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CEE Property Today

Real estate legal trends and developments in the region

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Welcome to CEE PROPERTY TODAY

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I would like to welcome you to the second issue of our real estate publication, where we look at the recent legal trends and developments in the property sector in some of the key Central and Eastern European (CEE) markets. Over the past few months, developers have been enjoying a more positive attitude towards investments and we have seen some interesting projects changing hands, particularly in Poland and in the Czech Republic. Hungary has also shown some activity, with Slovak and Romanian markets showing signs of gaining back some of the foreign investors' attention.

Many of you will have seen the New Civil Code marking a substantial milestone in Czech legislation which has brought new rules for doing business in real estate, in particular. We also look at how other major changes over the past year have resulted in simplified planning and construction procedures in Hungary. Furthermore, we comment on a recent Polish Supreme Court's decision which brought more attention to contractual liabilities in construction contacts in Poland. Additionally, our experts talk about sector developments in Bulgaria, Romania, Russia, Slovakia and Ukraine.

I trust you will find our publication useful to your business. Please do get in touch if you would like to receive more information on any of these topics.

Kind regards
Dr. Gábor Czike

Footnote: *CEE Property Today* is prepared by CMS Cameron McKenna. It should not be treated as a comprehensive review of all legal developments it covers. It cannot substitute individual legal advice for existing circumstances. Also, while we aim for it to be as up-to-date as possible, some recent developments may miss our printing deadline.

Bulgaria

Recent developments affecting the local property sector

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Moratorium on land acquisition by foreigners is unconstitutional; Restrictions to agricultural land acquisition introduced by amendments to the Ownership and Use of the Agricultural Land Act.

The decision for moratorium on foreign parties acquiring land in Bulgaria has been declared unconstitutional by the Constitutional Court.
The decision for the moratorium was adopted by Parliament on 22 October 2013 and was due to last until 1 January 2020. It assigned to the Council of Ministers to undertake all necessary actions for the announcement of that moratorium.

It was introduced notwithstanding Bulgaria's agreement, in its EU accession treaty, that parties from EU/EEA states would be free to acquire land for secondary residences from 1 January 2012 and to acquire agricultural or forest land from 1 January 2014.

Parliament's decision to adopt the moratorium and to assign to the Council of Ministers to implement it was challenged in the Constitutional Court. The court declared the decision to be unconstitutional, on the basis that:

— it contradicts fundamental constitutional principles, such as the principle of the constitutional State and the principle of separation of powers

— it contains internal contradictions between its title and contents

— it was beyond the power of Parliament to assign to the Council of Ministers to undertake all necessary acts and actions and more specifically to undertake actions for the unilateral amendment of an international treaty

— the Council of Ministers had no legal instruments to implement the decision for the moratorium

— the Council of Ministers is not an executive body of the parliament; the Parliament may not adopt acts undermining the independence and discretion of Council of Ministers to conduct Bulgaria's foreign policy in relation to the EU and its treaty relations with other countries

— it directly contradicts the provision of the Constitution which authorises foreigners to inherit land by virtue of law

— it is inconsistent with the accession treaty, which is now part of Bulgarian law and takes precedence over any national laws which are inconsistent with it. The accession treaty can only be changed by the procedure set out in the treaty itself.

The regime of land acquisition by parties from EU/EEA states therefore remains unchanged with such parties being free to acquire land for secondary residences. As of 1 January 2014, such parties may also acquire agricultural or forest land in the country.

However, following the Constitutional Court's decision, the Parliament passed a Bill amending and supplementing the Ownership and Use of Agricultural Land Act, which imposes restrictions to agricultural land acquisition by foreigners. According to the Bill, such land may be acquired by:

— individuals who have resided in Bulgaria for more than five years; or

— legal entities that have been present in Bulgaria for more than five years.

Legal entities, registered in Bulgaria for less than five years prior to the acquisition may acquire agricultural land only if their shareholders or members meet the above mentioned criteria.

In addition, agricultural land may not be acquired or owned by the following:

— commercial companies, directly or indirectly owned companies registered in jurisdictions with preferential tax regime;

— commercial companies, whose shareholders or members are not parties from EU/EEA states (even if they have been registered in Bulgaria for more than five years); or

— joint-stock companies with bearers shares.

The President considered some of the provisions in the Bill contradictory to the Constitution and returned it for reconsideration by the Parliament. The Parliament re-approved the Bill, which means that the above restrictions to acquiring agricultural land by foreigners came fully into effect on May 10th, 2014.

Rights Guaranteed in the Event of Expropriation; Right of First Refusal of State and Municipalities

The Municipal Property Act (1996) and the State Property Act (1996) were amended on 20 December 2013 in the light of a decision of the Constitutional Court dated 15 July 2013, by which the court declared certain of the Acts' provisions relating to expropriation as contradictory to the Constitution. The unconstitutional provisions included:

— The decisions of the competent authorities on expropriation were to be published in the State Gazette, without being communicated separately to the affected parties. Accordingly, the term for appeal started running as of the publication in the State Gazette;

— Expropriation was effective even if the amount of the compensation determined by the authorities was appealed in court and was not effectively paid.

The Constitutional Court decreed that expropriation decisions must be communicated to the affected parties by means of a specific notice. It also confirmed the principle that the expropriation may not become effective before the owner has received full compensation for the expropriated property.

Separately, the Spatial Development Act (2001) (SDA), was amended as of 20 December 2013. The amendment provides for the right of first refusal of the State or municipalities in the event of sale of property (land) assigned for construction of objects, representing public state or municipal property based on an effective zoning plan. That right existed previously but did not apply to sales between co-owners. Based on the current regime, an owner may sell such land (or parts thereof) to a third party, only if it obtains the State or municipality's express written refusal to buy it at the proposed conditions. Prior to the amendments, the law suggested an option for the seller to provide the notary officer with evidence that the property was offered to the State or the municipality and a declaration that the offer was not accepted. If the declaration proved to be false, or if the sale was realised with a third party at more favourable terms than those offered, this could expose the parties to claims from the State or the municipality within 2 months from the sale.

Currently, parties must ensure they obtain the express refusal of the State or the municipality on the purchase and consider the timing implications involved.

Real Estate Transaction Corporate Approval Requirements Clarified by the Court

According to the Commerce Act (1991), the General Assembly of a limited liability company must authorise any transaction of purchase or disposal (whether by sale or otherwise) of real estate. The case law was inconsistent as to whether the lack of a corporate approval rendered the transaction invalid.

In the end of 2013, the Supreme Cassation Court, in an interpretative decision, clarified that if the General Assembly of a limited liability company has not granted its consent to the transaction, this would not affect the transaction's validity. Further, the lack of corporate authorisation shall not prevent the courts from proclaiming preliminary agreements involving real estate as final (if the relevant statutory and contractual conditions are met).

Thus the court gave preference to the stability of commercial turnover and ruled that the deficiencies in the internal affairs of limited liability companies may not affect the rights of third parties. If the legal representative of a company has concluded a real estate transaction absent the required decision of the General Assembly, he/she would be liable before the company.

Interpretive decisions are binding on the judicial and executive authorities, as well as on local and central administrative authorities.

Czech Republic

Building on other party's land under the New Civil Code

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Although the New Civil Code principally avoids separate ownership of land and buildings situated on such land, it simultaneously re-introduces the legal instrument of the "building right" which preserves the option to use another party's land for construction purposes. The principle of the building right is the right of an investor to erect a building on or under the surface of the land owned by another party. The right raises many questions and future court rulings will show how it will function in practice.

The Building Right

The building right is a right in rem in respect of property of another which is explicitly declared by the law as immovable property (immovable property in this case is the building right, and not the building itself). Throughout the period of duration of the right, the building affected by the building right will not become a part of the land on which it is situated but will be owned by the investor as a part of such right.

The right can be established both in respect of already existing buildings (e.g. for the purposes of their reconstruction or modernisation) and in respect of new buildings.

The building right can be transferred, encumbered, acquired by prescription and will be subject to inheritance. One of the advantages when compared to the current regulation is that the right can be encumbered (e.g. by mortgage) as early as the right is established, i.e. even before the commencement of construction works.

The building right is a temporary right in rem which may be established for not more than 99 years. The right may be extended, even repeatedly, however for a period of not more than 99 years. It may be acquired by contract, prescription or decision issued by a public authority (only if so provided by the law).

The contract establishing the building right must be in writing. The right established by a contract will arise upon the registration of the same in the real estate register.

The building right may be established for consideration or free of charge. In the event that the consideration is agreed in several recurrent payments, it will be called "construction payment" (in Czech: stavební plat) and will encumber the building right as the so called real burden (in Czech: reálné břemeno). The amount of the construction payment may however not be dependent from any contingent future event (e.g. development of prices of real estate), but the amount may be bound to the inflation or deflation rate, as applicable.

The owner of the land will have a pre-emption right to the building right and the investor will have a pre-emption right to the land (the pre-emption right may be excluded or restricted by agreement).

At the moment the building right ceases to exist, the building will become a part of the land and will thus be under the ownership of the owner of the land. Under the law, the investor will be entitled to compensation for the building in the amount of one half of the value of the building as at the moment the right has ceased to exist (the parties may, however, agree otherwise).

Questions left unanswered

In general, the New Civil Code stresses the autonomy of the will of contracting parties and the option to agree otherwise than as stipulated by the law. Despite the freedom related to the negotiations of contracts regarding the building right, this legal instrument raises a number of questions, in particular:

How will the situation be resolved in case of a building erected on several lands of other persons (the New Civil Code regulates the building right encumbering one land only)?

Will it be possible to contractually agree the option to withdraw from the building right? Will statutory reasons of termination apply to this right?

Will it be possible to establish more building right in respect of one land?

Will it be possible to erect an apartment house constituting of units as part of the building right?

Answers to these questions will ensue from the practice and the case law. With regard to the rather spare regulation of rights and obligations of the parties in the New Civil Code, we recommend, in addition to the specification of the will of the parties to establish the building right, specification of the encumbered land, duration of the right and provision whether the right is established for consideration or free of charge, also specifying the content of the right (in particular specification of the building to be erected, how the building will be modernised etc.), rights and obligations of the investor and owner of the land throughout the period of duration of the right, security of the right and specification of what will happen with the building after the right ceases to exist.

When can the building right be used?

If a land of another is to be used for construction purposes.

In case of a reconstruction of an existing building, for better use of the building or because the owner does not want to care about the building;

Primarily for buildings for temporary use (warehouses, smaller business centres) or for buildings the lifetime of which is limited (e.g. due to the technology used).

In case of a need to obtain financing for the construction (reconstruction) as the building right may be encumbered as early as the right is established, i.e. even before the commencement of construction works.

Hungary

Simplified planning and construction procedures

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In many jurisdictions, the regulations governing planning, building and construction procedures are among the most complex and comprehensive areas of law. Hungary was no exception to this rule. However, major changes made in 2013 have resulted in them being streamlined and simplified, digitalised and put online, and made less burdensome administratively.

The most important change is that almost every construction procedure has been digitalised. At the beginning of the procedure, each client can now ask the central construction authority for an electronic storage account to which it then uploads all documents (including plans); as soon as the application is submitted, the authority is given access to the account and the client may no longer amend the documents in it.

This approach has several advantages: it removes the need for multiple copies of documents to be submitted, often including huge files containing plans; and it also speeds up the communication process between client and authority, as well as between the authority and other bodies (such as the environmental authority) who may be involved.

Channelling all communication through the account shortens the process significantly, not least because it obviates the need to rely on the (much slower) postal service for delivery of the various resolutions, permits and other decisions.

Paper applications will continue to be accepted if, say, it is more practical to submit hard copies or the client has difficulty working electronically. In that event, the authority would digitalise the paper documents and continue to conduct all communications with other bodies electronically.

Several new procedures have also been introduced to make the procedures for obtaining construction permits simpler and easier for developers, including:

— Removing the need to obtain a permit for some simple constructions, alterations and demolitions. Local regulations in some areas may still require the local municipality to be notified before work may be started but this still removes the need for submitting elaborate plans or other complex documents.

— Giving mayors of local municipalities the right to express an opinion on the suitability of a planned development for the built environment of their town. Where required by the local regulation, developers must now ask for the mayor's opinion before applying for a permit and then attach the opinion to their building permit application.

— Allowing developers to make preliminary enquiries of the building authority, before submitting an application, as to how construction requirements would apply to their plans or whether their plans would comply with them. The answers and opinions they received would then be binding on the building authority as regards the developer's subsequent application unless and until any changes were made to the particular rules or development plans.

— Allowing developers to submit a consolidated construction permit application in some more complex cases, consisting of a preliminary conceptual phase (for clarifying construction and other requirements) and a permit application phase. This provides a single procedure in which the developer can apply to have zoning regulations amended, and obtain all necessary construction, environmental and operational permits, and those who oppose the development may express all their counter-arguments. Under the old system, developers with complex projects had to follow multiple different procedures, exposing them to multiple challenges and appeals from opponents of the plans and to a considerable financial and administrative burden.

— Requiring an online construction log to be kept in the central construction system for all building works requiring either a construction permit or a notification to the authority. This replaces the requirement to give written notice to the building authority before starting works. The log must keep a daily record of all events and works, starting when the developer hands over the construction site to the contractor and ending when it receives the occupancy permit. There are detailed legal requirements for completing the log. Maintaining the log online streamlines the administrative process by allowing all parties (developer, contractor and authorities) to examine it at any time.

— Simplifying the occupancy permit process by allowing developers to commence use by simply sending a notice to the authority, except where one or more conditions have been attached to occupation by any of the special authorities.

— Making construction permits valid for 3 years, unless either they are extended by the relevant authority or the actual construction works have started (in which case they must be finished within 5 years). Demolition permits are valid for only one year. A user-friendly aspect of the electronic procedure is that it automatically warns users at least 90 days before a permit is due to expire.

— Significantly restricting rights of appeal in order to deter frivolous and last minute appeals by neighbours seeking to delay use of the completed development. In the past, many developments suffered considerable delays due to the lengthy process of deciding appeals submitted by interested parties.

Poland

Growing impact of contractual liabilities in construction contracts

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Recently, the Polish Supreme Court passed a very interesting judgment which is not just significant from the perspective of the construction and property sector in Poland but may also have an application to contracts in other commercial settings. The issued decision concerned contractual penalties imposed on a contractor for delay in carrying out construction works (judgement of the Polish Supreme Court, dated 16 January 2013, Ref. nr.: II CSK 331/12). The decision will continue to be very relevant for future practice in the construction industry and has already put more importance on defining liabilities in contractual relationships.

Bad weather conditions put the case on trial

The judgment of the Supreme Court related to a dispute between an investor - a local municipality - and a contractor - a construction company awarded by tender to build a school playground. Due to adverse weather conditions, which made it impossible to lay some parts of the playground surface within the original timetable, the works were completed with a 10-month delay. As a result of the delay the municipality, for which the investment project was being carried out, invoked a clause imposing a penalty on the contractor for each day of delay, amounting in total to more than the value of the contract.

The case reached the Supreme Court on appeal after the municipality's claim had been upheld in the circuit court and court of appeal. Both courts determined that imposing the obligation to pay the penalty for a delay was fully justified, and stated that the contractor should have made allowances for adverse weather conditions. The Supreme Court overturned the decision, ruling that the weather conditions were an objective obstacle in performing the construction works as being 'beyond the parties' control'. It further stated that the penalty should not be imposed on the contractor for those days during which he could not have carried out the works due to bad weather conditions.

Imposing a fine for delayed construction work

Under usual circumstances, a construction works contract sets out a penalty clause if a constructor fails to perform his obligation within an agreed deadline. In

such case, the reasons for the delay and the extent of the contractor's fault are irrelevant and are not examined. The investor may then on these grounds pursue the payment of the penalty each time that the contractual deadline is not met.

However, recent practice has shown that this approach may appear wrong as was the case of the Supreme Court's decision. If the contractor proves that the delay in performing the work resulted from circumstances that were beyond his control, a contractual penalty may not be imposed.

This may be seen as a result of the character of contractual penalties under current legislation. A penalty clauses doe not exist to provide a party with a guaranteed payments, but are intended to compensate one party (with a lump sum) for loss suffered through the fault of another party, usually by failing to exercise due care. The penalty clauses should not, where they applied 'in case of delay', be triggered by adverse weather condition, which are outside the parties' control.

Defining the contractor's liability

Under Polish law, contracting parties can agree that one party will be liable to make a guarantee payment to the other if it should fail to perform its obligations even if no fault may be ascribed to it. However, the contract must clearly express this intention in order for it to be construed as a guarantee payment and not penalty clause. Therefore, when defining the contractor's liability in a construction works contract, it may not be sufficient to follow the standard practice and to specify that the contractual sum is payable 'for delay'.
As seen with the recent decision of the Supreme Court, a contractor can avoid the penalty if proving that circumstances beyond his control prevented him from finishing the works on time. It is therefore recommended to extend the liability by further defining additional preconditions that will hold the contractor liable for not meeting the contractual obligations in an event of circumstances beyond his control. By subjecting the contractual liability to the guarantee liability regime, contractual penalties may be more comfortably enforceable.

It is important to note that the Polish Supreme Court's standpoint is significant for future practice and to advisors in the construction industry in particular. The conclusion of the Court in the recent construction dispute will presumably be a strong argument in similar disputes going forward. It will also serve as a valuable guideline in share deal transactions and risks' assessment relating to all kinds of construction works contracts under the Polish law.

Romania

New special tax on constructions entered into force as of the 1st of January 2014

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The Romanian Fiscal Code has recently been amended by Governmental Emergency Ordinance no. 102/2013 to add, among other measures, a new tax on several categories of constructions which were not previously taxed separately.

Who is affected by the new tax?

Such tax will be owed as of 1 January 2014 by the following categories of taxpayers:

— (Romanian companies (except for public institutions, research institutes, non-profit associations and foundations);

— Foreign companies that are active in Romania though a permanent establishment; and

— Legal companies with a registered office in Romania set up as a EU company.

Note, in case of financial leasing operations, the taxpayer will be the lessee/user, whereas in case of operational leasing the tax will be owed by the lessor.

How is the new tax calculated?

The new tax will constitute 1.5% of the value of the constructions owned by taxpayers as of 31 December of the preceding year, of which the following will be deducted:

— value of buildings, including value of reconstruction, modernization, consolidation, modification or extension of buildings leased, conceded or under administration or use, for which it is already owed the regular tax on buildings by the owner or tax payer, as the case may be;

— value of constructions and works of reconstruction, modernization, consolidation, modification or extension of constructions that are at the time owned by or are envisaged to be transferred into State or administrative units' ownership; and

— value of constructions defined by law as "Terraces on arable land, orchards or vineyards".

If, during the current year, there is any increase or reduction of value of the mentioned constructions in tax payer's bookkeeping records the 1.5% tax on special constructions will not be re-calculated. Such modifications will be considered for determining the tax pertaining to the next year.

The expense with such tax is deductible, when setting out the net taxable income.

What types of constructions are considered for the purposes of the new tax?

There is a very wide range of special constructions for which the mentioned 1.5% tax is owed, such as: hydro plants, transformer stations, connection stations, thermo-electrical and nuclear plants, platforms, wells, loading-unloading platforms, basins, road infrastructure - streets, highways with all necessary accessories (pedestrian ways, traffic signs etc.), telecom aerial cabling (pylons, cabling etc.), platforms, towers and

metallic pillars for radio, mobile telecom, TV antennas, artificial lakes, constructions for electricity transportation, irrigations channels etc.

When is the new 1.5% tax due?

Taxpayers are obliged to calculate and declare the tax on special constructions by 25 May of the year when tax is due. Payment must be made in two equal tranches, by 25 May and 25 September.

If taxpayers cease their activity during a fiscal year, they need to declare and pay the special 1.5% tax for as long as they were in operation.

Newly set-up taxpayers owe the tax on constructions starting with the fiscal year following their incorporation.

The model and content of the declaration regarding the mentioned special tax will be issued by order of the president of the National Agency of Fiscal Administration by 30 January 2014.

If the Government Emergency Ordinance introducing the 1.5% special tax on constructions is not amended by the Parliament, it is expected to have significant consequences on various businesses, such as those in the energy sector and telecommunications.

Russia

Protecting your investments in future real estate objects

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Investing in future real estate objects after the decree of the Plenum of the Supreme Commercial Court of the Russian Federation on future real estate was adopted.

It has been almost three years since Decree No. 54 of the Plenum of the Supreme Commercial Court of the Russian Federation (the "SCC") "On certain issues of resolving disputes arising from agreements relating to properties to be built or purchased in the future" (the "Decree") was adopted. What has the year brought to investors? What trends are noteworthy and what should one do to protect his interests? We will try to share with you certain observations and conclusions.

Means of protection which do not protect

Following the adoption of the Decree, a persistent court practice was formed by which investors have been denied ownership rights if a property is under construction or it actually has been completed and put in operation, but the developer has not registered ownership (for example, Ruling No. VAS-5553/12 of the SCC, dated 16 May 2012; Ruling No. VAS-2834/12 of the SCC, dated 28 March 2012).

This approach is because the majority of investment agreements have been recognised as purchase and sale agreements in relation to future real estate. The logic is simple: legally, real estate does not exist until it is registered, so it is not possible to perform a purchase and sale agreement. What could be done? The agreement could be terminated and/or losses could be reimbursed. An investor (buyer) could compel the seller (developer) to transfer the property only once the developer has commissioned the property and registered its ownership to it.

The right to receive at least an incomplete property has practically been replaced with the right to be reimbursed for losses. The latter option is far from always being to the liking of investors. It is not only that the amount of losses must be proven, but a favourable court decision is not always enforceable. Indeed, by the time of enforcing the decision, the developer may already have neither money nor assets.

What could be done in this situation? The obvious option would be to change the conditions of the investment agreement so it would be impossible to recognise it as a purchase and sale agreement. What could replace a purchase and sale agreement?

"Not simple" partnership

The Decree itself mentions a simple partnership agreement (a joint venture agreement). This type of agreement is attractive in that the share in the property under construction arises as early as during construction. If any problems arise, a partner may count on retaining its share even if construction has not been completed.

However, there are some drawbacks. In order to register ownership of an investment, a partner must have rights to the land, for example, be a party to the land lease agreement. This is stated directly in the Decree. Does an investor need this? An investor's goal is to profit from its investment. Participating in land relationships at the construction stage as a rule does not meet this criterion.

Moreover, in becoming a partner, an investor becomes one of the participants in the joint venture, risks losses, and is responsible for the actions of the partnership along with the other participants. Taking into consideration the above, we recommend being very cautious when entering into a simple partnership agreement, thoroughly weighing all pros and cons.

Bittersweet share

It would seem that the solution could be found by applying Federal Law No. 214-FZ "On Participating in a Shared Construction of a Multi-Apartment Buildings and other Properties…", dated 30 December 2004 (the "Law").

The Law mainly applies to regular citizens who invest their savings in the construction of residential property for their own use. However, the Law could also apply to relationships between legal entities when constructing commercial real estate. Although such a practice is not widespread among developers.

This is understandable. The Law regulates matters of liability in detail, with the aim of protecting the investors, and requiring developers to disclose information publicly, including their financial position. Few developers will agree to work under such conditions, as they are not expressly required by the Law to do so when building commercial real estate.

However, this Law also does not eliminate all problems. Indeed, commercial courts considering claims for recognition of ownership rights, do not differentiate between this and purchase and sale agreements. A good example would be case A40-150035/10-60-941 that was recently upheld by the SCC. According to the court, a reference to the Law On Participating in a Shared Construction does not grant an investor the ownership right (including a shared ownership) to the property under construction in which he invests.

Hence, based on current commercial court practice, before construction has been completed and all the necessary documents have been submitted to the registration authorities, an investor may file similar claims with a commercial court as in the case of a purchase and sale agreement.

The courts of general jurisdiction also often refuse to recognise ownership rights to specific premises, but are more inclined to recognise a specific share in the joint shared ownership of the property under construction (for example, the Moscow City Court Ruling dated 24 April 2012 re case No. 33-9321). These courts review cases involving private citizens, so their jurisdiction does not extend to the economic disputes of legal entities.

Nevertheless, there are enough advantages of entering into agreements for shared construction for investors to use this type of agreement in practice. For example, the state registration of an agreement protects an investor from the double selling of the same property, and the pledge arising by operation of law, even if it isn't a cure-all, in any case substantially strengthens the position of an investor.

Alternatives for large investors

An important question is how can one protect his investment in this situation? One can use various means to secure obligations, such as pledge, penalties, and/or bank guarantees. Legislation does not prohibit a party to set up its own type of security. Insurance may also be used. However, insurance against entrepreneurial risks in Russia is more often the exception than the rule. Far from all companies offer this type of insurance.

Large investors that fully or substantially finance construction, have more influence on a developer. Taking into consideration their strong negotiating position, they could use corporate mechanisms to take control over the developer if the latter fails to comply with the terms of the investment agreement. Moreover, these mechanisms do not necessarily have to be governed by Russian law. Indeed, control over a Russian legal entity could also be obtained by acquiring the shares in the foreign parent company. In these instances, it is important to bring the proposed mechanisms in line with the ways of financing the Russian developer in order to take advantage of both foreign law and Russian legislation if a dispute does arise.

About the taxes

Interesting questions arise at the intersection of civil and tax law. A year after the Decree was adopted, it is possible to state that the relationships of the parties in civil law and tax disputes are qualified in an essentially different way.

A prime example of this is the decree of the Presidium of the SCC of 26 June 2012 re case A38-1216/2011. In discussing this case, attention was paid particularly to the necessity of applying tax legislation similar to an agency agreement. In our view the agency nature of

such relationship is well demonstrated by collective VAT invoices which technically could be considered agent's VAT invoices for funds of the principal used to purchase goods and services in the interest of the latter.

The court in this case confirmed that the existing tax treatment remains unchanged, and when re-issuing the VAT invoices issued by the contractors, the developer does not expose itself to liability to pay VAT on these invoices to the budget, given that it has not sold real estate property.

When resolving this case, the court's reference to sub-paragraph 4 of paragraph 3 of Article 39 of the Tax Code (the "Tax Code") has significant meaning. In so doing, the court expressly stated that the transfer of property under an investment agreement cannot be considered as a sale for tax purposes. Some experts are of the same opinion. However, the Ministry of Finance has not made reference to this Article in its official clarifications. Now even if the relationship of the parties to the agreement is considered to be one of purchase and sale for civil law purposes, this operation is not considered a sale for tax purposes. This at least is what clearly follows from analysing Article 39.3.4. of the Tax Code. We hope that future court practice will confirm this conclusion.

As a result, in tax disputes the court still suggests treating the transfer of real estate property under an investment agreement, only on the basis of tax law, using the concepts of "sale" and "investment activity". In civil law disputes, the courts chose to recognise an investment agreement as a purchase and sale agreement, applying all of the respective consequences of which we have spoken above.We will keep you updated as to the latest trends in the practice of resolving disputes in respect of investment agreements, because "who is forewarned is forearmed".

Slovakia

New restrictions to acquiring an agricultural land

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In November 2013, the Ministry of Agriculture and Rural Development of the Slovak Republic ("**Ministry**") submitted a bill imposing new obligations and restrictions on the acquiring of an agriculturally zoned land ("**Bill**").

Protecting the agricultural land

The Ministry rationalised the submission of the Bill with particular regards to the public interest, namely the necessity to protect and preserve the use of agricultural land - the cornerstone of Slovakia's environmental, economic, and social potential. As presented by the Ministry, the Bill aims to protect the land against deterioration and unreasonable minimisation of its area, lessening of the quality and the volume of the land. It also looks to protect agriculturally zoned land against speculative land acquisitions used for purposes (such as development) other than those set out by the Agricultural Land Fund.

Stronger position of agricultural sector players

The Bill strictly defines the group of persons (natural and legal) authorised to acquire title to agricultural land, and further sets outs rules for sellers on offering their agriculturally zoned land for sale. According to the Bill, sellers are entitled to offer their land for sale to selected bidders only, excluding the wider public from the possibility to own this kind of land. When acquiring agricultural land, the Bill generally favours those that are doing business in agricultural production and who, according to the Ministry, are likely to actively farm the land.

It is important to note that a potential landowner is required to use the land for agricultural production. In addition, they must carry out **agricultural production for at least three years from acquiring the land and the production site must be situated within a certain area (seat)**.

Stricter rules for acquiring agricultural land

The Bill divides the group of persons who are entitled to acquire agricultural land into tiers depending on their privilege (entitlement) to acquire title to agricultural land; requiring the relevant person/bidder to carry out agricultural production in one of the following:

— **The municipality** where the land is located;

— **The neighbouring municipality**, but only if the person referred to in point 1 above does not express his/her interest in the agricultural land or if he/she fails to offer the expected purchase price;

— **Irrespective of the place of the business** but only if the person referred to in point 2 above does not express his/her interest in the agricultural land or if he/she fails to offer the expected purchase price.

In the event that none of the bidders expresses his/her interest in buying the land or if the bidders fail to offer the expected purchase price for the agricultural land, the owner may then transfer title to their agricultural land to another person. The new owner does not have to comply with the requirement of doing business in agriculture nor will they be obliged to meet the place of business criteria.

Furthermore, there are specific rules for **foreigners that are interested in buying agricultural land in Slovakia**. If the foreigner's country of origin is a country which rules out Slovak citizens from acquiring agricultural land in the country, such foreigners are excluded from acquiring agriculturally zoned land in Slovakia.

Controversy surrounding the proposed changes

Regardless of the envisaged purpose of implementing the new legislation, in our view, the Bill represents a significant intervention of the ownership rights of the existing agricultural landowners and may be viewed as bordering on being unconstitutional. The Bill seems to contradict the Slovak constitution ("**Constitution**") which guarantees each citizen the right to own property, with the ownership rights of all landowners having equal content and enjoying equal protection.

In terms of the ownership right, the Bill mainly affects the so called *jus disponendi* or the right of disposing of a thing owned. The new rules significantly interfere with the concept of freely disposing of agricultural land. The Ministry thus proposes more regulation in the agricultural sector. Its aim is to further define agriculturally zoned land which can be owned by natural persons as well, despite the regulation under the Constitution which guarantees that in case of public interest, various assets can be owned exclusively by the state, the municipality or by selected legal persons. As the Constitution envisages ownership by a certain group of persons regulating the ownership by natural persons, the Bill does not conform to the Constitution.

Compensation

Under the current legislation and, in compliance with the Constitution, the expropriation or forced restriction of title is only allowed within the scope necessary and needs to be in the public interest. It shall only be carried out within the boundaries of the law and with appropriate compensation.

At this stage, the Bill does not grant appropriate compensation to the owners of agricultural land in return for such forced restriction of their title. The new proposed regulation therefore leaves some important questions relating to the compensation of landowners unanswered.

The Bill also introduces new terminology, which has not been defined in the Bill or in any other legislation. If the Bill is passed, its proper enforceability will probably be extremely problematic.

It is not clear at this stage whether the Bill will be passed by parliament. The period for submitting any comments on the Bill is now over, yet the outcome has not been made available to the public. Notwithstanding, it is expected that the proposed Bill will see some changes in the legislative process with the possibility of being fully withdrawn from.

Ukraine

Property title registration improvements

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Ukraine inherited a complex system for registering title to property from the USSR, which was unfortunately not in line with the expectations of foreign investors, and was unable to provide those interested parties the required quick access to accurate real estate information.

In 2013, long awaited changes to the rules and procedures for state registration of property rights and their limitations were implemented. These amendments came into effect on 1 January 2013; thus over the past year we have experienced some practical implications of this new system. We have set out below the most significant changes imposed by this new system. Before 2013, title registration of rights to land and buildings operated on a dual system:

— lease and ownership title and any limitations relating to use of land plots were registered in the land register by the local land resources bodies; and

— title to buildings/structures located on land plots and any encumbrances relating to such buildings/ structures were registered in the property register by municipal enterprises (called Bureau of Technical Inventory).

In addition to the above, there were a number of registers where encumbrances and limitations were also registered. Starting from 1 January 2013, a single registry replaced the numerous property rights registers that were previously in use, such as the State Registry of Rights to Real Estate and their Encumbrances, the State Register of Mortgages and the State Register of Bans on Alienation of Real Estate.

In line with the new registration system, all corporeal rights (ownership, use, servitude, mortgage etc.) to buildings and land acquired after 1 January 2013, are now to be registered in a new single register – the **State Register of Corporeal Rights to Immovable Property** (the "**Register**"). If such registration does not occur then these rights are considered to be invalid. The law does still acknowledge the validity of corporeal rights to immovable property acquired prior to 1 January 2013, provided that these rights were registered in accordance with the applicable requirements in place at the time. In such cases, the owner/user of the immovable property in question is not obliged to additionally register such rights into the new Register.

The Register itself is managed by the State Registration Service of Ukraine and the local departments of the Ministry of Justice of Ukraine. Actual registration of any rights (i.e. by way of entering data into the Register) is performed by state officials called "state registrars". Actual registration using the new system is completed much more efficiently than the previous system, on the following time frames:

— within one (1) working day for registration of mortgages, and

— within fourteen (14) working days for registration of all other corporeal rights (ownership, use, servitude etc.).

Once any rights have been registered, the state registrar will then issue an extract which will serve as the official document confirming state registration of the rights into the Register.

The time frames specified in items (a) and (b) above are actually established by law, however in practice it usually takes a longer period of time to properly register any rights (in some cases, this can be up to one month. Given that the Register has only been in operation for a year, it is likely that it may still face certain technical problems, however, these inconsistencies are expected to be resolved by the end of 2014.

Along with the abovementioned state registrars, notaries also have access to the Register. Thus, notaries are authorised to register property rights when certifying agreements under which the right to a building/land is being transferred or mortgaged (i.e. sale and purchase of buildings/land, mortgage agreements etc.), which is very convenient and effective from a timing perspective.

Although the new registration system has many advantages, it still does not resolve the vital issue of there being very limited access to title information. It is a well established practice in most European countries that the register of title to land and buildings is open to third parties. In Ukraine access to information in the Register is granted only to:

— the actual property owners, their authorised representatives, heirs or legal successors, as well as persons who have a right to lease/use the building, premises or land; and

— state bodies.

Third parties may access the Register only for the purposes of checking for any encumbrances and limitations (such as mortgages, pledges, etc.) established over a property.

Alongside the Register, there is one more official database which was also established in 2013. This database is called as the **State Land Cadastre** (the "**Cadastre**") and is managed by the State Land Agency. It contains detailed information with respect to characteristics of land plots. In particular, the Cadastre contains information on the land plots' owners and users, the cadastral number, location, area, designated purpose of land, borders, limitations of use, data on the quantity and quality of the land and the land's monetary value. Similarly to the Register, the majority of the information in the Cadastre is not publicly available. Third parties may access very limited information regarding land plots, such as their area, designated purpose and cadastral number, whilst all other information may be accessed only by the owners/users of the land plots, as well as state bodies.

Over the past year we have experienced a number of difficulties in terms of how the Register and Cadastre have been managed and operated. The integration of the numerous registers previously in existence into one single register has faced a number of obstacles, not helped by the fact that interaction and cooperation between the sate authorities that were previously in charge of registration and the newly appointed ones has been very poor. Nonetheless, the new system represents a positive step towards the establishment of a transparent system of title registration, the reduction of corruption and of state officials' inaction. It is hoped that the remaining flaws will be rectified by the end of 2014.

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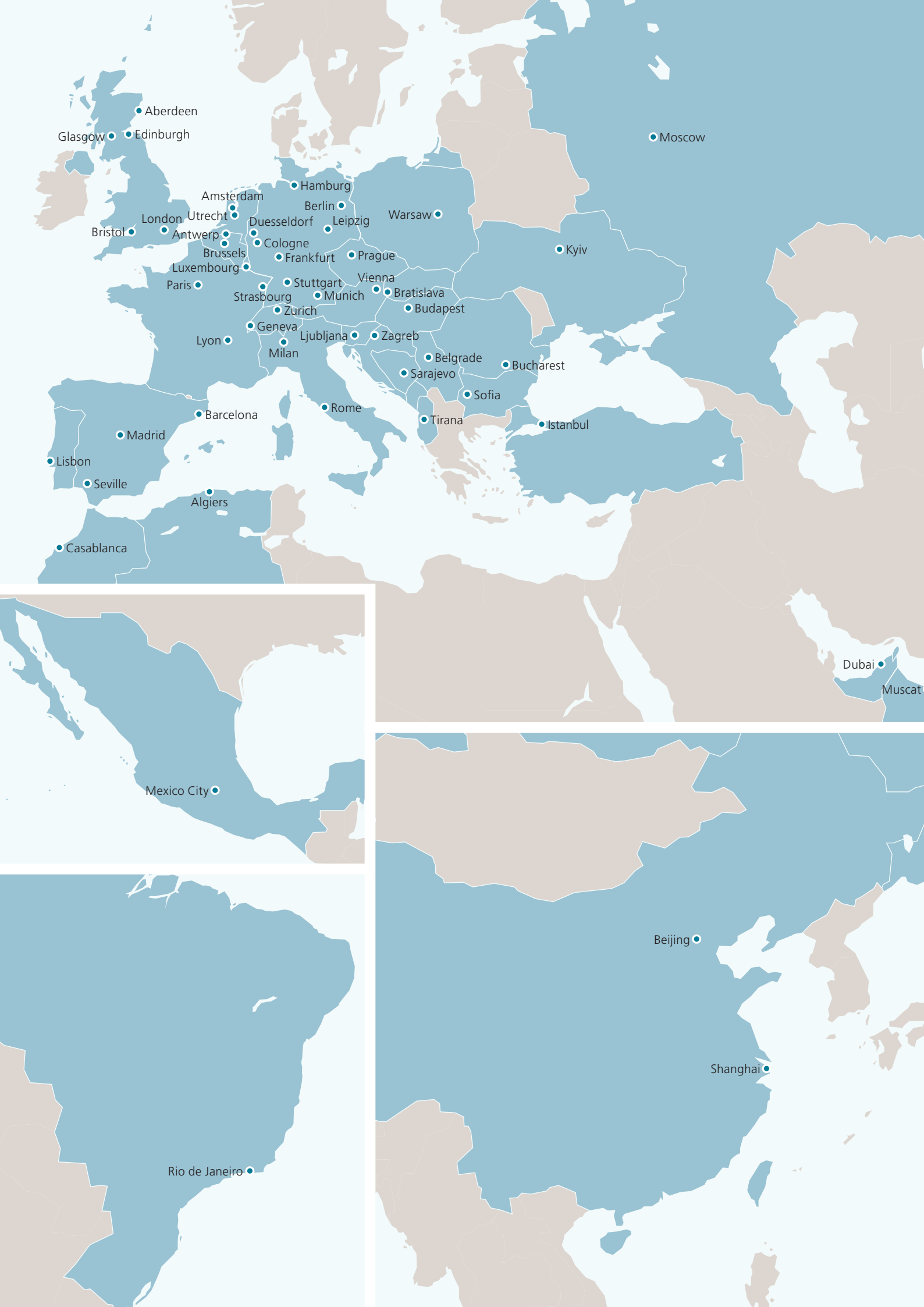
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