

Superficies agreements: a popular alternative to securing property

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The classical approach for securing properties needed for the construction of buildings is to acquire a particular plot of land by concluding a sale purchase agreement. An increasingly popular alternative in practice is to create a superficies right (Rom. *drept de superficie*) over a third-party plot of land for the development of a certain building project. This is of high importance especially in the field of renewable energy (photovoltaic and wind power plants), which is currently expanding in Romania.

We shall briefly describe below the particularities of superficies agreements concluded under Romanian law as well as some of their advantages.

Ownership of the land and building

The Romanian law applies the principle according to which the owner of the land is by default also the owner of the constructions built on such land. There are few exceptions to this principle, amongst which we find the superficies right (as a right *in rem* over a third-party plot of land). By creating a superficies right, the ownership of the plot of land and that of the building are separated; these properties will belong, thus, to different persons.

The superficies right is a complex right consisting of

- (i) the ownership of the building and
- (ii) the right of use over the plot of land on which the building is constructed.

This right of use entitles the holder of a superficies right to build a construction on the surface or in the underground of the third-party land and also to hold the ownership of such construction.

Term

Superficies rights are created in Romania for terms of maximum 99 years. Upon the expiry of the above-mentioned period of time, the right of superficies can be renewed. In order to guarantee the duration of the right of superficies, the parties undertake in practice, from the very conclusion of the contract, to extend its duration by an additional period (of maximum 99 years).

Preliminary steps. Formalities

Before concluding a superficies agreement, the respective land has to be measured and registered in the Land Book.

The superficies right (as a right *in rem*) is validly set up by concluding a contract in authenticated form.

On this basis, the right of superficies is registered in the Land Book of the encumbered land. The holder of the right of superficies may request and obtain the building permit for developing the planned construction project on his own name and behalf.

After completion and taking over of the construction works, the erected building will be registered in a separate Land Book as property of the holder of the superficies right.

Expiry of the superficies agreement

Upon expiry of the superficies agreement's term, the landowner acquires, by means of accession (Rom. *accessiune*), the ownership of the building constructed by the holder of the superficies right; this implies the obligation to pay its market value at the above-mentioned expiry date. The parties may, however, deviate from this legal principle by stipulating different conditions in the contract.

If the building did not exist upon the date of creation of the superficies right and its value is equal to or higher than the value of the land, the landowner can request the holder of the superficies right to buy the land at the market value it would have had if the building had not been constructed on such land. The holder of the superficies right may refuse to buy the land, provided however that it removes the construction on his own costs and restores the land to its previous state.

Advantages

Securing properties by concluding superficies agreements is most advisable in case of building projects with a limited period of time (for instance, plants for the production of energy from renewable sources). In these cases, the investor has no interest to acquire the ownership of the land, but a right of use of such land for the purpose of developing the plant is sufficient.

As opposed to sale purchase agreements, for which a complicated pre-emption procedure is required (as long as the land is located in the *extra muros* area), superficies agreements may be freely concluded (i.e., without a preliminary procedure).

Executive summary

Concluding an authenticated superficies agreement is most recommendable for securing third-party plots of land for implementing building projects with a limited duration in time. An advantage in this respect is that the pre-emption procedure required when purchasing plots of land located in the *extra muros* areas is not applicable for superficies agreements.

Since the Romanian Civil Code contains only few provisions on superficies rights, it is recommended to draft such contracts carefully, especially with regard to the rights and obligations of the parties and the effects of the expiry of the contractual term.

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