The restitution of real property abusively taken over by the state before 1989

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THE RESTITUTION OF REAL PROPERTY abusively taken over by the Romanian state before 1989 is an issue that even now, almost 20 years after the fall of Communism, still ignites social, political and legal debate. The dispute continues because, despite no less than four landmark laws (see box, on p112) on the matter, each massively amended over the years, no legislative solution has yet been able to justly, rapidly and definitively settle the conflict between former owners and the current holders of such property. Please note that we use the phrase 'former owners' to refer to the owners of real property at the time of the takeover, since it is customarily used to mark the difference from 'current owners', even though the lawfulness of the latter's ownership is, more often than not, debatable.

The Romanian state's inability to grant appropriate relief for damages suffered by former owners of nationalised real property has been highly criticised by the European Court of Human Rights (ECHR), which has imposed sanctions and has repeatedly reprehended Romania for violations of human rights.

No wonder then that nearly 20 years after the revolution (and close to the electoral campaign for legislative elections), yet another amendment to the real property restoration laws is under debate.

This article will briefly describe the legislative solutions and tendencies manifested in the Romanian case law of the past 20 years in connection with the restitution of *intra muros* real property, and will also summarise the legal provisions on this matter that were recently submitted for approval. This article could be of interest to foreign and national investors that either have or seek to obtain ownership of such property.

In the early 1990s former owners of nationalised real property or their successors used to file 'classic' legal actions for property recovery, based on the ordinary regulations in force since the 19th century, asking the courts to acknowledge that their ownership titles prevailed over the state's titles. The practice of the courts at the time, although not consistent, featured numerous decisions admitting such actions, based on the rationale that the takeover acts issued by the state in defiance of constitutional provisions in force at the time could not invalidate the titles of former owners. The judges mainly considered the age and validity of the former owner's title and the abusive nature of the takeover by the state.

This practice of the courts survived until 1995, when the Supreme Court of Justice (now the High Court of Cassation and Justice), in plenary session, passed a decision (Decision No 1/1995), binding for all other courts, declaring it inadmissible for former owners to regain property with an ordinary, classic, property-recovery action. The rationale for this decision was the general lack of competency of the courts to criticise enactments and hold them inapplicable, including those enactments by which the state took over real property before 1989.

Between 1995 and 1998 Decision No 1/1995 caused the Attorney General to file, and the former Supreme Court of Justice to admit, many extraordinary appeals moving for the cancellation of final decisions the courts had passed in favour of former owners. This new practice of the Supreme Court of Justice (followed by the other courts) led to the first condemnations of Romania by the ECHR, which deemed that the fundamental principles of the European Convention on Human Rights (the Convention) had been violated, specifically the right to fair trial and the establishment of legal relations, access to justice, and the protection of property.

Meanwhile, the first restitution law for real property abusively taken over by the state – Law No 112/1995 – had been adopted, instituting an administrative procedure for restitution based on an application that former owners could submit to local town halls within six months of the law coming into force.

However, this law was deemed inequitable to former owners and favourable to current holders (some even claimed that Law No 112/1995 led to nothing less than a second nationalisation of residential buildings), because:

- only real property – buildings – used for residential purposes was to be restituted;
- restitution was limited to those residential buildings where the former owners were inhabiting as tenants;
- besides the right to restoration granted to former owners living as tenants on their former property, all other tenants also received a right to purchase the buildings they inhabited from the state at a preferential price; and
- only derisory indemnification was offered to former owners who were not living as tenants in the buildings they formerly owned.

Since the overwhelming majority of former owners did not meet the conditions set by Law No 112/1995 for property restitution, lawyers continued to bring arguments to the courts in support of the admissibility of classic property recovery actions, in a continuing attempt to avoid the applicability of Law No 112/1995. Among other approaches, it has been stated that since this law only covered real property taken over based on a title, and since an abusive takeover cannot be deemed as being based on a title, then real property taken over abusively by the state could still be reclaimed by classic property recovery

actions, and the courts must find such actions admissible.

This new argument gained increasing acceptance in the courts, since by that time Romania had already been condemned in several ECHR cases for denying property recovery actions and for cancelling irrevocable court decisions after extraordinary appeals filed by the Attorney General.

Abandoning the practice of rejecting property recovery actions for not falling within the general competency of the courts was eventually confirmed by the former Supreme Court of Justice in Decision No 1 of 28 September 1998 in the plenary sessions of the Supreme Court of Justice.

However, this new decision still failed to provide a final solution to the disputes on restoration of property.

Thus, in early 2001, Law No 10/2001 came into force, governing not only residential buildings, but also all *intra muros* real property, including undeveloped land, regardless of its purpose at the time it was taken over.

As a general rule, this law provided that real property would be restituted in kind to former owners, irrespective of whether they were already in possession. The most important exceptions from restitution in kind were where the current holders of property had become owners based on deeds concluded in good faith, and where real property was included in the patrimony of privatised commercial companies.

Former owners who could not benefit from restitution in kind were to receive indemnification close to the market value of their properties.

Important exceptions from the rule of the restitution in kind instituted by Law No 10/2001, together with the fact that former owners' indemnity was made only in state bonds (specifically, shares in Fondul Proprietatea, a collective securities investment company set up by the Romanian government to ensure the financial resources required for the granting of indemnifications to former owners of real property. Former owners are granted shares in the fund in proportion with the value of their lost property) and was thus difficult to capitalise, continued to frustrate many former owners, who persisted in regaining their properties through the same classic property recovery action.

For the courts, however, Law No 10/2001 called for changes in practice, as property recovery actions were yet again denied as inadmissible. This time, inadmissibility was no longer justified by the general lack of competency of the courts to judge such actions, but by the existence of a special law creating an administrative procedure for the restitution of real property in kind.

The courts' new practice of denying property recovery claims as inadmissible remained almost unchanged until 2005, when the ECHR passed new decisions condemning Romania for lacking any efficient legal mechanism to effectively and fully indemnify former owners. The ECHR held:

> '... each state must equip itself with an adequate and sufficient legal arsenal to ensure compliance with the positive obligations imposed on it by the Convention' (*Paduraru v Romania* [2005]).

In these circumstances, the courts increasingly began to declare property recovery actions admissible, reasoning that although Law No 10/2001 had imposed the inadmissibility solution, the Convention made this law void since it was unable to ensure just and effective relief to former owners.

Against this background, between 2005 and 2008 the courts remained divided about the admissibility of property recovery actions, but showed an increasing tendency towards admitting them.

At the end of 2007 the Attorney General promoted an extraordinary appeal in the interest of the law, aiming to unify case law on property restitution actions bearing on nationalised real property.

This extraordinary appeal was settled on 9 June 2008 by the High Court of Cassation and Justice, which passed a decision that reads as follows:

> 'The conflict between the special and the general law is solved in the favour of the special law, according to the principle *specialia generalibus derogant*, even though not expressly provided for under the special law.
>
> 'Should any inconsistencies be found between the special law (Law No 10/2001) and the European Convention on Human Rights, the Convention will prevail. Such priority may be recognised in settling a property recovery action grounded on the provisions of the general law, to the extent that, in this way, another ownership right or the security of legal relations are not damaged.'

The first paragraph quoted above acknowledges that the special law prevails over the general law, in this case, that Law No 10/2001 prevails over Article 480 of the Civil Code regulating the classic property-recovery action.

The first part of the second paragraph admits to the priority of the principles instituted by the Convention, should there be inconsistencies with the special law. This point appears to lead to the conclusion that the High Court of Cassation and Justice supported the admissibility of the property recovery actions.

However, the last proposition of the second paragraph quoted seems to be of the highest significance, as one may logically derive from it that, even when inconsistencies between Law No 10/2001

RESTITUTION LAWS

The four key laws referring to the restitution of seized land are divided into two types: those reconstituting private property rights over agricultural and forestry lands (Law No 18/1991 and Law No 1/2001) and the *intra muros* property restoration laws (Law No 112/1995 and Law No 10/2001).

and the Convention occur, the Convention would still not prevail should Law No 10/2001's lack of effect damage the security of legal relations or another ownership right.

By this last proposition, the High Court of Cassation and Justice appears to leave it to the discretion of the courts to decide, on a case-by-case basis, whether the application of the Convention infringes the security of legal relations or other ownership rights.

It is hoped that the rationale of the decision passed by the High Court of Cassation and Justice, which has not yet been published, will provide detail on, and clarify the meaning of, the Court's disposition, especially since the decision aims at ensuring a unitary practice in this regard, mandatory for all judicial courts.

Paduraru v Romania [2005] ECHR 794

The same purpose – ensuring unified solutions to the restitution in kind of real property taken over by the state before 1989 – is at the centre of the recent draft law for the amendment of Law No 10/2001, which essentially proposes:

- exclusion from restitution in kind of real property validly transferred under Law No 112/1995;
- the right of persons whose sale-purchase agreements concluded under Law No 112/1995 have been cancelled through irrevocable judicial decisions to obtain indemnity at the market value of the property; and
- the prevalence of Law No 10/2001 as regards the restitution procedure (which entails the inadmissibility of property recovery actions).

This draft law was not beyond criticism, which came, *inter alia*, from the presidency in the form of an application for re-examination. The criticism mainly focused on the equivocal and imprecise character of the proposed regulation contradicting the Convention requirement that laws should be accessible and predictable. Further criticisms were that the draft:

- does not provide solutions for transitory situations;
- enshrines the lawfulness of nationalisation acts;
- contravenes constitutional provisions;
- provides differentiated indemnification procedures depending on the category of applicants; and
- does not regulate the court decisions passed before its introduction.

The future will tell the efficiency of the recently proposed legal provisions, but at the moment their content does not seem to eliminate the lack of legislative coherence and, in particular, fails to eliminate the divergences in practice that have created a climate of legal uncertainty and vacillation in matters related to the restitution of real property abusively taken over by the state before 1989.

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