

STUDIES AND COMMENTS

Land lease contract and prior right of lessee to concluding the new land lease contract - case of Slovakia

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Abstract

Land lease is one of the few possible ways to use the agricultural land effectively. This is caused by problems in the proprietary and user relationships, therefore the agricultural land lease and its legal regulation is especially important for Slovakia. This paper deals with the selected legal arrangements related to the agricultural land lease in Slovakia with an objective to identify application problems faced by lessees and lessors of agricultural land. When regulating the agricultural land lease relationships, the Slovak law maker prefers dispositive legal norms. However, this method is rarely used in the application practice. Contracting parties often focus only on obligatory characters of the contract, relying on the legal text of dispositive provisions. The legal arrangement of the lessee's prior right to sign the new lease contract attracts a particular attention. Current legal regulation of this lessee's right seems to be unenforceable; on the other hand, it collides with the basic human rights. This provision needs to be either cancelled or adjusted so that it achieves the objective defined by the law maker and so that it is legally enforceable in compliance with superior legal norms

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1. Introduction

Current state of the land ownership in Slovakia is affected by the two basic problems. First, it is a problem of unjustified land ownership caused by inconsistent registration in the past. Owners of approximately 20% of agricultural land – the so-called unknown owners' land, are unidentified today. This land cannot be the subject of the purchase and sale due to the unidentified seller. It is administered by the Slovak Land Fund³, the legal person established by the law for the purpose of administration of the state land and the so-called unknown owners'

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³ Slovak Land Fund is the legal person, established by the Law No. 330/1991 Collection, registered in the Business Register and administering the state land and the unknown owners' land. The Fund currently administers approximately 25% of the total area of agricultural land in Slovakia. The unknown owners' land represents 20% of this area; 5% represents the land owned by the state.

land.⁴Second, there is a problem of extreme fragmentation of the land ownership manifested in two ways - in fragmentation of the ownership right towards the land and in technical fragmentation. Fragmentation of the proprietary right is characterised by a high number of land co – owners (12 – 15 co – owners per 0.45 ha of land)⁵ and a very low average area of the land ownership per one owner (often in ten-thousandths). Technical fragmentation is manifested through scattered small area lands owned by the same owner in the terrain and through the limited access, or through no access of the owner to this land. These problems cause that the major area of the land (it is estimated that around 90% of the agricultural land) is the subject of lease. Owners and the Slovak Land Fund let this land on a lease for agricultural subjects (agricultural cooperatives, agricultural commercial corporations, or farmers). Therefore, the legal regulation of agricultural land lease and its individual legal arrangements require the attention of Slovak law maker, too. The paper deals with the selected legal arrangements related to the agricultural land lease in Slovakia with an objective to identify application problems faced by the agricultural land owners as well as agricultural subjects farming on the leased land.

2. Lease contract

Lease contract is regulated in the § 663 – 684 of the Civil Code. However, Law No. 504/2003 Collection on lease of the agricultural land, farm and forest land and amending some laws (hereinafter as Law on lease of agricultural land) has been especially adopted as an independent legal document for the land lease purpose, performing as a special legislation (*lex specialis*) towards the Civil Code. Law on lease of agricultural land regulates the agricultural land lease in two different situations:

- land lease for agricultural purposes where the law maker assumes the “short-term, disposable and occasional lease of smaller and consistent areas;”⁶;
- land lease for agricultural purposes in conducting a business, assuming the land use for agricultural production where substantial expenditures for land maintenance and restoration, soil fertility increase, plant production effective technics, transport, manipulation, and for constructions and infrastructure are required.⁷

Lease contract is the contract in which the *lessor undertakes to leave property to the lessee for consideration to use or to gain proceeds from the property on a temporary basis* (§ 663 of the Civil Code). Temporary nature and

⁴ Unknown owner is either the owner, whose name is known, but his place of residence or domicile is not known - the most, or the owner is not known, for example because the land book in the village was lost.

⁵ The explanatory memorandum to the Law No. 504/2003 Collection , p. 6-7.

⁶ The explanatory memorandum to the Law No. 504/2003 Collection, p. 5.

⁷ The explanatory memorandum to the Law No. 504/2003 Collection, p. 5.

repay ability are substantial characters of the lease contract. The lease contract can be negotiated as the fixed-term contract through defining the “duration or using purpose”⁸ or as the perpetual lease when the lease can be terminated, for example, through the agreement reached by contracting parties or through the notice. Repay ability of the contractual relationship is manifested in obligation of the lessee to pay the rent agreed in the lease contract or the rent commonly paid in the monetary form or in kind. However, other consideration, for example, leaving the different matter to be used by the lessor, is not excluded.

Civil Code does not require the lease contract to be concluded in a written form. However, in case of agricultural land lease it is necessary to take into consideration the Law on lease of agricultural land regulating the land lease in two different situations. In compliance with the second part of this Law, i.e. in case of land lease for agricultural purposes in conducting a business, in provision of the § 14 paragraph 1 the law maker requires the written form. It follows that the lessee is obliged to conclude with the lessor the lease contract for agricultural purposes in conducting a business in the written form; otherwise the legal act is not valid.

3. Essential terms of the lease contract

Each lease contract must consist of three essential terms: (1) definition of contracting parties (lessee, lessor) (2) subject of the lease and (3) repayment commitment.

3.1. Contracting parties

Lessee, i.e. the person using the subject of the lease, and lessor, i.e. the person providing the matter to be used by the lessee, are subjects of the lease relationship. Lessee and lessor can be the natural persons regardless their nationality and the legal persons regardless the law of the country in which they have been established. By other words, even strangers have right to conclude the agricultural land lease contract in Slovakia regardless they come from Member States or from third countries.

If the subject of the lease is in the tenancy in common, majority of the co-owners' votes calculated in accordance with the size of interests is required for the land lease conclusion. In case of the equal number of votes or when the majority is not achieved, the court may decide based on the suggestion of any co-owner.

If the subject of the lease relationship is in the estate by the entirety, approval of both husband and wife is required; otherwise the legal act is not valid.

In case the ownership of the leased matter is changed, the new owner enters rights and obligations, i.e. the legal status of the previous lessor, taking over all rights and obligations of the previous lessor. This, however, does not prevent the new lessor and lessee to reach the agreement on termination of the lease

⁸ Lazar, J. et al. *Občianske právo hmotné*, Iura edition, Bratislava, 2006, p. 146.

relationship. When such agreement is not reached, the legislation allows the lessee (due to the change of the lessor) to terminate the contract in the term defined by the legislation or agreed in the lease contract. Concerning immovable properties, this right has only the lessee.

3.2. Subject of the lease contract

When agricultural land is the subject of the lease, it is necessary to determine not only the type of the land or its area, but also in practice often omitted plot number, number of the document of title and the cadastral territory where the land is located. This omission is probably caused by relatively difficult extracting of individual types of land and their share from the cadastre, especially when high number of small area lands owned by one lessor is concerned. This, however, does not discharge the lessor or the lessee from their obligation precisely to identify the subject of the lease in the lease contract.

In accordance with the § 1 par. 2 of the Law on lease of agricultural land, agricultural land for lease purposes is:

- agricultural land or part of this land (arable land, vineyards, hop-fields, orchards, gardens or permanent grasslands);
- land with the building for agricultural purposes;
- other land left for agricultural purposes or part of this land (“considering the private-legal point of view, the real economic use of the land is decisive instead of administrative-legal classification of the land or land type registered in the cadastre”⁹).

Emergence of the relationship towards the agricultural land lasting for at least five years must be announced to the relevant office which records this legal fact in the cadastre (§ 34 and subsequent of the cadastral Law No. 162/1995 Collection, as amended). Record is possible only when the immovable property document of title is created; otherwise the office gives the record proposal back to the proposer, as the record is not possible to be created. On the other hand, the office has no means to find out if the lessee respects the obligation to notify emergence of the lease relationship and if the land is really used by the lessee or by the owner. Therefore, it is almost impossible to find out what area of agricultural land in Slovakia is leased. There is no legal document directly obliging contracting parties to notify the relevant administrative body about the lease contract conclusion. Decree of the Ministry of Agriculture of the Slovak Republic No. 249/2008 Collection laying down details on keeping land records obliges the lessee to create the land record in accordance with cadastral territories, with a distinction being made between the land leased based on lease contracts, land managed in accordance with specific legislation (especially Law No. 229/1991 Collection modifying the so-called statutory lease) and land owned and managed by the owner. The record consists of three parts (the written part, the map, and the

⁹The explanatory memorandum to the Law No. 504/2003 Collection.

collection of documents) and is updated up to 31st October of each calendar year. However, during the term of lease the lessee does not surrender this record to anyone. The obligation to surrender the record to the relevant office arises after the lease determination. Because the record in question would be useful for relevant administrative body when carrying out farming activities and not after their end when they can be used for archiving, importance of this provision is questionable. Moreover, there is no penalty motivating farmers to respect the mentioned obligation.

3.3. Rent

If the rent and the manner of its calculation is not exactly determined in the contract, the rent commonly paid in time of the contract conclusion, considering the price of the leased land and the way of its use is paid. However, if the lease contract is concluded for the land for agricultural purposes in conducting a business, an agreement on the rent respecting the minimum rent fixed by the legislation is required to be reached; otherwise the lease contract is not valid. The rent must be of minimum 1% of agricultural land price defined by the Decree of Ministry of Agriculture of the Slovak Republic No. 38/2005 Collection determining the value of land and its vegetation for the purpose of land consolidation. The question is what purpose was followed by the law maker when fixing the minimum rent. In accordance with this provision, the rent for the highest quality land is around 40 EUR per hectare. The average market rent is twice – three times higher today. This provision thus does not play its role and it does not provide the land lessor with adequate protection. Considering its importance by the law maker and redefining the minimum rent fixed by the legislation would be appropriate.

Another question arises concerning the provision adopted by the Law on lease of agricultural land amendment (Law No. 396/2009 Collection), completing the paragraph 5 into the § 10 where the lessee and lessor may agree on non-repayable use of the land if the rent fixed in accordance with the legal procedure is less than two EUR. This provision arises some question due its justification. Legal modification of legal land relationships does not prevent contracting parties to conclude the agricultural land commodatum agreement and nor the legal modification of the commodatum agreement modified in the Civil Code does not prevent the agricultural land to be its subject. The only requirement of the Civil Code is the individually determined matter which will not be run down by its use due to the Borrowing Party's obligation to return the same matter must be the subject of the commodatum agreement. Agricultural land meets this requirement. Contracting parties may thus always agree on non-repayable use of agricultural land and not only in case the rent is less than two EUR. Moreover, the legislation does not order the non-repayable relationship and allows contracting parties to reach an agreement in case the rent is less than two EUR. Therefore, an importance of this provision is missing. If the law maker planned to allow the Slovak Land

Fund to conclude the commodatum agreement, the Law on land fund had to be amended because it allows the Fund to administer the land through the lease and because provisions on the Slovak Land Fund property handling and administration are special provisions towards provisions of the Law on lease of agricultural land. In accordance with current legal provision the Slovak Land Fund is not allowed to conclude the commodatum agreement on land in its administration for agricultural purposes even under the condition the price for the lease is less than two EUR. Internal rules of the Slovak Land Fund set the minimum rent on 2.20 % of the land price in 2014.¹⁰ Finally, from a systematic point of view the provision on non-repayable use is not among lease relationships regulating provisions characterised by the repayability.

Law on lease of agricultural land allows modification of rent during the contract duration due to the defect or extraordinary circumstances not caused by the lessee and in case of the products price market regulation. The law maker allows the rent modification to motivate the lessee to keep on farming in case of worsened economic or natural conditions, to the detriment of the lessor's right on rent agreed and despite mostly stronger position of lessees in the contract in practice. Lessees are mostly entrepreneurs and the subject of the lease contract concerns their business activities, it means that they have more practical experiences with legal lease relationships than natural persons owning the leased land. Lessees particularly dictate conditions for the lease contract conclusion, limiting lessors to negotiate the rent. In case the average prices of agricultural products cultivated on leased land increased by more than 20% during the three consecutive years and if these products are subject of the market regulation, legislation allows the lessor to require higher rent. Agricultural land lessors usually work out of the agriculture; therefore they rarely have information allowing them to claim their right for higher rent. If the lessor does not find out the prices of agricultural products have been regulated (he either does not know where to find this information or he does not know if the lessee produces these products on his land) and he does not claim his right till 6 months, this right is precluded. This practically causes rare claim of provisions allowing the lessor to modify the rent. Contracting parties may solve this problem through the contractual provision obliging the lessee to inform the lessor on facts necessary to claim the right on the rent modification.

¹⁰ In compliance with the Slovak Land Fund General Director order, until 2014 the rent required by the Slovak Land Fund from the lessee was 1.5% of the land price determined according to Bonited Soil-Ecological Units. In 2014 the rent increased on 2.20% of this price and since 2015 it is yearly modified by the year-on-year average inflation rate published by the Statistical Office of the Slovak Republic for previous year. These modifications are aimed to approximate the rent for lease of the Slovak Land Fund land towards the market rental.

4. Non – essential terms of the lease contract

Additionally to the essential terms, the lease contract should contain further details on the lease relationship, avoiding potential conflicts between contracting parties. These include the term of lease, the way of surrender and use of subject of the lease, the term, the form and the way of paying the rent, usual or extraordinary costs, securing the lease relationship, sublease relationship, the way of the lease termination, returning the matter after the lease termination and the prior right of the lessee to conclude a new lease contract.

4.1. Prior right of the lessee to conclude a new lease contract

Some Member States use the so-called option to purchase the agricultural land for the benefit of the lessee. For example, Belgium, Italy, the Netherlands, Scotland and France guarantee the *ex lege* options to purchase, while Germany provides the possibility to agree on the option to purchase within the lease contract for the benefit of the lessee. In Hungary and Poland, the *ex lege* option to purchase is guaranteed for the lessee only in case of lease longer than three years, while in Lithuania the one year term of lease is sufficient for the option to purchase.¹¹

In Slovakia, the *ex lege* legislation does not guarantee the option to purchase for the lessee, however there are no restrictions for contracting parties to agree on it in the lease contract, however, the legislation provides the lessee with the so-called prior right for the new lease contract conclusion. Provision of the § 13 par. 2 of the Law on lease of agricultural land regulates the prior right of the lessee on land leased from natural and legal persons. Prior right of the lessee on land of the Slovak Land Fund is regulated individually in provisions of the § 13 par. 3 to 8 of the Law on lease of agricultural land.

Although the prior right of the lessee is guaranteed by the legislation, specifying details of its realisation in the lease contract is necessary for its application. In accordance with the § 13 par. 2 of the Law on lease of agricultural land, “*the lessee has right for prior conclusion of the new lease contract on land for the rent commonly paid, when he meets his contractual obligations duly and properly*”. In its second clause, the law determines four cases when the lessee has no prior right even in case he duly meets the lease contract obligations:

- (1) *when the lessor runs his own business in agriculture upon the termination of lease due to the term of lease expiration or due to the period of notice expiration;*
- (2) *when the new lessee is a person close to the lessor;*
- (3) *when the new lessee is the legal person of which the lessor is a member or an associate member;*

¹¹ Ciaian Pavel et al. *Rental Market Regulations for Agricultural Land in EU Member States and Candidate Countries*. Centre for European Policy Studies, Brussels, 2012, p. 21-23

(4) when the land determined in accordance with special legislation¹² for other than agricultural purposes is concerned.

Legislation provides the lessee, after the lease contract termination and in case of the lessee's interest, with right for prior conclusion of the lease contract with the lessor on land used by the lessee up to now, under the condition that the lessor will be willing to lease this land. This reflects the obligation of the lessor preferentially to conclude the lease contract with current lessee on this land, if the lessee applies for it.

Questions the legislation does not deal with arise here. In what term and what way should the lessee apply his prior right towards the lessor? What penalty threatens the lessor for violating the prior right of the lessee to conclude the new lease contract? Will the new lease contract with the new lessee be valid without acceptance of the prior right of current lessee? Is this provision in compliance with the Constitution of the Slovak Republic and with human rights guaranteed by the European Convention on Human Rights?

4.2. Prior right for conclusion of the new lease contract – the view of the lessee

To successfully enforce the prior right for conclusion of the new lease contract, the lessee must particularly know that the legislation provides this right and in what cases he has this right. The lessee may preventively and repressively protect his prior right for conclusion of the new lease contract.

Preventive legal protection is based on rights and obligations properly modified by contracting parties within the lease contract. Legislation allows a contractual arrangement concerning the term and the way in which the lessee applies his right for prior conclusion of the new lease contract. In order to secure the legal certainty, it would be advantageous for both parties to agree on the term when and how the lessee may apply his prior right at the lessor.

The action is a repressive tool, however, its bringing does not exclude a settlement between contracting parties through the conciliation. The lessee may claim the compensation, eventually the contractual fine if agreed in the lease contract, at the court. When the contractual fine has not been agreed within the lease contract, the lessee may only claim the damages; however, this requires relatively difficult evidence of cost of damage incurred and of a causal connection between the damage and the violation of lessor's obligation preferentially to conclude the lease contract with the original lessee.

Although the legislation provides the lessee with right for a prior conclusion of the new lease contract, it omits providing the legal protection in the form of any sanction for the lessor in case of its violation. The question is whether the lessee may claim at the court his prior right through the special action for fulfilment, i.e. the action resulting in a final judgment replacing the missing will of lessor to valid

¹² Law No. 220/2004 Collection on protection and use of agricultural land.

conclusion of the new lease contract. By the opinion of the legal theory, the will indicated by the subject of legal relationship may be replaced by the judicial decision only when it is literally allowed by the legislation.¹³ For example, in provision § 603 par. 3 of the Civil Code the party entitled within the contractual option to purchase may require the new buyer in case of its violation to provide the matter for purchase. Decision of the court will thus represent the proposal for contract which the entitled party may accept and thus conclude the contract. However, there is no similar provision in § 13 par. 2 of the Law on lease of agricultural land, therefore it probably will not be possible to claim the conclusion of the lease contract through an action for fulfilment.

When the lessor cannot be forced through the court to conclude the lease contract with current lessee and thus to respect his prior right, then it does not make any sense to require the court to declare a void or voidable contract concluded between the lessor and third party (new lessee). If the court even declares such void or voidable contract, the lessee would still have no legal tools to force the lessor to conclude the new lease contract with him. Furthermore, it is questionable whether the court may declare a void or voidable lease contract concluded between the lessor and third party, based on the violation of the prior right of the lessee. The question is the void or voidable contract is going on. Cases of voidable legal acts are exhaustively defined within the § 40a of the Civil Code where the violation of prior right of the lessee for conclusion of the new lease contract is not involved. In accordance with the decision of the Supreme Court of the Slovak Republic, “this naming cannot be even analogically extended to other cases.”¹⁴ In such case, we only can think of the option to claim the void legal act (lease contract with third party). Reasons for the void legal act are introduced in provision of the § 37 – 40 of the Civil Code. There is no judicatory of courts towards concerned problem; however, courts have been dealing with some cases concerning the option to purchase of the lessee. In accordance with the Decision of the Supreme Court of the Slovak Republic, “when the option to purchase between the lessor of non-residential premises and the lessee has been agreed only as the legally binding relationship without the substantial legal nature, the purchase contract between the lessor and third party is not void, as defined in the § 39 of the Civil Code.”¹⁵ The Court justifies this Decision as “this contract only binds its parties; therefore its violation may have legal consequences only for them, without any influence on legal status of third party – the opponent.” Additionally, “the fact that the subject of fulfilment has been earlier promised by the seller – the opponent to the complainant within the contract, cannot be the background for the conclusion that

¹³ Vojčík Peter et al, *Nahradenie prejavu vôle v teórii a súdnej judicature*, Justičná akadémia, Pezinok, 2013, p. 17-38.

¹⁴ R 50/1985 From Deciding of courts and state notaries assessment applying provisions amended in 1982, negotiated by the civil law college of the Supreme Court of the Slovak Republic on 22nd May 1985, Cpj 13/85.

¹⁵ R 30/2000 Judgement of the Supreme Court of the Slovak Republic of 27th April 1999, sp. zn. 1 Cdo 7/99.

the purpose of the purchase contract violated or evaded the law or was inconsistent with good morals.¹⁶

Moreover, application of the arrangement of void legal act seems to be too restrictive sanction, as use relationships are only concerned. Even in case of the legal option to purchase of co-owners towards the tenancy in common, the Civil Code does not give any sanction because of its violation in the nature of void legal act, but only by voidable legal act, i.e. the legal act will be only valid until entitled persons claimed the voidable legal act. The voidable legal act must be minded within the term of prescription from the moment when this legal act was carried out; otherwise the opposite party might raise an objection of prescription. Ownership right is, contrary to use relationships, one of the fundamental human rights. Then if the ownership right as a human right enjoys only the legal protection through voidable legal act, would it be fair to give sanction because of violation of prior right of the user (lessee) towards the land owner by void legal act? This question may be answered by the application practice of courts, or by the law maker amending the debatable provision § 13 par. 2 of the Law on lease of agricultural land. For legal certainty and balance of legal relationships it would be adequate if the law maker in provision § 13 par. 2 of the Law on lease of agricultural land explicitly introduces the sanction, adequate to violation of prior right of the lessee (e.g. opportunity of original lessee to claim the new lessee to provide the matter for lease, opportunity to claim voidable legal act which is conclusion of the lease contract with the new lessee). Otherwise the lessee can only claim the damages caused by the violation of prior right, especially in case the contracting parties did not agree on contractual penalty for such violation. Considering a difficult demonstration of high of damage and causal connection of this damage in connection with violation of prior right of lessee, provision § 13 par. 2 of the Law on lease of agricultural land seems to be legally unenforceable; and thus obsolete in the application practice.

4.3. Prior right for conclusion of the new lease contract – the view of the lessor

Civil Code (§ 123) authorises the owner to hold, use and handle the subject of his ownership and to enjoy its benefits. Through introduction of prior right of the lessee, the law maker has restricted the right of the owner to handle the subject of his ownership, as he cannot freely decide on handling the relevant immovable property, i.e. on who will be entrusted to use the land after the lease contract termination.

Perhaps there has been a good idea of the law maker particularly to protect the subject of the lease (the land) from fragmentation, to ensure a consistent use of agricultural land and, at the same time, “to create an appropriate legal environment guaranteeing the land user that within 5 – 10 years he may invest into the land and

¹⁶ R 30/2000 Judgement of the Supreme Court of the Slovak Republic of 27th April 1999, sp. zn. 1 Cdo 7/99.

into means of production needed for management which will retrospectively guarantee his prosperity and economical and social development of rural areas, as well.”¹⁷ The explanatory memorandum does not explain why the law maker decided to protect the right of the lessee to the detriment of the lessor; therefore we can only suppose that it was based on mentioned reasons.

The question is, what extent is the law maker competent to intervene in the ownership right of individual without its violation, for the benefit of the objective pursued. The ownership right is either protected by the Article 20 of the Constitution of the Slovak Republic and by the European Convention on Human Rights, as well. On the other hand, the beneficial use of the lessee is not among the basic human rights, therefore the law should not favour the legal protection of rights of the lessee before rights of the owner (lessor), to the detriment of his ownership (disposal) right to handle the land freely.

There is a different situation when the land is leased from the Slovak Land Fund which administers (not owns) agricultural land. The role of the Slovak Land Fund is to administer agricultural land and its leasing is one of the few provided solutions. In this case, an interest of the Slovak Land Fund and of the unknown owners is the land to be managed by the subject conscientiously meeting its contractual obligations and thus towards other new candidates, its right for prior conclusion of the lease contract is legitimate. However, we have to keep on mind that there is only 25% of agricultural land in administration of the Slovak Land Fund. Making the fund administration more effective must not lead to restrictions of ownership rights of lessors having three quarters of agricultural land in their ownership.

On the other hand, we have to admit that there is no absolute human right,¹⁸ i.e. it may be restricted by other human right where it is necessary to look for a rational compromise between both human rights concerned or requirements of public interest. On the other hand, it is necessary to respect the principle of proportionality, i.e. if the “rational relationship between the means used and the purpose observed or, in other words, if the fair balance between requirements of public interest and requirements of an individual have been achieved.”¹⁹ Then the question is whether there is a fair balance between the interest of the lessor to dispose freely with the subject of his ownership and the general public interest intended by the law maker through embedding the prior right of the lessee. The

¹⁷ Puškáč, Jaroslav, *Návrh legislatívnych opatrení zameraných na rozvoj vidieka a stabilitu podnikateľského prostredia v poľnohospodárstve*, Slovenská poľnohospodárska univerzita, Nitra, 2009, p. 268.

¹⁸ except for the prohibition of torture in art. 3 of the European Convention on Human Rights.

¹⁹ *Agosi c. Italy* (of 24th October 1986, *Annuaire*, č. 108) cited from Svák Ján, *Ochrana ľudských práv*, Eurokódex, Bratislava, 2003, p. 735-736. Also in case *Sporrong a Lönnroth c. Sweden*, for provision of article 1 of the Complementary Protocol 1 of the ECHR, the European Court of Human Rights had to determine whether the fair balance between requirements of public interest and requirements of an individual exists. Otherwise the individual would have to bear an excessive burden (cited from Svák Ján, *Ochrana ľudských práv*, Eurokódex, Bratislava, 2003, pp. 749-750).

motive of the law maker to adopt the provision on prior right of the lessee can be only supposed, because reasons for taking this measure are not provided by the explanatory memorandum to the Law on lease of agricultural land,

If the aim of the legislature was to protect agricultural land and to ensure its best possible management and exploitation for agricultural purposes, or to temporarily resolve the issue of fragmentation of land and to support agricultural production, then the provision of the § 12a on the sublease right better serves for this purpose, as the current lessee is obliged to conclude with the owner (current lessor) the sublease contract on different land because the original land may not be given to the lessor due to impossible rational use or access. In that case the lease is not terminated before the land consolidation (§ 12 par. 3 of the Law on lease of agricultural land). Finally, determination of land for other than agricultural purposes is one of the four exhaustively introduced reasons when the prior right of the lessee is not eligible even when the lessee duly and properly meets his obligations given in the lease contract.

More probable version is that the law maker has been following objectives concerning guarantees of entrepreneurs' investments into agriculture. This is given in the provision of the § 8 par. 1 on minimum term of the land lease in conducting a business (5 years); the entrepreneur also knows or should know his business planed return of investments and thus, before he starts his business activities, he should negotiate with the lessor the term of lease to be agreed within the lease contract. Withdrawal from such negotiated lease contract is only possible based on the explicit agreement reached by contracting parties (§ 676 par. 1 of the Civil Code) or in case the ownership of the immovable matter is changed but the lessee is the only authorised to give notice of termination (§ 680 par. 3 of the Civil Code). Finally, return of investment to the lessee is guaranteed by the § 13 par. 1 of the Law on lease of agricultural land according to which, when the lease is terminated before the term of return of expenditures incurred for maintenance of land in condition appropriate for a proper agricultural use expires, the lessee has right for adequate prolongation of term of lease or for adequate compensation. Therefore, there is no reason for the lessee to be protected through restriction of the ownership right of lessor – agricultural land owner.

It follows that a disproportional burden is put on the owner because there is no general interest to be preferred before individual interest of the owner. Moreover, the legislation guarantees the renewal of the lease with original lessee for the rent commonly paid, i.e. not for the rent the potential candidate for lease would provide. There is no possibility for the lessor to lease the land for third party willing to pay a higher rent which would finally have an impact on average rent in relevant locality. Thus the law maker has significantly intervened into the free price setting and into the agricultural land market development as well.

4.4. Prior right of the lessee for land from the Slovak Land Fund

Provision on right of the lessee for prior conclusion of the new lease contract is legitimate in case the land is leased from the Slovak Land Fund. Slovak Land Fund naturally prefers lessees who have been using the land up to now and meeting their obligations in time. Right here the law maker modified through amendments to the Law on lease of agricultural land the prior right of the lessee for land especially leased from the Slovak Land Fund.

In accordance with provision of the § 13 par. 3 of the Law on lease of agricultural land, *“when land managed by the fund in accordance with special rule is concerned, the lessee, duly and properly meeting his obligations from the lease contract, has prior right for conclusion of the new lease contract for the rent commonly paid.”* There is no justification for this provision because this right is also guaranteed by the § 13 par. 2 of the Law on lease of agricultural land, without special marking of the land lease from the Slovak Land Fund.

On the other hand, the law maker is not considering the situation when land in administration of the fund is provided to a real owner in terms of the restitution. Is the lease contract still valid together with the prior right of the lessee? If we start from the precondition that the fund is basically an indirect representative of the “unknown owner” administering his property in its name, then it is obliged to transfer all rights and duties of this administration on the owner who will be then bound by the lease contract and by the prior right of the lessee what in the given situation contradicts the constitutional right of the owner.

Provision on the prior right of the lessee for land from the Slovak Land Fund has been restricted by the legislation²⁰ for the benefit of young farmers²¹ and farmers meeting requirements for the small enterprise²² or microenterprise²³ willing to focus on special plant production or special animal production²⁴ where such farmer is required to own or to have in the lease some agricultural land. The fund may lease for such farmer only a limited area of the land up to the area of land

²⁰ Law No. 363/2014 Coll., amending the Slovak National Council Law No. 330/1991 Collection on land consolidations, land ownership arrangement, land offices, land fund and on land communities, as amended, and amending some acts.

²¹ In accordance with art. 2 par. 1 letter n) of the Regulation (EU) No 1305/2013 of the European Parliament and of the Council, “young farmer” means a person who is no more than 40 years of age at the moment of submitting the application, possesses adequate occupational skills and competence and is setting up for the first time in an agricultural holding as head of that holding.

²² In accordance with art. 2 par. 2 Annex I of the Commission Regulation (EU) No 651/2014, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.

²³ In accordance with art. 2 par. 3 Annex I of the Commission Regulation (EU) No 651/2014, a micro-enterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.

²⁴ Special plant production is represented through cultivation of vineyards, hop-fields or orchards or cultivation of special crops such as vegetables, root crops, legumes, medical herbs, aromatic herbs, spice, poppy, hemp, amaranth, buckwheat, millet. Special animal production represents the stocking density of agricultural land from 0.4 livestock unit per hectare (details in the regulation of the government No. 416/2014).

transferred in ownership or lease from other subjects with ceiling of 28 hectares. The right of original lessee for lease of all land leased from the fund is not deprived by the legislation, except for the part of this land²⁵ especially for special plant production and special animal production. This restriction of the lessee does not apply when he operates the special plant production and special animal production in the determined extent.

This step of the law maker can be positively perceived from the view of specialisation of agricultural production.²⁶ Also Ciaian, Kancs and Pokrivčák point out the insufficient level of specialisation of agricultural production especially caused by excessive transaction costs and by the market imperfections.²⁷ It is, however, questionable if the law maker has been also considering the status of the land ownership and land fragmentation. Although the explanatory memorandum quantifies the area of land for special plant production and special animal production (11 019 hectares), the question of the access to this land and the co-ownership issues are not concerned. It is therefore questionable, how many hectares of the area of 11 019 hectares will be possible to be determined for special agricultural production, ensuring the access to this land and to the resting land leased by the original lessee. Without the legal support, the Slovak Land Fund has probably only to consider this criterion, so that the new provisions of the law does not lose their effect. Ensuring such access in practice without land consolidation is questionable. The law maker also does not explain the reason for laying down the maximum area of 28 hectares that may be leased by the fund to the lessee for the specialised agricultural production. Finally, when the potential lessee wants to receive the land from the fund, he must first justify the ownership or conclusion of lease contracts with other subjects on the same required area. With respect to fact that only a small number of young farmers is supposed to own a sufficient area of land, and with respect to fact that the law maker did not cancel the existence of the prior right of the lessee for conclusion of the new lease contract also between private persons, and considering the limitation of resources in the area where the young farmer gains the land, land ownership fragmentation and access we can state that the subject provision is not sufficient for achieving the intended objective.

Although the provision of the § 10 par. 6 of the Law on lease of agricultural land prevents the lessee from subleasing the land leased from the fund (except for the § 12a), within the provision of the § 13 par. 6 of this law the law maker especially forbids to sublease the land leased from the fund for specialised agricultural production, reasoning concerns about the possible misuse of the new legal arrangement. Duplicate legal modification, however, cannot prevent from

²⁵ Depending on the area of land leased from the Slovak Land Fund, prior right of the original lessee for land with area of 3 to 10% of the leased area will be restricted (§ 13 par. 5 of the Law on lease of agricultural land).

²⁶ Rumanovská Ľubica, Takáč Ivan *Realizácia spoločnej poľnohospodárskej politiky v rokoch 2014-2020*, Slovenská poľnohospodárska univerzita, Nitra, 2015, p. 60- 67.

²⁷ Ciaian Pavel et al, *Comparative Advantages, Transaction Costs and Factor Content of Agricultural Trade: Empirical Evidence from the CEE*, XIIth congress of the European Association of Agricultural Economics, Ghent, 2008, p. 1-28.

possible misuse more than the law forbidding the sublease within the only one legal provision, it anyway contributes to the opacity of the lease legal modification.

5. Conclusion

When modifying lease relationships on agricultural land, Slovak law maker prefers dispositive legal norms, providing a wide scope of freedom for subjects of the lease relationship. It depends on contracting parties in what extent they use this scope for precise modification of their rights and obligations within the lease contract. This scope is only rarely used in the application practice. Contracting parties are limited to modification of obligatory requisites of the contract and they do not deal with irrelevant legal arrangements and they thus rely on legal dispositive provisions. These are, however, often very general and brief and their concretisation on the given lease relationship in case of conflict between contracting parties will finally depend on their interpretation and application by the court. Through the so-called prior right of the lessee for conclusion of the new lease contract, the law maker restricts the wide scope for modification of lease relationships. There is no such legal arrangement in other European countries. The law maker thus intervenes in the contractual freedom of the land owner, specifically the selection of the contractual partner as well as the rent, because of guaranteeing the rent commonly paid. On the other hand, the law maker omits to give sanctions the provision in case that the lessor violates the prior right of the lessee. It is also still questionable, what public interest has the law maker been following through the given provision when intervening the ownership right of the lessor and restricting his right freely to handle the subject of his ownership. On the one hand, prior right of the lessee is unenforceable; on the other hand, it collides with the basic human rights and it does not contribute to legal protection of any contracting party. Cancellation of the given provision, or its amendment so that it achieves the objective followed by the law maker and is legally enforceable in compliance with superior legal norms would be therefore adequate.

Bibliography

1. Ciaian, P., Kancs, D., Swinnen, J. F. M., Van Herck, K., Vranken, L. 2012. *Rental Market Regulations for Agricultural Land in EU Member States and Candidate Countries*. Working Paper no. 15. Brussels: Centre for European Policy Studies, 2012, no. 15, s. 21-23;
2. Ciaian, P., Kancs, D. A., Pokrivčák, J. 2008. *Comparative Advantages, Transaction Costs and Factor Content of Agricultural Trade: Empirical Evidence from the CEE*. In: EAAE 2008 Congress: XIIth congress of the European Association of Agricultural Economics, Ghent, Belgium, 2008;
3. Lazar, J. et al. 2006. *Občianske právo hmotné 2. 3. doplnené a prepracované vydanie*. Bratislava: IURA Edition, 2006. 598 s.;

4. Puškáč, J. 2009. *Návrh legislatívnych opatrení zameraných na rozvoj vidieka a stabilitu podnikateľského prostredia v poľnohospodárstve*. In: Rozvoj vidieka a spoločná poľnohospodárska politika EÚ, Nitra: SPU, 2009. s. 268;
5. Rumanovská E, Takáč I. 2015. *Realizácia spoločnej poľnohospodárskej politiky v rokoch 2014-2020*. In: Fast-growing trees and plants growing for energy purposes: international scientific conference. International scientific conference, 2015, pp. 60-67;
6. Svák, J. 2003. *Ochrana ľudských práv*. Bratislava: Eurokodex, 2003. 934 s.;
7. Vojčík, P. et al. 2008. *Občiansky zákonník. Stručný komentár*. 1. vyd. Bratislava: IURA Edition, 2008. 1218s.;
8. Vojčík, P., Bajánková, J. 2013. *Nahradenie prejavu vôle v teórii a sinedjudikaturé*. In: Ingerencia súdov do súkromnoprávných vzťahov: Zásahy súdov do kontraktačného procesu. Pezinok: Justičná akadémia, 2013, s. 17-38.

List of cited legal documents

1. Law No. 504/2003 Collection on lease of agricultural land, farm and forest land and on amendment of some laws, as amended [online] 25.06.2008 Available at <https://www.slov-lex.sk/domov>
2. Law No. 40/1964 Coll. Civil Code, as amended [online] 25.06.2016 Available at <https://www.slov-lex.sk/domov>
3. Law No. 220/2004 Collection on protection and use of agricultural land [online] 25.06.2016 Available at <https://www.slov-lex.sk/domov>
4. Law No. 363/2014 Collection, amending the Slovak National Council Law No. 330/1991 Collection on land consolidations, land ownership arrangement, land offices, land fund and on land communities, as amended, and amending some laws [online] 25.06.2016 Available at <https://www.slov-lex.sk/domov>
5. The explanatory memorandum to the Law No. 504/2003 Collection on lease of agricultural land, agricultural holding and forest land and on amendment of some laws, as amended [online] 25.06.2016 Available at <https://www.slov-lex.sk/domov>
6. The explanatory memorandum to the Law No. 571/2007 Collection amending the Slovak National Council Law No. 330/1991 Collection on land consolidations, land ownership arrangement, land offices, land fund and on land communities, as amended, and amending some laws [online] 31.10.2008 Available at <http://www.nrsr.sk/appbin/Tmp/dovodova0379.doc>
7. The explanatory memorandum to the Law No. 145/2013 Collection amending the Slovak National Council Law No. 330/1991 Collection on land consolidations, land ownership arrangement, land offices, land fund and on land communities, as amended, and amending some laws [online] 31.10.2016 Available at <http://www.epi.sk/dovodova-sprava/Dovodova-sprava-k-zakonu-c-145-2013-Z-z.htm>

List of judgments of national and international courts

1. Agosi c. Italy (of 24th October 1986, Annuaire, č. 108) cited from Svák Jan, *Ochrana ľudských práv*, Eurokodex, Bratislava, 2003, s. 735-736
2. Judgment of The Supreme Court of the Czech Republic of 18th September 2001, sp. Zn. 22 Cdo 2760/99 In: Soudní rozhledy č. 3/2002
3. Judgment of 27th November 2007 on the complaint No. 74258/01 for violation of the Article 1 Protocol No. 1 on the Convention. In: Justičná revue, annex 4/2008, s.56

4. R 50/1985 From Deciding of courts and state notaries assessment applying provisions amended in 1982, negotiated by the civil law college of the Supreme Court of the Slovak Republic on 22nd May 1985, Cpj 13/85
5. R 30/2000 Judgement of the Supreme Court of the Slovak Republic of 27th April 1999, sp. zn. 1 Cdo 7/99
6. R Co/95/2007 Judgment of the Krajský súd v Nitre (Regional Court in Nitra) of 25th October 2007, sp. zn. 8 o 95/2007