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NEWSLETTER NO. 8 – RECODIFICATION

Dear clients,

In this newsletter we shall provide you with the summary of fundamental changes and recommendations concerning the area of real estate law and the agenda of Land Registry introduced by the new Civil Code (the “NCC”).

### Superficies Solo Cedit Principle

The major change in this area of law is the return to the principle which applies in most European countries, i.e. that **a structure is considered to be a part of the plot of land on which it stands**. This principle had been applicable in the old Czechoslovakia till 1950, when it had been replaced by the principle under which a plot of land and a structure are two independent objects, with independent relations. As of now again, the owner of the structure (building) and the plot of land cannot dispose with the two properties independently and these can be disposed with only as one real estate property. The new principle will not apply in cases when the owners of the plot and the structure are different; properties will remain as independent objects. This diversity of ownership is not favourable and NCC considers it only as temporary and therefore also stipulates the following:

- a structure will merge with a plot of land and will cease to be an independent object when the ownership right to both real estate properties (structure and land) will be with the same owner (save for certain exceptions listed by the NCC, when the merge will not happen and the two properties will remain as independent although they will be owned by the same owner—see Section 3060 NCC),
- the owner of a plot of land and a structure erected on that plot of land have mutual statutory pre-emption right, which also binds future owners of the real estate property (if not applied).

The above specified rule will not apply to temporary structures, including elements that are built in into the land or the walls of such structures. Temporary nature of a structure may be given by its character or title on the basis of which it had been build. The NCC furthermore reserves separate ownership for machinery and other equipment that is merged with the real estate property and that is in the ownership of a different owner.

### **Definition of Real Estate Property**

The NCC defines as real estate property the following:

- plots of land and related rights in rem,
- underground constructions built for specific purposes (such as metro, wine cellar, etc.) under a plot of land in the ownership of a different owner and related rights in rem,
- right declared as real estate property by statutory provisions—surface right (§1240 *et seq.* NCC),
- objects declared by statutory provisions not to be part of plot of land, when such object also cannot be transported without violating its nature,
- units (residential or non-residential premises, as area determined sections of a building with shares in the common areas of the relevant real property, and sets of such residential or non-residential premises—see § 1158(2) and 1159 NCC),
- structures that have not merged with plot of land (different ownership) as described above.

All other property (material or non-material nature) are considered as movable assets (§ 498 (2) NCC).

**Even after January 1, 2014 the owner of a plot of land may temporarily assign his land to a different person and allow this person to temporarily build structures on that plot of land.**

This can happen on the basis of the following legal grounds:

- lease,
- easement right (services),
- surface right

### **Surface Right**

The NCC returns to the Czech legal system the institute of surface right represented by the special transferrable right in rem belonging to the builder (the person who has the building right) to have temporary a structure on or below a plot belonging to another owner. The surface right is considered to be a real estate property and can be established to new structure or to an existing one (for its modernisation or reconstruction)

The surface right may be established as temporary, **up to the period of 99 years maximum**. The surface right shall be established:

- by agreement of the parties upon its registration with Land Registry
- by decision of public authority; or
- by prescription of right (for statutory prescribed period).

A new unit (residential or non-residential) cannot be established on the basis of surface rights; this may still be done only under a contract for construction. It will not be possible to establish surface rights on a plot that is subject to a right that goes against the purpose of the structure. If the plot is encumbered with a lien, the consent of the lien creditor will be necessary in order to encumber it with surface rights. It will be possible to transfer or encumber surface rights; by law surface rights will transfer to a builder's heirs and other legal successors. Unless the contractual parties state otherwise in their entry into the Land Registry, a builder and owner of the plot will have a mutual right of first refusal.

The surface right shall terminate:

- by agreement,
- elapse of the agreed term—unless the parties agree otherwise, **after the expiry** of the period for which the surface rights were agreed, **the builder will have a claim against the owner to compensation for the structure** in the amount of one half of the value of the structure at the time of expiry of the surface rights.

## Purchase of Real Estate

As we have already mentioned in one of our earlier Newsletters, the NCC is based on the principle of contractual freedom. This means that the parties may stipulate freely their mutual rights and obligations, as long these are not in breach with law, public order or personal rights of third parties. Rights and obligations of the parties should be mutually balanced. A contract for purchase/sale of a real estate property must be executed *in written form*.

Fundamental provisions of contract for real estate property are:

- precise specification of contractual parties
- precise specification of the real estate property
- specification of purchase price or method for its calculation
- manifestation of the will of the parties to transfer the ownership title to the property

The NCC expands the possible reservations/provisions the parties may agree upon in the contract. The below specified list is demonstrative only and parties may agree on additional reservations/provisions in the contract:

- **reservation of ownership right**—the buyer becomes the owner of the property only upon full and proper payment of the purchase price; the risk of damages passes to the buyer upon hand-over of the property by seller,

- **reservation of return purchase/sale**—seller/buyer are under obligations to transfer the property back to the seller/buyer upon invitation and for payment. Unless a specific period agreed under the contract, the reservation period will be 3 year for movable assets and 10 years for real estate.
- **pre-emption right**—the debtor is obliged to offer the real estate for sale to the holder of the pre-emption right, if he wishes to sell it to third party. By special provisions the pre-emption right may be expanded also to other means of transfer of the ownership right to the property (other than sale). If expressly agreed, the pre-emption right will pass to the heir of the debtor and the pre-emption right may be transferred.
- **reservation of better buyer**—based on this provision the seller may favour a better buyer, if he claims his right within a set period (if not agreed otherwise such period is 1 year for real estate property). Who is a better buyer is decided solely by the seller and the new buyer does not necessary needs to offer a higher price.
- **trial purchase**—the seller is buying under conditions that he will approve the acquired assets within a trial period (if not agreed otherwise such period is 1 year for real estate property). The buyer may not return the property if it cannot be return in a conditions in which it had been accepted (subject to general try wear),
- **price clause**—the purchase price will be modified according to real costs. If the contract does not specify which costs are decisive for the modification of the purchase price, the purchase price will be modified in relation to the changes of the price of the main components necessary for the manufacturing (construction) of the property. The parties

must enforce the right under the price clause (when agreed) without an undue delay under the hand-over of the property.

The above specified reservations/rights are established *upon their registration in the Land Registry, if agreed as right- in-rem.*

### **Easement Rights**

The essence of the easement rights is that the entitled party has certain right in relation to asset of other owner, who is obliged to tolerate the limitation of his ownership right (by giving, doing, tolerating or omitting some actions). The NCC regulates easements in much more detail than the current civil code and **divides easements into services and real easements.**

### **Services**

Services will be characterised by the *passivity* of the owner, who must tolerate something to the benefit of someone else (e.g. walking across plot of land) or refrain from something (e.g. not build above a certain height on the owner's own plot).

One change that will be beneficial in practice is that the owner of the plot will be able to encumber it in favour of another plot belonging to the same owner; this can be practical for future sale of land.

The NCC dispositively and demonstratively regulates the most common services in practice:

- paths and roads
- personal services
- services on utility lines
- rights of use
- support of neighbouring building
- collection of rain water
- usufruct
- graze land

### Real Easements

Real easements will be characterised by the *activity* of the owner, real easements will oblige the owner of the servant property to take some action (e.g. provide part of the harvest to the recipient).

A real easement may encumber only a property entered into a public list (typically real estate). The real easement can be used as a security instrument. The owner of the easement will be able to request each owner of the property to provide unfulfilled obligations under the real easement or if the performance fails, provide for financial compensation. It will only be possible to establish a real easement as temporary; to establish it as not time-limited, the conditions under which the obliged party will be able to buy out the easement must be agreed at the time of establishing the real easement.

Please note that the NCC newly uses the term “Public Registry” for Land Registry.

### **Material Publicity Principle**

**The land registry will be governed by the material publicity principle, i.e. the protection of good faith.** If the status entered into the land registry does not reflect the actual legal status, the recorded status will testify in favour of the person who acquired the right in rem **for consideration in good faith** from the authorised person according to the status recorded in the registry. In other words, ignorance of the registered status does not provide for apology and it is presumed that what is registered in the Land Registry is compliant with the real legal status.

The applicability of the above rule is subject to **one year transition period** for all rights registered in the Land Registry prior to the effective date of the NCC or registered in the Land Registry till December 31, 2015.

*We suggest that for each legal acts that concern real estate property an up-to-date extract from the Land Register is obtained and the new entry in the Land registry is executed without any undue delay after the execution of the relevant legal act.*

If the status entered into the Land Registry does not reflect the actual legal status, i.e. a wrong owner is registered, it is possible to:

- request the competent Land Registry to remedy the situation—deletion of the entry,
- apply with the competent Land Registry for the registration of **note on the disputability of the entry** on the affected property, within a period of one month when the defected entry had been discovered by the applicant. The applicant must then file a court petition with the competent court within a period of two month and provide an evidence of such court petition to the Land Registry. Provided the party had not been informed about the registration of the entry in question by the Land Registry, he may enforce his right within a period of 3 years from the registration of such entry. If he files the request for registration of the note of disputability of the entry within this period then the note of disputability of the entry will affect the registration of any future entries (i.e. it will breach the parties good faith).

Other means of protection:

- **Circulation of notification about proposal for new entry in the register:**
  - (i) The Land Registry will be obliged to inform the owner of the property **as well as every entity with a right to the property entered into the land registry** (e.g. a lien, easement, right of lease or tenancy) immediately upon receipt of the proposal for a new entry; by circulating a letter to the permanent residency address or through data box;
  - (ii) If requested, the Land Registry will also circulate the notification via email or SMS;
  - (iii) Parties who have applied for so called “Watch Dog” service, will be informed also via this service;

- (iv) The Land Registry will not be able to finalize the registration of the new entry prior to elapse of 20 days from the date of notifying the affected entities of commencing the proceedings.
- **Optional so called “Watch Dog” service:** within this service the Land Registry provides notification to the registered parties about any application for new entry, registration of entry, record or a note. The service may be ordered only by the registered owners for the relevant properties. Notifications will be circulated via email, SMS or data box.

### **Entry as preferred method of new registration**

The Land Registry will use entry for registration of all rights in rem, i.e. not only rights created by contract, but also for rights in rem created, changed or terminated by a decision of public authority, prescription of right, public sale, etc., which have been registered by record under the old legislation.

### **Application for registration and Priority Principle**

The registration of new entry will be possible only upon a filing of application of the party to the registration proceeding. The law does not subscribe any statutory period during which such application should be filled; however from practical point of view we suggest filling the registration

application without any undue delay. The Land Registry is governed by Priority Principle which means that as decisive for the order of registration is the exact time when an application is submitted for registration to the Land Registry.

Fewer counterparts must now be submitted; instead of submitting counterparts equal to the number of participants in the legal proceedings plus two, a single counterpart will now suffice. In case a participant is represented in the registration proceeding by an attorney, his signature on the relevant power of attorney must be officially verified.

## **Registration**

Once the Land Registry approves the new entry, it will not send out a written decision on the registration, but the registration will become effective by uploading in the Land Registry file. If the Land Registry rejects an application for new entry, it is obliged to issue a written decision and send it out to the participants. After the new entry, the participants will only receive a notification of the new entry. The Land Registry is obliged now to send out all documentation not only to the participant's attorney (if appointed), but also to the participant.

We believe that the above summary will allow you better orientation in the new law. We are available for all your requests for any additional information.

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