

Superficies Solo Cedit in the Latvian Law

Jānis Rozenfelds, Dr. iur.

Faculty of Law, University of Latvia

Professor of the Faculty of Law

E-mail: law@rozenfelds.lv

The article is dedicated to the so-called problem of divided property, focusing upon the fact that in difference to the legal regulation, which existed in pre-war Latvia, the divided property in the current legal situation manifests itself as the existence of two independent and unrelated ownership rights regarding two different objects – building and land – within one and the same plot of land.

Keywords: *superficies*, superficiesiary, construction, land, legal technique, principle, construing transactions, divided property, servitude, *emphyteusis*, fiction, dualistic system of property, enforced lease, *dominium directum*, *Ober-Eigentum*, *dominium utile*, *Unter-Eigentum*, farmsteads of collective farmers, nationalisation.

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Introduction

Recognition of constructions, gardens and other moveable property attached to land as part of the land (*superficies solo cedit*) means the landowner's ownership right to the objects attached to the land, which the owner of the materials used for construction, respectively, loses. *Superficies* is understood as the existence of separate, other person's right on the land (*ius in re aliena*), for example, the building leasehold. In such a context the existence of various rights and interests is discussed,

contrary to *superficies solo cedit*. In assessing various systems of law, it has been noted that *superficies solo cedit* is typical of the East European block countries, since during the period of communism the ownership right to land did not exist or existed only formally.¹ This, apparently, does not mean *superficies* as a sub-type of ownership rights to other person's property, but a situation, when the ownership rights to land and to buildings are divided because of the suspicious attitude by the communist system of law towards property in general and land property in particular.

Latvia's legal system continues to contain elements, which, intermittently, can point to one, another or a third manifestation of *superficies solo cedit*.

Superficies solo cedit has been enshrined in Section 968 of Latvian Civil Law (CL): "A building erected on land and firmly attached to it shall be recognised as part thereof." Section 14 of "Law On Time and Procedures for Coming into Force of Introduction, Inheritance Law and Property Law Part of the Renewed Civil Law of the Republic of Latvia of 1937" envisages a number of cases, when the ownership right to buildings has been transferred to another person, independently of the landowner. The laws on land reform, apartment ownership and privatisation envisage similar exceptions. Thus, since the reinstatement of CL in 1993 a dualistic system of property has developed.² This system can be called dualistic both because of the aforementioned division of property rights and because it is impossible to link this legal regulation with a uniform, principal solution, but rather to one, based upon several mutually exclusive principles.

1 Genesis of *superficies solo cedit*

Historically, as the Latin name suggests, the origins of *superficies solo cedit* are linked with Roman law. In Roman law sources *superficies solo cedit* is linked with the origins and expiry of ownership right. *Superficies solo cedit* denotes the unavoidable fact that by attaching a moveable property to land, the right to these properties is transformed – the moveable property permanently attached to land becomes the property of the landowner (simultaneously ceasing to be moveable property).

The respective description of the situation has been indicated as the source for the predecessor of Section 968 of CL, currently in force, – Section 771 of the Private Law Code (PLC).³ It follows from the respective excerpt (D. 41, 1, 7, 10)⁴, that the materials used for construction belong to the builder, who, building upon his own land, has used other's materials. At the same time the previous owner does not lose his ownership right to the materials, such used, however, cannot claim ownership right to them, because the Law of the Twelve Tables (ancient original source of Roman law) do not allow claiming such materials back, however, the Law of the Twelve Tables envisages that the user of these have to repay to the owner of materials double value of these materials. "Thus, [Gaius, the author of the fragment, concludes rather unexpectedly – J.R] if the building collapse, the owner of the materials has the claim to ownership right (*vindication*) to these materials." Thus, we can conclude that starting from the very origins *superficies solo cedit* contained inconsistency (since the ownership right to property is acquired by the builder, even though the previous owner does not completely lose his right, he just loses "claim", while the building exists).

Section 968 of CL, just like its predecessor Section 771 of PLC, does not envisage a mechanism for compensating for losses – obviously, not because liability for using materials owned by another in construction were excluded, but rather because

the authors of PLC in truly pandectic spirit did not deem it necessary to make references to such obvious matters in an inappropriate place, i.e., to discuss issues linked with contract law in a chapter on property law. The situation described in the second fragment, which is noted as the original source of Section 968 of CL, Section 771 of PLC, (D. 41, 1, 7, 12), leads to an absolutely opposite result, namely, if the owner of materials has used them for construction, building on land owned by another. In this situation the builder, who was aware that the construction takes place on land not owned by him, irrevocably loses his ownership right to materials utilised in this manner. I.e., in this case the mechanism of fiction, favoured in Roman law, is offered as a solution to the situation, as it is assumed that the owner of materials, by building the materials into another person's property, has simultaneously agreed that by this action he waves his right to the used materials, therefore he cannot reclaim ownership rights to the used materials, even if the building were to collapse later. The author of the aforementioned fragments has not made the effort to explain, why in the first case the owner of the materials, in addition to the right to receive the double value of the used materials retains the claim, the implementation of which fully depends upon a chance occurrence – collapse of a building, but in the second case the owner of the materials has neither the claim to materials, nor compensation for losses.

As we see, this situation rather reminds of the one envisaged in Section 970 of CL, however, contrary to what might be expected, several other excerpts, not this one, are indicated as the primary source of Section 773 of PLC, the predecessor of Section 970 of CL.

An excursus into the past, even though allows explaining the origins of *superficies solo cedit*, shows that it is useless to search there for features of scientific classification, which would allow understanding the essence of *superficies solo cedit*. An attempt to define the concept of *superficies solo cedit*, encountered in Roman law, would lead to the conclusion that in these cases we do not encounter a theoretical principle, but, rather, reliance upon unavoidable fact that the objects that are inseparably attached to land should be treated as part of the land. Had the lawyers of ancient Rome perceived *superficies solo cedit* as a principle, they would not have envisaged parallel to *superficies solo cedit* also *superficies*, which is to be understood as the right to buildings, as the result of which the one who is building, quite on the contrary to the rule of *superficies solo cedit*, acquires independent ownership right to this construction. As the result we obtain *superficies solo cedit* as a means of legal technique – it is customary to recognise buildings as part of the land, unless stipulations to the contrary exist. The regulation envisaged by a number of legal acts, still in force, points to the fact that in modern law *superficies solo cedit* might be assessed as a means of legal technique.

French Civil Code (FCC) is a vivid example of this, containing a number of *expressis verbis* rules on what should be recognised as immovable property “by their nature” – buildings (Section 518), wind or watermills (Section 519). In addition to these also property, which is recognised as being immovable property by law (in the absence of conviction that these objects should be recognised as immovable “by their nature”, this remark is not used), i.e., harvest not yet gathered (Section 520), growing trees (Section 521), live stock given to the farmer (Section 522), water pipes (Section 523), articles, which the proprietor has placed on his land for the service and management of it, including stock (Section 524). A detailed enumeration of

articles for furnishing premises follows – sculptures, mirrors and the like, which the owner has “attached for ever with plaster, lime or cement” (Section 525).

This rich enumeration further strengthens the perception of *superficies solo cedit* as a means of legal technique, used to denote the civil law circulation of some articles, first of all, because the detailed enumeration prevents ambiguity, secondly, because the FCC regulation in some instances differs from the one found in Roman law, thus proving that this division is an artificial construct, i.e., one, which is rather disconnected with “the nature of things”. For example, agricultural inventory, which FCC recognises as part of immoveable property, Roman law did not recognise as even equipment of an agricultural farm as a company.⁵ Moreover, the experimenting with casuistic descriptions of *superficies solo cedit*, manifested in FCC, shows that this method of regulation most probably further complicates the task instead of simplifying it, which is much more effectively dealt with by the general reference found in Roman law, with the disclaimer concerning the possibility to amend it in compliance with the owner’s will, i.e., the inventory shall not be recognised as part of the farm, unless the farm has been bequeathed in the will together with the inventory, namely, as an “equipped” (*instructa*) farm (D. 33, 7, 2, 1).

The Roman law, as well as the legal regulation of FCC, highlights the problem of the parts of immoveable property not as an objective distinction, i.e., unconnected with the will of subjects, but as a means, which is directly connected with construing transactions, for example, wills. The disclaimer “unless stipulations to the contrary exist ...” can be added to any of the aforementioned norms. I.e., this reference serves as an explanation to the lack of the manifestation of owner’s will, which solely determines the fate of articles more or less connected with the immoveable property.

To sum up – *superficies solo cedit* originally was neither a principle, nor a rule of law, but a means of legal technique, which not only allowed, but directly envisaged exceptions. This regulation had evolved to prevent misunderstandings, when the subject of a transaction (most frequently – a will) had not expressed his will with sufficient clarity.

2 Latvian legal doctrine – the theory of presumption and principle

Latvian legal science has dealt with this problem in an entirely different way. One of the most popular views, also the one most consistently supported by case law, is that *superficies solo cedit* is a presumption (theory of presumption). In accordance with this theory, a presumption exists that the building belongs to the person, who owns the respective plot of land.⁶ Some judgements contain similar conclusions⁷, however, others contain references to “the principle of unity of land and building” (theory of principle)⁸.

The theory of presumption is closer to the understanding of *superficies solo cedit* as a means of legal technique than the theory of principle. The presumption means a supposition, which may be overturned by proving the opposite. For example, in case SKC-77/2005 the Court concludes that in accordance with Section 14(5) of “Law On Time and Procedures for Coming into Force of Introduction, Inheritance Law and Property Law Part of the Renewed Civil Law of the Republic of Latvia of 1937” the buildings (structures), which have not been registered at the Land Registry Department, the State Land Service or the local government as independent objects

of property, shall be considered the property of landowner, but other persons may acquire ownership right to such buildings (structures), if the court has satisfied the claim of such persons to recognise the ownership right to such objects. I. e., according to the theory of presumption, the unity of land and building is only an assumption, which can be overturned by facts proving the opposite. Obviously, this outcome in the case would be impossible if the theory of the principle of unity of land and building were applied, because it is impossible to overturn or doubt principles using evidence on violations of these principles.

In difference to the theory of presumption, which is also based upon concession that divided title to property as regards buildings and land can be established by an agreement between the parties to civil law relations, the theory of principle, even if not excluding completely such an impact of the sovereign will of the subjects of civil law circulation upon establishment of divided property, restricts it significantly. For example, a court noted that the unity of land and building is a fact, which cannot be amended by the will of the parties to the transaction (Judgement of 9 January 2002 by the Senate in Civil Case No. SKC-32).

The existence of the theory of presumption and the theory of principle is a proof of dual attitude towards the principle of divided property not only in practice, but also in legal science; moreover, this dual treatment of the problem of building and land is rooted in the very origins of divided property in Latvian law. On the one hand, the pre-conditions for divided property were created intentionally, when CL was restored, by envisaging exceptions to the regulation set out in this act. At the time the grounds for these exceptions was the need to constitute the situation, which had actually developed and was taken over from the previous system, which did not recognize the right to own land. On the other hand, the numerous additions and amendments to this norm of the law prove that this is rather intentional move towards dividing immovable property. It is significant that several later studies put the main emphasis upon voluntary establishment of divided ownership rights to property.⁹

Neither the theory of presumption, nor the theory of principle assesses *superficies solo cedit* as a means of legal technique or analyses it as a problem of interpretation of transactions (of the two, the theory of presumption is closer to the idea of legal technique). Latvian legal literature rather tends to perceive every case, when the land and the building does not belong to one and the same person as an undesirable exception to the general rule. Since exception is a category, which can be used to explain and justify various anomalies, also in this case we encounter attribution of such properties, which are impossible, simply because they contradict the nature of things. For example, irrespective of the obvious fact that the existence of a building, owned by another person, on the land makes utilisation of land practically impossible, the rights of the landowner and the owner of the building are treated as totally sovereign, moreover, as unlimited rights. Rights, which essentially are limited by the rights of another person, are still viewed as unlimited, absolute. It is impossible to characterise this system otherwise, but as dualistic, based upon the idea that simultaneous existence of two, mutually exclusive facts is possible.

3 Dualistic and divided system of property

It is important to distinguish between the system of dualistic property and the system of divided property both as to terminology and in reality. This should

be done because frequently the first one is erroneously identified with the latter. The system of divided property means the existence of separate rights on the land owned by another person. This is the right to the property of another (*ius in re aliena*), which may manifest itself as a servitude, hereditary leasehold (*emphyteusis*), the right to build (*superficies*), yet retaining a united property. Thus, the system of divided property is restriction of the ownership right in favour of another person's right. The dualistic system of property allows parallel existence of ownership right – to the building and the land, i.e., the dualistic system is based upon presumption that two sovereign ownership rights with regard to one and the same spatially delimited object are possible. One can assume that initially (i.e., following the reinstatement of the Law on Land Registers on 5 April 1993) this dualistic approach evolved by applying the exception to Section 968 of the CL, which was envisaged in the course of restoring the CL part on property law, as envisaged by Section 14 of “Law On Time and Procedures for Coming into Force of Introduction, Inheritance Law and Property Law Part of the Renewed Civil Law of the Republic of Latvia of 1937”, registering into Land Registers the structures and buildings, with regard to which independent right to property had evolved. Section 29 of the Law on Land Registers envisages that a separate Land Register division shall be opened with regard to each independent immovable property.

The dualistic system is based upon fiction. The system of divided property, which to a greater or lesser extent is allowed in many systems of law, can exist, without colluding with *superficies solo cedit*. The dualistic system excludes *superficies solo cedit*. This is exactly what the term “exception” denotes with regard to *superficies solo cedit*, which should not be mistaken for the system of divided property, which does not contradict *superficies solo cedit*, but supplements it.

Within the system of divided property a united object of property still exists, irrespectively of the landowners' and builders' opposite interests. Thus, the interests of one person are subordinated to the interests of another. Usually it follows from the special value of buildings that the landowners' rights are subordinated to those of the owner of buildings. The practical result of terminating divided property is the total loss of the landowner's rights in favour of the builder. In such cases legislation predominantly constitutes a fact that has already happened – the loss of the ownership right to land in favour of the builder. This trend is typical of the United States of America 19th century legislation. Even though it, at least during its initial stage, colluded with *superficies solo cedit*, finally this contradiction was solved in the way that ownership right to land was voluntarily or by forced sell alienated in favour of the builder or manager of land.¹⁰ A similar procedure took place in the United Kingdom in the mid-20th century. This is reflected in the Judgement by the European Court of Human Rights in the case *James and Others*.¹¹

The opposite situations are possible. For example, in Japan the land is incomparably more valuable than buildings, since the building seldom exists for more than 30 years, thus the secondary market of buildings is virtually non-existent. Hence, the building as an independent value causes no interest.¹² In the case of a divided property the property remains united, even though “divided”. Even though the rights of one subject – usually, the landowners', are reduced to a symbolic minimum, the latter is always left the hope that the encumbrance upon his land property will end and the ownership right will be restored in full scope (principle of flexibility of property).¹³

The situation is completely different in the dual system of ownership, based upon the fiction of existing two sovereign ownership rights. In these cases there is even no mechanism (except for the right of first refusal envisaged by law), which would make the termination of such a system possible (collapse of buildings in the case of *superficies* or servitude; prolonged failure to pay the rent in the case of *emphyteusis*). Under the dualistic system, even if both properties have ended up in the ownership of one and the same person, such unification is possible only upon the initiative of the owner himself, moreover, the terms for such initiative envisaged by law (fees, expenditure linked with drawing up the inventory of the building) might rather demotivate the owner to do it.

The common feature of the divided property and the dual system of property is the fact that in practice they both lead to very similar results – one of the subjects enjoys the right to use the land, the other, however, has only nominal right to land, not including its actual use. However, these shared features should not delude as to the principally different nature of these two systems.

Within the system of divided property the different interests are always realised in one property, however, the dualistic system envisages the existence of two completely sovereign rights to property. Within the system of divided property the scope of both subjects' rights is accurately described. Thus, these rights can be realised within the accurately described limits, as the rights of one person start only where the rights of the other person end. For example, the heritable leasehold (*vectigal, emphyteusis*) reflects the essence of a divided property – the right to receive rent payments, as well as the right to use the land belonging to another subject, which follows from it. The right to build (*superficies*), in its turn, emphasizes the right of the builder to use the land, owned by another person, for construction or other purposes.

Contrary to this, the dualistic system envisages establishment of forced lease relations only as an ancillary product to the separate ownership right to buildings, which the landowner has to claim especially. But the existence of a building on another person's land is not described as a right, but as a fact, i.e., the building does not arise from the exercise of right to build, but, on the contrary, the fact that the building is located on land owned by another person gives rise to the special right. In the case of right to build the actual construction follows from the right, which has been established before the construction has been actually realised. Thus, there are no doubts concerning the issue that the right to build does not cease to exist if the building actually collapses. The dualistic system, however, hides the fact that one person's right is subordinated to another person's right. Therefore one of the most ambiguous issues is, whether the right to build is or is not dependant upon actual existence of the buildings.

The dualistic system of property has the peculiarity that the formal description of rights does not reflect at all or reflects very inaccurately the actual content of right. Like any exception the dualistic system is a description of a phenomenon, which cannot be explained by analysing this very description ("exception confirms the rule", which might as well be expressed as the denial of this causality). Thus, in difference to the system of divided property, which retains *superficies solo cedit*, the dual system is incompatible with *superficies solo cedit*. This is exactly the reason why it is a dualistic system, in which alongside the immoveable property subject to the postulate or principle of *superficies solo cedit* exists within a system of property, being exception to this system.

4 *Superficies solo cedit* in the inter-war period – the differences and similarities with the current regulation

The legal regulation of immovable property in the inter-war period is characterised by a radical transition from the legislation, which existed at the moment when independence was declared (legislation of the initial period) to legislation, which existed at the moment, when Latvia *de facto* lost its independence (legislation of the final period). The divided property in the pre-war Latvia in accordance with the concept, which was taken over in PLC from the pandect law, consisted of dominant property, called by V. Bukovskis¹⁴, as well as F. Konradi and A. Valters¹⁵ *dominium directum*, *Ober-Eigenthum*, and the superficies (*dominium utile*, *Unter-Eigenthum*), defined by Section 945 of PLC (not taken over into CL).

It should be taken into consideration that the intention was to terminate some rights to buildings and structures, not envisaged by CL, but which had evolved as dominant property rights prior CL came into force, in accordance with the procedure set out by the law “On revoking divided property rights”¹⁶. However, this had to happen in a longer period of time, with the owners of the buildings gradually pre-empting the property rights to land.

The existence of the concept of *dominium directum* (*Ober-Eigenthum*) and *dominium utile* (*Unter-Eigenthum*) or the divided property (*dominium divisum*), which dates back to the Middle Ages, is typical of the initial stage legislation. The literature on pandect law emphasizes the link between the right to build (*superficies*) and the right to heritable leasehold (*emphytheusis*) regulated in the Roman law.¹⁷ Likewise in Roman law, the rights enjoyed by the builder, who has the right to build to the structure erected on land owned by another (*superficiarius*), the subject of the right to use, based upon the heritable leaseholder (*ager emphytheuticarius*) in relation to the landowner are so extensive that the landowner has only the nominal title of the owner left.

Thus, the concept of divided property in the initial stage of Latvia’s legislation totally complied with the principle of *superficies solo cedit* and did not contradict it, granting the title of the owner *dominium utile* to the subject or the superficiary (PLC 942).¹⁸ Notwithstanding the deceptive terminology, in the practice the use of divided property also within this period ensured the priority of one concrete owner (superficiary) over the nominal owner (dominant owner).

However, when PLC was codified, the norms on divided property (PLC Section 942–952) were not included in the Civil Law of 1937. In view of the fact that neither PLC, nor its successor CL envisages the right to building and the right to hereditary leasehold, since these, as we see, were included in the peculiarly synthesised form of regulation on divided property included in PLC Section 942–952, but by discarding these norms the traditional instruments for ensuring the specific separate rights to buildings were excluded from CL. Thus, the coming into force of CL created the first pre-conditions for the situation, when the legal regulation no more fully coincided with the reality, since by excluding from codification the very concept of divided property, the preconditions for eliminating divided property were created, but, in fact, this divided property continued to exist. It is obvious that CL as an act codifying law could not eliminate, establish or change the existing legal relationships. A special act had to be adopted for this purpose, envisaging elimination of the right to divided property by pre-emption.¹⁹

Since the majority of PLC norms were included into CL mechanically, without systematization, contradictions are typical of these changes – on the one hand, by denying the existence of the divided property rights in principle, occasionally the terminology, which was based upon the concept of divided property, was retained. For example, references to the fact that in some cases “building is the leading immovable property” (CL Section 1143); as regards personal servitudes, the term “the user of the building” is still retained (CL Section 1209). Even though the authors of CL had been, obviously, in favour of the concept of undivided property (“If a superficies erects a building on servient land, upon the termination of the superficies neither he or she nor his or her heirs may demolish it, unless the superficies has specifically acquired such right” (CL Section 1210), however, it does not follow absolutely from this norm that the parties may not agree otherwise. But it is not stipulated either that the construction conducted in the framework of servitude would be the grounds to have right to the constructed, as the legislations of some other countries provide.

Thus, Section 675 of the Swiss Civil Law²⁰ envisages that buildings and other structures, which are located on the ground or underground in such a way as to be permanently attached to land, may be the property of a person, who is not the landowner, if this right is registered in the land register as servitude. At this point a critically minded reader might object that Section 675 of the Swiss Civil Law also contains features of the dualistic system. However, the aforementioned norm describes the rights of both parties with sufficient precision. Moreover, the fact that the division of land register, which reflects these “constructions belonging to another person”, is that of the immovable property, which these structures encumber. In difference to SCL, Latvian CL does not allow the existence of such separate ownership right at all, but envisages only compensation of costs or demolishing the building (CL Section 969, 970). Neither did CL accept any other form of legal regulation for the divided property – neither the right to build (*superficies*), which is envisaged for example, in 1943 Civil Code of Italy (ICC)²¹, Section 952–956, nor the right to hereditary leasehold (*emphyteusis*), envisaged by Section 957–977 of ICC. I.e., by giving up the “right of dominant property” of the Middle Ages, CL did not envisage any other replacement legal instruments for regulating divided property rights, which were typical of the legislative systems of other countries at the beginning of the 20th century. On the one hand, such legal regulation at least apparently is aimed at intensifying *superficies solo cedit*, on the other hand, as this legal regime neither at the time it was established, nor later meant giving up the divided property, but rather ignored the legal reality, in which the divided property continued to exist, and in practice promoted cultivation of fiction, which is always the inevitable result of ignoring the legal reality.

Giving up the construction of “dominant property” and “superficiary” would be justified, if the law had introduced instead of it *ius in re aliena* forms appropriate for the existing divided property – the right to build, the hereditary leasehold – or to transform the institute of servitude in accordance with these needs. However, this did not happen.

It can be concluded that giving up the construction of divided property was not a well-considered measure. Firstly, the mechanism for its actual termination was created, without taking into consideration things related to the expenditure and effort of the owners themselves, which, in contemporary world, would inevitably lead to complaints about human rights violations, which manifest themselves

as the violation of Article 1(1) of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; secondly, as the further development of Latvian law shows, it was inconsiderate to give up the mechanism, which envisaged deviations from *superficies solo cedit* (the right to build, hereditary leasehold).

5 *Superficies solo cedit* legal regime during the period of de facto loss of independence

Latvian civil law underwent even more radical changes leading towards dualistic system following occupation.²² It is interesting to note that also The Civil Code of the Russian Soviet Federative Socialist Republic, which in Latvia entered into force on 26 November 1940, envisaged a special Chapter on the right to build (Section 71–84 -c).²³

During this period, at least formally, there was no grounds for discussing *superficies solo cedit*, since, when land was nationalised, the buildings were not entirely nationalised at the same time. However, during this period of time the attachment of building to land of a completely opposite nature evolved. The ownership right to buildings could become a pre-condition for the so-called right to use land. Usually the area of land allocated for using or constructing a building was within the range of 0.06–0.12 ha. It is noteworthy that literature of the period describing the rights of a natural person to a residential house does not refer to the right to use land. It is only noted that “Section 91 of LC [Land Code of Latvian SSR – J. R.] envisages that in case the building perishes because of natural disaster or because of age, the user of the land retains the right to use the land if he within two years with the permission of the Executive Committee of the local council [i.e., the local government – J. R.] and in accordance with a design approved in due procedure starts restoring the demolished buildings or constructing new ones”.²⁴

Alongside the right to use the land, connected with the property right to buildings owned by natural persons, there was the plot of land in personal use of a collective farmer’s family (collective farmer’s farmstead) for setting up a vegetable garden and an orchard up to 0.50 hectares.²⁵

6 Return to *superficies solo cedit* following the restoration of independence

As regards the consequences of occupation period, this is the paradoxical co-existence of two antagonisms:

- 1) in accordance with the principle of Latvia’s *de jure* continuity, the legislation that concerns the period of occupation has no impact upon the existing legal regime;
- 2) the existence of the dualistic system of property, allowing separate ownership right to a building located on a land owned by another person, is being explained as a temporary situation, caused by the consequences of occupation.

In practice the dualistic construction of property exists alongside legislation, from which even the system of divided property, which was tolerated until 1937, has been excluded. Apparently, mechanical restoration of CL property law was not advantageous for dealing with the problem. The system of 1864–1937 PLC

would have been closer to the existing one, compared to the CL system of 1937. The next conclusion, which follows from the aforesaid, is that at the time when CL was restored, a sufficiently comprehensive analysis of the situation, which had evolved, was not conducted. As the result of all this, return to *superficies solo cedit*, alien to the Soviet law system, could not occur otherwise as only in the form of the dualist system, described above, i.e., as the co-existence of two mutually exclusive approaches.

The further development of dualistic system was totally opposite to the forecasted one: instead of the system of exceptions, caused during restoration of CL, to be gradually replaced with a system restoring the unity of land and building, the situation developed in the opposite direction – over time the list of so-called exceptions increased instead of decreasing. To verify this, it is sufficient to compare the initial and the current wording of Section 14 of the law “Law On Time and Procedures for Coming into Force of Introduction, Inheritance Law and Property Law Part of the Renewed Civil Law of the Republic of Latvia of 1937”.

“Section 14

The regulations of Section 968 and Section 973 shall not be applicable and the buildings (structures) or orchards (trees), until the merging into one property with land, shall be regarded as an independent object of property, if one of the following conditions exists:

- 1) the buildings have been built and the orchard (trees) has been planted on land, which has been allocated for this purpose by law, acquired through a transaction or on the other legal grounds before the Part on Property Law of the Civil Law came into force (1 September 1992), but the property right to land has been restored or is to be restored to the former owner or his heir (successor in rights) or if the land is cognizable to or belongs to the state or local government;*
- 2) the buildings have been acquired by privatising state or local government companies (business companies) or separate objects of immoveable property belonging to the state or local government;*
- 3) the buildings have been built or the orchard (trees) has been planted on a land belonging to or cognizable to the state or local government, which in accordance to law has been allocated for permanent use during the period of land reform;*
- 4) the buildings (structures), through the exercise of right to building leasehold, have been built, as the ancillary property of privatised companies, this buildings (structures) shall be considered an independent object of property together with the buildings to be privatised;*
- 5) the buildings (structures) have been built on leased land, if the contract on land lease has been concluded for a period of at least ten years, and the contract between the landowner and lessee envisages the lessee's rights to build upon the leased land buildings (structures) as independent objects of property. Such buildings (structures) shall be regarded as independent object of property only as long as the land lease contract is effective.*

If the buildings (structures) or the orchard (trees) are the object of independent property, then the landowner has the right of first refusal or the right to pre-emption. The owner of the buildings (structures) or the orchard (trees) shall have the same right of first refusal or the right to pre-emption in case the land plot is alienated.

The former owner and his heirs have the right of first refusal as regards land, buildings (structures) and orchards (trees) in accordance with the laws regulating the restoration of property rights and privatisation.

The buildings (structures), which have not been registered at the Department of Land Registers, the State Land Service or the local government as independent objects of property, shall be regarded as the landowner's property in accordance with Section 968 of the Civil Law. Other persons may acquire the ownership right to such buildings (structures), if the court has satisfied the claim of such persons to recognise the property right to the respective objects.

(in the wording of 24 April 1997 of the Law, which entered into force on 21.05.97.)"

The initial wording of this Section was aimed only at defining the legal status of structures erected during the Soviet period:

"Section 14

The regulation of Section 968 and Section 973 of the Civil Law shall not be applicable in cases, when the building has been built (acquired by other legal means) or the orchard (trees) have been planted on a plot of land allocated for this purpose in compliance with the laws valid at the time, but the property right to this plot of land has been restored to its former owner or his heirs (successors in rights).

In those cases when in accordance with the special laws of the Republic of Latvia, which envisage the restoration of the property (inheritance) right, the legal relationship of lease shall be established between the owner of the land plot and the owner of the building or the orchard (trees), but the owner of the building or orchard (trees) intentionally fails to comply with the terms of lease, the owner of the land has the right to claim termination of the lease relationship, applying the regulation of Section 970 and 978 of the Civil Law.

The former landowner (unless he has received an equivalent plot of land in his ownership or compensation) has the right of first refusal to acquire in his ownership the building and the orchard (trees). The owner of the buildings and the orchard (trees) has the same right of first refusal if the plot of land is alienated."

The following text has been added to Section 14(1) of this Law, following the words "former owner or his heir (successor in rights):

"as well as in cases, when state and local government enterprises, state and local government business companies or separate buildings or structures owned by the state or local government are privatised in accordance with special laws that regulate their privatisation" (wording as of 25.11.1994).

Thus, within five years following the restoration of the CL Part on property law, substantial changes were introduced, attributing exceptions to Section 968 of CL not only to objects erected in the period between nationalisation of land and revoking of CL until restoration of independence, but also to objects acquired through privatisation or even built after privatisation (Para 4 of Section 14), or buildings built by the lessee upon leased land (Para 5 of Section 14). The latter has provided grounds for introducing such concept as "voluntarily divided property" alongside the concept of "forcibly divided property", covered by Para 1–4 of Section 14.²⁶

Apparently, the Law on Land Registers understands the words "immoveable property" as the property together with buildings and structures, irrespectively of the fact, whether there were separate rights to buildings and structures. Hence, the terminology of the Law on Land Registers was not suitable for the system of property envisaged by CL, as well Section 14 of "Law On Time and Procedures for Coming into Force of Introduction, Inheritance Law and Property Law Part

of the Renewed Civil Law of the Republic of Latvia of 1937". The judges, applying the Law on Land Registers in the new situation, had no choice. Abiding by the requirement of the Law on Land Registers, on every occasion when separate right to a building was identified, a new division was opened especially for it. Likewise, a new division was opened for the plot of land. Further on the legal fates of these in reality connected properties were separated, and they, continuing to be physically inseparably attached, started their legal existence as totally separated immovable properties.

This is the process, i.e., by making the initial entries on immovable properties into the land registers, the dual system of immovable properties evolved. It is of interest to consider, whether it could have been possible to avoid this dualistic system. The legal regulation and the experience of institutions applying the respective legislation exclude this possibility. Firstly, there were various subjects (persons submitting the corroboration requests), upon whose initiative entries into the land registers were made. The judge of the Land Registers, making the entry (like the person submitting the corroboration request) had no way of knowing that parallel to the submitter's of corroboration request right to the immovable property (land) another person's right to the same immovable property (building) existed. Secondly, even if the owner of the building, who could not have not known that he had no and could not have the owner's property right to land, were the first to submit the corroboration request, the Law on Land Registers contained an explicit requirement to open a new division for each immovable property.

7 *Superficies solo cedit* and the problems of integrating the legal regulation on immovable property in the EU

Since Latvia's system of immovable properties should be aligned with the majority of the "old" member states' systems, to which the dualistic approach, typical of Latvia, is alien, the prevention of the dualistic system of immovable property gains relevance. It is clear that the existing mechanisms, which envisage the path of voluntary agreement, predominantly – using the right of first refusal, as the only solution to the problem, cannot transform the system radically. The previous experience both in Latvia (1938) and other countries (the USA in 19th century, the UK in the 20th century) shows that most effective solution to the problem is nationalisation, which, however, does not seem to be appropriate for Latvia, especially in view of the historical experience, which might have developed radically negative attitude towards nationalisation as the method for reforming any property.

The proposal made by G. Bērziņš during a discussion organised by the Ministry of Justice, dedicated to this issue, seems to be promising.²⁷ One of his proposals is linked to changes in taxation policy, which might serve as an incentive for the owners of land plots, encumbered by buildings, to alienate this land in favour of the owners of buildings (apartments).

An opinion has been expressed in literature that the dualistic system will cease to exist, so to say, automatically, by the owner of the building acquiring the land in his possession and by the landowner acquiring the building. *"If later the owner of the building (structure) acquires the ownership of the land, the land plot shall be joined to the division of the building (structure) and the former division of the land plot shall be closed"*²⁸. The judge of the Land Register Department may perform such activities only upon the request of the person, who has been registered as the owner

of immovable property. Moreover, there are several reasons (costs, additional activities), which might rather be an incentive not to do it.

Summary

1. In difference to the present legal regulation, the pre-war regulation, which was in force until January 1, 1938 and which also envisaged existence of separate rights to buildings, was still manifested as the rights within one and the same immovable property – the so called *superficies*.
2. In difference to the present legal regulation, where neither the owner of the land, nor of the building enjoys privileges of ownership rights with respect to the other subject of law, the pre-war legal regulation provided that the right to buildings had the decisive meaning, respectively – the so-called legal usage of the property. Only the hereditary leasehold (*emphyteusis*) as equivalent to Latin *dominium utile* and German *Unter-Eigentum* could exercise the ownership claim while the subject of the so-called *superficies* did not have such rights.
3. The publication also discusses origins of *superficies solo cedit* in the Roman law and its different legal regulations in the modern system of law. It is proposed to call the present legal regulation as the dualistic property system in contrast to the divided property system of the pre-war period.

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