

Maneuvering in lease agreements

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Tenants are often interested in establishing a pre-emptive right to real estate, should the landlord wish to sell it in the future. In this article, we present various methods of finding out if a pre-emptive right can be arranged not only in an alienation contract, but also, for example, directly in a lease agreement.

If you are a long-term tenant of a building or rent land for agricultural purposes, it is of vital interest to you who will become its new owner if your landlord decides to sell it. If you regulate your contractual relationship correctly and make use of the possibility to arrange a pre-emptive right, you can become the new owner yourself. Legal practitioners are of different opinions as to whether a pre-emptive right *in rem* (adj. from Latin “against or about a thing;” refers to a legal action directed toward property, rather than toward a particular person) can be arranged under other types of contract than an alienation contract (“scudzovacia zmluva”).

Pre-emptive right

We distinguish between a pre-emptive right that has the character of an obligation, and a pre-emptive right *in rem*. Whereas a pre-emptive right which has the character of an obligation ceases to exist if not used by the tenant, non-use of a pre-emptive right *in rem* by the tenant does not mean that it ceases to exist. The new owner of the real estate will also have to offer the real estate to the tenant first, if the owner decides to sell it.

A contractual pre-emptive right is included in the Civil Code among other covenants of a purchase agreement. However, the law directly states that a pre-emptive right may not only be arranged in connection with a sale, but also in case of other alienation

(especially barter agreements or deeds of gift). According to the next section of the Civil Code, a pre-emptive right can also be arranged as a right *in rem* and have effect towards the buyer’s successors. In this case the agreement has to be made in writing and the pre-emptive right is acquired on registration in the Cadaster. The question remains whether both of these provisions are connected: can a pre-emptive right *in rem* be established exclusively under an alienation contract, or can it also be validly established in writing under other types of contract (e.g. lease agreement, easement agreement, or individual agreement on establishing a pre-emptive right *in rem*)?

Ambiguous case law

Current Slovak case law is ambiguous with regard to establishing a pre-emptive right *in rem* under types of contracts other than an alienation contract. In 2010, the Supreme Court of the Slovak Republic ruled under Case No. Sžo 291/2009 that, logically, the legal regulation of a contractual pre-emptive right in the Civil Code can only be applied in context, and that an alienation contract is a prerequisite for establishing a pre-emptive right *in rem*. The parties to a lease agreement can also arrange a pre-emptive right in a lease agreement, but since this type of contract is not an alienation contract the arranged obligation will only apply to the parties, not to their legal

successors. Such an agreement does not need to be registered in the Cadaster.

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A differently constituted Senate of the Supreme Court of the Slovak Republic also ruled on a pre-emptive right *in rem* (Case No. 2 Sžo 193/2010) on June 2, 2011. This case concerned an agreement on establishing an easement, which is also not an alienation contract. Unlike the ruling from 2010 (Case No. Sžo 291/2009), the Senate did not identify with the opinion that a pre-emptive right cannot be arranged directly in an agreement on establishing an easement and was of the opinion that a pre-emptive right can also be arranged in a completely individual contract, whereas it is not necessary that a pre-emptive right should be the subject matter of an alienation contract.

Logical interpretation vs. contractual freedom

We believe that inclusion of

a pre-emptive right among other covenants of a purchase agreement is non-systematic and leads to doubts as to its practical use. It leads the public to believe that a pre-emptive right is typical of a purchase agreement and that a pre-emptive right, even *in rem*, can only be arranged under an alienation contract. We believe that the majority of provisions on contractual pre-emptive rights in the Civil Code are dispositive, and their “logical” interpretation cannot limit the basic principle of a state governed by law, which is contractual freedom. If the parties under any type of contract, whether an individual contract on establishing a pre-emptive right or another contract which does not concern alienation, explicitly agree in writing on a pre-emptive right to the real estate which will also apply to the legal successor of the obligated party, then the responsible land registry (“katastrálny odbor”) cannot refuse to register the pre-emptive right under that agreement.

Czech inspiration

As of January 1, 2014, the Czech Republic has a new Civil Code, which solved these interpretative questions by stating in Section 2140 (2) that a pre-emptive right can also be extended to other kinds of alienation than sale. In addition, a pre-emptive right can also be arranged in connection with any other agreement including as a separate specific agreement. The Czech solution of this issue could be an inspiration for Slovak legislators.



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