Dny práva – 2009 – Days of Law: the Conference Proceedings, 1. edition.
Brno : Masaryk University, 2009, ISBN 978-80-210-4990-1

OWNERSHIP ISSUES OF ARABLE AREAS OWNED BY FOREIGNERS OR ENSURED BY FIRMS OR ANY OTHER CONTRACTS

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Abstract
With this study, I want to draw the attention to an on and on appearing problem. In Hungary, the proprietary right of the areas existing in agricultural cultivation branch is protected by statutes since 1994: according to this only Hungarian citizen can be owner of agricultural areas; foreign citizen not (except if inheriting an area of this kind). Everyone looks for resp. hunted for the wicket-doors which, however, are associated with a number of risks.

Key words
Areas agricultural; contracts, real estate; “pocket contract”.

The Act LV:1994 issued on the arable land was accepted by the Hungarian Parliament on its 6th April 1994 session day and it came into force on 27th June 1994. The intention of the deputies with this regulation was among others to impede buying up of the arable land areas in the agriculture on basis of the transforming ownership and utilization conditions especially by foreign citizens resp. by foreign economic corporations and other organizations.

This was not changed not even by the admission of Hungary into the European Union. Hungary was granted deferring till 2011 resp. 2014 and thus the foreign citizens are not equally judged with the Hungarian citizens when acquiring arable areas.

However, shortly after the above said Act came into effect the Legislation recognized that together with the regulation a legal gap was also created because the Act failed to restrict resp. exclude the right of firms registered in Hungary relating to procurement of arable land. Before the Legislation this legal gap was recognized by the real estate agencies and dealers, too. With this purchasing of arable land became possible for all foreign citizens, provided that they established a firm in Hungary. Thus, within a short time buying and selling of vineyards took its beginning in majority beside the western boundary of Hungary and on the northern shore of Lake Balaton resp. on our hilly and elevated regions and numerous real estates became property of foreigner-owned firms. However, at the time of the purchasing nobody was dealing with the future of these firms.

When within a few months the Act was modified, already there was no legal possibility for procurement of the proprietary right of arable land by foreign

citizens, except for the inheritage. The Hungarian sellers recognized the solution in "selling" the arable areas with signing of different contacts, by concluding "pocket contracts" among the parties. The "pocket contract" is not a legal term, it is the product of the media. On pocket contract all agreements serving for assurance of ownership procurement not permitted by legal rules, e.g. by means of rental contract, maintenance contract, lease contract, testament, contract of inheritance, preliminary contract, etc. These solutions, however, do not ensure proprietary right for the buyers and, are accompanied by numerous risks both on the seller's side and especially on the buyer's side. Since the buyers would like to acquire the agricultural areas by all means, they did not asked too much and signed anything in order to take the areas into possession. Changes (e.g. death) occurring on either the seller's or on the buyer's side however may create uncleared situations, forcing the buyer to bear newer unexpected expenses and the heirs may face big surprises.

Since the Legislation in 1994 made acquirement of agricultural areas for firms impossible not only for firms owned by foreigners but for Hungarian owned firms as well, the firms obtaining agricultural property till that time faced in certain cases also difficulties. The founders when establishing the firms did not reckon with the tasks and risks associated with the firm: such as organization and cost of book-keeping, submittal of monthly or annual statements to be performed toward the tax authority (electronically since 2006), modification of the partnership contract of the firm pursuant to the often changing law, publication of reports, regular session of the topmost body of the company, and things to be done in connection with the minutes recorded on the sessions, etc. In so far as the firm fails to fulfill its compulsory declaring liabilities to deadline, then the tax authority may levy high fines to the non-performing firms and at the very worst it may suspend the taxation number and may have the firm deleted from the trade register. Deletion of the firm from the register however means death for the firm, since the firm ceases and thus provisions about its property have also to be made. And the problems begin here, since the members of the company may not receive the property of the firm since agricultural areas may not be acquired by foreigners.

Likewise the founders of the firms, the buyers of the pocket contracts also failed to reckon with the risks of the illegal contracts. In my study I introduce the risks of the above mentioned solutions, with special regard to the unsolved problems associated with the final settlement of the lawfully founded firms.

The arable land was always a determinant value of the countries. So was it in Hungary too after the political regime transformation. Everyone would like to acquire arable lands, areas owned formerly by the state. For this reason, subsequent to the regime change the arable areas belonged to the values to be specially protected: the Parliament accepted the Act LV:1994 issued on the arable land. According to this Act no foreign citizen could acquire proprietary right on agricultural areas.

The legal gap was recognized by real estate agents and lawyers and ensured possibility in spite of the Act legally for foreign citizens becoming owners of agricultural areas. If a foreign citizen established a firm in Hungary, it could buy real estates of this kind. The firms registered in Hungary could acquire any real estate ranging from the large-scale dimensions to the small hobby-like vineyards and fruit gardens.

The foreigners in order to enable buying of the wanted real estate established a firm at a lawyer and, after registration of the company the firm purchased the real estate and everyone was satisfied. For the foreigner the real estate agent had at the same time got a book-keeper and at once everything was all right until, e.g. due to an omitted tax return the Registry Court ordered deletion of the firm from the registration.

In so far as upon a summon of the Registry Court the members of the firm appeared at the Registry Court and restored the legal functioning, then everything went further on its way. If however the legal functioning already was not restorable because, let us suppose one member of the deposit partnership died and no new member was registered within 3 months pursuant to the former regulation or within 6 months pursuant to the new regulation, then a final settlement was ordered by the Registry Court. Final settlement and not winding up since these firms were never indebted to anyone and they were not insolvent since they did not perform any activity. In the course of the final settlement the liquidator has the task of property dividing. The agricultural area forms also a part of the property of the firm. According to the rules of the final settlement the property has to be divided among the members. However, in this case the members are foreign citizens whose property acquirement for arable land is excluded!

What is to be done in this case? In the course of the final settlement procedure the firm ceases without legal successor. Let us name the property acquirement of the members inheritance? Since the property of the firm ought to be transferred (inherited) from the ceasing firm. By inheritance namely even the proprietary right of a real estate qualified as arable land can be acquired (Act LV:1997, §4 (1). In theory the “transferring” of the property perhaps can be somehow traced back to inheritance, however the actual legal regulation acknowledges the inheritance concept only in case of natural persons. Thus the rules of the inheritance may not be applied. As a consequence of this the foreign citizens could not and may not acquire the proprietary right of their “own” real estate.

What was the destiny of real estates of this kind? The liquidator could sell the real estate but the value assessment prolonged the procedure for years and, in addition in favor of the members often usufructuary right for lifetime was recorded into the real estate registration, that is the real estates are non-sellable. Many of the concerned people wait for 2011 or 2014 when the foreign citizens could also have proprietary right on real estates qualified as arable land (the conditions are unknown yet). But whether those concerned will live this date? In the future the destiny of the “found” real estates of the

firms deleted from the trade register can be settled within the frame of a property settling procedure: by selling or transfer into ownership. The former is against the will of the members whilst the latter impacts with legal rules.

However, after the act issued on the arable lands the government recognized that with the regulation a legal gap was also created and thus the Parliament after a few months modified the legal rule by almost prompt effect: excluded the property acquiring right of firms registered in Hungary relating to arable lands and thus they could not acquire even limited proprietary right on arable lands. By this of course the hands of the Hungarian landowners were also partially bound, making the property procurement complicate for them.

For the foreign persons "missing" the possibility offered by the legal gap were offered with other "solutions" by the real estate agents. The real estate agents, the sellers, interpreters and the contract makers as well as were striving for their own benefit and not for the buyer's rights (since formerly the sale and purchase contracts were not bound to countersigning by an attorney): and the pocket contracts appeared in different forms.

The "pocket contract" is nothing else than a political, economical resp. media term, not a legal category. No term of this kind is included in any legal rule. The designation is however very appropriate: the parties conclude a contract with each other which is permitted this time by legal rule, however the true intention of the parties is quite different. In so far as the true intention was laid down in writing, then it was put into the pockets without date, not made public and this served / serves the will of the parties. The sale and purchase contract will be provided with date when the property acquiring is not excluded resp. restricted any longer. Different constructions have been developed which can be typified, however each construction has a danger of its own, if it serves for hiding of another contract.

The pocket contracts (aiming acquirement of arable land ownership by persons whose acquiring capacity is null and void due to violation of the legal rules excluding their acquiring capacity) are invalid from the date of their signing and they may not exert the legal effect (transferring of the proprietary right) attached by the law to the valid contracts. Thus null and void are, for example, the sale and purchase contracts, the option and buying-back, the change-, the donation-, maintenance-, or life-annuity contracts, the marital property contract, agreement establishing or ceasing a joint property, the testamentary disposition (last will, inheritance contract, donation for case of death), non-pecuniary contribution (contribution in kind), the foundation order, dividing of the partnership liquidation proportion, having arable land acquiring effect impacting into restrictions. In case of a business concluded with invalid contract the original state has to be restored – provided that it is still possible.

The risk of the pocket contracts made without date originates simply from the fact that the buyer pays the purchase price to the seller; however the ownership of the real estate is not changed on the property sheet at the Registry of Titled Deeds. Between providing the contract with date and the signing of the same often a long time may lapse; thus for example those who purchased at the mid of the 90's wait already for 15 years for registration of their name as owner in respect of the arable area. Since the legal transaction is not seen on the property sheet (as the contract is not submitted to the Registry of Title Deeds), thus the seller may either several times sell the real estate, as it may dispose with it (either by mortgaging it). Another risk of this solution is the death of the parties. Since the contract legally was not established, thus it is not sure that the heirs of the seller will remember for the fact that the arable land was "sold" by the devisor and thus not they are entitled to own it some day or other. On the other hand, in case of the buyer's death the real estate may not be inherited if the sellers do not "play further" the show and the invested property become lost. From accounting of the investments performed by the buyer newer legal disputes emerge. Disclosure of the truth takes a long time in a judicial proceeding.

What can be the solution? I want to draw the attention that in the solution discrimination has to be made between the real estate acquirement of the above mentioned firms and owners of the real estates purchased with pocket contracts. Legal rule facilitated – even if only for a short time – that firms of foreign ownership could acquire arable land! For this reason, the rules relating to the transition period ought to be regulated by an Act.

Literature:

- 109/1999. (XII. 29.)FVM rendelet az ingatlan-nyilvántartásról szóló 1997. évi CXLI. törvény végrehajtásáról
- 1959. évi IV. törvény a polgári törvénykönyvről
- 1972. évi 31. törvényerejű rendelet az ingatlan-nyilvántartásról
- 1990. évi XCIII. törvény az illetékekről
- 1994. évi LV törvény a termőföldről
- 1997. évi CXLI törvény az ingatlan-nyilvántartásról
- 1997. évi CXLIV. törvény a gazdasági társaságokról
- 1997. évi CXLV. törvény a cégnyilvántartásról, a cégnyilvánosságról és a bírósági cégeljárásról
- 2006. évi IV. törvény a gazdasági társaságokról

- 2006. évi V. törvény a cégnyilvántartásról, a bírósági cégeljárásról és a végelszámolásról
- 2007, évi CXXIX. törvény a termőföld védelméről
- 2009. évi XXVIII. törvény az egyes agrártárgyú törvények módosításáról

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