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**IT IS EASIER TO ESTABLISH A PROHIBITION OF ALIENATION AND ENCUMBRANCE
UNDER THE NEW CIVIL CODE OF HUNGARY**

According to the rules of the new Civil Code, from March 15, 2014 a prohibition of alienation and encumbrance can be established not only when the object in question is transferred. This may significantly increase the role of such prohibitions as collateral security.

The rules of the new Civil Code on the prohibition of alienation and encumbrance materially differ from the current rules. Besides the fact that such a prohibition may not only be established when the object is transferred, the violation of such a prohibition will not lead to the nullity of the alienation or encumbrance against everyone, but will rather mean their ineffectiveness towards the obligee of the prohibition. The Code also mentions “prohibition of alienation”, which does not hinder the encumbrance of the object.

It is the Fifth Book of Act V of 2013 on the new Civil Code that contains the rules on the ownership and possession of movables and real properties (hereinafter ‘objects’), and among them are the rules on prohibition of alienation and encumbrance, which may restrict the owner's right to dispose over the object.

Besides the “prohibition of alienation and encumbrance”, the new Civil Code also knows “prohibition of alienation”, which does not impede the owner in encumbering the object. Furthermore, the new Civil Code allows the establishment of other prohibitions that restrict the owner’s right of disposal in a different way.

Similarly to the previous regulation, the prohibition shall serve the protection of a right related to the object. This accessory nature of the prohibition is expressed by the rule that the prohibition shall lapse with the termination of the secured right.

It is a significant new development that the Code will not require the prohibition to be established simultaneously with the transfer of the object’s ownership. This may mean a material advantage in transactions where the mortgage/charge or buy option is established on objects not transferred in the transaction. (Somewhat counterbalancing the change that the currently usual establishment of a buy option as a credit security will be null and void in most cases under Section 6:99 of the new Civil Code, with the exception of a few cases.)

It is a change in respect of the effect of the prohibition that – contrary to the current rules – the alienation or encumbrance of the object in violation of the prohibition and without the prior consent of the obligee will not result in the nullity of the contract of alienation or encumbrance (e.g. sale, mortgage, charge). Rather, such alienation or encumbrance will only be (“relatively”) ineffective towards the obligee of the prohibition (and of the right protected by the prohibition). Nullity and relative ineffectiveness have a very different legal meaning. However, this difference does not primarily affect the obligee of the prohibition, but the legal relationship between the person transferring in spite of the prohibition and the person acquiring this way: namely, a valid contract will subsist between the latter two even in spite of the prohibition, and on the basis of this valid contract the parties will have rights and obligations towards each other (such as warranty and compensation for damages).

The new Civil Code provides – similarly to the old – that the prohibition does not restrict the *bona fide* acquisition of rights for value, thus the ineffectiveness described above only affects those who acquired a right gratuitously, or who were aware of the prohibition, or who should have been aware of the prohibition if proceeding with reasonable care. It is important to note that this rule is also applicable to the prohibition established by a law or in a court decision for the benefit of certain persons, *i.e.* contrary to the current regulation, *bona fide* acquisition for value may be stronger than the prohibition established by a court decision. (In the case of a statutory prohibition, it is “legally impossible” not to be aware of the laws.)

In the case of real properties, the above rules are applicable with an addition: If a prohibition of alienation (and encumbrance) is registered on the title deed, the land registry office will only register a later transfer or encumbrance if the applicant (acquirer) also files the declaration of consent from the obligee of the prohibition. (This is similar to the regulation of pre-emption rights.) Therefore in principle it is not possible that in spite of a validly registered transfer or encumbrance the obligee of the prohibition could later claim ineffectiveness of transfer or encumbrance. On the other hand, the fact that the prohibition of alienation and encumbrance may be registered in the land registry practically excludes the possibility that a third party acquires any right *bona fide*.

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