

The Brief

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Romania

New Civil Code - Real Estate Aspects

The Romanian New Civil Code entered into force on 1 October 2011. Although at first glance it might seem that it has only re-worded the provisions of the Old Civil Code and brought them up-to-date and in line with the latest doctrine and case-law, special attention needs to be paid to the New Civil Code as its more than 2,600 articles introduce several changes as compared to the former legislation.

This Brief intends to pinpoint some of the main legal changes set forth by the New Civil Code as regards real estate transactions and financing. For further information, queries regarding this newsletter or the matters addressed, please contact us at bruno.leroy@gide.com.

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1. Real Estate Publicity

The New Civil Code intends to change the real estate publicity system in order to have rights in rem over real estate (such as ownership, superficies or mortgage rights) acquired or modified only through registration with the Land Book, such registration having a constitutive effect and no longer a mere effect of rendering such rights enforceable against third parties.

However, the New Civil Code's Application Law has postponed the application of such a rule until finalisation of cadastral works for the entire administrative unit where the relevant real estate is located. For most parts of Romania, this is not likely to occur in the near future as cadastral works are advancing at a slow pace (according to the estimates of the National Agency for Cadastre and Real Estate Publicity, the cadastral works and the registration of properties should be finalised within 10 years).

Consequently, for the time being, registration with the Land Book of the acquisition or modification of rights in rem shall continue to have just an opposability effect.



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The New Civil Code maintained the traditional three categories of Land Book registrations: final registrations (in Romanian “*intabulari*”), provisory registrations (in Romanian “*înscrieri provizorii*”) and notes (in Romanian “*notari*”) - final and provisory registrations have as object rights in rem over real estate, while notes refer to the registration of other rights, acts, facts or legal situations related to the real estate.

Final registrations and provisory registrations under the New Civil Code may be performed based on authentic notary deeds, irrevocable court decisions, inheritance certificates or other deeds issued by administrative authorities in case the law provides for such a special case.

As regards notes, the New Civil Code provides that (a) as a rule, notes render the concerned rights, facts or other legal relations opposable to third parties and (b) in lack of such a note, the concerned right, fact or legal relation is nevertheless opposable to third parties having knowledge thereof, unless it results from the law that the mere knowledge thereof does not suffice so as to cover the lack of Land Book registration.

Note should be made that, according to the New Civil Code, provisory registrations and notes may be performed only in the cases expressly provided by law.

2. Formal Requirements

The New Civil Code clearly restates that contracts having as object the transfer or creation of rights in rem over real estate (land and/or constructions) must be executed as authentic deeds.

3. Interdictions to Transfer

According to the New Civil Code, parties may establish conventional interdictions to transfer certain assets provided that two cumulative conditions are met: (a) the term of the interdiction does not exceed 49 years as of the acquisition date and (b) there is a serious and legitimate interest justifying such interdiction. The owner may request the court's authorisation to transfer the asset in case the interest having justified the interdiction no longer exists or in case there is a superior interest for the asset's transfer.

In case of breach of the interdiction, the beneficiary may request the annulment of the transfer contract provided the interdiction had been registered with the Land Book.

Note should be made that, by derogation, interdictions to transfer provided under mortgage agreements do not block the transfer of the concerned asset, such transfer contracts being valid even if the third party purchaser had been aware that the mortgage agreement provided for such interdiction or for the fact that such transfer would be deemed as a breach of contract by the mortgagor.

If the interest for providing an interdiction to transfer may not be qualified as serious and legitimate, not only the interdiction but the entire contract may be null. Note must be made that (a) the nullity of the interdiction entails the nullity of the entire contract in case the interdiction had been determinant upon conclusion of the contract and that (b) interdictions included in onerous contracts are presumed to have been determinant, until proved otherwise.

4. Sale Option Agreements

The New Civil Code introduces a new type of contract: the option agreement. Pursuant to a sale option agreement¹ the offeror makes an irrevocable offer to sell the concerned asset to the offeree. In case the offeree exercises its option to purchase the asset within the term of the option, a sale and purchase contract is deemed to have been concluded by such exercise (without the need for an additional consent of the offeror to be obtained or for the parties to execute a sale and purchase agreement).

In the case of real estate, both the sale option agreement and the option exercise statement must be executed as authentic deeds.

The registration with the Land Book of the ownership transfer is carried out based on the option agreement, the option exercise statement and the proof of communication of the option exercise statement to the offeror.

5. Promises to Sell / Purchase

The New Civil Code maintains the general rules on promises to sell and/or purchase established by the Old Civil Code and related doctrine. Note should nevertheless be made of the following novelties:

- the principle that, in the event that a party refuses to execute the final contract, the other party may request the court to give a judgment having the value of a sale and purchase agreement, is extended to all promises, including unilateral promises; under the New Civil Code, such action is nevertheless subject to a statutes of limitation of 6 months as of the date when the final sale and purchase agreement should have been executed;
- money paid under a promise to sell is deemed to constitute a down-payment from the selling price, unless otherwise provided;
- in case the promising-seller breaches the promise, the promissory-buyer benefits from a legal mortgage over the real estate securing the reimbursement of the money paid under the promise.

6. Sale and Purchase Agreements

While the general framework on sale and purchase agreements under the New Civil Code is consistent with that provided for by the Old Civil Code, there are several changes that need to be taken into account:

- unless otherwise provided by the parties, interest shall accrue on the price (a) as of the ownership transfer, in case the sold asset produces civil or natural fruits (such as rents) or (b) as of hand-over of the sold asset, in case such asset doesn't produce fruits but brings other benefits to the purchaser;
- the New Civil Code provides for a general legal framework on legal and conventional pre-emption rights, applicable unless otherwise provided by contract or by law;

¹ The option agreement is a contract signed by both the offeror and the offeree.



- co-owners and neighbours benefit from a legal pre-emption right in case of sale of private forestry land;
- land tenants (in Romanian "*arendași*") benefit from a legal pre-emption right in case of sale of the leased agricultural assets;
- the New Civil Code recognises the validity of a sale and purchase agreement with redemption right; the term of the redemption option must nevertheless not exceed 5 years.

7. Lease Agreements

The New Civil Code sets forth a more detailed legal framework on lease agreements based mainly on the pre-existing legal provisions and case-law. Note should be nevertheless made as to the following changes:

- entering into a lease agreement: the lease is deemed concluded as soon as the parties have agreed upon the object of the lease and the rent. Hence, special attention should be paid to head of terms so as to make clear that such should not be deemed as lease agreements but mere undertakings of the parties to continue the negotiations for the future conclusion of the lease agreement;
- maximum term: lease agreements may be concluded for a maximum term of 49 years;
- enforceable title: lease agreements executed as authentic deeds and those executed as private deeds but registered with the tax authorities shall be deemed enforceable titles for the payment of rent, as well as the restitution of the leased asset upon expiry of the lease term;
- sale of the leased asset: in case of sale of the leased asset, the tenant's rights shall be enforceable against the new owner provided that (a) the lease had been registered with the Land Book, in the case of leased assets registered with the Land Book or (b) the lease agreement had a certain date preceding the date of the sale, in the case of leased assets not registered with the Land Book. The new owner shall be subrogated into all rights and obligations of the landlord under the lease agreement;
- invalidation of the landlord's title: in case the landlord's title over the leased asset is invalidated, the lease agreement is terminated *ope legis*, except in the case of a good faith tenant when the lease agreement remains in force for a maximum term of one year as of the invalidation of the landlord's title;
- preference right for a new lease: upon expiry of lease agreements over spaces used for a professional's activity, the tenant benefits from a preference right for entering into a new lease (provided the tenant had complied with its undertakings under the previous lease agreement).

8. Mortgage Agreements

Under the New Civil Code, mortgages may be created over real estate, over movable assets,² as well as over a universality of assets used for an undertaking's activity. Real estate mortgages may be established over: (a) real estate and its accessories, (b) usufruct of real estate and accessories, (c) superficies right and (d) co-ownership quota(s).

The New Civil Code provides for several cases of extensions / transfers of real estate mortgages, as follows:

- extension, without any other formality, over constructions, improvements and accessories of the mortgaged property, even if such are subsequent to the creation of the mortgage;
- transfer by law onto insurance proceeds and compensations received in case of destruction of, or damages to the mortgaged property, onto amounts due for expropriation for public utility purposes, and onto amounts due as damages for limitations of the ownership right established by law;
- extension, as of Land Book registration of the commencement of enforcement or, as the case may be, as of the commencement of the insolvency procedure, over rents (in Romanian "*chirii*") and land rents (in Romanian "*arenzi*"), as well as over natural and industrial fruits of the mortgaged property.

The New Civil Code expressly provides that the mortgagor is free to use, administer and dispose of the mortgaged asset, provided that the mortgagee's rights are not affected.

It must be reminded that, according to the New Civil Code, clauses included in the mortgage agreement and providing for an interdiction to transfer or for the qualification of such a transfer as an event of default do not affect the validity of transfer deeds, even if the purchaser was aware of the existence of such clauses under the mortgage agreement.

Nevertheless, in case the mortgagor carries out dispositions acts in relation to the mortgaged property that render impossible the enforcement of the mortgage, such acts may be annulled upon request of the mortgagee.

In addition, the New Civil Code stipulates that clauses providing for an acceleration of the loan or for the mortgagor's duty to pay another obligation in case additional guarantees are granted over the mortgaged property shall be deemed unwritten.

As regards the enforcement of mortgages, the New Civil Code provides that mortgage agreements are self-enforceable titles. The procedure for enforcement of real estate mortgages remains subject to the Civil Procedure Code.

The New Civil Code provides nevertheless that the mortgagor may simultaneously commence enforcement proceedings against other real estate (that are not subject to a mortgage) only in case the mortgaged assets are not sufficient for the payment of the secured obligation.

² Mortgages over movable assets under the New Civil Code correspond in principle with the securities in movable assets formerly governed by Title VI of Law No. 99/1999 on certain measures for speeding up the economic reform (Title VI having been repealed by the New Civil Code's Application Law).

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