–488a CC) of the contract for sale of company has many cogent norms in comparison with other contracts enumerated in the Commercial Code (see Section 263 CC). The cogent norms can not be changed with an agreement of contractual parties (the cogent norms are Sections 476, 477, 478, 479(2), 480, 483(3), 488, 488a CC). The contract must correspond with the basic provision (it means the Section 476 CC. This basic provision was considered as a cogent one thanks to the cogent norm Section 269(1) CC, in fact the basic provision was mediated as a cogent one before the harmonisation amendment, today the cogent character of the provision is clear from Section 263(2) CC).

Pursuant to Section 476(2) CC the contract for sale of company must be in writing. The written form is also obligatory for conclusion of the contract (before the harmonisation amendment we considered the provision of Section 476(2) 2 CC as a cogent one with regard to Section 272 CC). Nowadays the cogent character of the provision is also stated in Section 263(2) CC. A cogent character has each of the provisions which state an obligatory written form (see Section 263(2) 2 CC). It is in force for the report according to Section 483(1) CC, too.

The Basic Provision

According to Section 476 CC the seller covenants to pass the company to the purchaser and to transfer the ownership of the company to him and the purchaser

1 K. Marek, Smlouva o prodeji podniku a smlouva o nájmu podniku ve Obchodněprávní smlouvy, Brno 2004, 320 p. and the literature cited in the book.

covenants to take over seller´s obligations connected with the company and to pay the purchase price.

The purchase price is not the essential part of the contract. The essential part is only the obligation to pay the price. But the agreement about the price is very important.

The essential parts of the contract – besides the identification of the contractual parties:

- the obligation of the seller to pass the company to the purchaser;
- the obligation of the seller to transfer the ownership of the company to the purchaser;
- the identification of the company;
- the obligation of the purchaser to hand over the seller's obligations;
- the obligation of the purchaser to pay the purchase price.

The question – What is the company? – is answered in the provision of Section 5 CC.

The harmonization amendment did not change the provision of Section 5(1) CC which defines the company for the purpose of the Commercial Code. The company means an assembly of material, personal and immaterial components of business. Components of the company are also things, rights and other assets which belong to the businessman and serve the business or should serve this purpose.

On the other hand, the provision of Section 5(2) CC was changed with the harmonisation amendment and nowadays it states that the company is a mass thing. Its legal mode is governed by the regulation about things in a legal sense. The scope of special laws connected with real estates, things of industrial property and of other intellectual property, automobiles, etc. is applied, if they are components of the company.

In the case of the contract for sale of company a whole company must be passed (or a part of the company according to Section 487 CC). The Supreme Court of the Czech Republic rendered the judgment No. R 30/97 in the same meaning. Pursuant to the judgment the essential parts of the contract for sale of company are stated in Section 476(1) CC and the contract must contain the parts if it is the contract type

which is regulated by the relevant provisions[2] (the judgment can be used even if the basic provision was changed).

It is recommendable to accept these amendments, according to witch changes of the contract for sale of company must be in writing (to avoid any questions in respect of Section 272(2) CC)

In our opinion, de lege ferenda it is better to omit the provision of Section 272 CC. Then the civil legal regulation will be applied according to Section 1(2) CC and the contract can be changed only in writing. The text of Section 272(2) CC can also be edited in the following sense – the written form will be chosen by contracting parties only (the form will not be stated by the Code).

It must be remembered that if the component of the company which is the subject of the contract for sale of company is real estate (as is often the case), the declaration of will of the parties must be probably on the same document (according to the cogent norm Section 46(2) Civ.C. used in compliance with Section 1(2) CC). The real estate will be identified including data from the land register.

Besides the exact identification of the contractual parties and the exact identification of the subject of the contract for sale of business, other essential parts of the contract are the obligation of the seller to pass the company to the purchaser and to transfer the ownership of the company, the obligation of the purchaser to take over seller's obligations connected with the company and the obligation of the purchaser to pay the purchase price.

The fact that the Commercial Code contains the contract type of the contract for sale of company can not restrain the contractual parties if they demonstrate their will to solve the situation either, e. g. to conclude more partial contracts or to conclude an unnamed contract in case it is not possible to define the essential parts of the contract.

In a certain case a contract or contracts need not cover a whole company. Then there is an agreement that the identified subject of the contract will be transferred.

2 To the essential parts of contract (and other questions connected with the contract for sale of company) see also K. Eliáš, a kol. Kurs obchodního práva, Obchodní závazky, Cenné papíry, Praha 1996, p. 228, in the 2nd ed. 1999 p. 234 etc. K. Eliáš, Obchodní zákoník, Praktické poznámkové vydání s výběrem judikatury od roku 1900, Praha 1998, p. 521 etc. I. Pelikánová, Komentář k obchodnímu zákoníku – 4. díl., Praha 1997, p. 291 etc. S. Plíva, Smlouva o prodeji podniku, text z tzv. Karlovarských právnických dnů ze dne 22. 11. 1994 v Praze. I. Štenglová, S. Plíva, M. Tomsa, Obchodní zákoník – komentář, Praha 1996, p. 570, 5th ed. 1998 p. 804 etc., 6th ed. 2001 p. 1291 etc. To the contemporary essential parts of the contract for sale of company and other questions see, among other things, I. Štenglová, S. Plíva, M. Tomsa, Obchodní zákoník, Komentář, Praha 2005, p. 1187, etc. J. Dědič, a kol. Obchodní zákoník, Komentář, Praha 2002, p. 3474, etc. J. Husar, Pravna regulacia integracie verejnej moci do podnikania, Kosice 2007. J. Suchoza, Slovenske obchodne pravo, Banska Bystrica 1998.

Considering the principle of the Commercial Code – contractual freedom – it is not stated that contractual parties must use the contract type in a certain situation. Parties must not proceed in conflict with other legal provisions and evade the law or proceed out of accord with the principle "bonos mores".

If the subject of contract is the company, we think that conclusion of the contract for sale of company is better. It is rational to use the provisions of the contract type in the Commercial Code in a quite difficult contractual process.

What is the company (respectively the part of the company which is sold) and what is the subject of sale must be clear. The essential part of the contract is the obligation to pay the purchase price. The basic provision does not state the obligatory agreement about the price. The statement of the price or its way of stating is, in our opinion, needed. Section 482 CC envisages the way of stating the price instead of quoting the price.

The identification of the company including its obligations often refers to other document, or enclosure of the contract. It is recommended to identify obligations (excluding small ones) including guarantee obligations and to sign document – enclosure by the contractual parties.

We accede that the contract for sale of company is valid if it contains the essential parts, it means the identification of the company or its part which is sold even if the obligation identification was not done.

The obligation to transfer the ownership of the whole company as a mass thing is not the same as the ownership transfer of things which are components of the company. This ownership of movables is transferred to the purchaser on the day of efficiency of the contract according to the cogent norm Section 483(3) CC[3].

The ownership of real estate is transferred very often. The transfer must respect the cogent norm – the ownership of real estate is transferred from the seller to the purchaser with its deposit in the land register (see Section 483(3) CC).

In general an approval of companion or general assembly of the company is required in case of transfer of the company or in case of transfer of the part of the company. The relevant legal provisions must be applied, too (Section 67a CC). It is because of security of partners and creditors and information backup for partners´ decisions.

3 I. Štenglová, S. Plíva, M. Tomsa, Obchodní zákoník, Komentář, Praha 2001, p. 1292 and in other editions of the commentary.

The Act No. 256/2004 Coll. states the cases in which the company or the part of the company can be transferred only with the approval of the Czech National Bank.

If it is the transfer of the company in so called "big privatization", the Act No. 92/1991 Coll. is used.

In the case of sale of the company (or the part of the company) by administrator, the special Act No. 182/2006 will be applied from the 1st January, 2008.

Responsibility for Damage

According to Section 486 CC the purchaser has a right to a moderate discount from the purchase price corresponding to the missing or damaged things. If the missing things or the ascertainable damage were not stated in the report according to Section 483(1) CC, the right to discount can not be conceded in legal proceedings unless the seller knew about them at the time of hand – over.

These effects come into being in case of ascertainable damage during the run of the company if the damage is not announced in an immediate delay after their recognition or the damage could be found out with a professional care but not later than six months after the day of effectiveness of the contract (Section 482 CC). Section 428(2) and Section 439 are applied analogically (see Section 486(1) CC).

The purchaser has a right to back out of the contract, if it is not possible to run the company identified in the contract and the damages announced in time are irremovable or the seller did not remove them in an additional time which is stated by the purchaser. Section 441 CC is applied analogically (see Section 486(2) CC).

The purchaser can set up a claim to the purchase price discount in case of transferred obligations which were not stated in account records on the day of effectiveness of the contract (Section 482 CC). It is not applied if the purchaser knew about them at the time of a conclusion of a the contract (Section 486(3) CC).

The legal damage is governed by Sections 433 – 435 CC. If the ownership of real estate which is the component of the company is not transferred and the seller did not remove the damage in an additional time stated by the purchaser, the purchaser can back out of the contract (see Section 486(4) CC).

Section 486(5) CC states that the rights according to the above mentioned provisions do not effect the right of recovery. Section 440 CC is applied analogically.

In the publication Barešová, E. – Baudyš, P.,[4] *the judgment of the Regional Court Plzeň, No. 15 Ca 446/94 from the 31st November, 1995 about rescission of the contract for sale of company is cited: The legal title for ownership deposit in deposit proceedings is the contract. The report note only registers the existing real rights, its effectiveness is only for register. The rescission of contract is one–way legal act. The legal effects of the rescission of contract is governed in Section 349(1) CC. It is stated that the contract is finished with the rescission of contract. The legal effects of the rescission of contract come into effect when the declaration of will is delivered to the other contractual party. According to Section 349(1) CC the rescission of contract can not be cancelled or changed without the consent of the other contractual party. According to Section 351(1) CC all rights and duties are extinguished with the rescission of contract; the extinguishment comes into being by operation of the law. The land register has duty only to register the extinguishment, the report note has a register sense but not a legal making sense. If the land register cancels the ownership, it will get over its competence and its decision will be void.*

The provision of Section 486 CC is a dispositive norm. The purchaser has a right to a moderate discount from the purchase price corresponding to the missing or damaged things according to par. 1.

If the missing things or the ascertainable damage was not stated in the report of take–over, the right to discount can not be conceded in legal proceedings unless the seller knew about them at the time of passing the thing. Besides the damage about which the seller knows there is also ascertainable damage during the run of the company.

In the case of the damage that can be ascertainable during the run of the company, the effects are the same as in the above mentioned damage if the purchaser did not announce it to the seller in an immediate delay after its recognition or the damage could be found out with a professional care but not later than six months after the day of effectiveness of the contract.

The responsibility for damage is analogical to the responsibility for damage in breach of contract of purchase. The seller is responsible not only for damage of material things but for each damage of a thing, it means damage of components of the company and damage of the company as the entity. The provisions of the contract of purchase are applied analogically (Section 428(2) CC).

The analogical application of the contract of purchase is also for the discount from the purchase price (refer to Section 439 CC).

4 E. Barešová, P. Baudyš, Zákon o zápisech vlastnických a jiných věcných práv k nemovitostem, komentář, Praha 1996, p. 268.

According to Section 486(2) CC the purchaser can back out of the contract if it is not possible to run the company identified in the contract and the damage announced in time is irremovable or the seller did not remove it in an additional time that is stated by the purchaser (the provision of the contract of purchase Section 441 is applied analogically).

The purchaser can back out of the contract if the ownership of real estate which is the component of the company is not transferred and the seller did not remove the damage in an additional time which is stated by the purchaser (see Section 486(4) CC).

Streszczenie

Forma prawna przedsiębiorstwa – rozumianego jako zbiór rzeczy i praw – jest uregulowana przepisami dotyczącymi rzeczy w znaczeniu prawnym. Szczególne uprawnienia dotyczące nieruchomości, własności przemysłowej, własności intelektualnej, pojazdów itp. wchodzą w skład przedsiębiorstwa i w przypadku jego sprzedaży przechodzą w całości na nabywcę (sprzedaż może dotyczyć wyłącznie przedsiębiorstwa jako całości). Przy zachowaniu odpowiednich przepisów, do przeniesienia prawa własności przesiębiorstwa wymagana jest zgoda wspólników lub zgromadzenia ogólnego spółki.

Naděžda Rozehnalová, Jiří Valdhans

REAL ESTATE FROM THE PERSPECTIVE OF CZECH PRIVATE INTERNATIONAL LAW

General Remarks

This chapter considers the question of real estate from the view of Private International Law. Private international law as a legal discipline deals in general with three main areas of problems which can be, of course, widely and in detail specified. These three main areas according to a particular matter are[1]:

1) determination of law applicable to a particular question;

2) jurisdiction of national courts in such a matter;

3) treatment of a foreign judgment, especially recognition and enforcement of such a judgment.

A very important condition which has to be fulfilled in order to use the private international law rules is the presence of a relevant international element – it has to be of sufficient significance.

Hereafter we will focus on first two areas in which specificities in relation to real estate can be found while the third area holds the general character with no differences when dealing with the judgment in the matter related to the real estate. Because of this reason the third area mentioned above will not be discussed further in this chapter.

Determination of Applicable Law

Classification

The procedure how to determine the applicable law consists of several interconnected steps. The first of them is the classification of the subject-matter. Qualification could be defined as a process of analyzing the facts in order to subsume

1 M. Pauknerová, Evropské mezinárodní právo soukromé a procesní - aktuální otázky, "Evropské právo" 2003, no. 8, p. 2.

them under the certain legal rule[2], to be specific under the concrete conflicting rule of law. It is not a problem only of private international law but it is necessary to qualify the legal relationship in every case of using the legal rule as such.

Let me give you an example. A question is connected with the small construction and it is important to decide whether it is real estate or movable estate. It does not necessarily have to be a problem in the case of absence of a cross-border impact. In such a case the national legal rule is used and the problem is solved under the national law. When the cross-border impact is presented the first issue to be solved is the selection of law according to which the classification will be accomplished. Usually classification takes place according to the rules of the *lex fori*. Despite the fact that this is the most common method of classification, in case of a real estate several exemptions could be found in the international treaties on judicial cooperation. To name some examples – the treaty between former Czechoslovakia and former Yugoslavia (No. 207/1964 Sb.), or the treaty between former Czechoslovakia and former Soviet Union (No. 95/1983 Sb.), the treaty between former Czechoslovakia and Poland (No. 42/1989 Sb.), the treaty between former Czechoslovakia and Bulgaria (No. 3/1978 Sb.), or the same treaties between former Czechoslovakia and Cuba or Vietnam. All these treaties are still effective and according to their text the decision whether a thing is a real estate or a movable estate must be based on the law of a contracting state where the asset is situated. Moreover, all these exemptions are formulated only for the purposes of succession. There are also special conflicts of law rules included for these special purposes, but we will deal with this topic closely thereinafter.

Conflict of Law Rules and Determination of Applicable Law

When the legal classification is done, it is possible to proceed to the determination of the applicable law. For this purpose special legal rules were formed – a conflict of law rules (choice of law rules). These rules do not constitute the substantive legal solution of a particular matter but determine the one specific national legal order whose substantive law is used afterwards to solve the issue of fact[3]. To achieve this objective a special construction of a conflict of law rules is needed. In one part the scope (what is the matter ensues from the classification) is specified whereas the second part refers to the applicable law by using a connecting factor. From the general view of the Czech Republic these rules are contained not only in the national Act No. 97/1963 Sb., but also in international treaties and European secondary

2 N. Rozehnalová, V. Týč, Evropský justiční prostor (v civilních otázkách), Brno 2003.

3 Z. Kučera, Mezinárodní právo soukromé. Brno 2001. Or N. Rozehnalová, V. Týč, Evropský justiční prostor (v civilních otázkách), Brno 2003.

legislation. These latter sources of law have priority over national legal provisions in the case of concurrence.

Rights in Rem

When talking about real estate the most important issue to solve is the law applicable to the rights in rem. Conflicts of law rules for this topic are part of the Czech national Act No. 97/1963 Sb. with a few exceptions in international treaties.

Historically, the most important connecting factor for real estate (rights in rem) has been the principle of *lex rei sitae*. It is used also in the Czech legal order in Section 5 of the legal Act No. 97/1963 Sb. It is important to say that this principle entirely prevails even though there is a divergence for the purpose of succession. *Lex rei sitae* decides about what rights in rem are in existence, how they originate and cease or what is their capacity and effect[4].

The examples of the exceptions to be taken into consideration in international treaties are: the Treaty on juridical cooperation with Bulgaria (No. 3/1978 Sb.) and the Treaty on juridical cooperation with Poland (No. 42/1989 Sb.) where the connecting factor points the state where the real estate is – *lex rei sitae*. The treaty with Bulgaria speaks about rights in rem only whereas the treaty with Poland speaks more generally about legal relations to the real estate. Nonetheless, we incline to the interpretation within the meaning of the rights in rem. European secondary legislation in the field of private international law doesn't contain any conflict of law rules related to rights in rem to real estate.

Contracts

In this case we have to take into account also the Convention on the law applicable to contractual obligation – future ROMA I Regulation. The convention, still being not "communitarized" and thus existing as a source of international law only, is effective in the case of Czech Republic for contracts signed up on the 1st July 2006. The principle of *lex rei sitae* is used also for the contracts where the real estate is the subject-matter of such a contract (Section 10(2) of Act No. 97/1963 Sb., and Section 4(3) of the Convention). It doesn't matter whether it is a contract of purchase, working contract or mortgage contract or real burden contract. The only important condition is that the subject-matter of the contract is a right in real estate. It is not sufficient that the contract is only connected to the real estate (insurance contract)[5].

4 Z. Kučera, Mezinárodní právo soukromé, Brno 2001. p. 308.
5 Z. Kučera, L. Tichý, Zákon o mezinárodním právu soukromém a procesním. Komentář, Praha 1989.

Succession

The conflict of law rule for succession is the only exception in the Czech legal order from the principle *lex rei sitae*. According to the Section 17 of the Act No. 97/1963 Sb., legal relations in the case of succession should be governed by the *lex patrie* of decedent. Czech legal order uses so called uniform status of inheritance when both real estate and movable estate questions are subordinated to the same legal order – to the law of the citizenship of the decedent at the time of death. In case the state of the citizenship uses the split status of inheritance the usage of renvoi is possible and exploited in real juridical decision-making.

The conflict of law rules included in the international treaties on juridical cooperation (all mentioned therein before) uses for the purposes of succession also the principle of *lex rei sitae*.

Jurisdiction of Czech National Courts

In this part the practical authority granted to the Czech courts in proportion to the authority of foreign courts in matters of real estate will be dealt with. Also in this field of interest there are three levels of legal regulation – rules included in Czech national Act No. 97/1963 Sb., rules in European secondary legislation, i.e. Council Regulation (EC) No. 44/2001 on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels I), and rules included in international treaties (treaties on juridical cooperation mentioned supra). Jurisdiction of national courts in relation to foreign courts could be formed as exclusive (impact on recognition of foreign judgments which is then impossible) or shared.

Act No. 97/1963 Sb.

Jurisdiction of Czech courts in proceedings about rights in rem in real estate is not mentioned in the Act explicitly but Czech doctrine of private international law[6] regarding the interpretation of the Czech Civil Procedure Code No. 99/1963 Sb. Section 88 has reached a view of exclusive jurisdiction of Czech courts in these matters. After accession to the European Communities on 1st May 2004 the Brussels I has entered into force in the Czech Republic and while it is a Regulation, it is applied directly and has the direct effect in Member States so the national legal provisions are not used anymore if they are inconsistent with the regulation[7]. Brussels I regulation will be mentioned infra.

6 Z. Kučera, L. Tichý, Zákon o mezinárodním právu soukromém a procesním. Komentář. Praha 1989. or Z. Kučera, Mezinárodní právo soukromé, Brno 2001. p. 308.

7 A. Briggs, P. Rees, Civil Jurisdiction and Judgments, London 2005.

Another example of exclusive jurisdiction applies when the inheritance regarding real estate located in the Czech Republic is handled – Section 45(1/c) of the Act No. 97/1963 Sb.

In cases of proceedings which do not have as their object rights in rem in real estate but do have relation to real estate only shared jurisdiction asserts.

Brussels I Regulation

Section 22(1) of Brussels I which shall be used regardless of parties domicile[8] determines exclusive jurisdiction of the courts of the Member State in which the real estate is situated. It also means that the national provisions are not used any more in any occasion when it comes to this subject-matter. Usage of this provision is restricted only for proceedings which have as their object rights in rem in real estate or tenancies of immovable property. National court is obliged to comply with Section 25 while examining its jurisdiction in claims which are principally concerned with matters under Section 22 and shall declare of its own motion that it has no jurisdiction in claims it has not[9]. Many European Court of Justice decisions have interpreted this chapter and thus help to solve the problems with its application. Some of them are presented supra. Even though these are decisions from preliminary rulings to Brussels Convention Section 16, they are usable for the interpretation of Brussels I Regulation as well.

C-115/88 – Mario P. A. Reichert and others v. Dresdner Bank

The concept of "proceedings which have as their object rights in rem in immovable property" mentioned in Article 16(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be given an independent interpretation. It encompasses only those actions concerning rights in rem in immovable property which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with the protection of the powers which attach to their interest .

It does not apply to an action whereby a creditor seeks to have a disposition of a right in rem in immovable property rendered ineffective as against him on the ground that it was made in fraud of his rights by his debtor.

8 J. Pontier, E. Burg, EU Principles on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters, Hague.

9 U. Magnus, P. Mankowski, European commentaries on Private International Law. Brussels I Regulation, Munchen 2007.

C-294/92 – George Lawrence Webb v. Lawrence Desmond Webb

In order for Article 16(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil Matters to apply, it is not sufficient that a right in rem in immovable property be involved in the action or that the action have a link with immovable property: the action must be based on a right in rem and not on a right in personam, save in the case of the exception concerning tenancies of immovable property.

It follows that an action for a declaration that a person holds immovable property as trustee and for an order requiring that person to execute such documents as should be required to vest the legal ownership in the plaintiff does not constitute an action in rem within the meaning of Article 16(1) of the Convention.

C-73/77 – Theodorus Engelbertus Sanders v. Donald van der Putte

The concept of "matters relating to... tenancies of immovable property" within the context of article 16 of the Convention must not be interpreted as including an agreement to rent under a usufructuary lease a retail business carried on in immovable property rented from a third person by the lessor. The fact there is a dispute as to the existence of such an agreement does not affect the reply given as regards the applicability of article 16 of the Convention.

C-518/99 – Richard Gaillard v. Alaya Chekili

An action for rescission of a contract for the sale of land and consequential damages is not within the scope of the rules on exclusive jurisdiction in proceedings which have as their object rights in rem in immovable property under Article 16(1) of the Convention of 27 September 1968 between the Member States of the European Economic Community on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Convention of 9 October 1978 .

C-241/83 – Erich Rösler v. Horst Rottwinkel

Article 16(1) of the Convention of 27 September 1968 applies to all lettings of the immovable property, even for a short term, and even where they relate only to the use and occupation of a holiday home.

All disputes concerning the obligation of the landlord or of the tenant under a tenancy, in particular those concerning the existence of tenancies or the interpretation of the terms thereof, their duration, the giving up of possession rent and of incidental charges payable by the tenant, such as charges for the consumption of water, gas and electricity, fall within the exclusive jurisdiction conferred by

Article 16(1) of the Convention on the courts of the state in which the property is situated. On the other hand, disputes which are only indirectly related to the use of the property let, such as those concerning the loss of holiday enjoyment and travel expenses, do not fall within that exclusive jurisdiction.

International Treaties

Treaties on juridical cooperation mentioned hereinbefore are quite similar when dealing with jurisdiction in the matters of real estate. They state the jurisdiction of the courts of a contracting state where the real estate is located both in succession matters or matters about rights in rem.

Final Remarks

As shown above, real estate is considered to be an important object of legal regulation of private international law as well as in other legal disciplines. With respect to its character the principle *lex rei sitae* is mostly used with some exceptions as in case of succession. This approach to the conflict of law rules is reflected in procedural rules providing jurisdiction where usually exclusive jurisdiction is given to the courts of a state where the real estate is located. These solutions are also applied in the Czech legal system.

Streszczenie

Wskazanie właściwego (mającego zastosowanie w danej sytuacji) systemu prawnego oraz jurysdykcji, tj. określenie, czy ma zastosowanie własny system (jurysdykcja), czy system (jurysdykcja) państwa obcego, jest domeną prawa międzynarodowego prywatnego. W Republice Czeskiej stosowne przepisy zawarte są w ustawie nr 97/1963 Sb. oraz w podpisanych przez to państwo umowach międzynarodowych.

W odniesieniu do władania nieruchomościami stosowana jest zasada lex rei sitae. Wyjątek stanowi dziedziczenie nieruchomości – tu w prawie czeskim przyjęto zasadę lex patrie (prawo właściwe dla zmarłego). Kwestia postępowania w sprawach praw rzeczowych i dziedziczenia nieruchomości jest przekazywana do wyłącznej jurysdykcji sądów państwa, w którym znajduje się nieruchomość. W tym aspekcie czeskie prawo krajowe nie różni się od uregulowań unijnych i norm zawartych w traktatach międzynarodowych.

David Sehnálek

FREE MOVEMENT OF CAPITAL

Free movement of capital is so called the "fourth freedom" of the single market. Compared to other freedoms, the free movement of capital was marginalized for a long time. Limits on its free movement were necessary as the Member States had not been integrated in the area of monetary and economic cooperation. As the Member States intended to introduce the Economic and Monetary union all obstacles to free movement had to be removed. Full liberalization of this freedom was achieved in the early 1990s. Nowadays, all restrictions on the movement of capital between Member States and between Member States and third countries are according to the EC Treaty strictly prohibited.

The abovementioned prohibition of all obstacles to the free movement of capital is, however, not absolute. There still exist some exceptions which allow Member States to limit the flow of capital among them or to third countries. These are two main categories of such permitted exceptions:

1) general time unlimited exceptions and

2) temporary specific exceptions.

The first category can be further divided as there are written justifications of restrictions to the free movement of the capital which are laid down in Art. 58 EC and the unwritten justifications based on overriding requirements of the general interest[1]. Other permitted restrictions are set out in Art. 57 of the EC Treaty. Under this provision Member States are permitted to maintain[2] and/or introduce restriction against third countries.

---

1 See Case C-367/98, Commission v. Portugal para. 49, Case C-483/99, Commission v. France para. 45 or Case C-503/99, Commission v. Belgium para. 45 where the ECJ held that "the free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 73d(1) of the Treaty or by overriding requirements of the general interest and which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proporcionality".

2 Stand still clause against third countries.

I am not going to further deal with the above mentioned justifications in this article as the given volume for this article does not allow me to sufficiently elaborate on such a wide topic[3]. However, I would like to focus on the second category which I labeled as the temporary specific exceptions as they are relevant to the topic of this article.

When the Czech Republic and other new Member States were preparing themselves for the EC/EU accession it was generally believed that the full and unlimited acceptance of all Community freedoms might result in serious disturbances in the economy of new Member States. To prevent this, the Czech Republic has negotiated some exceptions from the EC common rules[4]. One of such exceptions is relevant to the free movement of capital[5].

According to negotiated exceptions the Czech Republic may maintain in force for five years from the date of accession its current rules on the acquisition of secondary residences by nationals of the Member States non-resident in the Czech Republic and by companies formed in accordance with the laws of another Member State and being neither established nor having a branch or a representative agency in the territory of the Czech Republic.

The Czech Republic may also maintain in force for seven years from the date of accession its current rules on the acquisition of agricultural land and forests by nationals of the Member States and by companies formed in accordance with the laws of another Member State which are neither established nor registered in the Czech Republic.

However, self–employed farmers who are nationals of another Member State and who wish to establish themselves and reside in the Czech Republic are not subject to the abovementioned restrictions. As such, they shall be treated equally with Czech nationals.

The transitional periods might be extended by the decision of Commission at the request of the Czech Republic in case that there is sufficient evidence that, upon expiry of the transitional periods, there will be serious disturbances or a threat of serious disturbances on the agricultural land market of the Czech Republic. Maximum length of such extension is three years.

3 For further reading see C. A. Grünwald, The German Volkswagengesetz and the free movement of capital [cited on January 14, 2008] available at http://www.jur.lu.se/internet/english/essay/masterth.nsf/0/831CB63F3CBB4792C1257013005147C9/$File/xsmall.pdf?OpenElement.

4 See Art. 24 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded.

5 See Annex V: List referred to in Article 24 of the Act of Accession: Czech Republic.

In the Czech national law the rules on acquisition of real estate by foreigners are laid down in the Foreign Exchange Act No. 219/1995 Sb. as amended (hereinafter referred to as the "FEA")[6].

The conclusion is that the transitional period negotiated by the Czech Republic allows it to maintain regulation which into certain extent limits foreigners from acquiring real estate. The free movement of capital is therefore not fully achieved yet in case of the Czech Republic. Restrictions are stronger in case of agricultural land and foreigners who are not citizens of Member State[7] trying to acquire such land. Their purpose is to limit foreigners from wealthier Member States to buy all relatively cheap real estate. It was believed that during the transitional period the prices and purchase power of Czech citizens will approximate with the EU average and Czech citizens and economy will be less vulnerable. The recent Czech regulation is, however, often circumventing as the foreigners who live abroad and want to invest here can use the loophole in the FEA and found a company in the Czech Republic. Such company is considered to be a Czech resident and can therefore acquire real estate here. The disadvantage of such option is rather complicated paperwork and additional larger funding and operating costs.

6 See more in P. Mrkývka, P. Schillerová, in chapter Acquisition of Real Estate in the Czech Republic by Non-residents.

7 Further restrictive regulations that regulate only state agricultural land and woods are included in two special acts: in Act No. 95/1999 Coll. which created the basis for privatization of state agricultural land and woodland and Act No. 229/1991 Coll. on Land, as amended. For further information see Acquisition of Immovable Property in Czech Republic, http://www.czechembassy.org/wwwo/default.asp?ido=1451&idj=2&amb=58&ParentIDO=104

Streszczenie

Swobodny przepływ kapitału jest podstawą uregulowań zawartych w unijnych przepisach o jednolitym rynku. Ogólnie rzecz biorąc, państwom członkowskim nie wolno ograniczać tej swobody. Jednak w pewnych sytuacjach konieczne okazuje się zachowanie pewnych wyjątków (ograniczeń) od ogólnej zasady swobody przepływu kapitału. Niniejszy artykuł dotyczy jedynie ograniczeń czasowych, jakie zostały wprowadzone w momencie przystąpienia nowych państw do UE w 2004 roku, aby nie dopuścić do poważnych zaburzeń w ich gospodarkach. Republika Czeska wykorzystała tę możliwość i w tzw. okresie przejściowym ogranicza obcokrajowcom prawo do nabywania nieruchomości.

Urszula Drozdowska

THE SUPERFICIES SOLO CEDIT PRINCIPLE IN POLISH CIVIL LAW

Superficies solo cedit – The surface yields to the ground

1. It is a famous principle, dating back to the Roman law, which means that everything that has been erected or planted on a piece of land becomes, as an integral part of the land, the property of the owner of the land. In ancient Rome, land was considered the most important thing; therefore, in cases of permanent connection of objects with the land, for example by planting trees on land owned by another person (*implantatio*), or by sowing seeds (*satio*), or even by erecting a building *(inaedificatio*), it was assumed that accession took effect and that the objects connected with the land has become property of the owner of the land[1].

In Polish civil law, this principle is included in articles 48 and 191 of the Civil Code[2]. According to the first of these legal provisions, integral parts of land include, in particular, buildings and other facilities permanently connected with the land, as well as trees and other plants, from the moment of their planting or sowing, with the exception of instances provided for in a relevant statute. Art. 191 of the Civil Code, on the other hand, states that if a movable object becomes connected with an immovable estate in a way that makes it an integral part of the land, ownership of the immovable estate extends over the movable object. As a result of such a connection, an object that has been separate becomes – as an integral part – property of the land's owner, regardless of who effected the connection and whose materials were used to effect it[3].

1 Compare K. Kolańczyk, Prawo rzymskie, issue 4, Warsaw 1986, p. 308.
2 Civil Code – the Act of 23 April, 1964, Journal of Laws No. 16, item 93 with changes.
3 See A. Doliwa, Prawo rzeczowe, Warsaw 2004, p. 15.

As mentioned above, the Polish law provides for certain exceptions to this principle. The first and most important exception concerns buildings which, in situations defined by relevant laws, do not share legal purpose with the land on which they have been erected.

2. As we know, the value of a building may by far exceed the value of the land on which the building has been erected[4]. Therefore, Polish law provides for situations where, in the case of a building erected on land that constitutes public property (is owned by the State Treasury or by a unit of the local government, most often a commune), the land remains public property and the building becomes a separate property connected with perpetual usufruct of the land (Art. 235 of the Civil Code)[5]. In order to explain the special character of this exception in the background of the Polish law, one must indicate that perpetual usufruct has served as a certain means of assistance of the State to the construction industry aimed, in particular, to support construction of residential housing. The State Treasury or a unit of local government (commune, district, province) can give land that it owns for perpetual usufruct, for a fee, to a natural or legal person so that this person can erect on that land a building or other facilities connected with the land (Art. 232 and subsequent articles of the Civil Code). Such land remains public property while the building becomes a separate property of the natural or legal person that is connected with the perpetual usufruct of the land.

The institution of perpetual usufruct used to have a very strong ideological basis. In the times of communism, when only the State could own land, there was a need for a legal structure that would provide a right to land (perpetual usufruct) that was necessary to conduct construction projects, while allowing the State to maintain the ownership of the land[6]. Currently, the institution of perpetual usufruct, while remaining a part of the Polish law, is undergoing a crisis[7] and the question whether it should be maintained is a subject of debate[8].

4 The Polish legislator established a different solution to situations where the building or another facility has much higher value than the plot of land that it had been built on and occupied in good faith, but that is owned by someone else. In such cases, the person who had erected the building or facility may demand that the owner transfer the ownership of the land with compensation. On the other hand, the owner of the land may also demand that the ownership of the land be bought from him (Art. 231 of the Civil Code). This legal provision does not constitute an exception to the *superficies solo cedit* principle but is rather a particular type of a claim that parties in such situations are entitled to.

5 According to A. Stelmachowski, in: System Prawa Prywatnego vol. 3, in: T. Dybowski, ed., Prawo rzeczowe, Warsaw 2007, p. 249.

6 Compare A. Doliwa, ibid., 171.

7 Under the legal acts (compare the Act of 4 September 1997, Journal of Laws No. 120 (2001), item 1299 with changes; the Act of 26 July 2001, Journal of laws No. 113, item 1209, with changes), natural persons had the possibility to transform perpetual usufruct into actual property. Similarly, some legal persons (such as housing cooperatives) could transform, under preferential terms, perpetual usufruct into property with the goal of regulating the legal status of their real estate.

8 See Z. Gawlik, Użytkowanie wieczyste *de lege ferenda* in: M. Sawczuk, ed., Czterdzieści lat Kodeksu Cywilnego. Materiały z Ogólnopolskiego Zjazdu Cywilistów w Rzeszowie (8-10 października 2004 r.) Kraków 2006, p. 115ff.

3. Similarly, the exception to the *superficies solo cedit* principle stipulated in Articles 272 and 279 of the Civil Code is related to Poland's former political regime. According to these two legal provisions, buildings erected on land owned by the State Treasury that has been handed over to a farming cooperative (Art. 272 of the Civil Code) or on land that constitutes members' contributions to a farming cooperative (Art. 279 of the Civil Code), remain a property of the cooperative that is separate from the land. The Act of 19 October 1991 on administration of farmland property of the State Treasury[9] cancelled the possibility to transfer such land, based on the aforementioned principles, to production cooperatives and the usufruct right expired after the end of the period provided for by the statute (31 December 1997). Consequently, the above-mentioned legal provisions are no longer in effect, even though they have not been formally abolished. Remarkably, this legal form of conducting an economic activity in the farming sector has lost its importance and, therefore, these legal provisions have lost their practical significance[10]. According to § 2 Art. 279 of the Civil Code, if the usufruct of land expires, the plot of land on which the buildings or facilities that are property of cooperatives and constitute contributions of the members of the farming cooperatives, may be acquired by the cooperative as its property, with compensation equal to the value of the land. Trees and other plants become property of the owner of the land. What this means, in effect, is a return to the *superficies solo cedit* principle.

4. Another exception to be discussed concerns real estate that constitutes separate premises. According to Art. 2 passage 1 of the Act of 24 June 1994 on the ownership of premises[11], a separate residential premise as well as a premise with a different designation, may constitute a separate piece of real estate. In general, a premise is defined as a chamber, or a set of chambers, that is separated with permanent walls within a building, along with ancillary rooms. Ancillary rooms, and in particular basements, attics, and storage rooms, are regarded as integral parts of the premise, unless an act of law[12] or a decision of a court of law states otherwise (Art. 2 passage 4 of the Act). Ownership of premises that is separate from the ownership of land may be established in buildings that are either private or public property. An authorized person acquires ownership of a premise together with a share of ownership of the building or land, defined as a percentage. If the building is an integral and non-separated part of the land, the legal structure is less complex as the share of ownership extends over the whole piece of real estate and the building. If the land is used under perpetual usufruct rights, the co-ownership covers solely the building that

9 Uniform text can be found in: Journal of Laws No. 208 (2004), item 2128 with changes.
10 Compare: A. Stelmachowski, ibid., 250.
11 Uniform text can be found in: Journal of Laws No. 80 (2000), item 903 with changes.
12 Separate ownership of a premise can be established either by a unilateral or by a multilateral legal act (see Art. 7 passage 1 of the law).

constitutes a separate piece of real estate owned by the homeowners' association (all the owners in the building). The land, on the other hand, is owned by a given unit of local government.

5. Art. 48 of the Civil Code states that facilities serving the purpose of supplying water, steam, gas, or electricity, or other similar facilities, do not constitute integral parts of the land or the building if they constitute a part of an enterprise or a company. As a result of permanent connection to a network owned by such an enterprise or company, they are no longer an integral part of a given piece of real estate and become property of the enterprise or company[13]. At the same time, Art. 191 of the Civil Code states that ownership of a piece of real estate extends over a movable object which has become connected with the immovable estate in a way that makes it an integral part of the land. Considering the mutual relation of these two legal provisions, the Supreme Court, in its decision of 8 March 2006[14], stated that the provision of Art. 49 of the Civil Code does not, by itself, constitute a sufficient legal basis for transferring ownership of facilities mentioned therein to the owner of the enterprise by connecting them with a network. Whether such transfer does take effect depends on the circumstances of a given case, especially on the contract between the entity who had built such facilities and the enterprise. In its decision of 7 November 1997[15], the Supreme Court declared that the recipient of electricity who was forced by monopolistic practices of the enterprise to finance the construction of facilities stipulated in Art. 49 of the Civil Code and then lost ownership of such facilities to the benefit of the enterprise as a result of connecting them to the network may claim to receive compensation for the cost he had incurred on the basis of legal provisions on baseless enrichment. Thus, in cases involving transmission facilities, exceptions to the *superficies solo cedit* principle apply only in particular circumstances of a given case. The current judicial decisions, most of all, support the interest of investors, that is persons who have financed and built such facilities in the framework of municipal economy.

6. To summarize the above discussion, one can state that the *superficies solo cedit* principle has been accepted by the Polish legislator, with the exceptions stipulated in the relevant laws. The number of such exceptions has decreased as a result of the system transformation in Poland. In practice, the separate ownership of a premise within a larger building has become the most important exception, as a result of the rapid growth of multi-family housing. Also, property and perpetual usufruct of land still coexist as forms of title to real estate.

13 See. Verdict of the Constitutional Tribunal of 4 December 1991, sign. W 4/91, OTK 1991, No 1, item 22.
14 Sign. III CZP 105/05, unpublished, quoted after S. Rudnicki, Komentarz do kodeksu cywilnego. Księga pierwsza. Część ogólna, Warsaw 2006, p. 203.
15 Sign. II CKN 424/97, OSNC 1998, No. 5, item 77.

Streszczenie

Artykuł wyjaśnia na czym polega zasada Superficies solo cedit oraz przedstawia na gruncie prawa cywilnego zastosowanie tej wywodzącej się jeszcze z prawa rzymskiego zasady. W polskim prawie cywilnym zasadę tę wypowiada art. 48 i 191 KC. W myśl pierwszego z cytowanych przepisów, do części składowych gruntu należą w szczególności budynki i inne urządzenia trwale z gruntem związane, jak również drzewa i inne rośliny od chwili zasadzenia lub zasiania. Z kolei art. 191 KC stanowi, iż w razie połączenia rzeczy ruchomej z nieruchomością, w taki sposób, że stała się ona częścią składową gruntu, własność tej nieruchomości rozciąga się na rzecz ruchomą. Publikacja omawia także wyjątki od wyżej wymienionej zasady. W szczególności przepisy kodeksu cywilnego tj. art. 235, art. 272, art. 279 oraz art. 2 ust. 1 ustawy z dnia 24 czerwca 1994 r. o własności lokali.

Krzysztof Radel

PERPETUAL USUFRUCT AS A FORM OF REAL ESTATE MANAGEMENT

The issue of perpetual usufruct was introduced to the Polish legal system by the Act of 14 July 1961 about urban and residential areas management (harmonized text: Official Journal of 1969, No. 22, item 159 with further amendments). Primarily, it was rooted ideologically. Its main aim was to make rapid housing construction development easier, at the same time protecting interests of the state from dangers, present in these times, connected with final sale of grounds designed for urbanization purposes. Despite changes in political systems, the idea of perpetual usufruct has not lost anything of its significance. Nowadays, it enables a relatively cheap access to grounds owned by State Treasury, self-governmental units and their correlations.

Within this binding legal system, the phenomenon of perpetual usufruct is regulated by two legal acts. General legal norms are defined by the Civil Code (Articles: 232-243 of the Civil Code), whereas complex and detailed regulations concerning all matters connected with perpetual usufruct were included into the Act of 21 August, 1997 about real estate management (harmonized text: Official Journal of 2004, No. 261, item 2603 with further amendments), hereinafter called 'REMA' (Real Estate Management Act).

Legal character of perpetual usufruct has evoked various doubts almost from its very first appearance in Polish legal system. It is commonly accepted nowadays that perpetual usufruct is a special kind of property law. Its specificity derives from the fact that it has been situated between possessive right and limited property law by its legislator. The fact that perpetual usufruct is a right based on somebody else's property and its user is a dependable one is the element which connects perpetual usufruct with limited possessive rights. The range of perpetual user's endorsements and the method of shaping that law are the decisive factors on similarity of perpetual usufruct to a possessive right. In result, in cases non-defined by perpetual usufruct provisions, these on possessive right apply.

In accordance with Article 232 of the Civil Code, only and exclusively ground property belonging to State Treasury, self-governmental units and their correlations may be subject to perpetual usufruct. However, property belonging to State Treasury

must be located within administrative borders of urban areas or outside them, but included into a plan of spatial management for urban areas and designed for implementation of its tasks of economy. The code limitation of the types of ground that may be subject to perpetual usufruct, however, has become broader pursuant to Article 232 § 2 of the Civil Code, in which the legislator indicated that in cases defined by special provisions, other than the aforementioned, grounds of State Treasury, self-governmental units and their correlations may also be subject to perpetual usufruct. With regard to the above-described situation, Article 13, Section 1 of REMA, which allows the possibility of setting the perpetual usufruct right at all grounds belonging to State Treasury and self-governmental units, whatsoever, is a special provision. Albeit, perpetual usufruct right must not be settled to a share in a right to ground, and so to joint ownership with regard to subjects indicated in Article 232 of the Civil Code[1].

Both an individual person and legal entity may be users of perpetual usufruct. It is also commonly accepted that there is a possibility of settling perpetual usufruct for more than one person (tenants in common). Perpetual joint ownership can be formed as effect of an agreement for perpetual usufruct made by the owner of a particular ground with several subjects in result of inheritance or court decree. In order to define the rules of perpetual joint ownership enactment, additional provisions on joint tenants are applied. Mutual relations between perpetual tenants can be also defined by an agreement settling this type of joint property right. It should be indicated here that each tenant becomes a co-owner of buildings situated on the ground, and the amount of shares in perpetual usufruct determines also the amount of shares in co-ownership of these buildings or objects[2]. However, in the event when the amount of shares in co-ownership has not been specified, in order to settle rights for particular building or object, it is acceptable and common practice to apply provisions of joint tenancy[3].

Acquiring the right for perpetual usufruct may appear as a result of the following: by legal provisions, as an effect of civil law action, acquisitive prescription, inheritance or issued administrative decision. However, a rudimentary method for creating perpetual usufruct right is to sign an agreement for such a right. It is made by tender offer or in non-tender way – in a result of conducted talks. Detailed rules for such agreements were specified in REMA, particularly Article 37 and the following.

1 Supreme Court Decree of 08 November 1977, reference number: IV CR 466/77, OSPiKA 1978, No. 7-8, point 144.

2 S. Szer, Gloss to Resolution of Supreme Court of 08 July 1966, reference number: III CZP 43/65 NP. 1967, No. 3, page 428.

3 By Resolution of Supreme Court of 08 July 1966, reference number: III CZP 43/66, OSNC 1966, No. 12, point 211.

The agreement for perpetual usufruct should, above all, include parties in the agreement, the purpose for which this perpetual usufruct right would be implemented, duration of perpetual usufruct, definition of method and date of property management and the way it would be used. In the event when perpetual usufruct is performed for the purpose of constructing buildings or buildings and other objects on this terrain, such agreement should also define date of commencement and finishing works, types of buildings and objects with the obligation to preserve them in adequate condition, condition and date of reconstruction of buildings and objects under the right of perpetual usufruct in case of their damage or demolition, any payment in favour of perpetual user due to buildings or appliance present on the perpetual usufruct area on the finishing date of the agreement. One should not forget that congruent to Articles 234 and 237 of the Civil Code, for settlement and transfer of perpetual usufruct right the provisions concerning real estate are to be applied.

Pursuant to Article 27 REMA, giving ground under perpetual usufruct requires entry into Land and Mortgage Register, which is of constitutive character. Entry into Land and Mortgage Register is a final stage in the procedure of establishing the right for perpetual usufruct. The user's endorsements for perpetual usufruct are created only at the moment of entry. Not only establishment of the right for perpetual usufruct is subject to entry into Land and Mortgage Register, but also general manner of its usage.

Article 233 of the Civil Code plays a key role in the perpetual usufruct phenomenon. It says that a perpetual user (tenant) may manage and use the ground with the exclusion of others. As it is easily noticeable, perpetual tenant's endorsements are similar to these of real estate owner. The boundaries for these endorsements are sole differences. The aforementioned boundaries are set by provisions of legal resolutions, rules of social coexistence and agreement for perpetual usufruct of grounds owned by State Treasury, self-governmental units and their correlations which limits its content and sets its user some obligations. Pursuant to Article 240 of the Civil Code if a perpetual tenant uses the ground in absolutely incongruent manner than primarily defined by the agreement, in particular when buildings were not constructed on a scheduled date, there is a possibility of dissolving the agreement before the initial date for which perpetual usufruct had been settled.

Among numerous endorsements of perpetual tenant of a particular ground, the right to use goods and items, which is physical and actual item management with exclusion of other people, plays the foremost role. A similar character of perpetual usufruct to possessive right also results in the ability of using so-called 'neighbouring rights'. We must not forget, however, that perpetual usufruct is limited by basic endorsements of real estate owner. The perpetual user of property must not during

binding agreement of perpetual usufruct violate owner's endorsements or replace him/her in making affidavit of will[4].

Another endorsement of a perpetual tenant is the ability to manage perpetual usufruct right by *inter vivos* and *mortis causa*. Endorsements to property management are restricted to the ability of gaining by a perpetual tenant partial or complete range of endorsements for other "item" through agreement, as well as the possibility of burdening this right with various limited property rights, such as right of exploitation**,** easement appurtenant and mortgage right. Perpetual usufruct, due to transferability, is subject to execution. However, it should be indicated here that limited property right with regard to perpetual usufruct, pursuant to Article 241 of the Civil Code, loses its validity when a right to perpetual usufruct expires. A perpetual tenant has a right to waive his entitlement to perpetual usufruct.

Furthermore, perpetual usufruct is eligible to gain natural and civil benefits in the event when a particular property which is under perpetual usufruct right gains such benefits.

A separate matter that needs to be pointed out is the issue of a legal character of buildings located on the ground subject to perpetual usufruct. It should be indicated here that regardless of the fact whether these buildings or appliance were raised by a perpetual tenant after perpetual usufruct right had been settled or if they had already been built at the moment of settling this right, these buildings are the actual property of the perpetual tenant. And so the rule of *superficies solo credit* is hereby waived; buildings and other objects are not a compound part of ground owned by State Treasury or self-governmental units. Ownership right for buildings and appliance subject to perpetual usufruct right is not independent; it is strictly connected with perpetual usufruct – accessory right.

Perpetual usufruct right is the major law. Ownership right for objects and appliance situated on a property which is subject to perpetual usufruct is subject to the former one. Therefore waiving perpetual usufruct right has also its effect on buildings and appliance; ownership in itself for these buildings and appliance cannot be transferred to other person without perpetual usufruct[5]. Expiration of perpetual usufruct right results in expiration of property right for buildings and appliance.

Unlike property right, perpetual usufruct is a temporary right. According to Article 236 § 1 of the Civil Code a particular property is given under perpetual usufruct right for a period of 99 years. Only in extraordinary cases, when the economic purpose for perpetual usufruct does not require such long period of time, a shorter duration of at least 40 years for perpetual usufruct is acceptable. The period

4 C. Wodniak, Użytkowanie wieczyste, Warsaw 2006, p. 147.
5 J. Ignatowicz, R. Stefaniuk, Prawo rzeczowe, Warsaw 2006, p. 184.

of perpetual usufruct right should be clearly stated by the agreement, and such period should be counted commencing from the date of entry of such right into Land and Mortgage Register. A perpetual tenant may request extension of such period from forty to ninety nine years, which request, pursuant to Article 236 § 2 of the Civil Code, may be submitted within five consecutive years before expiration of perpetual usufruct right, and in the event when the period for amortization of costs scheduled for a particular area is significantly longer than the time for termination of a period of perpetual usufruct, the claim for the extension should be submitted within adequately prior time. The prolongation of perpetual usufruct right can be made by signing a specially prepared agreement exclusively. Such agreement should have an official form of notarial deed, and the extended period of perpetual usufruct begins at the time of prior period expiration[6].

The legislator has not introduced any obstructions for multiple extension of perpetual usufruct period, and rejection of request for extended period for perpetual usufruct is acceptable only when it involves a serious social matter.

Perpetual usufruct is a chargeable right and therefore establishing it results in the obligation for payment in favour of the authority acting in the capacity of the owner of a particular ground who establishes such right. All issues, whatsoever, regarding fees for giving and, in consequence, using the right for perpetual usufruct are settled by Article 71 REMA. The legislator divides such fee into two parts. The first one – fee for giving ground under perpetual usufruct right – is paid as single entry, however, not later than until the date of signing the perpetual usufruct agreement. Its amount is a matter of an arrangement between a perpetual tenant and the authority acting in the capacity of the owner of the ground subject to perpetual usufruct. Pursuant to Article 72 REMA, the amount of this fee cannot be smaller than 15% and not higher than 25% of total value of the property provided by estate and property appraiser. The value of the property is established with regard to the value of its ownership right. Detailed rules of property value evaluation are described in Resolution of Council of Ministers of 21 September 2004 about property value evaluation and estimate evaluation preparation[7]. A perpetual tenant is also obliged to pay annual fee on the 1st day of January of every year of perpetual usufruct duration in the adequate amount, and its user is obliged to make this payment until the 31st day of March of each year. The amount of first annual fee is defined by the agreement, and every other is provided by the authority establishing perpetual usufruct right. Specific rules for establishing the amount of annual fee are presented in Article 72 Section 3 REMA, setting its boundaries from 03% to 3% of total value of the property calculated by estate and property appraiser, and not more. It should

6 Z. Truszkiewicz, Użytkowanie wieczyste.Zagadnienia konstrukcyjne, Kraków 2006, p. 211.
7 Official Journal 2003, No. 207, item 2109 with further amendments.

be mentioned here, however, that these factors can change with regard to a specific property under perpetual usufruct, however such a change can be only made in the agreement, and the rate of the factor defined in it is binding through the whole period of the agreement duration. It does not mean, though, that annual fees for perpetual usufruct are constant. The change in the property value results in the change in the amount of annual fee, as a result of so-called 'update mechanism'. It should be also noted here that updated property value evaluation can be performed once a year, and not more frequently. For efficient change in the amount of annual fee, the authority acting in the capacity of the owner of a particular ground is required to give notice and inform about the obligation of making actual payment. To summarize, the amount of annual fee is dependable on two independent factors: defining the percentage rate in the agreement for perpetual usufruct right and property value.

Determination of legal character of fees for perpetual usufruct is a separate issue. They are commonly perceived as civil law benefit as due to the fact that administrative authority acting in the capacity of the owner of a particular property does not perform administrative power, but civil power[8]. The fact that administrative authority possesses official power to decide on some issues connected with perpetual usufruct in the form of administrative decisions does not change much. In Article 78 Section 2 REMA, the legislator predicted the perpetual tenant's demand to determine that performed update of annual fee is unjustified or justified, but in different amount. A perpetual user may also apply for a change in the amount of annual fee in the event of changing the purpose for perpetual usufruct of the property.

Due to specifics of its legislation, perpetual usufruct uses two-level legal protection. Great similarity of perpetual usufruct right to possessive (property right) causes analogical legal provisions as in case of property right, applicable as far as protection of perpetual usufruct right is concerned. In effect of which, in the event of violation of this law, a perpetual tenant has a right to submit vindication, *action negatoria* or complementary claim. Furthermore, due to the fact that perpetual usufruct is a law based on somebody else's property, and its core touches upon the ability of using a particular ground or area by a perpetual tenant, he/she is also entitled to submit claims deriving from possessory protection[9], which means self-protection of the property owner such as necessary self-defense, self-assistance and court legal protection in a sense of submitting a claim by a perpetual tenant for regaining power of property possession in case it is lost.

Expiration of perpetual usufruct right is performed as a result of termination of certain amount of time defined by the agreement, dissolution of the agreement by

8 E. Gniewek, Obrót nierucomościami skarbowymi i samorządowymi, Kraków 1999, p. 435.
9 C. Wodniak, Użytkowanie wieczyste, Warsaw 2006, p. 162.

the authority which is the owner of the property due to causes on a perpetual tenant, expropriation and confusion.

The legislator bounded various legal effects to the phenomenon of perpetual usufruct right expiration. Termination of statutory obligations and termination of possessive right to buildings and appliance, for which a perpetual tenant should receive financial compensation adequate to their value, are some of them. On the other hand, a perpetual tenant is obliged to return the property to its owner. Moreover, the owner of such property preserves the right to claim against a perpetual tenant for compensation of damage arising in result of faulty or wrong usage of the property. Such claim loses it validity after three years, the same as the claim of a perpetual tenant for financial compensation for buildings and appliance existing on a particular property on the date of returning it to its holder.

Streszczenie

W artykule zostały przedstawione najważniejsze zagadnienia dotyczące instytucji użytkowania wieczystego w polskim systemie prawa. Przede wszystkim zaprezentowano problematykę charakteru prawnego użytkowania wieczystego, wskazano na przedmiot użytkowania wieczystego, a także podmioty na rzecz, których może zostać one ustanowione. Inne poruszane zagadnienia dotyczą m.in. możliwych sposobów nabycia użytkowania wieczystego oraz niezbędnych elementów, które prowadzą do jego ustanowienia, a także treści prawa użytkowania wieczystego, związanych z tym uprawnień i obowiązków użytkownika wieczystego oraz przysługujących mu środków ochrony prawnej. Osobnym omówionym zagadnieniem jest charakter prawny budynków i urządzeń znajdujących się na gruncie oddanym w użytkowanie wieczyste. W artykule przedstawione zostało także użytkowanie wieczyste jako prawo czasowe i odpłatne. Ukazano ramy czasowe, na jakie użytkowanie wieczyste może zostać ustanowione, możliwość przedłużania tego okresu oraz poruszono podstawowe kwestie dotyczące rodzaju opłat przewidzianych prawem za użytkowanie wieczyste i sposób ich wymiaru.

Piotr Kosior

ACQUIRING REAL ESTATE'S OWNERSHIP THROUGH ACQUISITIVE PRESCRIPTION

Acquisitive prescription is one of the modes of acquiring ownership of a thing regulated by the Civil Code (Art. 172 of the Civil Code and subsequent articles). This institution mostly refers to acquisition of ownership of movable and immovable property by a non-rightful owner, which results expressly from Art. 172 and 174 of the Civil Code, however, land servitude (Art. 292 of the Civil Code) and perpetual usufruct can also be objects of acquisitive prescription. The Supreme Court forejudged/settled a possibility of the latter property law's prescription in one of its resolutions/decisions[1]. In practice, however, acquisitive prescription is of the greatest legal importance with regard to real estates.

A basic function, and at the same time acquisitive prescription function's justification, is elimination of inexpedient discrepancies between a legal and factual situation of the thing in question. Acquisitive prescription is a specific case of acquiring ownership because, contrary to other legal forms of ownership acquirement, it does not occur in a mode of legal act but through the existence of legally envisaged prerequisites in a specified factual condition. Hence, in case of real estate acquisitive prescription two prerequisites must jointly occur: possession and the lapse of time. In case of movables' acquisitive prescription, a third prerequisite is necessary, namely the holder's good faith[2]. A possibility of acquisitive prescription is absolutely excluded without this prerequisite (Art. 174 of the Civil Code). Whereas the holder's good or bad faith does not condition a possibility of real estate acquisitive prescription itself as it only acts to the effect of the length of the lapse of time after which it is to occur.

Possession is a specified factual status expressed in a possibility of factual and real management/use of a thing. Pursuant to Art. 336 of the Civil Code, the

1 The resolution of the composition of 7 Judges of the Supreme Court of 11th December 1975, docket no. III CZP 63/75 (OSNCP 1976, No. 12, par. 259), which was granted legal rule's force by the Supreme Court.

2 Supreme Court, in the decision of 17th May 2000 docket no. I CKN 730/98 (Lex Polonica No. 379893), adjudicated that good faith of the holder of movable must last throughout the entire period of the acquisitive prescription's term.

holder of a thing is both a person who factually uses/manages it in the scope of its ownership as well as the person who uses /manages it in the scope of another right that is connected with a specified management/use of a thing. Specified presumptions provide benefits/advantages for the holder's legal situation. They include: presumption of independent possession (Art. 339 of the Civil Code), uninterrupted possession (Art.340 of the Civil Code) and legitimate possession (Art. 341 of the Civil Code). The first two presumptions are of particular importance in the context of acquisitive prescription of a thing to specify its main prerequisite, i.e. independent possession, as well as to count the time of possession. They are mutable presumptions (iuris tantum), therefore, until they are abolished in a proceeding, they exempt the holder from the necessity to prove that the use/management he/she is exercising over a thing has properties and scope corresponding to the owner's use/management, as well as from sometimes problematic proving that possession's continuity has been preserved for many years.

Possession as a prerequisite to acquire ownership by acquisitive prescription must be independent in nature, that is with the intention to possess a thing for oneself (cum animo rem sibi habendi). The Supreme Court accurately characterized an independent holder in the judgment of 19th December, 2000 (docket number V CKN 164/00 Lex Polonica No. 388726) ascribing him/her with the features of a person whose factual scope of the thing's (land's) use/management is the same as the owner's, moreover, who is in a position allowing the use of the thing in the same manner as the owner. It results from this that two elements must occur if we are to talk about independent possession of the holder: a physical element of managing/using the thing (corpus possessions) and an intellectual element of the intention to use/manage the thing for yourself (animus possidendi). The latter one is manifested by the will to possess a thing in a scope appropriate/suitable to the entitlement to a thing in the broadest meaning (possessing it for oneself), excluding other subjects/entities. A factor of will is the element that allows to distinguish independent possession from dependent possession. Therefore in practice, external (that is visible/apparent to others) indications of manifestation of the use/management of a thing "like an owner" made by the holder decide whether we deal with possession characteristic of ownership or dependent possession. Apart from acts of the holder's conduct, lack of effective resistance of third parties is also a characteristic indication of factual management/use.

A change of dependent management/use into independent one is also admissible but it is effective under a condition such a change will be expressly manifested to the outside as far as real estate acquirement through acquisitive prescription is concerned. A change which has been externalized and which will only remain in

the holder's intentional sphere, will be legally ineffective[3]. The holder's knowledge about who the title to the thing's ownership belongs to does not exclude him/her of a status of independent possession. Even in the situation they know they manage/use another person's thing, and although they want to maintain its possession and do it in such a way as if they were its owners, they obtain an attribute of independent possession.

The regulation included in Art. 172 of the Civil Code conditions the length of the period of time necessary to acquire real estate's ownership through acquisitive prescription upon good or bad faith. It should be emphasized that pursuant to grammatical interpretation of Art. 172 § 1 of the Civil Code, the assessment of real estate holder's good or bad faith is made at the moment of acquiring possession. Subsequent changes in the holder's awareness in the scope of good or bad faith do not influence the character/nature of this possession or the length of time after which ownership acquirement through acquisitive prescription occurs.

Due to the lack of a definition of good and bad faith in the Civil Code[4], this issue has been a subject of numerous opinions of judicature and doctrine. At present jurisdiction opts for the so called traditional understanding of the term good faith, according to which holder's good faith occurs when he/she is convinced he/she owns/possesses the thing in accordance with law, and his/her conviction is justified by the circumstances of a given case, nonetheless, good faith is excluded not only by a positive notice about lack of the right/entitlement but also a lack of the notice caused by negligence. A person who acquired real estate's ownership on the basis of an agreement aiming at a transfer of ownership concluded in a form different from a notary deed cannot be recognized as independent holder[5].

Acquisitive prescription runs against real estate's owner. Establishing a course of acquisitive prescription, provisions on the course of actions' termination are taken into account, which should be applied here according to Art. 175 of the Civil Code. Regulations on termination, once suitably adapted to the institution of acquisitive prescription, regulate issues regarding adjournment, suspension, disruption and renewal of acquisitive prescription's course (Art. 121-124 of the Civil Code).

Generally, the moment a thing is acquired into independent possession is designated as a starting date of acquisitive prescription's course. However, the moment which starts acquisitive prescription's course may be moved in time under

3 Decision of the Supreme Court of 13th March 1998, docket no. I CKN 538/97 (Lex Polonica No. 350704).

4 It may be indicated that for the needs of the provisions on warranty of public faith of Land and Mortgage Register, a definition of a person in bad faith is included in Art. 6 par. 2 of the Act of 6th July 1982 on Land and Mortgage Register and Mortgage (Journal of Laws of 2001, No. 124, par. 1361 with subsequent changes), which defines that it is a person who knows that the content of the Land and Mortgage Register is inconsistent with real legal status or the one who could have easily found it out.

5 Such was the decision of the Supreme Court in the resolution of the composition of Seven Judges of 6th December 1991 docket no. III CZP 108/91 (OSNCP 1992, No. 4 par. 48), granting it a legal rule's force.

the reasons specified in Art. 121 of the Civil Code. These reasons are connected with specified subject dependencies occurring between the thing's owner and its potential holder. Hence, acquisitive prescription's course by parents becomes suspended to the things possessed by minor children during parental authority. Acquisitive prescription does not run also in case of possessing things that belong to people who lack complete/entire capacity to legal transactions, i.e. guardians or curators during guardianship or tutelage/curatorship. A period of acquisitive prescription will also not run during marriage in favor of one of the spouses as to the objects separately owned by another spouse or to those jointly owned by the spouses. The course of acquisitive prescription's terms will also become suspended in case of force majeure throughout its occurrence.

In cases specified in the Civil Code the course of acquisitive prescription's term may be suspended. It means that when a prerequisite to suspend acquisitive prescription's term occurs, it will run further, as a matter of fact, but it will not be able to terminate before the lapse of specified time. Acquisitive prescription cannot terminate earlier than after the lapse of two years from the moment the real estate's owner came of age (Art. 173 of the Civil Code), or from the moment a statutory representative was appointed for a person lacking complete/entire capacity to legal transactions, or the reasons for their appointment came to an end (Art. 122 § 1 of the Civil Code). The course of acquisitive prescription's term is suspended also in case of a major person who is subject to total legal incapacitation (Art. 121 § 3 in connection with Art. 13 § 1 of the Civil Code).

Another situation connected with acquisitive prescription is interrupting its course. Pursuant to Art. 123 § 1 of the Civil Code, such interruption may occur for two reasons. The first one is so called owner's aggressive/offensive action aiming at causing interruption to possession. It is assumed that apart from a lawsuit aiming directly at interruption to possession, it may also be caused by other actions aiming directly at claiming, establishing, satisfying or securing property rights. E. Janeczko[6] includes the following actions therein: a lawsuit for ownership's establishment brought against the owner, motions/applications for a change of provisions in Land and Mortgage Register, proceeding aiming at Land and Mortgage Register's establishment (provided the holder participates in it), or a motion/application for real estate's separation.

The second reason for the interruption of acquisitive prescription's term is recognition of the owner's right by the holder. Such recognition may take a form of the holder's unilateral statement (so called improper/undue recognition) or a form of legal action concluded between the owner and the holder (so called proper/

6 E. Janeczko, Zasiedzenie, II edition, Warsaw – Zielona Góra 1999, p. 134.

due recognition)[7]. In the first case externalization of the owner's rights to the real estate by the holder may be manifested in his/her different conducts, both expressed and implied. Whereas in the second case it assumes a specified legal form whose subject is a given real estate (e.g. concluding a tenancy agreement whose subject is a specified real estate).

Interruption to acquisitive prescription effects in annihilation of a previous period of independent possession; it is assumed to be unexisting/null and void. After interruption is over, the course of acquisitive prescription commences from the beginning (Art. 124 § 1 of the Civil Code).

In Art. 176 of the Civil Code the legislator admitted a possibility of adding possession of a previous possessor during the course of acquisitive prescription's term. Such adding may solely occur if ownership has been transferred between the predecessor and successor, or when the holder is his/her predecessor's heir. Good faith plays an important role in adding predecessor's possession. If a previous holder acquired possession in bad faith, then a present holder, even if he/she has acted in good faith, may add the predecessor's time of possession only when it amounts to at least thirty years together with the time of possession of a present holder.

Acquiring the right through acquisitive prescription is connected with a relatively long lapse of time during which legal provisions may change several times. Therefore, international legal regulations on acquisitive prescription should be taken into consideration to count acquisitive prescription's terms.

After the Second World War civil law provisions within the territory of Poland were unified, including those regarding acquirement through acquisitive prescription. The decree of 11th October 1946 Property Law (Journal of Laws of 1946 No. 57 par. 319) valid/in force since 1st January 1947, specified terms of real estate's acquisitive prescription to be twenty years in case of possession in good faith and thirty years in case of possession in bad faith. It also envisaged a privileged form of acquisitive prescription by the holder entered into the Land and Mortgage Register, so called secundum tabulas, who became the real estate's owner already after the lapse of ten years, and in case of bad faith, at the moment of acquiring real estate into possession – after the lapse of twenty years.

The Civil Code which was in force since 1st January 1965 did not adopt secundum tabulas, however, it stipulated shorter terms for real estate's acquisitive prescription, which amounted to ten years in case of the holder's good faith, and twenty years – in case of bad faith. Since 1st October 1990 – the Act of 28th July 1990 on the change of the Act on the Civil Code[8] came into force, terms of possession required for

7 Ibid, p. 138.
8 Journal of Laws of 1990, No. 55, par. 321.

ownership acquirement have been extended again, and until now, depending on the holder's good or bad faith, they amount to twenty or thirty years.

According to Art. XLI of the Act of 23rd April 1964 – Introductory Acts to the Civil Code[9], this Code's provisions are applied to acquisitive prescription whose course commenced before the day the Civil Code came into force. Due to shorter terms of acquisitive prescription as compared to those specified in Property Law, the date the Civil Code came into force is the beginning of the acquisitive prescription's course. However, if acquisitive prescription that started before 1st January 1965 had occurred earlier with reference to previous provisions, acquisitive prescription occurs after the lapse of this earlier period. Whereas the Code's amendment, which has been in force since 1st October 1990 and which extended acquisitive prescription's terms, introduced a rule according to which the provisions of this Act are applied to acquisitive prescription whose course commenced to run before this Act came into force. Hence, if on 30th September 1990 at the latest, real estate's acquisitive prescription did not occur under the law according to shorter terms, after this date the period required to acquire the right got automatically prolonged by another ten years.

On the day the Civil Code came into force the Art. 177 therein excluded application of provisions on acquisitive prescription with regard to the state owned real estates. However, the statutory ban on acquisitive prescription of state owned terrains was introduced earlier, i.e. under the Act of 14th July 1961, but it only considered the real estates located within cities and housing districts' limits. The above mentioned Act of 28th July 1990 repealed Art. 177 of the Civil Code. Thus restrictions in the scope of acquiring state owned real estates through acquisitive prescription have been abolished. Intending to mitigate the effects of more than one many-year-long ownership of state owned real estates in the period excluding a possibility of their acquirement through acquisitive prescription, in Art. 10 thereof the legislator admitted a possibility of qualifying the previous possession's period required for acquirement through acquisitive prescription, however, no more than by a half, that is, depending on the holder's good or bad faith, maximally ten or fifteen years. On the basis of this provision's interpretation, particularly in the issue connected with the question whether a period of possession from before the date the provisions excluding acquisitive prescription of the state owned real estates came into force is qualified as the period of possession by which acquisitive prescription's term is shortened, the Supreme Court has been trying several times to modify the direction of its jurisdiction[10]. Eventually, it adjudicated in the resolution composed of

9 Journal of Laws of 1964, No. 16, par. 94).

10 See, e.g: the Act of 26th March 1993, III CZP 14/93, OSNCP 1993, No. 11, par. 196; the resolution of 8th September 1995, III CZP 104/95, OSNC 1996, No. 1, par. 2; decision of 27th June 2000, I CKN 796/98, OSNC 2000, No. 12, par. 234.

Seven Judges of 31st January 2002, Docket No. III CZP 72/2001 (OSNC 2002, No. 9, par. 107) that the period of possession from before the date the provisions excluding acquisitive prescription of the state owned real estates came into force is not qualified as the term by which the state owned real estate acquisitive prescription's term is shortened, nor is it included in establishing the period of time required to acquisitive prescription of such real estate.

Together with the state transformations of 1989 in Poland, there has been a gradual increase of a number of claims before courts for ascertainment of real estate acquisition through acquisitive prescription. Free market economy realities, where real estates were becoming more and more common and attractive objects of turnover, can be indicated as one of the main reasons for this phenomenon. In case of many-year-long real estates' independent holders who were not their formal owners, such turnover was conditioned by confirmation of their rights to the real estate by the court decision.

Proceedings for ascertainment of ownership acquisition through acquisitive prescription are regulated in detail by Art. 606-610 of the Code of Civil Procedure and, by reference to a suitable application of the provisions on ascertainment of inheritance acquirement – Art. 669, 673-677 § 1 of the Code of Civil Procedure. Such cases are settled/examined by regional courts (art. 507 of the Code of Civil Procedure). The court's competence/jurisdiction is established by the localization of the real estate covered by the motion/application, however, if the real estate is localized within the area of several regional courts, the choice of a competent court belongs to the applicant (Art. 43 § 1 of the Code of Civil Procedure in connection with Art. 13 § 2 of the Code of Civil Procedure). Cognizance of a case by the court depends on fee payment amounting to PLN 2000[11].

In his/her motion the applicant should indicate the interested persons, that is such whose rights are subject to the proceedings' result (art. 510 § 1 of the Code of Civil Procedure). This group of people should by all means include the owner (co-owners) of real estate and their legal successors, all authorized independent holders of a given real estate, and under some conditions, neighboring lands' holders too[12]. If the applicant fails to fulfill this requirement, the decision may be made only after summoning other interested parties by announcement (art. 609 § 2 of the Code of Civil Procedure). Failure to fulfill the requirement of establishing and summoning

11 Art. 40 of the Act of 28th July 2005 on Court Fees in Civil Cases (Journal of Laws of 2005, No. 167, par. 1398 with subs. changes).

12 Supreme Court in the decision of 5th October 1971 docket no. III CRN 271/71, OSNCP 1972, No. 2, par. 41, declared that holders of neighboring lands may be participants of the proceeding for acquisitive prescription when the result of the proceeding regards the rights they claim to the real estate indicated in the motion or to bordering belts of land .

other interested parties to take part in a case may produce a sanction in a form of proceedings' invalidity (art. 379 point 5 of the Code of Civil Procedure).

The aim of the proceedings is to establish (confirm) the fact of ownership acquirement and a person who acquired it as to the moment when statutory prerequisites of acquisitive prescription have been fulfilled. The court is not bound by the applicant's indication as to the person who should be listed in the decision as a person who acquired the real estate's ownership through acquisitive prescription. For example, it may happen that in the decision a previous independent holder to the applicant (his/her predecessor) will be indicated as the owner, the decision may also include few independent holders who fulfilled prerequisites necessary to acquire ownership through acquisitive prescription to the same real estate at the same time. Regulations of acquisitive prescription do not require a person indicated in the decision as the real estate's owner to be its current holder. During the proceedings the Court establishes all independent holders of real estate ex officio (Art. 670 § 1 of the Code of Civil Procedure in connection with Art. 610 § 1 of the Code of Civil Procedure).

Court's decision is of declaratory nature and is effective not only with regard to the proceeding's participants and the court which issued it but also to other courts and authorities' organs (the effect erga omnes). It is a proof that a person listed in the conclusion of a decision is the real estate's owner, whereas after it becomes legally valid and binding, it is the basis for further regulation/settlement of the real estate's legal status through entering a current owner in the II Section of the Land and Mortgage Register (Art. 31 par. 2 of the Act of 6th July 1982 on Land and Mortgage Register and Mortgage).

Streszczenie

Zasiedzenie prowadzi do nabycia własności przez nieuprawnionego samoistnego posiadacza danej rzeczy wskutek faktycznego wykonywania tego prawa przez oznaczony w ustawie czas, z czym wiąże się jednoczesna utrata prawa własności przez dotychczasowego właściciela. W ten sposób dochodzi do uzgodnienia długotrwałego stanu faktycznego władania rzeczą ze stanem prawnym, co prowadzi do ustabilizowania stosunków własnościowych. Przedmiotem zasiedzenia może być przede wszystkim prawo własności (rzeczy ruchomych i nieruchomości), ale także służebność gruntową, czy użytkowanie wieczyste. W praktyce jednak instytucja zasiedzenia znajduje najszersze zastosowanie dla nabycia w tej drodze własności nieruchomości. Nabycie własności w drodze zasiedzenia następuje z mocy prawa, a formalnym potwierdzeniem tego faktu jest orzeczenie sądu powszechnego.

Justyna Matys

WITHDRAWAL FROM A CONTRACT TRANSFERRING THE OWNERSHIP OF REAL ESTATE

1. The issue of withdrawal from a contract transferring ownership of real estate and, most of all, the legal consequences of such an act, are very controversial, both in judicial decisions and in the doctrine. This issue concerns the mutual relation between contract law and property law and the influence of the former on institutions of the latter, and involves the question of whether the material relations and the regulations of property law can modify, or even exclude, the possibility to apply the provisions of contract law with respect to contracts concerning real estate. It is necessary to consider whether a party to a contract can have a statutory right to withdraw from a contract transferring ownership of real estate but also whether such possibility is provided for by the principle of freedom of contract. The right to withdraw that may be effectively reserved in a contract with obligatory consequences is unquestionable, whereas in dual–consequence contracts as well as contracts of solely dispository nature, the effectiveness of such a reservation causes doubts.

The provision of Art. 560 of the Civil Code lists the possibility to withdraw from a sales contract as one of the rights granted by virtue of warranty. The code does not mention any restrictions as to the object of a sales contract. Consequently, withdrawal from a contract transferring ownership of real estate can also be deemed as allowed. Also Art. 491 of the Civil Code provides for the possibility to withdraw from a reciprocal contract when one of the parties is late in performing its obligations. A real estate sale contract is a reciprocal contract and, therefore, based on the letter of the legal provision one ought to consider withdrawal from a contract transferring ownership of real estate as allowed, unless the provision stipulates some exceptions. The condition, however, is that the contract cannot have been performed[1]. What raises doubts is the permissibility of a contract including a reservation on withdrawal, if both parties have performed their duties.

1 See also Art. 898 § 1 of the Civil Code which provides for the possibility to cancel a donation contract which has been performed.

When discussing the issue of termination of a contract transferring ownership of real estate, it is important to note that Art. 901 of the Civil Code provides for the possibility to terminate a donation contract, subject to meeting some conditions stipulated therein, while Art. 913 § 2 of the Civil Code allows for terminating a life usufruct contract.

2. The problem of termination of and withdrawal from a contract transferring ownership of real estate, as well as the legal consequences of such an act, has been the object of several decisions of the Supreme Court. One of the most notable is the resolution of the Supreme Court of 17 November 1993[2], in which the Court decided that, on the basis of Art. 491 § 1 of the Civil Code, it is permissible to withdraw from a contract transferring the right of perpetual usufruct of land and the building located thereon, subject to the condition that the reciprocal contract can not have been performed. According to the court, this results from the provision of the code. Based on Art. 155 § 1 of the Civil Code, transfer of ownership of real estate takes place at the moment a contract is concluded, but in order for the contract to be performed, the other party also must perform its obligation consisting in the payment of the sale price. Consequently, if the buyer is late in the payment of even a small portion of the total price, the contract can be deemed as not performed. In such situations, the conditions stipulated in Art. 491 § 1 of the Civil Code are not met and, thus, withdrawal from the contract is possible.

In its next resolution[3] concerning this issue, the Supreme Court confirmed its earlier position. The court decided that a party can, within its statutory rights, withdraw from an obligation–disposition contract that constitutes a basis for the transfer of ownership of real estate. The condition for termination of a contract by its parties is that the contract must not be performed in its entirety. The Court declared that the location of the institution of transfer of ownership within property law does not exclude the application of provisions of contract law. Nevertheless, the Court concluded that reservation of the right to withdraw in a contract transferring ownership must be treated in the same manner as the condition for termination that is forbidden in Art. 157 § 2 of the Civil Code. Despite the differences between the two institutions, they lead to the same consequence: a grave threat to security and certainty of transactions. According to Art. 395 § 2 of the Civil Code, the execution of the right to withdrawal reverses the conclusion of a contract, which results in the obligation to return the received benefits. In the case of dual–consequence contracts, this impairs the permanence of the appropriation. With respect to the statutory right of a party to withdraw from a contract, the Supreme Court stated that it has

2 III CZP 156/93, OSNC 1994, No. 6, item. 128.

3 Ordinance of the Supreme Court of 30 November 1994, III CZP 130/94, OSNC 1995, No. 3, item 42, with a critical gloss of E. Drozd. "Przegląd Sądowy" 1995, No. 10, p. 109.

a different nature. The essence of this right is that it does not exist at the moment a contract is concluded, that it emerges during the performance of the contract, and that it is dependent on the other party's behavior. The fact that a contract results in a material consequence does not contradict the right to withdraw from the contract. A transfer of ownership of real estate is not irreversible and separate from the status of obligations. The Court noted, as it did in its earlier resolution of 1993, that transfer of ownership does not have to mean that all obligations have been performed on time. Consequently, the contractual relation is still in place, and that is why the condition stipulated in Art. 491 § 1 of the Civil Code is met. The Supreme Court also pointed at Art. 560 of the Civil Code and stated that improper performance of an obligation due to the existence of defects in the good that is the subject of an obligation, does not completely break the obligatory tie between the parties. The court also concluded that if a contract has not been performed, then its termination by agreement of both parties is possible in accordance with the freedom of contract (Art. 3531 of the Civil Code). On the other hand, a complete performance of the contract makes its termination invalid.

Representatives of the doctrine have not elaborated an unequivocal position in relation to the resolutions of the Supreme Court. It is important to note that the issue of withdrawal from a contract transferring ownership had not been uniformly interpreted in the literature. According to S. Breyer, Art. 491 of the Civil Code does not refer to contracts transferring ownership of real estate of obligatory–material nature and that such contracts, in the meaning of this legal provision, must be considered as performed[4]. J. S. Piątowski believes that if the provisions of contract law do not exclude it, then there is no reason to question the permissibility of withdrawal from a contract transferring ownership of real estate[5].

Those authors who accept the opinions of the Supreme Court and object to the possibility to include a withdrawal clause in contracts transferring ownership of real estate argue that the reservation has an effect similar to that which is eliminated by the legislator by the prohibition included in Art. 157 § 1 of the Civil Code. Until the deadline for the execution of the withdrawal right, neither the transfer of the ownership to the buyer nor the loss of ownership by the seller are definitive. In such a situation, transfer of ownership is neither permanent nor certain. The authors also point at Art. 395 § 2 of the Civil Code which defines the responsibilities of parties resulting from the contractual right of withdrawal. According to this legal provision, the buyer of real estate cannot take any actions that would lead to a change of its substance because he is obligated to return the real estate in an unchanged state[6].

4 S. Breyer, Przeniesienie własności nieruchomości, Warsaw 1971, p. 136.
5 J.S. Piątowski, in: System prawa cywilnego. Prawo rzeczowe.
6 P. Drapała, in: E. Łętowska, ed., System Prawa Prywatnego. Prawo zobowiązań – cz. ogólna, Warsaw 2006, p. 943.

A. Szpunar presents a very interesting opinion on the issue of withdrawal from a contract transferring the property right. In his opinion, both contractual and statutory right of withdrawal are permissible[7]. If a contract includes a reservation, the uncertainty is sustained only for a period indicated by the parties in the relevant clause. A. Szpunar highlights the fact that in Polish law, the registration of the buyer in the land and mortgage registry is not a necessary condition for the transfer of ownership of real estate, which results in the lack of stability and permanence of the transaction[8]. E. Drozd excludes the permissibility for the parties to include in the contract a withdrawal clause and, concerning the statutory withdrawal right, he states that its conditions are stipulated in the law itself and there is no need to make an additional condition of the contract not being performed in its entirety[9]. Both authors are critical of the opinion of the Supreme Court on termination of contracts, in particular of its permissibility only when the contract transferring ownership has not been performed completely. Especially E. Drozd rightfully points at practical problems, especially in determining when a contract is not performed in its entirety. He highlights the fact that, given such a position of judicial decisions, the parties should preventively not make a complete payment of the full sales price (e.g. pay 1 złoty less) in order for the contract to be performed incompletely. The notary who makes the notarial deed, is not in a position to determine if a contract has been performed completely and must rely on the declaration of the parties, which may not be true[10]. The author makes a proposition that the possibility to make a reservation in a real estate sale contract as to the right to repurchase, supports the admissibility to terminate a contract that has been performed. He also makes a comparison between termination of a real estate sales contract and the right to repurchase. The functions of both actions are similar but their consequences are very different. The difference lies, most of all, in the warranty of public faith in the land and mortgage registry (which is present in the case of a sale, and is questionable in the case of termination, as the termination would have to be payable), and in the responsibility for defects (present in the case of a sale and absent in the case of a termination)[11].

One must agree with the opinion that it is the statute that determines the conditions that must be met in execution of the statutory right of withdrawal. Setting a condition in judicial decisions that a contract must not be performed appears to be unjustified. Most of all, it causes practical difficulties in determining the verity of the parties' declarations, which results in such a condition being fictitious. It appears

7 A. Szpunar, Odstąpienie od umowy o przeniesienie własności nieruchomości, "Rejent" 1995, No. 6, p. 16 ff. The same in W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska–Bocian, Zobowiązania. Zarys wykładu Warsaw 2007, p. 213.

8 Ibid., 16

9 E. Drozd, a critical gloss to the ordinance by a bench composed of 7 judges of 30 November 1994, (III CZP 130/94), "Przegląd Sądowy" 1995, No. 10, p. 110–111.

10 Ibid., 112 ff.

11 Ibid., 117.

that making a reservation on the right of withdrawal from a contract transferring ownership of real estate can also be deemed as allowed. Similar to the right of repurchase, such a clause is not detrimental to the security of transactions if the parties meet the condition set in Art. 395 § 1 of the Civil Code by indicating a period in which withdrawal from the contract will be allowed. Nevertheless, in order to increase the certainty of the transaction, the parties may also stipulate conditions for such withdrawal, e.g. if the sale price is not paid in full by a certain date.

Referring to the necessity to assure the security and certainty of transactions as a reason against limiting the discretion of parties appears to be not substantiated since reservation of the right to repurchase in real estate sale contracts is allowed. Both actions have a similar effect: the transfer of the property right from the buyer to the seller of real estate. Nevertheless, there are some differences: in the case of withdrawal, the contract is considered as not concluded, while the execution of the right to repurchase does not lead to the contract being deemed as null and void. In the case of a withdrawal, a party is entitled to claim damages, while the right to repurchase constitutes the execution of a power that forms that very right.

3. The issue of withdrawal and termination of a contract transferring property rights is related to the issue of legal consequences of such acts. The judicial decisions do not interpret this issue in a uniform fashion[12]. As to the literature, E. Drozd concludes that a reverse transfer of ownership takes place by virtue of law and, therefore, additional contracts with material consequences are unnecessary[13]. The doctrine leans towards the opinion, which should be accepted, that termination of a contract leads to an obligatory consequence: the obligation of the buyer to transfer the ownership back to the seller. Thus, it is necessary to conclude a contract transferring ownership; nevertheless, it is deemed as possible to include in one notarial deed both a contract concerning the termination of the obligating contract and a contract concerning the transfer of ownership[14].

12 In its ordinance of 5 May 1993 (III CZP 9/93, OSNCP 1993, no. 12, item 215), the Supreme Court stated that termination by parties of a contract transferring ownership of real estate results in the ownership going back to the seller. In the ordinances of 17 November 1993 (III CZP 156/93, OSNC 1994, no 6, item 128) and of 27 April 1994 (III CZP 58/94, "Wokanda" 1994, No. 6, p. 5), the Supreme Court stated that, in order for material consequences to occur, it is necessary that the ownership of real estate be transferred. In reference to withdrawal from a sale contract of a movable object, the Supreme Court concluded that the consequence is the transfer of the object back to the seller. See the Supreme Court ordinance (7) of 27 February 2003, III CZP 80/02, OSNC 2003, no. 11, item 141.

13 E. Drozd, Glosa…, p. 118.

14 S. Rudnicki, Odstąpienie od umowy i rozwiązanie umowy przeniesienia własności nieruchomości in: G. Bieniek, S. Rudnicki, ed., Nieruchomości. Problematyka prawna, Warsaw 2007, p. 455, A. Szpunar, Odstąpienie od umowy…, p. 24.

Streszczenie

Zagadnieniem wywołującym kontrowersje oraz spory, zarówno w orzecznictwie, jak i w doktrynie, jest problematyka odstąpienia od umowy przenoszącej własność nieruchomości, a przede wszystkim skutków prawnych takiej czynności. Tematyka dotyczy wzajemnego stosunku i wpływu prawa zobowiązań na instytucje prawa rzeczowego: czy istniejący stosunek rzeczowy i reglamentacje wynikające z prawa rzeczowego mogą modyfikować, czy wręcz wykluczać możliwość stosowania postanowień prawa zobowiązań w odniesieniu do umów, których przedmiotem jest nieruchomość. Problematyka ta stała się przedmiotem szeregu wypowiedzi Sądu Najwyższego, w stosunku do których przedstawiciele doktryny nie wypracowali jednoznacznego stanowiska.

W kwestii skutków prawnych należy zaaprobować przeważający pogląd, że rozwiązanie umowy wywołuje skutek obligacyjny – zobowiązanie nabywcy do przeniesienia własności z powrotem na zbywcę. Konieczne jest zawarcie umowy przenoszącej własność, nie ma przeszkód, aby obie umowy o rozwiązanie umowy zobowiązującej i o przeniesienie własności zostały zawarte w jednym akcie notarialnym.

Teresa Mróz

HISTORIC IMMOVABLE PROPERTY – EXECUTION OF OWNERSHIP (REMARKS IN THE LIGHT OF THE CONSTITUTIONAL PRINCIPLE OF PROPORTIONALITY)

In Polish private law there is the usual differentiation between three types of immovable property: land, i.e. plots of land as separate objects of ownership; buildings, i.e. establishments permanently attached to a ground and which are subject to ownership separate from the ground; premises, i.e. parts of buildings subject to separate ownership[1]. The legal position of each type of ownership is not uniform. A good example of such difference is provided by a case of the ownership of a building situated on a land which is an object of perpetual usufruct. The ownership of the building is related to the perpetual usufruct by the right to the land that is weaker than legal ownership. An even more distinct example of the varying legal status of immovable property is the separate ownership of living spaces[2], which is dependent on the purpose of this type of ownership.

Therefore, this varying legal status of immovable property has not only theoretical, but also practical values, which is demonstrated well in the execution of legal ownership of real property. It needs to be stressed that in the actual execution of ownership the functional aspect of ownership is of significant meaning, as pointed out by A. Stelmachowski[3].

The overall content of the ownership law has been outlined in Article 140 of the Civil Code (KC) with the aim to indicate the limits of the execution of rights to property by the entitled. According to this rule, the limits of ownership are determined by three factors: the law, the principles of social coexistence and the socio-economic aspect of law. It is worth noticing that the last two restrictions appear rather archaic, not to say flagrant, considering the fact that ownership is a law which constitutes one of the main pillars of the economy, economic turnover and the entire private law.

1 E. Skowrońska in J. Pietrzykowski (ed.), Kodeks cywilny. Komentarz. Vol. I, Warsaw 1997, p. 110
2 See also: A. Doliwa, Prawo mieszkaniowe. Komentarz, Warsaw 2005, p. 532 and ff.
3 A. Stelmachowski, Zarys teorii prawa cywilnego, Warsaw 1998, p. 187.

In this context it is worth analysing the execution of ownership of historic immovable property. The term 'property of historical value' is not found in the rules of the Law of 23 July 2003 on historic property preservation and maintenance[4], yet in Article 3 of this law there appears an expression '**historic immovable property**'. Based on this law, it can be concluded that **the term 'historic immovable property' refers to a property, its part or a number of properties created by human, the preservation of which is in the interest of the society, because of their historical, artistic or educational value**. Thus there are grounds to assume that this legislation refers to the classic civil notion of immovable property and its types, **without coining a novel legal expression for historic immovable property**. Still, the legislation clearly indicates the specific **functional aspect of the legal ownership** of historic immovables. While executing the ownership rights, each owner of historic immovable property ought to pay heed to the **preservation of historic immovables**, which is in the interest of the society, because of the existing historical, artistic or educational value (Article 3 Point 1 of the Law). This raises the fundamental question of adequate balance between preservation of historic property realised by public administration authorities and the civil notion of ownership as well as the principles of its execution in this specific arrangement.

According to the private law regulations, the ownership law is marked by two attributes of principle importance:

1) This law expresses the widest range of relations between the subject and the property;

2) This law is characterised by a specific flexibility.

These are two universal attributes which may relate to all forms of ownership[5]. Therefore, their application in the execution of ownership of historic immovable property needs to be considered.

In view of Article 4 of the law on historic property preservation, the preservation of property is mainly based on activities by public administration bodies which aim at:

1) Ensuring legal, structural and financial conditions enabling permanent preservation of historic properties as well as their development and maintenance;

2) Preventing risks which could cause damage to the value of historic properties;

3) Preventing destruction and inadequate use of historic properties;

4 Journal of Laws No. 162, point 1568 as amended.
5 A. Stelmachowski, Zarys..., p. 174.

4) Counteracting theft, disappearance or illegal transport of historic property abroad;

5) Monitoring of the maintenance and function of historic properties;

6) Considering preservation objectives in development and environmental planning.

It is evident that the term 'preservation' will entail elements of interference by authorities; the power of authorities which enables the imperative and compulsory measures.

There is no doubt that the law on historic property preservation, apart from fulfilling the public interest, **gives rise to restrictions in the execution of ownership rights with regards to historic immovable property** as well as any other historic property.

These restrictions are frequently crucial. One can take as an example the requirement of Article 25 of the Law to adhere to particular guidelines in the development of a historic property for practical purposes with a prior consent of historic property conservation authorities in a particular province. Moreover, the rule of Article 32 of the Law imposes the obligation to enable access to a historic property for research purposes. Another significant restriction is laid in Article 49 of the Law and provides that the conservation authority of a particular province may issue a decision demanding conservation or construction works. Implementation of this decision does not exempt the owner of a historic immovable property from the obligation to obtain the permission for any construction activity or to report in instances stipulated in the Construction Law.

If a legal owner fails to fulfil the obligation imposed by the decision and, consequently, substitute works are carried out, the province conservation authority issues a determination of the liability to the State Treasure on account of conducting the substitute conservation works, specifying the time limit and the requirements of the liability. Such liability is secured by obligatory collateral claimed by province conservation authorities according to the decision determining the amount of the liability.

Additional duties and restrictions regarding the execution of legal ownership of historic immovable property are introduced by the Law of 21 August 1997 on real property management[6]. In the rule of Article 39 of the Law, there is a statement that any construction activities which are to be carried out near a building listed as historic property or in the area listed as historic property, require permission issued by a relevant historic conservation authority. A permission for demolition of

6 Journal of Laws 2004, No. 261, point 2603 as amended.

a building listed as historic property may be issued only following the decision of General Property Conservation Authority which acts on behalf of a relevant minister for culture and national heritage preservation, to remove this object from the list of historic properties.

So far the most theoretically and practically controversial was Article 31 Paragraph 1 of the Law on historic property preservation, which requires a legal owner to cover the expenses of archaeological research and documentation, if these activities are indispensable for preservation of a particular historic property. In relation to this rule, there appears a statement in the literature to declare that this rule **protects historic property, above all, from its legal owner** and this function is principal[7]. It needs to be stressed here that **preservation of historic property lies in the duties of public authorities, and Article 31 Paragraph 1 of this Law represents the outcome and the way this duty is fulfilled**. However, we have to differentiate between the preservation of historical property and its maintenance. The preservation belongs to public administration, while the maintenance is strictly individualised[8]. The fundamental question is whether the restrictions in legal ownership and in other property rights resulting from this type of rules are justified in the constitutional norms.

This issue was subject to the decision by the Constitutional Tribunal. The verdict of 8 October 2007 (Case No. K20/07)[9] by the Constitutional Tribunal ruled that Article 31 Paragraph 1 of the Law of 23 July 2003 on historic property preservation and maintenance is not in accordance with Article 64 Paragraph 1 and 3 in relation to Article 31 Paragraph 3 and Article 73 of the Constitution of the Republic of Poland.

Every legal owner of historic immovable property is obliged to take the burden and provide for public services related to historic property preservation as outlined in the Law, because the subject of this ownership plays a specific role and its maintenance is in the public interest (Article 3 of the Law on historic property preservation). **This particular burden is to aid the realisation of public interest and not to transfer the public authorities' duties onto the legal owner of a historic immovable property.**

In the grounds for the above verdict, the Constitutional Tribunal accurately emphasizes that the current state in the scope of this matter, as regulated by Article 31 Paragraph 1 of the Law on historic property preservation, is an indication of the lack of adequate balance between the private and the public interests, which has led

7 M. Drela, Własność zabytków, Warsaw 2006, p. 129.
8 K. Stanik, Ewolucja pojęcia „zabytek" w prawie polskim (zagadnienia podstawowe), "Studia Iuridica Lublinensia", 2007, No 9, p. 179.
9 Journal of Laws 2007, No. 192, point 1394.

to the violation of the nature of legal ownership. In this respect the above regulation has been ruled as conflicting with Article 64 Paragraph 1 and 3 in relation to Article 31 Paragraph 3 of the Constitution.

A number of legal solutions which aim to alleviate the burden are not sufficient to compensate for the expenses of archaeological research and documentation; such as Article 73 of the Law on preservation of historic property and Article 68 Point 3 of the Law on real property management.

Article 73 provides that the legal owner or possessor of a listed property, or a holder of permanent management of such property, has a right to apply for a special subsidy from the government to fund conservation, restoration and construction works related to this property. However, this applies only to properties registered on the list of historic properties, and the regulation of Article 31 Paragraph 1 of the Law on historic property preservation includes historic immovable property covered by conservation protection based on the local environmental planning and forest administration. The subsidy may only provide for the essential costs and does not include the research documentation expenses. In the end, this can lead to a state when a legal owner is not able to execute their legal ownership of the historic immovable property.

According to Article 68 Point 3 of the Law on real property management, when a property listed as historic is on sale, the price is dropped by 50%. A relevant authority with consent of a province governor or district council may elevate or reduce this discount.

In the assessment of any particular norms which interfere with the ownership law all already existing restrictions must be taken into account. In order to establish whether the essence of the ownership law has been preserved/maintained, it is necessary to analyse all legally valid restrictions[10]. The Constitution does not exclude the possibility to impose legal public charges on the ownership that would exceed benefits brought by the subject of the ownership. It is important though that the admissibility of this type of burden is limited, namely, it may not violate the essence of the ownership law, nor represent a hidden (indirect) form of expropriation. Additionally, burdens must not result in transferring the duties of public authorities on the owner[11]. The state of affairs caused by the current regulation on historic property preservation has particularly affected owners of historic immobile property. The legal validity of the rule of Article 31 Paragraph 1 of the Law questioned by the Constitutional Tribunal ceases 18 months from the publication of the verdict in the

10 See the judgment of Constitutional Tribunal of 17.05.2006, Case No. K 33/05, OTK ZU 2006, No. 5A, point 57, as well as the judgment of 7.11.2006, Case No. SK 42/05, OTK ZU, 2006, No. 10/A, point 148.

11 Grounds for the judgment of Constitutional Tribunal of 8.10.2007, Case No. K 20/07, Journal of Laws 2007, No. 192, point 1394.

Journal of Laws of the Republic of Poland. This verdict is of immense importance, as it once again indicates the significance of the criteria of the constitutional principle of proportionality.

Streszczenie

Przepisy ustawy z 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami, nie posługują się pojęciem "nieruchomość zabytkowa", za to w art. 3 tejże ustawy pojawia się określenie "zabytek nieruchomy". Na podstawie tego przepisu można wnioskować, że za zabytek nieruchomy należy uznać nieruchomość, jej część lub zespół nieruchomości, będących dziełem człowieka, których zachowanie leży w interesie społecznym ze względu na posiadaną wartość historyczną, artystyczną lub naukową. Są więc podstawy aby przyjąć, że ustawodawca odwołuje się tu do klasycznego cywilistycznego pojęcia nieruchomości i ich rodzajów, nie tworząc nowej konstrukcji prawnej nieruchomości zabytkowej. Wyraźnie jednak wskazuje się tu na specyficzny aspekt funkcjonalny prawa własności zabytku nieruchomego. Każdy właściciel zabytku nieruchomego przy wykonywaniu prawa własności powinien mieć na względzie zachowanie zabytku nieruchomego, co "leży w interesie społecznym ze względu na posiadaną wartość historyczną, artystyczną lub naukową" (art. 3 pkt 1) ustawy).

Agnieszka Malarewicz

THE LEGAL CHARACTER OF "CEMETERTY PROPERTY" IN POLISH CIVIL LAW

"Cemetery property" is not clearly or precisely defined in Polish law. The 23rd April 1964 Civil Code Act contains only the definition of "property" itself, stipulating that it is part of an area which constitutes a separate object of ownership – these are landed estates. The buildings or parts of them closely attached to the estate are also considered estates – if they form, by virtue of special regulations, a separate object of ownership distinct from landed estates.

The definition of "property", included in Article 46 item 1 of the Civil Code, is the only universal and legally binding example in the whole civil law system as there is no other definition that would give "land estates" other meaning in civil law which would give validity to the statement that the term "property" may have a meaning other than that provided in the Civil Code.

This also cannot be concluded from the definition of "landed estates", included in the 21st August 1997 Act on property and estate management, according to which 'landed estates' are defined as land with its own integral elements, excluding any buildings and premises which constitute a separate object of ownership. The definition does not provide any grounds to understand "landed estates" in any other way.

As a conclusion, it can be accepted that the term "property", as stipulated in the Civil Code and in the Act on property and estate management, also refers to cemetery property.

If a landed estate is part of the area that forms a separate object of ownership, it means that the isolation of the part of the area – i.e. the determination of the area size and their external borders – is an essential requirement to constitute a separate object of ownership. Apart from the physical isolation of a particular landed estate, its legal isolation is also indispensable. This means that the owner of a particular piece of land is specified. The legal status of any property is determined by creating a real

estate register or by entering the area isolated by external borders in the existing register.

In the case of cemetery properties – the legal rules do not impose the obligation of a real estate register entry, as the cemetery is the area (land) passed on to churches, confessional associations or budgetary establishments (which communal cemeteries are) to hold as perpetual usufruct. The only obligation that people administering the cemetery area have is to keep the so called cemetery registers. The cemetery administrator – on the grounds of the Minister of Interior and Administration ordinance, dated the 1st of August 2001, on keeping interment space records – is obliged to keep the following documentation:

- a register of people buried in the cemetery, kept as an increasing numeration or in an annual arrangement,
- a register of graves,
- a cemetery book containing a register of people buried in the cemetery in an alphabetical order.

The regulations of the 31st January 1959 Act on cemeteries and burials do not contain the definition of "cemetery property", and only article 1 states that "a cemetery" is an area designated in local spatial arrangement plans as a burying ground. Therefore, it may be concluded that a cemetery may only be established in an area designated in local spatial arrangement plans for burying purposes. The preparation of local spatial arrangement plans for a particular area in which local public purposes should be performed is obligatory. Public purposes, in accordance with the regulations, also include establishing and maintaining cemeteries. In spatial arrangement plans, the properties designated for cemeteries are described as the landed estates of the State Treasury given to communes and municipalities to administer.

On the grounds of the Act on cemeteries – establishing and expending confessional cemeteries is allowed only in the area designated for that purpose in the local spatial arrangement plans. This regulation is also applied to communal cemeteries.

We can distinguish three types of cemeteries: Communal, Confessional and Military. On the basis of this distinction the legislation grants local government organs (communes and municipalities) the right to establish, expand (after the competent sanitary inspector's permission) and administer communal cemeteries. The same right (referring to confessional cemeteries) is granted to the authorities of churches or confessional associations recognized by the state as corporate entities of public law, which according to their internal regulations organize the confessional cemetery structure. The Polish legal system excluded the possibility of establishing

and maintaining cemeteries by physical persons and legal entities. The regulations of the Act on cemeteries and burials are adequately applied to military graves and cemeteries. Military cemeteries are administered by the state and their maintenance costs are covered by the State Treasury. The conditions of military graves and cemeteries are under surveillance of communes, unless associations and social organization take over these activities.

The acquisition of cemetery properties is regulated by the Act on cemeteries and burials as well as the Act on property and estate management. According to the regulations, land constituting the property of the State Treasury or communal property which is designated for that purpose in the spatial arrangement plans can be passed over to church legal entities to be held as perpetual usufruct or sold. The properties designated for cemeteries which form community property can be sold for the price agreed during community meetings in villages, the city or commune councils in cities. In accordance with Art. 13 item 2 of the Act on property and estate management, the property belonging to the State Treasury can be the object of donation for public purposes. According to the regulation of this Act, the public purpose, among other things, covers establishing and maintaining cemeteries.

Polish law treats the right to interment space as the subject of civil law. The basic source of the internment rights is the civil contract concluded between the person that is authorized to bury the body and the cemetery. This type of contract belongs to innominate contracts (such civil contracts which are not regulated in the Polish Civil Code). The content of the contract covers the reception of the dead body to be buried. The Act does not stipulate any requirements as far as the contract form is concerned; therefore this type of contract may be concluded per facta concludentia. The right to interment space comprises both financial and non-financial rights. The former are, above all, connected to expenses incurred for the interment space and for the grave arrangement. The latter refer to the right to bury the body, to erect a headstone, to arrange the headstone's decoration or to perform other customary activities. If at least one dead body has been buried in the grave, the non-financial rights as elements of the right of internment space typically prevail. The district court is competent to determine the right to the interment space where the dead body has already been buried. Permission from the interment rights holder is required prior to interment or entombment in particular interment space. The interment space right, which is a personal right, is granted by the fact of burying a dead body. However, if there is no current holder, the right to interment space can be granted by concluding the contract with the cemetery administrator with the consent of all who are entitled to it. This right can also be granted by concluding a contract with the cemetery administrator with the present interment space holder's consent and by concluding the contract with the cemetery administrator for the use of a new interment space. The internment space can be used for another burial 20

years after a dead body has been previously buried. The particular interment space cannot be used even after that time when the person entitled makes a reservation against that and pays a fee. This reservation takes effect for the next 20 years and can be renewed. The present right to interment space does not expire automatically when the 20 years are over. After this period the interment space can be designated for another burial, i.e. the cemetery administration may pass the space on to another person for burying purposes. It is advisable, as far as possible, to inform the person who administers the interment space about such an intention. The present right to interment space expires when another person is granted the interment rights to that particular space. However, until the cemetery administration has not taken a decision about the space, it is possible to make a reservation and pay a fee to cover the next 20 years. The legislation provides a different solution for tombstones where more than one dead body may be buried. In such a case the people entitled do not need either to make a reservation or pay a fee after the 20 years have elapsed. The person who was not granted the right to administer the tombstone cannot be buried there. Ipso facto the cemetery administration does not have the right to administer the spaces in tombstones either before or after the 20 years have elapsed.

An interment space is not a separate property, it is property which is included as part of a larger estate (a cemetery). The civil code defines a "property" as the part of land or facilities firmly connected to the land. Whereas Article 48 of the Civil Code stipulates what should be understood as integral elements of landed estates – these are premises and other facilities firmly attached to the land, as well as trees or other plants, since they were planted or sowed. As far as cemetery property is concerned, funeral houses, ossuaries and sacred buildings are considered integral elements of cemetery property along with headstones erected by interment right holders. Headstones become the object of interment right, so sui generis of use vested in the subject of this right. They then share the purpose of a landed estate taken for burying purposes. Other elements of the grave such as memorials, flower pots, lamps and lanterns which are not connected physically to the property, and so could be detached at any time without losing their inherent properties, do not constitute integral elements of cemetery property.

Streszczenie

Przepisy kodeksu cywilnego oraz ustaw szczególnych, nie podają definicji nieruchomości cmentarnych. Autorka przyjęła, że pojęcie nieruchomości uregulowane w kodeksie cywilnym oraz w ustawie o gospodarce nieruchomościami odnosi się również do nieruchomości cmentarnych. Polskie prawo (ustawa z dnia 31 stycznia 1958 r. o cmentarzach i chowaniu zmarłych) traktuje prawo do grobu jako przedmiot prawa cywilnego, obejmujące zarówno uprawnienie majątkowe, związane z poniesionymi opłatami za grób i wydatkami na urządzenie grobu, jak i uprawnienia niemajątkowe: do pochowania zmarłego, do wystawienia nagrobka, do urządzenia wystroju nagrobka i do wykonania zwyczajowo przyjętych innych czynności.

Marek Zaremba

REAL ESTATE AS CONTRIBUTION TO A COMPANY

The Code of Commercial Companies (KSH)[1], similar to the Commercial Code[2] which was in force before, does not define a term of contribution to a commercial company directly. The Code only stipulates that in case of a private company (general partnership, ordinary partnership, limited partnership and limited–joint stock partnership) partner's contribution may involve a transfer or burden/encumbrance of the possession of things or other rights as well as provision of other considerations for the company. Whereas in case of capital partnerships (limited liability company and joint stock company) KHS does not define the term of contribution to a commercial company directly, and only in Art. 14 § 1 it provides that such right cannot be an object of non–pecuniary contribution.

These cannot be non–transferable rights nor provision of work/labor or services. Thus we deal with a statutory attempt to define a contribution to a capital company by indicating what the object thereof cannot be. A construction of Art. 14 § 1 of KSH provides a basis for formulating a thesis according to which this provision refers to the criteria of the object of contribution worked out by the jurisdiction only to a specific extent[3]. Analyzing the output of the jurisdiction it should be emphasized that the Supreme Court held an opinion that the object of contribution to a company may only be financial rights representing economic value which are transferable and which may take positions of assets in the company's balance[4]. The subject literature absolutely/decisively underlines features/properties contributions made to a company should be characterized with[5]. They include: admissibility of a certain right to legal transactions, a possibility to establish the economic value of this right as the object of contribution, a possibility of placing/including this right in the company's

1 Act of 15.09.2000 – Code of Commercial Companies (Journal of Laws No. 94, par. 1037 with subsequent changes), hereinafter as KSH.

2 Decree of President of the Republic of Poland of 27.06.1934 – Commercial Code (Journal of Laws No. 57, par. 502 with subsequent changes), hereinafter as KH.

3 T. Mróz, Funkcje kapitału zakładowego, a przedmiot wkładu w spółkach kapitałowych, ze szczególnym uwzględnieniem aportu, Studia z prawa prywatnego gospodarczego. Księga pamiątkowa ku czci prof. Ireneusza Weissa, Kraków 2003, p. 188.

4 See, e.g., reasons to the resolution of the Supreme Court of 26.03.1993 (III CZP 21/93), verdict of the Supreme Court of 20.05.1992 (III CZP 52/92).

5 P. Włodyka (edit.), Prawo Spółek, Kraków 1996, p. 480.

balance, transferability of the right which is the object of contribution to a company and functional/operational equivalency (interchangeability, exchangeability) in proportion to pecuniary contribution[6].

In the commercial law doctrine the term "contribution" is understood as the object of partner's or shareholder's consideration specified in the company's partnership contract (contract) contributed in return for interests and shares taken in possession therein[7]. It results from Art. 3 of KSH that a description of the object of contribution and determination of its value belong to *essentialia negotii* of a commercial company's partnership contract, and concluding a partnership contract, partners are obligated to contribute shares.

As a rule KSH envisages two kinds of contribution – pecuniary and non–pecuniary. Each kind of contribution should be assigned into a company at the time of its formation. In case of private companies a partner is obliged to contribute share to the company which is to be set up only at the moment the company is registered in the entrepreneurs' register–KRS[8]. Whereas in case of capital companies the object of contribution is assigned into the company under organization. A company under organization is a capital company which is operating between the moment of concluding a partnership contract and the moment of the company's registration in the entrepreneurs' register–KRS, i.e. a factual moment of the company's establishment. From the moment of effecting an entry into the entrepreneurs' register–KRS, a capital company is set up as a fully organized entity and obtains legal status.

Contributing share into a commercial company may involve transfer or encumbrance of the possession in things or other rights as well as provision of other considerations to the company. In particular, the object of non–pecuniary contribution may be: the ownership right, substantive/financial rights other than ownership rights, contract/liability rights and, in case of private companies, provision of work/labor and services. By all means the most important amongst the above listed rights are ownership rights, including: enterprise/business ownership, ownership of organized parts of an enterprise/business, ownership of movables and real estate ownership[9].

With regard to ownership of movables and real estates, we should emphasize the meaning of Art. 46 of the Civil Code (KC)[10]. Pursuant to its content, a real estate is part of the earth's surface which constitutes a separate object of ownership (land) as well buildings permanently attached to the land, or parts thereof, if by special provisions they are an object of ownership separate from the land. The provision

6 P. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, Kodeks handlowy. Komentarz t. I, Warsaw 1996, p. 159.
7 P. Sołtysiński, A. Szajkowski, A. Szumański, J. Szwaja, op. cit., p. 33.
8 Act of 20.08.1997 on State Court Register (Journal of Laws of 2001 No. 17, par. 209 with subsequent changes), hereinafter as KrRejU.
9 A. Kidyba, Prawo spółek handlowych, Kraków 2005, p. 101.
10 Act of 24.04.1965 – Civil Code (Journal of Laws No. 16, par. 93 with subsequent changes), hereinafter as KC.

of Art. 235 of the Civil Code includes a special regulation, under which buildings erected on the land owned by the State Treasury or by units of local self–government by the perpetual usufructuary are his property and a building on real estate separated from the land. Whereas land ownership extends into the space over and under the land within limits determined by its social–economic designation[11]. Except fossils found at different depths in the land and regulated by separate legal provisions, whatever refers to the land of real estate as a subject of civil law relationship also comprises an air column localized over the land and the land itself around its contour/outline. Following tradition, the Civil Code does not define the term of a movable at all, thus using a negative definition – movables are all things which are not immovables/real estates. A suitable application of the Civil Code's provisions with regard to commercial companies defines precisely, clearly and without any doubt a possibility of making use of a definition of a real estate expressed in the Civil Code's provisions[12].

KSH's provisions as well as suitably applied KC's provisions granting private companies a legal status, as well as KSH's provisions granting capital companies legal status, stipulate directly a possibility of purchasing real estates by commercial companies as the company's assets. These assets may also be contributed to the company by partners in a form of a contribution/share. Such a clear regulation aims at eliminating any and all doubts as to the possibility of purchasing real estates by the companies. What is more, there are no doubts whatsoever as to purchasing the ownership right to the real estate as contribution/share contributed by partners to the company under organization. In the light of Art. 12 of KSH, it is obvious that a company under organization becomes subject to the rights to the real estate purchased by the company during its organization as well. The concept assuming legal status of a capital company under organization in the scope of purchasing a real estate was criticized by doctrine representatives as early as on the stage of draft works on KSH. In J. Frąckowiak's opinion, KSH's provisions should decisively/absolutely exclude a possibility of purchasing a real estate by a company under organization (also as a form of contribution/share contributed by partners) because separate regulations could threaten safety and certainty of economic turnover/transactions as well as the rule of civil law, according to which you should not allow the ownership to be assigned into another person if this right is not of a final nature[13]. However, these postulates of commercial law doctrine have not been included in the KSH's draft/project.

A disposal/administration of the real estate ownership is treated by the law as an action of fundamental importance to the owner's financial interests due to the

11 M. Safjan (edit.), System Prawa Cywilnego, Prawo cywilne–część ogólna, Warsaw 2007, p. 1180.
12 Art. 2 KSH.
13 J. Frąckowiak, Uwagi do projektu prawa spółek, "Przegląd Prawa Handlowego" 1999, No. 2, p. 14.

value of this object in turnover/transactions[14]. Therefore, legal regulations condition admissibility of such administration on special requirements. These requirements will regard the content of a legal act transferring the real estate ownership into a company as well as requirements concerning a form of the ownership right's assignment. The first ones include a categorical/unconditional order resulting from KHS's provisions imposing a detailed specification of the object of contribution included in a partnership contract, whereas the other ones include an obligation to carry out a legal act transferring the real estate ownership by a notary deed. In other words, a partner transferring the real estate ownership into a company must expressly declare in the partnership contract that he/she contributes to the company the real estate ownership as a partner's contribution/share and not some other right (e.g. limited property right). Effective assignment/transfer of the real estate ownership into a company requires a notary deed of the act administering/disposing the real estate ownership right under penalty of being null and void. That's why a commercial company contract, which according to KSH's provisions must be in writing to be valid, must be concluded in this case in a form of a notary deed.

The rule saying that apports (pecuniary contributions) may only be assets which can be placed/contained in the company's balance decides about a fundamental importance of non–pecuniary contribution's estimation that is to be contributed to a company[15]. The estimation of the object of contribution, including the real estate ownership, is made by partners. Only in case of a joint stock company KSH's provisions obligate the Managing Board of a newly created join stock company to commission the evaluation of reliability of the contributions' estimate made by shareholders to an expert auditor. In case of the estimate report on the value of a real estate contributed as share to a commercial company an appropriate and reliable establishment of the value of a real estate contributed as share is extremely important. An estimate report of a real estate contributed to a company must be based on a reliable assessment of its economic value including all factors, both factual and legal, which could affect the value of a real estate contributed as share.

Apart from commercial companies, civil law companies function/operate in economic turnover/transactions. Pursuant to Art. 861 § 1 of KC, partner's contribution /share to a civil law company may involve contribution of ownership or other rights or provision of services to a company[16]. Discussing the issue of contributions it seems necessary to remind of the fact that a civil law company is not a legal person. It is only a liability relationship joining partners who are entrepreneurs. If a partnership contract does not create the establishment of a separate legal person, the property created from contributed shares will not be civil law company's property treated as

14 M. Minas, Aport w spółce kapitałowej, Gdańsk 2005, p. 125.
15 M. Minas, op. cit., p. 91.
16 M. Kutyła, Nieruchomość jako wkład do spółki cywilnej, "Nieruchomości" 2000, No. 1, p. 15.

a separate legal subject but joint property of partners, which, however, constitutes some separated whole. Therefore, an expression used in Art. 861 § 1 of KC should be understood in the following way: ownership rights or other rights contributed as share will become a separated joint property of the partners. In case of contributing to a company ownership of things, we should take into account provisions of Art. 862 of KC, according to which relevant provisions on sale are applied in execution/performance of an obligation involving contribution to a company of the possession in things as well liability for warranty and jeopardy of losing or damaging things. It should be emphasized that contribution of the possession in things to a company, however, is not a sale of things. It results from the quoted provision that, first of all, in order to execute/perform the above mentioned obligation, only the provisions on sale stipulated therein can be applied, second, application of these provisions is admissible only respectively/appropriately. It is also undeniable that if a partner is obliged to contribute the possession in things to a company, including real estates, KC's provisions on ownership transfer should be applied directly. A partner contributing a real estate ownership to a company ceases to be its only owner and all partners become its co–owners. Undoubtedly, we deal here with a transfer of real estate ownership. Therefore, in case of contributing real estate ownership to a company, it is necessary to observe the requirement of a notary deed provided for in Art. 158 of KC. On the other hand, Art. 860 § 2 of the Civil Code stipulates that a written form is only sufficient to prove a conclusion of a civil law company contract. Therefore, if a civil law company contract, where a partner is obliged to contribute real estate ownership as his share to a company has been concluded in accordance with the above mentioned general rule, it is necessary to conclude an additional contract by a notary deed in order to transfer real estate ownership. It is different when a civil law company contract is concluded by a notary deed. If such a contract stipulates the contribution in a form of real estate ownership, it should be deemed in the meaning of Art. 155 § 1 of KC as a contract obliging ownership transfer, which, according to the rule of a double effect of liability contracts, evokes not only a disposing/administering effect but at the same time it transfers ownership into a purchaser.

Elements/items of property contributed to a company as share constitute company's property and are part of its assets. Fixed assets and intangible and legal values of an expected period of use, not longer than a year, which are used for the needs connected with economic activity carried out by the company, are subject to depreciation if they are complete and fit to use on the day they are received to use[17]. Therefore, elements/items of property contributed as share in a form of so called

17 Act of 26.07.1991 – on Income Tax from Physical Persons (Journal of Laws of 2000 No. 14, par. 176 with subsequent changes), hereinafter as PDOFizU. Act of 15.02.1992 – on Income Tax from Legal Persons (Journal of Laws of 2000 No. 54, par. 654 with subsequent changes), hereinafter as PDOPrU.

fixed assets under construction (e.g. building on real estates under construction) are not registered as fixed assets and thus they are not depreciated. Amongst the others, capital allowance cannot be made on lands and perpetual usufruct of lands or buildings and residential houses if a tax payer does not make a decision on depreciating shares contributed to a company – Art. 22c PDOFizU.

Partnership contract's conclusion generates tax effects. Partnership contract is concluded when a tax liability in the scope of tax on civil law actions arises[18]. Partners are jointly obliged to register the conclusion of a partnership contract and to pay due tax. A tax base will be a sum of value of shares contributed to the company or the amount of its initial capital.

Summing up, it should be stated that real estates, or rather real estate ownership right contributed to a company as share, is becoming more and more popular way of carrying out shares to companies or to initial capital. Incessantly increasing value of real estates makes it a very attractive contribution which, on the one hand, may guarantee a partner a large share in the property/assets (in initial capital) of a company, and on the other hand, may be an object of considerable value in the assets/property of the company itself. That is why it is extremely important to determine the object of contribution which is real estate precisely, to establish the contribution's apport capacity, its effective contribution to a company, as well as to satisfy tax and accounting obligations which will burden both partners and the company itself.

18 Act of 9.09.2000 – on Tax on Civil Law Actions (Journal of Laws of 2005, No. 41, par. 399 with subsequent changes), hereinafter as PccU.

Streszczenie

W doktrynie prawa handlowego pod pojęciem „wkładu" rozumie się określony w akcie założycielskim (umowie) spółki przedmiot świadczenia wspólnika lub akcjonariusza wnoszony w zamian za obejmowane udziały lub akcje. Z art. 3 KSH wynika, że opis przedmiotu wkładu i określenie jego wartości należą do essentialia negotii umowy spółki handlowej, a wspólnicy poprzez zawarcie umowy spółki zobowiązują się do wniesienia wkładów. KSH przewiduje co do zasady dwa rodzaje wkładów – są to wkładu o charakterze pieniężnym oraz wkłady niepieniężne. Wniesienie wkładu do spółki handlowej może polegać na przeniesieniu lub obciążeniu własności rzeczy lub innych praw, a także dokonaniu innych świadczeń na rzecz spółki. W szczególności przedmiotem wkładu niepieniężnego mogą być: prawo własności, inne niż prawo własności prawa rzeczowe, prawa obligacyjne oraz w przypadku spółek osobowych świadczenie pracy i usług. Najważniejszą grupą spośród wymienionych są niewątpliwie prawa własności w tym: własność przedsiębiorstwa, własność zorganizowanych części przedsiębiorstwa, własność rzeczy ruchomych oraz własność nieruchomości.

Chapter II

REAL ESTATE IN ADMINISTRATIVE LAW

Jana Jurníková

REAL ESTATE IN CONSTRUCTION LAW

Introduction

Legal regulation in the area of construction law is, under conditions of the system of law of the Czech Republic, anchored in the Act No. 183/2006 Sb., on land planning and building regulations, as subsequently amended, namely with effect from 1 January 2007.

Before referring more closely to particular procedures of administrative authorities, we will focus on the definition of a basic term, closely associated with the given problems, which is the concept of construction. Building Act defines the construction as all construction works, developed by construction or assembly methods, regardless of their construction version, used construction products, materials and structures, for the purpose of utilisation and duration[1]. The construction can be regarded as a result of preparation and implementation of the project related to building development and decisive means to achieve goals of the project of this type.

The approval to carry out and locate the constructions is performed in a form of the decision-making process that is generally in competence of the administrative authority, namely of the building authority, whereby local competence complies with the place of construction or intent implementation.

1 Section 2 of the Act no. 183/2006 Sb., on land planning and building regulations, as subsequently amended.

Building Act No. 183/2006 Sb. governs particular procedures both of applicants for the construction location and implementation and administrative authorities granting these permissions.

Every built construction requires the assessment by administrative authorities, competent to decide in the matter of the construction location permission, following the construction realization permission and the construction occupancy permit. It concerns three scopes. It is necessary to solve them separately, but in mutual connections.

Planning Permission

In the first stage it is necessary to lay down the procedures of administrative authorities that shall decide on the construction location permission. The basis is the process of obtaining the planning permission that can be substituted by planning approval in some cases. A possibility of obtaining the planning approval is a manifestation of pursuit of maximum simplification of the construction and its control. Generally, it can be stated that the planning approval will be sufficient for buildings that have no increased demands on environment, no increased (adverse) environmental impact and that are without conflict from the point of view of neighbourly relationships, accordingly, it concerns mostly the constructions that require the notice for their realisation or that can be built even without any notice[2].

Building authority can give the planning approval[3] on the basis of statement of intent, if the intent is in built-up territory or in area suitable for building on, conditions in the territory do not change substantially and the intent does not require new demands on public transport and engineering infrastructure. Planning approval cannot be given if the binding opinion of involved body includes conditions, or disapproval is expressed by such binding opinion or if the intent is subject to assessment from the point of view of environmental impact according to the Act No. 100/2001 Sb. on assessment of environmental impacts.

The building authority is under an obligation to decide within 30 days after the date of the notice presentment.

If the building authority comes to the conclusion that the intent does not meet criteria for granting approval or if it is necessary to set the conditions of its implementation, it will decide in the order on discussion about the intent in planning procedure. Validity of the planning approval is 12 months after the date of its giving.

2 A. Kliková, K. Valachová, P. Havlan, E. Hamplová, Stavební právo – praktická příručka, Praha 2007, p. 88.
3 Section 96 of the Act no. 183/2006 Sb., on land planning and building regulations, as subsequently amended.

If the conditions to give the planning approval are not met, the planning permission must be given before the construction location. It concerns the administrative procedure, initiated on request of the participant in the procedure.

Within the planning procedure, public oral proceedings are ordered[4]. An applicant is obliged to ensure that information on his intent and on the fact that he filed the application for obtaining planning permission, would be posted and disclosed to public. Information on the intent is to be posted in the space determined by the building authority or in a suitable public place at the construction or land, in which the intent is to be implemented. In the event that all conditions for obtaining planning permission are met, the building authority will give it.

Planning permission of the construction location is valid for 2 years after the date of coming into legal validity. The planning permission loses its legal force if the building application or building notice was not filed within the validity period.

Under the Building Act No. 183/2006 Sb., it is possible to conduct the so-called summary planning procedure that is more suitable than time possibilities[5]. Summary procedure on the construction location can be performed further only when the intent is in the area suitable for building on or in built-up territory, it does not require the assessment of environmental impacts, the application has all prescribed essentials and it is accompanied by binding opinions of the involved authorities and consent of owners of neighboring properties.

The building authority will publish the draft verdict of planning permission and it will also deliver the draft verdict to involved authorities and the applicant. Within the time of 15 days after the date of the draft publication, involved authorities can raise in writing their objections and involved parties can make their objections to the summary planning procedure. If reservations, objections or comments were not raised in due time, the decision is considered to be given and it gains legal validity.

Building Permission

After obtaining the permission with location of objective constructions, both in forms of the planning approval or of planning permission, it is necessary to settle a matter of permission of the objective construction realization.

Two variants can be differentiated here, namely the building notice and permission.

4 Section 87 of the Act no. 183/2006 Sb., on land planning and building regulations, as subsequently amended.
5 Section 95 of the Act no. 183/2006 Sb., on land planning and building regulations, as subsequently amended.

In routine of the construction notice to the building authority, the notice has to comply with conditions as every filing according to rules of the administrative procedure and further the requirements mentioned in the provision of Article 105 of the Building Act. Beside compliance with these requirements, the builder will provide enclosures of the notice to the building authority.

The notice that does not have formalities requested by law is not considered to be the notice in accordance to the Building Act and the building authority will postpone it by a decree.

The builder can carry out the announced construction or equipment on the basis of a written consent of the building authority. The consent applies for 12 months. Within this period the builder has to initiate the construction, failing that, the consent loses the legal force.

If the consent to the realization of announced construction will not be delivered to the builder within 40 days after the date when the notice came to the building authority or prohibition of the announced building construction or equipment will not be delivered to him within this period, it is deemed that the building authority gave the consent.

The building authority can proscribe the announced building construction or equipment if it would be inconsistent with the binding opinion of the involved authority. The building authority will proscribe the announced building construction or equipment in a form of the decision that has to be given within 30 days after the date of the construction or equipment announcement[6].

In the event that it does not concern the construction at which only its announcement is sufficient or the construction that required neither permission nor notice, it is necessary that the builder would apply for obtaining planning permission[7]. Building permission proceedings are always initiated on the builder's request.

A participant in the building permission proceedings is, above all, the builder, further the construction owner in which a change or maintenance work are to be performed, a holder of the land on which the construction is to be built, the construction owner of the land on which the construction is to be built, and owners of neighboring properties.

The building authority will notify participants in the procedure who are known to him and involved authorities of commencement of the building permission proceedings at least 10 days before the oral proceedings. In the building permission proceedings, the concentration principle applies, which means that the building

6 J. Doležal, J. Mareček, V. Sedláčková, T. Sklenář, M. Tunka, Z. Vobrátilová, Nový stavební zákon, Praha 2006, p. 210.

7 Section 115 of the Act no. 183/2006 Sb., on land planning and building regulations, as subsequently amended.

authority is under an obligation to notify involved authorities and participants in proceedings that they can make binding opinions and objections, or evidence, in the oral proceedings at the latest, failing this, they will not be taken into account for reasons of the proceedings concentration.

Likewise, the objections are not taken into account that should or could be applied in the planning procedure. If the envisaged construction or intent complies with all terms requested by law, the building authority will give the building permission, authorizing the construction. The building authority lays down conditions for building construction in the building permission and if it is necessary, also for its use and it will decide on objections of participants in the proceedings. The building permission loses its legal force if the construction was not initiated within 2 years after the date when it came into effect.

Under conditions provided by the Building Act, it is possible that the so-called summary building permission proceedings will take place. It concerns the proceedings, the result of which will be the building permission that is conducted with the help of the authorized inspector.

If the builder concludes the contract for check of project documentation with the authorized inspector for the construction that he aims to build, he can notify only the building authority of such construction if concurring binding opinions of involved authorities were delivered and statement of persons who would be participants in the building permission proceedings were delivered, and it does not concern the construction that is directly defined as unfit for the summary building permission proceedings. The authorised inspector confirms by certificate that he verified the project documentation and attached documents necessary for giving of the building permission and that proposed construction can be built.

Final Building Approval

The building use is crowning of the whole process of the building construction. It is actually the very reason for construction of a specific building. Forms of the permission of use of specific buildings are different according to the specific construction type. Some buildings have very markedly simpler possibility of permission of their use.

If the constructions were built and completed, for execution of which the building notice or permission was required, it is necessary to notify the building authority of initiation of its use or to apply for obtaining the occupancy permit.

The occupancy notice is sufficient at buildings that are not subject to the occupancy permit. The builder is obliged to notify the building authority of his intent

to initiate to use the building, at least 30 days before the actual use of the above-mentioned building[8]. The builder can initiate to use the building for the purpose for which the construction was approved if the building authority does not prohibit by its decision to use the building within 30 days after the date of the notice.

The occupancy permit applies to the constructions whose properties cannot be influenced by future users[9]. It will concern mostly the constructions designed for use by some other person than the actual builder, for instance the construction of hospital, rental housing, commercial and factory building, construction for assembly of higher number of persons, construction of transport and residential infrastructure, construction for accommodation of convicted and accused persons, further the construction in which the execution of testing operation was set and conversion of the building that is a cultural monument.

The occupancy permit is given on the request of the builder. The building authority will set the date of the final control inspection of the construction within 15 days after the date of delivery of the builder application, and it states, at the same time, which documents will be presented by the builder in it. If the building authority will find defects preventing from safe use of the construction or contradiction with binding opinions of involved parties, it will give within 15 days after the date of the final control inspection the decision, by which it will prohibit to use the construction. If the building authority will assess in the course of the final control inspection of the construction work that the construction meets all requirements for its safe and proper use, it will give the occupancy permit within the period of 15 days after the date of the final control inspection of the construction that is a proof of allowed purpose of the construction use.

Further possibilities how to use the building is a possibility of the so-called premature use, i.e. use of the building even before definitive construction completion. The building authority can give, on the builder's request, time limited premature occupancy permit of the construction before its full completion if it does not have a fundamental influence on the construction usability, it will not endanger safety and health of persons or animals or living environment. The construction occupancy permit is given under the provision of Article 123 of the Building Act.

8 Section 119 of the Act no. 183/2006 Sb., on land planning and building regulations, as subsequently amended.
9 Section 122 of the Act no. 183/2006 Sb., on land planning and building regulations, as subsequently amended.

Conclusion

In the Czech Republic, the area of public construction law is regulated by a relatively new legal form, aimed at maximum simplification of decision-making processes and at minimum burden on builders. Most of decision-making processes take place in a form of administrative procedure that should provide as wide as possible possibilities of protection of rights of all participants in the procedure. Apart from this, there are the processes whose aim is to reduce maximally decision-making and to formalize them minimally. These can be applied especially in constructions without neighbor problems and in buildings having no environmental impact.

Streszczenie

Artykuł poświęcony jest charakterystyce czeskich regulacji z zakresu prawa budowlanego. Szczególną uwagę poświęcono zagadnieniom związanym z pozwoleniami na budowę – procedurze uzyskiwania pozwolenia (procedurę „zwykłą" oraz skróconą), obowiązkom informacyjnym, możliwości korzystania z budynku na podstawie zgłoszenia, możliwości zobowiązania inwestora do podjęcia starań o zezwolenie na zamieszkanie.

Petr Průcha, Jan Neckář

EXPROPRIATION FROM THE ADMINISTRATIVE LAW AND FINANCIAL LAW POINT OF VIEW IN THE CZECH REPUBLIC

Expropriation is a legal institute which uses the power to make changes in property rights. The aim of this institute is the facilitation of the desirable fixed **transition**, or **restriction**, **of the property rights** in situations where it would not be possible without this institute.

The basic legal act which regulates the expropriation is the Declaration of Fundamental Rights and Freedoms. It states that the expropriation or the restriction of the property rights is admissible only in the public interest, on the basis of acts and by compensation[1]. In the legal regulation of ownership this constitutional presumption is specified in the Civil Code[2].

The expropriation procedure is regulated by administrative law regulations, among which the meritorious position has the Expropriation Act[3]. On the one hand there are supplemented civil conditions, which are necessary to be satisfied for acceding to the expropriation, and on the other hand the main **principles** of the expropriation procedure are set in this act. The expropriation procedure is the execution of public administration.

The **purposes** of expropriation are defined in several acts. The most considerable from this point of view is the Building Act[4].

---

1 Section 11(4) of the Declaration of Fundamental Rights, published as a resolution of the presidium of the Czech National Council as No. 2/1993.

2 Section 128(2) of the Civil Code (Act No. 40/1964 Sb.) states that the expropriation or restriction of property rights is allowed only in the public interest, if it is not possible to reach the purpose another way, on the basis of the act, only for the purpose and by compensation.

3 Expropriation Act (Act No. 183/2006 Sb.).

4 Building Act (Act No. 184/2006 Sb.) specifies the purposes of the expropriation (for itself): The property rights to the plots and building structures, which are necessary for reaching the constructions or other public welfare arrangements under this act, may be restricted or withdrawn, if they are specified in the published version of the town-planning documentation and if it is a public welfare construction of the transport or technical infrastructure, including the area, which is necessary for the building-up, and regular usage for the purpose of expropriation, public welfare arrangements, concerning the hazard control in the floodplains and other natural disaster areas, the raising of the retentive ability of the area and the protection of the archeological heritage, building structure or arrangement for the defense and security of the state, landscape sanitation. It is possible to take away or restrict the property right to the plot for the creation of the conditions required for necessary access, proper usage of

The **Expropriation Act** defines expropriation as a deprivation or restriction of the property right or of real burden to a plot or to a building structure and a transition of the property right or acquisition of the real burden to that plot or to a building structure for reaching the purpose of the expropriation, which is defined in several acts. The expropriation is admissible solely for the purpose defined in several acts and if the public interest for reaching this purpose predominates over maintenance of rights of the present owner and if it is not possible to acquire rights to the plot or to a building structure necessary for reaching the purpose of the expropriation by agreement of some other way.

The public interest for the expropriation has to be proved in the expropriation procedure.

The lien and the sub-lien right to the plot or to the building structure, the custodial transfer of the right concerning the plot or the building structure, generally the lease of the plot, building structure or its parts and the real burden to that plot or to a building structure are dissolved in the expropriation. On the other hand the rent of a flat is never dissolved.

The **compensation** of the expropriation is regulated by the Expropriation Act. This act states the statutory duty that the compensation is provided in principle in money. On the other hand, if the object of the expropriation is a property right of a plot or a building structure, the present owner has a possibility to get another real estate (plot or a building structure) by an agreement. Possible differences in value of the real estate will be the object of the settlement.

The compensation is provided by the **common price**[5] if the object of the expropriation is a plot or a building structure. If the object is a real burden then the compensation is provided by the value of the property right according to the real burden. Except this, the present owner has a title to obtain the compensation of the removal, compensation concerning the change of the place of business, and other purposeful compensation expended concerning the expropriation and its consequences from the expropriator.

The competence for expropriation procedure belongs to the **expropriation authority**[6]. The territorial jurisdiction is influenced by the territory of the authority where the real estate, which is the object of the procedure, is situated. In case of

the building structure or for the approach road to the plot or to the building structure. Other acts which enable expropriation for some purposes are, for example: Water Act, Mining Act, Road Act, Rail Act, etc.

5 The common price is a price which would be set as a selling price in case of selling the same, respectively the similar property, or it is a price of providing the same or similar services in the commercial relation in the date of evaluation.

6 The expropriation authorities are the municipal offices with a widespread competence (the number of these offices is 205) in their district of administration, plus the town-councils of the corporate towns (23) and the Town-Council of the Capital Prague.

situations when the real estate is inhered in two or more territories of expropriation authorities, the final decision as to which authority has the competence and will carry out the expropriation procedure is taken by the immediate common superior governing body.

The **parties to an action** are defined by the Expropriation Act. For the procedure the parties to an action are: the expropriator, the present owner, attaching creditor, sub-attaching creditor, the authorized person of the real burden to a plot or to a building structure (which is the object of the expropriation procedure) and the tenant of the plot or a building structure. However, the tenant of a flat is never a party to an action.

The procedure has a character of a **proposal procedure** and it is commenced by the request of the expropriator. The expropriator could be a natural person, an artificial person or a municipality, which demands:

- the transition of the property right to a plot or to a building structure,
- the constitution of the real burden to a plot or to a building structure, or
- the abolition or the restriction of the real burden to a plot or to a building structure.

The **requirement of the proposal**, or more precisely of the **application** for the initialization of the expropriation procedure, has to contain (except for general requirements for the administrative procedure):

- the identification of the plot or a building structure which is the object of the expropriation procedure and the identification of the rights of third parties,
- documents that the conditions for the expropriation were completed,
- specification of the kind of the expropriation, which is proposed,
- specification of the time period when and how the expropriator will begin to accomplish the aim of the expropriation.

To the application for the initialization of the expropriation procedure it is necessary to add the papers requested by law, including the expert's report, which is needed for setting the compensation. The expert's report is made out on the present owner's proposal or, with his agreement, on the expropriator's proposal.

If the application does not contain the formal requirements requested by law, the expropriator authority will assist with the elimination of the deficiencies, or will call upon the expropriator to eliminate the deficiencies in the appointed time. At the same time it is the duty of the expropriator authority to instruct what the consequences for the next procedure are if the deficiencies will not be eliminated.

The oral principle is governed for the expropriation procedure. The oral proceeding has to be set up for the hearing of the proposal. It has to be announced at least 30 days in advance to the parties of the procedure. In the announcement of the oral proceeding the expropriation authority has to draw parties' attention to the fact that their objections should be raised at the latest in the oral proceeding, or they will not be sustained (the concentration of the procedure principle).

The time for decision is regulated by the general regulation, which is stated in the Administration Procedure Act. In the sense of the act, the decision should be taken without delay, in 60 days at the latest. This time for decision can be extended for working out the expert's report.

At the end of the expropriation procedure the decision is taken, which has to have as an administrative decision the contentual and formal requirements. If it is not proved that the conditions for expropriation are completed, the expropriation authority will reject the request. If it is proved, then the authority will grant the request and concurrently will set up the compensation of the expropriation as well as the deadline for the payment of the compensation.

There are the terms and the ways how the expropriator has to begin the pursuance of the aim of the expropriation in the decision. The term cannot be longer than 2 years from the legal validity of the decision. The decision has to be justified of course. In the appeal instruction the expropriation authority has to instruct about the conditions of the abolition of the decision.

The appeal against the decision is possible to the governing administrative body. In this situation it is necessary to draw attention to the fact that the deferring effect is not suspended.

The rights which were taken or restricted from the present owner are transferred to the expropriator at the moment of the legal validity of the decision. The final order of the expropriation procedure can be, in the conditions set by the law, the object of judicial review.

The rights which were transferred consequently with the expropriation procedure have to be used only for the aims for which they were expropriated. The realization of the aims has to start in the term which was stated in the decision.

If the compensation is not paid in the term which was stated in the decision of the expropriation authority, or if the realization of the aims of the expropriation is not started within the term stated in the decision, the expropriation authority will take a decision, on the basis of a request of the original owner, that the expropriation

is dissolved[7]. In this situation, the original owner acquires the rights which were transferred to the expropriator or which were restricted at the moment of legal validity of the decision of the abolition of the expropriation. The original owner is obliged to return the paid compensation in 1 month at the latest.

Transfer of Taxation Rights

The expropriator is mostly the state due to the public interest on the transfer of rights. The expropriation is the ultima ratio of the restriction of the property rights; therefore the first step is the attempt to enter to an agreement between the state, which is in this negotiation represented by the state body, and the present owner. The type of the agreement is not determined by the law – it can be a contract of sale, barter contract or any other types of agreements.

If the present owner agrees with the sale or with a barter of the plot or a building structure, he is the taxpayer himself[8]. In case of the transfer of rights to the State of the Czech Republic the transfer is exempted from the real estate transfer tax and the present owner does not have the tax liability. But he is obliged to present his exemption in the Declaration of Real Estate Transfer Tax in 3 months at the latest from the month when the decisive facts[9] were fulfilled. If the property is transferred to any other subject apart from the State, the tax liability of the present owner is 3% from the selling price, which cannot be lower than the estimated price[10].

In case of the sale or any other agreement, when the transfer is paid, the exemption from the income tax is very interesting for the present owner in the case when the objects of the transfer are real estates, flats or non-residential premises if the present owner had the place of residence there for at least 2 years prior to the transfer or if the compensation is used for buying a new residence[11]. This exemption also applies in case of selling the property which is owned by the present owner for more than 5 years, but some restrictions are applied[12].

This 5-year-restriction period was stated due to the prevention of speculations in real estate. If the owner of the property which is the object of the negotiation and will be the object of the expropriation, in case of unsuccessful negotiation, possesses the plot or a building structure for less than 5 years, and therefore he is not able

7 The possibility and conditions for the dissolution of the expropriation, as it was underlined, has to be stated in the expropriation decision.
8 Section 8(1/a) of the Inheritance Tax, Gift Tax and Real Estate Transfer Tax Act (Act No. 357/1992 Sb.).
9 Decisive facts are defined in the Section 21(2) of the Inheritance Tax, Gift Tax and Real Estate Transfer Tax Act (Act No. 357/1992 Sb.).
10 Section 10(1/a) of the Inheritance Tax, Gift Tax and Real Estate Transfer Tax Act (Act No. 357/1992 Sb.).
11 Section 4(1/a) of the Income Tax Act (Act No. 586/1992 Sb.).
12 Section 4(1/b) of the Income Tax Act (Act No. 586/1992 Sb.).

to exempt the transfer from the real estate transfer tax, it is very often that at the beginning of the negotiation he announces the disagreement with selling the plot or the building structure and calls for expropriation.

If the negotiation is really unsuccessful and is not entered to the agreement, the expropriation procedure is the only way to transfer rights from the present owner. As it was underlined, the expropriation is a transfer independent of the will of the owner. In this situation the acquirer of the property is the tax payer[13] and it is his obligation to declare the Declaration of Real Estate Transfer Tax. The present owner is acquitted of any duty concerning the administration of the real estate transfer tax. Only one situation is stated when the taxpayer need not declare the Declaration of Real Estate Transfer Tax – when the property is transferred from the property of the Czech Republic and only in case of exemption of this transfer from the real estate transfer tax[14]. In all other situations the Declaration of Real Estate Transfer Tax is required.

In the situation when the expropriator acquires the property to the property of the Czech Republic, it is his obligation to declare the Declaration of Real Estate Transfer Tax and therein set up a claim to the exemption from the tax. Practically this is not done because of the increasing, and, due to exemption from the tax, useless costs. The routine is that only if the tax administrator calls upon the expropriator to declare the Declaration of Real Estate Transfer Tax, then it is declared. In many situations the tax administrator settles with a presentation of the documents or with a decision that the property is transferred to the property of the Czech Republic.

In comparison, which transfer – selling or the expropriation – is preferable to the present owner, it is clear that the expropriation is more advantageous for the present owner. First of all, the present owner is not obliged to declare the Declaration of Real Estate Transfer Tax because it is the expropriator's obligation. The second advantage of the expropriation is the exemption from the income tax without reference to the period for which the object of the expropriation is the property of the present owner[15].

In consequences of the above, the expropriation saves time and a lot of money for the present owner in comparison to his obligation in the situation when the transfer of the property is done by an agreement.

13 Section 8(1/b) of the Inheritance Tax, Gift Tax and Real Estate Transfer Tax Act (Act No. 357/1992 Sb.).
14 Section 21(6) of the Inheritance Tax, Gift Tax and Real Estate Transfer Tax Act (Act No. 357/1992 Sb.).
15 Section 4(1/zd) of the Income Tax Act (Act No. 586/1992 Sb.).

Streszczenie

Niniejsze opracowanie dotyczy instytucji wywłaszczenia nieruchomości: teoretycznych podstaw wywłaszczenia, prawnych uwarunkowań stosowania tej instytucji. Autorzy przedstawiają procedurę wywłaszczania (w tym – organy prowadzące postępowanie i strony tego postępowania), poruszają również zagadnienie sposobu definiowania interesu publicznego (cel wywłaszczenia), metod wyceny nieruchomości oraz orzekania o należnym odszkodowaniu. Zwrócono również uwagę na aspekt podatkowy wywłaszczenia, tj. obowiązki podatkowe po stronie wywłaszczonego i wywłaszczającego.

Petr Havlan

DISPOSAL OF REAL ESTATE OF PUBLIC SUBJECTS

The contemporary Czech "model" of disposal of real estates of public subjects (as an important part of public property) is in principle built on private law operations (typically on a contract) and public law limitations of autonomy of volition of a disposing person. This on the whole traditional way of disposing of public property started to develop itself in the Czech Republic up to the nineties of 20th century. Before that Commercial Code (Act No. 109/1964 Sb.) and individual executing regulations (stepwise published) about administration of national property regulated special, *in merito* public law institutes, inclusive contractual institutes (see e.g. part ten of the quoted code), on the basis of which the disposal of real estates of, at that time sole germane public subject – the state, was exercised.

The fact that now valid Act on property of the state (Act No. 219/2000 Sb. – "ZMS") is in principle presuming the use of ways of disposing of property, which are regulated by general (private law) regulations (i.e. mostly in civil and commercial code), nevertheless, it does not mean that it would fully resign its own (specific) and by its nature "public law" institutes for disposing of state property. That means that aside public law regulation of contracting terms, or restrictions on concluding certain types of contracts (which are both predominating), public law regulates also institutes which have no analogy in private law regulations.

Typically, *unilateral provision* in accordance with Section 20 ZMS belongs to such institutes. The concerned act is of "administrative law" character, which has its template in (as noted before) previous regulations and the measure in question can be taken only in the case specified in ZMS; that means inclusive the case of forfeiture of a realty in state ownership from the organizational unit which is managing this realty and handing it over to another organizational unit at the same time, when competent state administration body detects serious faults. Generally, it is possible to denominate "unilateral provision" as an instrument of disposal of property of the state "on a vertical way".

The second institute of this type is so called *inscription* (Section 19(1) ZMS). With this institute it is possible to dispose of property between organizational units of

the state, thus here inwardly of one possessive subject - the state. It is characteristic of "inscription" that it represents an agreement based on property administrative institute, whereby its thisness consists mainly in the fact that it is based on primarily organizational agreeing act of volition (organizational units have no legal personality). "Inscription" is intended to "horizontal" move of state property.

As a whole we can say that public law regulation of disposal of real estate of the state, that means understandably mainly rules for disposal in law of this real estate towards third subjects (power of alienation, relinquish to rental, putting real estate of state in commercial companies, etc.) is thanks to the Act on property of the state (despite some deficiencies) relatively compact and has its internal logic[1]. That does not apply to public law regulation of disposal of real estate of the next public subjects[2].

The second important type of public subjects – **territorial self governmental units** ("ÚSC" – municipalities and regions) is public law volition limitation of disposing subject expressively lower than by the state alone, and it mainly has the character of influence of creation (forming) the disposing person volition than its limitation. Nevertheless, the fact that Act on municipalities (Act No. 128/2000 Sb. – „OZř") and Act on regions (Act No. 129/2000 Sb. – „KZř") are in principle presuming the use of ways of disposing of real estate of competent ÚSC conditioned in general (private) law regulations (civil and commercial code),the above mentioned acts are free to set certain public law regulation of contract conditions, respectively to making wrong property law operations. It is typical that it is especially the determination of ÚSC organ (at first council and board), which is legitimate to decide about the contract type, respectively property law transaction type of the given unit to decide (see firstly Section 85 OZř and Sections 36 and 59(2) KZř therewith) that without this decision the transaction is of no validity (see Section 41(2) OZř and Section 23(2) KZř). The specific public law institute in question has no analogy in private law sphere, even if it could be found there. Specifically, it deals with *intention* of ÚSC to sell, to exchange or to present a realty. The intention must be made public for fifteen days (in case of region for thirty days), before the decision is taken by the ÚSC organ, by hanging it out on an official board of the municipal (regional) office, with a view to opinion expression of interested persons and acceptance of their offers. However, as a whole, it is possible to suppose that regularization of disposing of ÚSC real estate is unambiguously insufficient. Primarily a clear conception is missing[3].

1 For details on disposal of property (inclusive real estate) of the state see P. Havlan, Majetek státu v platné právní úpravě, Praha 2006, p. 203 et sequentia.

2 To the term "Public subjects" see P. Havlan, Veřejné vlastnictví v právu a společnosti, Praha 2008, p. 22 et sequentia.

3 In detail to disposal of property (inclusive real estate) of territorial self- governmental units see P. Havlan, Majetek obcí a krajů v platné právní úpravě, Praha 2004, p. 197 et sequentia, respectively relevant part of 2nd edition of

Analogous and in many respects even worse situation of public law regulation of real estate disposal is also by the following, in an exemplary way mentioned, subjects. To the most typical public subjects undoubtedly belong public universities. Rector or organs or persons authorized by the statue of public university decide about disposal of real estate (see Section 34(4) and 35(4) of Act No. 111/1998 Sb., on universities - "ZVŠ"). A decision can be taken after previous assent of executive council of public university (Section 19(2) ZVŠ) and after opinion expression of academic senate of public university (Section 9(2/c) ZVŠ); the executive council is obliged to announce any release of a previous written assent in seven days from its release to the Ministry of Education (Section 15(6) ZVŠ). Law operations "without assent of executive council and without announcement to the Ministry of Education are not valid" (Section 15 ZVŠ). As a typical example of no conception it can be here subsequently introduced at least that the Act on universities has no rule on transfer of real estate (curiously in contradiction to transfer of movable assets) on fixing the price in case of their remunerate transfer, nor the rule based on which it is possible to transfer a realty only in public interest, or if the transfer is more economical than another way of dispose of property (thing) in case of gratuitous conveyance[4].

The issue of disposal of real estate looks similar to public universities by relatively new public subject of autonomous public institution type such as **public research institutions** ("VVI") according to the Act No. 341/2005 Sb.; consequently, the main activity of the subject is research and its infrastructure. The organs of VVI (director and board) have to decide on disposal according to terms predetermined by the Act No. 341/2005 Sb. Firstly, VVI cannot dispose of a realty without a previous written assent of executive board, whereas to predetermined operations assent of the founder is needed, and that all under the sanction of absolute (unconditional) invalidity. By alienability of real estate, unlike in case of universities, it is explicitly predetermined that VVI must negotiate a price as high as it is usual at such place and time, and prospective gratuitous conveyance is possible only in public interest[5].

The situation of **Associations of professionals** (Chambers) in given area is absolutely alarming. With reference to public subjects of so called interest (professional) self-government we cannot find in any single acts of law (concerning this subject) any trace of any integrated regulation of disposal of real estate. The above described situation is connected with the fact that the regulation of the whole problem firstly relies in the internal regulations of associations. Nevertheless,

this publication (2008) – at press.

4 More to that see also P. Havlan, H. Neumannová, Veřejné vysoké školy jako subjekty vlastnického a jiných majetkových práv, "Právní rozhledy" 2006, no. 6, p. 203 and 204, or see also P. Havlan, M. Radvan, Czech Public Universities as Property and Tax Subjects. In Conference proceedings: Sovremennye problemy teorii nalogovogo prava (The Modern Problems of Tax Law Theory), Izdatěľstvo Voroněžskogo gosudarstvennogo universitěta, Voroněž 2007, p. 216 and 217.

5 More to that see P. Havlan, Veřejné výzkumné instituce, "Právní zpravodaj" 2005, no. 12, p. 11.

associations in the majority of cases are not fulfilling these expectations, which can be traced back also in the fact that needed methodical help of state administration, i.e. firstly competent ministries[6], is in principle missing.

* * *

Fundamental importance of real estate in ownership of public subjects – essentially, it is a core of public ownership as a comprehensive socioeconomic phenomenon with its unfungible functions – "stabilizational" function and "generally socializational" function - demands an appropriate legal regulation. It should be in final stage a comprehensive regulation of the given problem in a form of Act on property of public subjects and its scope determined general (basic) rules of disposal of property and especially of real estate. In the meantime there should be effort made for some perhaps "partial" improvements, which means adoption of the Act on property of territorial self-governmental units (under consideration already some time before), or to spread methodical help in this area by competent ministries, etc.

6 More to that see P. Havlan, H. Neumannová, K profesním komorám jako subjektům vlastnického a jiných majetkových práv, "Právní zpravodaj" 2007, no. 4, p. 11.

Streszczenie

Opracowanie stanowi krótką krytyczną analizę przepisów prawnych dotyczących rozporządzania nieruchomością przez wybrane podmioty publiczne (państwo, jednostki samorządu terytorialnego, uniwersytety państwowe, państwowe instytucje badawcze i stowarzyszenia zawodowe). Autor starał się przedstawić istotę typowych problemów związanych ze stosowaniem analizowanych regulacji w Republice Czeskiej prezentując jednocześnie propozycje stosownych rozwiązań.

Karel Schelle

THE BEGINNING OF THE EVIDENCE OF THE REAL PROPERTY IN THE CZECH COUNTRIES

Outset of Real Estate Records on our Territory

The word *cadastre* is of Latin origin and means about the same as a list (*caput* = a head, *capitastrum* = a list according to heads, later on according to any unit). In general, such word used to refer to a well-organized consistent description of special features, persons, things or rights, especially a description of lands and incomes from crafts and trades, compiled for tax purposes. The attempts to introduce a single tax policy date back to the year 1022, when the Czech monarch Oldřich implemented taxes collected on tracts of land.

Nobility started to ensure its private property rights by making entries in the land registry called "Zemské desky" early in the fourteenth century. Originally, however, such books kept with the land court served for records of court disputes. The first written evidence of such entries is a form filled in by a land scribe in 1278. The Czech example was followed by Moravian and Silesian authorities establishing land registries with the court of Brno and Olomouc in 1348 and with the court of Opava early in the fifteenth century.

Before 1650, entries of serfs´ tenures and duties were made, upon request of the lords of the manor, in registries called Urbars. The lands awarded in the Urbars to serfs and freemen were called urbar, rustic or, later on, also contribuent lands. Contrary to the lands awarded to lords and called manors, dominical or court estates, until 1706 exempt from tax.

In 1650, the Assembly of the Kingdom of Bohemia passed a resolution making taxes assessed on a more factual and fairer basis, with taxes levied only on farmhouses and lands owned by serfs. The final version of the document resulting from this resolution (dated 1653-1656) gave rise to the first revenue cadastre for Bohemia, referred to as the first rustic cadastre (the first Assessment Roll), in force in 1656-1684. The first rustic cadastre was revised and supplemented in 1674-1683

and is referred to as the second rustic cadastre of 1684 (the second Assessment Roll), in force until 1748. What can be regarded as the first Moravian cadastre are the so-called tract registries (the first tract visitation in 1656-1658, the second one in 1669-1697).

1 May 1749 was the effective date of the so-called first Theresian rustic cadastre (the third Assessment Roll dated 1748), replacing the previous Assessment Roll and the Moravian tract registries. After the new general visitation of rustic lands, the second Theresian rustic cadastre came into force in 1757 (the fourth Assessment Roll dated 1757). In 1749, statements of tax on dominical homesteads were introduced, in order to settle the land tax on manors depending on their number and area (exaequatorium). The survey to this aim was finished in 1756 and the resulting document is known under the name Exaequatorium dominicale dated 1757. It constituted a basis for the Theresian dominical cadastre. The Theresian rustic cadastre together with the Theresian dominical cadastre made up a large comprehensive cadastre covering all lands and homesteads both rustic and dominical. As a whole, it was called the Theresian cadastre or the Theresian cadastre rectification.

On 20 April 1785, Joseph II promulgated an edict reforming the land tax and survey system to the effect that all dominical and rustic fertile lands inside a municipality should be surveyed, and provided with a layout and calculation of their area and gross proceeds according to their fertility. The edict introduced two significant novelties – replacement of the existing assessment unit with another smaller and more frequent tax unit – a plot of land, each measured to determine the exact area and subsequently the proceeds thereof. The resulting document is referred to as Josephian cadastre. This was the first cadastre based on direct measurement of the actual state in the field. The Josephian cadastre was not welcomed by nobility, which enforced abrogation of the new cadastre after a year of its validity (1789-1790) and re-introduction of the Theresian cadastre.

After abrogation of the Josephian cadastre, the Theresian cadastre was in force only for a short time. The Josephian cadastre revealed all discrepancies in the areas entered in the Theresian cadastre. This led to introduction of a cadastre taking over the correct figures of the Josephian cadastre and keeping the nobility's benefits of the Exaequatorium. The new cadastre, called as Theresian-Josephian cadastre, was established in 1792, constituting a basis for the land registry and tax regulations until 1860, when the stable cadastre came into force.

With the Emperor´s edict No. 946 Sb., dated 1 June 1811, the General Civil Code was promulgated, setting a.o. the principles directly affecting further function of the cadastre. It introduced the rule that what lies above or below surface belongs to the owner of the corresponding plot of land (i.e. the Roman law principle *superficies solo cedit*) and that ownership transfer of immovable things requires entry in the

land registry - a registration called “vklad” – “intabulation”. The General Civil Code was in force until 1951, when it was abrogated by Act No. 141/1950 Sb. and the above-mentioned principles were abandoned.

The foundations of today’s modern cadastre of real estates were laid by the supreme edict of the Austrian emperor Franz I dated 23.12.1817 on the land tax and land survey. It was based on an accurate list and geodetic survey of all lands, the so-called stable cadastre. The stable cadastre was already fully based on the scientific basis of a large-scale map work. The new map work applied the Cassini-Soldner´s non conformal projection and the system of rectangular coordinates starting in trigonometric points Gusterberg (for Bohemia) and Saint Stephan (for Moravia). The chosen basic scale (1:2880) was based on the existing requirement of one Lower-Austrian morgen (i.e. a square with each side 40 fathoms long) represented on the map with one square inch (1 fathom = 6 ft, 1 foot = 12 inches, 40 fathoms x 6 inches x 12 ft = 2880). The boundaries of all plots of land were properly surveyed and marked in presence of their holders on the spot. The thorough survey was made in most cases applying the plane table (graphical intersection). In Bohemia, the thorough survey was carried out in 1826-1843, in Moravia in 1824-1836. All surveyed plots of land were projected in the map and numbered as parcels, with their areas determined from the projected area. Most of the cadastral maps valid on the territory of the Czech Republic are still derived from the survey documentation of the stable cadastre. Such cadastral maps (usually with the scale 1:2880) are valid on about 70 % territory of the today’s country.

The stable cadastre was getting outdated faster than expected, because it was not kept updated systematically. That’s why it was decided on its one-shot revision, so-called re-ambulation of the stable cadastre. The work was done very hastily in 1869-1881 with adverse effect on the original work.

Outset of Modern Records of Real Estates on our Territory

The first extensive and comprehensive positive-law norm regulating the records of real estates on our territory is the so-called General Land-Book Law implemented by Act No. 95/1871 Reich Code dated 25 June 1871. It regulated all existing public books (such as land registry, feudal registry, land books and municipal registries and mining registries) kept on acquisition, limitation and abolition of rights of user to real estates recorded in such books and new land books or mining registries that may exist in the future.

The land books were divided into a main book and a collection of deeds or a book of deeds. The main book consisted of insets intended for entries of objects of the particular book and changes therein and for entries of rights of user to the

relevant object and changes therein. Each deed according to which the particular entries in the book were made was provided with a certified copy. All of this formed a collection of deeds, or, if the entries were made directly in the book, a book of deeds. There were two fundamental principles of approach to the land books:

1. acquisition of relevant rights, transfer, limitation or abolishment thereof can be made only by entry in the main book,
2. anybody can consult the land books in presence of a clerk of the land book office and obtain copies or extracts of them.

The book entries were divided into the following categories:

1. registrations (as unconditional acquisition or abolition of rights – intabulation or extabulation),
2. preliminary records (as conditional acquisition or abolition of rights - prenotation),
3. notes.

In the land books, the following could be registered or recorded:

– rights of user or easements,
– repurchase rights and pre-emptive rights,
– lease and tenements.

The above-mentioned Act was a comprehensive norm, which in more than 130 paragraphs thoroughly regulated details of particular entries, preliminary records and notes, requisites of relevant source deeds, procedural rules of administration of the land books, method of how particular applications should be attended to, including relevant deadlines, scope and method of informing the affected persons including the delivery method and complaint procedure.

The Act went through several small amendments directed either at its text or mainly responding to the changed regulation of the rights of user in the Civil Code. Nevertheless, it was one of our record-breaking legal texts as regards "lifetime", with the interval between its adoption and abrogation being 93 years.

Owing to the fact that the Act covered the territory of Austria (or Cislaitania), it was received predominantly for Bohemia and Moravia after 1918. For special regulation of related rights and duties in Slovakia and Sub-Carpathian Ukraine, Act No. 90/1923 Sb. was intended, stipulating the requisites of relevant deeds, regulating deletion of receivables and fee exempts in deletion thereof and compilation of insets in Slovakia and Sub-Carpathian Ukraine.

A special role in keeping real estate records was played by edict of the President of the republic No. 124/1945 Sb., on some measures concerning land books, regulating changes in the book entries as follows:

1. in the book insets identifying as beneficiary the German Reich, Kingdom of Hungary, entities regulated by public law of Germany or Hungary, German Nazi Party, Hungarian fascist parties and other entities, organizations, enterprises, facilities, partnerships, funds and purpose-built property of such regimes or related thereto, and as their direct legal predecessors the Czechoslovak State, Bohemian or Moravian and Silesian Lands or their enterprises, institutes and funds that belonged to them or were administered by them, the land-book court deleted the entry of transfer of the right and renewed the entry to the benefit of the former beneficiary;
2. in the book inset identifying as beneficiary the former Protectorate Bohemia and Moravia or its enterprise, institute or fund that belonged to it or was administered by it, the land-book court entered instead of them as a beneficiary the Czechoslovak State or its enterprise, institute or fund that belonged to it or was administered by it.

Furthermore, it imposed the duty to delete, upon demand of the owner or a party otherwise beneficial in terms of land books:

1. the notes of confiscation, entered upon demand of the former German authorities, especially the former secret state police;
2. notes of introduction of forced administration as well as entries of a ban on alienation, encumbrance and tenement, made in the period of lack of liberty further to the petition of the Ministry of Agriculture (former Ministry of Agriculture and Forestry) or the Land Office for Bohemia and Moravia;
3. notes of subjugation entered in the period of lack of liberty further to the petition of the Land Office for Bohemia and Moravia.

Real Estate Records in Czechoslovakia after 1945

A brand new comprehensive regulation of real estate records was set up by Act No. 22/1964 Sb., on real-estate records. For the needs of the national economy, in order to "keep records of real estates, as required for planning and management of the economy, especially agricultural production, for protection of socialistic society's property and personal property of citizens, for proper administration of the national property and for protection of the agricultural-land portfolio and forest-

land portfolio“ defined the real estate records. The scope of such records included the following:

1. identification of all real-estate property as regards the land type, area and way of use, ownership relations, national property administration, right of permanent use of the national property, right of personal use of the lands, ownership rights limitation and other facts concerning the real estates necessary for the national economy;
2. a documentation of surveys, a documentation of entries and a collection of deeds.

The records should be made and kept in accordance with reality by the Central Office for Surveying and Mapping, mainly its district offices, which were in charge of keeping the records in accordance with reality, based on notified changes and local surveys, in co-ordinance with authorities, organizations and citizens to which it may have concerned. The above-mentioned authorities and organizations were obliged to present relevant decisions to the locally competent survey office at the latest within sixty days after such decisions came into legal force and other deeds within sixty days after the relevant legal relation was established. By operation of law, the data of the real estate records were binding for planning and management of agricultural production, for reporting and statistics of the agricultural-land portfolio and forest-land portfolio, for real-estate summaries run by socialistic organizations as well as a basis for contracts and other deeds related to the real estates.

At the same time, the Central Office for Surveying and Mapping was authorized, in mutual accord with involved ministries and central authorities, to enact regulations required for implementation of this law.

The regulation of the Central Office for Surveying and Mapping No. 23/1964 Sb., which implemented Act No. 22/1964 Sb., on real-estate records was enacted on the same date as the above-mentioned Act. It set out that real estate records should be kept for every municipality according to cadastral districts. A cadastral district is a technical unit consisting of a topographically closed complex of real estates, the records of which are kept together, with the perimeter of the cadastral district usually identical to the perimeter of the municipality (one municipality can, however, contain also two or more cadastral districts).

The real-estate records included the following types of documentation:

1. documentation of surveys (a land map, a working map and a registration map),

2. documentation of entries (a list of changes, a list of parcels, user´s sheets, ownership sheets (title deeds), a list of users and owners, a registry of users and owners and a list of houses),
3. collection of deeds (resolutions and other deeds, records of changes, field sketches, geometric lay–outs, notebooks of measured directions, angles and lengths, calculations of geodetic data, calculations of areas of changed parcels, lists or reports, etc.),
4. documentation of summaries and reports (summaries of land types – cultures, areas of particular cultures, summaries of registration sheets, etc.).

Real Estate Records in the Czech Republic Early in the 3rd Millennium

Whereas the previous Austrian comprehensive legal regulation was in force for the already mentioned 93 years, Act No. 22/1964 Sb. lasted only 28 years, before being replaced with other two Acts, with the first one (to put it simply) regulating the procedure of entries and registration of ownership titles to real estates, while the other one focusing rather on the substantive-law regulation of the very cadastre of real estates as such. Another peculiarity is a little paradoxical situation about these Acts, with the first Act passed by the Federal Assembly of the Czechoslovak Federative Republic, announced in the Collection of Acts and becoming valid several days before the other Act (Act on the Czech National Council), while using for those several days the so far non-existing terms of the second Act (mainly the very term "real estate cadastre").

Streszczenie

Słowo *cadastre* pochodzi z łaciny i oznacza mniej więcej to samo co listę/spis (*caput* = głowa, *capitastrum* = rejestr pogłówny). Ogólnie rzecz biorąc, słowo to zwykle odnosiło się do dobrze zorganizowanego spójnego opisu szczególnych cech, osób, rzeczy lub praw, szczególnie opisu gruntów i dochodów z rzemiosła i handlu gromadzonych w celach podatkowych. Próby wprowadzenia jednolitej polityki podatkowej sięgają roku 1022, w którym monarcha czeski Oldřich wprowadził podatki pobierane od obszaru gruntów. Pierwszą rozległą i wyczerpującą pozytywną regulację prawną dotyczącą rejestrów nieruchomości na terytorium Czech stanowiło tzw. Ogólne Prawo o Księdze Gruntów wprowadzone ustawą nr 95/1871 Kodeks Reich z dnia 25 czerwca 1871 roku. Nowa kompleksowa regulacja związana z rejestrowaniem nieruchomości została wprowadzona ustawą nr 22/1964 Sb., o rejestrach nieruchomości.

Alena Kliková

REAL ESTATE CADASTRE AND REAL ESTATE REGISTRATION

As the introduction regarding the determining of Real Estate Cadastre and Real Estate Registration, it is useful to start with the history of real estate record-keeping and of registration of real estates and rights. Originally, there were two types of keeping the register of real estate based on the reason of existence of the said types of real estate registers. The first reason for real estate registers was connected with taxes and fees, the second was linked with the protection of ownership and other rights connected with real estates. Protection of ownership and other rights was the task of so-called public books (land boards, farm land books, registry of real property, railway books, etc.). The tax Register of Real Estate is represented by so-called land cadastres (1st Teresian Cadastre, 2nd Teresian Cadastre, Lords' Cadastre, New Joseph's Cadastre, Stable Cadastre, Land Cadastre). Between 1956 and 1960 so-called unified registration of land was put into practice. The subject of the stated registration was the use of real estates and not their ownership. Another type of register came into being between 1964 and 1992 and was called Register of Real Estates.

Currently, The Real Estate Cadastre of the Czech Republic is in charge of registering real estates. The Real Estate Cadastre of the Czech Republic is defined as a data base on real estates in the Czech Republic. The stated data base comprises their list, description, geometry, and position data. Part of the cadastre is the register of ownership and other rights to the real estates. The Cadastre is at the moment integrated, up-to-dated computer system on real estates. It is a part of the basic systems of public administration in the Czech Republic. It is interconnected, for example, with the Register of Inhabitants, and so on. The Cadastre is a source of information, which serves for protecting rights regarding real estates, for tax purposes, for environment protection, for protecting agricultural and forest land, mineral resources, cultural monuments, for scientific and statistical purposes, etc.

The Real Estate Cadastre of the Czech Republic is determined by the following legal regulations:

- Act No. 344/1992 Sb., On the Real Estate Cadastre of the Czech Republic (Cadastral Act), as subsequently amended,
- Act No. 265/1992 Sb., on registering ownership and other rights regarding real estates, as subsequently amended,
- Regulation No. 26/2007 Sb., as subsequently amended,
- Act No. 359/1992 Sb. on geodetic and cadastral authorities, as subsequently amended,
- Regulation of the Czech Geodetic and Cadastral Office No. 162/2001 Sb., on providing information from the Real Estate Cadastre of the Czech Republic, as subsequently amended, and
- Statutory rules No. 111/2001 Sb. on comparing and taking information from the Real Estate cadastre of the Czech Republic and The Register of Inhabitants, as subsequently amended.

Public administration authorities in charge of the activities regarding the management of the Cadastre are determined by Act No. 359/1992 Sb., as subsequently amended. Public administration authorities in charge of providing the services of the Real Estate Cadastre are:

The Czech Geodetic and Cadastral Office – the central organ of state administration. It is located in Prague. It is presided by a chair who is appointed and recalled by the government of the Czech Republic - The Real Estate Cadastre of the Czech Republic provides and manages central administration of the Real Estate Cadastre of the Czech Republic, co-ordinates research in geodetic and cadastre, assures and co-ordinates international co-operation of the Czech Republic in the said field, operates other organs of the state administration in the field of geodetic and cadastre, verifies the management of central data base of the Real Estate Cadastre of the Czech Republic, and carries out further management and organization tasks within the section.

The Geodetic Office – another administrative authority with competence within the republic. It is located in Prague. The Geodetic Office carries out, e.g. administration of geodetic foundation of the Czech Republic, administration of basic state map works and theme state map works determined by the Office, or fulfils other task within the geodetic field, entrusted from The Czech Geodetic and Cadastral Office, etc.

Geodetic and Cadastral Inspectorates – are local administrative authorities. Inspectorates can be found in Brno, České Budějovice, Liberec, Opava, Pardubice, Plzeň, and in Prague. Each stated inspectorate carries out activities within their districts. Geodetic and cadastral inspectorates fulfill

mainly control and monitoring activities regarding the administration of cadastral offices, regarding geodetic activities performed for the Real Estate Cadastre. They further deal with disorders within geodetic field and perform tasks from the Czech Geodetic and Cadastral Office.

Cadastral Offices – are administrative organs established within regions. Regional operation of the said organs is determined in appendix No. 2 of the Act No. 359/1992 Sb. There are 14 cadastral offices for individual regions of the Czech Republic:

- Cadastral Office for Jihomoravský region located in Brno
- Cadastral Office for Olomoucký region located in Olomouc
- Cadastral Office for Královéhradecký region located in Hradec Králové
- Cadastral Office for Jihočeský region located in České Budějovice
- Cadastral Office for Karlovarský region located in Karlovy Vary
- Cadastral Office for the capital city Prague located in Prague
- Cadastral Office for Liberecký region located Liberec
- Cadastral Office for Plzeňský region located in Plzeň
- Cadastral Office for Pardubický region located in Pardubice
- Cadastral Office for Středočeský region located in Prague
- Cadastral Office for Ústecký region located in Ústí nad Labem
- Cadastral Office for Moravskoslezský region located in Opava
- Cadastral Office for Vysočina region located in Jihlava
- Cadastral Office for Zlínský region located in Zlín.

Cadastral offices carry out the administration within the Real Estate Cadastre through their **cadastral workplaces**, which are the internal organizational units of cadastral offices. Their names and places are published in the Collection of Law – notification The Real Estate Cadastre of the Czech Republic under No. 10/2004 Sb.

Cadastral offices are organs which carry out the principal part of state administration regarding the section of Real Estate Cadastre. Cadastral offices carry out state administration of the Real Estate Cadastre of the Czech Republic through locally appropriate cadastral workplaces in compliance with Act No. 265/1992 Sb. on registering ownership and other subject rights regarding real estates of the Czech Republic, as subsequently amended. Cadastral offices register, e.g. ownership and other subject rights regarding real estates, changes in data in

the Real Estate Cadastre, determine permission to enter new information or erase information regarding ownership and other subject rights linked with real estates in the Real Estate Cadastre. Furthermore, cadastral offices, through locally appropriate cadastral workplaces, correct consistency of Real Estate Cadastre with the real state, namely designate changes in the data in the cadastral base of operation, etc. Further activity of cadastral offices, carried out through locally appropriate workplaces, is enabling Real Estate cadastre inspections, providing information, land certificates, copies from the data base of geodetic information, descriptive information, and plot identification in the form of public documents, etc.

The Real Estate Cadastre is (as mentioned above) a computer registration system comprising data on real estates within the territory of the Czech Republic as well as right referential to them. The register within the Real Estate cadastre is divided according to subject and content.

According to subject the following items are registered within the real estate Cadastre:

- Pieces of land,
- Buildings connected with land by solid base, i.e.
  - buildings allocated land registry or registration number,
  - buildings not allocated land registry or registration number,
- Flats and non-residential spaces according to Act No. 72/1994 Sb., which determines some co-ownership relations regarding buildings, flats, and non-residential spaces - Act on flats ownership,
- Buildings, flats and non-residential spaces under construction, which will be liable to registration after having been finished, if demanded by the owner of the real estate property or another party,
- Buildings, flats and non-residential spaces under construction, which will be liable to registration after having been finished, in connection with formation, change or cessation of subject right to them,
- Buildings connected with land by solid base, listed in the special legal enactment (Act No. 183/2006 Sb. – Construction Law).

Pieces of land registered in the Real Estate Cadastre are divided into agricultural and non-agricultural land. Agricultural pieces of land are arable land, hop-fields, vineyards, gardens, orchards, permanent grassy plantations. Non-agricultural pieces of land are forests, water spaces, built-up areas, courtyards, and other spaces. All real estates are registered in the Real Estate Cadastre according to cadastral areas where they are located.

The registration of real estate properties in the cadastre involves also registration of rights connected with the said properties. Registered are:

- Legal relationships registered due to Act on registering ownership and other subject rights linked with real estate properties,
- State organizations management regarding state property (according to Act. 219/200 Sb., On the Property of the Czech Republic and its acting in legal relationships, Act. No. 113/1993 Sb., on Children and Youth Fund, as subsequently amended),
- Right to permanent use of a real estate property,
- Management of real estates within the Czech Republic,
- The capital city of Prague municipal districts authorization of municipal districts to manage the entrusted property of the capital city of Prague,
- Statutory cities municipal districts authorization to manage the entrusted property of the statutory cities,
- Authorization of a budgetary and subsidized organization established by a municipality or a municipal district of the capital city of Prague or statutory cities to manage the entrusted property of a municipality,
- Appurtenance to an organizational unit of a legal entity, if such is registered in a commercial or other register determined by law and the head of such an organizational unit is authorized to manage the real estate property registered in the Real Estate Cadastre on behalf of the above stated legal entity appurtenant to the organization unit,
- Further subject matters according to the character of the registered property due to the Cadastral Act a part of the Real Estate Cadastre.

Activities carried out by the Real Estate Cadastre are determined in the Cadastral Act No. 344/1992 Sb., as subsequently amended, and these are further adjusted in notice No. 26/2006 Sb. regarding reviewing the Real Estate Cadastre, correcting mistakes in the cadastral operation system, providing data from the Real Estate Cadastre, verifying copies of documents, renewing cadastral operation, comparing data of the Real Estate Cadastre with the data in the Register of Inhabitants, and carrying out registration into the Real Estate Cadastre. Below see a delimitation of the types of activities provided by the Real Estate Cadastre.

Review of the Cadastre

Review of the cadastre is ensuring compliance of the data in the Real Estate Cadastre with the actual state.

Correcting Mistakes in the Cadastral Operation System

Further activity managing the Real Estate Cadastre carried out by cadastral offices is correcting mistakes in the cadastral operation system. Correction can be carried out either after a written proposal of an owner or another party, or without a proposal (by virtue of office). Appurtenant cadastral office removes erroneous data, which came to being due to an obvious mistake running the cadastre or due to inaccuracy in measurement, etc. from the cadastre.

Providing Information from the Real Estate Cadastre

Data in the Real Estate Cadastre are public and it is possible to see them and make copies of them. Providing data from the cadastre is determined by regulation § 22 Act No. 344/1992 Sb., Cadastral Act, as subsequently amended, further, it is determined in detail by enactment No. 162/2001 Sb., on providing information from the Real Estate Cadastre.

Providing information from the Real Estate Cadastre can be executed in several forms. It is possible to provide information free of charge or for a charge, which is determined according to the Act on Administrative Charges in the wording of later regulations. Free of charge is looking into the Real Estate Cadastre or getting spoken information. Further forms of providing information from the Real Estate Cadastre are charged. Furthermore, forms of providing information from the Real Estate Cadastre are divided into information in the form of public documents and other forms. Providing information from the Real Estate Cadastre in the form of public documents:

- Providing extracts,
- Providing copies,
- Identifying plots.

Other forms:

- Providing verified copy or copies of documents from a collection of documents,
- Enabling distance access,
- CD, etc.[1]

1 Further see J. Jurníková, et al. Správní právo – zvláštní část, Brno 2004, p. 321.

Verifying Copies of Documents

Cadastral office verifies copies of documents on legal relationships from collection of documents of the cadastre and the registry of real property.

Renewing Cadastral Operation System

Renewing cadastral operation system is one of further activities of cadastral offices. Renewal of cadastral operation system is launched by appropriate cadastral office without any proposal. Cadastral operation system can be renewed by various ways:

- New mapping,
- Digitalizing,
- Land arrangement,
- Investigating communal lines.

Comparing the Data in Real Estate Cadastre with the Register of Inhabitants

One of further activities within the administration of the Real Estate Cadastre is comparing and taking over information of the Real Estate Cadastre of the Czech Republic and the Register of Inhabitants. The said activity as well as the course of it is determined by statutory rules No. 111/2001 Sb., on comparing and taking over information of The Real Estate Cadastre of the Czech Republic and the Register of Inhabitants. The compared items are so-called basic identification data of people, i.e. name, surname, birth number, date of birth, and residence.

Registration of Ownership and Other Subject Rights Regarding Real Estates

This is the most significant activity of the Real Estate Cadastre. This activity is linked with major consequences, i.e. assignments of ownership and other rights regarding real estates. Registration of the stated rights is determined by the Act No. 265/1992 Sb., on registration of ownership and other rights regarding real estates, as subsequently amended, and further implementation notice No. 26/2007 Sb., further Administrative Procedure Code No. 500/2004 Sb., as subsequently amended. Administrative Procedure Code is used as a subsidiary enactment if two special legal enactments do not determine particular procedure for cadastral office activities.

Registration into cadastre according to the above stated Act is:

A. an entry,

B. a record,

C. a note,

D. or their erasure.

The subject of registration into the Real Estate Cadastre is legal relationships relevant to a particular real estate property. Subject rights registered into the Real Estate Cadastre are listed in the Law. According to the Act on registration, the following are registered into the Real Estate Cadastre:

– Ownership right,

– Lien,

– Right of use, and

– Pre-emption right.

ad A) Registration of Entries

Registration of an entry is the most important registration into the Real Estate Cadastre as the constitutional effects of registration into the cadastre lead to origination, change or extinction of a right. Registration is either an entry or an erasure of ownership or other subject rights regarding real estates, if law does not determine otherwise, i.e. that the registration is to be carried out as a record or a note. Registered rights come into being, change or cease to be on the registration date into the cadastre. Legal effects of a registration come into being on the basis of legitimate decision on permitting a registration. The day of the legal effect is the day when the entry is delivered to the cadastral office.

Subject of the entry – are the rights registered in the cadastre. These are the rights of ownership, lien, use and pre-emption right with the effects of tenure, also further rights listed in the Act on the Real Estate Cadastre. These rights are registered into the Real Estate Cadastre mostly on the basis of bilateral agreements and contracts (e.g. purchase contract, agreement on common property in marriage settlement, etc.).

The participants of the proceedings on permitting registration of a right into the Real Estate Cadastre are those whose right are to be determined in the proceedings.

The proceedings on registration of a right is launched after a proposal of a participant of the administrative proceedings. If the proceedings will be started

upon a proposal of a participant it is always within the disposal of the participant[2]. The details and content of a proposal for registration of a right into the Real Estate Cadastre are determined by the law. The proposal for a registration must be supported by:

- a contract, which is a document for registration,
- power of attorney, if the participant of proceedings is represented,
- extract from the Business Register, it the participant of proceedings is a legal entity, and other documents demanded by law.

Cadastral office examines if the proposed entry fulfils the conditions determined by law. These conditions must be examined to the date of filing the proposal for a registration. In case that all the above stated legal conditions for registration of a right are fulfilled, appropriate cadastral office determines through their cadastral workplace that registration of the right is permitted. In case that the conditions for registration of a right are not fulfilled, the proposal for a registration of a right is declined. If registration of a right is permitted, appropriate cadastral office carries out the registration in the appropriate file, further, designates the so-called clause on permitting registration of a right.

Each proposal for launching proceedings regarding permission to register an entry in the Real Estate Cadastre is charged, by Act No. 634/2004 Sb., on administration charges, as subsequently amended, amounting to 500 Czech Crowns.

ad B) Registration of Records

Record into the Real Estate Cadastre is used for registration of ownership rights and other subject rights regarding real estates which came into being, changed or became extinct by law, by a decision of a statutory organ, by a knock down at a public auction, etc. These rights are registered into documents executed by state organs and on the basis of other documents. Documents executed by state organs must be sent to the cadastral office so that the registration is carried out within 30 days after their coming into legal validity or within 30 days after their execution. Cadastral office is obliged to examine if the decision or other submitted documents are legible, legitimate, do not contain mistakes or any other incorrectness. If cadastral office finds out that the submitted documents have any deficiency, they return it to the person who executed the document, designating the deficiencies. If the document is flawless, cadastral office carries out the record. After the registration of a right the office notifies all the parties.

2 Further see S. Kadečka, et al.. Meritum Správní právo, Praha 2007, p. 202.

Registration by a record is possible, e.g. in case of a right of use determined by law, i.e. in case of a right of use of a person who dies.

ad C) Registration of Notes

A note can be characterized as an entry which serves for designating a fact regarding a real estate property or a person and does not influence existence (coming into being or extinction) of a right. A note is of informational character. The significance of a note is to indicate possible legal flaws of a real estate property. Legal effects of registration of a note are declaratory.

A note is registered by a cadastral office on the basis of a delivered decision or court notice, tax administrator, executor, etc.

Streszczenie

Kataster Nieruchomości w Republice Czeskiej jest systemem informacyjnym i rejestracyjnym, który ujawnia prawa własności nieruchomości na terytorium Republiki Czeskiej oraz ich właścicieli. Każda osoba (bez względu na obywatelstwo lub narodowość) ma prawo wglądu do wszystkich informacji dotyczących wymienionych nieruchomości i ich właścicieli. Rejestr nieruchomości istnieje w Republice Czeskiej od wielu lat i ma pewne tradycje. Obecny Kataster jest prowadzony w sposób kompleksowy, systematyczny i szczegółowy z wykorzystaniem dokładnych metod pomiarowych. W razie niezgodności z rzeczywistą sytuacją i informacjami zgłoszonymi w Katastrze Nieruchomości, urząd katastralny dysponuje szeregiem instrumentów do skorygowania tej niezgodności.

Kataster Nieruchomości Republiki Czeskiej jest systemem publicznym regularnie aktualizowanym. Dane zawarte w katastrze są podzielone według ich rodzaju na wpis, rejestrację i notę. Każdy z wymienionych rodzajów jest szczegółowo określony przez prawo.

Ivana Průchová

LAND ARRANGEMENTS IN THE CZECH REPUBLIC (BASIC ISSUES)

Introductory Remark

Land Arrangements, or more precisely land consolidation, land division and land rounding, have a deep tradition in the conditions of the Czech Republic and inside its territory. Unfortunately, consecutively to the change of the political situation after the year 1948, there were serious errors in the way of regulating social relations concerning land arrangements. The most important failure is to be considered the fact that by the Government Statutory Order No. 47/1995 Sb., on Measures in the Field of Economic – Technical Land Arrangements, becoming legally effective, the exchanging of land based on the "owner principle" was abandoned. This principle was replaced by the principle of "exchanging usufruct rights" with the concern in assuring the interests of the agricultural mass production at the expense of others' interests. As a result of this, during the following years practically in the entire territory of the Czech Republic some ownership claims have not been obvious and there have even been some cases of duplicated or multiplicated ownership claims to the same land. Recurrent return to the principle of land exchange based on ownership rights came by passing of the Act No. 229/1991 Sb., concerning the Land Ownership Relations and Other Agricultural Property, as subsequently amended, in connection with the Act No. 284/1991 Sb., on Land Arrangements and Land Offices, as subsequently amended. It enabled to start the period of solving these ownership problems and at the same time fulfilling other requirements on the character, creation and protection of the countryside landscape.

Current Legal Regulation

Basic Concepts

According to a valid legislation the purpose of the Land Arrangements is to **arrange the estates with emphasis on a spatial and functional structure, also**

to unite or divide the estates in the public interest. The main reasons for these arrangements are to guarantee the owners the accessibility of the estate and provide reasonable use of it. They also adjust the boundaries in such a way as to ensure the rational usage of the estate. Everything mentioned above is taken into account with setting up the right of property and also easements. At the same time the conditions for environmental improvement, protection and fertilization of land resources, water management and increasing ecological landscape stability are provided.

The objects of the Land Arrangement are all estates in the district of these arrangements regardless their present way of usage, existing property rights and the right of usage to them.

A territory of the Land Arrangement is a territory that will be affected by these arrangements, which consists of one or more than one Land Register's districts. When it is needed for updating a Land Register, the land extend included into the Land Arrangements might be broader. It can include the estates that need to update their geodetic information. When it is convenient to the goal of Land Arrangements, the neighboring estates from the cadastral territory could be taken into the territory where the Land Arrangements take place.

If the cadastral territory is under a different Land Office, and this Land Office has also begun the Land Arrangements procedure, the estates will be taken into the Land Arrangements after a deal is made with the other Land Office whose jurisdiction are the estates therein.

The Administrative Code does not apply to determining a territory of the Land Arrangements.

The Land Arrangements are being implemented ordinarily in the **form of complex Land Arrangements** which are entitled to solve all relations – property rights, landscape-forming, ecological and all other relations that need to be taken into consideration. The form of simple Land Arrangements can also be used, especially when only specific needs for property usage (for example, quick reintegration of estates, the accession to the estates) or ecological needs of the landscape (for example, anti-erosive or flood-protection remedies) need to be solved. The simple form of Land Arrangements could also be used when the arrangements concern only part of the cadastral territory.

The specification or reconstruction of appointed estates which were assigned under the terms of presidential decree of the Republic No. 12/1945 Sb. and No. 28/1945 Sb. and by the Act No. 142/1947 Sb. and No. 46/1948 Sb., which is during the period of the second land reform, could be done by the simple Land Arrangements.

Making Decision in the Land Arrangements

The Land Arrangements are decided by the **Land Offices**. Their system is based at the level of the Ministry of Agriculture and consists of the Central Land Office and Land Offices that are established as administrative agencies with territorial jurisdiction set according to the supplement of the Act on Land Arrangements. Decisions on Land Arrangements are issued in the **special administrative procedure** for which the Administrative Code is used subsidiarily. This procedure is always regarded as the procedure started ex officio by the action of the Land Office. Land Arrangement procedure must always be started by the Land Office when the owners of acreage majority in the cadastre area declare consent for it. Starting of the Land Arrangement procedure is notified by the Land Office using public notice.

The Land Office notifies about the commenced procedure in a written form the competent Cadastre Office, agency of land planning (zoning), surveyor's office, agency of the agricultural land resources protection, agency of the environmental protection, agency of water utilization (water law agency) and agency of state forest administration. If the Land Arrangements procedure is concerning interests protected by the state security regulations, public healthcare regulations and other interests protected by special legal regulations, the Land Office also notifies these other concerned public administration offices. These offices specify requirements to protect the interests according to special regulations up to 30 days from notification receival.

There are many specific issues concerning the Land Arrangements procedure. One of the most important is the fact that the Land Arrangements procedure and decisions in this procedure are not affected by the legal terms for making decisions set by the Administrative Code. Also the special reason for stopping the Land Arrangements procedure is explicitly present in the regulation – it is effective in case that the reason for which the procedure was started does not take place any more and further in case that during Land Arrangements the obstacles unabling to continue the procedure appeared.

Key importance in the first phase of the Land Arrangements procedure is present by so called **introductory proceedings**. The Land Office invites the procedure parties and owners having any real property inside the presumed perimeter of Land Arrangements to these proceedings for introducing them with a purpose, form and expected perimeter of the Land Arrangements.

The group of the **Land Arrangements procedure** parties is regulated specifically in order to fulfill the purpose of Land Arrangements. They are primarily owners of real property affected by the solving in the Land Arrangements and both physical and legal persons whose property rights or other rights in rem to land

may be directly affected. These persons do not include the owners for whose land the only effect by the Land Arrangements is the renewal of geodetic information. Furthermore, they include a construction developer if the Land Arrangements are caused by the constructing activities. Finally, the parties are also the municipalities having the land involved into Land Arrangements in their territory. The parties can then be the municipalities with whose territory the land involved into Land Arrangements territory adjoins if they accede to the procedure as parties up to 30 days from the invitation by competent Land Office.

The owners of land solved in the Land Arrangements vote for the so called **committee of representatives** existing during the time of Land Arrangements. The committee represents their interests and closely cooperates with the Land Office and the processor of Land Arrangements project.

The important step in the Land Arrangements procedure is the creation of the **roster of land owners' claims** which is made by the Land Office. The roster of claims contains information about a price, acreage, distance and type of the land. Then it contains the information about the limitations resulting from lien, first option right, real burden and fixed period rental.

In the Land Arrangement procedure the effective legal regulation as of the day of creating the roster of claims is used for assessment. Now it is the Act No. 151/1997 Sb., on Property Assessment and on an Amendment to certain Acts (Act on Property Assessment), in the current statutory text and the executive public notice to the Act No. 540/2002 Sb., as subsequently amended. The Land Office determines whether the assessment will be done by the Office or will be delegated to the processor of Land Arrangements or court expert.

The next important step during the procedure is creating the **Land Arrangements project**. Its creating is ensured by the Land Office by the processor or the Office creates the entire project or its part itself.

The processor of project can be only the physical person having the administrative license to this activity according to Section 18 Act on Land Arrangements. In the name of legal person or the Land Office the project can be also created only by the physical person having the administrative license.

While processing the project, it is started from the information that the Land Office has at its disposal and further from the information that involved administrative agencies and administrators of subterranean and aerial conduits are obliged to provide free of charge to the Office.

The basis for the project of complex Land Arrangements is the surveying of objects that will remain the content of Land Register geodetic information even after the end of Land Arrangements. If it is rational for the examination by the Land

Office, this method is accordingly used with simple Land Arrangements. The output of geodetical activities that should form the basis for the Land Arrangements project must be verified by the physical person that was given the license according to Act No. 200/1994 Sb., on Surveying and Mapping and on Changes and Amendments of some Acts in connection with its coming into force, in the current statutory text. On the basis of surveying the real conditions in the terrain the territory of Land Arrangements and group of procedure parties are stated more precisely. Later changes of the territory and group of parties of Land Arrangements can be made if the Land Office finds the reasons for doing so.

In this phase the placing of borders is also investigated. It is carried out by the committee that consists of the employees of the Land Office, the Cadastre Office, the project processor, representatives of municipalities and according to current needs also the representatives of other agencies. The chairman of the committee and its members are designated by the director of the Land Office in accord with the Cadastre Office.

The Land Office submits the list of land parcels that are affected by the Land Arrangements to the Cadastre Office in order to mark the Land Arrangements in the Land Register.

Cooperation with the land owners takes place as one of significant instruments to provide reasonability and success of concrete Land Arrangements. The processor of the project is obliged to discuss the new land organization with involved land owners during the creating of Land Arrangement project and the owners are obliged to express their opinion on the project. If the owner does not express his opinion on the new land organization in the term set by the Land Office, it is assumed that he agrees with it.

For the examination of the Land Arrangement project the Land Office summons all owners if at least one third of owners or the committee of owners (when it was appointed) requests that.

If the procedure party does not take part at the hearing on call of the Land Office and had the opportunity to apply his observations and advice there, he can express his opinion on the object of hearing in a written form up to 15 days from receiving the call to take part at the hearing. The Land Office does not take account of later raised observations and suggestions.

The Land Office proposes to owners the **new estates** in the way that they correspond to the original ones with their adequacy in term of price adequacy, acreage adequacy, distance adequacy and, if possible, to type of the land.

Comparison of the price, the acreage and the distance of proposed estates with original estates is done totally for all estates of the owner solved in the Land Arrangements.

Decreasing or increasing the price, the acreage and the distance of newly proposed estates compared to original estates over the set criteria of adequacy can be made only with consent of the owner.

The essential polyfunctional instruments with functions of improving the conditions for own agricultural production and further with landscape-creating, environment protection and ecological functions are so called **community facilities** (they are especially remedies serving for making estates accessible - field or forest ways, little bridges, grade crossings, anti-erosive remedies, water utilization remedies, remedies for improving the environmental protection and environmental creation).

The community facilities plan is reviewed by the committee or by owners, if the committee was not elected. Then it is approved by the municipal council at the public session.

The processed community facilities plan is then handed over to involved state administration agencies by the Land Office. These state administration agencies have 30 days to express their opinion on the plan. Their agreeing opinion replaces the action (decision, consent, dispensation) according to special regulation.

From the Property Law point of view the Land Arrangements Act stipulates a certain sequence for segregating the estates necessary for community facilities. According to this sequence, first estates to be used are the land owned by the state, then land owned by the municipality. If it is not possible, other owners participate on segregating needed acreage of land resources proportionally according to total acreage of their exchanged land. In this case the claims of owners entering into the Land Arrangement are proportionally decreased.

While segregating the estates of state for community facilities the blocking is effective in relation to estates dedicated to mining minerals, estates in current intown area of municipality, estates in the area of municipality that can be built up and estates intended for compensation settlement in restitution process.

The community facilities implemented according to the authorized project are owned by the municipality at which territory they are based in if something other does not imply from the Land Arrangements carriage of a motion decision. If the owner of community facilities is supposed to be other subject than the municipality, the ownership of that facility can be gained without charge only in the case that this facility is supposed to serve the public interest.

Hearing on the processed Land Arrangements project is notified by the **Land Office** at the official notice board where it is possible to look at the processed project for 30 days. The project has to be displayed also inside the village. The Land Office notifies all known procedure parties about the project display and at the same time it informs them that they have last possibility to apply their observations at the Land Office. Therefore, the principle of procedure concentration applies there. The Land Office does not take account of later raised observations and suggestions. If the observations and suggestions are administered and on their basis the modifications of the project are made, the Land Office is obliged to request new opinion expression from involved parties. After the expiration of term to look at the processed project the Land Office summons the final hearing at which it evaluates the outcome of the Land Arrangements and notifies the project which will be decided to parties.

Making decisions in the Land Arrangements can be denominated as **two-phasal** and shows many specifics compared to general administrative procedure.

In the first phase the **approval of the Land Arrangements** project takes place. The Land Office decides about it if owners of 75 percent acreage of the land solved in the Land Arrangements agree with it whereas the weight of the vote of share part-proprietor corresponds to his share to the total acreage of the land. The decision on the project's approval is notified by public notice and the Land Office delivers it to all known parties. From the essentials of the project only the documentary part and graphical part both relating to this particular party are enclosed to the decision delivered to procedure parties. It is possible to appeal against the decision on the Land Arrangements project's approval. In the case of appeal the Land Office that issued this decision notifies other procedure parties about the content of appeals addressed using the public notice along with notice about the possibility to express the opinion to the object of appeal up to 7 days from the day of delivery by public notice.

If the appellate agency affirms the decision of the Land Office, it will deliver it only to the appellant and notifies the decision of appeals to other parties using public notice.

If the appellate agency changes or reverses the decision of the Land Office, it will notify the decision of appeals using public notice and delivers it to all known procedure parties.

The Land Office that rendered an appealed decision can make decision of appeals itself if it allows an appeal in extenso and other procedure parties directly involved by the change agree. In that case the Land Office notifies the decision to all parties using public notice and delivers to those who are involved by the change.

The approved Land Arrangements project with all essentials is stored at the Land Office and at the competent municipal office where it is possible to look at it. The decision on the approval of the project that has the force of res judicata (so called "approved project") is delivered by the Land Office to the Cadastre Office for marking to the Land Register.

In the second phase the Land Office decides on the basis of the decision on the Land Arrangements approval having the force of res judicata **on the exchange or transition of property rights, the specification of the refunding the difference between estates' prices and the term, creating or repealing the easement to involved estates**. The approved project is legally binding for making decisions in the second phase. These decisions are issued after the verification whether the action against the decision on Land Arrangements project approval at the competent court was not taken.

The approved Land Arrangements project is legally binding for processing of the renewed file of geodetic information and also it is the binding basis for decisions on the transition of property rights to land upon which the community facilities are situated. The decision is notified using public notice and at the same time it is delivered to the Cadastre Office and all owners and persons involved by creating or repealing the easement or by the change in lien, all of them known to the Land Office. Only the part of essentials regarding the particular person is enclosed to the decision delivered to these persons. This decision comes to legal force by the last day of 15 days term passing. This term begins to run on the day of decision's posting using public notice.

The appeal is not possible against the decision on the exchange or the transition of property rights or on repealing or establishing the easement. Although it is possible to defend against it per curiam.

In cases when the output of Land Arrangements serves also as updated Land Register data, the updated Land Register data become valid by second phase decision coming into legal force.

The Implementation of the Land Arrangements

The implementation of Land Arrangements is based on accredited proposition of Land Arrangements. Proposition in this case has already been discussed with the committee of representatives and has been made with continuous cooperation with the committee. The owners' needs and financial guarantees of the Land Arrangements' implementation have to be taken into consideration.

Land Office then secures that the new arrangement of estates is delimited and marked in the terrain according to the needs of the owners, as soon as the decision on the Land Arrangements' proposition approval is in legal force.

The delimiting of boundaries for the estates that have their breaking points marked in the Land Register as persistently stabilized in connection with the Land Arrangements is not possible to be repeatedly covered from the state resources.

The Use of the Delimited Estates

If the owners do not make other arrangements, the use of the delimited estates begins after the harvest of crops and when the stubble ploughing is completed, which is usually on 1st October of the common year, even if the implementing decision was not published yet.

The Costs of Land Arrangements

The Costs of Land Arrangement are paid by the state. The cover of the cost could be also made by the participants of the Land Arrangement, or even other individuals or legal person, if they are interested in the implementation of the Land Arrangements. The state could provide subsidies or grants under special regulations. If the implementation of Land Arrangements is invoked as a result of estate constructing activities, the costs of the Land Arrangement are paid by the participant of building permit procedure (estate promoter) in the extent depending on the area affected by the building construction.

Streszczenie

W opracowaniu przedstawiono podstawowe zagadnienia dotyczące scalania gruntów w Republice Czeskiej. instytucja ta uregulowana jest głównie w ustawie nr 284/1991 Sb. Stosowanie przepisów tej ustawy (oraz innych aktów związanych z omawianą materią) jest bardzo trudne, w szczególności z powodu złożoności praw do gruntu oraz nieuporządkowanych stosunków własnościowych. Autorka prezentuje tytułową problematykę z punktu widzenia prawa materialnego oraz procesowego.

Ilona Jančářová

ENVIRONMENTAL LIMITATIONS OF THE LAND USE

Introduction

According to the Czech law, a real estate is a piece of land and/or buildings connected to the land by a solid base. Because of the environmental aspects of the real-estate, this contribution will be focused mainly to the land, which must be considered as a part of nature even though it is used and reshaped by man. Therefore it must be protected and its use is regulated according to the environmental law.

In the Czech Republic, the owner of the real estate property is limited by numerous environmental regulations, related mainly to the way how the land can be used. These regulations are contained in various laws dealing especially with nature protection, forest and agricultural land protection and others. Because of its limited scope, this contribution is aimed at selected legal instruments in this field.

Land-use Categories and Development Projects

The whole area of land in the Czech Republic is divided into different categories according to the prevailing and most effective use of the particular piece of land. These categories are arable land, hop fields (hop gardens), vineyards, gardens, orchards and meadows and pastures (grass areas). These categories altogether represent the agricultural land. Non – agricultural land (other than agricultural) includes categories of forest land, water areas (land covered by surface water bodies), developed areas and other areas[1].

There is a basic rule that the land should be used for the purpose which is designated by the specific category that the lot is part of. It means, for example, that vineyards should be used for raising wine, orchards for planting fruit trees while municipal parks or parking lots represent the last category – other areas. If the owner intends to change one category of land into another one, he generally needs to have

1 Act No. 344/1992 Sb. on the Real Estate Cadaster, as subsequently amended.

a permit (development consent or other land-use permit). The authority competent to issue this permit is the building authority. In certain cases, before this decision is made, an approval issued by another authority is needed. Those are situations, for example, if forest land should be used for construction of a high-way or agricultural land should be used as a parking lot or for other purposes. The approvals issued by different environmental protection authorities (air protection authority, water protection authority, nature protection authority, etc.) are always needed if environmental components could be affected significantly by the projected activity.

It is necessary to say, at the same time, that the development project, resp. the projected change of category, has to be consistent with land use plans that were accepted and approved according to the law. Inconsistent projects may not be permitted; otherwise the permitting decision would be illegal.

Moreover, the Act No. 334/1992 Sb., on the agricultural land protection, as subsequently amended, enables the agricultural land protection authority to impose the duty to change the present category into another one for environmental protection purposes. In this case, the owner of the land is entitled to recover the expense needed for the change as well as the economic loss that he had suffered by the change of category. However, this owner's right is not set quite clearly and this is probably the reason why this provision is not applied in practice.

A special instrument of environmental protection related to development is represented by the environmental impact assessment procedure (EIA). EIA is the procedure enabling the assessment of all the impacts the proposed activity might have on the environment. The goal of the environmental impact assessment is to embody the environmental protection to development programs and projects and to incorporate the environmental aspects to decision-making processes. Not all activities are assessed in this procedure, though. They are delimited in the Annex I to the Act[2] and by the screening procedure which is a part of the environmental impact assessment. Such activities must be assessed in the EIA procedure before they are permitted.

Land as a Part of the Nature

The Act No. 114/1992 Sb., on nature protection, as subsequently amended, set various legal requirements in relation to the use of the land. First of all, the basic duty of all landowners is to protect territorial systems of ecological stability that

2 The Czech Act No. 100/2001 Sb., on the Environmental Impact Assessment, as subsequently amended, comes out of the Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as subsequently amended by the Directive 97/11/EC, and the Directive 2001/42/ES on the environmental assessment of certain plans and projects.

were established at their real estates. Creation of those ecosystems is considered to be a public interest. If the change of category of land is needed for the sake of the system of ecological stability, the landowner can either agree with the change of category or the land authority has a duty to offer him another lot owned by the state. At the same time, the Building Act No. 183/2006 Sb. declares the establishment of territorial system of ecological stability elements as a reason for possible expropriation. Therefore, the landowner does not have another choice than to agree with the offer; otherwise he could lose his real estate based on the expropriation decision.

The provision dealing with the necessary change of land category is similar but different to the above mentioned possibility of the agricultural land protection authority to impose the duty to change the present category into another one for environmental protection purposes according to the Act on agricultural land protection. This regulation, however, cannot be applied for the land needed for the establishment of territorial systems of ecological stability[3].

Beside systems of ecological stability, the Nature protection act introduces so called "significant landscape components". These significant landscape components are forests, marshes, watercourses, ponds, lakes and river valleys. They are designated directly by the law. Beside those, other parts of nature can be proclaimed as significant landscape components based on the decision of the nature protection authority in the process of registration.

Significant landscape components are protected against destruction. They can be used; however, their ecological functions may not be threatened or damaged. Activities that could seriously affect significant landscape components, such as changes of land-use categories, development projects, changes of watercourses and similar ones, must be approved by the nature protection authority in advance. A similar rule relates to landscape protection. To put a building in the landscape and to do other activities that could significantly affect the landscape, the nature protection authority's approval is required as well.

Landowners are also limited in their right to cut solitary trees growing outside the forest. The basic legal rule is that they need to have a permit. There are certain exemptions from this rule, for example, if the tree threatens the lives of people and/or their property, one does not have to have a permit to cut it down, or natural persons do not need to have a permit to cut down smaller trees up to a certain size, etc. Aside from the permit, the nature protection authority is entitled to ask for compensation in the form of planting a new tree at another site with the consent of the owner of that site.

3 Section 59(3) of the Nature protection act No. 114/1992 Sb., as subsequently amended.

Specific conditions are set by the law for specially protected areas. The Czech law differentiates various categories of specially protected areas. These are bird areas, national parks, protected landscape areas, national nature reserves, nature reserves, national nature monuments and nature monuments. Some of them form the European system of protected areas NATURA 2000.

Based on the Directive 79/409/EHS, bird areas were established by several governmental regulations. The landowners in those bird areas may develop their economic activities; however, the government was enabled to set activities taking place in the specific bird areas which must be approved by the nature protection authority.

On the territory of the first zone of national parks or protected landscape areas it is prohibited to permit placing and construction of new buildings. In second and other zones, if it is not prohibited directly by the law, any development activities must be approved by the nature protection authority in the form of a binding opinion with the exception of a developed area in the fourth zone where the land-use planning documentation is in existence, part of which is the nature protection authority's opinion.

On the whole territory of national parks the land can be used in a manner not causing substantial changes in biodiversity or threatening the functions of its ecosystem. The forests in national parks must be managed in a special way with the aim to support biodiversity. Timber production cannot be a primary goal in national parks. Similar limitations and conditions of their use are set for other categories of specially protected areas including their protective areas. Instead of an obligation to respect those legally set conditions for especially protected areas established by the nature protection authority, landowners can enter into agreements with the nature protection authority. Based on those agreements, national nature reserve, nature reserve, national nature monuments and nature monuments can be established along with the conditions of their use and care about them.

The only way how to permit an activity which is prohibited under the especially protected areas regime is to get an exemption according to Section 43 (Nature Protection Act). The exemptions can be awarded by the government in cases when another public interest significantly prevails the interests of nature protection.

A particular piece of land is eligible to serve as a habitat of especially protected species of animals and plants that are endangered, highly endangered or critically endangered according to the Czech law. In this case, the landowner is also limited in using his property, because those species are protected and it is generally prohibited to damage or otherwise disturb them or their habitats. The exemption of the ban can be decided upon by the nature protection authority only if the public interest significantly prevails the nature protection interests in cases specified by the law.

It is obvious that because of the limitations landowners can suffer substantial economic loss. That is why they are entitled to compensation if they own agricultural land, forest land or a pond with fish or poultry farming. The same right to compensation belongs to the tenant of the land if the owner does not apply for it. The right to adequate compensation arises from the Charter of Basic Human Rights and is specified in Section 58 of the Nature Protection Act. The application of this provision, however, is complicated. There are some question marks if the landowner is entitled to the compensation each year or at a single time, and if his right relates to the so called "potential economic loss" or to actual loss that the landowner had suffered.

Another substantial limitation of landowners under the Nature Protection Act is the priority transfer right of the state to the undeveloped land outside the developed areas of municipalities which is consequently in the territory of national parks, national nature reserves and national nature monuments. If the owner of this land intends to sell it, he has a duty to offer it to the nature protection authority. Only if the state is not interested in the property, then the landowners are free to complete a deal.

A general duty of the landowner is to improve the status of the natural environment with the aim to conserve the biodiversity and to support its system of ecological stability. To provide the nature with favorable care, the landowners are encouraged to enter into agreements with the Nature Protection Authorities. Those agreements set conditions of the proper management of the land. The owners are eligible to apply for a financial subsidy. On the other hand, if the owner refuses to take measures to improve the natural state of the environment, the nature protection authority is entitled to do so. The landowners and tenants are obliged to let persons carrying out such measures to enter the property and to take those measures.

Another limitation in relation to investors and landowners is contained in Section 66 of the Nature Protection Act. According to it, the nature protection authority is entitled to set conditions for activities taken by the natural and legal persons who could cause illegal change of generally or especially protected parts of the nature, and even to prohibit such activity. It means that even legally permitted activity can be stopped for the sake of nature protection. If the activity is taking place according to the Building Act No. 183/2006 Sb., the investor having discovered protected parts of the nature has a duty to report this finding to the building authority or to the nature protection authority. At the same time he is obliged to take measures to secure it and to interrupt or stop the activity so that the protected part of nature would not be damaged or destroyed. The authorities then set conditions for activities taken, they can even decide on interruption of the work until the approval to proceed is issued. Based on the announcement of the finding, the building permit/development

consent can be changed in the public interest. Even though the investors are entitled to compensation of expenses that were incurred due to the above mentioned process, they are generally reluctant to keep the law.

Forest Land

The owners of the forests are limited in use of this land because of the environmental functions of the forests not only according to the Nature Protection Act, but also in the regime of the Forest Act No. 289/1995 Sb., as subsequently amended. While using the forest the owner must take care of its environmental functions. The forest land may not be used for other purposes without the approval issued by the state forest administration. Beside that, legal requirements for the change of category of land must be fulfilled. In this case, the approval will serve as a basis for the development consent or another land-use permit.

To prevent injuries and damage to the property, for example by falling stones, trees or by avalanches, it should be necessary to take measures to prevent it. The owner of the forest land is obliged to withstand those measures. Moreover, the forest state administration is entitled to decide on the changes of forest management or to limit the use of the particular forest lot. The landowner has the right to compensation for the loss that he had suffered based on this decision.

Other limitations are related to the forest management. Landowners have to renew the forest stand and obey various regulatory requirements; for example, they are allowed to cut down only trees older than 80 years of age and exploit timber according to the forest management plans setting the maximum amount of timber, to take measures to prevent pests and others. Substantial limitations are related to protective forests and to special purpose forests (for example forests in national parks and other) because their management should be aimed at other functions than timber production. The owner of the forest has the right to compensation of expenses paid for measures imposed by the forest state administration and the loss he had suffered by the limitation of economic use of his property.

Conclusion

The environmental law in the Czech Republic sets very strong requirements limiting the owners of the land for the sake of nature, resp. environmental components and environment as a whole. Fulfillment of those duties is secured by sanctions that may be imposed for illegal behavior. However, the requirements are so strong that very often it pays off to breach the law. Fines are usually set too low and in a certain range without regard to time when the illegal behavior is taking place. If fines were

set for each day in which the law was broken, in certain situations it would be more effective.

Provisions establishing the owner's right to adequate compensation for the limitation of the use of his land were missing for quite a long time in the Czech law which resulted in noncompliance with the Czech Charter of Basic Human Rights in the past. Nowadays, those provisions were incorporated into the law; however, the right to compensation is not set clearly enough to be applied without difficulties.

Streszczenie

W Republice Czeskiej właściciela nieruchomości ograniczają liczne przepisy „środowiskowe" związane głównie ze sposobem w jaki może być wykorzystany grunt. Przepisy te zawarte są w różnych ustawach, w szczególności tych dotyczących ochrony środowiska, ochrony lasów i gruntów rolnych. Ze względu na ograniczony zakres niniejszy artykuł ma na celu przedstawienie wybranych instrumentów ograniczających swobodę korzystania z prawa własności nieruchomości.

Krzysztof Prokop

EXPROPRIATION OF REAL ESTATE IN THE CONSTITUTION OF THE REPUBLIC OF POLAND AND IN THE DECISIONS OF THE CONSTITUTIONAL TRIBUNAL

1. The Essence of Expropriation of Real Estate in the Constitution of the Republic of Poland

The notion of expropriation has caused a lot of doubts ever since this term was first used in Art. 7 of the Constitution of 1952 (in the version formed by the amendment of December 1989[1]). Even though the Constitution of 1952 was abolished when the "Small Constitution" of 1992 became effective[2], Art. 7 maintained its binding force until the Constitution of the Republic of Poland of 2 April 1997 came into force[3]. Article 21 of the current Constitution says: "1. The Republic of Poland shall protect ownership and the right of succession. 2.2. Expropriation may be allowed solely for public purposes and for just compensation."

Problems with the definition of expropriation are caused, most of all, by the fact that the Constitution does not precisely define this institution. Expropriation is regarded as a pre-existing term and, to define it, one must refer to views of the

1 Statute of 29 December 1989 on amending the Constitution of the Polish People's Republic (Journal of Laws no. 75, item 444). As a result of the revision of the Constitution, such laws were changed as those on the social and economic system. The changes included an introduction of the principle of freedom of economic activity and protection of property.

2 Constitutional law of 17 October 1992 on Mutual Relations between the Legislative and the Executive Powers in the Republic of Poland, and on Territorial Self-government (Journal of laws no. 84, item 426, with subsequent changes).

3 Journal of Laws no. 78, item 483, with subsequent changes.

doctrine and to judicial decisions. Notably, as a statutory institution, expropriation has been and still is understood as deprivation of property on the basis of an individual administrative decision[4].

Since the early 1990s, the constitutional term of expropriation has been generally understood in a broader sense than the statutory one. On the basis or Art. 7 of the Constitution of 1952, in its decision of 8 May 1990, the Constitutional Tribunal stated that "expropriation, in the understanding of Art. 7, means all deprivation of property [...] regardless of its form"[5]. The position of the Tribunal was completely different in its decision of 28 May 1991. The position of the Tribunal was completely different in its verdict of 28 May 1991[6], when the Tribunal decided that the term "expropriation" has a fixed meaning in the doctrine and the law, and stands for depriving of property conducted on the basis of an individual administrative decision. However, in its later decisions, the Constitutional Tribunal returned to the broader definition of expropriation presented in the verdict of 8 May 1990. This understanding of the institution of expropriation became dominant in the 1990s. Because the provision on expropriation was transferred into the Constitution of 1997 almost without any changes, the decisions of the Constitutional Tribunal of the early 1990s remain valid to this day.

The fact that expropriation is treated as a pre-existing term does not mean that it should be interpreted the way it is defined in the act on real estate administration. According to general principles of interpretation of legal acts, as well as to decisions of the Constitutional Tribunal, provisions of the Constitution must not be interpreted on the basis of statutory provisions[7]. Therefore, the interpretation of the institution of expropriation in the Constitution of the Republic of Poland must be autonomous[8]. The statutory provisions may only play an ancillary role in the process of interpretation. This was the argument used by the Constitutional Tribunal in its verdict of 7 February 2001[9]. In another verdict, that of 12 April 2000[10], the Tribunal stated that it is the Constitution that must set the direction for interpretation of statutory provisions, not the other way around.

The broad definition of expropriation that results from the Constitutional Tribunal verdicts means that expropriation comprises not only deprivation of property under an administrative decision but also any other deprivation of property

4 See Art. 112 of the statute of 21 August 1997 on Administration of Real Estate (Journal of Laws 2004, no. 261, item 2603, with subsequent changes) and art. 46-48 of the previous statute of 29 April 1985 on Administration of Real Estate and Expropriation of Real Estate (Journal of Laws 1991, No. 30, item 127).
5 K 1/90, OTK 1990, item 2.
6 K 1/91, OTK 1991, item 4.
7 See L. Morawski, Zasady wykładni prawa, Toruń 2006, p. 113.
8 B. Banaszkiewicz, Konstytucyjne prawo do własności in: M. Wyrzykowski (ed.) Konstytucyjne podstawy systemu prawa, Warsaw 2001, p. 47.
9 K 27/00, OTK 2001, no. 2, item 29.
10 K 8/98, OTK 2000, no. 3, item 87.

for public purposes. The form of the deprivation of property is irrelevant[11]. To support this position of the Tribunal, one can quote the fact that Art. 21, item 2 of the Constitution does not stipulate the allowed form of expropriation[12]. Another provision of the Constitution (Art. 31 passage 2) states only that expropriation can be effected solely on the basis of a statute.

The position of the Constitutional Tribunal was modified in the aforementioned verdict of 12 April 2000 and in the verdict of 14 March 2000[13].The Tribunal made the reservation that the broad understanding of expropriation may not give the legislator the discretion to deprive citizens of property. Article 21 passage 2 may not be a model of control for depriving communes of elements of their property. What is applicable in such cases is the provisions of Art. 165 and 167 of the Constitution.

The verdict of the Constitutional Tribunal of 19 December 2002[14] on the property of Poles who have left their property in the territories to the east of the Bug River when they were re-settled to Poland in its new borders after World War II shows that Art. 21 passage 2 may refer to the so-called factual expropriation in the understanding of the decisions of the European Court of Human Rights[15]. On the other hand, in the aforementioned verdict of 14 March 2000, the Constitutional Tribunal found expropriation *ex lege*, conducted by means of a statute, which is a general and abstract act, as being in conformance with the constitution[16].

The Constitutional Tribunal's verdict of 21 June 2000 was a turning point in the constitutional understanding of expropriation[17].The Tribunal returned to the narrow definition of expropriation that was presented in the K1/91 case. The Tribunal referred to expropriation as a pre-existing institution and highlighted the importance of the administrative act of expropriation. It also stated that adapting the broad definition of expropriation makes the difference between expropriation and nationalization, and between expropriation and limitation of proprietary rights, very blurry. This standing was accepted by a part of the doctrine[18].

11 Verdict of the Constitutional Tribunal of 8 May 1990, K1/90.
12 See M. Szewczyk, Ingerencja publicznoprawna w prawo własności jednostki w demokratycznym państwie prawa in: J. Filipek (ed.), Jednostka w demokratycznym państwie prawa, , Bielsko Biała 2003, p. 654, 660-661.
13 P 5/99, OTK 2000, no. 2, item 60.
14 K 33/2002, OTK-A 2003, no. 7, item 97.
15 The existence of factual expropriation was permitted by the European Court of Human Rights, in its verdict in the Sporrong and Lönnroth against Sweden case (1982). See C. Mik, Prawo własności w Europejskiej Konwencji Praw Człowieka, "Państwo i Prawo" 1993, No. 5, p. 30.
16 See L. Garlicki, "Artykuł 21" in: Konstytucja Rzeczypospolitej Polskiej. Komentarz, v. 3, Warsaw: 2003, note no. 16, and the critical remarks of T. Woś to such definition of expropriation: T. Woś, Wywłaszczenie i zwrot nieruchomości, Warsaw 2007, p.35-36.
17 P 25/02, OTK-A 2005, no. 6, item 65.
18 T. Woś, ibid., 33-35.

2. The Object of Expropriation

According to a systemic interpretation, expropriation (Art. 21 passage 2 of the Constitution) applies to property stipulated in Art. 21 passage 1 of the Constitution. Due to the variety of terms used by the Constitution, it is difficult to determine the meaning of the term "property" in the understanding of Art. 21. Without a deep analysis of this issue[19], it is reasonable to support the view that the meaning of property should be broad, due to the guarantee role of the Constitution. Property, in the understanding of Art. 21, means various proprietary rights. Contrary to the provisions of relevant statutes, the Constitution does not specifically state that expropriation refers to real estate. Consequently, as a part of the doctrine claims, the object of expropriation may be not only real estate but also movable goods and intangible goods[20]. An additional argument supporting such a position is the broad definition of property in Art. 1 of the Protocol no. 1 to the Convention on the Protection of Human Rights and Fundamental Freedoms[21]. The supporters of the narrow definition of expropriation, on the other hand, claim that only real estate may be the object of expropriation[22].

3. Prerequisites for Expropriation

The material prerequisite for expropriation is a public purpose. The Constitution does not define this term and leaves it to statutory provisions to define it[23]. The legislator purposefully used an imprecise definition in order to allow the statute to cover complex circumstances of social life[24]. The prerequisites are evaluated not only by the agency effecting expropriation but also by the court that decides on the legality (conformance with the constitution) of the deed[25]. The linguistic interpretation leads to the conclusion that a public purpose has to serve the whole society or a regional society[26]. The limit of so-defined public purpose is the principle of proportionality[27].

A public purpose of a compensation means that expropriation cannot be effected to the benefit of a public entity (e.g. to enfranchise members of housing

19 See M. Szalewska, Wywłaszczenie nieruchomości, Toruń 2005, 121-124; S. Jarosz-Żukowska, Konstytucyjna zasada ochrony własności, Kraków 2003, p. 32-43; T. Woś, ibid., 28-30.
20 M. Szalewska, ibid., 125; otherwise T. Woś, ibid., 30.
21 See F. Zoll, Prawo własności w Europejskiej Konwencji Praw Człowieka, "Przegląd Sądowy" 1998, No. 5, p. 28.
22 T. Woś, ibid., 40.
23 M. Szewczyk, ibid., 655. The public purpose is defined by Art. 6 of the statute on administration of real estate.
24 L. Garlicki, ibid., note 18.
25 Ibid.
26 T. Dybowski, Własność w przepisach konstytucyjnych wedle stanu obowiązywania w 1996 in: J. Trzciński, A. Jankiewicz (eds), Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej, Warsaw 1996, p. 326.
27 See M. Szalewska, ibid., 98. Compare B. Banaszkiewicz, ibid., 48; L. Garlicki, ibid., note 18.

cooperatives)[28]. It is prohibited to use real estate that has been expropriated for a purpose other than a public one[29].

The literature on this subject does not contain any important disagreements on defining public purpose as a prerequisite for expropriation being constitutional and not as a part of the definition of expropriation[30]. Similarly, in its verdict of 12 April 2000, the Constitutional Tribunal stated that "a public purpose is the condition for admissibility of expropriation and not its constitutive characteristic."

The formal prerequisite of expropriation is its statutory grounds. The possibility to effect expropriation solely on the basis of a statute is stipulated in Art. 31 passage 3 of the Constitution. This provision allows for limiting the rights and freedoms of an individual solely by means of a statute. This is particularly important because expropriation, which breaches the essence of proprietary rights, can be effected only on the basis of a statute[31]. Moreover, it should be highlighted that authorization to effect expropriation must be expressly stated in a statute and cannot be implied[32].

4. Just Compensation

As early as the aforementioned verdicts of 1990, the Constitutional Tribunal decided that just compensation is compensation that does not harm the individual and, thus, one which is fair and equivalent[33]. Such compensation should make up for the value of the expropriated real estate and allow the owner to reconstruct it[34]. Moreover, it should determine an adequate, given the circumstances, method to evaluate and pay the compensation[35]. Such compensation does not always have to be a full compensation. The very fact of the compensation not being full does not have to be deemed unconstitutional[36]. Nevertheless, decisions of the Constitutional Tribunal have tended to require a compensation of the full value of the expropriated good[37].

Imposing deductions other than those related to the pre-existing encumbrances of the real estate breaches the constitutional principle of just compensation[38].

28 L. Garlicki, ibid., note 15. See verdict of the Constitutional Tribunal of 29 May 2001.
29 T. Dybowski, ibid., 326.
30 So says e.g. B. Banaszkiewicz, ibid., 47.
31 L. Garlicki, ibid., note 18.
32 See the decision of the Supreme Administrative Court of 15 February 2000, SA/Bk 901/99, OSP 2001, v. 4, item. 61 with a gloss of M. Wolanin.
33 Verdict of the Constitutional Tribunal of 8 May 1990, OTK 1990, item 2.
34 Verdict of the Constitutional Tribunal of 19 June 1990, K 2/90, OTK 1990, item 3.
35 M. Szalewska, ibid., 257.
36 Verdict of the Constitutional Tribunal of 23 September 2003, K 20/02, OTK-A 2003, no. 7, item 76.
37 See L. Garlicki, ibid., note 20.
38 Verdict of the Constitutional Tribunal of 8 May 1990.

Compensation must be paid instantly[39]. The Constitutional Tribunal also decided that it was not allowed to pay compensation in installments in such a way that the actual value of the compensation becomes lower as a result of inflation[40].

5. Conclusion

It is quite difficult to define the essence of expropriation in the Constitution of the Republic of Poland. There is a broad agreement on the fact that the institution of expropriation is autonomous to statutory provisions. On the other hand, the lack of a legal definition of expropriation in the Constitution results in it being regarded as a pre-existing institution. The doctrine does not unanimously declare whether expropriation stipulated in Art. 21 passage 2 of the Constitution should be treated in a broad way, regardless of its form, or whether it should be treated traditionally, as the deprivation of ownership of real estate on the basis of an administrative decision. The lack of unanimity in the doctrine affects the decisions of the Constitutional Tribunal. Just a few years ago, one could say that, despite some hesitation, the Tribunal adopted the broad concept of expropriation. However, in its decision of 21 June 2005, the Tribunal returned to the traditional definition of expropriation.

It appears that the rights of an individual should be the focal point of discussions about the constitutional concept of expropriation. Therefore, one should strive to define the circumstances in which the constitutional proprietary right will be protected in the most effective manner. Nevertheless, it appears that a broad definition of expropriation is a more effective method and, as T. Woś proves in his work, an expropriation effected on the basis of an individual administrative decision, subject to the monitoring of an administrative court, can assure an effective protection of proprietary rights. Allowing *ex lege* expropriation results in a constitutional becoming the only measure of defense available to an individual[41]. It is apparent that discussion on the constitutional nature of expropriation is far from reaching its conclusion.

39 P. Winczorek, Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Warsaw 2000, p. 35.
40 Verdict of 19 June 1990, K 2/90 (OTK 1990, no. 1, item 3). Similarly in verdict of 14 March 2000, P 5/99.
41 T. Woś, ibid., 35–36

Streszczenie

Problematyka wywłaszczenia nieruchomości została uregulowana w art. 21 ust. 2 Konstytucji RP z 1997 r. W świetle tego przepisu wywłaszczenie może być dokonane tylko na cele publiczne i za słusznym odszkodowaniem. Ustrojodawca nie konkretyzuje, że chodzi o wywłaszczenie nieruchomości (jak to jest tradycyjnie rozumiane). W związku z tym w doktrynie i orzecznictwie Trybunału Konstytucyjnego pojawiają się, wciąż nierozstrzygnięte, kontrowersje co do faktycznego przedmiotu wywłaszczenia, o którym mowa w konstytucji. Sprawę dodatkowo komplikują spory co do konstytucyjnego rozumienia prawa własności (art. 21 ust. 1).

Mirosław Wincenciak

EXPROPRIATION AND OTHER LIMITATIONS OF OWNERSHIP OF REAL ESTATE BY VIRTUE OF ACTS OF APPLICATION OF LAW BY PUBLIC ADMINISTRATION

1. The right to own real estate is not *ius infinitum* because it does not give the owner absolute power over an object. The scope of the law is defined by the totality of provisions of the legal system. The legislator has decided that in the limits defined by laws and principles of communal life, the owner can, with the exclusion of other persons, use the object in accordance with the socioeconomic purpose of his right and, in particular, he can receive proceeds and other income from the object (Art. 140 of the Civil Code). These statutory limits are constraints provided for in civil law and in administrative law.

The history of Polish law has various examples of the state's interference in the property rights to real estate by means of administrative law measures. In the post–war period, property was taken away on the basis of nationalization acts. This form of dispossession was characterized by the fact that property rights were taken away on the basis of a general act and, as a rule, without compensation. After 1990, as a result of reactivation of territorial self–government, communalization of property consisting in transferring ownership from the state to the local government, became a new legal phenomenon. In case of communalization, the procedure of transferring ownership to the entities of local government is generally based on general acts and decisions of the public administration entity (province governor – wojewoda) are of declaratory nature[1]. The common characteristic of both forms of dispossession is the fact that the transfer of ownership takes place solely by virtue of law to the state

1 For example, compare a similar institution provided for in Art. 73 passages 1 and 3 of the Act of 13 October 1998 on provisions that introduce acts reforming public administration (Journal of Laws No. 133, item 872 with subsequent changes): "Real estate that, as of 31 December 1998, remains in the dominion of the State Treasury or the dominion of entities of local government, do not constitute their property and have been occupied by public roads, become, as of 1 January 1999, by virtue of law, the property of the State Treasury or competent entities of local government with compensation." "The basis for revealing in the land and mortgage register the transfer of ownership of the real estate mentioned in passage 1 to the State Treasury or to entities of local government is the final decision of the wojewoda (head of the government administration on the level of province)."

or to the local government, and the verdict of the entity confirming this fact is of declaratory nature[2].

The ability of public administration to interfere with property rights of private persons is determined by the provisions of law. In a democratic state governed by law, dispossession of private persons by virtue of a general act of the government must be considered as an exceptional situation caused by important constitutional reasons. Consequently, in the current legal system, the instruments of the administrative law that influence property rights of private persons are most often provisions that allow expropriation of real estate or another form of limiting the property by virtue of an individual administrative act of constitutive nature.

Interference of public authorities in property rights is justified by public purposes. The Constitution of the Republic of Poland refers to the term "public purpose" on two occasions. In Art. 21 passage 2, the constitutional legislator states that expropriation is effected for public purposes and with just compensation, and in Art. 216 passage 1, he states that the financial means for public purposes are collected and spent in ways defined in a statute. The term "public purpose" is also a statutory term[3]. The understanding of "public purpose" in the statute applies to issues concerning expropriation and other forms of limitation of property rights defined in that legal act[4]. Moreover, the legislator uses this term in other statutes. Consequently, limitation of property rights to private real estate may result, among others, from the need to achieve public purposes. In the process of application of law, in case of lack of a legal definition, administration entities are to deduce the purpose from the statutes that are in force[5].

2. The most far–reaching legal instrument to influence property rights under administrative process is expropriation. It consists in depriving of or limiting, by means of a decision, property rights, perpetual usufruct, or another real right to a property. The competent entity in expropriation cases is the head of local government on the district level, the starosta. Real estate can be expropriated only

2 Recently, there has been an effort to take stock of the state and communal property. Under the Act of 7 September 2007 on revealing in land and mortgage register the property right of real estate belonging to the State Treasury and entities of local government (Journal of Laws No. 191, item. 1365), the competent starostas were supposed to prepare and transfer to the competent wojewodas, marshals of the provincial parliaments, heads of local governments on district, town, and city levels, within 6 months of the act taking effect, lists of real estate that, by virtue of separate laws, became the property of the State Treasury and are owned by the State Treasury or by entities of local government.

3 Art. 6 of the Act of 21 August 1997 on real estate management (the uniform text is available in Journal of Laws 2004, No. 261, item 2603 with subsequent changes) defined public purpose. This provision defines public purpose as, for example, demarcating land for public roads or waterways; construction, maintenance and performance of construction works on such roads, buildings, and equipment of public transportation, as well as public communication and signaling; separating land for railways as well as construction and maintenance of railways.

4 Compare M. Gdesz, Cel publiczny w gospodarce nieruchomościami, Zielona Góra 2002.

5 Compare on this subject W. Jakimowicz, Wykładnia w prawie administracyjnym, Warsaw 2006, p. 114–115.

to the benefit of the State Treasury or a local government entity. Expropriation of real estate can be effected if public purposes cannot be achieved in a way other than deprivation or limitation of property rights and these rights cannot be obtained by means of a contract. Initiation of an expropriation proceeding must be preceded by negotiations to purchase, by means of a contract, the property right, perpetual usufruct, or other limited real rights. The transfer of the property right to the State Treasury or to a local government entity takes place on the day when the decision to expropriate a piece of real estate becomes final. Such a decision constitutes a basis to make an entry in the land and mortgage registry. The real estate to be expropriated must be located in an area designated in the local development plans for public purposes or a decision to locate a public purpose investment must be issued for it.

As mentioned above, deprivation of property right to real estate or of another right takes place with compensation to the expropriated person corresponding to the value of the expropriated real estate or the value of the right. The compensation is determined by the starosta. The amount of compensation is determined on the basis of the condition and the value of the expropriated real estate on the day the expropriation decision is issued. The amount of compensation is determined on the basis of an assessment by a property expert that specifies the value of the real estate. The basis for the determination of the compensation is the market value of the real estate. The procedure includes the obligation to conduct an administrative proceeding, unless the procedure concerns real estate with unregulated legal status. Moreover, the expropriation decision may indicate the necessary easements or to impose the obligation to build and maintain equipment that will prevent risks, damage, and inconveniences to the owners or the users of adjacent real estate.

3. The legislator provides for other forms of limiting property rights, besides expropriation, which may result from acts of application of law by public administration. According to the aforementioned act on real estate management, the starosta performing a task that is in the scope of competences of government administration can limit, by virtue of his decision, ways to use real estate by issuing a permit to install and lay in the real estate draining systems, conduits and equipment to convey liquids, steam, gas, and electricity, equipment for public communications and signalling, as well as other utilities and equipment located underground, on ground surface, or overground, that are necessary to use these conduits and equipment, if the owner or perpetual usufructor of the real estate does not agree to it. Similarly to the case of expropriation, this limitation can take effect if it is in conformance to the provisions of the local development plan or, in the case such plan is not in place, if a decision has been made to locate a public purpose investment that results in such limitation. If installation or laying of such paths, conduits, and equipment makes it impossible for the owner or perpetual usufructor to properly use

the real estate the same way as he did before, or in a way that is in conformance to its earlier purpose, the owner or perpetual usufructor can demand that the starosta or the person applying for a permit purchase from him, to the benefit of the State Treasury, by virtue of a contract, the real estate or the perpetual usufruct. The location of the aforementioned paths and equipment causes the owner or perpetual usufructor to take the obligation to give access to the real estate for the purpose of performing actions related to the maintenance and repairs of the paths, conduits, and equipment. The obligation to give access to the real estate is subject to execution of the administrative decision.

In situations where the interests protected by law are endangered, the legislator allows for an immediate interference with the property right. The statute of 24 August 1991 on fire protection (the uniform text can be found in Dz.U. [Journal of Laws] of 2002, No. 147, item 1229 with subsequent changes), the leader of a fire crew can take possession of real estate and equipment that is useful in the crew's actions for the time of such actions (Art. 25 passage 1 item 3). Another example is Art. 90 of the Act of 4 February 1994, Geological and Mining Law (the uniform text can be found in Dz. U. [Journal of Laws] of 2005, No. 228, item 1947 with subsequent changes). This law provides for decisions by competent mining supervision agency to allow a seizure of real estate in case of a risk to life or health of persons, to safety of a mining company and its operation, and to public utilities in connection with operations of a mining company, for a period required to remove the risk and its effects. Such a decision stipulates what real estate is subject to seizure, the purpose of the seizure, as well as the date and duration of the seizure. The decision is subject to immediate execution. The owner is entitled to receive compensation for damage resulting from the seizure of his real estate.

4. Another example of limitation to the possession of real estate is the requirement to allow an investor to access the real estate when the investor wants to initiate construction works on the neighboring lot. According to the Building Law Act (Art. 47), if preparatory works or construction works require accessing the neighboring building or premise, or entering the neighboring real estate, the investor is required to obtain, prior to beginning the works, the permission of the owner (or tenant) of the neighboring real estate, building, or premise to enter it, and to agree on the expected method, scope, and dates of using these facilities, as well as a possible compensation for these actions. If such terms are not agreed on, the competent entity, upon request of the investor, decides, within 14 days of filing such a request, by virtue of decision, on the necessity to enter the neighboring building, premise, or real estate. If the investor's application is found to be justified, the body defines the limits of the required need and the terms of usage of the neighboring building, premise, or real estate. Upon completion of the works, the investor is required to repair all damage

that have occurred as a result of his usage of the neighboring real estate, building, or premise, in conformance to the principles defined in the Civil Code.

5. The content and scope of the dominion over land, to include property rights, is also defined by the obligation to obtain various licenses and permits. Examples of such interference in the area of changing the arrangement of land by placing buildings thereon: a decision on terms of construction[6], a decision on environmental conditions for obtaining a permit to complete a project[7], and a building permit. Similar examples in the area of use and change of use of real estate: a decision to change a forest into farmland, a decision to change the type of use of a building, a decision that requires the owner of a house to connect his property to a sewage system if the technical conditions allow it, a decision to allow cutting down a tree growing on a lot of land. The above–mentioned decisions allow for a certain type of behavior on the land and, on the other hand, serve the purpose of competent bodies of public administration defining various limitations that influence the content and scope of exercise of property rights (for example the outline of a planned building is defined in a decision on construction terms as, in principle, an extension of the existing buildings in neighboring lots – § 4 passage 1 of the ordinance of the Minister of Infrastructure of 26 August 2003 on methods to define requirements of new buildings and arrangement of land in the case of lack of a local development plan (Dz.U. [Journal of Laws], No. 164, item 1588).

6. Apart from the typical limitations on the ownership of real estate, one can point at orders issued to owners of real estate (persons having dominion over real estate) which are called public burdens, that is requirements to fulfill certain obligations (active behavior) of non–pecuniary nature, for the purpose of achieving certain public purposes. The material public burden is the duty to provide or give access to objects that are in the dominion of the obligated subject[8]. An example of a duty to bear public burdens is Art. 22 of the Act of 18 April 2002 on the state of natural disaster (Dz.U. [Journal of Laws], No. 62, item 558 with subsequent changes), which provides for the possibility to introduce the duty to provide material aid if the means and measures available to the wójt (head of local government on the level of a rural commune), the starosta, or the burmistrz or president (mayor) of a city are insufficient. Such material aid includes:

– allowing the use of owned real estate or movable objects,

6 Art. 59 passage 1 of the Act of 27 March 2003 on spatial planning and management, Journal of Laws No. 80, item 717 with subsequent changes.

7 Art. 46 passage 1 of the Act of 27 April 2001, Environmental protection law (the uniform text is available in Journal of Laws 2006, No. 129, item 902).

8 M. Szubiakowski, in: M. Wierzbowski, ed., Prawo administracyjne, Warsaw 1999, p. 138.

– granting access to premises to evacuated persons,

– using the real estate in a certain way and in a certain scope.

7. Based on an analysis of the aforementioned examples of interference of state administration in property rights of real estate, the types of acts of application of law can be attributed different functions and purposes. The first group includes examples of acts of limitation of ownership due to the need to complete projects serving the society as a whole (for example expropriation of a property in order to build a school – Art. 112 and next of the Act on real estate management). The second group includes decisions in argument of civil nature, in relations between administered entities, in which the administrative body plays the role of an arbiter (a decision concerning the breach of water relations – Art. 29 passage 3 of the Water Law Act). The third group includes decisions of supervisory and control function. By defining and allowing for a certain behavior in real estate, the administration influences the observance of the current law and achieves goals stipulated in laws (decision on construction terms – Art. 59 of the Act of 27 March 2003 on spatial planning and development. The last group includes acts of interference with property rights performed in emergency situations where important interests protected by law are endangered. These acts can be defined as acts protecting the public interest, since it is in the interest of the state to prevent disasters or other phenomena that are socially undesirable.

Streszczenie

Historia polskiego prawa dostarcza różnych przykładów ingerencji państwa w prawo własności nieruchomości za pomocą środków administracyjnoprawnych. Na przykład w okresie powojennym odbierano własność na podstawie aktów nacjonalizacyjnych. Obecnie, oprócz decyzji o wywłaszczeniu nieruchomości, jako przykłady ingerencji państwa w prawo własności można wskazać: decyzję o ograniczeniu korzystania z nieruchomości poprzez udzielenie zezwolenia na zakładanie i przeprowadzanie na nieruchomości ciągów drenażowych; wprowadzenie przez wójta obowiązku świadczeń rzeczowych polegających, między innymi, na udostępnianiu pomieszczeń osobom ewakuowanym, w trakcie prowadzenia akcji ratowniczej realizowanej zgodnie z postanowieniami ustawy o stanie klęski żywiołowej; decyzję o zezwoleniu na zmianę lasu na użytek rolny. Przewidzianym przepisami prawa ingerencjom administracji w prawo własności można przypisać różne funkcje i cele.

Maciej Etel

THE USE OF COMMUNAL PROPERTIES FOR BUSINESS ACTIVITY

1. Introduction

The issue of undertaking and conducting a business activity by a commune is controversial. The current regulations, as they stand today, are not perceived uniformly, which results in many difficulties at the stage of their interpretation and application. Moreover, it is worth pointing out that they have evolved significantly since 1989 as the legislator has applied extremely diverse regulations determined *inter alia* by the reform of local government and policy of the state[1]. As a consequence, various regulations as far as communes, poviats and voivodeships are concerned were introduced[2].

The issue provokes the question: 'is a commune entitled to be engaged in a business activity within the current legal order, and is such an activity undertaken at the commune's discretion'? The crucial matter is also the use of communal properties for commercial purposes. Taking this into consideration, it should be pointed out that this article aims to present a general presentation of the issue regarding the business activity performed by a commune for commercial purposes on the basis of its property. The article provides a binding legal status and the interpretation of fundamental regulations. However, it does not resolve the questions resulting from the practical application of the regulations, which, due to several blanket clauses and vague phrases, were not determined precisely.

1 See C. Banasiński, M. Kulesza, Ustawa o gospodarce komunalnej. Komentarz, Warsaw 2002, p. 20 and next; C. Kosikowski, Publiczne prawo gospodarcze Polski i Unii Europejskiej, Warsaw 2007, p. 311–319; P. Krzystek, D. Wacinkiewicz, Komunalna działalność gospodarcza w teorii i praktyce, in K. Sławik ed., Działalność gospodarcza – kluczowe problemy, p. 72–74.

2 Compare Art. 9 of the 8th of March 1990 Act on Municipal Local Government (Journal of Laws of 2001 r., No. 142, item 1591 with subsequent changes) and Art. 6 of the 5th of June 1996 Act on Poviat Local Government (Journal of Laws of 2001, No. 142, item 1592 with subsequent changes) and Art. 13 of the 5th of June 1996 Act on Voivodship Local Government (Journal of Laws of 2001, No. 142, item 1590 with subsequent changes).

2. The Domains of Communal Activity

The distinction of two domains of communal activity is indispensable for an appropriate introduction of the issue:

– an activity in the public utility domain,

– an activity going beyond the domain of public utility.

The fundamental communal activity should be identified within the sphere of a public utility. The activity is a key, and at the same time a fundamental function of the local governmental unit. In other words, it is the execution of public purposes entrusted in communes which, by virtue of the Constitution of the Polish Republic, form their own tasks by fulfilling the needs of the local community[3].

The catalogue of basic communal obligations is stipulated in the Municipal Local Government Act[4]. This catalogue is open and merely includes an exemplary enumeration of basic competences, often regulated in separate acts. The essential common characteristic should be underlined. The performance of communal specific tasks is the obligation of the commune as a unit of local government. It should be kept in mind, however, that an obligation shall not be identified with any rights. The commune is obliged to perform its own specific tasks, namely the tasks of public utility, since, as a public authority, it has to take on board and realize [its responsibilities regarding] particular intervention functions in the economy[5]. It should be active especially in the areas of essential social activity in which private entities, due to the lack of profitability, are not interested in undertaking a business activity[6]. In other words, a commune or a communal legal entity not only may, but is obliged to perform their fundamental competences.

The priority of activity in the public utility domain is not to give a commune profit, but to perform the tasks which aim to realize the current and continuous fulfilment of the collective needs of a local government community[7]. Therefore, the activity of a commune should not be perceived as a business activity as it is deprived of one of the most fundamental features of business activity – the profit–gaining

3 See Art. 166 of The Constitution of the Republic of Poland (Journal of Laws of 1997, No. 78, item with subsequent changes).

4 The 8th of March 1990 Act on Municipal Local Government (Journal of Laws of 2001, No. 142, item 1591 with subsequent changes).

5 C. Kosikowski, Publiczne prawo gospodarcze Polski i Unii Europejskiej, Warsaw 2007, p. 314

6 See judgment of the Supreme Administrative Court of 9th January 2003, SA/Gd 1968/2002, OwSS 2003, No. 4, item 105.

7 See J. Olszewski (ed.), Publiczne prawo gospodarcze, Warsaw 2005, p. 78; C. Banasiński, Gospodarka komunalna, in H. Gronkiewicz–Waltz, M. Wierzbowski (ed.), Prawo gospodarcze. Zagadnienia administracyjnoprawne, p. 166–186.

objective[8]. As for the rule, a commune fulfils the obligations in the name of the needs of the local government community and not for gaining profit[9].

The nature of communal activity which goes beyond the public utility domain is completely different. It can be identified with business activity. This field of activity is defined as a commercial one and is not limited to communal specific tasks – its main objective is to make a profit. However, a commune cannot engage in a business activity at its discretion, otherwise, as the evolution of the issue and the experience gained show, it could come, through the main sphere of actions undertaken and performed, at the expense of the inhabitants. It is inadvisable that profit should be the main objective of a commune in contradiction with the execution of its own tasks. Taking this into consideration, the legislator determined a general principle which states that a commune may perform commercial activity but only in situations which were stipulated in a separate act[10]. The separate act is the 20th December 1996 Act on Municipal Economy[11], which specifies the situations that justify undertaking the activity going beyond the public utility domain and also indicates the appropriate organizational and legal forms[12].

3. The Use of Communal Properties for Commercial Business Activity

The Act on Municipal Economy indicates three situations in which a commune can undertake a business activity. The present article discusses this in the context of communal properties[13].

Art. 10 of the Act on Municipal Economy indicates that a commune may engage in an activity which goes beyond communal specific tasks if two conditions are met. The first condition is that the needs of the local government community are not fulfilled in the local markets. The second condition is a situation when unemployment in the commune significantly influences (in a negative way) the living standards of the local government community and undertaking the activity mentioned above is the only measure [which can be taken] for the community to express its proactive–

8 See Art. 2 of the 2nd of July 2004 Act on Freedom of Economic Activity (Journal of Laws of 2007, No. 155, item 1095 with subsequent changes); C. Kosikowski, Ustawa o swobodzie działalności gospodarczej. Komentarz, Warsaw 2007, p. 15–28.

9 The profit gained while performing communal own tasks cannot be ruled out.

10 Art. 9 of the 8th of March 1990 Act on Municipal Local Government.

11 The 20th December 1996 Act on Municipal Economy (Journal of Laws of 1997, No. 9, item 43 with subsequent changes).

12 See Art. 10 of the 20th December 1996 Act on Municipal Economy.

13 Properties are not the only indicator of commercial activity, however, taking into account the amount of property a commune possesses, it should be stated that they are the basis for this kind of activity.

ness in relation to the inefficiency of other actions undertaken on the grounds of other separate regulations.

Thus a commune may take advantage of the entrusted properties as an efficient, and at the same time, final measure to combat any unemployment. The arrangement of the communal property for the public serviceable purposes where workplaces will be created both at a preparatory stage (e.g. building works) and also when they will have been completed – in a building created thanks to used communal property (e.g. an airport, a sports stadium, a dumping ground) is an example of this[14]. The use of communal property for commercial purposes brings the effect of workplace increase, and also fulfils the needs of the commune's inhabitants.

However, it should be underlined that a commercial activity undertaken by a commune cannot compete with the business activity of private entrepreneurs existing in the market place. This transgression beyond the public utility domain could otherwise provoke outcomes quite opposite to intended purposes *inter alia* the bankruptcy of the private enterprise and its consequences[15].

Art.10 section 2 of the Act on Municipal Economy stipulates another situation whereby, with the backing of the legislation, a commune can undertake and conduct commercial activities. In the name of rational property management, a commune may form commercial partnerships or become part of established partnerships, using the [their] property as a non–monetary contribution. The rational management of communal property is a prerequisite justifying undertaking a commercial activity. In other words, if the sale of communal property or the management of it in any other way causes a severe financial loss, the commune may, on the basis of this property, undertake commercial activity. The activity is performed to secure the value of the property, to manage it and for capital protection. The accepted solution is valid due to the very probable situation where it would be more profitable, especially long–term, to invest the property in the partnership capital, or to form a partnership on this basis rather than make a hasty sale. As a rational reaction for an economic situation the commune will guarantee financial care over the entrusted property.

The third circumstance is stipulated in Art. 10 section 3 of the Act on Municipal Economy. The rule does not set any condition for undertaking a commercial activity by a commune. The only prerequisite for forming a commercial partnership or joining up with an existing partnership is that such an activity would be essential for the commune to function and develop. In the aforementioned article the legislator additionally specified the activity domains that were found crucial. Advisory,

14 Compare P. Krzystek, D. Wacinkiewicz, Komunalna działalność gospodarcza w teorii i praktyce, in K. Sławik (ed.), Działalność gospodarcza – kluczowe problemy, p. 81–84

15 C. Banasiński, M. Kulesza, Ustawa… op. cit., p. 20 and next; W. Maciejko, P. Zaborniak, Tworzenie spółek kapitałowych przez samorząd gminny jako forma ograniczania lokalnego bezrobocia, "Samorząd Terytorialny" 2007, No. 1–2, p. 68–69

educational, promotional and editorial activities supporting the development of the commune and also banking and insurance activities were included in this. The aforementioned catalogue shall be considered open, and takes into consideration the phrase: "..., and also other partnerships important for the development of the commune"; with the reservation that Art. 10 section 3 will be interpreted in the context of the Act on Municipal Local Government. Thus, the usefulness and necessity for the development and functioning of the commune, but also for fulfilling fundamental needs of the local government community, is the priority of commercial activity admissibility[16]. The commune may use communal properties for forming commercial partnerships on this basis to ensure the balanced development and the progress of the commune, however, exclusively for the activity that serves public purposes.

4. Conclusions

In the Polish legal system the Act on Municipal Local Government and the Act on Municipal Economy refer to the issues of undertaking and conducting business activity by a commune. The regulations stipulate the fundamental domains of communal activity and also the rules for undertaking commercial activity.

The analysis of binding regulations specifies the essential, for the subject discussed, role of communal properties – they create a real basis for commercial activity. The fact is that the Act on Municipal Economy stipulates only three situations in which a commune may go beyond the sphere of its own specific tasks. However, the construction of the regulations and the phrases used result in a much larger number of factual situations that justify undertaking such a business activity. The statement that a commune does not engage in business activity at its discretion is still valid. The analysis of the prerequisites stipulated in the Act on Municipal Economy supports the statement that the activity going beyond the sphere of communal, specific purposes is only justified when it serves the public policy[17]. The commune may then use their properties for business activity when it is aimed at improving the status of the local government community, combating unemployment, managing the property in a rational way and when guaranteeing development and progress.

Additionally, apart from the activity discussed in the present publication, communal properties may be an object of sale, exchange, renouncement, perpetual

16 See P. Zaborniak, Glosa do wyroku NSA z dnia 6 grudnia 2000 r. I SA/Gd 1977/1999, "Samorząd Terytorialny" 2002, No. 7–8, p. 137–138; Judgment of the Supreme Administrative Court of 6th December 2000, I SA/Gd 1977/1999, OwSS 2001, No. 2, item 63.

17 C. Kosikowski, Publiczne prawo gospodarcze Polski i Unii Europejskiej, Warsaw 2007, p. 314.

usufruct, lease and tenancy, consigning in permanent management and also be charged with limited real rights, made as non–monetary contributions into partnership capital (contribution balance sheets), passed to public enterprises as stock and as the property of the foundations that are being formed. However, such a use of property is only possible on the grounds of the regulations stipulated in the Act on Property Management along with the application of a number of complementary acts[18].

18 The 21st August 1997 Act on Property Management (Journal of Laws of 2004, No. 261, item 2603 with subsequent changes).

Streszczenie

Przedmiotem niniejszej publikacji jest ogólne przedstawienie zagadnienia podejmowania przez gminę działalności gospodarczej w oparciu o posiadane nieruchomości. Publikacja bazuje na obowiązującym stanie prawnym oraz wykładni przepisów odnoszących się do podstawowych sfer aktywności gminy. W sposób szczególny uwzględnia działalności o charakterze stricte komercyjnym, wobec której stawia pytania: czy gmina może prowadzić taką działalność i czy ewentualnie może ją podejmować dowolnie? Odpowiedzi i rozwiązania akcentowanych wątpliwości formułuje poprzez wskazanie stanów faktycznych zakładających wykorzystanie gminnych nieruchomości, jako tworzących realne podstawy do prowadzenia działalności komercyjnej.

Ewa Kowalewska–Borys

PROTECTION OF AN IMMOVABLE MONUMENT UNDER ART. 108 OF THE ACT ON PROTECTION OF MONUMENTS AND CARE FOR MONUMENTS

I. Definition of the term "immovable monument"

Provisions of the Act of 23 July 2003 on protection of monuments and care for monuments[1] (APMCM) do not contain the term "monumental real estate," which would have been acceptable in accordance with the convention of Polish private law. Civil law terminology distinguishes three types of immovable estate: land which is part of the Earth's surface that constitutes a separate property; buildings which are permanently connected with the land and which are a property separate from the land; and premises which constitute parts of buildings which, in turn, constitute a separate property. The glossary of basic terms of Art. 3 of the Act includes the term "immovable monument" and its definition, which also refers to the provisions of the Civil Code. On the basis of this provision, one can conclude that an immovable monument is defined as immovable estate or its part, or an ensemble of immovable estates which have been made by humans, whose preservation is in the interest of the society because of their historical, artistic, or scientific value. Consequently, one can assume that the legislator is making a reference to the standard civil law definition of immovable estate and its kinds without creating a new legal structure of monumental real estate. Nevertheless, the legislator clearly points at a specific functional aspect of property rights concerning an immovable monument[2].

II. The scope of protection of an immovable monument under the Civil Code and under other laws

The term "criminal law protection of monuments" means not only the provisions of material and process criminal law (the following articles of the Criminal Code

1 Journal of Laws No. 162, item 1568 with subsequent changes, henceforth called APMCM.

2 See T. Mróz, Historic Immovable Property – Execution of Ownership (Remarks in the Light of the Constitutional Principle of Proportionality)

of 1997: Art. 278 § 1 and § 2; Art. 284 § 1 and § 2, Art. 285 § 1, Art. 286 § 1, Art. 287 § 1, Art. 288 § 1 and § 3, Art. 291 § 1 in connection with 294 § 2; and in the Code of Criminal Procedure of 1997 with respect to the institution of auxiliary prosecutor in connection with Art. 95 item 2 of the APMCM), law on petty offences (included in the Petty Offences' Code of 1997 and in the Code of Procedure in Cases Involving Petty Offences of 2003, e.g. Art. 124 of the Petty Offences' Code, which is a counterpart of Art. 288 § 1 of the Criminal Code), but also laws resulting from international Conventions on the protection of cultural goods that Poland is a part of and that have an impact on the scope of this protection[3]. Nevertheless, it should be noted that these Conventions do not include provisions that define expressis verbis the model of protection of monuments under the criminal law, thus giving to the Polish legislator a full independence and sovereignty. Most of all, protection of monuments under criminal law is provided for in chapter 11 of the aforementioned law on protection of monuments and care for monuments of 2003. Unfortunately, the limited scope and subject of this paper do not allow for a precise analysis of the criminal law and criminal procedure aspects of protection of monuments[4], to include a detailed analysis of the imprecise, arbitrary, and controversial criminal law definition of the term "good of special importance to culture[5]." The most important legal provision to the protection of "immovable monuments" under criminal law, which is at the same time linked with civil law protection of such monuments, is Article 108 of the Act on protection of monuments and care for monuments which, along with the provisions of Art. 288 of the Criminal Code and Art. 294 § 2 of the

3 See, most of all: the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict along with the Regulations for the Execution of the Convention, Journal of Laws 1957, no. 46, item 212; the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Journal of Laws 1974, no. 20, item 106; the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, Journal of Laws 1976, no. 32, item 190; the 1992 Council of Europe's European Convention on the Protection of the Archaeological Heritage, Journal of laws 1996, no. 120, item 564; the 1954 Council of Europe's European Cultural Convention, Journal of Laws 1990, no 8, item 44.

4 The threat of insurance crimes in the area of real estate (including monumental real estate), especially concerning typical fraudulent arson aimed at beguilement of compensation, is a fact. The number of incidental events resulting in compensation is large and it is very difficult and costly to repair their effects. Also, such fraudulent efforts to obtain compensation may appear to be the simplest way to solve the financial problems of the owner of real estate. Incidents where the perpetrator purposefully covers real estate with a policy of larger value than the value of the property or purchases two insurance policies are very difficult and frequent. Typical cases of insurance fraud in the real estate market involve situations where the owner pretends that components of a building were destroyed by fire, even though they were destroyed as a result of poor maintenance, or where the perpetrator reports larger losses than those he actually suffered. Other typical cases are those where the owner insures his property to a value that is higher than its actual value, which results in larger compensation, or when he purchases multiple insurances policies in several insurance companies and then sets the real estate on fire and obtains compensation from several sources, or when the event that constitutes a basis for payment of compensation had occurred before the insurance policy was purchased, etc.

5 See: A. Zoll, ed., Kodeks karny. Część szczególna. Komentarz, Kraków 2006, p. 483ff; A. Wąsek, ed., Kodeks karny. Część szczególna, vol. II, Duże Komentarze Becka, Warsaw 2006, p. 1130ff; A. Marek, Kodeks karny. Komentarz Warsaw 2007, p. 536ff; T. Bojarski, A. Michalska–Warias, J. Piórkowska–Flieger, M. Szwarczyk, Kodeks karny. Komentarz, Warsaw 2006, p. 617.

Criminal Code, constitutes a "semi–code–based" model[6] of protection of monuments in the current legal system[7].

The object of protection against an offence defined in Art. 108 of the APMCM is property, ownership, and other rights to an immovable monument[8]. Therefore, a person wronged by this offence can be not only the owner of the immovable monument, but also any legal bona fide possessor (user, lessee, or tenant) who has the right, completely independently of the owner, to file a motion for prosecuting[9]. The offence defined in Art. 108 of the APMCM can be committed by any person who is capable of bearing criminal responsibility and, therefore, is a common offense. On the other hand, committing this forbidden act by negligence, in a situation where the offender does not take certain action despite his legal duty to prevent destruction of or damage to an immovable monument, constitutes an individual improper offense. This means that this offense can be committed only by a person who is a guarantor of non–occurrence of the effect that constitutes the feature of this offense. This special legal duty to prevent a negative effect in the form of destruction of or damage to an immovable monument can be defined in a legal provision, a civil law contract (e.g. lease, rental), or a decision of a competent institution or person. The source of this duty can also be a voluntary obligation of the subject to prevent the destruction of or damage to real estate. The behavior of the perpetrator of the offense defined in Art. 108 of the APMCM can take two alternative forms, stipulated in this law, of destruction of and damage to an immovable monument. A different behavior of the perpetrator does not meet the criteria for the criminal act defined in Art. 108 of the APMCM and, consequently, cannot be a basis for criminal responsibility. The doctrine points at the practical difficulties with determining a precise distinction between the causative act consisting in destroying monumental real estate and the act of damaging such estate[10]. It appears that the effect caused by the perpetrator of the offense is the most important factor in determining whether his behavior qualifies as destruction of property or as damage to property[11]. In the ordinary sense of the word, to destroy a thing means to annihilate it, to wreck it, to devastate it, to exterminate it,

6 The term "'semi–code–based model" is used after M. Bojarski and W. Radecki, Ochrona zabytków w polskim prawie karnym. Stan aktualny i propozycje de lege ferenda in: J. Kaczmarek, ed., Prawnokarna ochrona dziedzictwa kultury. Materiały z konferencji, Gdańsk 2005, Kraków 2006, p. 22.

7 Because of the stringent limitations, the provision of Art. 108 of the APMCM is commented in the area concerning only immovable goods. Of course, the features of the offence defined in Art. 108 of the APMCM do not limit the object of this criminal act to an immovable object, but also cover movable objects.

8 Compare the sentence of the Supreme Court of 9 December 2003, III KK 165/03, LEX no. 140098.

9 See the sentence of the Supreme Court of 24 April 1990, WR 116/90, OSNKW 1991, no 1–3, item 6; the gloss to this sentence by S. Łagodziński, PiP 1992, v. 10, p. 114ff, sentence of the Supreme Court of 20 May 1935, "Zbiór Orzeczeń Sądu Najwyższego., Orzeczenia Izby Karnej" 1935, no. 10, item 36.

10 Commentaries: A. Zoll, ed., Kodeks karny. Część szczególna. Komentarz, Kraków 2006, p. 365ff; A. Wąsek, ed., Kodeks karny. Część szczególna, vol. II, Duże Komentarze Becka, Warszawa 2006, p. 1130ff; A. Marek, Kodeks karny. Komentarz [Criminal Code. Commentary], wyd. IV, Warsaw: LexisNexis 2007, 536ff; T. Bojarski, A. Michalska–Warias, J. Piórkowska–Flieger, M. Szwarczyk, Kodeks karny. Komentarz, Warsaw 2006, p. 617.

11 M. Kulik, Przestępstwo i wykroczenie uszkodzenia rzeczy, Lublin 2005, p. 62.

to eradicate it, and to cause it to wear out, spoil, waste, and become damaged[12]. Thus, for example, if an immovable monument burns, it will be a complete (or partial), major, and irreversible impairment of its substance and characteristics, which makes it impossible to use the monumental real estate in accordance with its purpose and with its characteristics. To damage a thing, on the other hand, means to destroy it partly, to cause a small defect, but also to break it, to cause it to decay, to weaken it, to impair it[13]. Thus, if a monumental property is damaged, it will also be not suitable to be used in accordance with its characteristics or purpose, its substance will be impaired, but it will not be completely destroyed[14]. A comparison of the two causative acts of destroying and damaging real estate clearly shows that destroying is a "qualified" (i.e. more serious) form of damaging. It should also be highlighted that destroying is an irreversible process affecting the substance of real estate. What is common in both forms of behavior of the perpetrator of the offense defined in Art. 108 of the APMCM is his interference with the object, with the difference being its intensity and scope. This interference must absolutely involve the impairment of the substance of the immovable monument. The legal provision which is the subject of this discussion does not require the perpetrator's behavior to be directed solely against someone else's real estate, which is the case in the features of the criminal act defined in Art. 288 of the Criminal Code. The crime defined in Art. 108 of the APMCM is a material crime due to the alternative formulation of its effect as either destroying or damaging an immovable monument. The criminal behavior of the perpetrator and the effect must be liked with a cause–effect relationship which, in the case of omission, is subject to two–stage verification. The first stage consists in determining what is the scope of legal duty of the perpetrator, whether the performance of the duty of the perpetrator really would have decreased the risk of occurrence of the effect taking the form of destruction of or damage to the monument. As for the features of the subject of the forbidden act under Art. 108 § 1 of the APMCM, this is an intentional offense. The intentional nature can take the form of either direct intent or possible intent. It should be mentioned that both the motives and the goals of the perpetrator's behavior are relevant. Unintentional destruction of or damage to a monument is criminalized under Art. 108 § 2 of the act and, similarly to the case of intentional commitment of this offense, includes both the actions and the omissions of the perpetrator, with the exception that they must be unintentional[15]. The lack of intent in the commitment of the offense results in a more

12 Słownik języka polskiego Warsaw 1993, p. 381. 382

13 Ibid., 629.

14 Examples include: painting inscriptions, graffiti, or soiling monumental real estate, if they lower its material value or utility to the extent that, in order to remove them, it will be necessary to impair the building substance. See the resolution of the Supreme Court of 13 March 1984, VI KZP 48/83, OSNKW 1984, no. 7, item 71, and the sentence of the Supreme Court of 22 August 2002, V KKN 362/01, Orz. Prok. i Pr. 2003, no. 5.

15 There is a different and wrong opinion. See: R.Golat, Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz, Kraków 2004, p. 193.

lenient sentence. The offense of destroying or damaging an immovable monument is subject to penalty of imprisonment for a period of 3 months to 5 years. In the case of unintentional destruction of or damage to an immovable monument, the perpetrator is subject to a fine, restriction of liberty, or imprisonment for a period of up to 2 years. In the case of an intentional commitment of the offense defined in Art. 108 of the APMCM, the court is required to adjudicate exemplary damages to a specified social purpose related to the protection of monuments in the amount of three to thirty times the minimum monthly wage. In the case of unintentional commitment of this offense, exemplary damages are optional.

Streszczenie

W niniejszym opracowaniu poruszono problematykę pozakodeksowej i kodeksowej ochrony zabytku nieruchomego. Omówienie zakresu pojęć: „zabytek nieruchomy" i „nieruchomość zabytkowa" jest punktem wyjścia dla charakterystyki form ochrony zabytku nieruchomego uregulowanych w przepisach prawa karnego, przepisach o ochronie zabytków oraz normach zawartych w międzynarodowych Konwencjach dotyczących ochrony dóbr kultury, których Polska jest stroną. Szczegółowej analizie poddano art. 108 ustawy o ochronie zabytków i opiece nad zabytkami będący najistotniejszym przepisem z punktu widzenia karnoprawnej ochrony zabytku nieruchomego. Przepis ten, jako łączący się zarazem z ochroną cywilnoprawną oraz z przepisami art. 288 i art. 294 § 2 kodeksu karnego, stanowi „półkodeksowy" model ochrony zabytków w obowiązującym stanie prawnym.

Chapter III

REAL ESTATE IN FINANCIAL LAW

Petr Mrkývka, Petra Schillerová

ACQUISITION OF REAL ESTATE IN THE CZECH REPUBLIC BY NON–RESIDENTS

The legislator in the Czech Republic has traditionally entrusted regulation of the acquisition of real estate by non–residents within the operation of the Foreign Exchange Act, although it does not consider real estate as such to be a foreign exchange value.

The Foreign Exchange Act (Act No. 219/1995 Sb.) essentially represents a code of foreign exchange law in the Czech Republic. Foreign exchange law is regarded as a subsystem of financial law by the legal sciences, specifically the non–fiscal part of financial law. Foreign exchange law means a set of legal standards regulating monetary transactions with foreign countries and the disposal of foreign means of payment, foreign exchange funds as well as other values in relation to foreign countries[1]. Two basic categories of persons occur in the relations regulated by foreign exchange law. Their status is decisive also for access to the acquisition of real estate in the Czech Republic. A natural person with permanent residence in the territory of the Czech Republic and a legal person with its registered office in the Czech Republic are persons constituting the **resident** category. Other persons are **non–residents**. Rather than discrimination between legal and natural persons or citizenship and the origin of capital, the determination of foreign exchange status is substantiated on the relation to the territory of the Czech Republic.

The current foreign exchange law is very liberal and built on the liberal principle of free access of residents to foreign currency and non–residents to the

1 P. Mrkývka in P. Mrkývka (ed.), Finanční právo a finanční správa, Brno 2004, p. 227.

Czech currency. However, it is less liberal regarding access to the ownership of real estate.

The acquisition of real estate is an important manner of capital allocation – both domestic and foreign. The state tends to prevent foreigners from accessing the ownership of real estate for various reasons. Soil in particular is traditionally perceived as something national not to be held in foreign hands, but there are also many buildings that are regarded as national treasures. One reason thus rests in the protection of national identity, typical primarily for small nations with a shorter statehood and unfortunate experience with foreign rule. Differences in buying power between the domestic population and economically stronger foreigners are the second cause for unwillingness to liberate the market of real estate. However, there is also a wide range of other reasons. Given that allocation of capital with foreign element is concerned, the basic regulation of the law on the acquisition of real estate with foreign element has been entrusted to foreign exchange law.

The Czech Republic is absolutely liberal with respect to the ownership of real estate abroad by residents and it does not put any obstacles to them. Residents do not have any duty to notify regarding real estate abroad and the state does not demand them to pay a real estate tax[2]. The latter, if in place, is paid abroad[3]. On the other hand, some non–residents have a reduced access to the ownership of real estate in the Czech Republic.

The following non–residents should be differentiated:

1. non–residents – Czech Republic nationals,
2. non–residents – nationals of a member state of the European Communities,
3. non–residents – nationals of a signatory state of a given agreement on investment support and protection or, as the case may be, other agreement dealing with the ownership of real estate by persons from one state in another state,
4. non–residents – other states' nationals.

For access to the ownership of real estate, categories of the latter must also be differentiated from the view of foreign exchange law. Foreign exchange law differentiates between two **categories of real estate**, specifically:

1. agricultural plots of land,
2. other real estate.

2 On real estate tax in the Czech Republic, e.g. P. Mrkývka in Etel, L. (ed.). Europejskie systemy opodatkowania nieruchomości. Warsaw 2003.

3 For more on the subject, refer to M. Radvan, Zdanění nemovitostí v Evropě, Praha 2005.

Agricultural plots of land are plots of land falling within the agricultural land fund and plots of land intended to function as forests.

Non–residents – Czech Republic nationals, and subsequently non–residents – legal persons having placed their enterprise or unit of an enterprise in the Czech Republic and having the right to undertake business in the Czech Republic have enjoyed free acquisition of real estate as residents since 1995 and 2002, respectively, and non–residents – nationals with residence permit for a national of a member state of the European Communities have had the same rights as residents since 2004. The last–mentioned are bound to the condition of a three–year residence in the Czech Republic and they simultaneously must be registered in the Czech Republic as farmers in the event that they wish to acquire an agricultural plot of land.

Other non–residents may acquire real estate in the Czech Republic only:

1. by virtue of inheritance,
2. for diplomatic representation of a state on the condition of reciprocity,
3. into the joint ownership of spouses of whom only one is a resident or non–resident – Czech Republic national,
4. from a lineal relative,
5. from a sibling,
6. from a spouse,
7. by exchange, and
8. on the basis of preemption right on account of joint ownership,
9. by exchange,
10. by virtue of construction on own plot of land,
11. if the plot of land concerned forms a single functional unit with a building in his ownership,
12. on the basis of special regulations, in particular in the area of privatization and restitutions.

Foreign exchange law leaves the form of acquisition of ownership to be regulated by civil law and it only determines the right to transfer ownership of real estate. The Civil Code[4] also deals with the issues of inheritance, joint ownership of spouses, relationship categories, etc.

4 Act No. 40/1964 Sb., as subsequently amended.

There are two limitations concerning exchange. An exchange is in accordance with the Foreign Exchange Act if the price of the real estate does not exceed the price of the original real estate. If an agricultural plot of land is concerned, it may only be exchanged for an agricultural plot of land. The price shall be ascertained according to the Act on Evaluation of Property.

However, the boundaries stipulated by the Foreign Exchange Act are very easy to surmount in a legal manner. It is sufficient for a non–resident to establish a legal person in the Czech Republic with its registered office in the Czech Republic and the latter will become a resident. The Commercial Code,[5] which *inter alia* governs business companies, makes it possible to establish a limited liability company and register it in the Czech Republic with a single person as partner and a joint stock company in a similar manner. In this manner the non–resident as a sole partner or as a sole person controlling the joint stock company concerned has fully under his control the real estate owned by the legal person concerned and also a direct benefit from the real estate concerned[6].

Agreements on investment support and protection represent an exception from the possibilities of obtaining ownership right to a real estate under foreign exchange law as they essentially guarantee at least the same rights to investors from the other contracting state as those enjoyed by residents. In addition to these agreements, there may be international agreements stipulating the acquisition of real estate for specific non–residents – investors, and thus place them in the position of residents within the limits of the agreement concerned.

The first half of the 1990s also represented a period of denationalization of the economy, which had two basic forms; restitutions (returning nationalized property to former owners and their successors) and privatization (transfer of property in state ownership to private ownership). The legal regulation of restitutions[7] and privatization[8] represents a special regulation in addition to the Foreign Exchange Act with respect to non–residents and the acquisition of real estate in the Czech Republic.

It is not reasonable to anticipate a further liberalization in the acquisition of real estate by non–resident persons outside the European Communities, although given the relatively liberal approach to the possibility of occurrence of the right to undertake business in the Czech Republic, a further liberalization is in fact not very necessary.

5 Act No. 513/1991 Sb., as subsequently amended.
6 P. Kotáb, P. Novotný, in M. Bakeš (ed.), Finanční pravo, Praha 2006, p. 538.
7 For example Act No. 403/1990 Sb., on the mitigation of consequences of property injuries, as subsequently amended.
8 For example Act No. 427/1990 Sb., on the transfers of state ownership of some chattels to other legal or natural persons, as subsequently amended, or Act No. 92/1991 Sb., on the transfer of state property to other persons, as subsequently amended.

Streszczenie

Nabycie nieruchomości jest ważnym sposobem lokaty kapitału, zarówno krajowego jak i zagranicznego. Celem państwa jest niedopuszczenie obcokrajowców do nabywania własności nieruchomości, przy czym władze państwowe kierują się bardzo różnymi względami. Szczególnie ziemia jest tradycyjnie postrzegana jako dobro narodowe, które nie może znaleźć się w obcych rękach. Ponadto istnieje również wiele budynków i budowli uważanych za bogactwa narodowe. Zatem jedna z przyczyn związana jest z ochroną tożsamości narodowej, typowej przede wszystkim dla małych narodów z krótszym okresem państwowości i złymi doświadczeniami obcych rządów. Różnice w sile nabywczej pomiędzy ludnością czeską a ekonomicznie silniejszymi obcokrajowcami są drugim powodem niechęci do uwolnienia rynku nieruchomości. Istnieje również wiele innych przyczyn. Jeżeli chodzi o lokowanie zagranicznego kapitału w nieruchomościach, główna reglamentacja prawna w tym zakresie zawarta jest w prawie dewizowym.

Republika Czeska jest całkowicie liberalna jeżeli chodzi o nabywanie prawa własności nieruchomości położonych za granicą przez rezydentów i nie stawia przed nimi żadnych przeszkód w tym zakresie. Rezydenci nie mają obowiązku informowania o swoich nieruchomościach znajdujących się zagranicą i państwo nie żąda od nich zapłaty podatku od nieruchomości. Podatek ten, jeżeli istnieje, jest płacony zagranicą. Nierezydenci mają ograniczony dostęp do własności nieruchomości w Republice Czeskiej.

Libor Kyncl

LIMITATIONS ON CASH PAYMENTS DURING REAL PROPERTY TRANSFERS

Cash Payment Limitations in General

The Czech legal regulation of cash payments limitations exists in the form of the Act No. 254/2004 Sb., on limitation of cash payments and on modification of Act No. 337/1992 Sb., on administration of taxes and charges, as subsequently amended. This regulation is legally effective as of 1st July 2004.

This act stipulates that cash payments exceeding the amount EUR 15,000.00 are forbidden[1] (payments over this limit can only be made cashless). This restriction also includes payments by using precious metals and gemstones in the worth over this amount. On the contrary, cash payments do not include depositing of money in the bank and withdrawal of money from the bank – they are not even considered to be cash payments.[2] Disobedience of this regulation may result in an administrative penalty from CZK 10.000 to CZK 5.000.000 issued by the territorial financial bodies – the penalty does not depend on the guilt, the regulation constitutes the objective responsibility.

When the payer (debtor) has to pay more than EUR 15.000,00 and asks payee (creditor) to get payee's bank account number, the payee is obliged to give his bank account number to the payer. As long as the payer does not get payee's bank account number, the creditor's delay is present[3].

---

1 Vide Section 4(1) of the Act No. 254/2004 Sb., on limitation of cash payments and on modification of Act No. 337/1992 Sb., on administration of taxes and Charles, as subsequently amended.

2 See Section 2(2) of the Act No. 254/2004 Sb., on limitation of cash payments and on modification of Act No. 337/1992 Sb., on administration of taxes and Charles, as subsequently amended.

3 Vide R. Kulková, Právní regulace hotovostních plateb – zákon o omezení plateb v hotovosti, "Právo a podnikání" 2004, no. 6, p. 6.

Cash Payment Specially Used for Real Property Transfers

There is a method of cash payment often used for real property transfers which is approved by the Czech legal regulation: notarial safe deposit[4]. A usual scenario works this way:

- A buyer using this method of payment stores the money for the real property transfer in the notary office at the time specified by contract (before the transition of ownership).
- The notary secures the money in the safe or in the bank account.
- Second side of the contract is fulfilled (for example ownership of the real property is transferred to the buyer – effectively in the Real Estate Register, i.e. Cadastre).
- A seller retrieves the money stored in the notary office.

Notarial safe deposit still remains the lawful way how to transfer money for the real property and from the legal effectivity of this regulation (1st July 2004) the number of notarial safe deposits for transferring the real property increased.

It is important to remark that the real–estate transfer tax payment for real property transfer is also the part of the transfer (although the payment of this tax is separated from the payment for the real property itself) but it is not limited to be paid in cash by the law.

Payments in the Currencies Different from EUR

Because the Czech Republic is still not the part of the Eurozone (the area using the common currency EUR), EUR is used only in the minority of transactions. Therefore all cash payments have to be calculated from CZK or any other currency used to EUR for the purpose of verifying the amount – the exchange rate used is the rate as of the day of the payment.

4 See Sections 85 – 89 of the Act No. 358/1992 Sb., on Notaries and their Activities (Notaries Act), as subsequently amended.

Streszczenie

Celem niniejszego opracowania jest analiza zawartych w czeskim prawie ograniczeń dotyczących wpłat gotówkowych za przeniesienie własności nieruchomości. Co do zasady czeskie przepisy zabraniają dokonywania wpłat gotówkowych przekraczających kwotę 15,000.00 EURO. Autor opisuje wyjątki od tej zasady.

Michal Radvan, Ivana Pařízková, Dana Šramková

REAL ESTATE IN TAX LAW

Although there are many tax acts in the Czech Republic, they lack the definition of "tax". The answer to the question what the tax is can be found just in the tax theory: a tax is an obligatory amount defined by an Act with a laid down rate which is more or less regularly collected from the incomes of economic subjects to the public budgets on the irrecoverable principle[1].

There is the same problem with the definition of tax as with the definition of fee. The tax theory describes the fee[2] as an obligatory irrecoverable amount defined by an Act and collected by the State or other public corporations for certain legal acts. In contrast to tax this amount is irregular (ad hoc) and the fee payer is eligible to ask for some consideration. It means that fee is very similar to the price and sometimes we can even see somebody to collect "fee" for baggage deposit or coat deposit (though it is not the right term)[3].

To tell the truth, the difference between "tax" and "fee" is really more theoretical than practical. The main rule concerning both taxes and fees is included in the Czech Charter of Fundamental Rights and Freedoms. Article 11(5) assigns that taxes and fees can be imposed only by acts. It means not only taxes, but also all the fees, must be imposed by acts, not just by ordinances of municipalities or ministries.

The following text deals with both taxes and fees concerning real estate. Of course all the property taxes and charges (especially real estate tax, real estate transfer tax) should be mentioned in this place, however, we must not forget that there are many provisions in other legal tax acts concerning real estate, for example in Income Taxes Act and Value Added Tax Act.

---

1 Cp. P. Mrkývka in: P. Mrkývka, Finanční právo a finanční správa – 2nd part. Brno 2004, p. 6. We can find something similar to the definition of tax in the Czech legislation; in the Administration of Taxes Act (Act no. 337/1992 Sb., as subsequently amended, Section 1(1)) there is a legislative short cut of tax - tax means: taxes, fees, transfers, advance payments and other assessments.

2 The term "fee" means the same as the term "charge".

3 Cp. P. Mrkývka, in: P. Mrkývka, Finanční právo a finanční správa – 2nd part., Brno 2004, p. 6.

Real Estate Tax

The most common property tax *not only in the Czech Republic* is the real estate tax[4]. The ownership of the real estate is to be taxed by the real estate tax. Even the Real Estate Tax Act[5] divides this act de iure into two parts (land tax and building tax), according to specifics of the structural items it is better to divide the tax into three, respectively four parts – land tax, building tax, flat tax and very similar to the last one non–residential premises tax. It is necessary to count every tax for every real estate separately. The total sum of these taxes is the final real estate tax written down in one tax return. The revenue from the real estate tax is the income of the municipality in whose district the real estate is situated[6]. On the other hand, the tax administrator is the Revenue Office, in whose district such real estate is situated. This rule is not very clever and it should be changed, so that the real estate tax would be administered by the municipalities.

The profitability of the real estate tax is not very good and there are a lot of discussions whether to abolish this tax or not. In fact, this tax can be very useful, especially for municipalities as the beneficiaries of real estate tax: a return from this tax is stable and there is hardly any tax evasion. We can expect that the citizens paying real estate tax will try to use their property in the best way they can (lease, reconstruction, land cultivating, etc.), if they are obliged to pay this tax. The penalties are regulated by Tax Administration Act[7].

a) Land Tax

Since the 18th century there has been the Real Estate Cadastre (land register) in the Czech Republic and it has been used as well for the definition of the object of land tax: the object of land tax is created by the lands in the territory of the Czech Republic registered in the land register. But the land tax is not imposed on some lands; they are even registered in cadastre, for example lands within the area of the ground plan of building which is built on, woodlands, if they involve preventive forests and forests of special designation, water–covered areas, except ponds used for commercial fish–farming or lands used for defense of the state.

4 Vide M. Radvan, Zdanění majetku v Evropě. Praha 2007, p. 29–146. L. Etel, System opodatkowania nieruchomości w Polsce. In: Europejskie systemy opodatkowania nieruchomości – praca zbiorowa pod redakcją prof. Leonarda Etela, Warsaw 2003, p. 175–248.

5 Act no. 338/1992 Sb., as subsequently amended.

6 More about tax revenues of the municipalities in I. Pařízková, Finanční právo. Finance územní samosprávy. Brno 2005, p. 112–113. Cp. M. Netolický, Rozpočtové určení daní pro obce: Jaké změny nás čekají? in: „Moderní obec" 2007, no. 8, p. 10–11.

7 Act no. 337/1992 Sb., as subsequently amended. On penalties in tax law see, for example D. Sramkova, Penal Tax Law – Sanctions for the breach of legal tax regulation in the Czech Republic, in: The problems of the financial law evolution in Central and Eastern Europe within the integration processes, Bialystok–Vilnius 2004, p. 93 + CD.

Although numerous kinds of lands are liable to land tax, they can be tax–exempt. There are a lot of reasons and many conditions for lands to be exempted from taxation. The most common condition is not to use the land for running business. The legislator was motivated especially by public interests, ecological aspects and international treaties in creating exemptions. In several cases, the tax return must not be filed (for example land is owned by state, municipalities or regions); other claims for exemptions must be set up in the tax return (for example lands owned by churches, schools and universities or hospitals). Usually the exemptions are permanent, but several lands are exempted just for several years (lands after reclamation, lands affected by a natural disaster. The last exemption depends on the opinion of municipality. Since the beginning of January 2008, the municipalities have power to exempt agricultural lands, too.

In most cases the taxpayer of the land tax is the owner of the land. In case of lands registered in the Real Estate Cadastre in the facile way the leaseholder has to pay the tax. Even the user of the land can be the taxpayer of land tax. This can happen if the owner of such land is unknown or if the boundaries of the lands came into being in the terrain after such lands were handed over as compensation for the original lands which were consolidated. Of course, any agreement about tax duty transfer is prohibited. If two or more people should be the taxpayer of the land, they must pay the tax jointly and severally. If one of them pays the tax, the tax duty of the other is fulfilled. This is not very fair for the one who is really paying the tax. That is why the new rule was adopted: any of the part owners can file the tax return for his part of land, but he (and of course all the others) has to pay the minimum tax of CZK 50 because of higher administrative costs of the tax office.

The system of assessment of the tax base and tax rate is different for every kind of land:

– The tax base of *agricultural lands* such as arable land, hop–fields, vineyards, gardens, orchards and permanent grass growth is the price of land determined as a multiple of the actual area of the land in square meters and the average price per square meter of the land laid down in a decree. The tax rate is different: lower (0,25%) for permanent grass growth (they have lower productivity), higher (0,75%) for the other agricultural lands.

– In case of *commercial forests and ponds used for fish–farming,* the taxpayer can choose what is better for him: whether to use the price of the land as determined pursuant to the price regulations valid on 1 January of the taxable period or the actual area in square meters multiplied by CZK 3,80. The tax rate is just one of 0,25%.

– The tax base of *other lands* is the actual area of the land in square meters, as ascertained on 1 January of the taxable period. The tax rate per square meter

is different for development lands (CZK 1) and built–on areas, courtyards and other areas (CZK 0,10). Development land has another value depending on the fact whether it is in a small village or in a city. So the tax rate CZK 1 is not final and it is regulated (multiplied) by the location rent[8] – the coefficient according to the number of inhabitants (municipality can increase or reduce a basic coefficient by a generally binding ordinance).

The counted tax can be multiplied by the local coefficient of 2, 3, 4 or 5. This coefficient can be set for the first time in the year 2009 and it can be set by the municipality in the generally binding ordinance. The tax must be rounded up to the whole CZK.

b) Building Tax

Both buildings for dwelling and buildings used for business are liable to building tax. The objects of taxation are the buildings in the territory of the Czech Republic connected to the land with fixed foundations. These buildings must have an acceptance certificate in a form of assent or decree. Buildings are liable to tax if they are used even if there is no acceptance certificate (but it should be) or if the owner has a permission to use them, too.

Other buildings, especially small–sized buildings, are not liable to buildings tax, so that the land under them is liable to land tax. Some other buildings are not levied as buildings, as well as the land under them is not levied as lands. These are, for example, buildings including flats or non–residential premises (they are liable to flats and non–residential premises tax), water dams and other structures used to regulate water flows, water conduits and sewerages, city waste water treatment plants, energy distribution structures and public transport structures (roads, highways, railways, airports, ports, etc).

There are a large number of buildings that are liable to buildings tax but they are tax–exempt. The reasons and conditions are very the same as the ones mentioned for the land tax. The most common condition is not to use the land for running business. The legislator was motivated especially by public interests, ecological aspects and international treaties in creating exemptions but we can see motivations for economics, too. Sometimes even the tax return can not be filed. This rule is applied for buildings owned by the state, municipalities, regions and diplomatic representatives or used in public passenger transport. Other claims for exemptions must be set up in the tax return. For better understanding, it is useful to create two parts of these exemptions. In the first group there are buildings that are tax–exempt permanently (buildings owned by churches, schools and universities, museums,

8 See more in chapter on Building Tax.

galleries and hospitals, etc.). Other lands are exempted just for several years. We should mention especially newly–constructed residential buildings and flats in newly–constructed residential buildings owned by individuals for 15 years after the issue of an acceptance certificate (they must be used for permanent residence by their owners or persons close to these owners) or structures where the heating system was converted from use of solid fuels to more ecological fuel for five years. The municipalities have a possibility to exempt buildings affected by a natural disaster for a period up to five years to eliminate consequences of natural disasters.

In general, the taxpayer of the buildings tax is the owner of the structure. If the structure is managed by the Czech Republic's Land Fund or the Administration of State Material Reserves, these entities are the taxpayers. But if these structures are leased, their lessees should pay the buildings tax. (This rule is not used for residential buildings, where the above mentioned entities are the taxpayers.) If two or more people should be the taxpayers of the land, they must pay the tax jointly and severally. If one of them pays the tax, tax duty of the others is fulfilled.

The tax base is the same for all kinds of buildings and it is defined as built–up area in square meters as on 1 January of the taxable period. The tax base must be rounded up to the whole square meters. This system is not modern and the Czech Republic should be inspired by many other European countries where the value of the structure is used as the tax base. The tax rate is different for separate kinds of buildings. In fact, knowing or even finding a correct tax rate in the Act is very difficult, so the following table might help[9]:

Table 1: **Buildings Tax Calculation**

Object of buildings tax	Standard tax rate (CZK/m²)	Increased tax rate (additional above–ground floor)	Multiplied coefficients			
			Location rent	Municipal coefficient	National park coef.	Local coefficient
Residential buildings	1	+ 0,75 CZK/m²*	x 1,0 – 5,0	–	–	2,3,4,5
Other structures that provide facilities for residential buildings (over 16 m²)	1	+ 0,75 CZK/m²*	x 1,0 – 5,0	–	–	2,3,4,5
Houses and family houses used for individual recreation	3	+ 0,75 CZK/m²*	–	none / 1,5	x 2,0	2,3,4,5
Other structures that provide facilities for houses and family houses used for individual recreation	1	+ 0,75 CZK/m²*	–	none / 1,5	x 2,0	2,3,4,5

9 The tax must be rounded up to the whole CZK.

Garages	4	+ 0,75 CZK/m²*	–	none / 1,5	–	2,3,4,5
Structures for business activity – primary agricultural production, forestry and water management	1	+ 0,75 CZK/m²**	–	none / 1,5	–	2,3,4,5
Structures for business activity – industrial production, civil engineering, transport, power and other agricultural production	5	+ 0,75 CZK/m²**	–	none / 1,5	–	2,3,4,5
Structures for business activity – other business activity	10	+ 0,75 CZK/m²**		none / 1,5	–	2,3,4,5
Other structures	3	+ 0,75 CZK/m²*	–	–	–	2,3,4,5

** If the area of a built–up additional above–ground floor exceeds two–thirds of the built–up area*

*** Always*

The standard tax rate shall be increased by CZK 0,75 per each additional above–ground floor (so called increased tax rate). This standard rate or increased rate shall be multiplied by the location rent – the coefficient according to the number of inhabitants (the municipality can increase or reduce a basic coefficient by a generally binding ordinance):

Table 2: **Location Rent**

Number of inhabitants / Municipality	**Location rent**				
	Basic	**Reduced**			**Increased**
≤ 1 000	1,0	–	–	–	1,4
> 1 000 ≤ 6 000	1,4	–	–	1,0	1,6
> 6 000 ≤ 10 000	1,6	–	1,0	1,4	2,0
> 10 000 ≤ 25 000	2,0	1,0	1,4	1,6	2,5
> 25 000 ≤ 50 000	2,5	1,4	1,6	2,0	3,5
> 50 000 + Františkovy Lázně, Luhačovice, Mariánské Lázně, Poděbrady	3,5	1,6	2,0	2,5	4,5
Prague	4,5	2,0	2,5	3,5	5,0

Where the location rent can not be used, the standard tax rate shall be increased by the so called municipal coefficient assessed by a generally binding ordinance of the municipality. The national park coefficient is used for houses located in national parks or first–category protected countryside zones.

The counted tax can be multiplied by the local coefficient of 2, 3, 4 or 5. This coefficient can be set for the first time in the year 2009 and it can be set by the municipality in the generally binding ordinance. The tax must be rounded up to the whole CZK.

c) Flat Tax and Non–Residential Premises Tax

The flats and non–residential premises tax is a special category of the building tax. This tax includes proportionate shares in common areas of the building such as laundries, hanging rooms, corridors, etc. related to the flats and non–residential premises. Only flats and non–residential premises registered in the Real Estate Cadastre are liable to tax. Buildings in which flats and non–residential premises are objects of taxation are not liable to buildings tax.

Exemptions from flats and non–residential premises tax are the same as the exemptions from building tax. Only one more exemption should be mentioned: flats owned by individuals in newly–constructed residential houses, if they are used as a permanent residence by their owners or person close to these owners, are tax–exempt.

The definition of the taxpayer of flats and non–residential premises tax is the same as the definition of the taxpayer of buildings tax; it means the owner of the flat or non–residential premise is usually the taxpayer of this tax.

The tax base of flats and non–residential premises tax is so called adjusted floor area, it means the floor area of the flat or non residential premise in square meters as on 1 January of the taxable period, multiplied by a coefficient of 1,20. The tax rate is different for flats and for non–residential premises. The standard tax base for flats is CZK 1 per square meter of the adjusted floor area. This standard rate shall be multiplied by the location rent and by the local coefficient (see above).

In non–residential premises there are usually run some business activities and the taxpayer must set the standard rate according to this business activity: CZK 1 per square meter of the adjusted floor area for non–residential premises used for primary agricultural production, forestry and water management, CZK 5 for non–residential premises used for industrial production, civil engineering, transport, power and other agricultural production, and CZK 10 for non–residential premises used for other business activity. If the non–residential premise is used as a garage, the standard tax rate is CZK 4 per square meter of the adjusted floor area. These standard rates shall be multiplied by the municipal coefficient and by the local coefficient (see above). If the non–residential premise is used for anything else, the standard tax rate is CZK 1 per square meter of the adjusted floor area and it can be multiplied by the location rent and by the local coefficient (see above). The tax must be rounded up to the whole CZK.

d) Real Estate Tax Administration

The tax return must be filed by the taxpayer by 31 January of the taxable period (the calendar year). The real estate tax is assessed according to the situation as on 1 January of the calendar year of which it is assessed.

In fact, the tax return is not necessary to be filed every year; usually if the tax return was filed in any of the previous taxable period and there are no changes, the taxpayer does not have this duty. Even if there are changes in the tax rate, in the average price of land, in the coefficients, etc., there is no duty to file the tax return.

Every year the Reventue Office sends the assessment with the tax duty to every taxpayer. If the annual real estate tax does not exceed CZK 5 000, it shall be payable in one payment not later than 31 May of the current taxable period. If the tax exceeds CZK 5 000, it shall be payable in two equal installments not later than 31 May and 30 November. The taxpayers engaged in farming and fish–farming have to pay the tax in two installments not later than 31 August and 30 November.

Transfer Taxes

All the transfer taxes (inheritance tax, gift tax and real estate transfer tax) are regulated by one act[10]. The difference between these three taxes is in fact whether the transfer of the property is realized for money (real estate transfer tax) or whether it is gratuitous (inheritance tax and gift tax). If that transfer is gratuitous, it is necessary to know whether the transfer is *inter vivos* (gift tax) or *mortis causa* (inheritance tax)[11].

a) Real Estate Transfer Tax

The aim of this tax is to draw a part of purchase price obtained from the sale of real estate. Since the acquisition of property is not gratuitous, the tax rate is lower than for other transfer taxes[12]. Real estate transfer tax is payable on the transfer of ownership title to the real estate for consideration and the establishment of an easement without consideration upon the acquisition of real estate by donation. Even in cases when this transfer is cancelled and the cancellation renders the contract null and void from its inception, the transfer of ownership title to real estate for a consideration is liable to the real estate tax. Exchange of real estate is considered as a single transfer. The tax will be collected on the transfer of real estate with higher tax.

10 Act no. 357/1992 Sb., Inheritance Tax, Gift Tax and Real Estate Transfer Tax Act, as subsequently amended.
11 Vide M. Radvan, Zdanění majetku v Evropě, Praha 2007, p. 147–268.
12 Vide J. Neckář, Zdanění převodů nemovitostí v Evropě, "Daně a finance" 2007, no. 10, p. 3–10.

The only important exemption is the exemption of the first transfer for consideration of ownership title to a newly–constructed building, if such a building has not been used yet, or to a flat in a new building, if such a flat has not been used yet, on condition that the transferor is a natural person or legal entity and such a structure is transferred in connection with a business activity of the transferor, or if the transferor is municipality.

The real estate tax is paid mostly by the transferor (the seller). In this case the person acquiring the real estate becomes the surety. In other cases the taxpayer is the beneficiary from an easement or another benefit similar to an easement. Talking about the exchange of real estates, both the transferor and the transferee are liable to pay the tax; both of them are obliged to pay the tax jointly and severally.

The tax base is usually the price ascertained pursuant to the Act no. 151/1997 Sb., Act on Property Valuation, as subsequently amended, and valid on the day of acquisition of the real estate. But if the agreed price of real estate is higher than the price ascertained pursuant to the Act on Property Valuation, this agreed price must be used as a tax base. The tax base can include as well the price of an easement established without consideration, the price ascertained pursuant to the Act on Property Valuation and valid on the day of the acquisition of the real estate on the basis of the relevant financial lease contract, the price from auction, etc. The tax base is rounded up to the whole hundreds of CZK. The tax rate is linear of 3% of the tax base. The tax must be rounded up to the whole CZK.

The taxpayer must file a tax return with the Revenue Office in whose district the real estate is situated latest by the end of the third month following the month when registration of such transfer was made in the Real Estate Cadastre. A tax return shall be accompanied by a certified copy of the contract or other document by which ownership relations to specific real estate are confirmed or certified. The taxpayer must enclose an expert's valuation of the price, too. The taxpayer must state all necessary information in the tax return and calculate the tax. If the real estate transfer tax stated in the tax return corresponds to the real estate transfer tax assessed, the tax administrator need not notify the taxpayer of such assessment. Tax must be paid within the time–limit for filing the tax return. The revenue of the inheritance tax is the income of the state budget.

b) Inheritance Tax

Any acquisition of property (immovable asset, movable things, securities, receivables, property rights, etc.) by inheritance is liable to inheritance tax There is the difference of property liable to tax depending on the citizenship and permanent address of the decedent and kind of property.

The most useful exemption from taxation is the acquisition of property by inheritance that concerns persons included in the first (direct relatives and spouses) and in the second category (other relatives and persons living with the decedent in one household for at least one year before the death of the decedent and who took care of the common household or were dependent on the decedent for their support). For the third category (other natural persons and legal entities) there are several other exemptions like acquisition of movable property belonging to individuals, if the value of such property does not exceed CZK 20 000. Acquisition of deposit in bank accounts, money (financial means), securities, if the total amount of all these values does not exceed CZK 20 000, is exempted, too. Tax is collected only on those parts of the value by which the above mentioned limits are exceeded. We can see that there are no exemptions of acquisition of real estate like in many other European countries.

The taxpayer of inheritance tax is an heir who acquires an inheritance on the basis of a testament or by operation of law or on both such legal grounds. The person of the taxpayer is always set out in the final decision concluding inheritance proceedings issued by the competent authority.

The tax base is the value of the property acquired by the heir (the price of the property determined in inheritance proceedings) reduced by the debts of the decedent, the value of property exempted from taxation, expenses related to the decedent's funeral and remuneration to the notary. The tax base must be rounded up to the whole hundreds of CZK. The tax rate is progressive and depends on the value of the property. It is necessary to use the same proceedings as the ones used for the gift tax (see below) and the final tax should be divided by two to calculate the inheritance tax. The tax must be rounded up to the whole CZK.

The taxpayer must file a tax return with the competent Revenue Office (the one in whose district the decedent had his residential address or where he mostly stayed) within 30 day of the day when court's decision by which inheritance proceedings were completed became final. The Revenue Office calculates the tax using the data in the tax return and final ruling on inheritance sent by court. The tax must be paid within 30 days since the delivery of the order of tax payment (tax assessment). The revenue of the inheritance tax is the income of state budget.

c) Gift Tax

The main purpose of this tax is to guarantee that decedents will not evade inheritance tax (will not give gifts to the heirs during their life. Gift tax is imposed on the gratuitous acquisition of property (real estate, movable property, other benefits) on the basis of an act in law (*inter vivos*), other than by a decedent's death

(*mortis causa*). There are many acts in law that can be used for donation but the most common is the contract of donation.

The object of taxation is donation of movable property from abroad to a presentee in the Czech Republic or from the Czech Republic to a presentee abroad, too. The tax will be also collected on movable property which is donated abroad or acquired abroad from the means donated to a presentee abroad, if the donated or acquired movable property was imported by a presentee to the Czech Republic. The donation of real estate located in the area of the Czech Republic is always liable to gift tax. There are several situations when the gratuitous acquisition of property is not liable to gift tax (for example benefits or gratuitous transfer of property on the basis of a duty laid down in a legislative act).

There are a lot of exemptions used for the purpose of gift tax. The most useful exemption from taxation is the acquisition of property by inheritance that concerns persons included in the first and in the second category (see chapter on inheritance tax). Persons included in the third are using exemptions in case of acquisition of movable property belonging to individuals, if the value of such property does not exceed CZK 20 000 and in case of acquisition of deposit in bank accounts, money (financial means), securities, if the total amount of all these values does not exceed CZK 20 000. The tax is collected only on those parts of the value by which the above mentioned limits are exceeded. The only exemption dealing with real estate is exemption of free–of–charge transfers of flats, family houses, garages from housing co–operatives' ownership to ownership of such housing co–operatives' members (natural persons).

Usually the taxpayer of the gift tax is the presentee (donee, transferee). The donor is the tax surety (guarantor). However, when a gift is donated to someone abroad, the donor is the taxpayer of the gift tax. If two or more persons are obliged to pay the gift tax, each of them has to file the tax return and each of them has to pay his part of tax.

The tax base of the gift tax is defined as the price of the property (price ascertained under Act no. 151/1997 Sb., Act on Property Valuation, as subsequently amended) reduced by debts and the value of other liabilities pertaining to the object of tax, the value of tax–exempt property and customs and taxes paid on the importation of movable things donated or imported from abroad. To evade tax, many of the taxpayers are trying to divide the gift into parts. The act remembers these situations and sets that the price of gift from the same donor to the same donee within two subsequent calendar years shall be added together and the sum of the prices is the tax base. If the tax was paid in the first year, in the second year it will be credited against the tax assessed on the subsequent acquisition of property. The tax base must be rounded up to the whole hundreds of CZK.

The tax rate is progressive and depends on the value of the property:

Table 3: **Tax Rates of Gift Tax**

Tax base from (mil. CZK)	**Tax base to** (mil. CZK)	**Tax rate for persons in the third category** (CZK +% from the tax base exceeding lower bound)
	1	7,0
1	2	70 000 + 9,0
2	5	160 000 + 12,0
5	7	520 000 + 15,0
7	10	820 000 + 18,0
10	20	1 360 000 + 21,0
20	30	3 460 000 + 25,0
30	40	5 960 000 + 30,0
40	50	8 960 000 + 35,0
50		12 460 000 + 40,0

The tax must be rounded up to the whole CZK.

The taxpayer must file a tax return with the Revenue Office in whose district the real estate is situated (donation of real estate) or the one in whose district the taxpayer has his residential address or registered office (donation of movable property) within 30 day of the day when the donation of a movable asset or some other property benefit took place or a contract on free–of–charge transfer of ownership title to specific real estate with a clause confirming its registration to Real Estate Cadastre was served on the taxpayer. A tax return shall be accompanied by a certified copy of the contract or other document by which ownership relations to specific real estate are confirmed or certified. The taxpayer must enclose an expert's valuation of the price, too. The taxpayer must state only necessary information in the tax return and the Revenue Office calculates the tax using the data in the tax return. The tax must be paid within 30 days of delivery of the order of tax payment (tax assessment). The revenue of the inheritance tax is the income of state budget.

Real Estate within the VAT Legislation

Value added tax (VAT) is the basis of the excise duty system in the Czech Republic, but on the other hand, it is also the basis of the whole tax system. The VAT

is regulated by the VAT Act (Act. No. 235/2004 Sb., as subsequently amended) as of May 1, 2004.

VAT is the excise duty and it is a universal, an obligatory and a rated tax. The system of excise duty is completed with consumption taxes, which are applied only to selected products which have a consumer character. The indirectness of the VAT is seen in the principle when bearers of VAT – who act as buyers, clients etc. – do not fulfill their obligation (tax liability) directly to the State, but through registered taxpayers who are obliged to collect and transfer the VAT. The universality of VAT is based on the principle that it is applied to all business activities (some exemptions of exempted business are applied) and all business subjects (registered as a taxpayer). Therefore equal conditions are created for all forms of business activities.

The subject of the tax is the taxpayer as a person obliged to the tax and it could be a natural or a legal person, which individually gives effect to the business activities which has a firm domicile, a place of business or business premises in the Czech Republic and which has had a turnover in the last 12 successive months of CZK1,000,000.00.

The tax base is an amount of money which is reduced by a tax which the taxpayer obtained or has to obtain in consequences to the carried out taxable payment from the person for which it is done, or from a third party.

The object of the tax is the supply of the goods, the transfer of the real estate or the transition of the real estate in an auction, supply of services and acquisition of the goods from another Member State of the EU. The place of delivery in the situation of the transfer of the real estate is the place of the real estate. The transfer of the real estate is specified as the transfer of the real estate which is an object of registration in the Cadastral Register. If it is not, then the transfer is considered to be a supply of goods.

In case of the supply of services related to the real estates, building surveyor and to construction and assembling works, the place of delivery is stated according to the real estate which is an object of the activities. Consequently to this regulation, it is possible to say that all activities concerning the real estate which is situated in the Czech Republic, are always the object of the VAT in the Czech Republic. The tax rate for those activities is stated in the amount of 19% (this is the basic rate).

The reduced rate – 9% – is stated for construction and assembling works concerning the reconstruction of completed constructions, the block of flats or a flat. The reduced rate is also used for social public housing.

The transfers of real estates, flats or non–flat places is exempted from VAT after 3 years after the acquisition of final building approval, and also the financial leasing of building constructions, flats and non–flat places is exempted from VAT.

The exemption is also applied to the lease of real estates, flats or non–flat places, but only in a long–term lease situation.

The period of taxation is a calendar month or calendar quarter (it depends on the amount of the turnover of the taxpayer).

The declaration of taxes has to be declared by the 25th day at the latest after the end of the period of taxation.

Real Estate within the Income Taxes Legislation

The following text deals with legal regulation of real estate in the income taxes point of view. It intends to refer with its subject both to the traditional Czech income taxes regulation (e.g. the influence of the real estate transfer tax to the tax base, tax exemptions or depreciation of assets) and to the relatively shortly adopted changes in the tax law (e.g. special binding considerations).

The income taxes system in the Czech Republic consists of taxation of individuals and legal entities, both covered by the Income Taxes Act[13]. Personal income tax is imposed on income of individuals. These taxpayers who have their home address in the Czech Republic, or who usually stay here, are liable to tax on income arising from sources in both the Czech and abroad. Other taxpayers (except of those staying here only for the purpose of studies or medical treatment) shall be liable to tax on income arising solely from sources in the Czech Republic. There is a similar rule according to the corporate income taxes.

Since 1.1.2008 a new system of tax rates has been effective:

– Individuals shall be no more subject to taxation at progressive rates ranging. There is one linear rate 15% (from the 2009 taxable period it will be 12.5%);

– The corporate income tax rate is 21% (from the 2009 taxable period it will be 20%).

There are two types of income connected with the real estate which are liable to personal or corporate income tax: rental income and income from transfer of real estate.

13 Act no. 586/1992 Sb., Income Taxes Act, as subsequently amended. For more details see, for example I. Pařízková, Daň z příjmů, in: P. Mrkývka, P., Finanční právo a finanční správa – 2nd part, Brno 2004, p. 140–177. Or M. Radvan, Czech Tax Law, Brno 2005, p. 14–25.

a) Income from Transfer of Real Estate:

The tax base in the case of both personal and corporate income tax shall include the income from transfer (sale) of real estate situated in the Czech Republic, reduced by the "documented" expenses. As an expense shall be considered, e.g. the price for which a taxpayer acquired this property. Into the tax base is included neither the real estate transfer tax, nor the real estate tax[14].

b) Rental Income:

The tax base in the case of personal income tax shall include the income from the lease of real estate or parts of it, reduced by the expenses incurred to generate, assure and maintain that income. Moreover, the taxpayer has also another option. Unless he claims the "documented" (real) expenses, he may claim as the "lump" expenses 30% of his rental income. Unfortunately, there are no such rules for those "lump" expenses within the corporate income tax legislation.

On the other hand, according to the Czech Income Taxes Act, the income attained by inheritance, restitution or donation of real estate is not liable to the personal income tax.

However, the most interesting rules concerning the real estate can be found within the tax exemptions as the traditional tax correction institutes. There are different exemptions for personal and corporate incomes.

The following types of **personal income** shall be tax exempt[15]:

1. Income from sale of a family house or an apartment (including co–ownership or an ownership interest in the common parts of the building and including the land related hereto) where the seller has his home address. For application of this tax exemption there has to be proved that the seller had his home address there for at least two years immediately before the sale or he had his home address there for a period less than two years and he uses the means acquired from its selling for meeting his house needs. It is not allowed to apply this exemption to income gained from the sale of a real property if it is/was included in business property in the last 2 years.
2. Income from sale of a real estate (including non residential spaces) not pursuant above; generally, if the period of time between their acquisition and sale exceeds 5 years. If the real estate was acquired by inheritance from a person who was the seller's direct relative or spouse, the 5 year period shall be shortened by the period when the real estate was in the devisor's

14 For more details see the Income Taxes Act: Sections 10(1, 5), 22(1/d, e) and 24(2/ch, u).
15 See Section 4(1/a, b) of the Income Taxes Act.

ownership. As in the first case, there is forbidden to apply this exemption to income gained from the sale of a real property if it is/was included in business property in the last 5 years.

The following types of **corporate income** shall be tax exempt [16]:

1. Incomes from regulated[17] rents for apartments and from garage rents (including the income from payments for services connected with the use of apartments or garages) in ownership or co–ownership of housing cooperatives or used by members of legal entities which were formed for the purpose of becoming owners of those buildings.
2. Incomes from leasing of real estates, if such property form part of a certain foundation's assets and is recorded in the Foundation Register.

c) Depreciation

For the purpose of the Income Taxes Act the buildings, houses, apartments, non–residential spaces and structures shall mean "tangible fixed assets". Those assets are to be depreciated. However, a taxpayer is not obliged to claim depreciation for the purposes of the law and is entitled even to interrupt it[18].

In the first year of depreciation, the taxpayer shall allocate his assets into the relevant depreciation categories according to the Annex No. 1 to the Czech Income Taxes Act. The real estate shall be classified by the depreciation categories 4, 5 or 6. After finding the appropriate category, the taxpayer has to choose one of the depreciation methods mentioned in Section 30 of the Czech Income Taxes Act: either the straight line method or the accelerated one. The determined method may not be changed during the entire period of depreciation.

d) Binding Consideration

Where a taxpayer has doubt whether the conditions laid down in the tax legislation are met, he has the possibility to ask the tax administrator for his binding consideration. Although the binding consideration may be seen as a very useful institute, it may be used only in a few cases. According to the Section 34b of the Tax Administration Act[19], there has to be an extra enactment for each case in the specific tax legislation.

16 For more details see Section 19(1/c, r) of the Income Taxes Act.
17 See Sections 3 and 4 of the Act no. 526/1990 Sb., on Prices, as subsequently amended.
18 For more details see Sections 26 – 32 of the Income Taxes Act.
19 Act no. 357/1992 Sb., as subsequently amended.

Since the 1st January 2008, though, a new legal regulation has been effective, where the binding consideration rules are extended. Nowadays the binding consideration may be requested, e.g. if:

– The taxpayer is not sure about the proportion of the "documented" expenses related to the real estate which is used partly for the business and partly for the private activities.

– The taxpayer is not sure whether his alteration of an asset shall mean the technical appreciation or not.

Local Charge on Evaluation of Building Land

Every municipality in the Czech Republic has a possibility to levy local charges (local fees, local taxes[20]). The authority for doing so is needed to be established by law. Not every municipality levies every local charge, town council has an opportunity to decide whether the municipality will levy the local charge and it can define the amount of this charge. In fact, the income from the local charges is quite important for the municipalities and paying local charges is the same duty as to pay every other taxes and charges. Local charges have (except the fiscal function) regulation and protective function, too.

The list of local charges is set in Act no. 565/1990 Sb., Local Charges Act, as subsequently amended. In its section 14 it contains authorization for municipalities to assess local charges by the ordinance. In this ordinance conditions for levying, charge rate, charge maturity and possible immunity must be given. The ordinance may not exceed the conditions defined by Local Charges Act (for example, absolute charge rate or varieties of charges)[21].

If somebody has a duty to pay a local tax and he fails to do it (in time or he does not pay the right amount), the municipality sends him an assessment. The amount due can be raised three times in the assessment. The municipality must make a legal act to a debtor in three years after the end of the year when the debtor had to pay the charge, as then there is no chance to levy the charge. The maximum term is ten years after the end of the year when the debtor had to pay the charge. The administration office is the municipality that levied the charge. The municipality has the right to reduce the charge or to exempt the charge duty or accessories to the charge.

There is only one local charge connected with real estate – the charge on evaluation of building land. This charge is paid by the owner of the lot if he has

20 See also P. Mrkývka, Některé úvahy o materiálním základu veřejné správy, "Časopis pro právní vědu a praxi" 2003, no. 2. Vide M. Radvan, Zdanění majetku v Evropě, Praha 2007, p. 331–332.

21 Vide M. Radvan in: P. Mrkývka P. a kol., Finanční právo a finanční správa – 2nd part, Brno 2004, p. 300–310.

a possibility to connect it to municipal water conduit or sewerage. It means that the charge is paid as a cover of municipality's expenditures of investments to the infrastructure. By this, the value of the building land is increased. But the owner has to pay the charge even if he does not take an advantage to connect to municipal water conduit and sewerage. The charge rate can be at maximum the difference between the prices before and after the possibility to connect the lot to water conduit or sewerage at maximum. Prices are ascertained under Act no. 151/1997 Sb., Act on Property Valuation, as subsequently amended. The charge rate must be published in the municipal ordinance.

Streszczenie

Niniejszy rozdział przedstawia aspekty podatkowe władania nieruchomościami. Najważniejszymi podatkami w tym zakresie są podatki od własności, w szczególności podatek od nieruchomości, który jest związany zarówno z gruntami jak i infrastrukturą (budynkami), w tym mieszkaniami i lokalami niemieszkalnymi.

Władanie nieruchomością może również być przedmiotem opodatkowania podatkiem od spadków, od darowizn oraz podatkiem od przeniesienia własności nieruchomości.

Autorzy omawiają konstrukcje wymienionych wyżej podatków. Wskazują również na podatki dochodowe oraz podatek od wartości dodanej jako daniny obciążające powstały (w związku z dysponowaniem nieruchomością) przychód, dochód lub obrót. Osobne miejsce poświęcono tematyce opłat związanych z nieruchomościami, w szczególności – opłatą związaną z przyłączeniem nieruchomości do gminnej sieci wodociągowo–kanalizacyjnej.

Eugeniusz Ruśkowski

REAL PROPERTY TURNOVER IN POLISH FOREIGN EXCHANGE LAW

As a rule, foreign exchange is subject of turnover in foreign exchange law. Even though in international turnover real property is not included in foreign exchange definition, its turnover is quite often subject to diverse foreign exchange restrictions. Such situation was occurring for transformation period[1], including still binding the Foreign Exchange Act of 27 July 2002 (Journal of Laws No. 141, item 1178 with amendments)[2].

Initially in accordance with this act, real property turnover in Polish foreign exchange law was subject of following direct restrictions:

– obtaining necessity of general or individual foreign exchange permits for acquisition by residents of real property situated in third countries[3] and the rights attached thereto;

– duty of residents acquiring from non–residents or selling to non–residents real property, which value equals or exceeds equivalent of EUR 10 000, within 30 days after the day of acquisition or sale[4].

---

1 See, for example E. Ruśkowski, Komentarz do ustawy prawo dewizowe, Warsaw 1994; E. Ruśkowski, Prawo dewizowe, Warsaw 1997; J. J. Skoczylas, Prawo dewizowe. Komentarz, Warsaw 2000.

2 Compare, for example E. Fojcik–Mastalska, Nowe prawo dewizowe. Komentarz 2003, Wrocław 2003; W. Wojtowicz, A. Grogol, Prawo dewizowe, Warsaw 2003; Z. Ofiarski, Prawo dewizowe. Komentarze Zakamycza, Zakamycze 2003.

3 Third countries shall mean states other than Republic of Poland which are not Member States of the European Union. Third countries belonging to the European Economic Area or the Organization for Economic Cooperation and Development shall be treated on a par with the Member States of the European Union.

4 Article 30 item 3 of the Act of 27 July 2002 in connection with § 5 of the Council of Ministers Ordinance of 10 December 2002 on manner, scope and time for the performance by residents making cross–border foreign exchange turnover of obligations of providing the National Bank of Poland with data to the extent necessary for

First of above mentioned restriction has been liberalized by Minister of Finance Ordinance of 3 September 2002 on general foreign exchange permits[5], in that way there has been permitted for acquisition:

– by residents of BIT countries[6] and rights to real property for the purpose of business activities, started and conducted in these countries;

– by residents, other than natural persons, of real property situated in third countries, if the price of its acquisition does not exceed equivalent of EUR 50 000 and acquisition does not take place in connection with business activities conducting.

At the moment of accession of Poland to European Union there appeared doubts on compliance of the mentioned above foreign exchange regulations with Article 56 and 57 of EC Treaty. Finally, the regulations have been changed by act on amendment of Foreign Exchange Act and other acts of 26 January 2007[7], as well by establishing new executive regulations. In accordance with them real property turnover is subject of following direct restrictions:

– exportation, dispatch and transfer by residents to third countries[8] of domestic or foreign means of payment, to be used for starting or expanding business activities in these countries, including the acquisition of real property for these activities' purpose, with the exception of transfer to third countries domestic or foreign means of payment for defrayal of expenses of activities consisting in direct provision of services in performance of signed contract or promotion and advertising business activities conducted by resident in the country;

– residents acquiring from non–residents real property which total value equals or exceeds the equivalent of EUR 10 000, are obliged to provide the

the preparation of the balance of payments and the external accounts of the state (Journal of Laws No. 218, item 1835).

5 Journal of Laws No. 154, item 1273 with amendments.

6 BIT countries in accordance with ordinance shall mean third countries which signed with the Republic of Poland the agreements on mutual support and protection of the investments. On a par with BIT countries there are treated: Russian Federation, Kirgizstan, Armenia, Georgia, Turkmenistan, Republic of South Africa and Algeria.

7 Journal of Laws No. 61, item 410.

8 Above amendment has also changed third countries definition. Currently, third countries shall mean states which are not Member States of the European Union, as well their dependent, autonomous and associated territories and dependent, autonomous and associated territories of the Member Sates of the European Union. Third countries belonging to the European Economic Area or the Organization for Economic Cooperation and Development shall be treated on a par with the Member States of the European Union. Dependent, autonomous and associated territories of the Member States of the European Union or third country belonging to the European Economic Area or the Organization for Economic Cooperation and Development shall be treated on a par with this state or country, if this par treatment results from international agreements binding the Republic of Poland to the extent regulated by act.

National Bank of Poland with data on acquisition or selling of real property within 30 days after conclusion of transaction[9].

First of above mentioned restriction has been liberalized by Minister of Finance Ordinance of 4 September 2007 on general foreign exchange permits in that way there has been permitted for transferring by residents to BIT countries through authorized banks, domestic and foreign means of payment to be used for starting or expanding business activities in these countries, including the acquisition of real property for these activities' purpose[10].

Above information means that currently only transactions of real property acquisition for starting or expanding business activities by residents with few countries of "third countries" group, are subject of restrictions. Then permits for these transactions must be granted by the President of the National Bank of Poland by way of individual foreign exchange permit. Besides, acquisition and selling by residents with non–residents of real property, which total value equals or exceeds EUR 10 000, are subject of registration duty in the National Bank of Poland. Infringement of these obligations is liable to criminal and fiscal sanctions, regulated by Articles 100 § 1 and 106l § 1 of the Penal Fiscal Code of 10 September 1999[11].

It's obvious that residents or non–residents trying to buy or sell real property pursuant to Polish foreign exchange law, must also comply with other restrictions, indirectly affecting on foreign exchange legality of such operations. There may be enumerated, among others, the following duties: written declarations of residents and non–residents crossing the state border to customs authorities or authorities of the Frontier Guards about importation into the country or exportation abroad of foreign exchange gold and foreign exchange platinum, irrespective of amount, also domestic and foreign means of payment, if their total value exceeds the equivalent of EUR 10 000; making by residents and non–residents money transfers abroad and settlements in the country connected with foreign exchange turnover through authorized banks if the amount transferred or settled exceeds the equivalent of EUR 15 000.

9 See § 5 of Minister of Finance Ordinance of 17 September 2007 on manner, scope and time for the performance by residents making foreign exchange turnover and the operators carrying out exchange operations of obligation of providing the National Bank of Poland with data to the extent necessary for the preparation of the balance of payments and international investment position (Journal of Laws No. 183, item 1308).

10 The ordinance has also changed BIT countries definition and countries treated on a par with them. Currently, BIT countries shall mean third countries which signed with the Republic of Poland the agreements on mutual support and protection of the investments. On a par with BIT countries there are treated third countries which concluded with European Communities and their Member States agreements binding of the Republic of Poland on partnership and cooperation, association and other similar agreements including provisions obliging to secure free movement of capital concerning direct investment, liquidation of these investments and income transfer from them.

11 Journal of Laws No. 83, item 930 with amendments.

In general, it can be affirmed that currently in Poland international turnover of real property is almost free with regard to foreign exchange provisions, but keeping in mind the duty of providing the National Bank of Poland with data and other less important direct duties concerning foreign exchange transactions.

Streszczenie

W prawie dewizowym przedmiotem obrotu są – co do zasady – wartości dewizowe. Mimo tego, że nieruchomości w obrocie międzynarodowym nie są zaliczane do wartości dewizowych, często ich obrót podlega różnorodnym ograniczeniom dewizowym. W Polsce tak właśnie było przez cały okres transformacji, włącznie z obowiązującą dzisiaj ustawą z dnia 27 lipca 2002 r. – Prawo dewizowe.

Leonard Etel

REAL ESTATE TAX REFORM

The necessity to reform real estate taxation system in Poland, far from being perfect, does not need justification. It is an effect of numerous factors, the most significant ones presented in the professional literature[1]. It is commonly recognised that appropriate measures to complete the reform of the system should be undertaken as soon as possible. The present article describes the key steps which, in my opinion, would contribute to development of a reasonable system of real estate taxation.

1. It is necessary to collect regulations regarding real estate taxation in a framework of a new, single real estate tax. Today, the regulations concerning taxes on real estate are scattered between three legal acts. However, this phenomenon of imposing a burden of a few tax obligations on the same object (real estate), while these taxes remain mutually exclusive, is not an isolated concept in Europe, and the idea itself to replace three existing taxes with one deserves praise[2]. The introduction of one tax would make the mechanism of imposing this property levy easier and contribute to the golden rule of transparent tax system.

2. Real estate tax base should be estinated according to the property's value instead of its area. Works to modify the real estate tax system toward introduction of ***ad valorem*** tax have been in progress for a long time in Poland. Unfortunately, in the Polish system the real estate tax rates are determined otherwise by the legislation. Apart from the real estate tax on buildings structures, the rates for other levies depend on the total or usable area of land, building or premises. Such state resembles calculating property with a measuring tape, i.e. the time when the extent of property could be measured with the area of accumulated lands, which in fact has been long forgotten. Today we experience situations when the same tax is levied on a person who owns a ruined shed and on an individual possessing a luxury holiday home (of the same area as the said shed). Therefore the government plans to

1 See R. Dowgier, L. Etel, T. Kurzynka, G. Liszewski, M. Popławski, E. Wróblewski, Reforma podatków majątkowych, Warsaw 2004.
2 M. Radvan, Opodatkowanie majątku w Europie, Prague 2007.

combine agricultural, forest and real estate tax into a single levy called cadastral tax, being a financial charge whose base would be the value of property (agricultural, forest or other) registered in the cadastre.

3. The system of agricultural taxation should be redeveloped, including property related to agriculture. In the present system the agricultural taxation is still a question, particularly with regard to agricultural property. In the current situation, taxes on property, agricultural tax in particular, are the only financial charge imposed on farmers, with an exception of incomes derived from special agricultural production. As general rules of revenue and income taxes do not apply to farmers, the agricultural tax construction is forced to be a kind of combination of revenue, income and property tax. Of course it is some fiction, nonetheless, it overshadows the agricultural tax outline. As far as agricultural taxation reform is concerned, measures to increase the agricultural tax and merge it with new real estate tax deserve support. Maintaining in the tax system a separate tax, levied exclusively on agricultural property, seems pointless. Increasing the agricultural tax does not mean that agricultural lands immediately lose preferential treatment, if *ad valorem* tax is imposed. The review of the situation in other countries proves that agricultural lands are being taxed in a relatively less bothersome way than other real properties.

There is also a need to change farmers' taxation, which would involve imposing income tax on them. It does not necessarily have to result in an increase of tax burden of this group. Farmers with the lowest income would not pay this tax at all or would pay very small income tax. Nowadays, an owner of 2000 ha of land with an agriculture enterprise built on it is exempt from the tax. Is it fair when compared with taxing the pensioners and the unemployed? Imposing income tax on the incomes related to agricultural production will provide uniform standards of business incomes taxation. The farmers in Poland will be no longer a privileged occupational group exempt from taxes.

4. Real estate taxation requires development of a register of property. At the moment, there is,in fact, no consistent and reliable record that could provide for an accurate assessment of taxes on real property. The area being base for agricultural, forest and property tax is supposed to be found in land or building register. Actually, we have only land register, as building register has not been developed until today. The data recorded in the land register, in particular classification of agricultural lands, are often out–of–date, which causes many obstacles for levying those taxes. That is why special registers for the purpose of taxation should be developed as quickly as possible by the tax authorities, as well as land and building registers ought to be updated and modernised. Improvement of those registers functioning will contribute to the creation of a fiscal cadastre in Poland.

5. Introduction of "green" taxes should be effected during implementation of property tax reform. Environmentally friendly solutions combined with tax regulations, as it is confirmed by the experience of other countries, bring excellent results. Property taxes, because of their nature, are great instruments of eco–friendly behaviour stimulation. In the Polish system, which was previously underlined, such solutions hardly exist. Consequently, it is necessary to introduce them when reshaping existing grounds for property taxation.

6. Current system of property tax exemptions has to be put in order. First of all, it is essential to limit the exemption extent and unify exemption granting rules. There are such property taxes which hardly provide a benefit to local budget because of an expanded catalogue of exemptions and statutory allowances. For example, statutory exemption of agricultural lands of classes V, VI and VIz,[3] under the Act on Agricultural Tax, causes that municipalities having exclusively these classes of lands within their borders receive no income due to this tax. It should be to a greater degree left to the municipal council to decide on exemption at the territory within its control. Exemptions from local taxes forced by central legislation cut off the municipal tax incomes, which in such circumstances should be compensated by the national budget. In the present system, compensations (calculated while granting subsidies) are nearly eliminated.

The notion of "objective exemptions" should be erased from regulations allowing the council to decide on exemption. The interest of the taxpayers is secured well enough with the Constitutional restriction to establish tax exemptions only under an act of parliament. Pure objective exemptions are hard to identify correctly, which effects in many linguistic "freaks" in resolutions of councils. They emerge as a result of the councils' attempts to avoid establishing other exemptions than objective while issuing a law without specifying its subject.

The model of exemptions being decided on in cooperation with local authorities should be offered by the legislation to much bigger extent. The exemptions under the Act on Agricultural Tax, which are imposed by a decision of *wojt* (*burmistrz*, city president),[4] may be an example. Such exemption is provided by an act of parliament, but applied only after a taxpayer applied to tax authority. Detailed conditions to apply exemptions of this type should be regulated by council resolutions that would allow adjustment to local conditions.

3 Soils of those classes can be generally regarded as very poor or the poorest.

4 W*ojt, burmistrz,* city president are offices of the same level of heads of municipal authorities; their different names depend generally on the rural, urban–rural or urban character of a municipality.

7. A reform of local tax and levy system is indispensable. What we have today is a chaotic composition of financial charges, shaped in the former period, fiscally ineffective. Changing the rules of real estate taxation and introduction of cadastre should become the ground to develop a modern system of taxes and local charges. The taxation of real estate constitutes a major source of local authorities income in every system. As it is proved by experience, approximately 20–30 per cent of buildings and lands in Poland avoid taxations, for different reasons. The introduction of the cadastre, even without increasing tax burden, would contribute to a significant increase in local authorities income due to real estate taxation.

Excessive and unnecessarily complicated system of some local taxes in Poland should be made simple. The attempts, began in 2002, to make the Polish transport tax consistent with two EU directives on vehicle taxation resulted in the creation of the system complicated to the degree that neither taxpayers nor tax authorities have been able to indicate the accurate amount of tax obligation. This is because vehicle technical data, being a tax base, are hardly accessible or simply lacking in the available documentation. In such a situation, how can a taxpayer be expected to fulfil his fiscal obligations correctly?

The unreasonable system of updating transport tax rates should be also revised. The minimal rates are updated by euro exchange rate growth indicator while the maximum rates are updated by goods and services price growth given in PLN. Application of these two different indicators caused that the minimum rates exceeded the maximum rates, which required legislative reaction.

Similar problems arise as far as real estate tax is considered. The introduction of glossary of legal terms, which was indented to put an end to interpretation controversies, made them even grow. "Technical reasons", "permanent connection to the ground" or "foundation" are good examples of terms defined in the glossary that will be long discussed to develop their uniform interpretation, which directly impacts on the amount of tax due.

8. Concluding, it must be stated that Poland needs a reform of outdated regulations on real property taxation, but first and foremost development of cadastre and *ad valorem* real estate tax. The current Polish tax, based on the area not on the value of real estate, is a relic of communist period. Real estate tax reform is the most important part of recommended modifications to the tax system, because of organisationally difficult and very expensive development of cadastre. It is not insignificant that the Poles are afraid of *ad valorem* real estate tax, expecting it to increase tax burden imposed on real estate. That is the reason why the cadastre based system and *ad valorem* real estate tax, having been introduced for over ten years by now, have no chance for quick implementation. Step–by–step evolution of area real estate tax into *ad valorem* real estate tax is the solution to the problem.

Streszczenie

Polski „system" opodatkowania nieruchomości jest bardzo daleki od doskonałości. Potrzeba jego jak najszybszej reformy nie wymaga głębszego uzasadnienia, tym bardziej że zagadnienie to zostało dość dobrze opisane w literaturze przedmiotu. Wiele rozwiązań dotyczących opodatkowania nieruchomości jawi się jako archaiczne, niedostosowane do realiów nowoczesnej gospodarki. W niniejszym artykule przedstawiono główne kierunki postulowanych zmian w opodatkowaniu nieruchomości w Polsce.

Mariusz Popławski

THE TAXATION OF POSSESSION OF REAL ESTATE IN POLAND

General Remarks

There is a duty to pay a property tax for real estate in Poland. It can be one of the three following dues: the real estate tax, agricultural tax or forest tax[1]. These taxes perform an important role in the activity of municipality. Some facts introduced below can confirm it.

Firstly, these taxes en bloc supply budgets of communes. Thereby they determine the important source of income of these units[2]. This refers especially to the real estate tax, because incomes from the agricultural tax or the forest tax are comparatively not large.

Secondly, the communes, thank to these benefits, can lead the local tax policy[3]. This is connected with the possibility of formation of the height of tax rates or introducing the tax exemptions and tax allowances. It has a direct influence on the height of the charge imposed on subjects working in the given commune. This influences especially those who are in business. As a rule, they are burdened with higher taxes. Suitable tax policy, which is realized by precepting bodies, first of all, in the real estate tax, can stimulate economic activity in municipalities. Tax policy can also efficiently diminish the business activity. It can influence the decision to choose another place for business, wherein taxes imposed on seisin in law of real estate will be lower, and where better preferences are admitted.

1 See L. Etel (editor), Prawo podatkowe, Warsaw 2005, page 39 and next.
2 See M. Popławski (ed.), Stanowienie i stosowanie prawa podatkowego w gminach, Białystok 2007, p. 59 and next, where one introduced the role of tax revenues in budgets of the municipalities.
3 See E. Ruśkowski, Orzecznictwo sądów administracyjnych jako czynnik kształtowania samorządowej polityki podatkowej, (in:) The jubilee–book of Prof. Andrzej Kabat, Olsztyn 2004.

The Relation between Real Estate Tax, Agricultural Tax and Forest Tax

There isn't one tax connected with the seisin in law with real estate in Poland. There are three separate, supplementary taxes. However, there can be only one of these dues bounded with the given real estate. Otherwise, we would deal with double taxation. As a consequence, settling, e.g. agricultural tax, as a proper one to be levied in the given case, eliminates the possibility of burdening this real estate with other property tax (forest or real estate tax).

The Object of Taxation

Real estate tax burdens structures, buildings and grounds which are not embraced by agricultural tax or forest tax. Arable lands are liable to agricultural tax only and forests are taxed with forest tax. It means that building structures (buildings and structures) are embraced by a real estate tax, while grounds, depending on their character, by one of the three above–mentioned taxes.

A definition of the building, introduced in the Act on Local Taxes, provides that it is a building structure which is permanently connected with the ground, possesses walls, foundations and the roof[4]. The taxed structures are building structures which are not building or the accessory buildings. As examples of suchlike objects one can point technical networks (telecommunication network, water conduits and sewerages, other conduit systems**,** energy distribution structures, etc.), reservoirs, antenna masts, etc. As contrasted with buildings, the structures are taxed only when commercially used. Buildings, on the other hand, will be taxable regardless of their character (habitable or commercially used).

A record in the register of property decides about the character of grounds. It is binding both for the taxpayers and tax authorities. Sometimes real estate tax can be levied on arable lands and forest. This will take place in the case of the factual seizure of these grounds on the economic activity other than agricultural. If so, it will be necessary to pay real estate tax. It can occur if there is a gravel pit commercially used on the arable land. Real estate tax should be imposed in spite of the fact that there are no changes concerning the character of that ground in the register of property.

The Taxpayers

In the real estate tax, agricultural tax and forest tax, the legislator introduced very similar rules denominative of the taxpayer. These can be all subjects, aside

4 See L. Etel, Podatek od nieruchomości, rolny, leśny, Warsaw 2005, p. 34 and next.

from their legal status, such as: natural persons, corporate bodies and organizational entities. There will be a duty levied on them if they will have at their disposal properties on the ground of a definite valid title. It can be ownership or perpetual usufruct[5]. It can be also the contract or other act, on the ground, where one subject becomes a possessor of real estate (for example the tack, hires, the commodate). However, a bailee of real estates (the tenant, the user, etc.) will be a taxpayer only when the contract refers to the property of the State Treasury or units of the territorial self–government. It means that the transfer of possession of private property is not effective with the passage of the tax duty on the possessor. In such a case, the owner is still the taxpayer.

The legislator foresees that in some cases a taxpayer will be the subject which has no valid title. With such a situation we deal in the case of the existence of the autonomous possessor and in the possession of real estates of the State Treasury or units of the territorial autonomy without the valid title.

The Tax Base

The tax base for buildings or their parts is determined by their usable area expressed in square meters. These data can be fixed based on the physical quantity survey of the area of the building along the internal length of walls. The quantity survey is made by the taxpayer who shows the usable area in the tax return.

The tax base for the structures determines their amortization value. It can be used when the object is redeemed. In other event, the tax base is the trading value fixed by the taxpayer after the regard of the state and the degree of the waste of the structure.

The tax base for grounds is expressed in meters (when taxed with real estate tax) or hectares (when taxed with an agricultural tax or forest tax). The legislator foresaw two exceptions from this rule. First one refers to the taxations of grounds under lakes, where the area to the taxation is fixed in hectares. The second exception appears in the agricultural tax, where arable lands of the area greater than 1 hectare are taxed after their count on the number of conversion hectares. To do so, one should take into consideration, besides the physical area, also the agricultural value (the usefulness) of the grounds and the district of location. It means that in some cases 1 hectare of ground, depending on higher indicated criteria, can determine 1,8 or 0,6 the conversion hectare.

5 Perpetual usufruct is a contract where the ground owned by State Treasury or units of the territorial self–government is delivered into the prolonged use to the given subject.

To settle the area of grounds one should take data from the register of property kept for the specific district.

Rules of Establishing the Rates

Municipalities, where the taxable real estates are located, decide about the height of the rates in the real estate tax, agricultural tax and forest tax. However, the influence on this element of a tax structure is realized in a different manner. In the real estate tax the commune council is obliged to qualify the height of rates. Rates defined by the commune council cannot exceed maximum rates, yearly valorized for the level of the inflation.

In the agricultural and in forest tax they depend on yearly qualified prices of rye (agricultural tax) and wood (the forest tax). The commune council can set down prices of these goods to decrease these taxes.

The Moment of Coming into Being and Extinction of a Tax Liability

Tax liability in the real estate tax, agricultural and forest tax comes into being from the first day of the month following the month wherein appeared circumstance based on which this duty comes into being. It means that a tax liability will be borne by the subject who purchased the ground or the building from the next month after purchasing the real estate. The exception refers to newly built buildings or structures. In this case tax liability comes into being only from the beginning of the year following the year wherein the construction of the mentioned objects was finished or wherein one began to use the building or its parts before their final finish.

Tax liability becomes extinct at the end of the month wherein the circumstance, based on which this duty existed went out (e.g. the sale of real estate, getting rid of possession of real estate).

Time Limits and Payment Rules

The taxpayer of the real estate tax, agricultural tax and forest tax who is a natural person is obliged to pay the tax in installments in time limits: to the 15th day of March, 15th day of May, 15th day of September and 15th day of November of the taxable year. This duty is executable, however, only after delivery of a tax decision to the taxpayer. This results from the fact that in these cases tax debt comes into being only as the result of delivering of the tax decision.

Wojt (burmistrz, city president)[6] is an entitled subject to pass these decisions. The base to fix this act should be the tax return filled in by the taxpayer, in which one should indicate all data indispensable to the taxation. Taxpayers, being natural persons, have been obliged to deliver these forms termly in 14 days, since the day of coming into being of the circumstances determining the tax liability.

Taxpayers that are of corporate bodies or organizational units are obliged to pay real estate tax, calculated individually by them, in the tax return, without the call. They ought to pay tax monthly, on account of the budget of proper municipalities, termly to the 15th day of each month. Agricultural tax is an exception payable by these subjects in four installments.

Tax Allowances and Tax Exemptions

The catalogue of preferences referring to local taxes imposed on the seisin in law of real estates is quite complex. They can be dichotomized for tax allowances and tax exemptions. Tax allowances appear only in the agricultural tax (e.g. the abatement of a tax in connection with investment expenses) or in forest tax (cutting down a price of wood). Tax allowances do not appear in the real estate tax.

Tax exemptions occur in all three taxes. They can arise out of Finance Acts or tax resolutions introduced by the parish councils. Nowadays the following cases are exempted from the real estate tax: the railway infrastructure and grounds occupied under it, buildings or their parts with the forest activity, buildings or their parts used exclusively for the agricultural activity, real estate occupied for the needs of associations for the activity among children and young people within the range of education, museums, schools, colleges, places of employment of disabled people.

In the agricultural tax, the following cases are exempted: grounds of the poor class (qualities), grounds of farms on which one ceased the farming production, grounds acquired for the purpose of increasing or the creation of a new farm. Forests with the stand aged to 40 years and forests inscribed individually to the register of monuments are exempted from the forest tax.

The commune council can introduce additional exemptions in tax resolutions[7]. Municipalities often take advantage of this possibility to exempt buildings and grounds of farmers who are retired, communal real estate not delivered into the possession to other subjects, or buildings used for charity or cultural–educational aims.

6 W*ojt, burmistrz,* city president are offices of the same level of heads of municipal authorities. Their different names depend generally on the rural, urban–rural or urban character of a municipality.

7 See L. Etel, M. Popławski, R. Dowgier, Gminny poradnik podatkowy, Volume I, Warsaw 2005, p. 68 and next.

Conclusions

There are several elements one should focus on in terms of taxes imposed on the seisin in law of real estate in Poland.

Firstly, these benefits determine en bloc the income of the budget of the municipalities.

Secondly, elements of these tax structures characterize far going resemblances. It can make the reform of the taxation of seisin in law of real estate easy. The final aim should be the introduction of an ad valoram tax.

Thirdly, the municipality, as the beneficiary, has a possibility to form some elements of tax structure. This refers to possibilities of assessing rates and introducing tax exemptions and tax allowances.

Streszczenie

Niniejszy artykuł jest poświecony przedstawieniu zasad opodatkowania władania nieruchomościami w Polsce. W pierwszej kolejności przedstawiono relację między podatkiem od nieruchomościami, podatkiem rolnym i leśnym, które mają zastosowanie do opodatkowania gruntów. Następnie opisano te świadczenia przez pryzmat analizy ich podstawowych elementów konstrukcyjnych między innymi: podmiot opodatkowania, przedmiot opodatkowania, podstawa opodatkowania, stawki podatkowe oraz zwolnienia podatkowe. W konkluzji tego opracowania zwrócono uwagę na kilka cech charakterystycznych dla ww. podatków. Wskazano, iż świadczenia te stanowią w całości dochód budżetu gmin. Podkreślono, iż elementy konstrukcji tych podatków cechują daleko idące podobieństwa. Ułatwić to może reformę opodatkowania władania nieruchomości poprzez wprowadzenie jednego podatku *ad valorem*. Zwrócono także uwagę, iż gmina, jako beneficjent, ma możliwość kształtowania, niektórych elementów konstrukcji podatkowych. Dotyczy to przede wszystkim możliwości ustalenia wysokości stawek podatkowych oraz wprowadzania zwolnień i ulg podatkowych.

Grzegorz Liszewski

TAXATION OF NONPROFESSIONAL REAL ESTATE TRANSACTIONS

Introduction

The topic of this paper is taxation of nonprofessional real estate transactions. Nonprofessional transactions are defined as any methods of transferring the ownership of real estate that are not connected with economic (for profit) activities and take the form of such civil law acts as, for example, sale, gift, or exchange. Taxes that are charged for this type of transactions are considered as property taxes[1] – this group of levies includes estate and gift tax, civil law transaction tax, and (to an extent) personal income tax. Unlike these property taxes, turnover taxes are designed to cover professional property transactions that are performed as a part of economic activity of a taxpayer that is conducted in circumstances indicating the intent to obtain revenue on a frequent basis.

Estate and Gift Tax

Estate and gift tax[2] is a pecuniary payment charged on the basis of the acquisition of certain elements of property (including real estate) in principle in relation with an estate or a gift. Nevertheless, its objective scope is much broader than the name indicates. The tax covers the acquisition by natural persons of the ownership of an object or of property rights by means of the following acts: succession, legacy, further legacy, testamentary instruction, gift, donor's instruction, acquisitive prescription, voluntary dissolution of co–ownership, compulsory portion of an inheritance, if the entitled person did not acquire it in the form of a gift granted by the testator or

1 Property taxes also include levies that are charged on the property owned: real estate tax, farmland tax, forest tax, means of transportation tax.

2 This levy is provided for in the Act of 28 July 1983 on the estate and gift tax (the uniform text is available in Journal of Laws 2004, No. 142, item 1514 with changes).

by means of succession, or in the form of a legacy, voluntary pension, voluntary usufruct, or voluntary easement.

Another transaction that is subject to the tax is acquisition of rights to a savings deposit on the basis of an instruction in case of death or the acquisition of shares of an investment fund on the basis of an instruction in case of death of a participant in an open or specialized open investment fund.

The act on estate and gift tax includes a large catalogue of objective exemptions (there are eleven of them). The exemptions related to transfers of real estate are:

1) acquisition of ownership or perpetual usufruct of real estate under the condition that at the moment of the acquisition the real estate constitutes a farm or its part, or will become a part of a farm which is the property of the acquirer and this farm will be kept by the acquirer for a period of at least 5 years after the date of acquisition;
2) physical acquisitive prescription of demarcated parts of real estate by persons who are co–owners of a fraction of the real estate – to the level of their participation in the co–ownership;
3) acquisition by means of inheritance by persons considered to be in the 1st and 2nd tax group of immovable monuments included in the register of monuments, if the acquirer secures and preserves them in conformance to relevant laws;
4) acquisition by persons considered to be in the 1st tax group of ownership of an object or of property rights by virtue of a voluntary dissolution of co–ownership.

Since 1 January 2007, a new tax exemption has been in place: all titles of acquisition of ownership or property rights to an object (without limits on its value) are exempt from taxation if the acquirer is a spouse, descendant, ascendant, a stepchild, a sibling, a stepfather, or a stepmother of a person from whom the acquisition takes place. As to real estate, the possibility to take advantage of such a broad exemption depends on meeting the following condition: The acquirer must notify the head of the competent tax office within a period of one month after the day that the tax obligation takes effect or, in the case of acquisition of real estate by means of inheritance, the period of one month after the court's decision confirming the acquisition of an inheritance becomes legally valid, or within a period of one month after the day that the acquirer learned about the acquisition the real estate (in such a case the acquirer must present evidence that he learned later that he acquired the real estate). This condition does not have to be met by persons who acquire real estate by means of a gift because gift of a real estate takes the form of a notarial deed and it is the notary who informs tax authorities of such a gift.

The payers of estate and gift taxes are natural persons who are acquirers of objects or property rights; thus, in the case of a gift contract the recipient of a gift is the taxpayer.

The tax obligation takes effect, depending on the title of acquisition, among others, at the moment of acceptance of an inheritance, at the moment of performing an instruction, legacy or further legacy, at the moment of satisfaction of the compulsory part of an inheritance, at the moment of satisfaction of the promised benefit or making a statement, in the form of a notarial deed (gift), at the moment that the decision of the court confirming acquisitive prescription becomes valid, at the moment that a contract or agreement is concluded or a court's verdict becomes valid (voluntary dissolution of co–ownership), or at the moment of voluntary easement, pension, or usufruct becoming effective.

In the case that acquisition is not reported to be taxed, the tax obligation takes effect at the moment that a paper is prepared confirming the acquisition or that a verdict of a court confirming the acquisition becomes valid. In other cases of a "concealed" acquisition, the tax obligation takes effect at the moment that the tax payer refers to the fact of acquisition before tax authorities or fiscal control entities.

The base for the estate and gift tax is the net value of the acquired object, i.e. the value minus the debts and burdens encumbering the object. The taxpayer must declare an adequate value before tax authorities. If tax authorities determine that the value declared by the taxpayer is different (less) than the market value, the value can be determined on the basis of an opinion of a property expert. The taxation base does not include the equivalent of 110 m^2 of the acquired house or apartment (which is covered by the housing tax deduction).

The amount of tax is dependent, among others, on the personal relation between the person from whom or after whom the objects or property rights were acquired. For this purpose, acquirers are divided into three tax groups: the 1st group comprises the closest persons, i.e. spouse, descendants, ascendants, siblings, stepchild, son in law, daughter in law, stepfather, stepmother, and parents in law; the 2nd group comprises taxpayers who are more distant relatives, e.g. the descendants of siblings, spouses of siblings, and siblings of spouses; and the 3rd tax group comprises all other acquirers who are not included in the first two groups[3].

What is peculiar to the estate and gift tax is the so–called housing tax deduction. The essence of the deduction (as mentioned above) is that the base of taxation is decreased by the equivalent of 110 m^2 of acquired house or apartment. The ability to take advantage of this deduction depends on the acquirer meeting several conditions.

3 The act provides for three progressive tax rates, one for each of the three tax groups. The lowest rate is for acquirers considered to be in the 1st tax group; the highest – for those in the 3rd tax group.

The most important one is that the acquirer can be (at the moment of acquisition) neither the owner nor the tenant of another house or apartment. If the acquirer is renting a premise or is the owner of a building, he must terminate the rent contract (transfer the property of the building or premise to his descendants, the State Treasury, or the commune) within 6 months of filing his tax declaration.

The tax authorities determine the amount of tax by virtue of a decision, based on the date revealed in the tax declaration filed by the taxpayer, in principle, within one month after the date of the tax obligation taking effect. Situations where the tax is calculated and collected by the remitter (notary) are an exception. Such situations take place in the case of contracts which transfer the ownership (among others of real estate) and which take the form of a notarial deed. With the exception of situations where the levy is collected by a remitter, the tax is payable within 14 days of the date of delivery of the decision that determines the amount of tax liability.

Civil Law Transaction Tax

The civil law transaction tax[4] is imposed, as the name suggests, on some transactions governed by civil law (mostly contracts). Such contracts lead to an exchange of goods and services and, therefore, constitute a civil law transaction. Nevertheless, the legislator decided that this tax does not cover those legal transactions that result in one party becoming the payer of the value added tax. Consequently, there is a division of transactions into those which are subject to the VAT (professional transactions) and those that are not performed as a part of the conducted (or planned) for–profit activity (economic activity). The latter are subject to the civil law transaction tax.

The object of this tax is civil law transactions that are stipulated in relevant laws. These include: sales, exchanges, gifts – in the part concerning the takeover by the recipient of debts and liabilities of the donor, contracts concerning the division of inheritance, and contracts concerning the dissolution of co–ownership – in the part concerning repayments and supplementary payments. The tax also covers changes to contracts, if they result in an increase of the taxation base, as well as verdicts of courts (including arbitration courts) and settlements, if they have the same effects as contracts that are covered by this tax.

The law on the civil law transaction tax includes a large catalogue of exemptions and objective exclusions. As for taxation of real estate transactions, the most notable are exemptions and exclusions of the following transactions:

4 The tax is provided for in the statute of 9 September 2000 on civil law transaction tax (uniform text is available in Journal of Laws 2007, No. 68, item 450 with changes).

1) sale of real estate or of the right to perpetual usufruct concluded in relation to the execution of claims resulting from the limitation of ways to use real estate based on environmental protection laws;
2) sale of housing premises in which the Military Housing Agency is a part;
3) sale of objects in execution or bankruptcy proceedings;
4) some contracts that transfer the ownership of real estate or its parts, along with their elements, except for houses or their parts that are located in towns, under the condition that, at the moment of transaction, the acquired land constitutes a farm or will form a farm, or will become a part of a farm that is the property of the acquirer;
5) sale of real estate, if the buyer is its former owner (who had been expropriated) – in the amount of compensation received for expropriation, under the condition that the purchase takes place within 5 years of receiving the compensation;
6) exchange of a house or a part thereof, housing premises that constitute a separate real estate, if the parties to the contract are persons considered to be in the 1st tax group according to the law on the estate and gift tax.

The tax obligation, in principle, becomes effective at the moment a civil law transaction takes place (a contract is concluded), at the moment a court's decision becomes legally valid, at the moment that a verdict of a court of arbitration is delivered, at the moment an agreement is concluded or at the moment that a taxpayer refers to the fact of performing a civil law transaction – if the taxpayer had not filed a tax declaration within 5 years of the end of the year in which the payment term expired, and then refers before tax authorities or fiscal supervision entity to the fact of its conclusion.

The payers of the civil law transaction tax are the acquirers of real estate. One exception is the exchange contract, in which case both parties of the contract are the payers of the tax.

The taxation base, in principle, is the market value of the object or the property right. The exceptions are mostly exchange contracts and gifts. The value of an object or a property right that influences the taxation base is provided by the taxpayer in his tax declaration. If the taxpayer does not determine this value or the value that the taxpayer provides is different, in the opinion of the head of the competent tax authorities, from the actual market value, then the tax authorities can determine the value based on an opinion of an expert or on an expert appraisal presented by the taxpayer.

The tax rates are defined as a percentage of the taxation base and, in the case of contracts concerning real estate, are equal to 2% of the taxation base.

Taxpayers are required to file a tax declaration and to calculate and pay the tax within 14 days of the tax obligation taking effect. The tax can also be calculated and collected by tax remitters: notaries in the case of civil law transactions taking the form of a notarial deed.

Personal Income Tax

The last levy imposed on nonprofessional real estate transactions is personal income tax[5]. The payers of this levy are natural persons who sell real estate, a part thereof, or a share in real estate, or the perpetual usufruct right to a plot of land. Such sale is not subject to taxation if it has been effected more than 5 years after the end of a calendar year in which the real estate was purchased or built.

The tax covers the revenue from the sale of real estate defined as the value equal to the price stated in the contract, decreased by the cost of the sale. If the price is significantly different, without a justified reason, from the market value of the real estate, then the revenue is determined by competent tax authorities as an amount equal to the market value determined on the basis of an expert's opinion. The cost that diminishes the revenue from the sale of real estate include documented cost of acquiring or documented cost of building, plus documented outlays which increased the value of the real estate and which were made during the period it was owned by the seller.

The following revenue is exempt from the tax:

1) revenue from the sale of the whole real estate, or its parts, of a farm (as long as the land does not lose its farmland or forest status as a result of the sale);
2) revenue from a compensation paid in accordance with the law on real estate management or by virtue of a sale of real estate for purposes that would justify its expropriation;
3) revenue from the sale of the perpetual usufruct right and the sale of real estate purchased in accordance with the law on real estate management in exchange for property left abroad.

The tax rate is equal to 19% of the taxation base and the tax is payable without summons until 30 April of the year following the year in which the real estate was

5 Act of 26 July 1991 on personal income tax (the uniform text is available in Journal of Laws 2000, No. 14, item 176 with changes).

sold. This is also the term for submitting the tax statement with the calculation of the due amount of tax. What is peculiar to the taxation of sale of real estate is that the income from this source is not added in the yearly tax statement to other income of the taxpayer. This income is separately taxed at a flat rate of 19%, regardless of the total value of the taxation base.

Streszczenie

Przedmiotem niniejszego opracowania jest zagadnienie opodatkowania nieprofesjonalnego obrotu nieruchomościami. Za nieprofesjonalny obrót uznano wszelkie sposoby przeniesienia własności nieruchomości niezwiązane z działalnością gospodarczą (zarobkową), przyjmujące formę takich czynności cywilnoprawnych, jak np. sprzedaż, darowizna, zamiana. Podatki, które obciążają tego typu obrót zaliczane są do podatków majątkowych – do tej grupy danin zaliczyć można podatek od spadków i darowizn, podatek od czynności cywilnoprawnych oraz (w pewnym zakresie) podatek dochodowy od osób fizycznych.

Paweł J. Lewkowicz

PROFESSIONAL TRADE IN PROPERTY

Polish law regulates professional trade in property principally as an economic activity conducted with the aim to obtain commercial gains. Consequently, only entities that belong to the so–called professional category, that is entities conducting registered economic activity, are required to pay taxes on professional trade in property. Under Art. 2 of the Act of 2 July 2004 on freedom of economic activity[1], economic activity is defined as commercial activity consisting in manufacturing, construction, trade, services, exploration and mining of minerals from deposits, as well as professional activity conducted in an organized and continuous fashion. However, for tax purposes, this definition is inadequate. In the area of taxation of professional activities, the tax law introduced detailed definitions of economic activity that are different from the one presented above. Taxation of professional trade in property is regulated by three tax laws: the act on personal income tax, the act on corporate income tax, and the act on value added tax. The latter act, by introducing the broadest definition of economic activity, has brought about a number of problems of interpretation.

Art. 5a item 6 of the Act of 26 July 1991 on personal income tax[2] defines economic activity as commercial activity consisting in manufacturing, trade, services, exploration or mining of minerals from deposits, as well as activity consisting in using objects or intangible and legal values, conducted on one's own behalf, regardless of its result, in an organized and continuous fashion. Thus, the definition of economic activity for the purpose of personal income tax is a little broader than the definition provided in the act on freedom of economic activity. According to Art. 9 passage 1 of the act on personal income tax, all sorts of income are subject to taxation. On the other hand, Art. 10 passage 1 item 4 of the act defines sources of revenue as real estate or its parts, as well as paid transfer of ownership of real estate or its parts, or co–ownership of real estate (Art. 10 passage 1 item 8 letter a of the act). This leads to the conclusion that professional trade in property is subject to personal income tax under the condition that it takes the form of an economic activity conducted by

1 i.e. Journal of Laws No. 55 (2007), item 1095 with changes.
2 i.e. Journal of Laws No. 14 (2000), item 176 with changes.

entrepreneurs. Depending on the taxpayer's choice of the personal income tax, the income earned by the entrepreneur can be subject to the regular tax rates (19%, 30%, or 40%), or to a flat tax (19%). It is the taxpayers who make the choice. Nevertheless, to be eligible for the flat tax, the taxpayer must submit to his local branch of the tax authorities a declaration on the selected form of taxation.

A similar structure of professional trade in property is incorporated into the Act of 15 February 1992 on corporate income tax[3]. The taxpayers who are covered by the provisions of this act are legal persons and entities who do not have the status of legal persons with respect to income from professional trade in property. The tax rate for such entities is equal to 19%. Of course, for the purpose of both personal income tax and corporate income tax, expenses related to the acquisition of property to be sold later constitute costs that can be deducted from the revenue, with the exception of trade in property conducted by such entities as real estate brokerages where it is the commission of these entities that is subject to taxation.

The law on value added tax provides for different solutions concerning professional trade in property. This results from the fact that the Act of 11 March 2004 on value added tax[4] does not require taxpayers to conduct a registered economic activity to be subject to this tax. This provision causes a number of controversial interpretations with regards to the question whether a natural person who delivers (sells) real estate is subject to this tax. In order to correctly present the issue of taxation of professional trade in property, one has to start with the basic definitions related to this tax, which are different from those presented above. According to Art. 15 of the Act on value added tax, the taxpayers of this tax include natural persons who conduct individual economic activity, regardless of its goal or outcome. In passage 2 of this provision, the legislator introduces a definition of economic activity as an activity that encompasses all types of work conducted by manufacturers, traders, or service providers, even when this activity is performed a single time in circumstances indicating that it is intended to be conducted frequently. This regulation explicitly stipulates a list of entities that are subject to this tax. The list includes manufacturers, traders, and service providers, that is "professional" entities or entities that conduct economic activity. What this means is that the very definition of "a taxpayer" excludes applying the provisions of this act to natural persons who do not conduct registered economic activity. However, this understanding is not so clear in the interpretations of Polish tax authorities. The definition of "a taxpayer" is essential to the determination of the scope of taxation since only activities that meet the subjective and objective criteria are subject to this tax. What this means is that a taxable activity must be performed by a subject who meets certain criteria

3 i.e. Journal of Laws No. 54 (2000), item 654 with changes.
4 Journal of Laws No. 54 (2004), item 535 with changes.

to be considered a taxpayer. Both of these conditions must be met simultaneously and, therefore, the subject must meet the criteria of a taxpayer in any given activity. Consequently, if a taxable activity is performed by a subject who does not meet the criteria of a VAT taxpayer, in principle, it is not taxable. The provisions of the 6th directive (similarly to those of the 2006 directive no. 112/2006/WE on the VAT) explicitly list this requirement as they regulate the performance of taxable activities by a taxpayer acting in such a role[5].

A similar opinion is presented in the judicial decisions of Polish provincial courts of administration. In its decision of 6 September 2006 (sign. of the record I SA/Wr 1254/06), a provincial administrative court declared that the sale, even repeated, of privately owned objects which are not related to economic activity and had not been purchased for the purpose of re–sale, does not meet the criteria of trade and, therefore, is not subject to the VAT tax. In its decision, the court also stated that "the fact that the subject is performing activities stipulated in Art. 5 of the Act on the VAT tax does not constitute a sufficient premise to consider these activities as covered by the requirement to pay the VAT tax because the activities must be performed by a subject who is a taxpayer in the understanding of this act, i.e. a subject conducting an individual registered economic activity." A similar opinion was presented by the Supreme Court of Administration in its decision of 24 April 2007 (sign. of the record I FSK 603/06) where it stated that trade should be defined as an organized purchasing of goods with the aim of their re–sale and that the condition for considering a given person as a taxpayer is the person's constant involvement in the conduct of an economic activity. The court provided a profound justification and a comprehensive explanation of who can be regarded as a taxpayer of the VAT tax. According to the Court, in order for a given activity to be subject to the value added tax, the following two premises must be fulfilled simultaneously:

- first: a given activity must be included in the list of activities that are subject to the value added tax,
- second: the activity must be conducted by a subject who is a VAT taxpayer in relation to the performance of this activity.

Moreover, the Court concluded that trade should be defined as an organized purchasing of goods with the aim of their re–sale. Thus, activities that are subject to the VAT tax include all activities, even single ones, that meet the criteria for being included in so–defined category of trade, that is organized sale of goods, preceded by their purchase made with the aim of re–sale, and whose characteristics indicate the intent of their continuation in this form. Nevertheless, the Court highlighted in

5 A commentary to Art. 15 of the Act of 11 March 2004 on value added tax (Journal of Laws No. 54 (2004), item 535), in: A. Bartosiewicz, R. Kubacki, VAT. Komentarz, Lex: 2007), second edition, ibid.

its decision that the condition for considering a person as a taxpayer is this person's constant involvement in the economic activity. Thus, it is reasonable to conclude that a natural person who is occasionally involved in a sale of goods must not be considered as a payer of the VAT tax. The Supreme Court of Administration also highlighted that, in accordance with Art. 4 passage 3 of the 6th Directive, Art. 12 passage 1 of the Directive 2006/112 (in force since 1 January 2007), and Art. 15 passage 2 of the Act of 11 May 2004 on the value added tax (Dz.U. [Journal of Laws] No. 54, item 535 with subsequent changes), henceforth called the VAT act, the occasional nature of an activity, or the single performance of an activity, leads to a person being considered as a taxpayer only in the case that such occasional or single activities are performed in relation to the activities of manufacturers, traders, or service providers, to include entities acquiring natural resources, and farmers, as well as to the activities of persons performing liberal professions. The aforementioned legal acts do not allow for taxation of activities, even if they can be defined as the sale of goods or provision of services in the understanding of Art. 7 and 8 of the VAT act, if they are not performed as a part of activities of manufacturers, traders, or service providers. On the other hand, a provincial court of administration concluded in its decision that not always a person's intent to perform an activity in a frequent manner will result in this person being considered as a VAT taxpayer. After all, the legislator had the intent to include only professional entities in the group of taxpayers of this tax[6].

The opinions of tax authorities provide another important aspect. In its decision of 27 July 2007 (sign. 1438/VAT2/443–88/07/PG), the Warszawa – Ursynów branch of the tax authorities clearly indicated that the seller of six plots of land, separated from a farm that he had run for 25 years, will not be subject to the VAT tax because "the sale of the plots is taking place in circumstances indicating that this activity will not take the form of an organized activity and the plots had not been purchased with the aim of their re–sale." What is immensely important in confirming the judicial decisions that have been made so far is the decision of the Warsaw court of administration[7] where the Court, deciding on a case concerning the taxation on a sale of a piece of real estate, concluded that the sale of plots of land by a person who is not conducting a registered economic company is not subject to the VAT tax. The Court stated that, according to Art. 15 of the VAT act, a given subject will be considered as a taxpayer, even when he performs the activity in an occasional fashion, as long as the activity will be related to the registered economic activity that he is conducting. In the justification, the Court pointed to the judicial decisions

6 Decision of the provincial court of administration of 17 April 2007, sign. of the record I SA/Wr 123/07, "Rejent" 2007, No. 5, p. 182, see also the decision of the provincial court of administration of 26 January 2007, sign. of the record I SA/Wr 1688/06, "Przegląd orzecznictwa podatkowego" 2007, No. 2, item 34.

7 Sign. of the record III SA/Wa 1217/06, not published.

of the European Court of Justice, in particular to the decision of 26 September 1996 concerning the case no. C–230/94, where the ECJ stated that, in the understanding of the law on the value added tax, economic activity is defined as professional economic transactions. Consequently, professional transactions, from the point of view of the value added tax, are only those transactions that are performed by professional entities, i.e. entities that perform economic activity in the strict sense of this term. Such entrepreneurs are required to calculate the tax due and to pay it into the account of their branch of the tax authorities. Professional trade in property in Poland is subject to the basic rate of the VAT tax equal to 22%. The only exception is trade in buildings that belong to the category of housing buildings, which is defined as permanent dwellings classified in chapter 11 of the Polish Classification of Buildings. The construction and trade in such buildings is subject to a preferential rate of the VAT tax equal to 7%.

Streszczenie

Zasadniczo, definicyjnie, profesjonalny obrót majątkiem odnosi się do wykonywania działalności gospodarczej w celach zarobkowych, w sposób zorganizowany i ciągły. Jednak w regulacjach podatkowych nie zawsze pojęcie to odnosić się będzie do wykonywanej, rejestrowanej działalności. Konstrukcja systemu podatkowego dotyczącego opodatkowania czynności profesjonalnych wprowadza bowiem szczególne, różniące się od ogólnie przyjętej, definicje działalności gospodarczej dla własnych potrzeb podatkowych, przez co zdarzyć się może wykonywanie profesjonalnego obrotu majątkiem np. przez osobę fizyczną nieprowadzącą działalności gospodarczej w sposób zorganizowany i ciągły. Poniższy tekst ma przedstawić zasady opodatkowania profesjonalnego obrotu majątkiem w systemie polskiego prawa podatkowego z uwzględnieniem jego specyfiki na gruncie tych przepisów.

Rafał Dowgier

TAXATION OF REAL ESTATE CONNECTED WITH CONDUCTING ECONOMIC ACTIVITY

General Remarks

In Polish legislation, the highest burdens in the scope of real estate tax are those connected with running economic activity. For instance, a maximum rate of land tax connected with running economic activity is twice as high as the one for the land not used in such an activity. In case of buildings, this difference is even higher – a maximum rate for buildings connected with running economic activity is three times as high as for other buildings.

It is a rule that buildings and building structures of entrepreneurs are covered by real estate tax regulated in the Act of 12.01.1991 on Local Taxes and Fees[1]. On the other hand, entrepreneurs' lands may be taxed by one of three taxes: from real estate tax through agricultural to forest tax. The structure of agricultural tax is regulated by the Act of 15.11.1984 on Agricultural Tax[2], whereas forest tax in regulated by the Act of 30.10.2002 on Forest Tax[3]. It should be emphasized that entrepreneurs' lands, irrespective of their nature, which are actually seized in order to run economic activity thereon, are taxed by real estate tax. Only agricultural lands and forests which do not serve such an activity may be taxed by a relatively low agricultural tax or forest tax.

First, I will present principles of real estate taxation with reference to buildings and building structures that are subject to the Act on Local Taxes and Fees.

A Statutory Definition of a Relation between Land, Building and Building Structure and Running Economic Activity

The Act on Local Taxes and Fees (Art. 1a par. 1 point 3) defines lands, buildings and building structures connected with running economic activity, which are

1 Uniform text Journal of Laws of 2006 No. 121, item 844 with subsequent changes
2 Uniform text Journal of Laws of 2006 No. 136, item 969 with subsequent changes
3 Journal of Laws No. 200, item 1682 with subsequent changes

deemed/understood as lands, buildings and building structures that are possessed by entrepreneurs or other entities running economic activity excluding housing estates/houses and lands joined with these buildings as well as lands under lakes seized for water reservoirs or water power plants unless the subject of taxation is not and cannot be used to run this activity for technical reasons.

In the light of the above definition, a very fact of possessing land, building or building structure by an entrepreneur, in principle results in their taxation according to the highest rates or taxation in general (building structures). In fact, it does not matter at all whether they are really used for economic activity. The above definition does not mention any conditions to use such type of property/real estate for purposes connected with economic activity at all. The only prerequisite is their possession by an entrepreneur.

Real Estate Owned by Entrepreneurs

As it was mentioned before, in principle, land, building or building structure are considered to be connected with running economic activity not according to their actual use but only to an objective fact of their possession by an entrepreneur. An owner is both an entity who actually takes possession of a thing as an owner (self–contained possessor/holder) and the one who actually takes its possession as a user, lien holder, tenant, lessee or enjoys another right which implies a specific possession of a third party (dependent possessor/holder). Under the Act on Local Taxes and Fees, an entity possessing a real estate on the basis of other legal titles than those comprised by the subject scope of the Civil Code is an owner as well. The very fact of taking a real estate into possession by an entrepreneur makes him/her its owner in the meaning of Art. 1a par. 1 point 3 of the Act thereof.

The meaning of the above definition arises considerable doubts with reference to entrepreneurs who are natural persons and buy real estate for purposes not connected with their economic activity at all. I mean here, e.g., a situation where such a subject purchases a recreational/leisure land. May such land be treated as the one connected with running economic activity? In the light of literal reading of the above quoted provision, it seems so, but a rational approach to its content contradicts such its interpretation. The above mentioned land has been purchased for purposes not connected with running economic activity in any way. We can also claim that this land has not been purchased by an entrepreneur at all. In case of natural persons running economic activity they can act as entrepreneurs as well as non–entrepreneurs. In practice, it is very difficult to distinguish those two kinds of activities, however, it is possible. A purchase of land by such an entity, e.g. for recreational/leisure purposes, or to build a house thereon, can not be treated as

a manifestation of an entrepreneur's activity, therefore in this situation we should not talk about real estate that is possessed by an entrepreneur. The situation is completely different when a natural person running economic activity purchases land for future investment within their activity. In this case, despite the fact that the land is currently not used to run this activity, nor it is likely to be used likewise in the nearest future, it should be burdened by the highest rates of the tax as it has been purchased within, as well as for, the objectives of a conducted activity.

It should be emphasized that taxation of real estate that is possessed by natural persons – entrepreneurs, create numerous problems in practice for the above mentioned reasons. A separation of a private sphere of activity of these entities and their actions as entrepreneurs is very difficult in many cases. Legal persons that are entrepreneurs (e.g. limited liabilities companies, joint stock companies) do not cause similar problems. In their cases, we may assume that all real estate they own/possess is purchased within the frames of their activities, therefore they are possessed by an entrepreneur and as such they should be burdened by the highest rates of real estate tax.

Real Estate of Entrepreneurs that Is Not Used to Run Economic Activity

As it has already been mentioned before, if/when buildings and lands that are covered by the provisions of the Act on Local Taxes and Fees are possessed by an entrepreneur, they are subject to the highest tax rates. Building structures are taxed only when they are possessed by entrepreneurs.

However, there are three exceptions to the above rule introduced by the legislator.

Housing estates possessed by an entrepreneur as well as the lands joined with them are taxed by the highest rates of real estate tax.

The same rules of taxation refer to the lands of entrepreneurs which are located under lakes, water reservoirs and water power plants.

What is more, we deal with a special situation when land, building or building structure are possessed by an entrepreneur but, for technical reasons, they are not and they cannot be used in their economic activity. I mean such cases when a bad condition of an object (e.g. building's construction defects/damage) prevents its safe use. Therefore, if such an object is not used, it is not burdened with the highest tax rate but a rate that is three times lower.

In case of lands that are agricultural farmland or forests, their very possession by an entrepreneur does not change the level of agricultural or forest tax. These types of lands, unless they are seized for economic activity, are taxed under the same rules as lands of the entities that do not conduct economic activity. Whereas when an entrepreneur starts to use them to conduct economic activity, he/she is obliged to pay a much higher real estate tax instead of a low agricultural or forest tax.

Conclusions

A binding/existing legal status in Poland in the scope of taxation of entrepreneurs' real estate is characterized by the following elements.

First, in the scope of lands' taxation, a determination/establishment of their category (agricultural land, forest, other) is of crucial importance. In case of agricultural lands and forests they are taxed by agricultural or forest tax respectively, according to the same rules irrespective of a tax payer unless they are seized for conducting economic activity. Therefore, in such cases tax liabilities of entrepreneurs and entities that do not conduct economic activity are the same.

Second, lands that are agricultural farmland or forests seized for economic activity are taxed by a high rate of real estate tax instead of a very low rate of agricultural or forest tax.

Third, lands and buildings taxed by real estate tax are treated as the ones connected with conducting economic activity and therefore they are burdened by the highest rate of the tax by the very fact they are possessed by an entrepreneur. In case of building structures, they are taxed only when they are connected with conducting economic activity.

Fourth, the relation between land, building, building structure and conducting economic activity is, with some exceptions, a situation when they are possessed by an entity conducting economic activity regardless of the fact whether they are actually used therein in a given moment.

Streszczenie

W Polsce z władaniem nieruchomościami wiąże się obciążenie jednym z trzech podatków: od nieruchomości, rolnym lub leśnym. Zasadą jest przy tym, iż budynki i budowle podlegają opodatkowaniu jedynie podatkiem od nieruchomości, a grunty jednym z trzech wyżej wskazanych świadczeń.

Szczególnie wysokie obciążenia wiążą się z nieruchomościami będącymi w posiadaniu podmiotów prowadzących działalność gospodarczą. Podkreślić przy tym należy, iż w przypadku gruntów rolnych czy leśnych będących w ich posiadaniu, obciążone są one stosunkowo niskim podatkiem rolnym lub leśnym. Jedynie faktyczne wykorzystywanie tych gruntów do działalności gospodarczej skutkuje ich opodatkowaniem wysokim podatkiem od nieruchomości. W przypadku innych kategorii gruntów, a także budynków i budowli, podlegają one opodatkowaniu najwyższymi stawkami podatku od nieruchomości bez względu na to, czy rzeczywiście są do działalności gospodarczej wykorzystywane. Wystarczający jest sam obiektywny fakt ich pozostawania w posiadaniu przedsiębiorcy.

Rafał Dowgier

Tax Law

Academic crib, Difin, Warsaw 2008, 116 pages

Everyone who has done it or used it knows how difficult it is to write a good crib. At the same time, a good crib is and has been an indispensable element of the process of getting to know and learning difficult and complex issues, such as, undeniably, tax law. It has been and still is a good way of systemizing knowledge and discerning the most essential aspects. I know from my own experience that nothing can teach as effectively as writing cribs. On a little sheet of paper you have to contain the most important and the most difficult things to remember. Such a composition of issues systemizes knowledge in an excellent way. However, you need to know a lot to write a good crib. I remember getting down to writing it after having read notes from lectures and a handbook several times. Only then I knew I could express the essence of a particular field in a synthetic form. The Author of the reviewed study has succeeded in it. It indicates everything an academic lecture on tax law should contain. The first part depicts issues comprising general tax law (definitions, classifications, rules, sources, etc.), tax proceedings, tax control/inspection and checking operations. The second part of the study contains a description of all taxes presenting their entity, subject, tax base, rates, exemption tax allowances as well as a course and terms of payment. There is nothing more to add, in my opinion, the composition corresponds with the study's formula superbly. The manner of presenting individual institutions deserves emphasis. Generally, they are presented in a form of tables, charts and diagrams. It is a great craftsmanship to present entire tax law in such a form. This way of presentation promotes not only faster learning but also grasping the entire tax law. In a very short time, only looking through the crib, you can become generally acquainted with all parts of tax law, which is very often a weakness of many students who know details superbly. Such insight is also necessary for people who professionally deal with one fragment of tax law. They usually know, e.g., income taxes perfectly well but they know next to nothing about other institutions of tax law. You can get to know them using the crib.

However, even memorizing the crib does not guarantee passing an examination in this subject, in my opinion. Nevertheless, you can always try!!! If you want to prepare well to this exam, you must first listen to the lecture, study the handbook thoroughly, and only then use the crib. Such a learning course will excellently simplify passing an examination with the most demanding teacher. I can guarantee this. On the other hand, if you missed the lectures, and there is no time to read the handbook, your lifeline is the tax law crib. It is bound to help more often than not.

Leonard Etel

Michal Radvan

PROPERTY TAXATION IN EUROPE

C.H. Beck, Prague 2007, 390 pages

A book by Michal Radvan titled "Property taxation in Europe" was published in Prague by the C.H.Beck publishing house last year. The organization of the book can be considered as typical for this type of work: the author discusses the structure of the various property taxes in the Czech legal system and compares them with their counterparts that are in force in other European countries.

The author defines property taxes as levies on property (the real estate tax and the tax on means of transportation) and on non-commercial transactions involving property (estate tax, donation tax, real estate sales tax). A similar classification of property taxes can be found in the Polish tax law science.

The author strives to demonstrate the need for and the directions of a reform of the Czech property tax system. In doing so, he tries to answer the following questions:

- Do property taxes constitute a second (double) taxation of income?
- Are property taxes an effective way to provide income for public institutions?
- Are property taxes "just"?
- Does real estate taxation based on the surface area of land or buildings still guarantee, in the modern world, efficiency of the tax or should it be replaced by taxation based on the value of real estate?

The discussion is preceded by a description of how property levies evolved in the Czech Republic and the roots of the current laws constitute a starting point for the analysis and assessment of the present property tax model.

The issues related to real estate taxes occupy the most prominent place in the discussions presented in the book. The author rightfully considers the real estate tax as the most important (with respect to the national government's revenue) of all the property taxes. The author's analysis of the provisions of the Czech law on real

estate tax leads him to the conclusion that this tax, in certain situations, constitutes a third stage of taxation imposed on income, next to the income tax and the real estate sales tax. This situation does not mean that it is unnecessary to have a separate tax on real estate (which was the solution adopted, for example, in Belgium), due to the fact that this tax constitutes a source of revenue for the local government on the commune level. If real estate tax was incorporated into income tax, the local government would be deprived of a part of its constant and certain revenue which is easy to collect and virtually impossible to evade.

Assuming that the real estate tax is a vital and necessary element of the tax system, the author considers the proper method to define the basis for the tax. He evaluates the following two options:

– a tax based on units of measurement (e.g. on surface area),

– a tax based on the value of an object.

In the Czech Republic, the same as in Poland, no "ad valorem" real estate tax, that is one based on the value of property, has been introduced so far. The book highlights some differences between the Czech real estate tax system and the systems adopted in other countries:

1) The Czech local government has lower autonomy compared to local governments in the countries of Western Europe.

2) The Czech tax is linked to the person (the taxpayer) and not to the object (real estate),

3) the value of real estate is shown in a computer system (a national database) which makes participation of experts in tax proceedings unnecessary.

4) The value assumed as the basis for "ad valorem" taxation is also used for the purpose of other taxes (e.g. the civil law action tax).

5) Introduction of an "ad valorem" tax results in an increase of the value of the real estate tax and the population (consisting mostly of natural persons) is not ready to accept this increased tax burden related to owning real estate.

6) In some European countries, real estate tax can be considered as cost for the purpose of calculating personal income tax.

Considering the above, one can conclude that the Czech laws concerning the real estate tax are much different from those adopted in other European countries. The author sees the need to implement the "ad valorem" principle and considers the market value of real estate as the most appropriate basis for taxation.

The Czech Ministry of Finance is already working on a project of reform of the real estate tax. The main tenet of this reform is a change of the taxation base

from surface area to market value for both the real estate tax and other taxes on transactions involving real estate. Property values will be determined by communes in their respective territories. The tax rates will be between 0.05% and 0.5%. The project will only concern taxation of land and the principles for taxation of buildings and premises will remain unchanged. The author proposes that other taxes (those on buildings and premises) should also be included in the planned reform and sees the need to provide to the real estate owners the possibility to question (in the course of an administrative process) the value of their property determined by the commune.

The Czech estate tax is very similar to its counterparts in other countries and, unlike the Anglo-Saxon models, it is linked to persons as it burdens the persons who acquire an inheritance (and not the mass of the succession). The tax rates are dependent on the degree of kinship between the acquirer and the deceased person; the closer the kinship – the lower the rates. For that purpose, the acquirers have been divided into three groups. Members of the first tax group (spouses, descendants, and ascendants) are exempted from the tax. Members of the second and third tax group are entitled to certain amounts of deductions.

The author finds two key problems with the application of this tax: the cost of the fiscal administration (incommensurate with the amounts of tax collected) and the requirement to determine the value of the real estate in a tax proceeding in each case. In the latter case, a large improvement could be achieved by implementing an official real estate database that would include information on real estate values (and could be used also for the purpose of the "ad valorem" real estate tax).

The problems with the Czech gift tax are very similar. Besides gifts in the strict sense of this word, this tax also covers "other similar property enlargements," but the statute does not define these and only judicial decisions provide a guidance as to how to interpret this term.

A unique problem concerning the gift tax is the phenomenon of widespread evasion of this tax. With the exception of real estate, means of transportation, money deposited in bank accounts, copyrights, etc., transactions involving other goods are very rarely disclosed to tax authorities.

The Polish counterpart of the Czech real estate sales tax is the civil law action tax. It can be said that Poland has surpassed its southern neighbor in the area of taxation of sales contracts with a property tax. In the Czech Republic, it is still the seller of real estate who pays the tax, even though in real transactions parties try to agree otherwise. On 1 January 2007, the Polish legislator accepted the actual situation and made the buyer responsible for paying the tax. What remains unrealized both in the Czech Republic and in Poland is the implementation of a real estate register that would include information on the value of real estate for the purpose of taxation, including the aforementioned sales tax.

Of all the property taxes, the only tax whose amount should be dependent on factors other than value is the tax on means of transportation. What is unique to this tax is that it is based on the need to compensate for the damage to the road infrastructure and to the natural environment caused by motor vehicles. Consequently, the tax rate should reflect the theoretical damage caused by a vehicle, instead of being proportional to its value. In that respect, the Czech tax system is very similar to the Polish system: the rate of the tax on means of transportation (the amount) depends on the weight of the vehicle and the number of axes (trucks, buses, etc.) or on the engine capacity (passenger cars, which are no longer subject to taxation in Poland).

Apart from the standard property taxes, the book also discusses the remaining property levies that resemble taxes. As it turns out these are similar to levies existing in the Polish tax system:

– a fee on dog ownership (until the end of 2007 it had been defined in Poland as a tax on dog ownership),
– a fee on the increase of the value of real estate caused by public projects, such as connecting the property to a water and sewage system (which in Poland is commonly called a planning rent),
– fees for using radios and television sets (a counterpart of the Polish subscription fees).

Contrary to their names, these levies are not related to any benefit provided by public law entities. Their existence proves the fact that "smuggling" into the legal system of taxes which are called fees in order to avoid public protests is ubiquitous in Europe.

After reading the book, one can come to several key conclusions. As mentioned above, the Czech laws on property taxes are similar to those present in Poland, concerning both taxes on possession of real estate (with surface area as the taxation base) as well as other property (the tax on means of transportation) and taxes on an extraordinary enlargement of property (the estate and gift tax). The same as in Poland, efforts to introduce a real estate tax based on the value of property have encountered resistance on the part of the society, mainly due to the fear of excessive increase of fiscal burdens. Last but not least, it turns out that property taxes are the only ones that so far have not undergone a thorough reform. While in the 1990s a reform of taxation of transactions and income was implemented, the property levies have not been reformed because, for reasons presented in the book, they are considered to be the most difficult. The oldest acts of substantive tax law are the statutes on property taxes as they date back to the 1980s or the early 1990s.

Grzegorz Liszewski

POLSKIE ORZECZNICTWO DOTYCZĄCE WŁADANIA NIERUCHOMOŚCIAMI[1]

Orzeczenie TK z dnia 8 maja 1990 r. (K 1/90)

Artykuł 7 Konstytucji RP ustanawia konstytucyjną, a więc wzmożoną ochronę własności, dopuszczając wywłaszczenie wyłącznie na cele publiczne i tylko za słusznym odszkodowaniem. Wywłaszczenie w rozumieniu art. 7 Konstytucji – zdaniem Trybunału Konstytucyjnego – to wszelkie pozbawienie własności z przeznaczeniem na cele publiczne, bez względu na formę (nie tylko na podstawie decyzji administracyjnej), a słuszne odszkodowanie – to odszkodowanie sprawiedliwe. Sprawiedliwe odszkodowanie jest to jednocześnie odszkodowanie ekwiwalentne, bowiem tylko takie nie narusza istoty odszkodowania za przejętą własność. Ograniczenie prawa do ekwiwalentnego odszkodowania poprzez wprowadzenie potrąceń z innych tytułów niż już ciążące na nieruchomości stanowi naruszenie konstytucyjnej zasady słusznego, tj. sprawiedliwego odszkodowania, i jest w ten sposób naruszeniem samej własności.

Orzeczenie TK z dnia 19 czerwca 1990 r. (K 2/90)

Artykuł 7 Konstytucji ustanowił konstytucyjną, a więc w naszym systemie prawnym nadrzędną ochronę własności, co w analizowanej kwestii wyraża się w postanowieniu dopuszczającym wywłaszczenie wyłącznie na cele publiczne i tylko za słusznym odszkodowaniem, które w państwie prawnym należy rozumieć jako odszkodowanie nie krzywdzące obywateli, a więc odszkodowanie ekwiwalentne, tj. dające wywłaszczonemu możliwość odtworzenia rzeczy przejętej przez państwo.

Wyrok SN z dnia 26.02.2003 r. (II CKN 1306/00)

Dwie niezabudowane działki gruntu graniczące ze sobą i należące do tego samego właściciela, dla których jest prowadzona jedna księga wieczysta, stanowią – w rozumieniu art. 46 § 1 kc. – jedną nieruchomość gruntową.

Postanowienie SN z dnia 30.10.2003 r. (IV CK 114/02)

Stanowiące własność tej samej osoby i graniczące ze sobą działki gruntu objęte oddzielnymi księgami wieczystymi są odrębnymi nieruchomościami w rozumie-

1 Wybrane fragmenty tez i uzasadnień orzeczeń, źródło: System Informacji Prawnej LEX.

niu art. 46 § 1 kc. Odrębność tę tracą w razie połączenia ich w jednej księdze wieczystej.

Wyrok NSA z dnia 08.12.2006 r. (I OSK 124/06)

Dla uznania danego obszaru gruntu za nieruchomość konieczne jest jej wyodrębnienie od innych podmiotów jakimi w stosunku do niego są otaczające go grunty. Zatem dany grunt może stać się nieruchomością na skutek skonkretyzowania jego przedmiotowego zakresu, które następuje przez określenie jego zewnętrznych granic.

Postanowienie SN z dnia 25.03.1998 r. (II CKN 635/97)

Budynki i urządzenia znajdujące się na gruncie oddanym w użytkowanie wieczyste, których użytkownik nie wzniósł ani nie nabył przy zawarciu umowy o oddanie gruntu w użytkowanie wieczyste nie stanowią jego własności i nie są objęte prawem własności związanym z użytkowaniem wieczystym. Zgodnie z zasadą superficies solo cedit stanowią one część składową nieruchomości, jeżeli są trwale z nią związane i dzielą los prawny nieruchomości.

Uchwała SN z dnia 08.03.2006 r. (III CZP 105/05)

Przepis art. 49 kc. nie stanowi samoistnej podstawy prawnej przejścia urządzeń służących do doprowadzania lub odprowadzania wody, pary, gazu, prądu elektrycznego oraz innych podobnych urządzeń na własność właściciela przedsiębiorstwa przez ich połączenie z siecią należącą do tego przedsiębiorstwa. Wejście wymienionych w nim urządzeń w skład przedsiębiorstwa jest jedynie przesłanką ich wyłączenia spod działania zasady superficies solo cedit wyrażonej w przepisach art. 48 i 191 kc. Kwestia własności tych urządzeń pozostaje natomiast poza zakresem art. 49 kc., który nie określa, do kogo urządzenia będą należały i na podstawie jakiego tytułu prawnego.

Wyrok SN z dnia 26.02.2003 r. (II CK 40/02)

1. Przepis art. 49 kc. stanowi, że urządzenia służące do doprowadzania lub odprowadzania wody, pary, gazu, prądu elektrycznego oraz inne urządzenia podobne nie należą do części składowych gruntu lub budynku, jeżeli wchodzą w skład przedsiębiorstwa lub zakładu. Przepis ten wyznacza granice pomiędzy częścią składową przedsiębiorstwa i częścią składową nieruchomości, określając granice zastosowania zasady superficies solo cedit. Uzależnia on obowiązywanie tej zasady od tego, czy sporne urządzenia wchodzą w skład większej zorganizowanej całości, jaką jest przedsiębiorstwo.

2. Szczególne uregulowanie statusu prawnego wszystkich urządzeń wymienionych w art. 49 kc. wynika stąd, że fizyczne bądź funkcjonalne powiązanie urządzenia w taki sposób, że staje się częścią składową przedsiębiorstwa, wyklucza uznanie go za część składową nieruchomości, choćby było z nią trwale związane.

3. Omawiany przepis art. 49 kc. przesądza tylko, iż urządzenia w nim wymienione oraz inne urządzenia podobne nie należą już do części składowych gruntu strony powodowej, bowiem weszły – według ustaleń tego Sądu – w skład przedsiębiorstwa. Pozostawił ten przepis otwartą kwestię sposobu uzyskania tytułu prawnego do tego urządzenia przez prowadzącego przedsiębiorstwo. Wejście bowiem w skład przedsiębiorstwa, w tym znaczeniu, że urządzenie stało się elementem pewnego zbioru, nie jest równoznaczne z przeniesieniem własności do tych urządzeń, co potwierdza konstytucyjna zasada ochrony prawa własności.

Wyrok NSA z dnia 04.10.2006 r. (II OSK 1183/05)

Artykuł 235 kc. ma charakter iuris cogentis. Prawem głównym jest prawo wieczystego użytkowania gruntu, a prawem związanym (podrzędnym) jest własność usytuowanych na tym gruncie budynków i urządzeń. Zbycie tego prawa odnosi się też do budynków. Użytkowanie wieczyste nie może być przedmiotem obrotu prawnego odrębnym od prawa własności budynków wzniesionych na tym gruncie i odwrotnie.

Wyrok SN z dnia 23.01.2003 r. (II CKN 1155/00)

1. Kodeks cywilny nadał prawu wieczystego użytkowania gruntu nadrzędny charakter w stosunku do prawa własności budynków na tym gruncie, co oznacza, że prawem głównym jest prawo wieczystego użytkowania, a prawem związanym (podrzędnym) jest prawo własności budynków i urządzeń.

2. Użytkowanie wieczyste gruntu nie może być przedmiotem obrotu prawnego odrębnym od prawa własności budynków wzniesionych na tym gruncie, i odwrotnie, to ostatnie prawo nie może być przedmiotem obrotu prawnego odrębnym od prawa użytkowania wieczystego.

Uchwała SN z dnia 14.07.1994 r. (III CZP 86/94)

W budynkach wzniesionych na gruncie będącym w użytkowaniu wieczystym dopuszczalne jest ustanowienie własności lokali z jednoczesnym oddaniem w użytkowanie wieczyste ułamkowej części tego gruntu, jeżeli jego podział jest nieuzasadniony.

Uchwała SN z dnia 11.07.1983 r. (III CZP 27/83)

Osoba trzecia, która wzniosła wspólnie z wieczystym użytkownikiem dom mieszkalny, nie staje się przez to współwłaścicielem tego domu. Osobie tej przysługuje natomiast – przy zachowaniu przesłanek z art. 231 § 1 kc. – prawo domagania się przeniesienia na nią udziału w wieczystym użytkowaniu oraz przeniesienia własności do części budynku.

Uchwała SN z dnia 08.07.1966 r. (III CZP 43/66)

Budynek na gruncie oddanym w wieczyste użytkowanie, wzniesiony kosztem jednego z współużytkowników zgodnie z postanowieniami umowy normującej sposób korzystania z terenu państwowego przez wieczystego użytkownika, stanowi współwłasność wszystkich współużytkowników wieczystych.

Uchwała SN z dnia 11 grudnia 1975 r. (III CZP 63/75)

Możliwość nabycia w drodze zasiedzenia użytkowania wieczystego podlega jednak istotnemu ograniczeniu. Należy mianowicie przyjąć, że dopuszczalne jest to tylko wtedy, gdy użytkowanie wieczyste zostało już ustanowione na rzecz oznaczonej osoby. Nie wchodziłoby natomiast w rachubę nabycie tego prawa na skutek długotrwałego jego wykonywania co do nieruchomości państwowej, która nie została oddana w użytkowanie wieczyste.

Uchwała SN z dnia 24.03.1980 r. (III CZP 14/80)

Osoba, która uzyskała posiadanie nieruchomości w drodze umowy sporządzonej bez zachowania formy aktu notarialnego, nie może być – w zakresie zasiedzenia tej nieruchomości (art. 172 § 1 kc.) – uważana za samoistnego posiadacza będącego w dobrej wierze.

Postanowienie SN z dnia 27.02.1981 r. (III CRN 20/81)

Nieformalny nabywca nieruchomości jest jej posiadaczem w złej wierze, wie bowiem że ze względu na niezachowanie formy aktu notarialnego (art. 158 kc.) nie nabył prawa własności, w związku z czym własność otrzymanej w wykonaniu nieważnej umowy nieruchomości może nabyć przez zasiedzenie po upływie lat 20 od chwili uzyskania posiadania (art. 172 § 2 kc.). Mimo złej wiary nabywca taki może domagać się przeniesienia na niego na podstawie art. 231 § 1 kc własności otrzymanej nieruchomości lub jej części, jeżeli na nieruchomości tej wzniósł budynek o wartości przenoszącej znacznie wartość zajętej na ten cel działki oraz jeżeli ze względu

na okoliczności danego przypadku zasady współżycia społecznego nakazują traktowanie go z tego punktu widzenia tak jak posiadacza w dobrej wierze.

Uchwała SN z dnia 17.09.1986 r. (III CZP 58/86)

Osoba, która uzyskała posiadanie nieruchomości na podstawie umowy zobowiązującej do przeniesienia jej własności, sporządzonej w formie aktu notarialnego, może mieć przymioty samoistnego posiadacza w dobrej wierze w rozumieniu art. 172 kc.

Postanowienie SN z dnia 07.04.1994 r. (III CRN 18/94)

Posiadanie samoistne – może wchodzić w grę nie tylko w sytuacji, gdy posiadacz jest przekonany o swoich uprawnieniach właściciela, lecz także wówczas gdy wie, że nie jest właścicielem, ale chce posiadać rzecz i posiada ją tak, jakby był jej właścicielem. Objęcie rzeczy w posiadanie na podstawie umowy, której celem było przeniesienie własności, z reguły – gdy cel ten nie został osiągnięty np. wobec niezachowania formy notarialnej – wskazuje na posiadanie samoistne.

Wyrok NSA z dnia 25.03.1999 r. (I SA 1306/98)

Stwierdzenie nabycia własności nieruchomości przez zasiedzenie następuje w drodze postanowienia sądu powszechnego mającego charakter deklaratoryjny, a więc potwierdzający powstanie skutku prawnego w postaci uzyskania tytułu własności nieruchomości z mocy samego prawa. Wzruszenie takiego postanowienia w wyniku wznowienia postępowania sądowego i oddalenie wniosku o zasiedzenie oznacza, że podmiot ubiegający się o własność w drodze zasiedzenia nigdy tej własności nie nabył, ponieważ nie spełnił wymogów ustawowych.

uchwała SN z dnia 30 listopada 1994 r. (III CZP 130/94)

Odstąpienie od umowy przenoszącej własność nieruchomości wywiera skutek obligacyjny, nie powodując automatycznego przejęcia własności z powrotem na zbywcę.

uchwała SN z dnia 27 lutego 2003 r. (III CZP 80/02)

Odstąpienie od umowy sprzedaży rzeczy ruchomej na podstawie art. 491 § 1 oraz art. 560 § 2 kc. powoduje przejście własności tej rzeczy z powrotem na zbywcę.

Opracował: Grzegorz Liszewski

LITERATURA – WYBÓR

1. Bakeš, M. (ed.). Finanční právo, Praha 2006.
2. Banasiński C., Kulesza M., Ustawa o gospodarce komunalnej. Komentarz, Warsaw 2002.
3. Banaszkiewicz B., Konstytucyjne prawo do własności, [w:] Wyrzykowski M. (red.) Konstytucyjne podstawy systemu prawa, Instytut Spraw Publicznych, Warsaw 2001.
4. Bartošek, M., Encyklopedie římského práva, Praha 1981.
5. Baudyš, P. Katastr nemovitostí, Praha 2003.
6. Bradáč, A., Fiala, J., Hlavinková, V. Nemovitosti. Oceňování a právní vztahy, Praha 2007.
7. Briggs, A., Rees. P. Civil Jurisdiction and Judgments, London 2005.
8. Brzeszczyńska S., Podatek od spadków i darowizn, Warsaw 2007.
9. Chustecka K., Krawczyk I. Ustawa o podatku od spadków i darowizn. Komentarz, Warsaw 2007.
10. Cioch H., Witczak H., Zasada superficies solo cedit w prawie polskim, "Rejent" 1999, nr 3.
11. Dědič, J. a kol. Obchodní zákoník, Komentář, Praha 2002.
12. Doliwa A., Prawo mieszkaniowe. Komentarz, Warsaw 2005.
13. Dowgier R., Etel L., Kurzynka T., Liszewski G., Poplawski M., Wroblewski E., Reforma podatkow majatkowych, Warsaw 2004.
14. Drela M., Własność zabytków, Warsaw 2006.
15. Drozd E., Glosa krytyczna do uchwały składu 7 sędziów z dn. 30.11.1994 r., (III CZP 130/94), "Przegląd Sądowy" 1995, nr 10.
16. Dudzik S., Działalność gospodarcza samorządu terytorialnego. Problematyka prawna, Kraków 1998.
17. Dvořák, J., Spáčil, J. Společné jmění manželů v teorii a judikatuře, Praha 2007.
18. Dybowski T. (red.), System Prawa Prywatnego. Tom 3. Prawo rzeczowe, Warsaw 2007.
19. Eliáš, K. a kol. Kurs obchodního práva, Obchodní závazky, Cenné papíry, Praha 1996.
20. Etel L., Presnarowicz S., Podatki i opłaty samorządowe. Komentarz, Warsaw 2005.

21. Etel L., Reforma opodatkowania nieruchomości w Polsce, Białystok 1998.

22. Etel, L. (ed.). Europejskie systemy opodatkowania nieruchomości, Warsaw 2003.

23. Fiala, J., Korecká, V., Kurka, V. Vlastnictví a nájem bytů, Praha 2004.

24. Fojcik–Mastalska E., Nowe prawo dewizowe. Komentarz 2003, Wrocław 2003.

25. Gdesz M., Cel publiczny w gospodarce nieruchomościami, Zielona Góra 2002 .

26. Gniewek E. (red.), Podstawy prawa cywilnego, Warsaw 2005 r.

27. Gniewek E., Obrót nieruchomościami skarbowymi i samorządowymi, Kraków 1999.

28. Goettel M., Goettel A. Podatek od czynności cywilnoprawnych. Komentarz, Kraków 2007.

29. Gronkiewicz–Waltz H., Wierzbowski M. (red.), Prawo gospodarcze. Zagadnienia administracyjnoprawne, Warsaw 2007.

30. Havlan, P. Majetek státu v platné právní úpravě, Praha, 2006.

31. Havlan, P. Veřejné vlastnictví v právu a společnosti, Praha 2008.

32. Hrušáková, M., Králíčková, Z. České rodinné právo, Brno 2006.

33. Ignatowicz J., Stefaniuk R., Prawo rzeczowe, Warsaw 2006.

34. Janeczko E., Zasiedzenie, Wydanie 2, Warsaw – Zielona Góra 1999.

35. Jarosz–Żukowska S., Konstytucyjna zasada ochrony własności, Kraków 2003.

36. Jurníková, J. a kol. Správní právo – zvláštní část, Brno 2004.

37. Kidyba A., Handlowe spółki osobowe, Kraków 2005 r.

38. Kliková, A., Valachová, K., Havlan, P., Hamplová, E., Stavební právo – praktická příručka, Praha 2007.

39. Knapp, V. Proměny času. Vzpomínky nestora české právní vědy, Praha 1998.

40. Kol. Obce 2006–2007, Praha 2006.

41. Kosikowski C., Komentarz do ustawy o gospodarce komunalnej oraz wzory aktów gminy dotyczące przekształceń przedsiębiorstw komunalnych, Łódź – Zielona Góra 1997.

42. Kosikowski C., Publiczne prawo gospodarcze Polski i Unii Europejskiej, Warsaw 2007.

43. Krywan T., VATemecum 2008, Warsaw 2008.

44. Kuba, B., Olivová, K. Katastr nemovitostí České republiky, Praha 2004.

45. Kučera, Z. Mezinárodní právo soukromé, Brno 2001.

46. Kunicki A., Umowne prawo odstąpienia, Lwów 1939.

47. Magnus, U., Mankowski, P. European commentaries on Private International Law. Brussels I Regulation, Munchen 2007.

48. Malý, S. Nový stavební zákon s komentářem, Praha 2007.

49. Maruchin W., Modzelewski K., Iwińska R., Kaczmarek M. J., Leksykon CIT 2008, Warsaw 2008.

50. Mrkývka P. a kol. Finanční právo a finanční správa, Brno 2004.

51. Mróz T., Stec M. (red.), Prawo gospodarcze prywatne, Warsaw 2005.

52. Ofiarski Z., Prawo dewizowe. Komentarze Zakamycza, Kraków 2003.

53. Ofiarski Z., Ustawy: o opłacie skarbowej, o podatku od czynności cywilno-prawnych – Komentarz, Warsaw 2003.

54. Pařízková, I. Finanční právo. Finance územní samosprávy, Brno 2005.

55. Pekárek, M., Průchová, I. Pozemkové právo, Brno 2003.

56. Pelikánová, I. Komentář k obchodnímu zákoníku – 4. díl., Praha 1997.

57. Pietrzykowski J. (red.), Kodeks cywilny. Komentarz. Tom I, Warsaw 1997.

58. Procházka, V. Česká poddanská nemovitost v pozemkových knihách 16. a 17. století, Praha 1963.

59. Průcha, P. Správní právo. Obecná část, Brno 2004.

60. Radvan, M. Czech Tax Law, Brno 2005.

61. Radvan, M. Zdanění majetku v Evropě, Praha 2007.

62. Radvan, M. Zdanění nemovitostí v Evropě. Praha 2005.

63. Radvanová, S., Zuklínová, M. Kurz občanského práva. Instituty rodinného práva, Praha 1999.

64. Radwański Z. (red.), System Prawa Prywatnego, Prawo cywilne – część ogólna, tom 1, Warsaw 2007.

65. Rozehnalová, N., Týč, V. Evropský justiční prostor (v civilních otázkách), Brno 2003.

66. Rudnicki S. (red.), Prawo obrotu nieruchomościami, Warsaw 2001

67. Bieniek G., Rudnicki S., Nieruchomości. Problematyka prawna, Warsaw 2006.

68. Rudnicki S., Nabycie przez zasiedzenie, Warsaw 2007.

69. Rudnicki S., Odstąpienie od umowy i rozwiązanie umowy przeniesienia własności nieruchomości, (w:) G. Bieniek, S. Rudnicki (red.), Nieruchomości. Problematyka prawna, Warsaw 2007.

70. Ruśkowski E., Komentarz do ustawy prawo dewizowe, Warsaw 1994.

71. Selucká, M. Nájem a podnájem bytu, Brno 2005.

72. Skoczylas J.J., Prawo dewizowe. Komentarz, Warsaw 2000.

73. Sławik K. (red.), Działalność gospodarcza – kluczowe problemy, Warsaw 2007.

74. Smoleń P. Kształtowanie obciążenia w podatku od spadków i darowizn, Lublin 2007.

75. Sołtysiński S., Szajkowski A., Szumański A., Szwaja J., Kodeks spółek handlowych – komentarz, tom 1, Warsaw 2001.

76. Stanik K., Ewolucja pojęcia „zabytek" w prawie polskim (zagadnienia podstawowe), „Studia Iuridica Lubllinensia" 2007.

77. Stelmachowski A., Zarys teorii prawa cywilnego, Warsaw 1998.

78. Štenglová, I., Plíva, S., Tomsa, M. Obchodní zákoník, Komentář, Praha 2005.

79. Szachułowicz J.(red.), Gospodarka nieruchomościami, Warsaw 2001.

80. Szalewska M, Wywłaszczenie nieruchomości, Toruń 2005.

81. Szewczyk M., Ingerencja publicznoprawna w prawo własności jednostki w demokratycznym państwie prawa, [w:] Jednostka w demokratycznym państwie prawa, red. J. Filipek, Bielsko–Biała 2003.

82. Szpunar A., Odstąpienie od umowy o przeniesienie własności nieruchomości, „Rejent" 1995, nr 6.

83. Truszkiewicz Z., Użytkowanie wieczyste. Zagadnienia konstrukcyjne, Kraków 2006.

84. Vážný, J. Vlastnictví a práva věcná, Brno 1937.

85. Woś T., Wywłaszczenie i zwrot nieruchomości, Warsaw 2007.

86. Woźniak C., Użytkowanie wieczyste, Warsaw 2006.

87. Woźniak Z., Wpływ zastrzeżenia umownego prawa odstąpienia na sferę stosunku obligacyjnego, (w:) E. Gniewek (red.), O źródłach i elementach stosunków prawnych. Księga pamiątkowa ku czci Prof. A. Kleina, Kraków 2000.

88. Wójtowicz W., Gorgol A., Prawo dewizowe, Warsaw 2003.

89. Zubrzycki J., Leksykon VAT 2007, Wrocław 2007.

Opracował: Grzegorz Liszewski