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ACQUISITION OF IMMOVABLES BY A JOINT VENTURE IN POLAND

*Marian Kepinski**

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I. INTRODUCTION

This article presents the main legal problems involved in obtaining land and other immovables needed to run a joint venture in Poland. The existence of these legal problems indicates that while the Polish economic reform has been under way for almost nine years, the Polish legal system still requires further adjustments in order to effectively deal with the new economic conditions.

The Polish legal system distinguishes between different types of interests in land.¹ There are property rights which cover inter alia ownership, perpetual usufruct (use), and usufruct easements. There also exist contractual interests in land such as tenancy or leases. The distinction between these types of interests lies in the fact that property rights are effective not only between the parties but also against all other persons (*erga omnes*). Contractual interests are effective only between the actual parties. This article will concentrate on the interests in land, buildings, and apartments, which are all (considered) immovables.² The common feature of all immovables is that special

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1. See Rudzinski, *A Comparative Study of Polish Property Law*, in POLISH CIVIL LAW 57-108 (D. Lasok ed. 1973); see also E. LETOWSKA, J. PIATOWSKI INTRODUCTION TO THE CIVIL CODE OF THE P.P.R. (1981).

2. KODEKS CYWILNY [KOD. CYW.] art. 46 (Pol.). For an English translation, see *Civil Code* (Z. Negbi trans.), in 4 POLISH CIVIL LAW 3 (D. Lasok ed. 1975). See also CIVIL CODE OF THE P.P.R. OF 1964 (1981).

permission is required for a foreigner to acquire the ownership of them. This requirement was extended recently not only to foreign natural persons and legal persons residing abroad, but also to legal persons residing in Poland if they are controlled by foreign legal or natural persons.³ A legal person such as a limited liability or joint stock company is considered to be controlled when a foreign natural or legal person holds at least fifty percent of its capital.

No joint venture could operate in Poland without access to land, buildings, and apartments. The practical experience of companies created under the Law of 1982 (small-industry companies)⁴ has shown that many of the companies operate their businesses without actually owning property rights in the land. Instead, these small-industry companies obtain access to property through contractual arrangements. The reasons for this choice are simple. Usually, permission to run a small-industry company is limited to twenty years. In such a case, investing in full ownership would be a waste of money since considerable hard currency must initially be spent in order to cover the start-up costs of a joint venture. Moreover, there are always fears that the permission to buy land or other immovables may be refused, especially since the Polish government has failed to issue clear policy guidelines on that matter.

However, securing access to land through contractual, rather than "erga omnes" interests has its disadvantages. First, contractual interests are subject to the civil code provisions giving the lessor the right to terminate a contract with notice. Even though the parties may sign a contract for a very long period of time (20-30 years) under the law it may be terminated on notice after ten years of tenancy.⁵ The investment made by a foreign company in a joint venture may not be properly paid off during such a shortened period of time. There is no doubt that "erga omnes" property rights are better adapted to ensure access to land for the relatively long period of time required by a joint venture operation.

3. See The Law of March 24, 1920 on Acquisition of Immovables by Foreigners, 1933 Dziennik Ustaw [Dz. U.], no. 24, item 202, as amended in 1988, 1988 Dz. U., no. 41, item 325, art. 46. Before that amendment, all legal persons incorporated in Poland were considered as Polish legal persons not subject to the Law of 1920.

4. The Law of 6 July 1982 on Principles of Conducting Business Activity in Small Industry by Foreign Natural and Legal Persons on the Territory of the Polish Republic, 1989 Dz. U. no. 27, item 148, text with amendments in 1989 Dz. U. no. 74.

5. Art. 695 Civil Code.

II. PROVISIONS OF NEW LAW OF 1988

The Law of 1988⁶ contains only very short statements concerning land as the basis of joint venture activity. Those provisions are divided into two sections. One refers to land owned by the State, while the other refers to immovables which are not State-owned. The Law is far from being complete on these matters and therefore needs further explanation. The remainder of this article will discuss both State-owned and non State-owned immovables, and how they affect joint ventures.

III. STATE LAND AND OTHER IMMOVABLES AS INPUT INTO A JOINT VENTURE

The Law of 1988 provides that companies can either acquire State land in perpetual usufruct or obtain leases of such land.⁷ The Law does not provide whether and under what conditions the State-owned enterprises may participate in a joint venture through the contribution of immovables. Article 16 paragraph 5 provides only that such contribution shall be made in accordance with the laws governing the administration of State land. The main legal provisions are contained in the Law of April 29, 1985 on the Management of Land and Expropriation of Immovables.⁸ Those provisions concern land which is zoned for construction. The administration of State-owned agricultural land is regulated by other provisions. In most cases, however, the land needed for a joint venture is destined for construction of buildings and other structures and therefore the Law of 1985 must be analyzed.

According to the Law of 1985, State-owned land may be transferred to state units in management, to social organizations in usufruct, and to other legal and natural persons in perpetual usufruct. In some exceptional cases State land may be sold to housing cooperatives and to natural persons as property.

A State enterprise which holds land in management is not considered the owner of that land. The owner is the Treasury.⁹ A recent

6. The Law of 23 December 1988 on Economic Activity with the Participation of Foreign Parties, 1988 Dz. U. no. 41, item 324, as amended 28 December 1989, 1989 Dz. U. no. 74, item 442 [hereinafter Law of 1988].

7. *Id.* at art. 25.

8. The Law of 29 April 1985, as amended 1989 Dz. U. no. 14, item 74 [hereinafter Law of 1985].

9. See Klein, *Zbywanie srodkow trwalych przez przedsiebiorstwo panstwowe*, PANSTWO I PRAWO, Feb. 1984, at 33, 47-51; Domanski, *Wniesienie nieruchomosci panstwowej do spolki z udzialem zagranicznym*, PANSTWO I PRAWO, Jan. 1988, at 59-64.

change in the Civil Code has not altered the legal situation of State units and other social organizations in that respect.¹⁰ The difference can be seen in the legal features accompanying these units. A right to land is not conveyed through contract but through administrative decision. Such an interest in land may be transferred only to another State unit through a written contract approved by the appropriate administrative authority. A State manager of land can return it to the State or the State can take it over in certain cases specified by the Law. With few exceptions, a State unit cannot sell or dispose of the land.

A State enterprise or other unit cannot bring into a joint venture its right of management. In that respect the new law on foreign investment is less favorable to investors than the old law of 1986.¹¹ According to the latter law, Polish partners were allowed to bring State immovables into a joint venture in the form of usufruct.

In order to apply for the permission to start a joint venture in Poland the future partners must indicate the base of their enterprise and the location of its production units.¹² In most cases the creation of a joint venture will be based on contractual rights, not on property rights. The contribution of a Polish partner may consist, therefore, in leasing, renting, or in any other way allowing the joint venture to use the land by contract. This method of accessing land is not prohibited by the law although usually a State-owned enterprise must obtain the permission of its founding body and all appropriate internal branches. Usually such contribution would be against consideration in the company's equity, not for rent. The evaluation of this type of input into the company's equity is not easy and therefore needs to be officially made during the creation of the company.¹³

10. KOD CYW. art. 128, as amended 31 Jan. 1989, 1989 Dz. U. no. 3, item 11.

In the new version, the rule of so called "unity" of state property is abandoned and the code allows the attribution of property to state-owned legal persons. See also Okolski, *Spolki handlowe z udzialem podmiotow zagranicznych*, PRZEGLAD USTAWODAWSTWA GOSPODARCZEGO, no.8-9, at 262, 264-265 (1989). Kolski suggests that the Law of 1988 should be applied only to the Treasury of State-owned land. Okolski admits, however, that the situation is not clear. Unfortunately, his argument must be rejected because State-owned land has specific regulations which, as *lex specialis*, remain in force. This remains the case despite the change of civil code art. 128, which is perceived as *lex generalis*. In other words we still need the divesting act of Treasury of State granting immovables to State owned enterprises in full property.

11. That Law is discussed in more detailed manner by Domanski, *supra* note 9.

12. Law of 1988, art. 10 ¶ 1, p. 6.

13. Evaluation of inputs of this kind can be verified by experts. Art. 16 of the Law of 1988. Domanski suggests that the value should correspond to the market value of rent for lease of land, capitalized over a certain period of time. Domanski, *supra* note 9, at 61-64.

The same is true with respect to social organizations which enjoy the right of usufruct instead of the right of management. In all of these cases, this type of input into the company's equity presents some material value but the land itself remains state property and is not subject to execution in case of the company's bankruptcy. The foreign partner in a joint venture should also study in full the original decision to grant the land to the State or social unit in order to determine for how long and for what purpose the land was given. Buildings and other structures affixed to the land are subject to the same legal status as land.

As far as agricultural land is concerned, State units or social organizations are controlled even more by the State in the ways in which they may use that land. This pertains in particular to use for agricultural production. Changing the use of the land from agricultural to other utilizations is subject to many conditions and financial consequences. Additionally, the legal situation of units using State land for agriculture is almost the same as the situation of units using the land for other purposes. The main difference is that State units and cooperatives are not obliged to pay for land which they use for farming, whereas they must pay for land used for other purposes.¹⁴

If a joint venture wants to start agricultural production of any kind, it can obtain access to land through contract, just as in the case of land used for construction of buildings. If a cooperative or State unit wants to bring State land into a joint venture it should obtain the acceptance of such a program from the local authorities supervising the use of that land.

Housing cooperatives, natural persons and legal persons other than State units and social organizations may receive State land in perpetual usufruct. That is the second largest property right after ownership. That right can be transferred through a contract¹⁵ and, therefore, might be an object of contribution by a Polish partner to a joint venture. However, some important conditions should be observed. First, the contract should be in the form of a notarial act. Second, the permission of the Ministry of Internal Affairs is required when a joint venture is considered a foreigner according to certain provisions of the Law of 1920. The determination of when such permission is required is not entirely clear because the Law of 1920 refers only to the right of ownership of immovables and does not mention other rights. The Civil Code provides, however, that the provisions on the transfer of owner-

14. Council of Ministers Regulation of 7 April 1986 on Ways of Transfer of State Agricultural Immovables between Units of Socialized Economy, 1986 Dz. U. no. 17, item 90.

15. KOD. CYW, *supra* note 2, art. 237.

ship are applicable "mutatis mutandis" to the transfer of perpetual usufruct.¹⁶ This is an important problem. The Ministry of Internal Affairs should issue guidelines or the Supreme Court should decide when such permission is needed to clarify the situation. Until such a clarification is made, it is better for practical reasons to apply for the permission to the Ministry of Internal Affairs.

Such permission is undoubtedly required when a natural or legal person receives a property right in a building or apartment raised on State land which was given to that person in perpetual usufruct. In that case buildings and apartments become the property of the usufructuary although the land remains State owned. However, the ownership of buildings and apartments is considered to be the right legally connected with the perpetual usufruct.¹⁷ That means that these rights cannot exist separately, and must be transferred jointly. Since perpetual usufruct and the ownership connected with it are transferrable, they have market value and the evaluation of the contribution of that kind is not difficult in comparison with the evaluation of contractual interests.

IV. IMMOVABLES WHICH ARE NOT STATE-OWNED AS INPUT INTO A JOINT VENTURE

Practically, State units cannot own immovables. Even in cases when State units buy land through a contract from a natural person or a cooperative, such land becomes the object of management rather than of ownership.¹⁸ That view might be correct only in those cases when State enterprises are organized as commercial corporations with mixed capital.¹⁹ Only in such rare cases may they eventually enjoy the ownership of immovables and bring such an immovable as input into a joint venture.

Other than that, cooperatives can have their own land and other immovables. These may be brought into a joint venture on the condition that all provisions concerning the transfer of immovables are observed. Usually decisions of all internal branches of a cooperative are required before the cooperative can dispose of the immovable. The same applies to immovables which are the property of other social organizations, such as trade unions or associations.

16. *Id.*

17. *Id.* at art. 235.

18. Law of 1985, *supra* note 8, at art. 38 ¶ 2.

19. Usually limited liability companies with participation of several state-owned enterprises and/or cooperatives and/or in some cases private companies.

Natural persons and their partnerships or companies can own their land and bring it into a joint venture. In all these cases, the contribution of immovables must be made in the form of a notarial deed. That deed must be concluded under the condition that the company will receive the appropriate permission. Under Polish law, a conditional contract cannot transfer ownership to a joint venture. It only creates the obligation to transfer ownership. That obligation is fulfilled when parties agree unconditionally to the immediate transfer of ownership. The latter agreement must be concluded in notarial form after permission has been granted. These steps are not easy to accomplish and, therefore, Polish legal assistance seems absolutely necessary in these cases.

V. ACQUIRING IMMOVABLES BY A JOINT VENTURE

A joint venture may not only receive immovables as input in kind from a Polish partner but may also acquire land, buildings, or apartments. In order to buy or acquire immovables in that way a joint venture must already exist.

The Law of 1988 provides that State land can be granted to a joint venture in perpetual usufruct or leased. This provision corresponds with the Law of 1985.²⁰ The procedure of getting land in perpetual usufruct is long and complicated. A joint venture must apply to the local authority for a decision to grant the land, building, or apartment. When a joint venture is controlled by foreign natural or legal persons, permission from the Ministry of Internal Affairs is not needed.²¹ A final administrative decision to grant an immovable to a joint venture must specify all relevant information such as the period of the grant,²² the ways the land or building shall be used, any royalties due, and the initial price to be paid.

That decision enables a notarial contract to be drafted in the same terms as the decision. The contract between the Treasury and a perpetual usufructuary needs to be registered in the Land Register. The entry into the register creates perpetual usufruct as a real right.

If a joint venture plans to operate in agriculture, it may apply to buy State land for ownership. New provisions on selling State agricultural land do not exclude such a possibility and list among "organiza-

20. Law of 1988, *supra* note 6, art. 4 ¶ 5 § 2; art. 6 ¶ 3.

21. KOD. CYW., *supra* note 2, at art. 237. Art. 237 provides that the provisions on the transfer of ownership are applicable to the transfer of perpetual usufruct. However, we have to deal with establishing of perpetual usufruct, not with transferring it.

22. Usually for 40-99 years.

tions which carry out agricultural activity”²³ units authorized to buy such land. The procedure of granting such land is similar to that applicable to perpetual usufruct. The administrative decision enables a notarial contract between the Treasury and the buyer to be drafted. When a joint venture is considered to be a foreigner, the permission from the Ministry of Internal Affairs is required.²⁴

Leasing State land to a joint venture is a standard contract regulated in the Civil Code. Leasing agricultural land by the State is regulated often by specific provisions which are similar to those in the Civil Code. Leasing land for a period longer than 10 years can be terminated on notice by each party. A notarial form is not required and usually a contract is drafted in writing. Currently, in view of growing inflation, the main problem with such leases consists of assuring the real value of the agreed-upon rent.

A joint venture may buy land from any legal or natural person which appears to be the owner of the land. The notarial act is always needed to transfer the ownership in immovables and permission from the Ministry of Internal Affairs also is required.

VI. CONCLUSION

The methods of acquiring immovable objects by joint ventures in Poland are in most instances very complicated. This is particularly noticeable in the case of contribution in kind to a joint venture made by units which hold State immovables. Such immovables may be obtained only through contract and not in the form of ownership. That creates legal insecurity because contractual interests are always less secure than real interests. Also, immovables which are not owned by a joint venture are excluded from legal liability. That is especially true when considerable investment in State-owned land is made.

23. The Law of 12 March 1958 on Sales of State Agricultural Immovables. The consolidated text appears in 1989 Dz. U. no. 58, item 348.

24. The simplest way to avoid complications connected with the Law of 1920 is to entitle the foreign partner to less than 50% of company's capital. That solution, however, is not always agreeable to foreign parties.