



REAL ESTATE  
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# Real Estate

# Overview of the Romanian real estate legal market

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**In line with the massive development of the worldwide real estate industry, which reached its peak in 2008, the Romanian real estate market witnessed a period of significant change and achievement. The residential, office and retail sectors have rapidly developed and in less than a decade Romania's real estate environment has substantially changed. At that time Romania became a very dynamic and attractive market for real estate investors, and foreign investments in this sector continued to grow, especially after it was announced that the country would join the EU in January 2007. The standard income tax rate of 16%, which was introduced in 2005, proved to be another valuable incentive worldwide for foreign investments, and a boost for real estate. Nevertheless, the worldwide financial crisis of the last few years has inevitably impacted on Romania's development and left a mark on the main economic drivers, such as the real estate market. The new restrictive financing conditions, both at the level of real estate developers and end consumers, have limited investors' ability to complete ongoing projects for developing new ones, as well as reducing the end consumers' appetite to buy, especially in the residential sector. As a consequence, we have witnessed a significant shrinkage of investments in general, and for those in real estate in particular. However, since late 2009, the country's economic cycle has stabilised and at present it seems to be slowly but constantly showing signs of future ascent.**



Dan Borbely

Besides the influence of anti-crisis measures in the international business environment, the revival of the Romanian real estate market is attributable to a number of key local factors. As an emerging economy, Romania still has a lot of unexploited opportunities, which make it an attractive market for foreign investors. Despite the financial crisis of recent years, the retail sector continued to significantly expand, stressing the Romanian market's ability to absorb more goods and services. The need for quality office space – generated by the business expansion of many multinational companies active in Romania – also fuelled this sector's growth.

Another factor strongly supporting the revival of the real estate market in Romania is the legal system and tax policy. After a transition period in which property law was changed to reflect the transformation from the communist era seizures of property to private ownership, the legal system is now stable and mature and allows the secure execution and implementation of real estate transactions.

The result of the improvements made to the Romanian legal environment over the last 20 years is the new codification of private law reports: on October 1, 2011, a new Civil Code entered into force.

## The Romanian legal system prior to October 1, 2011

Since 1989, when the communist regime was abolished, substantial changes have been made to the Romanian

legal system, in order to address the new realities of the economic, political and social environment.

Special reparatory laws (Law No. 18/1991, Law No. 1/2000, Law No. 10/2001) came into force to facilitate the reinstatement of the private property system in Romania. Former owners whose properties were abusively seized under the communist regime, between 1945 and 1989, were finally granted a legal framework that allowed the restitution in kind of the properties, or the payment of compensation.

A law regulating immovable's publicity was adopted in 1996. This legislation aimed to strengthen the security of the civil circuit, by facilitating a track record system of legal operations involving immovable assets in Romania. However, until October 1, 2011, the registration of property rights in the land book (land registry) had only opposability effects towards third parties, not constitutive effects.

A special set of laws and ancillary regulations were issued to address the ongoing construction process and territorial development (among them, Law No. 50/1991 regarding the authorisation of construction works and Law No. 350/2001 on territorial arrangement and town planning). The relevant set of rules has been amended from time to time resulting in their current form, which creates a smooth and applicant-friendly permitting process, with a view to encouraging real estate development in Romania.

As for the codification of the civil law reports and

regulations, until October 1, 2011 this was done by the Civil Code initially adopted in 1864, subsequently amended and published in 1993.

## **The new Civil Code – proof of the stability and maturity of the Romanian legal system**

The new Civil Code is a legislative work of unprecedented scale in Romanian private law. This fundamental codification is salutary not only in terms of the impressive scope of the areas it addresses, but also the unifying effect and enhanced normative coherence it lends to the legislation. The essential merit of the new Civil Code is not only that it sets out the main trends in written law and legal practice over the last 150 years, but also that it harmonises Romanian private legislation with European norms and the requirements of the modern era.

The new Civil Code has had a substantial impact on the property regime. Some of the biggest changes are presented below.

### **The right to ownership of immovable assets is acquired through registration in the land book**

One of the most important changes in this area involves the means of acquiring ownership rights over immovable assets – registration of the right in the land book. Unlike the legal regime abolished on October 1, 2011, which granted opposability effects only with registration with the land book, the new Civil Code implements a new rule, designed to strengthen the security of the civil circuit.

A result of the new regulation is that proof of the ownership right is possible only with the land book excerpt, as opposed to the former proof of ownership right, which required extensive due diligence on the chain of transfer of the property right.

This new system will come into force at a later stage, subject to all cadastral works for each administrative territorial unit having been completed. Until such time, the registration of the property right in the land book will continue to have opposability effects and the property right over immovable assets will continue to be acquired by means of convention, inheritance, court decision, accession, etc.

The formality of authentication by a public notary, under the sanction of absolute nullity of the transfer deed, has been maintained by the new Civil Code.

The rule stipulating the acquisition of the ownership right over immovable assets by means of registration in the land book has a number of exceptions, including cases when the right is obtained by inheritance, forced sale, expropriation for public utility causes, natural accession or other cases expressly provided by law.

The same rule is applicable for the establishment of

a mortgage right over immovable assets, which shall only be legally constituted upon the date of registration in the land book. The formality of the authentic mortgage deed, under the sanction of absolute nullity, is maintained by the new Civil Code.

### **The inalienability clause is presumed in the conventions regarding the transfer of the property right to a specific person**

The new Civil Code includes a number of articles intended to regulate the conventional limits to the property right. The inalienability clause has now been expressly stipulated and its governing regime has been codified.

For a period of up to 49 years from the date when the asset is obtained, either by means of convention or by will, an inalienability clause may be stipulated. There is, however, one condition that must be met: the inalienability should serve a lawful and serious interest. Moreover, the court may rule that the inalienability clause no longer applies if the interest justifying its establishment no longer exists or if a superseding interest takes precedence.

An important new element of the inalienability clause is that such a clause is presumed in the conventions governing the transfer of the property right to a specific person. Moreover, in the cases of onerous transfer conventions, this clause is presumed to have had a determinative character for the conclusion of the said convention. Consequently, the nullity of such a clause triggers the nullity of the convention.

The assets over which an inalienability clause is established cannot be subject to an enforcement procedure.

In line with the legal regime governing the immovable publicity system, in order to be opposable for third parties, the inalienability clause should be registered in the land book.

### **The superficies right**

The superficies right is substantially regulated in the new Civil Code. In the context of existing real estate development grounded on the legal reports of superficies, the codification of an applicable set of rules can only be helpful.

The superficies right is defined as the right to have or to erect a construction on land that is the property of another person, above or below ground, to which the holder of the superficies right acquires a use right.

Among other ways, the superficies right may be established by convention or court decision. Unlike the former Civil Code, the new Civil Code expressly stipulates that the superficies right may be acquired by the renunciation of the owner of the land to invoke accession or by the assignment of such right.

The maximum term of the superficies right is 99 years, but it may be renewed. The holder of the superficies right may dispose of or mortgage this right only with the property right over the construction and not separately.

The superficies right ceases with the expiration of the term, loss of the construction and in other cases stipulated by law.

#### **The hardship clause – regulated for the first time**

The new Civil Code recognises and regulates, for the first time in the Romanian legal system, the hardship clause.

Under the new regulations, the court may order both the adjustment of the contract, in order to rightfully distribute between the parties the losses and benefits resulting from the change of circumstances, or the cessation of the contract.

A number of conditions must be met to allow the court to intervene, namely: the change of circumstances must occur after the conclusion of the contract; the change of circumstances, as well as their extent, must not have been foreseeable by the debtor on the date of signing the contract; the debtor did not

assume the risk of the change of circumstances; and the debtor has tried, acting in good faith and in a reasonable term, to negotiate the reasonable and rightful readjustment of the contract.

If these conditions are not met, the parties are bound to comply with their obligations, even if the contract's execution became more onerous.

The regulation of the hardship clause is salutary. Significant Romanian case law has been developed in this area during the last three years, in the context of the economic difficulties that impacted on the real estate market, our law firm being a pioneer in this area by informing and assisting the clients in negotiating ongoing agreements whereby the discrepancies created by the financial crisis were addressed on the mere principles of the hardship clause as now regulated by the new Civil Code.

#### **Good faith in negotiations**

Another salutary regulation of the new Civil Code is the concept of good faith and the effects of acting contrary to good faith during negotiations. The principle governing the exercising of rights and obligations by the parties, according to the new Civil Code, is that of acting in good faith.

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Unlike the former Civil Code, which did not cover this area, the new enactment pointedly stipulates that parties must act in good faith both during the negotiation and conclusion of the contract as well as during its execution.

Even if the parties cannot be held liable for the failure of the negotiations, the new Civil Code specifically provides that a party who initiates, continues or breaks the negotiations in bad faith may be held liable for the losses suffered by the other party. A party is considered to have acted in bad faith if that party has initiated or continued negotiations without the intention of signing the contract.

### The transition to the new Civil Code

The new Civil Code stipulates that civil law is applicable as long as it is in force. It does not have retroactive effect. The deeds concluded prior to the entry into force of the new law cannot have other effects than those stipulated by the law in force upon the date of their conclusion.

In line with the above principle, deeds that are null and void or are affected by a nullity cause on the date

when the new Civil Code came into force shall continue to be governed by the former law. These cannot be considered valid or effective by the effect of the new law.

All contracts signed prior to October 1, 2011 shall be governed by the former regulations, as concerns their conclusion, interpretation, effects, execution and cessation. However, any amendments to such contracts shall be made in compliance with the conditions stipulated by the new Civil Code.

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