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# Cross-Border Real Estate Practice

Laura Lavia Haidempergher and Andrey Selytin\*

This article surveys developments in international cross-border real estate practice during 2012 in two selected jurisdictions: Argentina and Ukraine.<sup>1</sup>

## I. Argentina: New Restrictions to Foreign Acquisition of Rural Land

During 2012, Argentina established a new regime imposing restrictions on the acquisition of rural land by foreign individuals and entities.

On December 28, 2011 (the last business day in 2011), Law No. 26737<sup>2</sup> (the Law) was published in the Official Gazette, setting forth cadastral and ownership assessment of rural lands and restrictions on the purchase and possession of such lands by foreign individuals and legal entities. On February 29, 2012, the Official Gazette published Decree No. 274/2012<sup>3</sup> (the Decree), which regulates the Law.

The Law applies to all foreign individuals and foreign legal entities that own or possess lands for agricultural, forest, touristic, or any other rural purpose. The Law does not affect any right previously acquired. The Law also created a special registry, the National Registry of Rural Land, with the purpose of centralizing the real estate and ownership registry of rural land in the country. Currently, this information is stored in provincial land registries. Consequently, each provincial registry would have to resign its authority in favor of the national registry created by this law. This appears to affect the provinces' autonomy because Argentina is a federal country.

Foreign individuals or entities that owned rural land when the Law became effective were required to report their ownership to the National Registry of Rural Land within 180 days of when the Decree became effective; the 180-day period expired at the end of

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1. For developments in 2011, see Anders Forkman et al., *Cross-Border Real Estate Practice*, 46 INT'L LAW. 321 (2012).

2. Dec. 27, 2011, [32.305] B.O. 13 (Arg.). The Law was issued on December 22, 2011 and became effective on December 27, 2011. *See id.*

3. Feb. 29, 2012, [32.347] B.O. 1 (Arg.). The Decree was issued on February 28, 2012 and became effective on March 9, 2012. *See id.*

August 2012.<sup>4</sup> The Decree required affidavit forms to be filed in the following circumstances:

- The initial registration of each rural property owned or possessed by foreign individuals or legal entities;
- Upon a change in corporate capital, within thirty days of the date when the change occurs. The management body of the company, or its legal representative in Argentina as the case may be, must report the event; and
- Upon the transfer of property or possession rights over rural land to third parties, even if they are not covered by the Law.<sup>5</sup>

If a foreign individual or entity does not comply with these affidavit submission requirements, the National Registry of Rural Land shall inform the Tax Authority (AFIP) and the Financial Intelligence Units (UIF) for them to investigate the involved assets and persons, including partners, managers and legal representatives.

The Decree imposes an obligation on the provinces to report the total area of their territories, including the surface of each of their departments, municipalities or similar political divisions, distinguishing rural land from urban land.<sup>6</sup> The Interministry Council of Rural Land shall ultimately set the total land area of each province. Likewise, each province shall report, according to the information provided by the corresponding provincial registry, the rural land owned by foreign individuals and entities or possessed by them. The records of the relevant real estate and possession registries shall determine ownership and possession, as the case may be. In the event no possession registry exists, the application authority shall determine the information sources to collect such data. Provincial registries shall also provide a list of foreign entities and entities with foreign capital registered in their jurisdiction, as well as any other information that the application authority might require.

In connection with the restrictions, the Law sets forth a 15 percent limit on the legal ownership of rural land within the national territory by foreign individuals or entities.<sup>7</sup> In addition, this ownership cannot exceed 15 percent of the provincial and municipal territories where the relevant property is located. The Decree also clarifies that the territories of Malvinas, Georgias del Sur, and Sandwich del Sur (the South Georgia and South Sandwich Islands) shall be included within this 15 percent total should they be recovered.<sup>8</sup>

Likewise, the ownership of foreign individuals or legal entities of the same nationality must not exceed 30 percent of the total 15 percent nor 1000 hectares within certain areas classified as core areas.<sup>9</sup> The Decree sets forth the departments and districts that are to be considered as core areas.<sup>10</sup>

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4. Dec. 27, 2011, [32.305] B.O. 13 (Arg.).

5. Feb. 29, 2012, [32.347] B.O. 1, 3 (Arg.).

6. *Id.* at 1.

7. Dec. 27, 2011, [32.305] B.O. 13 (Arg.).

8. Feb. 29, 2012, [32.347] B.O. 1, 2 (Arg.).

9. Dec. 27, 2011, [32.305] B.O. 13 (Arg.).

10. Feb. 29, 2012, [32.347] B.O. 1, 2 (Arg.) (describing “core areas” as Marcos Juarez departments and union in the province of Córdoba, Belgrano, San Martín, St. Jerome, Iriondo, San Lorenzo, Rosario, Constitution, Caretakers, General Lopez in the province of Santa Fe, as well as parts of Leandro N. Alem, General Viamonte Bragado, General Arenales, Junín, Alberti, Red, Chivilcoy, Chacabuco, Colon, Jump, San Nicolás,

The Law considers the following entities to be foreign:

- entities that have been incorporated in a foreign country;
- entities, including associations or de facto partnerships, that have been incorporated in Argentina, where foreign individuals or legal entities incorporated in foreign countries hold a majority stake (more than 51 percent of the capital), are entitled to the votes needed to prevail at shareholders' meetings, control the local company by means of special relationships such as de facto control or hold more than 25 percent of the shares;
- trusts in which foreign individuals or entities are beneficiaries in a percentage exceeding 25 percent;
- foreign individuals or companies whose participation in any type of joint ventures or collaborative agreements exceeds 25 percent;
- foreign individuals or companies that hold convertible bonds issued by a company incorporated in Argentina such that, if converted, they might acquire more than 25 percent of the company or a percentage entitling them to the votes needed to prevail at shareholders' meetings; and
- entities owned by any foreign government or governmental entity.

Foreign individuals, whether domiciled in Argentina or not, shall be covered by the law except for the following cases:

- individuals who can demonstrate that they have lived continuously and permanently in Argentina for ten years;
- individuals with Argentine children who can demonstrate that they have lived continuously and permanently in Argentina for five years; and
- individuals who have been married to an Argentine citizen for five years prior to the acquisition of the property rights who can demonstrate that they have lived continuously and permanently in Argentina for that time.<sup>11</sup>

In the case of the acquisition of rural land located within security zones, the foreign individual or entity must request a prior authorization from the Ministry of Homeland Affairs.

There are two types of security areas within the Argentine territory: (1) border areas, including rural or suburban areas adjacent to the borders with neighboring countries listed in Decree No. 887/1994;<sup>12</sup> and (2) internal areas, all rural or suburban areas located within 30 kilometers (18.64 miles) of military headquarters or other security forces facilities.<sup>13</sup>

The Law also forbids foreign individuals and entities to own or possess coastal properties on relevant permanent bodies of water or property containing such bodies. According

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Ramallo, San Pedro, Baradero, San Antonio de Areco, Exaltation of the Cross, Captain Sarmiento, and San Andres de Giles in the province of Buenos Aires).

11. Dec. 27, 2011, [32.305] B.O. 13 (Arg.).

12. June 6, 1994, [1.182] B.O. 3 (Arg.).

13. Dec. 27, 2011, [32.305] B.O. 13 (Arg.).

to the Decree, the Interministry Council of Rural Land shall determine the relevant and permanent bodies of water. In addition, the Decree prescribes that territories containing water works planned or under development, and defined as public interest, shall be included in this prohibition.<sup>14</sup>

Supporters of the regime consider the limitations set forth necessary in order to avoid unfair competition between foreign and local investors because foreign investors benefit from the favorable exchange rate.

From a constitutional viewpoint, the Law seems to contradict sections 14, 20, and 25 of the National Constitution. Sections 14 and 25 generally forbid discrimination and promote equality before the law, and section 20 expressly grants foreigners the right to acquire and sell properties in the country under the same conditions as Argentinean citizens.

The Law also states that, for the purposes of its application and regarding Bilateral Investment Treaties (BIT) to which Argentina is a party, the purchase of rural land shall not be deemed as an investment, as it is a non-renewable natural resource.<sup>15</sup> This provision violates the fair and equitable treatment principle in international investment law.

## II. Ukraine: Land Reform

### A. LAND CADASTRE

The Law of Ukraine “On State Land Cadastre” (Law on Cadastre)<sup>16</sup> was passed on July 7, 2011 and went into effect on January 1, 2013. According to the new law, the State Land Cadastre (the Cadastre) is the unified state database of land located within Ukraine and contains geographic coordinates of all land plots, information on their designated purpose of use, encumbrances, quantitative and qualitative characteristics, value, and owner and tenant(s).

Each land plot will be registered with the Cadastre and assigned a unique number. The registration will be based on the owners’ application, supported with the drawings and catalogue of geographical coordinates of the land plots. The owner of the land plot will get an extract from the cadastre, which will confirm proper registration of the land plot. Such extracts will replace existing state acts of ownership to land, which are the current title documents to land. The land plot can be the object of the civil rights, for example, leasehold title, only after registration in the Cadastre. Land plots in the existing cadastre will be automatically transferred to the new Cadastre. Information concerning individual plots of land, except owners’ personal data, will be available to the public free of charge on the State Land Cadastre website.<sup>17</sup>

14. Feb. 29, 2012, [32.347] B.O. 1, 3 (Arg.).

15. Dec. 27, 2011, [32.305] B.O. 13 (Arg.).

16. Про Державний земельний кадастр [On State Land Cadastre], VERKHOVNA RADA OF UKRAINE 2013, No. 8, art. 61.

17. See *Cadastre & Registration*, ST. AGENCY LAND RESOURCES UKR., [http://www.dazru.gov.ua/terra/control/en/publish/category?cat\\_id=37826](http://www.dazru.gov.ua/terra/control/en/publish/category?cat_id=37826) (last visited Feb. 23, 2012).

## B. REGISTRATION OF REAL ESTATE AND ENCUMBRANCES

The Law of Ukraine “On State Registration of Titles and Encumbrances to Real Estate”<sup>18</sup> (the Registration Law) will also come into effect on January 1, 2013. The Registration Law stipulates that such titles to the land plot as ownership, right to possess, right to use (servitude), right to use for the agricultural purposes (*emphyteusis*), right to construct (*superficies*), right of permanent use or leasehold, mortgage, and other rights to the land plot, as well as ownership and encumbrances to the real estate itself, should be registered with the State Real Estate Register (the Register) to be enforceable against third parties. An important new feature of the Register is the automatic and immediate transfer of information to and from the Cadastre.

The main difference between the new registration system and the previous one is the closed link between the land plot and the real estate on it. Under the previous system, there were separate databases for the land and the real estate. This created difficulties in protection of ownership and other titles, multiplied bureaucracy, and increased transactional costs. The new system is supposed to overcome these issues and facilitate real estate transactions.

The new registration procedure challenges both businesses and lawyers. Its effect can be illustrated by the sale of a house or building with a leasehold to the land on which it sits. According to the Civil Code of Ukraine,<sup>19</sup> when a buyer purchases a house, the buyer also receives the seller’s title to the land plot on which the house is located. In practice, this means that normally a house should be sold with land. If the seller of a building possesses only a leasehold to a plot of land, the leasehold should be transferred to the buyer. The problem, however, is that many homeowners have no legally registered right to the plots on which their houses are located.

In 2012, in order to stimulate homeowners to legalize their titles to the plots, the parliament passed amendments to the Civil Code of Ukraine that require the cadastre number of the land plot to be included in the sale and purchase agreement of the house or building. The only exemption is for the sale and purchase of apartments in multi-unit buildings.

To prepare for a sale under the old system, a seller had to obtain extracts from two databases operated by two different authorities—the land cadaster and the real estate register. The purpose of the new system is to make it possible to get a single extract from the Register containing all relevant information about both the land plot and the house. For leaseholds, this effect is even more crucial. The leasehold is the dominant legal instrument used in Ukraine to grant rights to another’s land plot for purposes such as real estate development, executed mainly on state-owned land, and in the agriculture business, where the sale and purchase of land is prohibited.

Under the old system, a lease agreement for land became valid from the moment of registration in the special Land Book. The Registration Law abolishes registration of the land lease agreements as the essential requirement for their validity, providing at the same time that leasehold title to land becomes effective from the moment of its registration in

18. Про державну реєстрацію речових прав на нерухоме майно та їх обтяжень [On State Registration of Corporeal Rights to Real Estate and their Encumbrances], VERKHOVNA RADA OF UKRAINE 2004, No. 51, art. 533.

19. VERKHOVNA RADA [Civil Code] No. 435-IV, art. 377 (Ukr.).

the Register. In other words, the state registration of the land lease agreement will be replaced with state registration of the leasehold title to the land plot.

From a leaseholder's point of view, any leasehold to land plots must be submitted to the Register. This, however, will be possible only after all those land plots are: (1) registered with the Cadastre; and (2) registered with the Register (or, rather, the ownership to them is registered there). Neither is under full control of the leaseholder, as only the owner can apply for the registration of the land plot and for the registration of ownership to it as well.

Another issue is raised by land lease agreements that have not been registered in the old Land Book. Under the old system, those non-registered agreements are not valid. Considering cancellation of the state registration of land lease agreement, it is not clear if the non-registered agreement would be accepted for the registration of the leasehold title in the Register.

At the same time, the new registration system makes titles to land negotiable. Even under the old system, a leasehold to land could be mortgaged to the bank as collateral to secure the loan. In practice, that happened very rarely due to the absence of a foreclosure procedure. It is expected that the new system will allow transfer of titles to land without involvement of the owner of the land plot, which makes a leasehold more attractive as collateral for a creditor.

### C. MORATORIUM ON THE SALE AND PURCHASE OF AGRICULTURAL LAND

The sale or transfer of agricultural land in Ukraine is strongly limited. The actual wording of clause 14 of Transitive Provision of the Land Code<sup>20</sup> stipulates that, until January 1, 2016, the sale, purchase, any other alienation, or change of designated purpose of use of land plots designated for commercial agriculture is prohibited except for succession, exchange of one land plot for another, and purchase by the state for public needs (nationalization). The origin of the moratorium is deeply related to collective farm reform. As part of its Soviet heritage, Ukraine had only a rudimentary structure in its agricultural business. Collective farms were formally joint companies of individuals who possessed all agricultural land. In 1999, President Leonid Kuchma of Ukraine issued an order that privatized agricultural land.<sup>21</sup> As a result, the land possessed by collective farms had been distributed among individuals. The government, afraid of land speculation and facing strong opposition from left-oriented politicians—mainly socialist and communist—established a temporary moratorium on the sale and purchase of agricultural land. The owners of such land could lease, but not sell, the land. It was because of this restriction that the leasehold became so important for the agricultural business. Now, the typical structure of an agricultural business in Ukraine is a company renting agricultural land from the individual owners and cultivating it.

The moratorium is one of the barriers for investments to the agricultural sector. No ownership, combined with non-transparent registration procedures for lease agreements,

20. Земельний Кодекс України [Of the Land Code of Ukraine], VERKHOVNA RADA OF UKRAINE 2002, No.34, art. 27.

21. Про невідкладні заходи щодо прискорення реформування аграрного сектора економіки [On Urgent Measures to Accelerate the Reform of the Agricultural Sector], Edict of the President of Ukraine 1999, No. 254k/96-VR.

made doing business in agriculture unattractive, as well as limiting the financing available to agricultural companies from banks.

According to the current edition of the Land Code of Ukraine, the moratorium is temporary. Turnover of agricultural lands will become possible after the law on land market enters into force, but not earlier than January 1, 2013.<sup>22</sup> The Land Market Bill had been approved in its first reading on December 9, 2011.<sup>23</sup> Given its significance, it was published in the official government newspaper for public discussion.<sup>24</sup>

The bill proved controversial and provoked many discussions. It appeared that, by formally allowing the sale and purchase of agricultural land, it would actually provide for stronger restrictions on the transfer of such land. For example, the owners of agricultural land could only be individual citizens of Ukraine, the state (represented by the state land bank, the state authorities and the government of the Autonomic Republic of Crimea), or the territorial communities (municipalities). Foreigners and legal entities would not be allowed to acquire agricultural land. For comparison, under the old system, a legal entity owned by a Ukrainian individual could be the owner of up to 100 hectares of agricultural land. Other significant limitations on the right of ownership of the land were as follows:

- A single person could own no more than 100 hectares of agricultural land, including partial shares and common property;
- If a person did not sell any excess land within a year, it would be nationalized.<sup>25</sup>

The bill also included restrictions to leasehold to land. The bill stipulated that no person (individual or legal entity, including affiliated persons and persons connected to it by relations of control) could have a leasehold to more than 6000 hectares of agricultural land located within the territory of one community district or to more than 5 percent of agricultural land located on the territory of one region.<sup>26</sup>

But the bill left open the question as to how such limitations would be implemented. First, the bill did not specify whether these limitations would apply retroactively to those who had already rented more than 6000 hectares in one district. If not, big agricultural companies would save their leaseholds, but they would be limited in their ability to enlarge them. If so, it was unclear whether exceeding the limitations would terminate existing rent agreements. Neither the bill nor any other law, however, stipulated such a reason for termination of a lease agreement before its expiration.

Another question concerns the consequences if the parties to a lease agreement ignore the limitations. The bill said the control over the limitations would be carried out according to the legislation. So, one could suggest that the State Land Resources Agency—the government authority liable for land market development—or its regional division should bring an action against both contractual parties for termination of the lease agreements. But in that case, a number of new questions arise. For example, if a person rented 10,000

22. Проект Закон України Про Ринок Земліб [Draft Law of Ukraine On Land Market], No. 9001-d, art. 14, § 2, cls. (1)-(3), reprinted in *Draft Law of Ukraine "On Land Market"*, GOLOS UKRAINE (Jan. 25, 2012), <http://www.golos.com.ua/Article.aspx?id=246624> (Ukr.).

23. Про прийняття за основу проекту Закону України про ринок земель [On Adopting Draft Law of Ukraine On Land Market], VERKHOVNA RADA OF UKRAINE 2011.

24. See Draft Law of Ukraine On Land Market, *supra* note 22.

25. *Id.* art. 14.

26. *Id.*

hectares based on 100 agreements, which rent agreements should be terminated and which should remain valid?

All this is presented to illustrate that the law did not provide for the means to implement the limitations provided in it. Moreover, verbal treatment of the bill allows a number of solutions to overcome those limitations. As mentioned, the Land Market Bill provided that the total area of the land plots designated for agriculture that can be rented by one person cannot be more than 6000 hectares of agricultural lands within the territory of one district or 5 percent of the agricultural land within the territory of the region.<sup>27</sup> The key phrase is “can be rented.” In our understanding, the legal meaning of “can be rented” is “used on the basis of the rent agreement,” which means that the 6000-hectare restriction is limited to rent agreements and does not cover other agreements on use of the land. What kinds of solutions are available for the tenants?

The easiest and most obvious solution is the *emphyteusis*. The right of use the land plot for agricultural purposes (*emphyteusis*) is provided by the current edition of chapter 33 of the Civil Code of Ukraine and in the current edition of the chapter 16 of the Land Code of Ukraine.<sup>28</sup> The *emphyteusis* is established based on an agreement between the owner of the land plot and the person who wishes to use this land plot. The right to use another’s land plot for the agricultural purposes is subject to alienation and succession, including inheritance.

It appeared that the Land Market Bill would pass second reading in late 2012, but it was not put on the agenda for the autumn session of the Parliament. Instead, in October, the Parliament adopted, in the first reading, another bill that would extend the moratorium on the transfer of agricultural land through January 1, 2016.<sup>29</sup> On November 20, 2012, the parliament approved this bill in its second reading and in whole. It provides as follows:

- Sale and purchase, any other alienation, and change of the designated purpose of use of land designated for truck agriculture will be prohibited unless the law on turnover of the agricultural land is passed, but in no event earlier than January 1, 2016.
- Contribution of the land share (the right to get the land plot of a terminated collective farm in ownership) to the capital of the legal entity will also be prohibited unless the law on turnover of the agricultural land is passed, but in no event earlier than January 1, 2016.
- This law will enter into force one day after its official publishing.
- The Cabinet of Ministers is instructed to elaborate and to bring to the parliament a bill on the turnover of agricultural land within six months after this law enters into force.<sup>30</sup>

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27. *Id.*

28. Цивільний Кодекс України [Civil Code of Ukraine], VERKHOVNA RADA OF UKRAINE 2003, ch. 33, art. 407; Земельний Кодекс України [Of the Land Code of Ukraine], VERKHOVNA RADA OF UKRAINE 2002, ch. 16.1, art. 102-1.

29. Про внесення змін до Земельного кодексу України [On Amendments to the Land Code of the Ukraine], VERKHOVNA RADA OF UKRAINE 2012.

30. *See id.*

The change between 2015 in the first draft and 2016 in the final one occurred after the bill was initially rejected. Under pressure from the opposition, the parliament reconsidered the bill and approved an extension to 2016.

Under these circumstances, the Land Market Bill discussed earlier as a mechanism to end moratorium and establish free transfer of agricultural land seems to lose this initial meaning, as adopted amendments refer to a new title—the law on the turnover of agricultural land. At the same time, it is quite possible that the law on the turnover of agricultural land would absorb some provisions of the Land Market Bill.

The extension of the moratorium on the sale and purchase of agricultural land is the compromise between followers and opponents of free transfer of agricultural land in Ukraine. For the time being, it seems to be even more beneficial for the agricultural business than passing Land Market Law would have been, as no restrictions to leaseholds to land have been established.

#### D. STATE LAND BANK

Following recent amendments to the Law on Banks and Banking<sup>31</sup> the Cabinet of Ministers of Ukraine created the State Land Bank and registered it with the National Bank of Ukraine. The Parliament also elected five members to the supervisory board of the State Land Bank.

The Land Market Bill defined the State Land Bank of Ukraine as a specialized state financial institution with the main task of lending funds secured by land and other property to agricultural producers who own the exclusive right to put mortgages over their agricultural land, as well as the right to buy and sell agricultural land. Capital for the State Land Bank is to be contributed from the monetary fund and with state land.

Considering that the Land Market Bill will likely never be adopted, the exclusivity of the State Land Bank in agricultural land financing market has been put aside. Under such circumstances, its function is not clear now. Unfortunately, this is not the only initiative of the Ukrainian government that has not been accomplished. Fortunately, the Ukrainian government was reasonable enough not to remove other commercial banks from financing agricultural businesses.

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31. Про банки і банківську діяльність [On Banks and Banking], VERKHOVNA RADA OF UKRAINE 2001, No. 56, art. 7.

