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Restitution: A Romanian Şmecherie

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Introduction

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A Şmecherie (pronounced “sch-mek-a-ree-a”) is a Romanian ruse. That is what Romania’s Parliament foisted upon the nation in place of a genuine law to restore real property abusively confiscated from the victims of the former communist regime. Long awaited by those wronged by the communists, to whom Law 112/1995 (the “Old Restitution Law”) had offered little remedy, Law 10/2001 (the “Law”), effective as of February 14, 2001, is not much more than a series of declarative statements shrouded in insincere exceptions and procedures designed to thwart genuine restitution and prolong communist misappropriations.

The most unwarranted and sordid aspect of the new Law is art. 16. That article makes it virtually impossible for victims to recover real estate presently occupied by health, educational, cultural or public interest institutions, headquarters of political parties, diplomatic missions, consular offices, offices of international organizations accredited in Romania and residences of diplomatic staff. While it is somewhat arguable – at least in a social democratic sense - that real estate occupied by hospitals and schools should be restored in kind to the former owners, the decision not to return property occupied by political parties, embassies, et al., protects no social interests, and makes a mockery of the inalienable right of ownership. Indeed, a solution could have even been found for schools and hospitals so that stolen properties could be restored to the

owners by making the state a tenant for a number of years.

Under communism, Romanians used to say that "they (the communists) pretend that they are paying us, and we pretend that we are working." Eleven years after the fall of communism, it appears that this sad joke can be adapted to the new Law by saying: "we (the Romanian State) pretend that we are restoring stolen properties and you (the victims) should pretend that you are receiving justice."

General Presentation

At the outset, it is important to caution that the Law is multifaceted and too long to describe in adequate detail in this article. The reader must consult with counsel and not rely upon the description below for advice.

The first article of the Law misleadingly proclaims restitution in kind of abusively confiscated real property (meaning the return of the actual confiscated realty) as the paramount goal of the Law and equivalent remedies as an alternative to be used only when restitution in kind is not possible. However, there are so many exceptions to the right of restitution in kind, that the remedy by equivalent prevails throughout – a remedy burdened in the Law by a lack of substance and the need for further regulations.

“Abusively confiscated” real estate is defined in the Law under the following categories:

- a) real estate nationalized either under Law 119/1948, or without valid title;
- b) real estate confiscated under sentences for political crimes, such as opposition against the totalitarian communist regime;
- c) real estate donated to the State or to other legal persons, by virtue of certain regulations passed between March 6, 1945 – December 22, 1989, or when a final and irrevocable court decision was passed to annul the contribution or attest to its nullity;
- d) real estate seized by the State due to non-payment of taxes for reasons beyond the owner’s control, or deemed to have been abandoned, based upon administrative dispositions or court decisions between March 6, 1945- December 22, 1989;
- e) real estate seized by the State based upon the provisions of laws or regulations unpublished in *Monitorul Oficial* or *Buletinul Oficial* on the date of expropriation;
- f) real estate seized by the State based upon Law 139/1940 regarding requisitions and not restored, or whose owners have not received equitable compensation;
- g) any other real estate seized by the State under valid title, as defined in Law 213/1998 on public property (“Public Property Law”); and
- h) any other real estate confiscated by the State without valid title or without compliance with the legal provisions in force at the time of expropriation, or illegally

confiscated based on dispositions issued by governmental or administrative authorities.

Although the Law refers mainly to buildings, land, and movable assets that became immovable by incorporation into such buildings, the Law’s remedies also refer to the pertinent installations and equipment. However, since the Law refers only to their restitution in kind, if they were replaced or destroyed, restitution in kind becomes impossible, and equivalent compensation cannot be granted.

Shareholders of a legal person that used to own real estate will benefit from the Law irrespective of whether the entity still exists. If the legal person *per se* is to have the property restored, then it must fit one of the following three criteria: (i) such entity continued its activity until the effective date of the Law; (ii) such entity was banned prior to December 22, 1989, but resumed business thereafter, and a court decision attests to its identity as the legal entity previously banned from business; or (iii) the legal entity is a political party whose activity was forbidden until December 22, 1989, and was resumed after that date.

Persons who received compensation under international agreements concluded by Romania, as provided in the appendix attached to the Law, are expressly excluded from the provisions of the Law, as not being entitled to restitution or to other remedies.

Restitution in Kind or by Equivalent Value

If the victim of an abusive confiscation qualifies for coverage under the Law, determining whether the remedy available will be restitution in kind or equivalent can become rather difficult. For example:

- 1) In the case of totally or partially demolished buildings,

restitution in kind will only be possible for undeveloped land and buildings that were not demolished, whereas in the case of demolished buildings and occupied land, only remedies by equivalent are to be provided.

- 2) There are several possibilities in the event that certain buildings were erected on the land pertinent to a confiscated building:

- a) total restitution in kind, if unauthorized buildings or light and mobile structures were erected on the land after January 1, 1990;

- b) restitution in kind of land remaining undeveloped, if certain buildings were erected on the rest of the plot, in compliance with approved city-planning documents -- equivalent compensation will be determined for the land occupied by new buildings;

- c) restitution in kind of undeveloped land and of the remaining buildings if the expropriated buildings were totally or partially demolished, but the specific works for which expropriation was ordered were not performed -- remedies by equivalent will be granted for demolished constructions; and

- d) compensation by equivalent for the entire property will be granted when such property is entirely occupied by buildings.

- 3) Where buildings used for purposes other than residential, that were demolished or whose restitution in kind is totally or partially impossible, the Law

provides remedies by equivalent value, such as stock in businesses undergoing privatization, shares in companies traded on the stock exchange, or by compensation with other goods or services that must first be agreed upon between the present real estate holder and the claimant.

4) Buildings expropriated with valid title in exchange for compensation, if not demolished to date, may be restituted in kind against repayment of any received compensation, updated for inflation, provided that such buildings were not legally disposed of.

5) In the event that the entitled persons are granted compensations, as provided by the Old Restitution Law, restitution in kind will only be possible if the building was not sold prior to the effective date of the Law, provided that the compensation, updated for inflation, is returned. In the event that the building was sold, the owner will only be entitled to the difference between the collected amount, updated for inflation, and the value of the building, to be covered by shares or vouchers. (These vouchers are a new species of securities that will be issued by the Ministry of Finance to be used to pay claimants for restitution by equivalent value but only to acquire shares in companies undergoing privatization.) In case the claimant did not collect compensation under the Old Restitution Law or the compensation was not yet established, remedies provided by the Law will be granted. Fortunately, persons who did

not file any request based on Old restitution Law, or whose requests were rejected or not solved until enforcement of the Law may submit a request under the present Law.

6) As regards real estate seized under valid title, held by the State, cooperative organizations or any other legal person, in the event that such person was granted compensation, it will be entitled to choose between the following: 1) restitution in kind, conditioned by reimbursement of previously granted compensation; or (2) payment of the balance between the compensation and the total value of the building.

7) As noted in the Introduction, a special situation is presented by buildings occupied by health, education, cultural or public interest institutions, headquarters of political parties, diplomatic missions, consular offices, offices of international organizations accredited in Romania and residences of diplomatic staff. Former owners will not have returned to them the respective real estate in kind if seized under valid title, and will only be granted the equivalent in cash for their former properties.

Additionally, the Government will decide upon a list of buildings not to be restored to the former owners in kind. In the future, the former owners will be able to apply for restitution in kind if such property is no longer needed to serve a public interest. However, the law fails to specify who makes such decision and merely states that owners "will be notified." They would be unwise to hold their breaths in anticipation of such notification ever being made.

Exclusivity of Remedies by Equivalent Value

For inexplicable reasons, restitution in kind of property which used to belong to legal persons is contingent upon the owner being the sole associate of such legal entity or, in case of joint ownership of the stock of such legal entity, on the owners being members of the same family. Consequently, in all other cases, claimants will not get their property back under any circumstances. Restitution by equivalent is also the exclusive remedy if the building no longer exists on the effective date of Law, except for buildings destroyed by natural calamities; if the building was transformed into a new one, unless otherwise established by the parties – a term used in the law without any definition, but seemingly meant to include the present holder and the claimant; or if the building was disposed of in favor of the former tenant under Old Restitution Law.

Types of Compensation by Equivalent Value

The Law provides two forms of compensation by equivalent value:

Compensation in vouchers or shares: Within 30 days of the effective date of the Law, the Ministry of Finance must draft regulations regarding the issuance of a new form of voucher to be used as compensation for claimants. The Law stipulates that the vouchers may circulate on the market and may be used exclusively in the privatization process by the claimant in lieu of cash. State agencies involved in privatization must accept them as currency for the purchase of shares and assets of companies undergoing privatization. Such bonds are valid for 7 years from the date of their issuance and may be traded for shares in companies undergoing privatization only during such period.

As regards shares, persons entitled to compensation may apply to state agencies involved in privatization within

60 days from receipt of the decision whereby they were granted the right to receive such type of compensation. Then, within a new 60-day period from when the claimant's application was registered with the appropriate state agency, that agency must invite the claimant to negotiate the terms of the remedy by equivalent value.

Compensation in cash: With regard to cash compensation, the Law refers to regulations not yet enacted. The government must appoint an inter-ministerial commission within 6 months from the effective date of the Law. Within one year from the expiration of such 6-month term (i.e. within 18 months from the date when the Law became effective), the Parliament must adopt a "special law" which will regulate the procedure to be followed for obtaining cash compensation, as well as the amount of compensation to be granted. The Law further provides, with no other details, that cash compensation "may be limited", i.e. the "special law" to be adopted will provide that cash compensation cannot exceed a certain amount of ROL. (This would be similar to the provisions of Law 18 regarding land restitution that initially provided that no matter how much agricultural land a claimant once owned, the maximum a claimant could get back was 10 hectares. Law 18 was later amended to allow for more substantial restitution.)

Restitution Procedures Regulated by the Law

In every instance, the restitution procedure starts with an application by the former owner for restitution in kind. Oddly enough, this must occur even if such remedy is specifically made inapplicable by other provisions of the Law. The Law is so miserably written that the right interpretation seems to be that one must claim restitution in kind even if such in-kind restitution is specifically excluded as inapplicable by the law. Such conclusion comes from the interpretation of art. 21, which clearly states that the former owner must claim the restitution in kind within 6 months from the date when the Law becomes effective. The Law allows claimants a total of 18 months from the date when the Law becomes effective to bring evidence of their title over the properties as well as evidence of their inheritance rights. If restitution in kind is, as art. 24 puts it, "denied or not available", the legal entity holding the property must make, within 60 days from the registration of the former owner's claim, a counter-offer for compensation by equivalent. In the event that several properties are claimed, separate applications must be filed.

The Law also refers to the situation where the current holder of the real estate is unknown, in which case the application is filed with the local city hall at the site of the property. The application will be valid even when addressed to another entity other than the one holding the building or to an entity holding only part of the building. In such latter case, the notified entity must provide the holder with information concerning the legal person holding the other part of the building, and provide the claimant with the property's ownership or administration documents.

The Law places special emphasis on such applications because they are "evidence of compliance with the 6

month term," even if wrongly addressed. Non-compliance with the 6-month term entails a failure of this procedure, and loss of the right to claim remedies in court. The filing of the claim within the legal term counts as an acceptance of ownership of the property so claimed for the successors who, between March 6, 1945 and the date of the Law, had been prevented from accepting heritage, and have thereby forfeited their right to do so. According to Romanian law, inheritors must formally accept an inheritance within 6 months from death of the person. Failure to do that means non-acceptance of the inheritance. What the Law does is to allow any person –even those who did not accept the inheritance within 6 months to claim the properties to which they are entitled.

If the current holder of the property is a legal person, it must pass a decision on restitution, and explain its reasons therein, within 60 days of either receipt of the application and supporting documents, or upon the separate submission of such documents. The claimant must be invited to attend the appropriate Board meeting and the Board's decision must be communicated to the claimant within 10 days of its issuance. If approving restitution, the decision, under the Law, acquires the probative value of an authentic writ, attesting to the ownership right of the claimant. That decision will also constitute a writ of execution for the reinstatement of the claimant to his ownership rights, as soon as duly entered in the real estate register and provided that reinstatement is sought within 3 years of notice.

In the event that restitution in kind is not approved or is impossible, the holder of the property must make a counter offer for compensation equivalent to the real estate value, within the same term.

The Law provides for a 60-day term from receipt of the compensation offer for the claimant to accept or refuse it;

failure to express an option is deemed a refusal. Should the offer be refused, the claimant can appeal the decision in court within 30 days from notification. Although the right to acceptance or refusal can be theoretically exercised within 60 days, in fact the right to sue is barred after the first 30 days. The two terms should have been correlated. The inconsistency makes for a flawed procedure.

The Law also provides for the procedure to be followed when the property is currently held by a legal entity such a public utility company, a national company, a state-owned company etc.

Rental Agreements and Tenants' Protection

The provisions of Government Emergency Ordinance No. 40/1999 regarding protection of tenants and establishing of rent for residential spaces continues to apply to rental agreements concluded for the restituted buildings despite those agreements having been concluded by former holders of the property who were not the rightful owners. An obligation to extend the tenancy for a period of 5 years from the date upon which the claimant is reinstated continues, unless the tenant is offered another adequate residence and agrees to promptly vacate the occupied space. Maximum rent to be paid by natural persons whose monthly income per family member is between the net monthly income at national level and twice such income may not exceed 25% of the monthly net income of such family. Failure to conclude a new rental agreement due to disagreements on the rent requested by the owner will entail extension of the rental agreement until the concluding of a new one.

Real estate restored in kind that is currently rented by the State is subject to a preemption right in case of sale, to be exercised within 90 days from receipt of the owners' notification of its intention to sell. Violation of such preemption right will nullify the sale-purchase agreements concluded in breach thereof.

Conclusions

The exceptions and procedures created by the Law were not designed to solve the complexities incident to the return of abusively confiscated property, but to prevent it from occurring in most cases. This is a ruse that fools no one. It neither satisfies the moral obligation of a democratic society to return the stolen goods it wrongfully received, nor does it satisfy Romania's obligations to gain accession to the European Union. Sadly, it is the legacy of the past government's unfulfilled promise to the victims of communism.



Communist Moldova?

The Communist Party of the Republic of Moldova (CPM) won almost half of the votes cast in the February 25 election and, because of the system of proportional distribution, it now has a commanding majority of 71 out of 101 seats in the new parliament. Mr. Vladimir Voronin, the CPM's leader, is slated to be elected President of Moldova by the Parliament in the next several days. He has become the undisputed most powerful man in the country as leader of the ruling party and the nation's next President.

During the campaign, the Communists promised to enlarge the role of the state in the national economy, to suspend the privatization of factories of "strategic importance" such as Moldtelecom, the national power-grids and electric companies, and the tobacco and wine industries, to join the Russia-Belarus

Union and to re-establish Russian as a state language in Moldova along with Romanian.

But most observers believe that the election results were not a mandate for the return of communism, but a direct consequence of the failure of the conservative parties in the previous Parliament to halt the nation's economic slide. The vote was one of despair and anger -- not ideology. The CPM now rules the poorest country in Europe. According to the UNDP, over 90% of the population have incomes of less than \$2 per day.

In this framework, does the communist electoral victory mean an end to reform and a return to the past? The short answer is no. Can anyone seriously contemplate improving the economic situation in Moldova without relying on support from the West -- its financial institutions and its investors? The real priority of the country is economic growth. Ironically, the Communists seem to know that the faded ideology of the past is of little use to them in the future. They know that they must follow the same path of reform that they have been attacking for years -- only more diligently than their predecessors.

In a speech at the CPM's plenum on March 3, Mr. Voronin said "All that happens in the country as of February 26, even the snow that fell after the elections, will be linked in people's minds with the communists. We have ceased being an opposition party and must recognize the responsibility that we bear. Unfortunately, some of us have yet to latch onto this change and are still playing the part of the partisan in the joke who continues to derail trains after the war is over."

Indeed, immediately after the official announcement of the results, Mr. Voronin said that he is not going to rebuild communism in Moldova; that he does *not* intend to revise the results of the earlier privatization plans of the

government; and that he is not opposed to private land ownership or cooperation with the World Bank and the International Monetary Fund. Far from espousing communist ideology, after 4 years of a wretched economic situation in the country, Mr. Veronin is saying that Moldova's priorities are related to economic growth, predictable fiscal legislation, foreign investment and social protection for the poor.

Moreover, the Communists are unlikely to engage in a pogrom against the rich, since many of them are now in their own ranks -- including Mr. Veronin.

The victory of Communists in Moldova may seem like a present to Russians who dream of a Russian state within the borders of the previous Soviet empire -- but is it? While many observers believe the Russians will now have an even greater influence in Chisinau than they did under the Lucinschi regime, Mr. Voronin is too clever to allow himself or his nation to become a Russian puppet state. Certainly, Moldova cannot rely on free supplies of gas, electricity and raw materials from a Russia whose own vast potential and energies are now spent on saving itself. Indeed, the votes that the CPM gathered on February 25 were not cast to render Moldova as a marginal appendix of the Russian Federation. Most Moldovans are ethnic Romanians and they hardly fared well under the previous fifty years of Soviet rule. Russia's importance to Moldova is primarily because it is the nation's largest trading partner and holds the keys to most of the country's energy requirements. That is reason alone to maintain a close friendship with the giant bear.

Some observers also believe that one of the positive results of the CPM victory will be the settlement of the Transdnistrian conflict. This may be naive. The victory of the Communists in Moldova is not an argument to reunite the country after 10 years of a

de facto separate existence. That could only be true if the secessionists were ideologues. But the secessionist leaders in Tiraspol are running a business enterprise which depends upon the continuation of the conflict in the region for the economic and financial revenues that they exploit from the territory. The secession has little to do with the economic orientation of Chisinau or the pro-Western alignment of its leadership. This is why the secessionists have already expressed skepticism about the CPM's victory. The Transdnistrian conflict can only come to an end when Russia ceases its support for Tiraspol.

Consequently, what has most likely occurred in Moldova is that the divisional bickering of the past four years is now over. A strong political leadership has emerged that appears to be pragmatic and therefore oriented towards a social democratic form of market economy despite its communist label. Some things that the leadership in Chisinau will now undertake may exasperate Moldova's friends in the West, but all in all, Moldova should turn out to be an easier place to do business than it has been during the past four years.

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