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The right of foreigners to purchase agricultural lands in Romania: Cross-border conflict mediation

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THE RIGHT OF FOREIGNERS TO PURCHASE AGRICULTURAL LANDS IN ROMANIA. CROSS-BORDER CONFLICT MEDIATION

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Summary: Ever since becoming a member state of the European Union, Romania had to adapt its internal laws so that the citizens of other EU member states, or those of other entities for which this right is acknowledged by Law 17/2014, stateless persons residing in these states and legal persons established in accordance with the internal laws of these states can benefit from a regulatory framework in virtue of which they can acquire the right of private property over Romanian agricultural fields, under the same conditions as Romanian citizens, stateless persons based in Romania or Romanian legal persons. Outsourcing the civil circuit over the Romanian agricultural fields raises a serious question over the reaction of the society, which is still vibrant to anything that concerns the preservation of property over the ancestral land.

Keywords: foreigners, mediation, conflict, land, alienation

INTRODUCTION

The right to property is the most important, thorough and full real property and it benefits from a distinct regulation in our civil law system, within the New Civil Code (Law 287/2009), in the contents of Book III. About Goods.

The concept of property goes way back to the neo-roman antiquity, where individual property existed only for immovable goods (for instance, land belonged to the tribe, the family or no one). Once fertilizer or crop rotation practices started to be used on the same plots and by the same group of persons, those crops naturally became an object of family property and, later, of individual property. In Roman law, in the time of the XII Tables (*Lex Duodecim Tabularum*), the right to property initially appeared as an exclusive right to use and usufruct, meaning that the crops from the cultivated land were collected by a person, after which the mentioned crop became mutual property again. With the passing of time, the cultivated plot stayed with the person cultivating it, with the latter even being able to build a house on that land. Under these conditions, individual and perpetual property has surfaced, having only one owner, which was the *pater familias*⁵[5], descending directly from *dominium* and which awarded the owner with an exclusive, sovereign and perpetual right based on three attributes: possession (*ius possidendi*), use (*ius utendi* and *ius fruendi*) and disposition (*ius abutendi*). In the Middle Ages, property became more complex, but only as to what concerns real-estate property, which was divided in accordance with the existing vassalage relationships. Therefore, *dominium eminens*, which belonged to the feudal owner, and *dominium utile*, which belonged to the vassal⁶[1], had surfaced.

MATERIALS AND WORK METHODS

In order to accomplish this study, the existing regulatory documents at the level of the European Union were used: regulations, directives, recommendations, Romania and Bulgaria's Treaty of Accession to the European Union, as well as other constitutive and changing treaties; national regulatory documents: laws, ordinances, decisions, codes; jurisprudence and legal doctrine. The interpretation of law concerning mediation and property is accomplished through logical-rational operations that seek to clarify and explain the contents and meaning of norms, for the

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⁵ Marilena Uliescu, Noul Cod Civil Studii și Comentarii, Volumul II, Cartea a III-a și Cartea a IV-a (art.535-1163).

⁶ Bîrsan Corneliu, Drept Civil. Drepturi reale principale, Ediția a III-a, revăzută și adăugită.

purpose of their just application, through the accurate classifying of various practical situations. Among these there are methods such as literary or declarative, extensive, restrictive interpretation, logical, grammatical, systematic interpretation - by correlation to other legal provisions or the historical-teleological interpretation - by determining the practical purpose and utility considered by the lawmaker at the time of issuing the legal norms concerning mediation and property.

RESULTS AND DISCUSSIONS

The Constitution of Romania, adopted during the meeting of the Constituent Assembly of November 21, 1991, and revised by Law 429/2003, law approved by way of a national referendum in the same year, provides, within the contents of Chapter II. Fundamental rights and liberties, art. 44 par. 1, that "The right to property and receivables from the state are guaranteed"⁷. Furthermore, the contents of paragraph 2 of the same article provide that "Private property is guaranteed and protected equally by the law, regardless of who the owner is. Foreign citizens and stateless persons can acquire the right to private property over lands only under the conditions resulted from Romania's accession to the European Union and from other international treaties to which Romania is a party, based on reciprocity, under the conditions provided through organic law, as well as through legal inheritance"[6]. It is observed that the cited constitutional provision, issued in 2003, was meant to prepare the society for January 1, 2007, when Romania became a member state of the European Union, with all the rights and obligations deriving from this event, a well known fact being that the European trail of our country started with signing Romania's European Union Association Agreement, on February 1, 1993.

The possibility for a citizen of an EU member state to obtain the right of property over a real-estate located in another member states finds its origins in the Treaty of Founding the European Economic Community (EEC), signed in Rome, in 1957. Even though, at that time, the name of European Union didn't exist yet, with the member states being only 6, while the framework over which the European Union was built hasn't surfaced yet, the establishment of a common market through EEC, based on the famous four liberties (free movement of people, capital, goods and services), represents the act of free will of the signatory states. Through this, the signatory states have laid down the outline for the future European structure concerning the possibility of purchasing land (immovable good and economic capital), overcoming the barrier of exclusively national property, this being determined by the profoundly nationalist considerations of the thinking between the early XX century and the beginning of the post-war era of the same century. The contents of this document formally introduce a series of common policies, of which we identify the common agricultural policy (art. 38-47) and the common commercial policy (art. 110-116)⁸ [11], precursory to the existing common policies, today, in the European Union.

Through the obligations undertaken by Romania through the Treaty of Accession to the European Union, during the first 7 years of the EU membership, until January 1, 2014, the citizens of other EU member states, the citizens of the Swiss Confederation, citizens of the states that are part of the Agreement on the European Economic Area (AEEA), as well as the stateless persons residing in these countries and legal persons bearing the nationality of these countries had a series of restrictions concerning the right to purchase agricultural land in Romania, meaning that they were not allowed to purchase land as natural persons, but rather through certain commercial companies of Romanian nationality or by way of association with Romanian natural and legal persons. Starting with January 1, 2012, the aforementioned persons have gained the right to purchase land within the built-up areas, yards, houses, and vacation homes in Romania, other than unincorporated agricultural lands, forests or hayfields.

Since the start of 2014, the need to comply with the obligations undertaken through Romania's and Bulgaria's Treaty of Accession to the European Union, signed on April 25, 2005 and

⁷ The Constitution of Romania, revised and republished.

⁸ the Treaty of Founding the European Economic Community (EEC).

ratified by the Parliament of Romania through Law no. 157/May 24, 2005⁹[9] has materialized through the emergence of Law 17/2014 concerning the sale-purchase of agricultural lands.

Law 17/2014 lists, within the contents of art. 1, the three legitimate purposes: ensuring food security, protecting national interests and exploiting natural resources in accordance with the national interest; regulating sale-purchase of agricultural lands outside of the built-up areas; massing the agricultural lands in order to increase the size of farms and to streamline the economic activities. The latter purpose represents the expression of the legal protection of current owners of the agricultural funds, recorded *ope legis*, through the provisions of art. 4-12, concerning the right of pre-emption (preference) in favor of the co-owners¹⁰, tenants, neighboring owners, as well in favor of the Romanian State, through the State Domains Agency, in this order, at equal prices and conditions. Under the conditions of the law and of the common law in matters of pre-emption, the holders of the right are preferred when sale purchase over the agricultural land from outside the built-up areas is perfected, as we have earlier mentioned, a vision introduced by one of the purposes for issuing this law itself, which is to mass up the agricultural fields in view of increasing the size of the farms and to streamline their economic activity.

Within the contents of art. 3, the subjects over which the legal provisions are applicable are listed, thus, the provisions of the law are applied to “Romanian citizens, to the citizens of an European Union member state, to those of the states that are party to the Agreement on the European Economic Area (AEEA) or those of the Swiss Confederation, as well as to the stateless persons residing in Romania, in one of the European Union member states, in a state that is a party to AEEA or in the Swiss Confederation, as well as to legal persons with a Romanian nationality, the nationality of one of the European Union member states, of the states which are a party to AEEA or of the Swiss Confederation”. According to the provisions of the same paragraph, the aforementioned legal and natural persons can acquire agricultural land outside of the built-up areas of Romania only under **conditions of reciprocity**, their right, therefore, being subject to the suspensive condition of ensuring an identical legal framework by the states of which they are citizens of or of which they are nationals of (legal persons) for the Romanian citizens, stateless persons residing in Romania and legal persons that are nationals of Romania, in view of purchasing land in the aforementioned states. Moreover, the provisions of the law mean that, in the given conditions, they cannot have an agricultural land from the built-up areas¹¹, as an object of a sale-purchase, nor those located outside of the built-up areas, but which contain archeological sites, lands for which the procedure of sale-purchase is governed by the special law for matters of protecting historical monuments, Law 422/2001, republished.

The provisions of art. 2, par. 3 from Law 17/2014 reinforce the spirit of the constitutional norm provided in art. 44 par. 2 of the Romanian Constitution, amended and republished, and make reference to the international treaties to which Romania is a party, treaties ratified through the internal law mechanism and to the rule of reciprocity in order to operate the sale-purchase of agricultural land outside the built-up areas of Romania with citizens of third party countries, stateless persons and non-citizens residing in these states. In the event that these conditions exist

⁹ Law no. 157/2005 of May 24, 2005 for the ratification of the Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (member states of the European Union) and the Republic of Bulgaria and Romania concerning the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on April 25, 2005, published in the Official Gazette of Romania no. 465 of June 1, 2005.

¹⁰ Common property, as a type of the right of property, showcases the following forms: standard co-property (by shares), forced co-property; property in condominium; periodical property, according to the New Civil Code, Law 287/2009.

¹¹ Within the built up areas means the territory located under the administrative authority of municipalities, cities, towns and villages.

outside the will of the contracting parties, the sale-purchase of agricultural land outside the built-up areas, by the aforementioned, is also regulated by the provisions of Law 17/2014.

Chapter II of Law 17/2014 comprises a series of special provisions relating to the sale-purchase of lands from outside the built-up areas, on the establishment of certain special conditions which are required to be fulfilled, meaning a series of permits that need to be requested and obtained, in case of agricultural lands from outside the built-up areas which are located within a distance of 30 km. from the state borders of Romania and from the shore of the Black Sea, a condition which is not applied to preemptions and neither to agricultural lands located outside the built up areas which contain archeological sites.

Chapters III and IV from the contents of Law 17/2014 contain the material and procedural law provisions concerning the application of the right to preemption in relation to the persons mentioned within the contents of provision art.4 par. 1, the non-fulfillment of which brings the sanction of absolute invalidity to the translative document of property, according to the provision included in art. 16 of Law 17/2014. The existence of the sanction of absolute invalidity to the translative document of property, over a land located outside the built-up areas, concluded by disregarding the legal provisions concerning the right to preemption, together with the other sanctions operating in the event of breaching the other imperatives of the law, provided in the contents of the final and transitory provisions of Law 17/2014, operates within the logic of the same purpose of the law, being that of the necessity to accomplish a massing of the lands and to increase and streamline the agricultural farm, a stringent need of the Romanian agriculture.

CONCLUSIONS

In the event of purchasing agricultural land outside of the built-up areas in Romania, by citizens of the EU member states, citizens of the Swiss Confederation, citizens of the states which are parties to the Agreement on the European Economic Area, citizens of third party states, parties to the international treaties signed with Romania under conditions of reciprocity or by stateless persons residing in these states or legal persons that are nationals of these states, or in case of purchasing land in other member or third party states, by the Romanian citizens, by stateless persons residing in Romania or legal persons that are nationals of Romania, based on reciprocity or in the event of existing state-level treaties, all conflicts which may arise between the subjects of the legal relationship of sale-purchase¹², we consider to be legal relationships that contain elements of extraneity, such as: citizenship or residence – for natural persons, and nationality for legal persons¹³[4]. In such cases, the provisions of Directive 52/CE/2008 of the European Parliament and Council operate in regards to certain aspects of mediations in civil and commercial matters, including cross-border mediation. According to the provisions of art. 2 par. 1 of Directive 52/CE/2008, published in the Official Journal of the European Union, “within the meaning of this directive, a cross-border dispute is that in which at least one of the parties is headquartered or resides in another member state than that of any other party at the date on which: (a) the parties decide to resort to mediation after the dispute arises; (b) mediation is imposed by court; (c) there is an obligation to resort to mediation due to a national right, (d) an invitation is addressed to the parties, within the meaning of article 5.”

According to the provisions of art. 1 par. 2 from the aforementioned directive, this is applied to civil and commercial disputes, with an exception being the cases in which there are rights and obligations that the parties cannot apply in accordance with the applicable law. Furthermore, Directive 52/CE/2008 is not applied to tax, customs or administrative matters or in the event of the state's liability towards the deeds and omissions arising from exercising the role of public authority.

¹² Conflicts can be generated, in these cases, by factors of civil nature, as well as matters related to the delimitation of boundaries, real estate matters, avulsion, servitudes or other factors of such nature, or factors of criminal nature, such as disturbance of possession, violation of domicile, wrecking etc.

¹³ Lupașcu Dan, Diana Ungureanu, Drept internațional privat.

We accept the conclusions of the directive concerning the utility of mediation in cross-border matters and we conclude by introducing the institution of mediation as an important pillar of social peace-making, with matters arising from the practice of selling-purchasing agricultural lands from outside the built-up areas being a complex source of study for the theory of alternative means of dispute resolution. Since it is still early days for the application of Law 17/2014, without a practice and jurisprudence of the courts for this topic yet to exist, we consider that the attempt to settle various conflicts, arising from the legal relationship to alienate agricultural lands from the built-up areas, as well as other legal operations where the parties are able to undertake their rights and obligations, can be subjected to mediation *a priori*, as well as to other Alternative Dispute Resolution procedures and, only in the event of disagreement, to the judicial procedure.

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