

Andrea Pradi (ed.)

**TRANSFER OF IMMOVEABLE  
PROPERTY IN EUROPE**

**FROM CONTRACT TO REGISTRATION**

**UNIVERSITÀ DEGLI STUDI DI TRENTO**  
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## PREFACE

The volume contains, for the most part, the papers presented at the International Conference on Transfer of Immoveable Property held at the Department of Legal Sciences of the University of Trento at the end of March 2009. It could be considered as a by-product of the research activities conducted by the group on Transfer of Immoveable Property in European Law, which investigate on this specific topic within the international research on the "Common Core of European Private Law" run by Professors Ugo Mattei and Mauro Bussani.

The conference has been for the group an intermediate step of the research launched in the summer of 2006 at the Department of Legal Science, University of Trento, by Professors Elizabeth Cooke (University of Reading) and Luz Martinez (University of Valencia), who I reached in the editorial board the year after.

This step has been a breathing space in the on-going research with a little different spirit from the one which characterize the research related to the Common Core. Instead of comparing the operational rules, we wanted every national reporter to lay out the legal principles on which different systems base the Transfer of Immoveable Property. This has not wanted to be an act of intolerance toward the methodology of research on the Common Core, but a moment to deepen the same, as through the factual approach (the methodology on which the Common Core Project is based) some information concerning the administrative organization of the different models of immoveable registration systems' (the presence of a notary, the organization of the Land register, what it register, how it is administrated) is difficult to make them emerge.

However we assume that these information are very important for the completion of the work of the main project because it seems that despite the different legal systems have developed very different principles (eg. consensualistic one vs. the registration principle) at a practical level we may observe that there is abroad convergence in entrusting the registration moment with a crucial role in the transfer process. But this constitutes the future development of the work on Transfer of Immoveable group's within the Common Core of European Private Law project. For

the moment it has been decided to collect the conference materials in this book who wants to be an easy introduction to the principles governing Transfer of Immoveable Property in some European Countries.

Other than the Department of Legal Science of University of Trento, in the persons of its Director Prof. Gianni Santucci and its staff members, a special thanks goes undoubtedly to the Collegio Nazionale del Notariato (Italian Notary Council), the Colegio Nacional de Registradores de la Propiedad (Spain) and the Associazione RB Schlesinger per lo Studio del Diritto Europeo, that has contributed financially to the realization of the Conference and consequently to the accomplishment of this volume.

Last but not least, a sincere thank goes to all the contributors of the volume that after working hard by diligently writing their paper, have patiently waited for the delays in its publication, that are attributable only to my person.

Trento January 2012

Andrea Pradi

## ECONOMIC QUESTIONS CONCERNING THE RULES FOR THE TRANSFER AND PUBLICITY OF IMMOVABLE PROPERTY

*Luz M. Martínez Velencoso \**

### *1. General questions. The role of property rights from the perspective of economic theory*

The rules that regulate private property provide a legal framework for the distribution of wealth in each State. This article will attempt to analyse these rules from an economic perspective, an analysis that, in the words of POSNER, is fundamentally a common sense approach to the question.

The classic theorem of COASE<sup>1</sup> is well known in the field of economic – juridical science. According to this theory, if property rights are well defined and there are no transaction costs then the market will be in a perfect, efficient state of equilibrium. By well-defined property rights, COASE was referring to a hypothetical situation in which all goods and resources would have a titled owner, and the title would clearly specify the limits to ownership and the steps that would be necessary to remove these limits. By the absence of transaction costs, COASE meant that there would be no costs attached to an agreement that transferred a right from one holder to another. The costs that derive from transfer agreements can be grouped into three different types. 1) Costs associated with the search made by those interested in acquiring property rights, or made to find a subject interested in acquiring property rights. 2) Negotiation costs, or costs that derive from the design of the content of the transaction. 3) Execution costs, in the case that the agreement has not been kept to and needs to be enforced.

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<sup>1</sup> This thesis is expounded in his well known works “The Federal Communications Commission”, *Journal of Law & Economics*, vol. 2, 1959, pp. 1-40; “The problem of social cost”, *Journal of Law & Economics*, vol. 3, 1960, pp. 1-44.

According to COASE, the law can facilitate negotiation by reducing the costs of transactions, and reduced transaction costs encourage the transmission of property, which in turn allows for the growth of a nation's wealth. The voluntary exchange of goods redistributes property, as it changes hands from those who attribute to it one value, to those who attribute to it another, higher value. Therefore, the rules that govern the exchange of property maximize wealth by protecting and encouraging the voluntary exchange of goods. These same rules also maximize wealth by permitting proprietors to claim the benefits derived from the use of a resource<sup>2</sup>.

The economic analysis of property rights is an interesting approach to their study, because it places property rights in relation with the costs associated with their transfer. This offers a different perspective from the traditional approach to their analysis that normally centres on the definition, content, delimitation, and forms of transmission of property rights, and it is also recognition of the fact that these elements are not independent from the costs and the practicalities of their commercial transfer<sup>3</sup>.

Property rights have a fundamental effect on decision making processes concerning the use of resources, and therefore have a profound impact on economic activity. They determine the identity of economic agents and define the distribution of wealth in a society. There are, therefore, clear advantages to having a secure system of property rights within a legal system. States pursue this objective of economic efficiency by regulating the transmission of property and by establishing mechanisms to give publicity to property rights, both of which favour property transfer.

In economic theory, ownership is defined as the freedom or the capacity to adopt decisions over goods and these decisions may effect how goods are used, to whom their benefits should belong, and whether

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<sup>2</sup> Concerning this question see Cooter, Ulen, 2004, p. 113.

<sup>3</sup> Cfr. Gómez Pomar, 1998, p. 1067. In the Common Law tradition, see especially Barzel, 1989, p. 2, who makes a connection between the concept of property rights and transaction costs.

to effect changes in their form or substance<sup>4</sup>. It is these same faculties that are conferred on a subject by the right of ownership according to the traditional definition given by article 348 of the Spanish Civil Code. There are essentially three characteristics that property rights need to have in order to be efficient:

1) They need to be universal. All goods and resources should be owned, with the exception of those that are so abundant that they can be freely consumed without becoming scarce. 2) They need to be exclusive. This means that it must be legally possible to exclude others from using or consuming them. 3) They need to be transferable. This allows goods and resources to be passed on to users that are more efficient<sup>5</sup>.

### *1.1 Transaction Costs*

COASE was one of the first economists to draw attention to the importance of the role played by transaction costs. Transaction costs may be defined as “the cost of transferring property rights”. Property rights always entail a cost, as our freedom to use goods and resources is always limited. Economic transactions are the transfer of property rights. Transactions require a series of mechanisms to protect the agents that participate in them from the risks inherent in the exchange. The function of contracts is to plan an agreed response to future events that might affect the object of the transaction. All transactions involve costs. These costs often stem from the search for information. This search for information may relate to the object of the transaction, it may be a search for the best purchaser, or it may be a search for information about the purchaser’s circumstances and conduct. Negotiating an agreement to determine the positions of the parties and the price of the transfer, results in costs, and so does drawing up a contract. Once the precise content of the agreement has been clearly defined, there is still the possibility that further costs will be incurred if one of the parties does not comply with its terms voluntarily and it is necessary to enforce the agreement.

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<sup>4</sup> Williamson, 1985, p. 27.

<sup>5</sup> Cfr. Paz-Ares, 1981, p. 645.

When subjects agree to exchange goods, they do so because they believe that what they will obtain from the exchange is worth more than what they offer in return. The exchange of goods would have no costs if each party knew exactly what it wanted from the exchange (that is the use it expected to obtain from the goods to be exchanged) and to what extent these goods had the qualities that each sought to acquire<sup>6</sup>. In the opinion of BARZEL, in order for property rights to be clearly defined, it is necessary that both their owner, and any other party interested in their acquisition, should have access to information detailing the properties of the goods in question. This is more difficult in the case of goods that are unique (such as immovable goods) than in the case of standardized goods, and therefore negotiations over unique goods are more complex than negotiations over fungible goods. COOTER and ULEN comment that the negotiations over the sale of a melon are quite simple as there is very little that one needs to know about the melon. However, the negotiations necessary for the acquisition of a house are much more complex as they often include looking for finance, compiling information about the state of the property and settling on a price. The seller of a property is obviously far better informed about its condition than the purchaser is, and the purchaser is in a far better position to assess the likelihood that he will obtain the necessary finance for the purchase. It is for this reason that the rules that regulate property rights create instruments that publicly state the ownership of goods, such as Land Registers. These are legal mechanisms that reduce the costs of the transfer of property rights.

### *1.2 The faculty of disposition and acquisitions "a non domino"*

One of the faculties conferred on the owner of a property is the power of disposition over it. The definitions of the right of ownership provided by the Spanish, Italian and French Civil Codes all refer to this power of disposition over property. These Codes devote a great deal of attention to resolving the problems associated with the transmission of property from

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<sup>6</sup> On this subject in Spanish legal doctrine cfr. Alfaro, 1996, p. 143.

one subject to another. When a subject has the right of ownership, he wants to be certain that he effectively has the power of disposition over the property and have some guarantee that no other subject will appear who claims to have acquired the same right. The owner of the right requires that his title to the property is superior to the rights of the subject that transmitted it to him and any rights that a third party might claim to have over the same property. The information one receives concerning a property can never be fully guaranteed to be accurate<sup>7</sup>, and the legal system cannot always protect the interests of both the previous and the present proprietor of a property at the same time. A rule that prevents individuals from obtaining ownership of a property if there is a thief in the chain of transmission will protect the interests of the present owners to the detriment of potential future owners. However, this type of rule also places a burden on the present owners of the property, as it lays the onus on them to demonstrate to any potential buyers that they are in fact the genuine owners. Alternatively, the law can protect the subject that acquires a property from the risk that third parties have a prior legal claim to it (article 34 of the Spanish mortgage Act is an example of this type of legislation). A law of this kind saves future purchasers the trouble of investigating the authenticity of the chain of transmissions, but the current proprietor cannot be sure that the property will not be taken away from him without his consent.

The laws that regulate these matters have to evaluate these risks and must try to minimize them for both parties as much as possible<sup>8</sup>. The law itself influences the quantity and quality of the information available and therefore affects the distribution of risks. To give an example; in some States there is a Register in which all past holders of a legal title to a property have had to inscribe their right to the property. A law of this nature reduces the risk that a thief appears in the chain of transmissions.

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<sup>7</sup>ARRUÑADA, 2004, p. 69, argues that: "the supposition that the information available is incomplete is essential. The registry of rights is designed to provide full and accurate information to protect both the previous and the present proprietor; and, if it is not able to protect the proprietors in a significant number of cases then its chances of survival are very limited".

<sup>8</sup> Cfr. Baird, Jackson, 1984, p. 301.

However, it also generates costs derived from the upkeep of the register. The law has to determine the information that is necessary for property rights to be delimited perfectly and for the risks to be distributed efficiently between the current proprietors and future buyers. It also has to strike a balance between providing incentives to increase the amount of information available about a property and the costs that these measures entail. In this way, the law can minimize the problem of conflicts between those that claim a valid title to the property, and increase the value of the property in the hands of the legally guaranteed title holders.

### *1.3. Legal security and security in the commercial transfer of property*

The problem just discussed could be considered part of what has been traditionally perceived as the dichotomy between the principle of legal security and trade security in commercial exchange. EHRENBURG, however, argues that this dichotomy does not really exist, as both principles seek to protect similar interests<sup>9</sup>. The general idea is that legal security protects the holder of the legal title to a right (the subject that has this right) while the principle of trade security protects the subject that acquires this right (the subject that wishes to have the right). Both principles seek to protect the legitimate owner of a right.

In relation with the right to ownership, the notion of security refers to the ability of the title holder of the property right to exploit the economic value of the resource in question exclusively, without being exposed to the constant risk that a third-party might dispossess or disturb him in the pacific possession of that right. Obviously, if this protection were only available from the private sector, then individuals would be forced to contract security firms, and the expense would be enormous and in most cases prohibitive. It makes sense therefore, that this protection is provided more cheaply and simply by the legal system. Article 348 of the

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<sup>9</sup> Taken from "Rechtssicherheit und Verkehrssicherheit mit besonderer Rücksicht auf das Handelsregister", *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts*, 1903, pp. 273-338. The Spanish translation is by PAU PEDRÓN, cfr. Ehrenberg, V., *Seguridad Jurídica y Seguridad del Trafico*, Cuadernos de Derecho Registral, 2003.

Spanish Civil Code grants legal actions to proprietors to enable them to reclaim property from third parties that have it in their possession and also to declare the absence or inexistence of encumbrances over their ownership rights. In this way, the Spanish legal system reduces the costs implicit in the determination and safeguard of property rights<sup>10</sup>.

Legal security tries to guarantee that the title holder to a right has the effective possession of that right. This means that the title holder can appropriate the value of the use of that right and the value of the exchange of that right. Title holders therefore have the certainty that they alone may use or exchange the goods and resources over which their rights operate. Legal security also aims to prevent title holders from losing or being perturbed in their rights without their consent. The principal of legal security in this case can be identified with the prohibition of expropriation, as the aim is to ensure that the desired transmission takes place and is not frustrated by circumstances that are unknown to the subject wishing to acquire the rights to be exchanged. This is achieved when there are no market failures caused by inaccurate information that elevates transaction costs. When the information available is inaccurate, it results in economic inefficiency.

The price of resources is calculated as a function of the utility that can be obtained from them. If the holder of an ownership title does not consent to its transfer then it is because the offer he receives is less than the benefit he obtains from keeping it under his ownership. If he were to consent to this transfer then this would lead to what Pareto describes as a sub-optimal distribution of resources. However, it might well be the case that an ownership title that has the value of 400 for its title holder X does not pass into the hands of Y, who assigns it a value of 500, because the transaction costs are greater than 100. The aim of the legal system, according to the thesis of COASE, is to reduce transaction costs, and in order to do this it might sometimes be convenient to expropriate the title from X and assign it to Y, under whose ownership it has a greater value.

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<sup>10</sup> In the opinion of PAZ-ARES 1985, p. 12, "the creation of legal security allows for economies of scale, because as the volume of production increases there is a notable depreciation in the average cost of production".

X would be offered in exchange a price between 400 and 500, the market value. This is the logic behind the rules that govern trade security.

An alternative approach to the rules governing trade security is to make their objective that of avoiding the situation by which the rights of the subject that acquires ownership are negatively affected by circumstances that he could not have known about, due to a lack of information in the market<sup>11</sup>. In this case, the rules of trade security are rules that limit the information necessary to acquire a right. These regulations attempt to reduce transaction costs that could interfere with efficient exchanges. An example of this is article 34 of the Spanish Mortgage Act. This article limits the information considered relevant to a transaction to that published in the Land Register. However, these types of regulations increase the costs incurred by the original ownership title holders in order to reduce the risk that their goods are transmitted without their consent. These regulations can therefore only be considered efficient when they generate greater savings than costs.

For an acquisition to be considered valid the principle of legal security obliges the subject that acquires a title to establish that the subject from whom he acquires it is the genuine title holder, and that his acquisition forms part of a chain of legal acquisitions. However, the principle of trade security limits the information relevant for the valid acquisition of a right, and permits acquisitions *a non domine*. The first rule encourages the subject that acquires a right to verify that the transmitter is the real owner of the title in question, whilst the second rule provides a strong incentive for proprietors to protect themselves against the threat of dispossession<sup>12</sup>.

The following rules of Roman origin have proved themselves to be efficient from the perspective of an economic analysis of the question under consideration. *Ubi rem meam invenio ibi vindico* (the goods may be claimed in the place they are located). This expression means that the legal action to reclaim property may be exercised against third parties in possession of those goods. *Id quod nostrum est, sine facto nostro ad alium transferri non potest* (this means literally “our goods may not be transferred

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<sup>11</sup> See PAZ-ARES 1985, p. 19.

<sup>12</sup> Cfr. COOTER, ULEN, 2004, p. 151.

to another except by virtue of our acts. *Res inter alios acta, aliis nec nocet nec prodest*, (a contract cannot affect the rights of those who are not party to it). *Nemo plus iuris ad alium tranferre potest, quam ipse haberet*, (nobody is able to transmit more rights than those he possesses). These rules are efficient from an economic perspective because they enforce the idea that an economic resource should remain in the hands of its original owner<sup>13</sup> except when special circumstances arise that necessitate a different course of action.

Under exceptional circumstances, it may be possible to permit the temporary expropriation of the goods of a title holder when conditions arise that allow one to suppose that it would be in the interests of the title holder for this temporary expropriation to take place. This can only be the case when the protection afforded by trade security allows the subject the disposal of the right and when the benefit obtained from the change of ownership is greater than the value of the use of the right in question.

The rules relating to trade security are rules that transform the normal protection that the legal system gives to the title holder of a right: instead of protecting the subjective value that the right holds for its owner, these rules protect the objective market value of the right<sup>14</sup>.

## 2. *Instruments for the publicity of property rights*

When agreements concerning the transmission of rights are made, it is very important that the parties can be sure of the premises on which these agreements are to be based. Among these premises are those relating to the properties of the goods to be transmitted, and the authenticity of the title of ownership of the transmitter of the goods to be transferred.

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<sup>13</sup> Concerning this topic see Paz-Ares 1985, pp. 22-23.

<sup>14</sup> With reference to this subject see CALABRESI, MELAMED, 1972, p. 1112. In the opinion of these authors, the legal system can protect the property rights of a subject in two ways, by way of property rules or by the use of liability rules. The decision to implement one system or another will depend on the associated transaction costs. If the market functions without any appreciable transaction costs then it is preferable to protect the rights of the subject through property rules, whereas if there are externalities that affect the function of the market then it is preferable to operate a system of liability rules.

Any uncertainty surrounding the authenticity of an ownership title to goods makes the sale of the goods difficult and reduces their value. As a necessary condition for economic efficiency in the transmission of goods all doubts concerning ownership titles must be eliminated. To this end, the law creates instruments of publicity. A system of publicity can prevent the conclusion of fraudulent agreements.

### 2.1 *Publicity of possession*

Taking possession of an immovable good can sometimes be a necessary condition for the acquirer of a property to ascertain the superiority of his right over that of third parties. In some legal systems, as in the Spanish legal system, the handing over of the possession of a property is an integral part of the legal process of transmission. There is no doubt that the handing over of possession constitutes an instrument of publicity for property rights, as it is by this means that the title holder proclaims his legal ownership of the goods in question.

When the transmission of a property takes place but the subject that transmitted ownership retains the possession of the property then this situation may generate a high degree of uncertainty among third parties as to the genuine owner of the property.

Establishing property rights by means of the possession of goods can result in significant costs, for example, the costs occasioned by the need to investigate the chain of ownership of a good. This type of investigation is often difficult to carry out further back than a generation, and this in turn increases the risk that a subject will appear with a legitimate claim and dispossess the purchaser of his goods.

Another legal function of possession is that it allows for the acquisition of property rights by usucapion. The fundament of this mode of acquiring rights is the inactivity of the title holders: *If the owner sleeps on his rights, allowing trespass to age, the trespasser may acquire ownership of the property* (COOTER Y ULEN (2004, p. 154).

The advantages of usucapion from an economic perspective are that it eliminates doubts over the true title holder of goods and allows ownership to be conferred on those that are really using goods. The use of

this mechanism eliminates the risk of legal actions to reclaim property based on titles held in the distant past. Another economic justification of usucapion is that it prevents the situation in which valuable economic resources are left unused over long periods of time. This is because it gives the “productive” user a means of acquiring the title to a property to the detriment of the “unproductive” user.

There is however, a cost to usucapion, as property owners have to be certain to safeguard their properties from the risk of losing it and expel any potential usurpers.

## 2.2 *The Land Register*

Given the deficiencies of the publicity mechanism based on possession, Land Registry Systems have developed as the principal alternative to them.

One of the functions of the legal system is to regulate the institutions by which rights are exchanged so that these transactions are secure and foreseeable. One of these institutions is the Land Register, which collects information on the ownership, content, reliability, and expected revenue associated with rights over immovable goods<sup>15</sup>. The Land Register therefore operates over a fundamental element of the economic system, the delimitation, attribution, and protection of property rights.

By offering information on property rights, the Land Register reduces the costs associated with exchanges and foments the circulation of goods and it can therefore be described as an instrument in the creation of wealth. This view is endorsed in a report published by the World Bank, *World Development Report. From Plan to Market*, Oxford University Press, 1996, p. 89: “For pledging to work, lenders need a cheap and easy way to determine whether a prior security interest exists against the property. Some advanced legal systems do this by maintaining a publicly accessible registry”.

This same argument had been put forward many years before in the explanatory preamble to the Spanish Mortgage Act of 1861; “Our laws on

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<sup>15</sup>See GÓMEZ-POMAR, 1998, p. 1067. MÉNDEZ GONZÁLEZ, 2002, p. 881.

Mortgages stand condemned both by science and by reason as they neither guarantee property sufficiently nor exercise a healthy influence on public property. Furthermore, they do not establish firm bases for credit secured by real estate, they do not encourage the circulation of wealth, they do not moderate interest on money, they do not facilitate the acquisition of immovable property and they do not provide sufficient assurance to those who lend money on the basis of this guarantee. Given this situation the need for reform is pressing and indispensable for the creation of mortgage banks, to create certainty regarding ownership and other property rights, to combat the effects of bad faith and to free proprietors from the yoke of merciless usurers”.

The Land Register publishes information on the chain of transmissions of a property and reduces the risk of transfers being carried out without the compliance of the title holder. It also offers security to potential acquirers of a property by providing them with information concerning the temporal validity and the legitimacy of the transmitter’s title to the property.

To sum up, The Land Register lowers the risk that the acquirer will obtain an invalid title without increasing the threat to the transmitter that he may lose his title to the property without his consent.

As we shall see a little later in this article, there are several different types of Land Register (*register of deeds, title register...*), some of them attest to the ownership of a property whilst others offer mechanisms to protect property rights while leaving the question of establishing ownership to the rules governing possession. In some legal systems the Land Register is the exclusive source of information about the title holders of immovable goods, while in others the Land Register functions alongside a system of publicity based on possession.

From the perspective of an economic analysis, the publicity afforded by the Land Registry is of greater functional value than the publicity given by the mere possession of goods when these goods are costly. For other types of goods, the maintenance costs of this system of publicity exceed the benefits obtained from the reduction of the types of risk we have mentioned. Property registers are also more efficient when; the registered

goods are not subject to frequent transmissions, when the goods in question have a long economic life, and when the registered goods are susceptible to economic exploitation by several subjects at the same time (for example when it may be possible to constitute limited property rights over the goods – such as a mortgage).

A Property register is also efficient when the descriptions of the registered goods it provides give more information about them than their mere possession can.

### *2.3 The rules for the transfer of property as an instrument for sharing risk between the transmitter and the acquirer of a property.*

There are currently several different types of systems in use for the transmission of immovable goods in Europe that have developed as a result of the different legal traditions throughout the continent.

The rules that govern the transmission of property are important as they provide an answer to a series of fundamental questions that arise from the circulation of goods. Some of the most important of these questions are: a) Who has the effective power of disposition over the goods sold? b) Who is responsible for any damages caused to third parties by the goods? c) Do the goods constitute a guarantee for the creditors of the transmitter or the acquirer of the goods? d) Who supports the risk of the good perishing? e) Who has the right to obtain the benefits produced by the goods sold?

Broadly speaking, the main systems of property transmission in Europe can be divided into the following categories.

- A) Legal systems, such as the French legal system and those which developed under its influence (the Italian, the Portuguese and the Belgian legal systems), that link the transmission of property to a contract, in which case it is an agreement between the parties that produces the effective transmission of property.
- B) Legal systems such as the German legal system and those it has exerted an influence on (for example the Austrian, the Swiss and the Greek legal systems), in which the conclusion of a contract must be accompanied by a contract on the actual transfer of the property and

the inscription of the transmission in the Land Registry. In most of the legal systems influenced by the German legal system the contract on the actual transfer of the property has been substituted by the inscription. A characteristic of German law is that the contract on the actual transfer of the property is disconnected causally from the contract that details the obligations of the parties, in such a way that the nullity of the contract detailing the contractual obligations has no effect over the validity of the transmission of property.

- C) The Spanish legal system shares some of the characteristics of both of the legal systems previously cited. The Spanish system requires the celebration of a contract (a title) and the *traditio* (the delivery of possession with the intention of passing ownership, which is the *modo* or correct form). These requirements are an example of how some aspects of the Spanish legal tradition have asserted themselves over the strong influence of the French. A distinctive characteristic of the Spanish system is the causal relation between the contract and the transmission of property. If the contract is invalid then the transmission of ownership cannot be said to have taken place.
- D) The Common Law system uses a complicated process known as “conveyance” to transfer property. This process consists of various stages, and in some countries (such as the United Kingdom) the consummation of the process of acquisition is only achieved with the inscription of the title in the Land Registry.

From the perspective of an economic analysis (cfr SACCO, 1991, p. 900) the optimum system of property transfer would be that in which a single subject could be said to have; (1) an interest in safeguarding and conserving the physical condition of the property; (2) the legal means to protect the property, (3) and physical contact with the property, so that the title holder would be in a position to see whatever steps it might be necessary to take to safeguard and conserve it. However, it is not within the power of the legislator to condition the transmission of the property and the actions associated with the transfer in such a way as to ensure that these three conditions always coincide. The legislator is forced to

choose between conflicting interests and distribute risk between the parties in one way or another.

The three conditions stated are not met in the solution provided by the French legal system. SACCO describes the French solution as “pseudo consensual” and attributes it to an intense dislike on the part of its creators of the obligation to give. This obligation is substituted by the automatic effect of the transmission of the property. The obligation to give is characterized by the fact that the creditor, who has an effective interest in the condition of the property, does not have any legal action at his disposal to protect it. The authority to do so is held by the proprietor, who has a number of legal actions available to him to protect the property (such as the action to recover the property from the possession of third parties and the *actio negativa*).

As a consequence, the French legislator considered it advantageous to convert the buyer automatically into the proprietor rather than the creditor of an obligation to give. However, this consensual system has a weakness. While it transfers the authority to protect the property into the hands of the buyer, who is naturally the subject interested in preserving the property in good condition, it means that the ability to protect the property is conceded to a subject that does not have it at his disposal. This subject, who does not have the possession of the property in question, is therefore not in a position to detect potential threats to it<sup>16</sup>.

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<sup>16</sup> Spanish legal doctrine has come to the same conclusion; see for example ALONSO PÉREZ, 1972, pp. 254 ff. This author considers the rule *res perit domino* to be a deviation from the original *periculum est emptoris* applied in Roman Law and claims it was a creation of the natural law school of rationalists. This school of thought maintained that it was against the laws of nature and therefore wrong for the buyer to have to assume all the risk of a transaction, as it had traditionally been believed was the case in Roman law, and that in fact Roman law had not actually imposed this burden on the buyer. Hugo Grotius drew attention to several passages from the Roman period that he felt clearly showed that ownership was able to be transmitted, even without the act of placing the property in the possession of the buyer (the *traditio*), by the mere consent of the parties. However, even the consecration of the maxim *res perit domino* does not eliminate the injustice of the rule *periculum est emptoris*, because making the buyer the owner of a property without handing over to him the possession and the use of it is effectively the same as making him a creditor of the right to the property. In both cases the goods perish to the detriment of the subject that has to pay the price.

A part of German legal doctrine has criticised the German model of property transfer. These authors feel that in the sale of immovable goods, property should be transmitted on the payment of the price stipulated and the handover of the property<sup>17</sup>. This is the thesis held by members of the school of KARL SCHIMDT, who do not favour the current model of property transfer in the German Civil Code. They dispute the necessity to distinguish between obligatory contracts and contracts on the actual transfer of property.

The critics of this model draw on a wide range of historical sources to support their critique, including Roman Law, ancient Germanic Law, natural law philosophy and nineteenth century Prussian Law.

Another controversial issue in the German system of property transfer is the principle of abstraction. This principle states that contracts on the transfer of property are independent from their cause, which means that they produce effects even if the accompanying obligatory contract proves to be invalid. The decision to incorporate the principle of abstraction in the legal system is a political decision taken by the legislator in an attempt to balance the conflict of interests generated between the transmitter of the property, the acquirer and his creditors, the successors of both parties and the interests of commercial traffic<sup>18</sup>.

The principle of causality and the principle of abstraction are techniques used to distribute risk between the parties to a contract. The principle of causality better protects the interests of the creditors of both parties, because only the patrimony of their debtor is placed at their disposition and it does not protect the good faith of the acquirer's creditor based on the appearance of the situation created. In this way, a subject that has goods at his disposal is able to retrieve them from the patrimony of a third party, without his interests being secondary to those of the acquirer's creditors.

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<sup>17</sup> This is the opinion of Brandt 1940, pp. 322 ff., which has been criticised by Lange, 1943, pp. 188 ff.

<sup>18</sup> This principle was included in the German Civil Code due to the influence of Savigny. The celebrated German jurist considered just cause to be the agreement that the parties reach over the transmission of property whilst the property agreement itself (*Einigung*) is a separate legal act that does not depend on a contract outlining the obligations of the parties.

The principle of abstraction guarantees equality between the parties, because both the subject that transmits the property and the subject that acquires it only have legal actions based on their contractual obligations. According to the principle of causality this would not be the case, as there exists a danger that the seller might stake a claim to the property by means of the *reivindicativo* (which is used to defend a property right), while the purchaser of the property would only have legal actions based on the other party's contractual obligations).

In the opinion of LANGE, the best property transfer system would be that which combined the principle of causality with a system of acquisition of property *a non domino*. This would afford the parties protection against any possible defects in the underlying legal agreement and would also protect the interests of commercial traffic security<sup>19</sup>. This is the solution that Spanish legislators have opted for. While the Spanish system of property transfer is causal it also protects those that acquired their right from a subject that appeared in the Land Register as the title holder of the property by maintaining the validity of their acquisition, even when the transmitter was not really the legitimate owner. It also protects the acquirer from any other resolution or revocation of rights that did not figure in the Land Registry at the time of transfer (Article 34 of the Spanish Mortgage Act).

### 3. *The economic functions of the Land Register. A comparative analysis of the different Land Registration Systems*

The legal systems of Europe differ not only in the rules they employ to regulate property transfer but also in the organization and efficiency of their respective Land Registries.

In Germanic systems, the Land Registry has a fundamental role to play in transactions over immovable goods, as inscription in the Registry has

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<sup>19</sup> In the words of Lange, 1943, p. 226: "Ich habe deshalb stets gegen das Abstraktionsprinzip gekämpft und halte diesen Kampf auch heute noch aufrecht, obwohl ich die Begründung aus der Unvollständigkeit dieses gebildes heraus nicht mehr für zutreffend halte".

replaced the “traditio” or the act of handing over the physical possession of the property. In Germany itself however, inscription in the Land Registry has to be preceded by an agreement over the act of transferring the property (abstracted from the separate agreement over the obligations of the parties). In Switzerland however, the law requires a causal contract that has the specific aim of transferring ownership (arts. 657, I; 665, I ZGB). In both systems inscription is necessary, as without inscription neither the agreement to transfer property nor the causal contract produce the effect of transmission.

The act of inscription is currently a constitutive act in the United Kingdom and has been so since the 2002 “Land Registration Act” came into force. In the so called “Latin” legal systems (such as the French, the Italian and the Belgian) inscription in the Land Registry does not form part of the mechanism of transmission, and the function of the Land Registry in these countries is primarily to give publicity to titles over property. The inscription of a right over an immovable good is therefore only useful when a subject wishes to invoke that right against third parties.

The French system of transmissions was reformed 1955, and the intention of the legislator was to make registration an efficient instrument to help guarantee commercial security. The reform made it obligatory to inscribe properties in the Land Register but stopped short of making registration a constitutive act<sup>20</sup>.

Spanish law differs from the French model in various ways as it incorporates a number of aspects of the German property transfer system. As in the French system, inscription in the Spanish model is not constitutive of the act of transmission but is a declarative act.

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<sup>20</sup>This same obligation exists in the legal systems of Belgium, Luxemburg, Italy and Sweden in which notaries and other public officials have to comply with this obligation within a three month period starting from the date on which the document was presented. In the French legal system this obligation appears in article 33 of the governmental decree issued on the 4<sup>th</sup> of January 1955. In Sweden the same obligation is contained in article 3, chapter 20 of the Land Code of 2000; following the Swedish system if the required documents are not presented to the Registry within the three months period the party responsible may be fined but the sale is valid and the effects of the transmission will have been consolidated.

Transmission of property requires a contract to transfer ownership (or another type of valid title) and the act of handing over possession of the property (known in Spanish Law as the theory of title and mode). Inscription has a three-fold effect<sup>21</sup>:

- 1) The first effect of inscription in the registry is one it shares with the French system. A subject that inscribes his right in the Land Registry cannot see his right opposed or adversely affected by any act of the transmitter of the property that creates another, incompatible right.
- 2) The second effect goes a stage further than the French model. When a right has been specifically inscribed in the Land Registry for at least two years (arts. 28 y 207 LH), the title holder of that right is empowered, by virtue of the inscription, to exercise and enforce the registered right *erga omnes*.
- 3) The third effect of registration is due to the principle of public good faith in the Register. According to this principle, when a subject that has inscribed his right acquired it from a subject that appeared as the title holder in the Register, his right to the title will be upheld even if the transmitter of the title is not the genuine title holder. This principle also protects the inscribed title holder if his title is threatened by a cause of termination of his right that does not appear in the Registry (article 34 of The Spanish Mortgage Act).

According to the way in which Registers are organized and the degree of effectiveness attributed to them, it is possible to divide them into two main categories.

a) The registration of deeds system. This type of system is also termed the “unopposable system” and is currently used in France, Belgium, Portugal and Italy. The defining characteristic of this system is that documents are registered without the identification of the latest genuine title holder, that is to say the documents are not examined beforehand as part of a process to establish the identity of the title holder, but merely have to comply with certain formal requisites. The content of the Register, therefore, only defines a group of possible title holders, and holds a

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<sup>21</sup> Regarding this matter see Gordillo Cañas, 2001, p. 11.

complete set of all the documents pertaining to a property, which may be inspected on request.

Given the resulting lack of certainty of this system, it is quite common that subjects contract "title insurance"; to provide them with an indemnity should they be dispossessed of their title. The negative aspect of this measure is that while the indemnity provides economic security, an insurance contract obviously does not provide any degree of legal security, as the acquirer of the property may lose his title to it. Even the measure of economic security provided is limited, as the title security does not cover the full value of the property, but only the purchase price (or a percentage of the purchase price) and not other related costs of the purchase. The payment of any indemnity is also subject to the exceptions and conditions stipulated in the insurance policy.

b) The registration of titles system, which is also referred to as the "the presumption of correctness system". This system is currently in place in Germany, Austria, Switzerland, Spain and England. By this system rights are inscribed in the registry, and it does not consist of a collection of the original documentation pertaining to the property, as does the registration of deeds system. The registrar is responsible for carrying out a check on the legality of the claims presented and will not permit any inscription that contradicts a right already inscribed in the registry without the prior authorization of its title holder. In this system the principles of exactness (the content of the Registrar is presumed to be a true reflection of the legal situation) and priority (by which a posterior but registered act prevails over a previous but unregistered act) both apply.

Under the registration of deeds system, tribunals resolve disputes by adjudicating property rights according to the moment in which the deeds were inscribed in the Registrar. This creates a strong incentive for subjects to inscribe the deeds to a property as soon as possible and for the parties or their intermediaries to gain the consent of the title holders of the rights affected in order to do so. In this way, the parties can voluntarily avoid possible future conflicts over the ownership of titles.

In the registration of titles system, private contracts are also accorded priority when inscribed. However, the Registrar is accorded authority that is almost akin to that of a judge and will not inscribe a right if it negatively affects one previously inscribed, unless the title holder gives his permission for the Registrar to do so. This eliminates a potential weakness of the registry and means that those legal systems that have this type of Registry treat inscription as conclusive proof of the existence of the right, and establish a system of responsibility for those exceptional cases in which there is an error in the register. As a consequence, those who acquire a property in good faith, trusting in the accuracy of the registry, will not be stripped of their rights over the property even if the genuine title holder subsequently appears.

The two registry systems incur different types of expenses and provide different kinds of benefits in terms of reducing the costs derived from the uncertainty and the risk of losing property rights.

The registration of deeds system is certainly cheaper than the registration of titles system, but it is generally considered less effective. The lower cost of the registration of deeds system is due to the fact that the examination of the deeds to establish the legality of the rights contained in them is purely voluntary, and under these systems services to assess and insure the parties are provided by private companies. This has sometimes been cited as a benefit, because as this system foments the intervention of the private sector the resulting competition to provide services tends to minimize the cost of the services they provide.

However, in the opinion of ARRUÑADA (2004, p. 70), these advantages are more illusory than real. The cost of voluntarily insuring a right can be as much as and sometimes even higher than the cost occasioned by the inscription of the right in the public registry. The organization of this type of service by the private sector may also be inefficient in economic terms as they are often provided by monopolies and are normally tightly controlled by state regulations. Both the fees of a French notary and the prices that can be charged by an insurance company in the United States are fixed by the state, and both the notary and the insurance company are subject to legislation that limits entrance to their profession and specifies

the “products” they can offer and the procedures they must follow. As a consequence, this duplication of institutions (private companies and the deeds registry) to provide guarantees to the parties in a property transfer is not economically efficient.

The registration of titles system requires a prior examination of the legality of the rights to be inscribed to be carried out by a public official. This requisite obviously increases the costs of the transaction. However, by organizing the property Registry in a professional manner along the same lines as the organization of the judiciary, a high level of productivity can be achieved. This level of productivity is even higher when the registrar earns the benefits produced by the Registry office (as is the case in Spain).

The costs of the registration of titles system are offset by the greater security it provides<sup>22</sup>, as it protects those who acquire property in good faith through rules that govern the responsibility for errors in the registrar (by which subjects are compensated for losses caused by errors) (ARRUÑADA, GAROUPA, 2004).

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<sup>22</sup> According to Demsetz, 1967, p. 347 y ff; this improvement in the definition of the rights in question is only efficient when the benefits associated with it are greater than the costs it generates.

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**TRANSFER OF IMMOVABLE  
AND REGISTRATION SYSTEM IN AUSTRIA:  
A BRIEF OVERVIEW**

*Alessio Greco\**

*1. Introduction*

The events after the Spring of Nations in 1848 and the Habsburg Court desire to implement a legal system more congruent with the social and economic conditions of the citizens of the Empire during the 19<sup>th</sup> century, favoured the contact between Austrian and German legal scholars. The merit of building such a bridge between these two worlds has to be mainly ascribed to Josef Unger professor of jurisprudence at the Vienna University who was a fervent supporter of the Historical School of Law and of the Pandectist School.<sup>1</sup> However, although Unger's writings helped to forge the links between Austrian law and German Pandectist doctrines, it would be a mistake if one regarded the Austrian private law as being similar in appearance to the German one. Actually, if one looks at the history of the codification of the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*, hereinafter ABGB), one can notice that the code is firmly rooted in the *Iustiniani Institutiones*,<sup>2</sup> though strongly affected by the natural law jurisprudence and by Kant's moral philosophy.<sup>3</sup>

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<sup>1</sup> For an introduction to the development of the Austrian private law system see KONRAD ZWEIGERT [HEIN KÖTZ], *Introduction to comparative law*, Oxford: Clarendon Press (3<sup>rd</sup> ed., 1998), 157-166; FRANZ GSCHNITZER, *Allgemeiner Teil des bürgerlichen Rechts*, Vienna-New York: Springer (2<sup>nd</sup> ed., 1992), 9-28.

<sup>2</sup> THEO MAYER-MALY, *Kauf und Eigentumsübergang im österreichischen Recht*, ZNR 12 (1990), 164-168. In this regard, one has to underline that the approach to the principles of Roman law occurred through the filter of the glossators and commentators. The former aimed at clarifying the meaning of the provisions of the *Corpus Iuris Civilis* through a detailed text studies; the latter aimed at achieving a practical application of the Roman law through interpretation and fictitious constructions. In this regard, see GSCHNITZER, *Allgemeiner Teil*, 10.

<sup>3</sup> ANTONIO GAMBARO [RODOLFO SACCO], *Sistemi giuridici comparati*, Torino: UTET (2<sup>nd</sup> ed., 2002), 395.

This is more evident if one considers the relationship between the ‘transferor-transferee’ dichotomy and the derivative acquisition of ownership. These are based upon the model of Roman law, the *Codex Theresianus* and the subsequent legislative projects<sup>4</sup> aimed at offering a comprehensive and uniform system to regulate the transactions among citizens within the Austrian Empire. By the reading of the modern Austrian Civil Code, the acceptance of the Roman doctrine of contract law is evident. ABGB § 380 provides in fact, that property cannot be acquired without a title (*titulus - Titel/Verpflichtungsgeschäft*) and a legal mode of acquisition (*modus adquirendi- Erwerbungsart*). Hence on the one hand, any valid legal act transferring ownership (*titulus*) gives rise only to the transferor’s personal obligation to transfer ownership of the goods to the transferee. On the other hand, the proper acquisition of ownership right to the goods occurs by virtue of a further act through which the transferee acquires physical control of the goods (*modus adquirendi*).

## 2. Derivative Acquisition

According to ABGB §§ 380, 423, and 425, title (*Titel/Verpflichtungsgeschäft*) and delivery (*Übergabe/Übernahme*) are the requirements for an effective derivative acquisition. Obviously, the law requires also that the transferor be entitled to transfer the ownership right to the goods. Indeed, if one reads the last sentence of ABGB § 442, one can immediately notice the echo of the *nemo plus iuris* principle of Roman law according to which no one can transfer to another person more rights than he himself has.<sup>5</sup> This rule however, does not apply in the case of agency. In fact, although the agent is not the owner; he is entitled to transfer ownership by virtue of

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<sup>4</sup>*Codex Theresianus*, Title II, Caput IV, § 1, in PHILIPP HARRAS RITTER VON HARRASOWSKY (edited by), *Der Codex Theresianus und seine Umarbeitungen*, (1884); *Entwurf ‚Horten‘*, Caput V/2, § 1, in PHILIPP HARRAS RITTER VON HARRASOWSKY (edited by), *Der Codex Theresianus und seine Umarbeitungen*, (1886), vol. 1.

<sup>5</sup> This means that in case the transferor is the holder of an ownership right under condition or term, the transferee will acquire only an expectant right to ownership, which will be affected to the extent that the condition or the term occurs. See HEINRICH KLANG, in HEINRICH KLANG (edited by), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Vienna: Österreichische Staatsdruckerei (2<sup>nd</sup> ed., 1950), vol. II, § 442, 383.

the fact that the owner has vested him with authority to dispose (*Verfügungsbefugnis*).<sup>6</sup> Moreover, in case the transferor does not have such an authority, the real owner can subsequently ratify the transferor's act of disposition so to make it retroactively and legally effective.<sup>7</sup>

According to ABGB § 424 the title to derivative acquisition can be based upon a contract, a *mortis causa* disposition, a court decision, or an order by law. However, the law requires the title being objectively valid.<sup>8</sup> This means that the ownership transfer is effective as long as there are no defects that can invalidate the effectiveness of the parties' agreement. Consequently, in case the title is void or it becomes ineffective due to enforcement of one of the causes of annulment with *ex tunc* effects provided by the civil code, the transfer is deemed to have been invalid since the beginning. Any delivery of the goods to the transferee would be ineffective and the return of the property to the transferor would be required.<sup>9</sup> Such a result does not occur in case the title is declared ineffective with *ex nunc* effects. The delivery to the transferee in this case, will not be affected since the transferor had notwithstanding, a valid title at the time of the transfer of the goods and before the declaration of its ineffectiveness.<sup>10</sup> However, if the transferor has to return his performance to the transferee because of defeasibility of the title, the transferor is entitled to bring a claim for the return either of the property or of its economic value based upon the transferee's unjustified enrichment

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<sup>6</sup>GERT IRO, *Bürgerliches Recht. Sachenrecht*, Vienna-New York: Springer (3<sup>rd</sup> ed., 2008), vol. IV, 116.

<sup>7</sup>IRO, *ibidem*. In this regard, one has to underline that Iro's thesis is based upon a doctrinal interpretation of the second sentence of ABGB § 366, according to which the transferee validly acquires ownership from a non-owner, if the latter has acquired in the meantime the ownership of the transferred goods. For more details see WOLFGANG FABER, National Reports on the Transfer of Movable in Austria, in WOLFGANG FABER [BRIGITTA LURGER] (edited by), *National Reports on the Transfer of Movable in Europe*, Munich: Sellier (2008), 60.

<sup>8</sup>IRO, *op. cit.*, 113.

<sup>9</sup>IRO, *op. cit.*, 114; BERNHARD ECCHER, in HELMUT KOZIOL [PETER BYDLINSKI, RAIMUND BOLLENBERGER] (edited by), *Kurzkommentar zum ABGB: Allgemeines bürgerliches Gesetzbuch*, Vienna: Springer (2<sup>nd</sup> ed., 2007), § 424, 388. Same principle applies in case of annulment of the expropriation order (OGH SZ 69/39 = ÖJZ 1996/135 (EvBl)).

<sup>10</sup>Iro, *ibidem*.

(*schuldrechtlicher Rückgabeanspruch*).<sup>11</sup> Accordingly, Austrian property law is considered a 'causal' transfer system and this makes the Austrian property law different from the German 'abstract' transfer system. In fact in Germany, the validity of title is not relevant for the effectiveness of ownership transfer: therefore the transferee will acquire ownership right to the goods simply by virtue of a valid *modus acquirendi*.

One can explain such a difference in the construction of the ownership transfer system by looking at the history of the two countries and the interests which the draftsmen of the respective civil codes wanted to protect at the time of their implementation<sup>12</sup>. On the one hand, there was the German Empire which during the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century, emerged to become one of the most powerful industrial economies in the world and a formidable great power. On the other hand, there was the Habsburg Empire a wide territory in which the economy was mainly of feudal nature. Moreover, after the second half of the 19<sup>th</sup> century, the Habsburg Empire endured a period of ongoing wars which increased the national deficit and took resources away from the private industry discouraging consequently industrial growth.

Given all of this, it is easily understandable that in the intention of the draftsmen of the German Civil Code, the 'abstract' transfer system aimed at granting quickness and certainty in the daily trade transaction in favour of the transferee. In the opinion of the Austrian drafters by contrast, the 'causal' transfer system was the means to protect more effectively the owner in a society where property was a relevant index of wealth.<sup>13</sup>

As it is precisely stated by ABGB § 425, the transferor does not acquire any ownership right by virtue of the solo title but a further requirement is

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<sup>11</sup>KARL SPIELBÜCHLER, in PETER RUMMEL (edited by), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Vienna: MANZ (3<sup>rd</sup> ed., 2000) vol. I, § 424, 630.

<sup>12</sup>The preparatory work for the German Civil Code (*Bürgerliches Gesetzbuch - BGB*) started in 1881, but the Code became effective only on the 1<sup>st</sup> of January 1900. The Austrian Civil Code was enacted on the 1<sup>st</sup> of January 1812 after almost 40 years during which the *Codex Theresianus* (1766), the *Horten Entwurf* (1776), and *Josephinische Gesetzbuch* (1787) took turns in the codification process of the Austrian civil law.

<sup>13</sup>MAYER-MALY, *op. cit.*, 168.

necessary for a valid ownership transfer. This is qualified as *modus acquirendi* and it consists of giving to the transferee the power to exercise an *erga omnes* power over the asset. Some scholars consider the *modus acquirendi* as being the combination of two acts: a juridical act by virtue of which the parties agree that ownership will pass from the transferor to the transferee (disposition agreement – *Verfügungsgeschäft*) and the material act by virtue of which the asset is physically transferred to the transferee (*Übergabe*). Others consider the *modus acquirendi* consisting only in the transferee's material control of the asset on the basis of the fact that the parties are free to decide when to stipulate the *Verfügungsgeschäft*. The disposition agreement can occur in fact, at the time either of the stipulation of the underlying contract (*Verpflichtungsgeschäft*) or of the delivery of the property. Consequently, the relevant moment for the achievement of the 'ownership transfer' mechanism is identified in the delivery of the asset.<sup>14</sup>

This different understanding of the concept of *modus acquirendi* divided the scholars as for the transferor's possibility to change his mind. According to those scholars who argue that the *modus acquirendi* consists of the disposition agreement and delivery, the transferor is entitled *ex uno latere* to retain the ownership right in spite of the delivery although the parties did not agree upon retention of title clause. On the other hand, scholars who indentify the *modus acquirendi* in the delivery deny such a possibility since the transferor cannot change his mind as soon as the underlying agreement and the disposition act are jointly stipulated.

Some scholar contests such an opinion because it would deny the possibility of the transferor to exercise self-help in case the transferee was defaulting. Acquisition of possession of the asset implies always the collaboration of both parties but if the transferor's intention to dispose of

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<sup>14</sup>IRO, *op. cit.*, 114; THOMAS KLICKA, in MICHAEL SCHWIMANN [BEA VERSCHRÄGEN](edited by), *ABGB. Praxiskommentar*, Vienna: LexisNexis (3<sup>rd</sup> ed., 2005) vol. II, § 425, 219; ECCHER, in KOZIOL/BYDLINSKI/BOLLENBERGER, *op. cit.*, § 425, 389. As for the requirement of delivery (*traditio*), some scholars argue that in the intention of the draftmen of the civil code delivery was not a necessary element to the acquisition of ownership right. They maintain, indeed, that acquisition is achieved by virtue of the *Verfügungsgeschäft* and delivery is only the mean to make acquisition effective *vis-à-vis* third parties. In this regard, see KLANG, in KLANG, *op. cit.*, § 425, 306.

the asset is changed because of transferee's conduct, the fact to force the transferor to deliver the asset though potentially knowing the difficulty to receive the performance on the part of the transferee would be indeed unfair.<sup>15</sup>

As a result of the 'causal' transfer system, it is required that the *causa* of the disposition agreement finds own economic justification and effectiveness in the valid underlying agreement. This means that if the underlying agreement is invalid, the disposition agreement is invalid as well. In addition, the two legal acts have to mutually correspond especially concerning the object and the scope of the right,<sup>16</sup> as well as it is required that the parties manifest respectively their consent to transfer (*Übergabe*) and accept (*Übernahme*) the asset. In this regard, scholars argue that the transferor's will to transfer the asset without transferee's manifest acceptance is not sufficient to the transferee's ownership acquisition. Conversely, transferee's conduct to accept the asset suffices to prove his will to acquire its ownership and thus no further investigation about the parties' consensus is usually required. The evidence to the contrary is always admissible and it falls into the general rules about lack of capacity (ABGB §§ 865-867) or consensus (ABGB §§ 869-877).<sup>17</sup>

Finally, one has to underline that as for movable goods, the requirement of the *modus acquirendi* is fulfilled by means of the delivery under ABGB §§ 426 *et seq.*. As for immovable goods, the acquisition of the physical possession of the asset is not necessary but the acquisitive effects of delivery are fictitiously achieved by entry into the land register (*Grundbuch*) under ABGB §§ 431 *et seq.* and §§ 61 *et seq.* of the Austrian Federal Law on the Land Register.<sup>18</sup>

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<sup>15</sup>IRO, *op. cit.*, 115.

<sup>16</sup>IRO, *ibidem*; KLANG, in KLANG, *op. cit.*, § 425, 306.

<sup>17</sup>KLANG, in KLANG, *op. cit.*, § 425, 307.

<sup>18</sup>SPIELBÜCHLER, in RUMMEL, *op. cit.*, § 431, 642.

### 3. The Structure of the Land Register

The provisions concerning the institution and regulation of the land register can be found in the *Allgemeines Grundbuchgesetz* of 1955 (Austrian Federal Law on the Land Register, hereinafter GBG), but other provisions are included in the relevant laws of 1930 (*Allgemeines Grundbuchsanlegungsgesetz* – Austrian Federal Law on the Implementation of the Land Register, hereinafter AGAG) and of 1980 (*Allgemeines Grundbuchsumstellungsgesetz* – Austrian Federal Law on the Reform of the Land Register, hereinafter GUG), as well as in the civil code.<sup>19</sup>

The land register consists of the main register (*Hauptbuch*) and the collection of documents (*Urkundensammlung* – GBG § 1),<sup>20</sup> the map of the real estate (*Grundbuchsmappe*), the list of landowners (*Personenverzeichnis*), the list of addresses where the immovables are located (*Anschriftenverzeichnis*), and auxiliary information concerning the real estate (*Grundstücksverzeichnis*). Each real estate is registered under an entry number (*Einlagezahl*). Each entry consists of 3 folios (AGAG § 6): 1) folio A (*Gutsbestandsblatt* or *A-Blatt*) that contains the general information as for the property (AGAG §§ 7-9); 2) folio B (*Eigentumsblatt* or *B-Blatt*) that gives information about the landowners right to the immovable, 'restrain on alienation' term, the existence of another person's right for security purpose (AGAG §§ 10-11(2)); 3) and folio C (*Lastenblatt* or *C-Blatt*), where encumbrances on the property are correctly registered

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<sup>19</sup> The Austrian State administrates other registers for specific immovable goods such as the real estate of the aristocracy (*Landtafel*), mining (*Bergbuch*), railway (*Eisenbahnbuch*), and water (*Wasserbuch*). The same principles governing the general land register apply to the above-mentioned registers. See IRO, *op. cit.*, 40; FRANZ GSCHNITZER, *Österreichisches Sachenrecht*, Vienna-New York: Springer (2<sup>nd</sup> ed., 1985), 33-34. For a short introduction to the history of the land register, see GSCHNITZER, *Sachenrecht, op. cit.*, 27.

<sup>20</sup> The *Urkundensammlung* contains all the documents that served as basis for the registration of an immovable. It is a secondary source of information, since the entry into register constitutes the main source of information concerning the immovable. However, in case the information in the documents cannot be briefly reported in the entry of the main register, one can refer directly to the documents as if the information held in the documents were effectively entered into the main register (GBG § 5). See GSCHNITZER, *Sachenrecht*, 29-31.

(AGAG § 11).<sup>21</sup> Moreover, GBG § 3 provides that any physical division (*Abschreibung*) or addition (*Zuschreibung*) of real estate has to be registered. Consequently, the respective entries will be modified or deleted (if this is the case!) and the new real estate will be registered under a new entry. The encumbrances that were lawfully attached to the prior real estate will be automatically transferred to the new real estate.<sup>22</sup>

Under GBG § 8 the possible entries into the register are the registration of rights *in rem* (*Einverleibung* or *Intabulation*), the precautionary registration of right *in rem* (*Vormerkung*), and the annotation (*Anmerkung*). As said above, the law provides that the *Einverleibung* is absolutely required for the acquisition, transfer, restrain, and cancellation (so called *Extabulation*) of right *in rem*. Therefore, *Einverleibung* refers to the entry of all those documents that justify any modification or limitation of the landowner's ownership right. *Vormerkung* refers to the possibility, under certain conditions provided by law to register the acquisition, transfer, restrain, and cancellation of right *in rem* to the immovable good before the fact, causing the entry to produce entirely its effects. In the meantime, the beneficiary (*Vormerkungswerber*) and the opponent (*Vormerkungsgegner*) are entitled to enter into the register any right acquired on the basis of the right subject to precautionary registration (e.g. right *in rem* for security purpose). The effectiveness of any subsequently acquired right will depend obviously on the fact that the temporarily registered right may entirely produce its effects (GBG § 49(1)).<sup>23</sup> Consequently, it is required that the relevant documents necessary to temporarily register the right-to-be fulfil already all the formalities provided by law as well as to ensure they do not have so evident mistakes which weaken their reliability (GBG §§ 26 *et seq.*). If the opponent refuses to collaborate, the beneficiary has to bring an 'action for declaratory judgement' (*Rechtfertigungsklage*) either within 14 days from the denial of collaboration (GBG §§ 42 *et seq.*; ABGB § 439) or before the opponent brings an action for the cancellation of this entry (GBG § 45(3)). However, in case the *Vormerkung* should not produce its effect because

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<sup>21</sup>IRO, *op. cit.*, 43; GSCHNITZER, *Sachenrecht*, 32-33.

<sup>22</sup>IRO, *op. cit.*, 50-51; GSCHNITZER, *Sachenrecht*, 36-37.

<sup>23</sup>IRO, *op. cit.*, 48.

the parties did not reach an agreement upon the concerned right, or the term to bring the action for declaratory judgement was expired, the court decides the ineffectiveness of *Vormerkung* or the opponent can ask for the cancellation of the *Vormerkung*. As a result of the cancellation, all the entries which were done in function of the *Vormerkung* shall be deleted *ex officio* (GBG § 46 *et seq.*).<sup>24</sup>

The object of an *Einverleibung* and a *Vormerkung* can be only a right *in rem*. In all those cases where legal relevance have to be attached to a fact (e.g. the status of being under age, order of a trustee, restrain on disposal of the property because of bankruptcy, priority notice, *etc*) an *Anmerkung* to the property will be entered into the register (GBG § 20).<sup>25</sup> The goal of the *Anmerkung* is to grant on the basis of the rank, a degree of protection to the different entries which do not consist in rights *in rem*. Therefore, in the case of concurrent claims affecting the right over the property (e.g. pending proceedings, mortgage credits, *etc...*), priority will be given to the right of the person who took care to register his claim first.

#### 4. *The Principles Governing the Land Register*

The principles governing the land register are not expressly held by norms, but they are mainly the product of legal doctrine.<sup>26</sup> They can be classified as follows:

- 1) 'principle of registration' (*Eintragungsgrundsatz*);
- 2) 'principle of public access' (*Öffentlichkeitsgrundsatz*);
- 3) 'principle of reliability' (*Vertrauensgrundsatz*);
- 4) 'priority principle' (*Prioritätsgrundsatz*);
- 5) 'speciality principle' (*Spazilitätsgrundsatz*);
- 6) 'principle of claim' (*Antragsgrundsatz*);
- 7) 'principle of legality' (*Legalitätsgrundsatz*).

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<sup>24</sup>IRO, *op. cit.*, 49.

<sup>25</sup>GSCHNITZER, *Sachenrecht*, 35.

<sup>26</sup>GSCHNITZER, *Sachenrecht*, 37.

As said above, the land register acquires remarkable relevance as for the constitution, transfer, and termination of any right *in rem* over immovable goods. The entry into the land register indeed, fulfils the requirement of *modus acquirendi* necessary to the ownership transfer of an immovable (GBG § 4).<sup>27</sup> Accordingly, by ‘principle of registration’ (*Eintragungsgrundsatz*), one refers to the constitutive effect of the entry into the register insofar as the underlying contract, the real agreement, and the transferor’s authority to dispose are valid.<sup>28</sup>

Everyone is entitled to examine the register (‘principle of public access – *Öffentlichkeitsgrundsatz*). However, some limitations apply in case the person does not have a concrete interest in examining the register. In fact, in order to protect the privacy of individuals, the list of the landowner is accessible only to the person who has to make a registration (GUG § 5(4)). Such a provision do not apply in case the person examining the register is a notary, a lawyer, a local public agency, or a social security agency (GUG § 6(2)).<sup>29</sup>

The ‘principle of specialty’ (*Spazilitätsgrundsatz*) concerns the fact that each entry has to refer to a specific property. Therefore, each property is treated as a unit (GBG § 3) to which a specific page in the land register listing the rights and burdens over the property is dedicated. The concept of ‘unit’ implies that each entry will affect the whole property; thus, it is not possible that entry refers only to a part of the property. The principle makes an exception in the case of mortgage. Specifically, in the case of co-ownership the co-owner can mortgage his share. The property, though being treated as unit, is ideally divided so that the mortgagee of the co-owner is entitled to ask for registration of his credit right acquired on the mortgagor’s share of the immovable. However, one has to underline that

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<sup>27</sup>IRO, *op. cit.*, 41. In the case of movable goods, the last stage in order to achieve ownership transfer consists in the acquisition of possession of the goods. Therefore, the land register has the same function that possession has for movable goods. See GSCHNITZER, *Sachenrecht*, 28.

<sup>28</sup> The principle of registration has some exceptions, by virtue of which the effects of an acquired right are independent from the entry into the register: *e.g.* acquisitive prescription (ABGB § 1500), estate distribution by probate court (ABGB §§ 797 and 799), and merge (AktG §§ 219 *et seq.*, GmbHG § 96, *etc.*). IRO, *op. cit.*, 51-52; GSCHNITZER, *Sachenrecht*, 39.

<sup>29</sup>IRO, *op. cit.*, 52; GSCHNITZER, *Sachenrecht*, 40.

this is an apparent exception to the 'principle of specialty'. Indeed, the court will authorise the registration of the mortgage on the co-owner's whole share and not on a single asset of the co-owned immovable. Therefore, the 'principle of unit' will be always respected. Another exception concerns the case in which the mortgagee has obtained the registration of a mortgage on a property, the value of which is highly disproportionate with respect to the value of the mortgagor's credit. In this case, the mortgagor can ask the court to reduce the value of the mortgage or to register the mortgage on a part of the originally mortgaged property (GBG § 14). The case of simultaneous mortgages, which occurs when the repayment of a credit is contemporarily guaranteed by two or more registered immovables (GBG § 15), is another exception to the 'principle of specialty'.<sup>30</sup> However, if the intention of the parties is to register an entry for a specific part of the registered immovable, they have to modify the parcel (GBG § 3(2)). In this regard, the GBG provides that the changes of the property can be done by means of parcel division (*Abschreibung*) and property addition (*Zuschreibung*).<sup>31</sup> In the respect of the 'principle of specialty', if an immovable which is encumbered with burdens is parcelled out, the new properties resulting from the division will be contemporarily encumbered with the burden weighting on the original property. In addition, if the new encumbered immovable is joined to another immovable the burden will extend to the new whole property.<sup>32</sup>

According to GBG § 76 the individuals legitimated to demand the registration of an entry are exclusively the parties to the contract. This is known as the 'principle of claim' (*Antragsgrundsatz*). However, the court can act *ex officio* only in specific cases provided by law. Cancellation of invalid and incorrect entries (GBG §§ 130-135), cancellation of priority notice for subsequent sale or mortgage after 1 year from the moment of the relevant entry (GBG § 57), cancellation of those legally unjustifiable entries because of non-occurrence of the fact referred in the precautionary

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<sup>30</sup>GSCHNITZER, *Sachenrecht*, 38; ERICH FEIL, *Österreichisches Grundbuchsrecht. Eine systematische Darstellung*, Vienna-New York: Springer (1972), 78 and 149.

<sup>31</sup>IRO, *op. cit.*, 50; FEIL, *op. cit.*, 81 *et seq.*

<sup>32</sup>IRO, *op. cit.*, 51; GSCHNITZER, *Sachenrecht*, 37.

registration (GBG § 49) are examples of autonomous intervention of the court in the modification of the entries into the land register.<sup>33</sup>

The 'principle of legality' (*Legalitätsgrundsatz*) refers to the fact that the court has the duty to verify *ex officio* the correctness both of the demand for registration and of the filed documents. Specifically, the court will verify whether the land register holds other entries that impede the registration, whether the parties have authority to dispose and the legitimacy to demand the registration, and whether the filed documents fulfil the formal requirements provided by law.<sup>34</sup>

### 5. Acquisition in Good Faith

Particular attention deserves the principle of reliability (*Vertrauensgrundsatz*). The register in fact, accomplishes a function of publicity. This means that the completeness and accuracy of the information held by the register has to be considered correct until the contrary is proved. Such a presumption derives from the fact that all the information concerning the real estate has to be entered into the register.<sup>35</sup>

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<sup>33</sup>IRO, *op. cit.*, 58; FEIL, *op. cit.*, 101.

<sup>34</sup>IRO, *op. cit.*, 58-59; GSCHNITZER, *Sachenrecht*, 38; FEIL, *ibidem*.

<sup>35</sup> The Austrian territory is divided in parcels. Each parcel, which is the smallest real estate unit, is registered under a unique indentifying number in the cadastral community (*Katastralgemeinde*). One or more cadastral communities constitute a municipality (*Gemeinde*), the smallest political entity. The Austrian Federal Office for Calibration and Measurement (*Bundesamt für Eich- und Vermessungswesen*) is in charge to manage and update all the cadastral (physical) information of parcels, whereas specialised local courts in charge to keep the land register (*Grundbuchsgerichte*) manage all those information concerning the constitution, modification, and termination of ownership rights or other related rights in a parcel. Before 1978, these subjects kept two distinct registers: consequently, frequent exchanges of information between them were necessary. In 1978, the constant increase of land transactions since 1950 fosters the Austrian government to start a process of digitisation of the cadastral and land register, which was completed in 1992. Such a process has had the advantage to centralise all entries, which are stored at the Austrian Federal Computing Centre (*Bundesrechenzentrum*), to interconnect the data of the cadastre and the land register, and to decentralise the system for the data updating by providing district cadastral offices and the local courts with terminals directly connected to the Computing Centre. For more information about the collection and management of geo-data in the Austrian cadastre, see REINFRIED MANSBERGER [GERHARD MUGGENHUBER], *Geo-Data*

Specifically, the person who acquires by being confident of the accuracy of the entry benefits from twofold protection. On the one hand, he can trust that every entry is legally valid; on the other hand, a non-registered claim cannot produce effects *vis-à-vis* the transferee in good faith. This is particularly relevant in case the transferee acquires from a person who is not the owner of the immovable but the name of whom is notwithstanding entered into the register (example of acquisition *a non domino*). In fact, if the transferee is in good faith, his acquisition will receive protection even if the prior entry might be mistaken (e.g. the name of the real owner has been wrongly deleted) or incomplete (e.g. the person who has acquired by virtue of acquisitive prescription have not registered his new title).<sup>36</sup> This means that his title will prevail over the title of the real owner as well as he will be legitimately entitled to transfer his title to third parties, unless the right-holder has challenged the transferee's title by entering his counterclaim into the register (see para. 7).<sup>37</sup> It is important to underline that such a form of protection is not granted to the acquirer in bad faith as well as to the mistakenly registered owner.<sup>38</sup> Moreover, case law emphasises that good faith has to exist from the time the parties agree upon the transfer of the property until the time the parties apply for the entry into the register at the district court.<sup>39</sup> In addition, it is worth noticing that under GUG § 3 all the deleted entries are stored in an accessory register (*Verzeichnis der gelöschten Eintragungen*). Therefore, the acquirer of a right over an immovable has a

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*Infrastructure for Land Management in Austria*, FIG Working Week 2004, <[http://www.fig.net/pub/athens/papers/ts10/TS10\\_3\\_Mansberger\\_Muggenhuber.pdf](http://www.fig.net/pub/athens/papers/ts10/TS10_3_Mansberger_Muggenhuber.pdf)>, and ERNST HÖFLINGER, *Austrian cadastre and database on real estate fully opened to the public*, FIG XXI Congress and Commission 7 Annual Meeting (Brighton, UK) 19-25 July 1998, <<http://www.sli.unimelb.edu.au/fig7/Brighton98/Comm7Papers/TS34-Hoeflinger.html>>.

<sup>36</sup>IRO, *op. cit.*, 52. As to the person who has acquired by acquisitive prescription but does not have registered his right, he can oppose his title *vis-à-vis* third parties apart from those persons who have acquired by being in good faith on the accuracy of the entry into the register. See GSCHNITZER, *Sachenrecht*, 41.

<sup>37</sup>IRO, *op. cit.*, 124.

<sup>38</sup> The mistakenly registered owner cannot claim to have acquired ownership simply based upon the fact that his name is entered into the register, unless he can prove to have acquired a valid title to ownership right. See GSCHNITZER, *ibidem*.

<sup>39</sup> OGH SZ 67/37 = NZ 1994, 136.

duty to control every part of the land register in order to be deemed in good faith and then to receive full legal protection.<sup>40</sup> The entry into the register in fact, gives a presumption of knowledge which prevents a person from claiming his lack of awareness of the entry.<sup>41</sup> Specifically, ABGB § 443 provides that a person who did not examine the register may be affected by his gross negligence.<sup>42</sup> Consequently, even if he claims not to have been aware of another person's right, his title will bear this burden and he will not be in position to bring a warranty claim *vis-à-vis* the transferor, unless the latter had expressly assured him that the property was free from another person's right (ABGB § 928).

#### 6. Ranking Order and Priority Principle: the Case of Double Sale

The entry of rights into the register follows a precise ranking order, which turns out to be relevant in solving the case of two or more concurrent rights in one and the same immovable. The rank in the land register is assigned by the court in charge to keep the land register (*Grundbuchgericht*) after having verified whether the parties have fulfilled the requirements provided by law in order to obtain the registration of their agreement (GBG § 29). The court will assign a docket number (so-called *Tagebuchzahl*) according to a temporal order, so that the right of an individual who registers first will rank higher than the right of an individual who registers subsequently. Before the court decide on

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<sup>40</sup>IRO, *op. cit.*, 44; GSCHNITZER, *Sachenrecht*, 35. Specifically, the protection granted by the publicity principle is applicable insofar as the transferee may prove his good faith by showing that the examination of the main register and the collection of documents did not reveal the existence of another person's right, which may limit or shape the use of the registered property. The transferee's good faith cannot be, hence, based upon the examination of the register of the maps, which provides only a physical and no-legal relevant description of the real estate and which, consequently, does not fulfil the requirement of reliability under the 'publicity principle'. See GSCHNITZER, *Sachenrecht*, 42; IRO, *op. cit.*, 124.

<sup>41</sup>IRO, *op. cit.*, 49-50 and 124; KLANG, in KLANG, *op. cit.*, §§ 431-446, 348.

<sup>42</sup> However, one has to underline that the examination of the register is not sufficient in case the transferee has a reasonable suspicious (for instance after a material inspection of the property) that the reality differs from what is written in the register. See GSCHNITZER, *Sachenrecht*, 41.

authorisation to modification of the data of the land register, the individual who has deposited the demand for registration will obtain a sealing docket number (so called 'Plombe' - GUG § 11). This number aims at granting the applicant a specific ranking order while cases concerning potential conflicts with contenders of a right to a prior registration are pending before the ordinary court. Once the ordinary court has issued its decision on the case, the court of the land register can register the entry with the proper docket number (GUG § 13).<sup>43</sup> However, the law provides for the possibility that the parties can modify the ranking order. Such a modification can be achieved by means of either the 'concession of priority' (*Vorrangseinräumung*), of the 'annotation of the ranking' (*Anmerkung der Rangordnung*), or of the 'right of disposition' under ABGB § 469 (*Verfügungsrecht*).

The 'cession of priority' (*Vorrangseinräumung*) consists in the parties' agreement to mutually exchange their own ranking order (GBG § 30). It is not relevant whether the exchange concerns the rank of heterogeneous rights.<sup>44</sup> The 'cession of priority' can be in the form of either an ordinary registration (*Einverleibung*) or of a precautionary registration (*Vormerkung*).<sup>45</sup> The owner's assent is required in case the exchange concerns the rank of mortgages. His assent is not required if the mortgagee transfers only a part of his credit by granting to the transferee the priority on the amount of money that the mortgagee will receive from the mortgagor.<sup>46</sup> The court's authorisation to the registration of the cession of the ranking order is required; in order for the parties' agreement to produce general effects *vis-à-vis* other individuals. In addition, the assent of third parties is required if the exchange harms their rights (GBG § 30(1)). If the court gives the authorisation but the applicant delays or omits to register the entry of his right, the agreement upon the cession of the ranking order will produce obligatory effects only

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<sup>43</sup>FEIL, *op. cit.*, 50-51.

<sup>44</sup> The law provides for some exception to the cession of the ranking order (e.g. *Vorrangseinräumung* is not possible in case one of the parties is willing to transfer the rank attached to a mortgage for future credits or to the right to succession by *fidei commissum*). For more details see, see FEIL, *op. cit.*, 53.

<sup>45</sup>FEIL, *ibidem*.

<sup>46</sup>FEIL, *ibidem*.

between the contracting parties.<sup>47</sup> It can happen however, that the cession of the ranking order is registered but without having asked the third parties' assent. In this case, if the right of the individual who has acquired the prior ranking order imposes a higher sacrifice/burden on the right-holders who come next in the rank, the latter's right will be affected as much as the right which was previously ranked before theirs (GBG § 30(6)).<sup>48</sup>

As to the 'cession of priority', ABGB § 469 grants to the owner of a mortgaged property a similar right; specifically, the law provides that the entry of a mortgage in the land register is deleted once the mortgagor has entirely paid his debt. If the mortgagor pays his debt by instalments and he does not ask for the mortgage value reassessment, ABGB § 469 entitles the mortgagor to transfer the ranking order related to the partially paid mortgage to another mortgagee (*Verfügungsrecht*). Such a transfer is possible under the condition that at the time of each instalment the mortgagor and the mortgagee have mutually issued a cancellation receipt (*Löschungsquittung - Teillöschungsquittung*) to prove the occurred payment.<sup>49</sup> In addition, it is required that the mortgagor has filed the necessary documents to obtain the new mortgage and that the value of the new mortgage is not higher than the sum of the paid debt and of due interest rates.<sup>50</sup> Finally, GBG § 58 entitles the owner/mortgagor by means of annotation into the land register to retain the right under ABGB § 469 *vis-à-vis* third parties for a period of three years (*Rangvorbehalt*), in case he has fully paid the registered mortgage and the mortgage has been cancelled from the register.<sup>51</sup> This gives the owner the opportunity to gain bargaining power with a new potential mortgagee by offering him a better rank for his mortgage-backed credit.

As said above, a further exception to the ranking order consists in the 'annotation of the ranking' (*Anmerkung der Rangordnung*). The owner is entitled to retain the ranking for future entries in the case of either sale or

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<sup>47</sup>IRO, *op. cit.*, 55; FEIL, *op. cit.*, 52-53.

<sup>48</sup>FEIL, *op. cit.*, 54-55.

<sup>49</sup>IRO, *op. cit.*, 194.

<sup>50</sup>IRO, *op. cit.*, 195; GSCHNITZER, *Sachenrecht*, 47.

<sup>51</sup>IRO, *op. cit.*, 196; FEIL, *op. cit.*, 56.

mortgage of a specified outstanding sum (GBG § 53).<sup>52</sup> In this last case, the value of the future mortgage cannot be higher than the amount declared at the time of the request of the annotation. Such a right lasts for 1 year from the time the owner has obtained by court order the annotation in the land register (GBG §§ 55 and 56(1)).<sup>53</sup> After the elapse of this term, the court of the land register will delete *ex officio* the 'annotation of the ranking' (GBG § 57(2)).<sup>54</sup> During this term, other entries can be registered according to their chronological order. However, the transferee who has acquired a right from the owner and who is in possession of the documents proving the court order under GBG § 54, can register his right into the reserved rank (GBG § 56(2)).<sup>55</sup> Within 14 days from the time the transferee has been authorised to register his right, he can demand the cancellation of all those entries that harm his right *in rem* and that the court of the land register had previously authorised (GBG § 57(1)).<sup>56</sup> The transferee is prevented from exercising such a right *vis-à-vis* third parties, if the existence of third parties' rights was already mentioned in the 'annotation of the ranking' or the entry does not have a right-generating effect.<sup>57</sup> As seen for the owner, even the mortgagee is entitled under certain circumstances, to retain his ranking for future entries. Precisely, GBG § 53(2) provides that the mortgagee is entitled to exercise such a right in two specific cases. The first case occurs when the mortgagee intends to assign his mortgage-backed credit to a third party by transferring him the court decision that authorised the 'annotation of the ranking'. The second case occurs when the debtor performs his obligation *vis-à-vis* the mortgagee. In this case on the one hand, the debtor wants to prevent the mortgagee from transferring his credit right to an unwished third party; on the other hand, the mortgagee obtains the guarantee of the

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<sup>52</sup>SPIELBÜCHLER, in RUMMEL, *op. cit.*, § 440, 666.

<sup>53</sup>HINTEREGGER, in SCHWIMANN, *op. cit.*, § 440, 266; SPIELBÜCHLER, in RUMMEL, *ibidem*.

<sup>54</sup> Although an extension of the term cannot be demanded, the owner can ask for a new annotation, which will confer a new ranking order. See GSCHNITZER, *Sachenrecht*, 49; FEIL, *op. cit.*, 62; HINTEREGGER, in SCHWIMANN, *ibidem*; SPIELBÜCHLER, in RUMMEL, *op. cit.*, § 440, 667.

<sup>55</sup>HINTEREGGER, in SCHWIMANN, *ibidem*.

<sup>56</sup>FEIL, *op. cit.*, 75; GSCHNITZER, *Sachenrecht*, 48. See also OGH SZ 39/106 = ÖJZ 1967/210 (EvBl).

<sup>57</sup>HINTEREGGER, in SCHWIMANN, *op. cit.*, 267. See also OGH SZ 70/4 = WoBl 1997/242.

debtor's performance by virtue of the 'threat' to transfer the mortgage-backed credit to another party. Therefore, as soon as the debt is paid the mortgagee will give to the debtor the court decision on the 'annotation of the ranking' so that this can be deleted.<sup>58</sup>

GBG § 29(1) specifies that the ranking order to a right is attached to an entry not from the moment a contracting party fulfils his obligation *vis-à-vis* the other contracting party but from the moment the court authorises the registration. As said above, there are cases in which a specific ranking order can be reserved or exchanged but a previous court order is always required in order for the party to modify the rank into the land register.

It can happen, however that two or more assignees claim contemporaneously to register concurrent rights *in rem* over the property against a common assignor.<sup>59</sup> If this is the case, GBG § 29(2) entitles the court as keeper of the land register, to temporarily authorise the simultaneous registration of the concurrent rights under the same ranking order, in order for the parties to take legal action before the ordinary court and to clarify their legal relationship to the property (GBG § 103).<sup>60</sup> Once the ordinary court is asked to hear the case, its decision will have important effects on the defeated party, as the principle governing the land register is *prior in tabulatione potior in iure*.<sup>61</sup> It means that in the conflict between several assignees the winning party will be the one who obtains the authorisation to fully register his right (*Prioritätsgrundsatz*). In this regard, it has to be underlined that the registration of the sales contract under ABGB §§ 431 *et seq.* and GBG §§ 61 *et seq.* has the same effect as physical possession in the case of movables, *i.e.* it constitutes the *modus acquirendi*. The *prior in tabulatione potior in iure* principle is clearly expressed in the case of sales contract. Under ABGB § 440, in fact, if several buyers purchase the same immovable from one and the same seller, the buyer who first entered the contract in the register would be

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<sup>58</sup>IRO, *op. cit.*, 57.

<sup>59</sup>SPIELBÜCHLER, in RUMMEL, *op. cit.*, § 440, 666.

<sup>60</sup> Such a solution derives from the fact that, in the proceeding before the court as keeper of the land register, the latter is not in the position to acquire a complete cognition of the case as well as he can refuse the authorisation to the registration if the parties' documents are fully valid. See KLANG, in KLANG, *op. cit.*, § 440, 382-383.

<sup>61</sup>GSCHNITZER, *Sachenrecht*, 44;

the one to acquire possession and hence to be considered as the legitimate owner.<sup>62</sup> Even if he was the last to acquire the immovable, he can oppose its acquisition to the other acquirers by reason of having fulfilled the 'registration' requirement. The losing party however, is not left without protection. Under tort law in fact, he can take legal action against the transferor by virtue of the claim for performance (*Erfüllungsanspruch*) as the latter has neglected his duty not to sell twice.<sup>63</sup> Moreover, he is entitled to bring a claim both for compensation and for the physical restitution of the immovable *vis-à-vis* the transferee who was authorised to register his concurrent right. The latter will be obliged to return the immovable in case he was aware of the agreement between the transferor and the plaintiff<sup>64</sup> and he (with or without the transferor's complicity) aimed at harming the plaintiff's acquired right.<sup>65</sup> However, in issuing the decision, the court has also to take into account of the plaintiff's negligence in case the latter has delayed or omitted the registration without any reason. The delay in or the omission of the registration are not considered as causes of negligence, if the plaintiff has acquired against payment whereas the defendant gratuitously.<sup>66</sup> To sum up, it is fair to say that the ranking order hence, accomplishes an important task by offering a degree of protection among concurrent entries.

### 7. *Protection of the Holder of a Denied Right in rem*

The person who is legitimate to have registered a right *in rem* over an immovable is not left without protection against the person whose entry into the register unlawfully harms his title. GBG § 61 and § 122 provide

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<sup>62</sup>KLANG, in KLANG, *op. cit.*, § 440, 382.

<sup>63</sup>HINTEREGGER, in SCHWIMANN, *op. cit.*, § 440, 269.

<sup>64</sup> In this regard, scholars argue that the transferee is assumed to have a sufficient knowledge of another party's right, when he has the legitimate suspicion that the property is used by a person different from the registered owner or that there are circumstances, which do not allow the transferee to acquire a full ownership right in short term or to use the immovable as guarantee. See HINTEREGGER, in SCHWIMANN, *op. cit.*, § 440, 270-271.

<sup>65</sup>HINTEREGGER, in SCHWIMANN, *op. cit.*, § 440, 270.

<sup>66</sup>HINTEREGGER, in SCHWIMANN, *ibidem*.

for two means to challenge the presumption of correctness of the entry. They are the 'recourse' (*Rekurs* - GBG § 122) and the 'action for cancellation' of the entry (*Löschungsklage* - GBG § 61). In this regard, one has to distinguish whether the claimed invalidity is based upon a formal or substantial defect. In fact on the one hand, the recourse aims at making valid and thus at obtaining the registration of the title that the court as register-keeper has deemed not to be formally correct on the basis of the whole documents filed by the party; on the other hand, the action for cancellation aims at obtaining the invalidity of the current entry.<sup>67</sup> Accordingly, the claimant has to bring recourse in case the current entry does not fulfil the formal requirements for the registration but it is substantially lawful. In this case, the claimant has to prove that entry is without those extrinsic requirements on the basis of which the court can authorise the registration. He has to bring an action for cancellation in case the entry fulfils the formal requirements for the registration but it is substantially illegitimate (*e.g.* when the *causa* of defendant's title is void). However, if the entry does not only fulfil the formal requirement for the registration but it is also substantially illegitimate (*e.g.* the register keeper has mistakenly confused the number of the parcel), the claimant can bring a recourse against the court that took the wrong decision, as well as he can bring an action for cancellation of the entry.<sup>68</sup>

Once the legitimate right-holder has brought the case before the court, the court will provide for the registration of the *Streitanmerkung* (annotation of litigation) over the immovable. According to GBG § 61(1) the *Streitanmerkung* can be asked both to the ordinary court and to the court keeping the land register. By virtue of the entry of the *Streitanmerkung*, the claimant cannot immediately exercise his right *in rem*, but he will acquire authority to dispose over the immovable only if the court rules in his favour.<sup>69</sup>

From the moment of the entry of the *Streitanmerkung* third parties are supposed to have knowledge that a person has brought either a recourse or an action for cancellation *vis-à-vis* the current beneficiary of the

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<sup>67</sup>GSCHNITZER, *Sachenrecht*, 42.

<sup>68</sup>GSCHNITZER, *Sachenrecht*, 43.

<sup>69</sup>GSCHNITZER, *Sachenrecht*, 53.

registration. Therefore, if a third party has demanded the registration of his right *in rem* to the immovable after the entry of the *Streitanmerkung*, he will be considered as being a transferee in bad faith and the decision of the court will have effects on his title.<sup>70</sup> The legitimate right-holder however, cannot oppose the *Streitanmerkung vis-à-vis* the transferee in good faith, in case the latter has successfully obtained the registration of the title under GBG § 119. In case the transferee in good faith has demanded but not yet obtained the registration of his title, the *Streitanmerkung* produces effects *vis-à-vis* him if the legitimate right-holder asks for its registration within three years from the moment of the demand of the registration of good faith transferee's title (GBG § 64). Once registered the *Streitanmerkung*, the legitimate right-holder has further 60 days within which he has to bring an action for the cancellation of the third parties title (GBG § 63).<sup>71</sup>

However, it can happen that because of acquisitive prescription, time limitation, or other facts provided by law the information entered into the register do not offer a correct representation of the current legal status of the property. The person who has acquired a right *in rem* to the immovable (*e.g.* as a result of acquisitive prescription (ABGB § 1498)) can ask the court to recognise his right and to grant him the registration of his title. In this regard, one has to underline that the proper action to bring before the court will be not an action for cancellation (*Löschungsklage*), which aims at eliminating those entries harming the claimant's title, but simply an action for correction of the entry (*Berichtigungsklage*). As seen for the recourse and the action for cancellation, once the court is asked to hear the case, the court will provide for the registration of the *Streitanmerkung*, which will produce *vis-à-vis* the third party who has acquired a right *in rem* based upon the trust of the correctness of the entry into the register the above-mentioned effects (GBG §§ 69-71).<sup>72</sup> In case the *Streitanmerkung* cannot be registered (*e.g.* expiration of the term), the Act on the Enforcement of Civil Judgments (*Exekutionsordnung*) provides in EO § 382(1) n. 6 that the court can grant to the claimant a temporary

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<sup>70</sup>IRO, *op. cit.*, 124-125; GSCHNITZER, *Sachenrecht*, 43.

<sup>71</sup>IRO, *op. cit.*, 126; GSCHNITZER, *Sachenrecht, ibidem*.

<sup>72</sup>IRO, *op. cit.*, 127; GSCHNITZER, *Sachenrecht, op. cit.*, 44.

restriction order which will be entered into the register *ex officio* (EO § 384(2)) and which will prevent the registered right-holder/defendant from exercising his right over the contended immovable.<sup>73</sup>

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<sup>73</sup>IRO, *ibidem*.

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## THE TRANSFER OF IMMOVABLE PROPERTY IN BELGIAN LAW

Vincent Sagaert\* and Alexis Lemmerling\*\*

### 1. *Transfer of immovable property*

#### 1.1. *Consensual system*

The sale of an immovable (as well as a movable) good is – according to Belgian law – a so-called consensual agreement: it is complete by the mere consensus between the parties (articles 1138 and 1583 C.C.). Except if parties have agreed otherwise, the contractual rights and obligations between parties come into existence immediately and the ownership of the property is transferred immediately. Article 1583 C.C. provides that “it<sup>1</sup> is complete between the parties, and ownership is acquired as of right by the buyer with respect to the seller, as soon as the object and the price have been agreed upon, although the object has not yet been delivered nor the price already been paid”<sup>2</sup>. The object and price are the essential elements of the sales agreements, but parties can determine other essential elements which are the object of consensus between the parties.

In consequence, transfer of ownership belongs to the essential features of a sales agreement<sup>3</sup>.

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<sup>1</sup> Meaning: a sale.

<sup>2</sup> The original French text states as follows: “*Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé*”. We have argued earlier – in relation to the sale of movable goods – that the difference between a so-called consensual system and a so-called delivery system is by far not as big as it is often presented: V. SAGAERT, “Consensus versus delivery systems. Consensus about tradition?”, in W. FABER and B. LURGER (ed.), *Rules for the transfer of movables. A candidate for European harmonization or national reforms?*, München, Sellier, 2008, 9-46.

<sup>3</sup> H. DE PAGE and A. MEINERTZHAGEN-LIMPENS, *Traité élémentaire de droit civil belge*, Brussels, Bruylant, 1975, IVn° 21.

However, the problem of proof will easily emerge. Article 1341 C.C. provides that “a notarial deed or a private deed must be drawn up in all matters exceeding a sum of 375 €, even for voluntary deposits, and no proof by witness is allowed against or beyond the contents of instruments, or as to what is alleged to have been said before, at the time of, or after the instruments, although it is a question of an inferior sum or value. All of which without prejudice to what is prescribed in the statutes relating to commerce.” The last sentence of this provision refers to the rules on proof in commercial relationships, in which proof can be given by any legal means, including presumptions and witnesses. Outside the scope of the free proof in commercial relations, the proof of sales agreements exceeding 375€ with witnesses or presumptions will not be allowed.

So despite the consensual system as set out above, both parties will almost always be obliged to sign a private deed (“*onderhandse verkoopovereenkomst / compromis de vente*”) in order to create for themselves and for third parties a proof of the said sales transaction. In Belgian legal practice, this private deed, if well drafted, and postpones the transfer of ownership until the moment of the signing of the notarial sales deed. This is in legal practice also the moment at which the purchase price is paid and the buyer takes effective possession of the premises, as well is it the moment on which the liability for the risk of the premises is transferred to the buyer.

So the legal theory provides that the ownership is transferred immediately when parties have agreed upon the object and the price (*consensual system*), but in legal practice we see that nearly always the transfer of ownership is – if parties are well advised or have consulted a public notary from the real beginning of their negotiations – postponed until the signing of the notarial deed.

In order to avoid registration duty penalties, the sales agreement must be given a “certain date” – this means a date which is opposable to third parties – within four months after the agreement comes into existence.

This certain date is usually given by signing a notarial deed.<sup>4</sup> Hence, in legal practice the maximum delay between the signing of the private deed and the signing of the notarial deed is set at four months, because the registration duties should be paid within four months after the agreement on the object and the price<sup>5</sup>, unless there are precedent conditions involved. In the latter case, the delay of four months will only begin at the moment that the last condition precedent has been fulfilled<sup>6</sup>.

If the private deed itself is registered, which is rather uncommon, the notarial deed must not be passed within four months after the signing of the private agreement. In that case, the registration duties will be levied by presenting the private deed to the Registration Office ("*Registratiekantoor / Bureau d'Enregistrement*") before the expiration of the said delay. Registration duties will be paid then, but no transcription in the Mortgage Register can be executed on the basis of a private agreement (cf. *supra*), therefore a notarial deed is needed anyhow.

The registration duties amount to 10 or 12.5 % of the sales value of the property, depending on the Region where it is situated: 10% in the Flemish Region and 12.5% in the Brussels Metropolitan Region and the Walloon Region<sup>7</sup>. These taxes are diminished if the property is bought by a professional buyer who re-sells the property within a certain delay after the purchase. If this delay of four months for registration is exceeded, tax penalties will become due, equal to the amount of the registration duties.

The public Offices on Soil Pollution<sup>8</sup> will frequently also have to intervene. We will, in the following, not go into detail in the provisions on Soil Pollution. However, these provisions play an important role as the compliance with the public law obligations is a validity requirement for the transfer of ownership. Therefore, a private deed should - in order to be valid - be concluded subject to the condition precedent of compliance

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<sup>4</sup> The two other possibilities are that the private deed itself is published or that one of the signing parties had died (article 1328 C.C.).

<sup>5</sup> Article 32.4° of the Belgian Code on Registration Taxes

<sup>6</sup> Article 32-33 Code on Registration taxes.

<sup>7</sup> Article 44 of the Code on Registration Taxes.

<sup>8</sup> For the Flemish Region: the OVAM (*Openbare Vlaamse Afvalstoffen Maatschappij*), for the Brussels Region: the IBGE (*Institut Bruxellois pour la Gestion de l'Environnement*) and for the Walloon Region an office to be determined later on.

with the soil pollution requirements, and the notarial deed can only be concluded once these obligations have been complied with. Belgian case law is quite severe and even annihilates private deeds which are not made subject to the compliance with the soil pollution provisions if the pollution of the property at stake does not exceed problematic values.

If the soil certificates demonstrate that the soil pollution exceeds the set standards, the transfer will normally only take place after the decontamination work have been finished, except if derogation is allowed by the public office on soil pollution (which most frequently requires that the transferor provides for a financial guaranty in order to effectuate these works).

This issue is highly complicated in Belgian law, and has become even more complex due to the regionalization of this field of law. The applicable laws are, with regard to the Flemish Region the Decree made on the 27<sup>th</sup> of October 2006<sup>9</sup> for the Brussels Metropolitan Region the Ordinance of March 5<sup>th</sup> 2009<sup>10</sup> and for the Walloon Region the Decree of December 5<sup>th</sup> 2008<sup>11</sup>.

Also the municipal Town Planning Departments will have to intervene in the Flemish Region before concluding a private deed. The Flemish Town Planning Code<sup>12</sup> obliges the seller to mention certain information from Register of Plans and Permits in the private deed<sup>13</sup>. If such information is not yet available at the moment of the signing of the said deed, a condition precedent regarding the obtaining of this information will have to be inserted in the deed.

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<sup>9</sup>Published in the Official Belgian Bulletin on 22 January 2007.

<sup>10</sup> Published in the Official Belgian Bulletin on 10 March 2009.

<sup>11</sup>Published in the Official Belgian Bulletin on 12 February 2009 and only partially become into force.

<sup>12</sup>Decree of 15 May 2009, published in the Official Belgian Bulletin on 20 August 2009.

<sup>13</sup>Article 5.2.5 of the Codex.

## 2. Mortgage Register

### 2.1. Basic principles

Although the transfer of immovable property only requires an agreement on the object and the price, a transcription in the Mortgage Register ("*Hypotheekkantoor / Bureau des Hypothèques*") is needed in order to make the sale effective in relation to third parties with competing rights on the good in good faith<sup>14</sup>. Such a transcription by the Mortgage Registrar ("*Hypotheekbewaarder / Conservateur des hypothèques*") can only be realized on the basis of an authentic deed, which most frequently is a notarial deed ("*notariële akte / acte notarié*") but can also be a deed of a public officer of the Public Purchase Committee ("*Aankoopcomité / Comité d'Achat*") or a judicial decision recognizing that a sales agreement has been concluded<sup>15</sup>. This means that even a private deed first needs to be authenticated before the transfer of ownership can be made enforceable towards third parties with competing rights in good faith and that the intervention of the public notary is mandatory to this purposes<sup>16</sup>.

The Mortgage Register is a deeds register, not only a title register. All deeds presented to the Mortgage Registrar are entirely copied<sup>17</sup>. As a consequence, with the transcription of the deed, the title emerging from this deed is also registered. Apart from that, not only sales deeds are registered, but also deeds of gift, long lease deeds (more than nine years), easement deeds, building division deeds, seizure measures, etc. The only restriction is that the object of the deed should be an immovable property. There is no similar register in Belgium for movable goods.

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<sup>14</sup>Article 1 Mortgage Act.

<sup>15</sup> Article 2 Mortgage Act.

<sup>16</sup>If the selling party is a public authority however, the function of public notary can be replaced by the public officer of the "Public Purchase Committee" (*Aankoopcomité / Comité d'Acquisition*).

<sup>17</sup>Copying is now organised by computer scan, but until only a few years ago by handwriting.

A sales agreement is, even without publicity in the Mortgage Register, effective *vis-à-vis* third parties who have knowledge of the existence of this agreement or who ought to have knowledge of the existence of this agreement. Good faith is presumed, bad faith has to be proved by the party who aims to oppose the sales agreement to a third party prior to the publication in the Mortgage Register.

Moreover, only third parties with competing rights can argue that they do not have to take into account the transfer as long as it has not been published in the Mortgage Register. "Competing rights" means that the third party also has a "right in rem" on the same immovable property. If a conflict arises between two competing rights between two persons in good faith, the first one who has registered his title in the Mortgage Register will prevail. The priority principle is applied in relation to the moment of publication in the Mortgage Register. If, thus A sells an immovable to B and afterwards A sells the same immovable to C, the latter will prevail if he proceeds as the first one to the publicity in the Mortgage Register and if he did not know and ought not to know that the immovable had already been sold to B. It is questionable whether creditors can be considered as third parties. For instance: A sells an immovable property to B, and A is declared bankrupt after the sales agreement but before its transcription in the Mortgage Register. There is no unanimity as to the question whether the bankruptcy trustee must respect the sales agreement. According to DIRIX, the insolvency administrator represents the creditors. As their claim has been realized at the moment of the declaration of bankruptcy, they have – from that moment on – to be considered as third parties with competing rights. Therefore, the insolvency administrator can argue that a sale which has not been registered in the Mortgage Register, is not opposable to him.<sup>18</sup> In the same sense, a creditor seizing an immovable after its sale but before the transcription of the sale, must not take into account the sales agreement either (article 1577 Judicial Code).

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<sup>18</sup> See on this debate: E. DIRIX, "Faillissement en lopende overeenkomsten en", *Rechtskundig Weekblad* 2003-04, 207.

Because of this importance of the registration in the Mortgage Register, the public notary, when charged with drawing up a new sales deed, will have as first task to make a search in the Mortgage Register in order to assess whether the transferor is registered as owner of the property right he is purporting to transfer and whether there are no other property rights or leases of more than nine years (which also have to be published in order to be opposable) burdening the premise. On the basis of all this information, he will draft the notarial deed formalising the private deed between parties (if there is one). The public notary finally ensures the registration of this new sales deed in the Mortgage register within a delay of one month after the signing of the said deed<sup>19</sup>. The Mortgage Registrar then will register the deed within a new delay of one month<sup>20</sup>. Afterwards, on the request of the notary involved, the Mortgage Registrar sends a new mortgage certificate mentioning the transcription of the sales deed to the said notary. On the basis of this certificate, the notary is certified that the sales agreement has become effective in relation to third parties and he can close the file.

The Belgian Mortgage Register is a “*negative*” system of registries: the registration of deeds does not ensure the validity of the registered rights. The Mortgage Registrar has a sheer passive role: he is even not entitled to verify the validity of the agreement between parties. The Mortgage Registrar is even obliged to register all deeds which formally meet the criterion to be considered as authentic deed transferring property rights. In other words: the rights which are registered are merely possible rights, but their validity must still be assessed by the person consulting the Register (in most cases: the public notary). It is possible that the title of the one who is registered as owner is contested later on, in which case this action should be mentioned in the margin of the Mortgage Register<sup>21</sup>. This is the reason why the notarial deed always mentions the changes in property regime during the last thirty years, which is equal to the prescription period in order to annihilate property rights. The idea behind is that the validity of these acts on the basis of which the

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<sup>19</sup>Article 2 *in fine* Mortgage Act

<sup>20</sup>Article 126 Mortgage Act.

<sup>21</sup>Article 3 Mortgage Act.

transferor has acquired ownership, determines the validity of this ownership and thus of the possibility to transfer it.

Imagine that person X (registered owner) tries to sell the property owned by person Y (true owner), to person Z (who is in good faith) and that person Z registers the sales deed afterwards, he will not become the owner until the period for acquisitive prescription has expired (as in Belgian law, the sale of another one's property is void<sup>22</sup>). The registration by person Z, in the same way as the registration by his predecessor, does not cover grounds of invalidity of the transfer. Person Z will only have a personal claim for indemnity against his seller, but person Y stays the only true owner.

Moreover, the Belgian Mortgage Register is person-based, and not structured as a *Grundbuch*. The Mortgage Register is structured alongside the name of the persons holding a property right on an immovable property. Hence, searches in the registers can only be effected on the basis of the identity of a person holding rights on the immovable. The identification number of the parcel is not sufficient. This means that if you want to obtain the information about premise X, you should give at least one name of an actual owner or bearer of another property right.

If one knows the identification number but not a right holder, one first has to pass via the cadastral register, who will provide for an indicative identity of a right holder, and one can verify afterwards this information in the Mortgage Register. It should therefore not amaze one that this system of search for information on real estate only being able to be done on a "personal" basis, is often criticised<sup>23</sup>: the search criteria should be based on the data of the premise instead of on the data of the persons related to this premise.

When an immovable property is registered on the name of a company, the posterior change of the company name is also not immediately registered in the Mortgage Register, as there is no legal obligation to do so. Therefore it is always recommended to mention all the former names of the company when consulting the Mortgage Register, although the

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<sup>22</sup> Article 1599 C.C.

<sup>23</sup> A. VERBEKE and J. BYTTEBIER, "Onroerende en hypothecaire publiciteit - Organisatie en tegenwerpelijheid", *Rechtskundig Weekblad* 1997-1998, 1101.

Mortgage Registrar should be able to track the change of the company name as well.

It is important to mention that not all transfers of immovable property are registered in the Mortgage Register.

Only transfers *inter vivos* are transcribed. The transfers *mortis causa* cannot be traced in the Mortgage Register: the transfer of inherited immovable property is not mentioned in this register. This means that in the given case, the Mortgage Register does not reflect the actual ownership of the premise. With a transfer *mortis causa*, the immovable property passes immediately to the heirs, but neither on the basis of a consensual system nor on the basis of a notarial deed. Article 777 C.C. states that all acts accepting an inheritance have retroactive force until the moment of the decease. This means that the transfer immediately takes place on the moment of the decease, without any other formalities being needed. So no notarial deed needs to be drawn up, no registration in any kind of register needs to be made. The only information regarding the transfer of immovable property *mortis causa* can be found in the competent Registration Office, where the inheritance tax needs to be paid on the basis of a declaration of inheritance<sup>24</sup>. But it needs to be clarified that the information held in the Registration Office does not offer the same legal guarantees as the Mortgage Register. As there is no notarial deed needed for a registration in the Registration Office, the information held by this Office has often not been checked by any real estate or family law professional. Needless to say, this forms a major gap in the publicity of immovable property. From a legal point of view, the information provided by the Registration Office does not have any value or effect. Only the Mortgage Register ground the effectiveness of a transfer.

Moreover, only consensual transfers of immovables are the object of publicity. The transfer of immovable property by way of law (e.g. acquisitive prescription, accession, etc.) does not figure in the Mortgage Registers. These transfers are automatically (*de iure*) effective *vis-à-vis* third parties.

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<sup>24</sup>Article 35 of the Belgian Inheritance Tax Code.

## 2.2 Organisation of the Mortgage Registers

The Belgian Mortgage Register cannot (yet) be consulted on the internet. Demands to obtain information from this register (called a mortgage certificate - "*hypothecair getuigschrift / certificat hypothécaire*") still need to be handed over in paper form (regular mail or fax)<sup>25</sup> to the competent Mortgage Registrar (depending on the situation of the premise)<sup>26</sup>. The delay in which this mortgage certificate is supplied depends on the urgency of the demand and of the functioning of the particular Mortgage Office, but it takes easily two to three weeks.<sup>27</sup> However, it can last sometimes up to three months. These delays heavily burden the timeframes which are usually to be taken into account in case of a transfer. Although one of the essential characteristics of the Mortgage Register is its accessibility to everyone, the vast majority of the demands is effected by public notaries in charge of real estate transactions.

One of the risks pursuant to the sometimes long delays between the moment of the demand and the moment of receiving the mortgage certificate, is the possibility that a few days before signing a sales deed, the actual owner (not acting in good faith) sells the premise to another buyer or allows another bank to vest a mortgage on the sold premise. It is also even possible that after the passing of the authentic deed, but before its registration in the Mortgage Register, the transferor sells his premise again to a second buyer, who registers his deed before the first buyer. This is what is called the "*dead angle*" of the Belgian mortgage system and this can only be solved by making online consultations of the Mortgage Register possible. Anyhow, the Belgian public notaries, being aware of this dead angle and of the liability issues arising in that case, will apply for registration in the Mortgage Register as soon as possible after the signing of the sales deed.

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<sup>25</sup>Article 127 Mortgage Act.

<sup>26</sup>Article 82 Mortgage Act.

<sup>27</sup> It is, in some regions, possible to obtain a preliminary document from the Mortgage Registrar on the day of the demand, but it is clearly stated on the document that this information does not provide for any legal certainty.

### 3 . Land Register (Cadastral register)

#### 3.1. Basic principles

The Belgian Land Register ("*Kadaster / Cadastre*") was initially created for two purposes: (i) collecting data regarding the income of immovable property and subsequently offering a basis for real estate taxation and (ii) creating a proof of ownership for this immovable property<sup>28</sup>. This explains why it is actually still a division of the Belgian Ministry of Finance<sup>29</sup>. Every year the annual real estate tax ("*onroerende voorheffing / précompte immobilier*") is calculated on the basis of the (indexed) cadastral income accorded to each parcel of land.

The Land Register provides us with an inventory of all immovable properties in Belgium. Although the information held within this register almost entirely originates from notarial (sales) deeds, this register cannot be considered as a sound proof of ownership. It only provides a strong indication of ownership (a *presumption of ownership*), which needs to be completed with the relevant information mentioned in the sales deeds themselves and the Mortgage Register (and eventually the Registration Office in case of a transfer *mortis causa*). Legal certainty about the proprietary status of a premise can only be obtained through the Mortgage Register.

Moreover, the Land Register is only updated several months (sometimes years) after the transfer of immovable property and the description of the rights held on the premise (usufructuary, co-owner, bare owner, long lease holder, ...) is not always correctly reproduced, mainly in case of a transfer *mortis causa* and this entails at once the drawback of the whole land registering system.

Nevertheless, the Land Register constitutes an essential element in the transfer of immovable property and a vital tool for the Belgian public notaries drawing up notarial deeds of sale. Besides, there is no other (e.g.

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<sup>28</sup> A. VERBEKE and J. BYTTEBIER, "Onroerende en hypothecaire publiciteit - Organisatie en tegenwerpelijheid", *Rechtskundig Weekblad* 1997-1998, 1119.

<sup>29</sup> "Federale Overheidsdienst Financiën / Service Public Fédéral Finances".

a non-tax related) databank containing information about division of land in Belgium.

### 3.2 Organisation

Every parcel of land has its own cadastral identification number, although some parcels (for instance parcels owned by public authorities) do not have such a number. Once a parcel is split in two or more parts and is transferred individually, they receive a new cadastral identification number.

The cadastral records are organised per municipality (*"gemeente / commune"*). A municipality can have one or more divisions (*"afdeling / division"*). Next, each division has its own section (*"sectie / section"*) and then finally every section has its own cadastral parcel number (*"perceelnummer / numéro de la parcelle"*). Furthermore, every parcel number can have a sub-parcel number (e.g. after the splitting of an existing parcel number). One of the difficulties is that the identification of a parcel can change with a reorganisation of the plots of land in the region, in which case it becomes utterly difficult to track the development of the proprietary status of the premise.

The Land Registers requires for each parcel number to also has a surface. However, this surface mentioned in the Land Register is not always correct, due to the fact that theses surfaces are merely copied from the notarial deeds. The surfaces described in these sales deeds are usually not remeasured before each transfer. Only when there is reason for doubt about the exact surface of the land or after the splitting of an existing parcel of land, parties appeal to a land surveyor and the surfaces are considered to be correct. In order to avoid all discussions later on when the buyer or seller might discover that the parcel of land is smaller or larger than the one mentioned in the cadastral records, both parties will usually insert a clause in the private deed and in the subsequent sales deed saying that all differences should they be bigger or not than 1/20<sup>th</sup>

of the total surface of the land, and cannot give cause to any ground for voidness or compensation whatsoever<sup>30</sup>.

Contrary to the Mortgage Register, the Belgian Land Register is not (only) a person-based register. It is organised on the base of the exact address of the premise and per cadastral parcel of land, although you can obtain cadastral extracts mentioning all parcels of land belonging to one person in a specific municipality. But as set out before, the Land Register does not have any proprietary impact: the name(s) of the person(s) holding property rights on the premise, as it emerges from the Land Register, does not give you any sound certainty about the proprietary status of the premise, but it will enable you to make a search in the Mortgage Register on the basis of these names. In that way both registers are complementary. Contrary to the Mortgage Register, the Land Register is not a deeds register, but a register based on information originating from deeds.

Not only cadastral identification numbers can be found in the cadastral records, but also cadastral plans. These plans can be a great help in order to recompose the situation of certain premises or trace former cadastral identification numbers. They also provide the identity of the owners of the surrounding parcels of land.

The information of the Land Register can be orally obtained in offices of the Ministry of Finance and extracts from the cadastral records can be obtained on the basis of a written form<sup>31</sup>.

Unfortunately, until now, a public online consultation of the cadastral records is not possible. It takes easily two weeks after a written request to obtain extracts from the cadastral records. But only a few years ago, it has been made possible for the Belgian public notaries to have an online access to the cadastral information<sup>32</sup>. They can consult this information

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<sup>30</sup> Article 1619 C.C. stipulates that only if the difference between the real surface and the surface mentioned in the sales agreement is more than 1/20<sup>th</sup> of the total surface, the aggrieved party can claim price compensation, except if agreed otherwise. Parties nearly always agree otherwise, putting that no compensation will be due anyhow.

<sup>31</sup>Articles 2 and 5 of the Royal Decree of 22 September 2002 on the determination of the fees and other rules for the exchange of cadastral extracts and information.

<sup>32</sup>Via the tool [www.e-notariat.be](http://www.e-notariat.be) from the Royal Federation of Belgian Notaries (“*KFBN – FRNB*”).

online, but still have to make a written request to receive official extracts or plans from the Land Register. But for other (mainly non-professional) persons this information is still not accessible online.

## LEGAL SOURCES

The principal statutory rules regarding the transfer of immovable property in Belgium are spread throughout different books and titles of the Civil Code of 21 March 1804 (hereafter referred to as the C.C.), and more in particular:

- Book II - Goods ("*Goederen / Biens*"), articles 516 to 577, which provide the definition of the terms "immovable property" and "ownership";
- Book III, Title VI - Sale ("*Verkoop / Vente*"), articles 1582 to 1685, containing the rules regarding the transfer of ownership;
- Book III Title XVIII - Securities and Mortgages ("*Voorrechten en hypotheken / Privilèges et Hypothèques*"), containing the Mortgage Act dated 16 December 1851<sup>33</sup> about the system of transcription of sales deeds and the subsequent theory of priority of titles.

As the cadastral system in Belgium (cf. *supra*) emerges from a tax recovery purpose, the relevant statutory rules about the Land Register are incorporated in the Belgian Income Tax Code (article 471 to 504) and a few Royal Decrees based on it (such as the 20 September 2002 Decree<sup>34</sup>). Finally, the registration taxes due in relation to a transfer of immovables are provided by the Code on Registration and Mortgage Taxes.<sup>35</sup> As these taxes are regionalized, different regimes apply for Flemish, Brussels and Walloon territory.

As exposed above, neither the Mortgage Register nor the Belgian Land Register can be consulted on the internet (except the latter, but with mere access for Belgian public notaries), so we cannot give any relevant internet references regarding these registers. With regard to the statutes, it is useful to observe that all Belgian Statutes can be found at [www.staatsblad.be](http://www.staatsblad.be) (dutch version) and (French version), which is the website of the Official Belgian Bulletin.

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<sup>33</sup>Published in the Official Belgian Bulletin (*Belgisch Staatsblad / Moniteur belge*) on 22 December 1851.

<sup>34</sup> Published in the Official Belgian Bulletin on 11 October 2002.

<sup>35</sup> See for this Code: [www.fisconetplus.be](http://www.fisconetplus.be)

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A clear overview of the Belgian mortgage publicity system can be found in :

VERBEKE A. AND BYTTEBIER J., *Onroerende en hypothecaire publiciteit - Organisatie en tegenwerpelijkeid (Real publicity and mortgage publicity)*, in *Rechtskundig Weekblad 1997-1998*, 1099-1127; DIRIX E., *Zekerheidsrechten*, in *Beginselen van Belgisch Privaatrecht*, Antwerp, Kluwer, 2006, 519 p.; GREGOIRE M., *Publicité foncière, sûretés réelles et privilèges*, Brussels, Bruylant, 2006.

**THE TRANSFER OF IMMOVEABLES IN ENGLAND AND WALES: A BRIEF  
INTRODUCTION**

*Matthew Conaglen\**

1. *Immoveables*

Before describing the system for the transfer of immoveables in England and Wales, it is worthwhile considering what constitutes an ‘immoveable’ in England and Wales.

The word ‘immoveable’ is not regularly used in English land law. Most commentators talk simply about ‘land’. ‘Land’ comprises the parcel of land itself, on the surface of the Earth, together with anything that has been placed upon the land in such a way as demonstrates an objective purpose that it be present “for the use or enjoyment of the land [as opposed to] for the more complete or convenient use or enjoyment of the thing itself”.<sup>1</sup> Things which have been attached to the land in this way are called fixtures. There can be difficult categorisation questions in determining whether something is a fixture, but a classic case is a house which is a clear example of a fixture and, as such, is considered as part of the land.

Importantly, however, land is treated as a three-dimensional object in English law. Hence, the land also includes all the soil beneath the surface of land and also the airspace above the parcel of land up to “such height as is necessary for the ordinary use and enjoyment of [the] land and the structures upon it”.<sup>2</sup> Further, it is possible for this three-dimensional parcel of land to be divided horizontally, so that it is possible (although unusual) for someone to acquire a parcel of ‘land’ which is comprised wholly of a three-dimensional box of thin air.

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<sup>1</sup>*Elitestone Ltd. v. Morris* [1997] 1 WLR 687 at p. 698.

<sup>2</sup>*Bernstein v. Skyviews & General Ltd.* [1978] 1 QB 479 at p. 488.

## 2. *Legal and Equitable Interests*

### 2.1 *Distinction*

To understand land law in England and Wales, one also needs to understand the difference between legal and equitable interests in land. The difference is essentially the result of historical accident, rather than logical design. As such, it is perhaps easiest to 'understand' by describing (in a very simplified and stylised form) the historical development of the difference. (The responses to the questionnaire provide by themselves a current 'snapshot' of the importance of the difference, but they do not explain why the difference exists or how one tells the difference between legal and equitable interests.).

The difference between law and equity stems from the historical difference between the English courts that administered the common law, and those that administered the chancery jurisdiction. The common law courts administered justice according to a system of writs. If the facts of a dispute did not fall within the confines of a writ the claim would fail at law. Claimants faced with this situation started to request that the King, as the fountain of justice, provide them with some form of remedy. Over time, the power to deal with such disputes passed to the Lord Chancellor, acting as the King's representative, and eventually passed to the Chancery courts, which were headed by the Lord Chancellor. In this way, the Chancery courts acquired power to furnish new remedies where the common law remedies were inadequate, particularly where the defendant's conscience made it inequitable for him to insist on his legal rights. As such, there developed a new jurisdiction (the 'chancery' or 'equitable' jurisdiction) which recognised rights, and provided remedies, which were not available in the common law courts. These separate jurisdictions are now administered by the same courts, but the legal principles of each jurisdiction have remained distinctive.

Thus 'equity' presupposes the existence of common law, but not vice versa. Equity's main contributions to land law are twofold:

(a) the chancery courts were prepared to recognise interests as having been created in equity (hence them being 'equitable interests') if the

interests had been created with lesser formality than was necessary to create a formal legal interest; and

(b) equity was prepared to recognise interests where the common law courts would not. The most important of these is the trust: where S passed property to T to hold for the benefit of B, the common law courts would recognise T as the legal owner but refused to recognise that B had any interest in the property, whereas the chancery courts recognised the legal title of T (they could not deny that) but also recognised that B had an interest in the property. By definition, B's interest must be an equitable interest as it was not recognised by the common law courts.

Since 1925, statute has controlled which interests in land are capable of being legal or equitable. Sections 1(1) & 1(2) of the Law of Property Act 1925 list the estates and interests in land which are capable of being legal. Principal amongst these are the 'fee simple absolute' (effectively absolute ownership), leaseholds, easements, profits à prendre, and mortgages. Any interests in land which are not listed in section 1(1) or 1(2) must be equitable interests. Furthermore, even if an interest is listed in section 1(1) or 1(2), it is only a legal interest if the requisite formalities have been complied with for its creation as a legal interest – if these are missing, the interest will be an equitable interest (if it exists at all).

## 2.2 *Relevance of distinction*

The distinction between legal and equitable interests is relevant for two reasons. *First*, the distinction impacts upon the formality with which an interest must be created: equitable interests can be created with less formality than legal interests. *Second*, and far more importantly, the distinction between legal and equitable interests has historically been important to the issue of priorities (i.e., to the question whether the interest is binding on third parties). The difference between legal and equitable interests affects priorities less today than it did historically, but it is worthwhile summarising (again, in a very simplified and stylised form) the historical development of these priorities principles, as it shows why the distinction mattered.

The distinction between legal and equitable interests was most important before there was any system of registration relating to land. In that period, a legal interest in land would bind all third parties, irrespective of whether they had paid value for the land and irrespective of whether they had notice of the interest. At this stage, equitable interests also bound third parties, but with two very important exceptions.

(a) First, if the legal owner of land had power to deal with the land free of the equitable interests (as where a trustee is empowered under the trust to sell the land), then any such dealing with the land would 'overreach' the equitable interests and pass full legal title to the purchaser free from those equitable interests (the equitable interests would be enforced against the purchase money instead, if any were received).<sup>3</sup>

(b) Secondly, even if the trustee acted outside of his powers (i.e., in breach of trust), the holders of equitable interests could not assert those interests against anyone who was a bona fide purchaser of a legal interest in the land without notice of the equitable interest.

In the second half of the nineteenth century, a system of land registration was introduced, but it was not until the late twentieth century that registration on sale became compulsory for the whole of England and Wales. In the meantime, in 1925, a system of registration of interests in unregistered land was introduced by the Land Charges Act 1925 (now re-enacted as the Land Charges Act 1972). Under this Act, the land itself was not registered (hence it is 'unregistered land'), but rather the Land Charges Register contained a record of lesser interests in the land. The interests which can be registered in the Land Charges Register are listed in section 2 of the Land Charges Act 1972. If an interest is listed in section 2 but is not entered in the Land Charges Register, then the interest will not bind a purchaser of the land, irrespective of whether the

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<sup>3</sup>Not all equitable interests can be overreached in this way, but the law as to which interests can and cannot be overreached is unclear. The manner in which overreaching of interests in land takes place is now regulated by statute, such that equitable interests in land will be overreached only if any proceeds of sale are paid to all trustees and there are two or more trustees: sections 2(1)(ii) & 27(2), Law of Property Act 1925 (hereinafter, "LPA 1925"). Only one trustee is necessary if the trustee is a trust corporation.

purchaser had notice of the interest. Also, a purchaser of the land is bound by any interests which are registered in the Land Charges Register, even if the interest was an equitable interest of which the purchaser had no actual notice.

Thus, for unregistered land since 1925 there are three relevant categories of interest: (a) legal interests which are not listed in section 2 of the Land Charges Act 1972 - these bind all third parties, as they did before 1925; (b) legal and equitable interests which are listed in section 2 of the Land Charges Act 1972 - these bind third parties if they are registered in the Land Charges Register, but not if they were not so registered, irrespective of notice; and (c) equitable interests which are not listed in section 2 of the Land Charges Act 1972 (such as a beneficiary's interest under a trust) - these bind all third parties unless they have been overreached or the third party was a bona fide purchaser of a legal interest in the land without notice of the equitable interest, as before.

Finally, the land registration system provided a different regime, whereby the land itself was registered. Under this system, the focus is far more on the Register itself. Where land is registered, a gratuitous donee of the land is bound by any interest which preceded his or her receipt of the property.<sup>4</sup> In contrast, someone who purchases the land for valuable consideration and becomes the registered owner takes free of other preceding interests,<sup>5</sup> *except that* the purchaser is bound by any interests which are entered in the Register at the time he or she becomes the registered proprietor (irrespective of whether the interest is legal or equitable and irrespective of notice), and he or she is also bound by any preceding interests which fall within Schedule 3 of the Land Registration Act 2002 - these latter interests are known as 'overriding interests' as they override the protection that the purchaser otherwise receives. The class of overriding interests is limited to the list contained in Schedule 3. Principal amongst them are short legal leases,<sup>6</sup> legal easements and profits à prendre,<sup>7</sup> and any interest (whether legal or equitable) where the interest

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<sup>4</sup>Section 28, Land Registration Act 2002 (hereinafter, "LRA 2002").

<sup>5</sup>Section 29, LRA 2002.

<sup>6</sup>Paragraph 1, Schedule 3, LRA 2002.

<sup>7</sup>Paragraph 3, Schedule 3, LRA 2002.

holder is in actual occupation of the land at the time it is disposed of to the purchaser.<sup>8</sup> Thus, with overriding interests, the difference between legal and equitable interests can be relevant – for example, an equitable easement would not qualify as an overriding interest whereas a legal easement would.

### 3. *Transfer system*

The system by which land is transferred in England and Wales depends upon whether the land has been registered with HM Land Registry or not, and whether the transferor's interest in the land is a legal interest or an equitable interest (for the difference between legal and equitable interests, see section B above).

#### 3.1 *Registered land*

Most, but not all, land in England and Wales has now been entered onto the Land Register: according to recent estimates from the Land Registry, over 87% of titles to land in England and Wales are registered.<sup>9</sup>

The Land Register contains three items for each parcel of land: (i) a Property Register, (ii) a Proprietorship Register, and a (iii) Charges Register. The Property Register identifies the parcel of land that has been registered (both by description and by reference to an official plan), and can include details of rights (such as easements) which benefit the parcel of land. The Proprietorship Register provides the name and address of the legal owner or owners of the land and can indicate whether there are any limitations on the powers of the owner to dispose of the land. The Charges Register indicates whether the property is subject to any mortgages (or other charges) as well as indicating whether the property is subject to any other encumbrances (such as easements or covenants).

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<sup>8</sup>Paragraph 2, Schedule 3, LRA 2002.

<sup>9</sup>See Land Registry, *Annual Report and Accounts 2005/6* (London, TSO, 2006): over 20 million titles are registered (p. 19) out of an estimated total of 23 million titles (p. 117).

If land is registered, technically legal title to that land can only be transferred by a deed,<sup>10</sup> coupled with registration of title in the Land Register.<sup>11</sup> However, the most important element is registration in the Land Register, as this is conclusive evidence of legal title even if the (now) registered proprietor would not otherwise have had legal title.<sup>12</sup>

Thus, the Land Register is a register of titles, rather than of deeds, in the sense that it is registration (rather than any underlying deeds) that transfers legal title to land. In other words, registration is both constitutive, and conclusive evidence,<sup>13</sup> of title.

Land can be transferred without a contract (thus allowing for gifts and transfer by succession). If a contract is used, the contract must be in writing and signed by both parties.<sup>14</sup> Again, any defect in this regard does not affect the transfer if the transfer has nonetheless been registered.<sup>15</sup> In this sense, the English system of land transfer is an abstract system, although that phrase is not a commonly used.

If the transferor's interest is an equitable interest, then only that equitable interest can be transferred. To do so, a deed is not required, but the transfer must be done in writing and signed by the transferor.<sup>16</sup> The Land Registry can only register legal estates in land,<sup>17</sup> and so a transfer of an equitable estate (such as a beneficiary's right under a trust of land) does not require registration. Some equitable interests in land can be entered onto the Register by way of a notice,<sup>18</sup> but this only acts to protect the priority of the interest – it is not constitutive of the interest itself, nor

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<sup>10</sup>Section 52(1), LPA 1925. In English law, a 'deed' is an instrument (1) which makes clear on its face that it is intended to be a deed; and (2) is signed in the presence of a witness who attests the signature; and (3) is delivered as a deed: Section 1, Law of Property (Miscellaneous Provisions) Act 1989.

<sup>11</sup>Section 27(1) & (2)(a), LRA 2002.

<sup>12</sup>Section 58(1), LRA 2002.

<sup>13</sup>It is possible to alter the Register where the Registrar has made a mistake, but the Register is conclusive until such a change is made.

<sup>14</sup>Section 2, Law of Property (Miscellaneous Provisions) Act 1989.

<sup>15</sup>Such a defect could justify the Register being altered, but the Register remains conclusive until such alteration is effected: the defect in the contract does not itself alter or affect the Register.

<sup>16</sup>Section 53, LPA 1925.

<sup>17</sup>Section 2, LRA 2002.

<sup>18</sup>Section 32, LRA 2002.

of its transfer. Importantly, the beneficiary's equitable interest under a trust is incapable of being entered on the Register, even by way of notice.<sup>19</sup>

### 3.2 *Unregistered land*

If the land to be transferred has not yet been entered onto the Land Register, then the only requirement to transfer legal title to the land is that there be a deed.<sup>20</sup> As is explained above, interests in the unregistered land may have been registered in the Land Charges Register, but this is only relevant in protecting the priority of those interests against a purchaser of the land – it is not a method for constituting or transferring unregistered interests. Again, the transfer of equitable interests in unregistered land does not require a deed, but rather writing signed by the transferor.<sup>21</sup>

It is noteworthy, however, that although a sale of the legal title to unregistered land will involve a transfer of legal title to the unregistered land by deed alone, such a transfer triggers an obligation to bring the land onto HM Land Registry (known as first registration),<sup>22</sup> and failure to do so within two months of the unregistered transfer renders the unregistered transfer void at law.<sup>23</sup>

Similarly, the first registration obligation arises where a lease longer than seven years is granted out of a freehold estate in unregistered land or where a legal mortgage is granted over unregistered land.<sup>24</sup>

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<sup>19</sup>Section 33(a)(i), LRA 2002.

<sup>20</sup>Section 52(1), LPA 1925.

<sup>21</sup>Section 53, LPA 1925.

<sup>22</sup>Section 4(1)(a), LRA 2002.

<sup>23</sup>Sections 6 & 7, LRA 2002. (The consequence of the unregistered transfer being void is that legal title to the land reverts to the transferor, who then holds that legal title on trust for the transferee.)

<sup>24</sup>Section 4(1)(c) & (g), LRA 2002.

## LEGAL SOURCES AND BIBLIOGRAPHICAL REFERENCES

The most important statutory sources for English land law are the Law of Property Act 1925 and the Land Registration Act 2002. Legislation passed since 1988 can be accessed online without payment at <http://www.opsi.gov.uk/acts.htm>. Legislation from before 1988 can be bought in print form from <http://www.tsoshop.co.uk/parliament/bookstore.asp> and by accessing various subscription-based online databases, such as Westlaw and LexisNexis.

For information about land law in England and Wales, reference can usefully be had to the following texts:

C. HARPUM, S. BRIDGE & M. DIXON, *Megarry & Wade's The Law of Real Property* (London, Thomson, 7th edn, 2008); R. ROPER (gen ed) *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (London, Sweet & Maxwell, Looseleaf edn, 2005); and E. COOKE, *The New Law of Land Registration* (Oxford, Hart Publishing, 2003). Also helpful is the Law Commission's report on land registration, which led to the enactment of the Land Registration Act 2002: *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC 271, 2001), which is also available online without charge at [http://www.lawcom.gov.uk/lc\\_reports.htm#2001](http://www.lawcom.gov.uk/lc_reports.htm#2001).

HM Land Register can be accessed online at <http://www.landregisteronline.gov.uk/>, where searches of the online register can also be conducted (for a modest fee), and further information about the Land Registry can be obtained from <http://www.landreg.gov.uk/>.



# INTRODUCTION OF THE FINNISH LEGAL SYSTEM FOR THE TRANSFER OF IMMOVABLE PROPERTY

*Matti Ilmari Niemi\**

## 1. *The Finnish System as a Nordic and European Legal System*

The Finnish system is a continental, that is, a civil law system. The point of departure is that laws are given by the national lawgiver, the Finnish Parliament (*Eduskunta*), in the form of statutes. The main role of the courts is to interpret the statutes, and the main role of precedents is to supplement the written law. Today, the position of Finland as a member of the European Union is acknowledged.

The Finnish system of real estate and its transfer is regulated comprehensively by statutes. Moreover, the statutes are well systemized. Public registers are an essential part of that system. The parcelling of land and other land survey are regulated by the Real Estate Formation Act (*kiinteistönmuodostamislaki*, 1995), the Finnish Cadastre by the Real Estate Register Act (*kiinteistörekisterilaki*, 1985) and both conveyances of real estate and land registration by the Code of Real Estate (*maakaari*, 1995). In this article, the focus is on the last one.<sup>1</sup>

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<sup>1</sup> English translations of many Finnish statutes are available in the data bank Finlex. The Finnish Code of Real Estate can be found online at: <http://www.finlex.fi/en/laki/kaannokset/1995/en19950540.pdf>.

As in Sweden, the preliminary works (*travaux préparatoires*) have an important role in Finland as a source of law and legal information alongside the text of the statutes. For instance, the Government Bill of the Code of Real Estate (*hallituksen esitys 1994:120*) is an important source for interpreting and complementing the text of the code. Unfortunately, unlike many statutes, bills are not translated into English.

In addition to being comprehensive, the statutes regulating the transfer of real estate and land registration are brought up to date. In practice, this means that the content of the regulation can be described, at least at a general level, by reference to the statutes. No confirmation by the Supreme Court or other courts is needed, and the references to literature have merely a minor role.

The major Finnish textbooks (in Finnish) about the transfer of ownership of real property and the land registration system are the following: *Jokela, Marjut, Kartio, Leena and Ojanen, Ilmari*, *Maakaari* (Talentum: 2004, *The Code of Real Estate*), *Tepora, Jarno*,

The Finnish legal system belongs to the Nordic group. There are, nevertheless, two sub-groups, the Danish-Norwegian and the Swedish-Finnish. The original roots of these systems are in the legal traditions of each of these countries but, no doubt, the influence of German law is significant. It is easy to recognize the influence of Roman law as well. For instance, the adopted conception of ownership is uni-titular. So far as real property is concerned, a particularly important model has been the German Civil Code and other legislation applied to registration.<sup>2</sup>

Historically, Swedish law has been the most powerful influence for Finnish Law. These countries share a history until the year 1809, and the stages of their legal evolution strongly resemble each other.

In recent times, the technical development of registration and, more generally, the possibilities provided by communication networks have brought about a remarkable change. The advancement of the duties of local (district) courts and other registration organisations has been an important reason for change. These developments have induced organisational changes in every Nordic country.

## 2. *Transfer of Real Property*

A title to a piece of real estate or a share or a parcel of it is acquired through a sale or trade, as a gift or as another conveyance.<sup>3</sup> The word “conveyance” here refers to a transfer of real property. The point of departure is the transfer of ownership through a transaction, that is, a contract.<sup>4</sup>

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*Kartio, Leena, Koulu, Risto and Wirilander, Juhani*, *Kiinteistön käyttö ja vaihdanta* (Kauppakaari:2002, *The Use and Exchange of Real Property*) and *Niemi, Matti Ilmari*, *Maakaaren järjestelmä I ja II* (WSOY 2002 and 2004, *The System of the Code of Real Estate I and II*). *Maakaaren järjestelmä III* will be published by Niemi and WSOY in 2009.

<sup>2</sup>*Bürgerliches Gesetzbuch* (BGB, 1896) and *Grundbuchordnung* (GBO, 1897). As far as land registration is concerned the chain of influence goes from Germany to Denmark, from Denmark to Sweden and from Sweden to Finland.

<sup>3</sup> Code of Real Estate 1:1 and 1:2 (chapter 1, section 2). Today, the German doctrine of commodities and their parts is not applied to parcels in Finland. A transferred parcel is treated equally to a piece of real estate even when it still is a part of an estate or a plot.

<sup>4</sup> Other types of acquisition, such as inheritance, are excluded.

The formal requirements of a valid transfer are strict. According to the Code of Real Estate, a sale of real estate shall be concluded in writing. The vendor and the purchaser or their attorneys shall sign the “deed” and a public notary shall attest the sale in the presence of the parties or their attorneys.<sup>5</sup> In Finland, the “deed” means a contract which will be explained later in this article. The notary does not draft the contract but merely witnesses the signatures of the parties or their attorneys and adds his own signature. On the other hand, the notary examines the validity of the transfer in outline.

The contract shall indicate the most important terms of the sale (*essentialia negotii*): the intent to transfer, the piece of real estate to be transferred, the vendor and the purchaser and the price or another consideration.<sup>6</sup> As a rule, other terms of transfer can be agreed outside the formally valid contract.

The transfer is void, and therefore not binding, if the formal requirements are not met. The same rules are applied to all transfers of real property.

A formally valid sale or another contract is the most important stage of the transfer. No separate deeds are recognized. Normally, the transferee becomes the legal owner immediately after the contract becomes binding. Title registration has significance in this respect, as well. This issue will be examined later in details.

A transfer of real property can be conditional. A sale may contain a cancellation or a suspension clause.<sup>7</sup> Regardless of the wording, they are treated in the same way. The clause is not valid if it is not included in the written contract signed by the parties and the notary.<sup>8</sup> Such a clause is often united with a term of payment of the purchase price. In these cases the clause is treated as a security for the vendor: the vendor has granted a loan to the purchaser and the object of the sale is a security for the loan. Regardless of the wording of the clause, the purchaser is treated as the owner immediately after the conclusion of the formally valid contract.

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<sup>5</sup> Code of Real Estate 2:1.1.

<sup>6</sup> Code of Real Estate 2:1.2.

<sup>7</sup> Code of Real Estate 2:2.1.

<sup>8</sup> Code of Real Estate 2:2.2.

His or her position is, nevertheless, limited by the security right of the vendor until the clause expires. The vendor is entitled to claim the piece of real estate back if the purchaser delays payment in an essential way. In this case, the sale can be cancelled. A cancellation or a suspension clause can be adopted to protect the purchaser, as well.

The period of validity of a cancellation or suspension clause is limited. It is not binding in so far as it is intended to remain valid for longer than five years from the conclusion of the sale.<sup>9</sup> In other words, the clause will terminate *ex lege* in that time regardless of its wording. The clause will terminate even before when there is payment of the purchase price, if the clause is united with a term of payment.

A purchaser shall register his or her title within six months of drafting the contract.<sup>10</sup> In the case of a conditional sale the application will be left in abeyance (be postponed).<sup>11</sup> At the same time, this is the way to publish the security right of the vendor. Registration will be granted when the purchaser presents the receipt of the purchase price and, in any case, the registration will be granted *ex officio* after the termination of the clause.<sup>12</sup>

Because of the strict formalities applying to transfers of real property, the cancellation of a sale can only be made in the same way (in the same form) as the original contract, or by the ruling of a court.<sup>13</sup>

### 3. *Special Features of the Finnish System*

There are three important features of the Finnish legal system which differentiate it from many continental systems, such as the German one.

First, there is no distinction between a contract *in personam* (e.g. a sales contract) and a contract *in rem*, concerning property and ownership. This is a general feature of property law in Finland as well as in other Nordic countries.

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<sup>9</sup> Code of Real Estate 2:2.2.

<sup>10</sup> Code of Real Estate 11:1.

<sup>11</sup> Code of Real Estate 12:2.1/1.

<sup>12</sup> Code of Real Estate 12:2.2.

<sup>13</sup> See Code of Real Estate 2:5.

At the general level, the distinction between property rights and personal obligations is important, but nevertheless, it has not been seen as a crucial one. In Nordic countries, this distinction does not affect the way courts interpret Private Law.

Second, and in connection with the previous point, there is no difference between a contract and a conveyance of ownership. A Finnish sale of real estate contains both of them. Hence, there is no difference between a sales contract and a deed.<sup>14</sup> A formally valid sales contract is considered a “deed”, transferring ownership from the vendor to the purchaser.<sup>15</sup> In other words, a “deed” is always included in such a contract. Title registration is granted when the purchaser presents the sales contract as the acquisition document.<sup>16</sup>

In most cases, no distinct agreements or written contracts are made before making a formally valid contract signed by the parties and a public notary. As a matter of fact, the term “deed” used in the English translation of the Finnish Code of Real Estate is misleading.<sup>17</sup> In Finland, this document is understood as a sales contract by which the transfer of ownership takes place.

As a conclusion and according to the given classification, it is clear that the Finnish system is abstract, not causal or consensual, in so far as the transfer of ownership of real property is concerned.

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<sup>14</sup>Even the difference between sales contracts (*köpekontrakt*), sales letters and “deeds” (*köpebrevet*) is unknown in Finland (see *jordabalken*, the Swedish Land Code 4:2, 4:5 and 4:6), despite being commonplace in Sweden. The meaning of the sales contract and sales letter in Swedish practice differs, however, from the German one. In Sweden, their use refers to a sale with a suspension clause related to a term of payment of the purchase price. In Sweden, parties may first sign the sales contract which contains all the clauses, and later sign the sales letter containing an explanation of the transfer of ownership and receipt of payment of the purchase price. The use of these two documents is not, however, necessary. In addition, the use of the two documents is an alternative to the suspension clause (see the Swedish Land Code 4:4.1). Also in Denmark, a practice similar to that of Sweden is recognized, and the terms *betinged skøde* and *ubetinget* or *endelig skøde* are used. In Finland, only one contract with a suspension clause is made in such a case.

<sup>15</sup> See Code of Real Estate 1:1 and 2:1.1.

<sup>16</sup> See Code of Real Estate 12:1.1.

<sup>17</sup> See Code of Real Estate 2:1.

Naturally, parties negotiate and reach an agreement before signing the final (formally valid) contract. However, a verbal agreement or a written contract merely signed by the parties is not binding. It is not possible to bind oneself to transfer any real property without fulfilling the formal requirements of the sales contract. Instead, negligence (non-conclusion) of a non-binding agreement as a tort can make the negligent party liable to compensation.<sup>18</sup> It is clear that the invalidity of any such preceding agreement or contract does not affect the validity of the final contract.

Parties can make a pre-contract before making the final contract.<sup>19</sup> A pre-contract is, however, not a necessary initial stage of a final contract or a compulsory part of the proceeding for the transfer of ownership. Its function is different. Moreover, the use of a pre-contract is not a conventional practice.

Normally, parties make a pre-contract when they know of an obstacle to the final contract. They can agree on the final contract and wait for the disappearance of the obstacle. A pre-contract binds its parties if it meets the same formal requirements of the final contract. In addition, the separate final contract meeting the same requirements has to be made later. Hence, two formally valid documents have to be made. In this case, a court ruling can replace the final contract.<sup>20</sup>

The object of a pre-contract is the final contract. The transfer of ownership or possession of a piece of real estate does not take place by concluding a pre-contract. Therefore, the pre-contract does not bind third parties, for instance the creditors of the transferor. A piece of real estate as the object of a pre-contract is considered the transferor's property after making the pre-contract and before registering the final contract.

The validity of a final contract does not depend on the validity or existence of a pre-contract or another preceding agreement. Neither does the invalidity of a pre-contract affect the validity of a final contract. Irrespective of the mistakes or reasons for invalidity involved in a pre-

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<sup>18</sup> See Code of Real Estate 2:8.

<sup>19</sup> See Code of Real Estate 2:7. There are many rules distinguishing the pre-contract from the final contract.

<sup>20</sup> See Enforcement Code 7:15.2.

contract, the same parties can later freely agree on the transfer of ownership of the same piece of real estate through a final contract.

Third, the registration of a title does not grant ownership to the purchaser or another transferee or a new owner over the real property. There is no crucial stage or moment suppressing the ownership of a transferor and creating the ownership of a transferee in all respects and at once. There is even no aspiration to create such a way to untie “the Gordian knot”. In other words, the German idea of registration creating ownership has not been adopted in Finland or in the other Nordic countries.<sup>21</sup>

Instead, the effects of title registration are weaker and more limited. Registration strengthens the ownership and position of the transferee. It is an issue of the effects of title registration examined in detail below. The effects and significance of title registration can be approached both from the viewpoints of transfer of ownership and the trustworthiness of the Title and Mortgage Register.

Today, a special kind of analytic conception has been adopted in Finland and in the other Nordic countries.<sup>22</sup> It can be described as a process or relational conception of the transfer of ownership. According to it, a transfer is a process including many stages united with different effects in different personal relations. The relationship between a transferor and a transferee is the most important. There are other relationships, as well, such as the one between the transferee and the creditors of the transferor and between the transferee and the so-called rightful owner (e.g. a predecessor of the transferor). The binding effect of a transfer can be tied to different stages in different relations.

According to the Finnish interpretation and application of this conception, as far as real property is concerned, a transfer of ownership mainly takes place by and at the moment of a transaction, that is, a sale or

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<sup>21</sup> On the German system, see BGB § 873 and 891.

<sup>22</sup> The analytic conception can be traced back to the writings of *Alf Ross* and certain other so-called Scandinavian legal realists during the 1930s. Their legal philosophy has not been supported since the 1980s but their analytic approach has dominated the Nordic civil law studies up to the present.

another contract. In addition to the contracting parties, it has an effect in the relation they have with their respective creditors.

As a rule, a transferee is treated as the owner immediately after the moment of entering into a formally valid contract. However, in certain other respects, for instance in relation to the rightful owner, title registration can decide the binding effect of the transfer.

#### 4. *The Finnish Registration System*

The Finnish registration system relating to land and water areas has traditionally been divided into two main parts. Registration has been divided even at the organizational level. The distinction is uniform with the German system, but nevertheless, registration has developed independently in Finland. The Swedish influence has been stronger than the German one.

There are two independent and different property registers. One is the Finnish cadastre, the register of land units, that is, the *Real Estate Register* (*kiinteistörekisteri*), maintained by the National Land Survey Bureau (*Maanmittauslaitos*). The other is the Finnish register of titles and other property rights over land, that is, the *Title and Mortgage Register* (*lainhuuto- ja kiinnitysrekisteri*), maintained by the local courts (*käräjäoikeudet*). They both are national, electronic (digital) and public.

The Real Estate Register is not merely a cadastre in the conventional sense. Its connection with taxation is not its key feature today. Taxation is, no doubt, the historical background of the register, but nevertheless, it has always had other different and more important tasks. Especially the direct connection between the register and the advanced and officially maintained land surveying system

is worth mentioning. The register is linked to a detailed and small scale digital map. The map is drawn up on the basis of decisions that arise from survey proceedings.

Land surveying as parcelling is the sole way to create new land units – that is, pieces of real estate as commodities in the legal sense and objects of rights – as well as to change their borderlines. New land units or

borders can be created only by an official surveying procedure. Besides, registration in the Real Estate Register is needed. These units are well defined and marked on the terrain by officials. Today, the whole territory of Finland is divided in real estate units. There are about 2.7 million pieces of real estate in Finland, all included in the Real Estate Register.

The basic, that is, the unit information of the Title and Mortgage Register is provided by the Real Estate Register. Together, these registers constitute the Land Information System (*kiinteistötietojärjestelmä*). People can monitor the registers in the offices of certain local authorities and can order certificates. In addition, many officials, banks, insurance companies, real estate agents and some other corporations have direct access to the system.

Four kinds of entries can be inserted in the Title and Mortgage Register.<sup>23</sup> Title registration (*lainhuudatus*) is the most important one. It is as crucial for the land registration system as the concept of ownership is for the property law system.

The owner of a piece of real estate who has last applied for the registration of his or her title may apply for a mortgage (*kiinnitys*). When the mortgage as a registration entry has been granted, the applicant is issued a mortgage instrument (*panttikirja*, an official document). A real estate lien (*panttioikeus*) can take place by handing over the mortgage instrument to a creditor by the owner.<sup>24</sup>

All significant limitations to property rights can be registered. Aside from liens, the Code of Real Estate recognizes other rights called special rights (*erityiset oikeudet*). This is the third registration type. An exhaustive list of registrable rights is given in the Code of Real Estate: a lease or another kind of usufruct, a right to a pension off the real estate, a right to take timber and a right to extract land or mineral resources or other comparable rights of extraction.<sup>25</sup> In addition, it is obligatory to register the most important usufructs in practice and land leases for residential or industrial purposes.<sup>26</sup> Nevertheless, the *numerus clausus* principle is not

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<sup>23</sup> Code of Real Estate 5:1.

<sup>24</sup> Code of Real Estate 16:2.1, 16:3.1 and 17:2.1.

<sup>25</sup> Code of Real Estate 14:1.1.

<sup>26</sup> Code of Real Estate 14:2.1.

acknowledged at a general level in Finland. Overriding interests in the English sense are not recognized.

The fourth type includes certain entries made by the registration authority *ex officio*. These are, for instance, a note of attachment directed at a piece of real estate or the bankruptcy of its owner.

One important dimension of the serviceability of the Title and Mortgage Register is its up-to-dateness.<sup>27</sup> The title registration period is six months and registration is voluntary in many cases. In this respect, it is important that notes on transfers of real property are entered soon (within a week) after the transaction in the form of acquisition information in the Title and Mortgage Register.<sup>28</sup> These entries are also made *ex officio* with the help of announcements made by public notaries. In the near future, the acquisition information will be entered into the register within a day of the transfer.

##### 5. *The Nature of Title Registration*

Finnish land registration can be classified as a title registration rather than a deed registration system.<sup>29</sup> The Finnish system has many specific features. It is not a pure title registration system. Broadly speaking, the Finnish registration system is similar to the Swedish one.

The Finnish system is not a system of registration of documents. It is the legal consequence of a transfer or another agreement or an acquisition

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<sup>27</sup> Besides up-to-dateness the serviceability of a land register depends on how exhaustive and trustworthy it is as far as ownership information is concerned. Exhaustiveness depends on the percentage of pieces of real estate, land and water areas are included in the land register. Trustworthiness can be divided into actual and public (formal) trustworthiness. They are examined below. Today, the Finnish Title and Mortgage register is at a high level in all these respects.

<sup>28</sup> Code of Real Estate 7:5.1.

<sup>29</sup> The definitions of title and deed registration studied here were taken from *Henssen and Zevenbergen*. Henssen, Jo, Basic principles of the Main Cadastral Systems in the World. In *Modern Cadastres and Cadastral Innovations*. Proceedings of the one day seminar in Delft on May 16, 1995. FIG Commission 7 and University of Melbourne, p. 5-12. Zevenbergen, Jaap, *Systems of Land Registration. Aspects and Effects*, NGG Nederlandse Commissie voor Geodesie Netherlands Geodetic Commission, Delft, September 2002.

which is registered. The acquired right, the name of its holder and the object of the right are registered. They constitute the essential content of the Title and Mortgage Register.<sup>30</sup> Hence, title registration means registration of ownership. To be precise, the registration of a title means the registration of an acquisition of ownership of a piece of real estate or a parcel or a share of it.<sup>31</sup>

The Title and Mortgage Register is a unit (“parcel”) based register. Units, as the basic information of the register, are pieces of real estate registered in the Finnish Cadastre, the Real Estate Register or shares or parcels of them. One can identify a unit by its unit number in the registers. By looking at the unit number, one can see by inspecting the Title and Mortgage Register who is the registered owner and which are the registered charges of the unit. A citizen’s and corporation’s trust in this information is protected by the legal effects of title registration.

The registration authority examines the registration application and its attachments. Both the fulfilment of the formal requirements and the validity of the acquisition are checked. The applicant has to present a formally valid sales contract or another acquisition document and prove the validity of his or her acquisition. In addition, the registration authority examines *ex officio* all of the information included in the registers available to it. Registration means acknowledgement of the applicant’s acquisition and right. Reasons for the invalidity of a registered right seldom appear. This means that the Title and Mortgage Register is actually trustworthy.

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<sup>30</sup> Applications and all their attachments including copies of contracts (“deeds”) are kept in the archives of the registration authorities. A registration authority can even make new copies of the contract. They are acknowledged as equal to the original (Code of Real Estate 12:1.1). It is important to remark, however, that the title (ownership) and its holder constitute the most essential content of the entries registered in the national electronic Title and Mortgage Register. People and corporations trust the register and the information it contains.

<sup>31</sup> Code of Real Estate 10:1. Registration of the vendor’s title is not a precondition for the validity of a transfer of real property or the title registration of the purchaser. The registration of a title can be granted to a purchaser that makes many transfers in a chain. In this case, only the last acquisition will be registered. Nevertheless, all acquisitions will be examined by the registration authority.

In principle, title registration is not a sufficient means to eliminate or amend the defects of acquisitions. Registration does not preclude the considerations of a dispute over rights to a piece of real estate or the validity of an acquisition questioned before a court of justice.<sup>32</sup> Registration of a title is not considered to be full proof of ownership. In this sense, there are no absolute titles in Finland. In other words, the principle of indefeasibility is not applied. Only certain formal defects are eliminated immediately by registration. On the other hand, registration eliminates and repairs defects indirectly through the effects of registration. Registration has this influence together with certain other facts, especially with the good faith (*bona fides*) of the transferee.

As a rule, title registration has an effect merely on the relationships between transferees and third persons. Disputes between the parties of a transaction are solved according to the rules of contract and other private law.

As stated above, a contract is the most important stage of transfer of real property. In certain respects, however, the transfer of ownership is determined by registration. The legal effects of title registration are impressions of this determination. The relation between a purchaser or another transferee and certain third persons is more certain in this way. In other words, registration settles transfers in these respects.

The significance of title registration is not restricted to the actual trustworthiness. The Title and Mortgage Register bears public (formal) trustworthiness. The legal effects of title registration are, however, not founded merely on public trustworthiness. As in other Nordic countries, the good faith of the transferee is required, as well.<sup>33</sup> On the other hand, there is no need for further (historic) investigations directed towards the title of the transferor or his or her predecessors if the transferor's title is registered and there is no information at hand making the transferor's ownership questionable.

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<sup>32</sup> Code of Real Estate 13:2.

<sup>33</sup> See Code of Real Estate 13:4.1. The good faith of a person is presumed. The fact that a person knew or should have known something has to be proved.

## 6. *The Effects of Title Registration*

The most important rules demonstrating the legal effects of title registration are substantial. They may decide the ownership of a piece of real estate. Rules on the State's liability for compensation are merely in a secondary position. They have a supplementary role in relation to the substantial rules.

Title registration has three effects, which are known as legitimation, priority and amending effects.

Here it is reasonable to concentrate on the two most important types of relation between a transferee and a third person which are settled by title registration. They are the two traditional and most basic questions regarding the effects of land registration. The first one is the relation with the so-called rightful owner (e.g. the predecessor of the transferor), and the other is the relation between competing transferees.

In practice, the effects of title registration don't come up very often. Hence, the main rule of transfer of ownership at the moment of a transaction (contract) is very strong. These effects are important from the systematic point of view and they manifest the public trustworthiness of the Title and Mortgage Register.

In relation with a transferee, the rightful owner takes priority. This is the point of departure. The rightful owner can claim his or her piece of real estate from the transferee if the rightful owner has lost his or her property by a void or voidable acquisition.<sup>34</sup>

The purchaser or another transferee can trust the registered title of the transferor. For instance, the sale of a piece of real estate is permanent even if the vendor was not the rightful titleholder due to a defect in his or her acquisition or that of a previous titleholder, if the title of the vendor was registered at the time of acquisition and the purchaser, at that time, did not know nor should have known that the vendor was not the rightful titleholder.<sup>35</sup>

These rules of trustworthiness of the Title and Mortgage Register apply to all kinds of conveyances (but not to all kinds of acquisitions). This is

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<sup>34</sup> Code of Real Estate 3:1.1.

<sup>35</sup> Code of Real Estate 13:4.1.

the legitimation effect of the Title and Mortgage Register: registration makes titleholders competent as transferors. In this respect, the registration of the transferee's title has no significance. In addition, the effects of the defects involved in the transferee's acquisition cannot be eliminated with these rules.

There are, however, certain exceptions. No protection is provided to the transferee if there are so-called strong reasons for invalidity at hand.<sup>36</sup> These reasons include forgery of a contract or another acquisition document, a power of attorney or another competence document; use of grave duress to coerce the rightful titleholder to make the transfer; and registration of a title of a transferor made by mistake or without the decision of the register authority.

The public trustworthiness of the Title and Mortgage Register is guaranteed by the State of Finland. The State is liable as the register authority. Therefore, both the transferee of a piece of real estate and its rightful owner can be entitled to compensation. A transferee is entitled to due compensation if he or she loses the object of the transfer because of the existence of a strong reason for invalidity, and if he or she is entitled to trust the registered title of the transferor. The same right belongs to the rightful owner if protection based on the trustworthiness of the Title and Mortgage Register is granted to the transferee.<sup>37</sup>

Whenever a double sale of a piece of real estate takes place, priority is granted to the first transferee.<sup>38</sup> It is possible, nevertheless, that a later transferee takes precedence. This exceptional solution presupposes, firstly, that the later transferee applies first for the registration of the title. Secondly, the later transferee should not have known the existence of the

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<sup>36</sup> Code of Real Estate 13:5.1.

<sup>37</sup> Code of Real Estate 13:6.1 and 2. The same rules apply to the transferees of parcels and shares of pieces of real estate as well as to the lienors (mortgagees) and the holders of special rights. They can trust the registered titles of pledgers (mortgagors) and conveyors of special rights (Code of Real Estate 10:1.2 and 13:4.2). The rules of the State's liability for compensation also apply (Code of Real Estate 14:7.3 and 17:11.2).

<sup>38</sup> Code of Real Estate 3:6.1.

previous conveyance at the time of acquisition.<sup>39</sup> Hence, the exception depends on the activity and good faith of the later transferee (as well as on the passivity of the previous transferee). If applications for the registration of a title arising from several competing acquisitions take place on the same day, the earliest transfer takes precedence. This is the priority effect of the Title and Mortgage Register.

In practice, both competing transferees trust in the registered title of the transferor, but the rules are not founded on that trust in cases of double transfer. The registration of the transferor's title has no significance in these cases. Besides, there are no rules concerning the State's liability when they happen.

In addition, registration has an amending effect. The formal errors of a contract ("deed") are corrected, that is, without effect, if the registration of the title based on the contract has taken place.<sup>40</sup>

The amending effect also operates when the rules of protection of enjoyment are applied. According to them, a transferee of a piece of real estate who has acted in good faith and who has possessed it as an owner for ten years after title registration can keep the property, despite it has been taken from its rightful owner.<sup>41</sup> Protection of enjoyment is provided even in the cases where strong reasons for invalidity exist, as well as between the parties of a transfer.

Aside from individuals and corporations, authorities trust the Title and Mortgage Register. For instance, a bailiff treats the holder of a registered title as an owner.<sup>42</sup> This presumption is, however, weak. Even before title registration, the transferee can reverse an attachment directed at the property and based on the debt of the transferor by showing a formally valid contract made before the attachment.

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<sup>39</sup> Code of Real Estate 13:3.1. The same rules apply to all conveyances of real property, even when transferees of a piece of real estate, special right holders, and lienors (mortgagees) are competing in the same way (Code of Real Estate 13:3.3 and 17:10.1).

<sup>40</sup> Code of Real Estate 13:1.

<sup>41</sup> Code of Real Estate 13:10.1.

<sup>42</sup> Enforcement Code 4:13.1

## 7. *The Future*

There are two important reforms in Finland, as far as the transfer of real property and land registration are concerned.

First, the traditional distinction between the cadastre and land registration is disappearing. Today, these registers together constitute a uniform information system, and are a part of the information services provided for society. Hence, it is natural that the registers are maintained by a register authority and later, perhaps, unified like in Sweden.

According to the Government Bill given to the Finnish Parliament in 2009, land registration will be transferred from the local courts to the National Land Survey Bureau.<sup>43</sup> The bureau has maintained the Real Estate Register and, according to the bill, will maintain the Title and Mortgage Register as well. In addition, the local offices of the bureau will act as the new land registration authorities. The reform should take place at the beginning of the year 2010. Similar decisions and amendments to statutes have been made both in Norway and Sweden.

As in many other European countries, a plan for the electronic conveyance of real property has been introduced.<sup>44</sup> According to the plan, transfers of real property will be made digitally and online. Title registration will start immediately and automatically when a contract has been signed electronically. In addition, electronic real estate liens will also be possible. This plan is a natural continuation of the adoption of the national and electronic registers of real property of the year 1985.

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<sup>43</sup> The Government Bill 2009:30, 27th March, 2009.

<sup>44</sup> The Report of the Commission of the Ministry of Justice, KM 2006:1.

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The Finnish system of real estate and its transfer is regulated comprehensively by statutes. Moreover, the statutes are well systemized. Public registers are an essential part of that system. The parcelling of land and other land survey are regulated by the Real Estate Formation Act (kiinteistönmuodostamislaki, 1995), the Finnish Cadastre by the Real Estate Register Act (kiinteistörekisterilaki, 1985) and both conveyances of real estate and land registration by the Code of Real Estate (maakaari, 1995).

The major Finnish textbooks (in Finnish) about the transfer of ownership of real property and the land registration system are the following: JOKELA M., KARTIO, L. AND OJANEN I., Maakaari, Talentum, 2004, (The Code of Real Estate), TEPORA J., KARTIO L., KOULU R. AND WIRILANDER, J., Kiinteistön käyttö ja vaihdanta, Kauppakaari, 2002, (The Use and Exchange of Real Property) and NIEMI M. I., Maakaaren järjestelmä I II ja III WSOY 2002, 2004 and 2010 (The System of the Code of Real Estate I, II and III).



# INTRODUCTION TO THE FRENCH SYSTEM OF TRANSFER OF IMMOVABLE PROPERTY

*Frédéric Planckeele\**

## *1. The principle of the transfer solo consensus*

The French system of transfer of immovable property is especially complex<sup>1</sup>. It is widely based on the sole will of the parties, and there is no register guaranteeing in an infallible way that the transferred right really exists.

### *1.1 The foundation of the principle*

The means of transfer is based entirely on the principles of freedom of contract and consensuality, which allow exceptions that apply to all the methods of transfer (sale, barter transaction, contribution to a company) and to all commodities (immovable and movable). French law requires neither delivery, nor conclusion of an additional contract, nor inscription in an official register. Conclusion of the initial contract is enough, in principle, to cause the transfer of property<sup>2</sup>; this is called “transfer solo consensu”. This principle is also the extreme but logical consequence of the distinction of the right of property and the underlying commodity: the owner keeps this quality even if he has neither the detention (for example, because of a rent or loan), nor even the possession of the commodity; the right of property is a title, and that’s what distinguishes it from possession, what is a fact. Furthermore, this agreement subjects itself to no form for its validity.

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<sup>1</sup> All the Codes, acts and sentences of the Court of cassation (since 1960) are published in French on the official website “legifrance.gouv.fr”. To find the sentences of the Court of cassation (in, «Jurisprudence judiciaire »), it’s enough to enter their date and number.

<sup>2</sup> Art. 711, 1138 and 1583 C. civ.

Though the agreement of the parties is enough to pull the transfer, many authors deny the existence of the obligation to transfer (*dare* in Latin), which is nevertheless recognized by the Civil Code<sup>3</sup>, considering that the transfer is a statutory effect of the contract<sup>4</sup>. Some other authors acknowledge this obligation to transfer, at least whenever the transfer is postponed<sup>5</sup>; in addition, they consider that the parties should proceed to the “civil delivery” of the piece of real estate at the same time they conclude the contract: this delivery takes place only by consent of the parties<sup>6</sup>. Anyway, there’s no doubt about the principle.

Unless otherwise agreed, the transfer takes place immediately, leading also to the transfer of risk, borne in principle by the owner<sup>7</sup>: if the building is totally or partially destroyed, the sale is not voided and the buyer has to pay the same the price. In application of the principles of consensuality and freedom of contract, the parties can freely agree to postpone the transfer. This is just a period of suspension that only concerns the performance of the contract. They can also postpone the risks, so the sale will not take place if the building is destroyed before the delivery.

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<sup>3</sup> Art 1136 to 1141.

<sup>4</sup> M. Fabre-Magnan, « Le mythe de l’obligation de donner », *RTD civ.* 1996, p.85; C. Saint-Alary-Houin, « Réflexions sur le transfert différé de la propriété immobilière », *Mélanges Pierre Raynaud*, Dalloz, 1985, p.747; D. Tallon, « Le surprenant réveil de l’obligation de donner », *D.* 1992, chron. 3, p.68. *Adde* for a summary and an analysis of the controversy A.-S. Courdier-Cuisinier, « Nouvel éclairage sur l’énigme de l’obligation de donner », *RTD civ.* 2005, p.521.

<sup>5</sup> P. Bloch, « L’obligation de transférer la propriété dans la vente », *RTD civ.* 1988, p.694; J. Huet, « Des différentes sortes d’obligations et, plus particulièrement, de l’obligation de donner, la mal nommée, la mal aimée », *Etudes Jacques Ghestin*, LGDJ, 2001, p.425; P. Simler, *J.-cl. Code Civ.*, art. 1136 à 1145, Distinction des obligations de donner, de faire et de ne pas faire, 2004, n° 12; F. Collart Dutilleul et P. Delebecque, *op. cit.*, n° 200.

<sup>6</sup> J.-P. Chazal et S. Vicente, art. préc., p.477; F. Zenati-Castaing et T. Revet, *op. cit.* n° 178. This civil delivery was presumed by the Civil Code, and was systematically practised before the French Revolution.

<sup>7</sup> Art. 1138 C. civ.

## 1.2 *The application of the principle*

The application of the principle must be specific regarding the modalities of the agreement and the persons bound by it.

While sales and barter transactions are subject to no form, donations must hardly of nullity be drafted by a notary, in order to make sure of the consent of the donor<sup>8</sup>. With the exception of this case, the agreement required for the transfer can in theory be oral, but a written evidence is required for any contract concerning a sum superior to 1 500 €<sup>9</sup>. The contract must be a product of the mutual agreement of the parties in transfers of property: an agreement of purchase or sale establishes already a sale<sup>10</sup>. But an agreement to sell or buy pulls only a simple obligation to do, according to the Court of Cassation; this one-sided promise does not oblige to conclude the sale if he retracts or deals with a third party before the beneficiary calls the option<sup>11</sup>. On the other hand, if he calls before, the sale is definitively trained.

Since the parties concluded a translativ contract, the principle of binding power of the contract excludes any retraction of the seller or the buyer. In practice, the parties postpone the transfer of property and the payment of the price until the contract is affirmed before a public notary (necessary formality to set the transfer against certain third parties). But this is just, in principle, a suspension term. If one of the parties refuses to affirm the sale, the other one can, by the common law of contracts, request a judge either for the enforcement of the sale, or the avoidance of the contract and/or damages<sup>12</sup>. However, it is possible that the parties themselves can break the principle of the consensuality, by making the

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<sup>8</sup> Art. 931 C. Civ.

<sup>9</sup> Art 1341 C. civ. But the evidence is free against the traders (art. L. 110-3 of the Code de commerce).

<sup>10</sup> Art. 1589 C. civ.

<sup>11</sup> Cass. 3<sup>ème</sup> civ., 15 déc. 1993, n° 91-10199:*Bull. civ.*, III, n° 174; *JCP G* 1995, II, 22366, note D. Mazeaud; D. 1994, p.507, note F. Bénac-Schmidt – Cass. 3<sup>ème</sup> civ., 25 mars 2009, n° 08-12237:*Bull. civ.*, III, n° 69; D. 2009, AJ p.1020. This analysis is very criticized by most authors, see about the controversy D. Mainguy, « L'efficacité de la rétractation de la promesse de contracter », *RTD civ.* 2004, p.1, and the references.

<sup>12</sup> See for example Cass. 3<sup>ème</sup> civ., Mars 25<sup>th</sup>, 2009, n° 08-11326:*Bull. civ.*, III, n° 67.

affirmation before a public notary a condition for the binding force of the contract. In this particular case, the sale is not bound by the promise of sale and either party can refuse to sign the notarial act<sup>13</sup>. In a certain way, this is less an exception of the principle of consensuality than an illustration of the power of the will of the parties. But there is a real exception that is important in practice: the non-professional buyer of a residential building (even if it's ancient) benefits from a period of 7 days during which he can freely retract<sup>14</sup>. The seller does not benefit from this right of retraction, which allows the buyer to secure himself a property in a short period of time, with the right to return it after reflection.

The persons that have concluded the contract are not the only ones affected by the principle of the transfer *solo consensu*<sup>15</sup>. The heirs are not considered as third parties and are compared to their parents: they are supposed to continue the person of their *de cuius*. The creditors are not third parties according to land publicity, so that the transfer of property can be set against them as soon as it takes place between the parties, even if the buyer has not paid the price yet. The transferred piece of real estate becomes immediately the transferee's property and is available to his creditors. The tenant does not escape this rule<sup>16</sup>. The same principle must be applied when the ruin of the building causes damage to a third party because of deficient maintenance or structural fault, which makes the owner liable according to the article 1386 of the Civil Code. It doesn't matter whether the buyer wasn't yet in possession and did not

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<sup>13</sup> See for example Cass. 3<sup>ème</sup> civ., May 10<sup>th</sup>, 2005, n° 03-19238: *AJDI* 2005, p.679, note F. Cohet-Cordey, and more generally: J. Schmidt-Szalewski, « Le rôle de l'acte authentique dans la vente immobilière », *RD imm.* 1989, p.147; C. Coutant, « La réitération des promesses synallagmatiques de vente », *AJPI* 1999, p.127 et s.; R.-N. Schütz, « L'exécution des promesses de vente », *Deffrénois* 1999, p.833.

<sup>14</sup> Art. L. 271-1 of the Code de la construction et de l'habitation, coming from the act of December 13<sup>th</sup>, 2000. When the parties didn't draft anything and ask the notary to draft the bill of sale, the buyer is given the right to have 7 days to think about the purchase, counted from the notification or the delivery of the project to the buyer.

<sup>15</sup> See especially A. Bénabent, *op. cit.*, n° 211.

<sup>16</sup> Cass. 3<sup>ème</sup> civ., June 17<sup>th</sup>, 1980: *JCP* 1981, éd. G, II, 19584, note M. Dagot. If the lease has been concluded by the seller before the transfer of property, the tenant can set it against the buyer provided that it is an authentic act or has sure date (art. 1743 C. Civ.), or if the buyer bought it while having knowledge of the lease (see for example Cass. 3<sup>ème</sup> civ., February 11<sup>th</sup>, 2004, n° 02-1276: *Bull.civ.*, III, n° 24).

pay the price yet. More generally, the date of transfer can be set against all third parties<sup>17</sup>, except those that are protected by « land publicity »<sup>18</sup>.

## 2 *The role of land publicity*

### 2.1 *The legal reach of land publicity and the cadastre*

France has both, a system of land publicity and a cadastre. Both, for historic and fiscal reasons, are connected with the Ministry of Finance. The control of the formalities is restrictive, which limits consequently the legal reach of land publicity and of the cadastre.

The land publicity regime was organized by the decree of January 4th, 1955<sup>19</sup>. It has the objective of publicizing the diverse acts and facts which affect the legal status of a piece of real estate, in order to improve the information of third parties. The core of this system consists in the obligation to publish acts, sentences and legal facts (such as death) which create or transfer a right over real estate. The act must be deposited at a local office called “land registry”, placed under the responsibility of a civil servant of the Ministry of Finance called « land registrar », who also collects expenses and fiscal taxes. This land registrar registers all relevant acts on a register updated on a daily basis, which allows him to establish the order of their publication. Especially after 1955, he had to establish a real-estate file which lists extracts of the published acts, sorted by owner (personal index cards) and property (real index cards). This mixed system allows him to obtain information, either on the pieces of real estate of a certain person, or on the rights and burdens concerning a piece of real estate. To allow the establishment of the real index cards, the decree of January 4th, 1955 created a correlation between the land publicity and the

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<sup>17</sup> Provided the contract has a sure date (art 1328 C. civ.).

<sup>18</sup> « Publicité foncière » in French.

<sup>19</sup> And by the decree of Octobre 14<sup>th</sup>, 1955 for details. See especially A. Fournier, *Rép. Civ. Dalloz*, V° Publicité foncière, 2007; S. Piedelièvre, *Traité de droit civil, La publicité foncière*, 2000, LGDJ; P. Simler et Ph. Delebecque, *Les sûretés, la publicité foncière*, 5<sup>ème</sup> éd., Précis Dalloz; Ph. Malaurie, L. Aynès et P. Crocq, *Les sûretés, la publicité foncière*, 4<sup>ème</sup> éd., Defrénois.

cadastre; despite they are managed by two different government agencies. Originally, the cadastre had an essentially fiscal function (establishment of the land tax). It also helps to identify the properties for which the land registrar has to register acts.

The cadastre does not guarantee that a certain piece of real estate belongs to a certain person. The indications of the cadastre are only an element of appreciation among many and can be disputed. In French law, with the exception of acquisitive prescription, there is no perfect evidence of ownership. It can be established by any means (title, possession, configuration of place, etc.), so the evidence for it can be freely appreciated by national courts. Contrary to the German tradition, French law does not consider land registration as the origin of rights over real estate. The land registrar does not define the rights of real estate owners: land publicity only informs third parties that B acquired his right of A, it doesn't prove that A was himself owner. The land registrar does not verify more the intrinsic regularity of the translative contract. He must only check that the transferor had published himself his title<sup>20</sup>, which doesn't mean that he was really the owner.

In summary, neither the land publicity, nor the cadastre can protect the buyer against the defects of the translative contract. The fact that the transfer of property is entirely based upon the contract brings two major inconveniences. On one hand, the property can't be transferred by contract if the transferor isn't in fact its owner: "*nemo plus juris ad alium transferre potest quem ipsem habet*"<sup>21</sup>. In application of the principle of private effect of the contract, the sale of property of a third party can't be set against him. The real owner does not even need to sue for the nullity of the contract<sup>22</sup> and can exercise an action for the recovery of his or her property. On the other hand, the contract can't transfer property if it isn't

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<sup>20</sup> Art. 3 of the decree of January 4<sup>th</sup>, 1955. This rule is called the principle of the relative effect of land publicity.

<sup>21</sup> The buyer can discover this problem if the seller has never published any title about the concerned property.

<sup>22</sup> Cass. 3<sup>ème</sup> civ., May 22<sup>th</sup>, 1997, n° 95-17480: *Bull. civ.*, III, n° 114. The nullity mentioned in article 1599 of the Civil Code is open only for the buyer, in order to protect him immediately against a future action for the recovery of property (see for example Cass. 3<sup>ème</sup> civ., 9 mars 2005, n°03-14916: *Bull. civ.*, III, n° 63).

valid for any other reason, for example because the seller deceived the buyer<sup>23</sup>, the discovery of a hidden defect<sup>24</sup> or the lack of payment of the price<sup>25</sup>. In such cases, because of the retroactive effect of nullity or avoidance, all the transactions concluded with the buyer have no legal effect, as though the seller had never been the owner: “*resoluto jure dantis, resolvitur jus accipientis*”. The request of nullity or avoidance of the contract must be published<sup>26</sup>, but this protects only the future buyers.

When it turns out that the translative contract is not valid or effective, the buyer can nevertheless try to call upon two corrective rules which bring him a new title: a jurisprudential rule called “theory of appearance”, and acquisitive prescription. The first one confers a title amending the polluted act, when the one who trusted appearance dealt under the influence of a common error. That requires that circumstances were such that a normally informed person would have made the same mistake, and naturally that the buyer acted in good faith<sup>27</sup>. Otherwise, the buyer can acquire a new property right by acquisitive prescription, which requires a continuous, peaceful, public and not ambiguous possession<sup>28</sup>, during a sufficient period of time<sup>29</sup>.

## 2.2 *The incidence of land publicity on the transfer of property*

The compulsory land publicity has an incidence on the training and effects of the contracts that transfer immovable property. On one hand, the contract must be certified by an authentic act for its publication, which makes the intervention of a notary necessary, mostly to affirm a

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<sup>23</sup> Art. 1116 C. Civ.

<sup>24</sup> Art. 1641 and 1644 C. Civ.

<sup>25</sup> Art. 1654 C. Civ.

<sup>26</sup> Art. 28, 4<sup>o</sup>, c) of the decree of January 4<sup>th</sup>, 1955.

<sup>27</sup> See for example Cass. 1<sup>ère</sup> civ., January 12<sup>th</sup>, 1988, n<sup>o</sup> 86-12218:JCP 1988, éd. N, II, p.333, note P. Salvage.

<sup>28</sup> Art. 2261 C. civ.

<sup>29</sup> Since the reform of prescription by the act of June 17<sup>th</sup>, 2008, the prescriptive period is reduced to 10 years if the owner is bona fide and leans on a just title, that is, an act which would have made him the owner if the transferor had been himself the owner (art. 2272 C. Civ.). If one of these two conditions is not performed, the period is as it was before, 30 years.

transfer already agreed upon by a simple contract. On the other hand, the publication brings about the possibility of opposing the transfer against certain interested third parties: the particular transferees of a same transferor, who would claim to have on the property a competing real right. For example, A sells to B, then A sells again to C. B can set his acquisition against C only if he publishes it first. C will prevail over B if he publishes his acquisition first at a moment when A still appears in the register as being the owner. The domain of this rule of conflict is limited. In particular, land publicity does not protect the purchaser against a competitor who claims to have acquired his right from a third party having sought no registration on the real-estate file: it protects him only against the existence of malicious acts committed by the vendor.

Furthermore, the Court of Cassation introduced a very important temperament based initially on fraud, and later on civil liability<sup>30</sup>: if C is the first one to register his right after acquiring it from A, knowing that A had already transferred it to B, C commits a fault that deprives him of benefitting from land publicity. However, if C resells to D and D publishes his right before B, D will lose the benefit of land publicity only if he bought the land with full knowledge of the facts<sup>31</sup>. This application of civil liability restrains the automaticity of land publicity.

Although its reach is limited, land publicity offers enough security for real estate transactions, because the conflicts settled by the decree of January 4th, 1955 are actually rather common. The actions in recovery of property coming from a third party totally absent in the real index card seem to concern only the bands of ground situated on the verge of two properties, not a whole property.

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<sup>30</sup> Cass. 3<sup>ème</sup> civ., January 30th, 1974, n° 72-14197: D. 1974, p.427, note J. Penneau; JCP 1975, éd. G, II, 18001, note M. Dagot. Many authors criticize this jurisprudence, see especially M. Gobert, « La publicité foncière, cette mal aimée », *Etudes Flour*, p.207; A. Fournier, « Le malaise actuel dans le droit de la publicité foncière », *Defrénois* 1980, p.1089. *Contra*: P.-Y. Gautier, « Bien aimée responsabilité civile: exercice de controverse doctrinale sur le thème de la publicité foncière », *Mélanges Gobert*, Economica, 2004, p.361.

<sup>31</sup> Cass. 3<sup>ème</sup> civ., June 11th, 1992, n° 90-10687: D. 1993, p.528, note A. Fournier.

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## TRANSFER OF IMMOVABLE PROPERTY IN GREECE

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### 1. General Information

The main rule for the transfer of ownership of immovables in Greek law is found in art. 1033 CC:

*“Transfer of ownership in immovable property requires an agreement between the owner and the acquirer that ownership passes to the latter on grounds of a legal causa. The agreement is documented in a notarial deed and it is subject to registration.”*

From this rather self-explicit rule, one can deduce the legal prerequisites and the basic principles governing the Greek system for the transfer of immovables. The prerequisites will be analysed in more detail below. First of all, as the basic principles of this transfer system are concerned, the principle of distinction applies,<sup>1</sup> meaning that the *in rem* contract, the transfer agreement *stricto sensu*, must be distinguished from the underlying *causa* (most often a contract of sale, but also barter, donation, a testament or other suitable title to transfer). Furthermore, the Greek system for the transfer of immovables is a causal<sup>2</sup> one: Unlike the transfer of movable assets under Greek law,<sup>3</sup> the transfer of immovables

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<sup>1</sup> For the principle of distinction in the context of the transfer of movables, see Georgiades, Property Law I (ΕμπράγματοΔικαιοI), § 48 nos. 2 *et seq.* [henceforth: Georgiades, EmprD I, § xxx no. xxx].

<sup>2</sup> For the concept of the *causa* and the distinction between causal and non-causal legal transactions *in rem* in Greek law, see Georgiades, EmprD I, § 6 nos. 32 *et seq.* For a short discussion of the abstract and causal systems of ownership transfer in the European context, see Bartels, An abstract or a causal system, in Faber & Lurger (eds.), Rules for the transfer of movables – A candidate for European Harmonisation or National Reforms?, 59 *et seq.*

<sup>3</sup>Cf. art. 1034 CC, according to which ownership in movable assets is transferred by the agreement of the parties and delivery to the transferee. The principle of abstraction, according to which the validity of the transfer (*in rem*) agreement is irrelevant from that of the underlying *causa*, is applicable under Greek law only for chattels; see Georgiades, EmprD I, § 48 nos. 1, 6 *et seq.*; Spyridakis, Property Law Vol. B'/1 (ΕμπράγματοΔικαιοΤόμοςB'/1), no. 141.1.1 [henceforth: Spyridakis, EmprD B'/1, no. xxx].

requires a valid *causa*, without which it cannot validly come into existence.<sup>4</sup> Finally, the transfer agreement (according to the prevailing opinion, also the underlying *causa*<sup>5</sup>) must be drawn up in a notarial deed (principle of formality) and it is subject to registration (principle of publicity<sup>6</sup>); this last point is of singular importance, since Greece is currently in a transitional period changing from a personal registration system (registration of transfer contracts and cataloguing by land owner) to a land registry system (concentration of all entries concerning transactions on a specific lot of land in a single registry unit). The aforementioned characteristics of the Greek system of transfer of immovables are discussed below in more detail in conjunction with the particular prerequisites of ownership transfer.

## 2. *The Prerequisites for the Transfer of Ownership in Detail*

From the provision mentioned above, it is inferred that transfer of immovables under Greek law is subject to five prerequisites: ownership of the transferor, transfer agreement, notarial deed, a cause in law for the conveyance (*justa causa*), and registration.<sup>7</sup>

### 2.1. *Ownership of the transferor*

The first prerequisite, the ownership of the transferor, is more or less self-evident and forms a specific emanation of the principle *nemo plus iuris ad alium transferre potest quam ipse habet* (ουδείς μετὰ γειπλέον ούτινος ἐχει δικαίωματος).<sup>8</sup> However, the rule is not

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<sup>4</sup> This rule is not as self-explicit as it appears to be; see below under B. 4.

<sup>5</sup> See Part B. 3. below.

<sup>6</sup> For more information on the specific emanations of the publicity principle, see *Georgiades*, EmprD I, § 2 nos. 15 *et seq.*

<sup>7</sup> *Georgiades*, EmprD I, § 43 nos. 1 *et seq.*

<sup>8</sup> AP 934/2000, 2001 ArchN 490 *et seq.*; CA Chania 178/2005, published in the AthBA Law Database; CA Athens 5707/1997, 1999 ArchN 194 (195). In fact, the transferor must be owner not only at the time of conclusion of the transfer agreement, but also at the time of its registration; AP 888/1977, 26 NoV 703; CA Athens 5707/1997, 1999 ArchN 194 (195); MCFI Athens 99/1990, 1992 Arm 900 (901).

without exceptions, which serve legal certainty in property relations. Those exceptions either refer to the possibility of transfer by a non-owner or, on the contrary, cases where the true owner's authority to dispose is restricted. The first group of cases includes an insolvency administrator (art. 17 IC 2007), a testament executor (art. 2021 CC), or an inheritance liquidator (arts. 1918, 1908 CC), who may validly transfer ownership of assets that do not belong to them, but to the insolvent person or the estate of the deceased respectively; the same is true, when the transfer is effected by the person designated as heir in a certificate of inheritance (*κληρονομητήριο*), even if the certificate is later annulled or declared inaccurate (see arts. 1963 CC, 822 CPC). More generally, according to art. 239 CC a transfer by a non-owner is valid, when the actual owner consents to it or, when his consent was not at hand at the time of the agreement, when he subsequently ratifies the transaction.<sup>9</sup> One could also add the cases of direct representation, whereby the owner's agent alienates the principal's property under the terms of arts. 211 *et seq.* CC.<sup>10</sup> In any case, it must be noted that Greek law until recently (*see* Part C.2. below) did not acknowledge the possibility of good faith acquisition of immovable property *a non domino*, an acquisition mode restricted solely to movable assets under arts. 1036 *et seq.* CC. In the second group of cases, the true owner is not always unlimitedly entitled to transfer ownership of his immovable assets; the obstacles arising in this respect could be categorised as either: personal, namely when the owner has been deprived of the authority to transfer his assets by court ruling, e.g. because he is declared insolvent (art. 17 IC 2007) or he is placed under court custodianship (arts. 1666 *et seq.* CC); or as estate-specific, which result from the specific status accorded by law to particular lots of land due to varying – and nowadays sometimes obsolete – circumstances (e.g. restrictions on the transfer to foreigners of estates lying at the land borders, forestry legislation, law of urban planning and constructions, restrictions on the alienation of land allotted by the State to certain social

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<sup>9</sup> For all those cases, *see* Georgiades, EmprD I, § 43 nos. 4 *et seq.*

<sup>10</sup> Spyridakis, EmprD B'/1, no. 139.3.1. For cases of indirect representation, *see* *ibid.*, no. 139.5.2.

groups or belonging to Muslims who were exchanged with Greek nationals from Turkey during the 20's, etc.).<sup>11</sup>

## 2.2. *Transfer agreement*

The second prerequisite is a transfer (*in rem*) agreement which affects the transfer and is distinct from the underlying *causa*, namely the personal (obligatory) agreement that only creates the obligation to transfer ownership. Although the law makes use of the term “agreement”, legal doctrine affirms that what is meant is the contract *in rem* for transfer of ownership.<sup>12</sup> Greek law follows in this respect the principle of distinction of the personal and the *in rem* contract (*αρχή της διάκρισης της εμπράγματης από τη νεοχική σύμβαση*), although quite often they temporally coincide and are even included in the same notarial deed, as is evidenced by the standard terminology used in such documents, where expressions such as “A *sells and transfers* to B” or “A *donates and transfers* to B” are commonplace.<sup>13</sup> However, the two contracts need not necessarily be concluded simultaneously, nor do they have to be included in the same document.

## 2.3. *Notarial authentication*

One of the most important prerequisites of ownership transfer in immovable property is the requirement of a notarial deed (*συμβολαιογραφικό έγγραφο*). If the transfer contract is not recorded by a notary, since the notarial deed is prescribed by law, the transfer is invalid (art. 159 § 1 CC). The importance of this prerequisite is reflected in the fact that it is enforced both in the aforementioned rule for the transfer of

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<sup>11</sup> For more details, see *Spyridakis*, EmprD B' /1, no. 139.6; *Georgiades*, EmprD I, § 43 nos. 6, 39 *et seq.* Also see *ibid.*, § 6 nos. 28 *et seq.* for the general restrictions to the authority to dispose under the CC or specific laws.

<sup>12</sup> *Georgiades*, EmprD I, § 43 nos. 31 *et seq.*; *Spyridakis*, EmprD B' /1, no. 139.2.1. Contrary to the transfer of chattels under Greek law (art. 1034 CC), delivery does not form an integral part of the *in rem* transfer contract of immovables. For the practical implications of delivery in the context of transfer of immovables, see Part D. 2. below.

<sup>13</sup> *Georgiades*, EmprD I, § 43 no. 24.

ownership in movables (art. 1033 CC) and art. 369 CC, which has a more general scope:

“Contracts for the creation, transfer, modification, or abolition of rights in rem in an immovable must be concluded before a notary public.”

Even though legal doctrine is not unanimous on whether the notarial deed is imposed by both provisions or only by art. 1033 CC, it is commonly accepted that both the transfer contract and the underlying *causa* are subject to the notarial form.<sup>14</sup> This requirement aims at furthering legal certainty in property relations in land, but also serves an advisory purpose by ensuring that the contracting parties are fully aware of the significance of their legal acts and they have been sufficiently instructed thereupon; moreover, it also facilitates proof, serves tax law purposes, etc. Apart from the transfer contract, a series of other contracts are also subject to the notarial form, such as the preliminary contract for the sale of immovables (*προσόμφωνο*), the contract granting the option to purchase an immovable in the future (*σόμφωνοπροαιρέσεως*), the consent (*συναίνεση*) to or subsequent approval (*έγκριση*) of the transfer by the true owner, the granting of authority (*πληρεξουσιότητα*) to alienate (but not the mandate [*εντολή*] to purchase an immovable), etc.<sup>15</sup>

#### 2.4. *Justa causa*

The fourth prerequisite consists of the existence of a valid underlying personal (obligatory) agreement that creates the duty to transfer ownership. It does not matter whether the *causa* has been concluded before or simultaneously with the transfer contract; crucial is the fact that it must be explicitly and specifically mentioned in the latter.<sup>16</sup> As mentioned above, it is usual in practice that both contracts are included in the same deed. A valid *causa* for the transfer of ownership in immovables usually consists in a personal contract suitable to this purpose, but also a

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<sup>14</sup>See e.g. AP 132/1971, 19 NoV 620; AP 601/1971, 20 NoV 54 (55).

<sup>15</sup>*Georgiades*, EmprD I, § 43 nos. 10 *et seq.*; *Spyridakis*, EmprD B'/1, nos. 139.2.4, 139.3.1 *et seq.*, who, however, bases the necessity of a notarial deed for the transfer agreement on art. 1033 CC alone.

<sup>16</sup>*Georgiades*, EmprD I, § 43 nos. 22 *et seq.*; *Spyridakis*, EmprD B'/1, nos. 139.2.5.

multilateral or unilateral legal transaction; examples include: sales, barter, donations, parental grants (*γονική παροχή*),<sup>17</sup> settlement agreements, or testamentary devises with an obligatory effect or even the articles of association of a company (whereby the partner's contribution consists in one or more immovables).<sup>18</sup> The underlying *causa* is of particular importance in the context of transfer of immovables in Greek law, because, unlike chattels, the causality principle (*αρχή του αιτιώδους*) makes the validity of the transfer agreement directly dependent upon that of the *causa*.

The practical implications of the causality principle deserve a closer examination:

(a) If the *causa* was void or inexistent at the outset, the transfer never took place, the transferor remains the owner and, as such, he can bring the revendication claim (art. 1094 CC) against the transferee.<sup>19</sup>

(b) If the *causa* is *subsequently* eliminated, e.g. as the result of avoidance of a voidable contract, revocation of a donation or rescission, opinions in Greek legal doctrine diverge. The majority opinion supports that, in any

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<sup>17</sup> Parental grants under Greek law are a specific form of donation *inter vivos* for specific purposes from parents to their children, which are accompanied by substantial tax benefits in comparison to transfer by normal donation, sale or inheritance (see art. 1509 CC and art. B law 1329/1983, Government Gazette Issue [henceforth: GGI] A' 25/18.02.1983, as amended; consolidated versions of the Greek laws are available only in legal databases, such as the Law Database of the Athens Bar Association [AthBA] or the NOMOS Law Database).

<sup>18</sup> *Georgiades*, EmprD I, § 43 no. 19; *Filios*, Property Law (*ΕμπράγματοΔίκαιο*)<sup>2</sup>, § 86 B. 1. [henceforth: *Filios*, EmprD<sup>2</sup>, § xxx]. It is disputed under Greek law whether ownership can be transferred by way of security (*καταπιστευτική μεταβίβαση κυριότητας*) or with the purpose that the transferee shall manage the property transferred (see *Georgiades/Stathopoulos* [-*Georgiades*], *Astikos Kodex: Interpretation by article - case law - bibliography*, Vol. V (*Αστικός Κώδιξ: ερμηνεία κατ' άρθρο - νομολογία - βιβλιογραφία, Τόμος V*), art. 1033 no. 19 [henceforth: *Georgiades/Stathopoulos* [-*collaborator*], AK [Volume number], art. xxx no. xxx]; *Eleftheriadou*, *Griechenland in von Bar* (ed.), *Sachenrecht in Europa* 3, 7 [75 *et seq.*]): case law steadily denies this possibility (AP 999/1996, 1998 EII Dni 847; AP 1315/1989, 1990 EEN 549; CA Larissa 781/2004, published in the AthBA Law Database; CA Athens 6827/1999, 2000 EII Dni 479), which nonetheless becomes increasingly accepted in recent legal doctrine; see *Georgiades*, Property Law II (*ΕμπράγματοΔίκαιο II*), § 92 no. 9; *Spyridakis*, EmprD B'/1, no. 139.3.6; *contra Filios*, EmprD<sup>2</sup>, § 257.

<sup>19</sup> *Georgiades*, EmprD I, § 43 no. 20; *Spyridakis*, EmprD B'/1, no. 139.2.5. (δ); *Filios*, EmprD<sup>2</sup>, § 86 B.3.

case, the transfer initially took place under a valid *causa* and it cannot not be directly affected by the elimination of the latter, but the transferor obtains (after the avoidance, revocation, rescission, etc.) a claim *ex unjustified enrichment* (arts. 904 *et seq.* CC) as against the transferee, who must retransfer ownership to him. Others differentiate depending on whether the elimination has an *ex nunc* (rescission [arts. 382 *et seq.*, 389 *et seq.* CC], revocation of donation [arts. 505 *et seq.* CC]) or an *ex tunc* effect (avoidance; arts. 184, 180 CC), and suggest that in the second case the validity of the *in rem* agreement is also affected.<sup>20</sup>

## 2.5 Registration (μεταγραφή)

The fifth requirement of transfer of ownership in movables, namely registration (or “transcription”, as the Greek term would be literally translated), has given rise to vivid doctrinal discourses in Greek law, while it has also received new attention in view of recent legislative reforms. To begin with, the transfer of ownership of an immovable is incomplete without registration (arts. 1033, 1198 CC); in fact, the

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<sup>20</sup> For the prevailing view, see AP 481/1960, 9 NoV 227 (228); MCFI Athens 99/1990, 1992 Arm 900 (901); Georgiades/Stathopoulos [-Georgiades], AK V, Introduction to arts. 1033-1093 no. 37; Georgiades, EmprD I, § 43 nos. 21 *et seq.* At first glance, this opinion seems to contradict the law of obligations, according to which avoidance also has *in rem* effects, while rescission only creates a claim *ex unjustified enrichment* (Stathopoulos, General Part of Law of Obligations (Γενικό Ενοχικό Δίκαιο)<sup>4</sup>, § 21 no. 113). Taking into account the principle of distinction between the underlying *causa* and the *in rem* agreement, authors remind that a series of reasons for the subsequent elimination of a valid contract, such as rescission, revocation of a donation, etc., affect in principal only the *causa*, not the transfer agreement, as well (besides, the cases where the *in rem* agreement is defective itself are of no interest in the context of the causality principle); consequently, the transfer remains valid, but the transferor obtains a personal claim *ex unjustified enrichment*, as a result of the elimination of the *causa*; see Georgiades/Stathopoulos [-Stathopoulos], AK IV, art. 904 no. 35; but cf. Georgiades/Stathopoulos [-Stathopoulos], AK VI, arts. 1203-1204 no. 3 (where the author supports that avoidance of the *causa* alone invalidates the transfer, as well, due to the causal character of the latter). Cf. also Spyridakis, EmprD B'/1, nos. 139.2.5. (ε) *et seq.*, who subscribes to the majority opinion, but also shows himself rather sympathetic towards the minority view and seems to believe that the resulting problems for the legal certainty of transactions are sufficiently addressed by the analogous application of arts. 1203 *et seq.* CC (see Part C. 1. [c] below). For the minority opinion, see Filios, EmprD<sup>2</sup>, § 86 B. 2.

prevailing view affirms that the transfer contract alone does not even produce *inter partes* effects<sup>21</sup> and the acquirer, until registration has been completed, is deemed to have a mere expectant right of ownership.<sup>22</sup> Registration is provided by law as an indispensable means of publicity in immovables and qualifies as an administrative act forming a *conditio iuris* of the transfer, not as a legal transaction.<sup>23</sup> Being a mere *conditio iuris*, it cannot cure an invalid title from its flaws<sup>24</sup> and, therefore, the registrar is not obliged to register a transfer act when it shows obvious legal defects.<sup>25</sup> The registration books are accessible to any person under the condition that they are consulted in the presence of or by his or her lawyer and provided that all due measures of care are observed. So as to prevent any damage to the integrity of the books (art. 1201 CC) the registrar is obliged to issue any copies, certificates, or summaries of the registered documents, as requested by the public.<sup>26</sup>

The law does not specify which person must proceed to the registration of a transfer act; therefore, this can be done by any person having a justifiable legal interest, such as the parties to a transfer agreement, acting together or separately, the transferee's creditors, etc.<sup>27</sup> Moreover, the law does not set any term, within which the registration of the transfer contract should take place; theoretically, it can be done at any time after

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<sup>21</sup> Georgiades/Stathopoulos [-*Filis*], AK VI, art. 1198 no. 19 *in fine*.

<sup>22</sup> Spyridakis, EmprD B'/1, no. 139.2.6. (στ); *Filios*, EmprD<sup>2</sup>, § 87 B.

<sup>23</sup> AP 888/77, 26 NoV 703; Georgiades, EmprD I, § 43 no. 33; Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, Introductory observations to arts. 1192-1208 no. 2; *ibid.* [-*Filis*], art. 1198 no. 5; *but see Filios*, EmprD<sup>2</sup>, § 85α B., who considers that the contract *in rem* and registration are equal elements of the uniform, two-fold transfer concept.

<sup>24</sup> CA Athens 6444/2003, 2005 EllDni 259; Georgiades/Stathopoulos [-*Stathopoulos*], AK VI art. 1192 no. 5; *ibid.* [-*Filis*], art. 1198 no. 5; *Filios*, EmprD<sup>2</sup>, §§ 87 A, 258 A.

<sup>25</sup> Expert Opinion of the Prosecutor of the Supreme Court no. 7/2007, 2008 EfAD 538 *et seq.*: The registrar is obliged (not just allowed) not to register acts with apparent flaws and, if he performs the registration, he may be subject to disciplinary, criminal and civil liability measures; CA Athens 6444/2003, 2005 EllDni 259 (260 *et seq.*).

<sup>26</sup> For more details on the different kinds of registry books and the grade to which the current registration system in Greece satisfies the requisites of formal and substantial publicity, *see* Part C immediately below.

<sup>27</sup> Georgiades, EmprD I, § 43 no. 26; Georgiades/Stathopoulos [-*Filis*], AK VI, art. 1194 nos. 1 *et seq.*

its conclusion.<sup>28</sup> However, it is in the best interest of the acquirer to proceed to the registration of his acquisition title the soonest possible; if anybody else registers a transfer title before him, the former will be the one to acquire ownership.<sup>29</sup> Registration has in principle an *ex nunc* effect with a few exceptions, the most notable of which is the registration of acts in the context of the law of succession (arts. 1193 CC), which retroacts to the time of death of the *de cuius* (CC arts. 1199, 1710, 1846).<sup>30</sup> In general terms, the maxim *prior tempore, potior iure* applies, but the law prescribes certain criteria so as to resolve cases of conflicting transfer titles: if more titles referring to the same immovable are registered on the same day,

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<sup>28</sup> On an isolated case, the Greek Supreme Court (*Αρειος Πάγος*) affirmed the legitimacy of the registration of a donation contract which had been concluded more than 30 years before (AP 125/1962, 10 NoV 701 [703]: a contract concluded in 1919 was registered in 1956).

<sup>29</sup> In this case, the transferor or even the subsequent acquirer who registered first may be liable in tort as against the “non-registered” transferee (arts. 914, 919 *et seq.* CC); it is also supported that the non-registered transferee can bring the *actio pauliana*, if the conditions for the reversal of a defrauding transaction are at hand (arts. 939 *et seq.* CC); see Georgiades/Stathopoulos (-Stathopoulos), AK VI art. 1192 no. 9; Spyridakis, EmprD B’/1, no. 139.3.8. *in fine*. Both the *actio pauliana* and the tort remedies, however, pose substantial proof difficulties; this is the reason why the best remedy in the hands of the transferee who did not acquire ownership (or whose ownership was burdened with a mortgage, etc. before registration) will be the transferor’s contractual liability resulting from the underlying *causa*.

<sup>30</sup> Georgiades/Stathopoulos [-Filis], AK VI, arts. 1198 no. 8, where further isolated cases of registration with an *ex tunc* effect are also mentioned, and 1199 nos. 1 *et seq.* The provision of art. 1193 CC is a novelty in comparison to the law in force prior to the Greek Civil Code of 1946, since the former did not provide for registration of acts of acquisition *mortis causa*, and its justification lies at the fact that Greek law does not acknowledge the concept of *hereditas iacens*. CC art. 1193 covers cases of inheritance (*κληρονομία*) and devise (*κληροδοσία*) of ownership and, more generally, the creation or abolition of any other restricted right *in rem* (e.g. land servitudes) over the land of the *de cuius* or another person. Registration in the context of the law of succession does not have an *ex tunc* effect only in those cases, when the hereditary devolution was made dependent upon a condition precedent; see Georgiades/Stathopoulos [-Stathopoulos], AK VI, art. 1193 nos. 1 *et seq.*; *ibid.* [-Filis], art. 1199 nos. 3, 5. The *ex tunc* effect of those cases can create interesting implications, when a transfer contract is registered after the transferor’s death, before or after the registration of acceptance of inheritance or further transfers performed by the heirs; for a detailed analysis, see Georgiades/Stathopoulos (-Stathopoulos), AK VI art. 1192 nos. 17 *et seq.*; also see Filios, EmprD<sup>2</sup>, §86 A.; on the possibility of registration after the transferor’s death and its relation to registrations performed by the heirs and their specific successors, see AP 1527/2004, 2005 EIIIDni 808 *et seq.*; AP 645/2003, 2004 NoV 34 *et seq.*; AP 942/2000, 2001 EIIIDni 137; cf. CA Athens 5707/1997, 1999 ArchN 194.

preference is given to the older title on the basis of the date it bears (art. 1206 CC); if, however, a title of transfer and a title granting a right of mortgage are registered on the same day, prevalence is accorded to the title registered first, not the one with the earliest date (art. 1207 CC).<sup>31</sup>

In respect of the question which titles are subject to registration, those include first and foremost the notarial deed containing the *in rem* contract (and usually also the *causa*, e.g. the contract of sale and transfer, donation and transfer, etc.). In case of hereditary succession, either the acceptance of inheritance by the heir (which, in respect of immovables, must be a notarial deed), or the certificate of inheritance, namely a court decree issued in a non-contentious procedure upon application of the heir, is registered (arts. 1193, 1195 CC). Moreover, legal doctrine affirms that transfer agreements under a condition can and should be registered, as well, regardless of whether the condition is subsequent or precedent (*cf.* CC art. 1923 on inheritance trusts)<sup>32</sup>; the same is true for the so-called “donations *mortis causa*” (CC arts. 2032 *et seq.*), insofar as they contain both the obligatory and the *in rem* contract and both are subject to the same condition.<sup>33</sup> In general terms, all legal acts creating, affecting, or eliminating a right *in rem* in immovable property must be registered, such as the grant by the owner of the authority to conclude such a transfer (art.

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<sup>31</sup> Georgiades/Stathopoulos [-*Filis*], AK VI, art. 1206 nos. 4 *et seq.*, art. 1207 nos. 3 *et seq.*; Spyridakis, EmprD B'/1, nos. 139.3.8 *et seq.* The provision of art. 1206 CC, coupled with the function of registration as a *conditio iuris* of the transfer, provides a simple resolution mechanism in cases of multiple acts of alienation over the same immovable. See also Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, art. 1192 nos. 11 *et seq.*, for a detailed enumeration of cases of successive or multiple transfers and the effects of registration at differing points in time in relation to those transfers, especially with regard to the retroactive effect of the registration of ownership acquisition by inheritance.

<sup>32</sup> Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, art. 1192 nos. 20 *et seq.*; Spyridakis, EmprD B'/1, no. 139.3.6.

<sup>33</sup> In spite of their misleading name, donations *mortis causa* under Greek law are agreements concluded *inter vivos* which make the donation dependent upon the donor's death or the death of both contracting parties; the main difference from a disposal of property by testament consists in the fact that, unlike a testament, such a donation agreement creates an obligation of the donor already prior to his death; Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, art. 1192 no. 29. Also see *ibid.*, art. 1193 no. 6, for the distinction of donations *mortis causa* from contracts in favour of a third party “in the event of death”.

217 CC), the consent to or the approval of a transfer performed by a non-owner (arts. 236, 238 CC), the ratification of an initially void transfer (art. 183 CC) or the waiver of the right to contest an avoidable contract (art. 156 CC); on the other hand, there is no obligation to register legal acts of a merely obligatory nature, such as the revocation of a donation or the rescission of the underlying *causa*.<sup>34</sup> Art. 1192 CC contains a detailed enumeration of acts subject to registration, including, apart from the aforementioned contracts, a series of court decisions and administrative acts which create or affect an ownership right or other rights *in rem* over an immovable.<sup>35</sup> Furthermore, subject to registration are lease contracts concluded for a period exceeding nine years (art. 1208 CC).

### 3. Registration in Particular – Shifting Trends

#### 3.1. The current (personal) registration system in Greece

The Greek registration system currently in place and the one the drafters of the CC had in mind (arts. 1192 *et seq.* CC) is a personal system, namely one based on the cataloguing of all acts on land according to directories organised by persons and not by lots of land.<sup>36</sup> The system was

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<sup>34</sup> Georgiades/Stathopoulos [-Stathopoulos], AK VI, art. 1192 nos. 32 *et seq.*; cf. Spyridakis, EmprD B'/1, no. 139.4.2. (δ), who suggests that a claimant bringing an action for avoidance of a transfer of ownership contract should be able to annotate this action in the relevant registry entry, just like in case of revendicatory actions.

<sup>35</sup> In respect of court decisions, apart from those adjudicating ownership (*see* art. 1056 CC), which actually constitute an original mode of ownership acquisition, also court decisions with the power of *res judicata* that condemn the defendant to conclude an *in rem* agreement must be registered (e.g. when the claimant and the defendant have already concluded a valid sales contract, but subsequently the defendant/transferor does not fulfil his contractual obligations, namely he does not transfer ownership). In this case, the court decision of course substitutes only the transferor's will; therefore, subject to registration are both the court decision and the declaration of the transferee, recorded in a notarial deed; Georgiades/Stathopoulos [-Stathopoulos], AK VI, art. 1192 no. 47.

<sup>36</sup> The only exceptions until the National Land Registry (*see* Part C.2. below) were the islands of Rhodes and Kos, where the Land Registries introduced by the Italians in 1929 were maintained after the annexation of the Dodecanese by Greece in 1947 (art. 8 law 510/1947, GGI A' 298/1947).

introduced for the first time with a statute in 1856, which followed the French system, and it was preserved after the entry into place of the CC in 1946. The personal registry system nowadays is organised and run according to the legislative decree 4201/1961<sup>37</sup> and the royal decree 533/1963,<sup>38</sup> which form part of the various legislative efforts at modernising the system and adapting it to modern needs.<sup>39</sup> Under this system the country is divided in districts, for each one of which a registry office (*υποθηκοφυλακείο*) is organised and where the following registration books are kept<sup>40</sup>:

- Alphabetical registry of owners (*γενικόαλφαβητικόευρετήριο*)
- Registration book (*βιβλίο μεταγραφών*)
- Registry of transactions entries by owner (*ευρετήριομερίδων*)
- General book of entries (*γενικόβιβλίοεκθέσεων*)
- Expropriations index (*ευρετήριο απαλλοτριώσεων*)
- Mortgage book (*βιβλίο υποθηκών*)
- Attachment book (*βιβλίο κατασχέσεων*)
- Revendication book (*βιβλίο διεκδικήσεων*)<sup>41</sup>

The personal character of the registry presupposes a complex system of consultation, while the person consulting it can never be sure that he acquires a comprehensive image of all registered transactions on a certain immovable. The consultation process could be summarised as follows: the person interested in acquiring information about a particular immovable needs to know the owner of this particular immovable. For this, he needs to go to the registry office of the district where the immovable lies and begins by consulting the alphabetical registry of

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<sup>37</sup>GGI A' 175/19.09.1961.

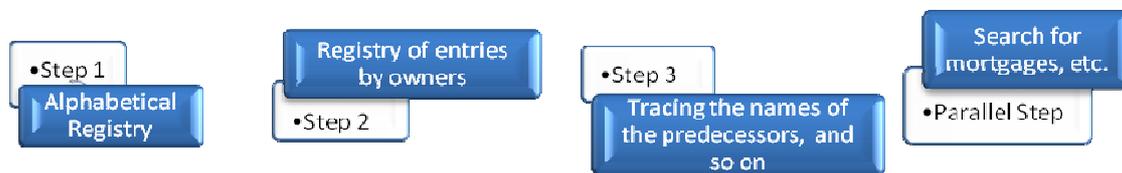
<sup>38</sup>GGI A' 147/21.09.1963.

<sup>39</sup> Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, Introductory observations to arts. 1192-1208, nos. 9 *et seq.*

<sup>40</sup> For more details on those, *see* Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, Introductory observations to arts. 1192-1208, no. 3; *ibid.* [-*Filis*], art. 1194 nos. 3 *et seq.*; *Filios*, EmprD<sup>2</sup>, § 260.

<sup>41</sup> The latter three books are regarded as independent public books that do not belong in the technical sense to the personal land registry (Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, Introductory observations to arts. 1192-1208, no. 3 *in fine*); however, they are all usually kept in the same registration office.

owners, which redirects him to the respective entry on the particular owner (*μερίδα*) in the registry of entries by owner. The owner entry contains references to the registration books, as well as eventual references to the other books, if for example the immovable in question has been attached, made subject to a mortgage, it forms the object of ongoing ownership litigation, etc.<sup>42</sup> It becomes apparent that the registry of entries plays a central role, since it is the guide to all other registries; moreover, the general book of entries is important, because it serves as an entry log and, therefore, disputes as to the order of registrations are solved on the basis of the order of entries in this book.<sup>43</sup>



As mentioned above, this registration serves the requisite of publicity (*δημοσιότητα*) in ownership relations in immovables. In this respect, one must differentiate between formal and substantial publicity. The first consists in the fact that transactions in immovables are made publicly known exactly by means of their registration, while the second refers to the practical implications of such publicity and, more specifically, to the question whether an acquirer of property in good faith from a non-owner

<sup>42</sup> The research method implies that the person wishing to consult the registry must not necessarily conduct the research on the basis of the name of the last owner; since the registry of entries by owner redirects to transactions where the person in question was either the transferee or the transferor (or, respectively, the grantee or the grantor in case e.g. of a land servitude), anyone consulting the registry can trace the chain of transactions both before and after the person, from whom he started the research.

<sup>43</sup> *Argyriou*, *The Law of the Land Registry: Theory - Case law - Samples (Το Δίκαιο του Κτηματολογίου: Θεωρία - Νομολογία - Υποδείγματα)*<sup>2</sup>, 2 (henceforth: *Argyriou*, *Land Registry*<sup>2</sup>, xxx); *Georgiades/Stathopoulos [-Stathopoulos]*, AK VI, Introductory observations to arts. 1192-1208, no. 10. Those two accessory books (alphabetical registry of owners and registry of entries by owner) are so instrumental in the function of the personal registration system, that they are deemed to constitute indispensable supplements of the registration books and registration is not considered to be complete until and unless the relevant entries have been made in those books, as well; AP 489/1956, 5 NoV 121; AP 205/1957, 5 NoV 775.

is protected or not.<sup>44</sup>The personal registry does not create a presumption of ownership and it does not attest to the existence and validity of the right registered, though only to the fact that registration took place.<sup>45</sup> Therefore, an acquirer in good faith is in principle<sup>46</sup> not protected, precisely because the registry cannot offer a comprehensive overview of the ownership status of the immovable in question; a person consulting the registry can only investigate a chain of owners, of which the owner he knows about forms part, but not whether other, irrelevant persons have registered transfer contracts or other titles on the particular land in question,<sup>47</sup> nor can he become informed on an eventual acquisitive prescription (which may not necessarily be registered). Therefore, the personal registry system can only satisfy the principle of formal publicity,<sup>48</sup> but not that of substantial publicity, as well. This is the reason why, once the last owner has been traced, the potential acquirer, who investigates the registries and wishes to attain some degree of certainty that the transferor is indeed the owner, must be able to trace the transferor's title or, if need be, also those of his predecessors for a period going back in time at least twenty years, namely the term of extraordinary acquisitive prescription under Greek law (*έκτακτηπαραγραφή*; art. 1045 CC), so that he can at least determine whether the transferor acquired ownership by means of acquisitive prescription, if not from a true owner. Still, he cannot be absolutely sure about the event of such acquisition, because the possession necessary for acquisitive prescription may be successfully contested.<sup>49</sup>

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<sup>44</sup>*Georgiades*, EmprD I, § 2 nos. 15 *et seq.*; *Georgiades/Stathopoulos [-Stathopoulos]*, AK VI, Introductory observations to arts. 1192-1208, no. 4.

<sup>45</sup>*Filios*, EmprD<sup>2</sup>, § 258 A; *Georgiades*, EmprD I, § 2 no. 22.

<sup>46</sup>See immediately below for certain exceptions.

<sup>47</sup>Apparently, the greatest danger in this respect is the event that a person has acquired ownership of the land in question in the meantime by acquisitive prescription, either it is registered or not. For the way in which acquisitive prescription is treated under the new Land Registry system, see *Argyriou*, Land Registry<sup>2</sup>, 198 *et seq.*

<sup>48</sup>And even typical publicity is not satisfyingly served; *Filios*, EmprD<sup>2</sup>, § 258 B. II.; *Georgiades*, EmprD I, § 2 no. 19.

<sup>49</sup>*Georgiades/Stathopoulos [-Stathopoulos]*, AK VI, Introductory observations to arts. 1192-1208, no. 6. In fact, in order to enhance his certainty, the potential acquirer must cross-check the records of various public authorities, so as to ascertain, for example, if one or more persons appearing as heirs in the registry are also designated as such in

Nevertheless, some of the problems resulting from the non-observance of substantial publicity are counteracted by the protection granted to third parties through a series of provisions, either of general character or specifically applicable on immovable property:

(a) Firstly, arts. 138 *et seq.* CC provide that sham agreements (namely declarations of intent that are not earnest) in principle do not produce any legal effects (they are void); however, they do not harm third parties who entered a contract on the basis of a sham agreement (e.g. bought an immovable from the sham transferee) in ignorance of the sham character of the previous transaction.<sup>50</sup>

(b) Secondly, art. 1202 CC offers a certain degree of protection in case of void transfer agreements: When a void transaction is recognised as such by court decision with the power of *res judicata*, the party that achieved the declaration of nullity must proceed to the registration (annotation) of the relevant decision in the pertinent registry. If he or she does not do so in time and the defendant manages to alienate the property prior to the annotation, this subsequent transfer will, of course, be invalid (because, in case of a void original transfer, ownership never passed to the initial transferee), but the winning claimant may be liable for damages as against third parties that were harmed through the lack of annotation of the decision recognising the nullity; such liability, however, is not strict, but fault-based.<sup>51</sup>

(c) Perhaps the most important group of exceptions is that regulated in the arts. 1203 *et seq.* CC. In case of voidable contracts (namely contracts contested on grounds of error, fraud or threat), the decision that declares a transaction avoided in principle has a retroactive effect, in accordance with the general rules for avoidance in Greek law (arts. 184, 180 CC). However, in respect of transfer contracts for immovables, the effect of the avoidance retroacts not to the time of conclusion of the contract, as it should be under the general rules, but to the time when the relevant court

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the respective testaments (if available), if the lot of land in question is eventually inalienable or burdened by construction restrictions, etc.; see *Filios*, EmprD<sup>2</sup>, § 258 B. II.

<sup>50</sup> *Spyridakis*, EmprD B' / 1, no. 139.4.1.; *Georgiades*, EmprD I, § 43 no. 35; *Filios*, EmprD<sup>2</sup>, § 88 B α).

<sup>51</sup> *Georgiades/Stathopoulos [-Stathopoulos]*, AK VI, art. 1202, nos. 4 *et seq.*

decision becomes *resjudicata* and is annotated on the margin of the registered title of acquisition (in the registration book). As a result, any rights *in rem* that third parties acquired in the meantime on the basis of the avoided (and registered) title are not overturned; the provision thus protects specific successors of the original acquirer or persons who acquired from him restricted rights *in rem* (e.g. a land servitude, a right of mortgage, etc.) on the property in question in the meantime.<sup>52</sup> Legal doctrine further specifies the scope of the rule and, either by virtue of teleological reduction or by merely interpreting the rule in the narrow sense, suggests that the protection of art. 1204 CC must be accorded only to third acquirers in good faith.<sup>53</sup> Although the rule primarily refers to the avoidance of the transfer (*in rem*) contract, it is affirmed that it should apply analogously also when only the *causa* is avoided, due to the causal character of the transfer system.<sup>54</sup>

The claimant in an action for avoidance may achieve further protection prior to the point in time set by art. 1204 CC, either by imposing conservative attachment on the immovable or by bringing the action for revendication together with the action for avoidance; both of those remedies, namely the application for conservative attachment and the revendicatory action must be registered in the pertinent books of the registry and any subsequent acquirer can no longer claim that he was in good faith, since he could and should have consulted all entries relevant and not simply the transfer title in the registration book.<sup>55</sup>

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<sup>52</sup>Georgiades, EmprD I, § 43 no. 36; Spyridakis, EmprD B'/1, no. 139.4.2.

<sup>53</sup> Georgiades/Stathopoulos [-Stathopoulos], AK VI, arts. 1203-1204, no. 5; Spyridakis, EmprD B'/1, no. 139.4.2.; but see Filios, EmprD<sup>2</sup>, § 264 E., who claims that good faith is irrelevant. For an extensive discussion of the arguments of both sides, see Tsolakidis, Avoidance of legal transaction on an immovable and third party protection under the transcription system and the National Land Registry (Ακύρωση δικαιοπραξίας με αντικείμενο ακίνητο και προστασία των τρίτων κατά το σύστημα μεταγραφών και το Εθνικό Κτηματολόγιο) [henceforth: Tsolakidis, Avoidance and third party protection], 117 et seq.

<sup>54</sup>Georgiades, EmprD I, § 43 no. 36 Fn. 49; Spyridakis, EmprD B'/1, no. 139.3.10. *in fine*; Georgiades/Stathopoulos [-Stathopoulos], AK VI, arts. 1203-1204, no. 3.

<sup>55</sup> Georgiades/Stathopoulos [-Stathopoulos], AK VI, arts. 1203-1204, no. 9. Bringing the revendicatory action seems at first glance inconsistent, since a voidable transfer contract (or *causa*) does not mean that ownership reverts automatically to the transferor; however, it is suggested that the action can be brought in the framework of

(d) Finally, arts. 1962 *et seq.* CC also protect persons who acquired ownership or another right *in rem* from a person certified as an heir in an inheritance certificate issued under the terms of arts. 819 *et seq.* CPC. The protection is subject to the acquirer's good faith, namely he must not be aware of the eventual inaccuracy or revocation of the inheritance certificate under the terms of arts. 1965 *et seq.* CC.<sup>56</sup>

### 3.2. Transition to the Land Registry System

The current system of personal registration has been subject to criticism in Greek literature for a long time, its major drawback being that it does not fully satisfy the principle of substantial publicity, namely the protection of third acquirers in good faith.<sup>57</sup> Therefore, the Greek legislator sought to change this intricate and complicated system; although the first efforts go back to the end of the 19<sup>th</sup> century,<sup>58</sup> a more sophisticated and organised effort was initiated in the mid-90's with the laws 2308/1995<sup>59</sup> and 2664/1998,<sup>60</sup> which were amended with a series of subsequent laws, such as the laws 3127/2003<sup>61</sup> and 3481/2006,<sup>62</sup> while a definite time-plan for the creation of the Land Registry Offices at least in the capital cities of the 52 Greek prefectures was set. The National Land Registry is organised and ran by the Greek Organisation of Land Registry and Mappings (GOLRM;

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art. 69 § 1 no. (δ) CPC, which allows a person to seek judicial protection when the creation or exercise of the right to be protected is directly dependent upon the court decision sought.

<sup>56</sup>Filios, EmprD<sup>2</sup>, § 88 B. β); Spyridakis, EmprD B'/1,no. 139.4.3.; Georgiades, EmprD I, § 43 no. 5.

<sup>57</sup>See Kousoulas, The law of the Land Registry - The legal evaluation of "land cataloguing" (l. 2308/1995) (ΤοδικαιοτομΚτηματολογίου - Ηνομικήθεώρησητης «κτηματογράφησης» [N. 2308/1995]), 9 *et seq.*; Argyriou, Land Registry<sup>2</sup>, 7; Georgiades/Stathopoulos [-Stathopoulos], AK VI, Introductory observations to arts. 1192-1208, nos. 1, 6.

<sup>58</sup>Gazis, The Land Registry and the land estate books (Το Κτηματολόγιοκαιτακτηματικάβιβλία), 40 NoV 1171 *et seq.*

<sup>59</sup>GGI A' 114/15.06.1995.

<sup>60</sup>GGI A' 275/03.12.1998.

<sup>61</sup>GGI A' 67/19.03.2003.

<sup>62</sup>GGI A' 162/02.08.2006; also see the Decision 425/09.01.2007 of the Executive Board of the Greek Organisation of Land Registry and Mappings, GGI B' 1443/09.08.2007.

Οργανισμός Κτηματολογίου και Χαρτογράφησης Ελλάδας, ΟΚΧΕ); after relevant suggestion by the GOLRM, the Minister of Environment, Spatial Planning and Public Works may cede some of the prerogatives of the GOLRM to the company “Κtimatologio S.A.”.<sup>63</sup> The transition from the old to the new system is carried out on a step-by-step basis<sup>64</sup> in those areas where the cataloguing process, the drawing up of the definite owners’ tables, and the judicial examination of complaints and objections has been completed;<sup>65</sup> the old Registration Offices (υποθηκοφυλακεία) are replaced by the new Land Registry Offices (κτηματολογικά γραφεία). According to data provided by “Κtimatologio S.A.”, by the end of 2007 94 Land

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<sup>63</sup> Art. 1 law 2664/1998, as amended.

<sup>64</sup> *Argyriou*, Land Registry<sup>2</sup>, 72 *et seq.*; *Pantazopoulos*, The transition from the transcriptions books system to the Land Registry system, in *Greek Civil Lawyers’ Association/Rhodes Bar Association/Giannakakis* (ed.), *The Land Registry – 3<sup>rd</sup> Panhellenic Congress of the Civil Lawyers’ Association*, 41 (43 *et seq.*).

<sup>65</sup> The legal framework of the Land Registry (the law 2308/1995 in particular) foresees a complicated and elaborate process of declaration of all rights in real property by the respective owners or other title holders, which must be done by themselves following specific time tables, and a procedure organised in multiple stages which include administrative and judicial control measures, so as to ensure the accuracy and truthfulness of the original registrations, since those constitute irrefutable presumptions. However, the scope of the present analysis does not allow delving in more detail into the very interesting matters and the substantial *corpus* of case law that have resulted in the meantime. For more information, see *Argyriou*, Land Registry<sup>2</sup>, 9 *et seq.*, 235 *et seq.*; *Diatsidis*, Issues of the National Land Registry. The irrebuttable presumption of the National Land Registry and its constitutionality (Θέματα Εθνικού Κτηματολογίου.

*Το αμάχητο τεκμήριο του εθνικού κτηματολογίου και η συνταγματικότητα του*), 2000 Arm 476 *et seq.*; *Doris*, Land cataloguing for the creation of a National Land Registry. Procedure up to the first entries in the Land Registry Books (Κτηματογράφηση για τη δημιουργία Εθνικού Κτηματολογίου.

*Διαδικασία έως τις πρώτες εγγραφές στα Κτηματολογικά Βιβλία*), 2001 IonEpDik 7 *et seq.*; *Kitsaras*, The first entries in the National Land Registry (Οι πρώτες εγγραφές στο Εθνικό Κτηματολόγιο), 15 *et seq.*, 73 *et seq.*, 147 *et seq.*; *Kotoulas*, Land Registry and transfers of immovables (from the submission of the initial applications until the original entries) (Κτηματολόγιο και μεταβιβάσεις ακινήτων [από τη submission των αρχικών δηλώσεων μέχρι τις πρώτες εγγραφές]), 1999 Arm 785 *et seq.*; *Magoulas*, Land Registry entries – The correction of the first incorrect entries (Κτηματολογικές εγγραφές – Η διόρθωση των πρώτων ανακριβών εγγραφών)<sup>2</sup>, 25 *et seq.*, 141 *et seq.*; *Nakis*, The possibilities of correcting apparent mistakes of the land registry entries by virtue of the amended article 18 l. 2664/1998 (Οιδνωτότητα διόρθωσης προδήλων σφαλμάτων των κτηματολογικών εγγραφών με βάση το τροποποιημένο άρθρο 18 Ν. 2664/1998), 2006 NoV 1627 *et seq.*

Registry Offices, covering a total area of 7.561.000 hectares and documenting 5.866.000 land property rights, were fully operational. The current phase of the project, which is planned to be completed by 2011, covers 3.100.000 hectares and 6.700.000 property rights, while after its completion the land property rights of approximately 2/3 of the Greek population will be covered.<sup>66</sup>

The critical differences between the old and the new system mainly consist in three points<sup>67</sup>. First, the Greek Land Registry (*ΕθνικόΚτηματολόγιο*) will be land-based, each land parcel will be given a specific number (National Land Registry Code Number - *ΚωδικόςΑριθμόςΕθνικούΚτηματολογίου, ΚΑΕΚ*), while the relevant charts and plans will be updated on a regular basis. Second, the principle of substantial publicity will be served, especially through the (rebuttable) presumption of accuracy of the registrations made in the Land Registry.<sup>68</sup>Third, the National Land Registry aims at serving multiple purposes, since it shall gather a wide range of data (statistical, demographical, economical, geological, etc.), which will render it multi-functional and a valuable source of information facilitating viable and rational planning and development in various domains, such as environmental, social or economic policies<sup>69</sup>; the Land Registry will thus be a titles registry and a cadastre at the same time.

The Greek Land Registry is based upon the following principles, some of which already applied for the personal registration system, while

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<sup>66</sup>See [http://www.ktimatologio.gr/Proodos\\_page.aspx](http://www.ktimatologio.gr/Proodos_page.aspx) (in Greek) (last accessed on July 29<sup>th</sup>, 2009).

<sup>67</sup>*Argyriou*, Land Registry<sup>2</sup>, 4 *et seq.*; *Filios*, EmprD<sup>2</sup>, §§ 266, 275; *Doris*, Land cataloguing..., 2001 IonEpDik 7 *et seq.*

<sup>68</sup>In sharp contrast to the current personal system, where the registration merely attests to the fact that registration took place, but not whether the property status resulting from the registration books is also accurate or not; *cf.* Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, Introductory observations to arts. 1192-1208, no. 6; *ibid.* [-*Filis*], art. 1198, no. 4. For the precise meaning of the accuracy of the registrations in the Land Registry, see *Filios*, EmprD<sup>2</sup>, § 274.

<sup>69</sup>*Argyriou*, Land Registry<sup>2</sup>, 71 (Fn. 30); *Doris*, Land cataloguing..., 2001 IonEpDik 8. The multi-purpose Land Registry and the practical difficulties that its creation entails were one of the main reasons for which the introduction of the land-based registration system delayed so much in Greece; *Gazis*, The Land Registry..., 40 NoV 1174.

others are new (such as the protection of good faith acquirers), or even innovative (such as the principle of openness)<sup>70</sup>:

- Information on a land-lot basis
- Substantive legality control (not merely typical control for apparent defects) by the registrar prior to each registration
- Prior tempore, potior iure principle
- Public books accessible by everybody
- Protection of substantial publicity (acquirers in good faith)
- Principle of openness, which means that the Land Registry is easily adaptable to future needs by adding further information
- On the technical and practical level, the most important innovation consists in gathering all information scattered across the various books of the current personal system in one single information sheet (*κτηματολογικόφύλλο*) concerning each immovable.<sup>71</sup> The books and constituent parts of the new Land Registry system are the following<sup>72</sup>:
  - Land Registry diagrams (maps)
  - Land Registry Inventories (indexes of the properties shown on each map; these information also form the object of the initial registrations in the Land Registry)
  - Land Registry Books
  - Logbook (for keeping time records of the incoming acts to be registered)
  - Alphabetical Index of owners or other beneficiaries of rights registered
  - Archive (containing all documents, maps, etc., accompanying each application for registration)

The new registration system creates a series of interesting legal issues and changes the current practice of transactions in land for many respects.<sup>73</sup> It

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<sup>70</sup> Art. 2 law 2664/1998; *Argyriou*, Land Registry<sup>2</sup>, 67 *et seq.*; *Filos*, EmprD<sup>2</sup>, § 266 Γ.

<sup>71</sup> See art. 12 law 2664/1998 for the acts that are registered in the Land Registry Books.

<sup>72</sup> Art. 3 § 2 law 2664/1998.

<sup>73</sup> One could mention the remedies granted for the correction of inaccurate or false original registrations, the issues raised in respect of existent property rights in land

is interesting to refer shortly to the principle of substantial publicity, which under the new Land Registry is served by a double presumption: on one hand, the initial registrations, once they become definite (see arts. 6 §§ 1-2, 7 § 1 l. 2664/1998), form an irrebuttable presumption of ownership in favour of the person listed as the owner (if the ownership status is challenged after the initial entry has become definite, the worst case scenario is that the registered owner becomes liable *ex unjustified enrichment* – and eventually tort – as against the true owner; art. 7 § 2 l. 2664/1998); the same applies for any other right in land registered in the Land Registry. On the other hand, each subsequent acquisition forms a rebuttable presumption of ownership in favour of the person featured as owner in the Land Registry books.<sup>74</sup> By virtue of this presumption, the new Land Registry introduces the possibility of good faith acquisition of land *a non domino*. Until overturned, the presumption protects every specific successor in good faith of the featured owner or his universal successors. The presumption may be overturned only by a final court decision (namely a decision which can no longer be challenged, not even before the Supreme Court; *αμετάκλητη δικαστική απόφαση*) and provided that the specific successor did not acquire for consideration or, when he did acquire for consideration, if he also was in bad faith at the time of acquisition, either intentionally or gross negligently. In those cases, where the true owner cannot overturn the subsequent acquisition, as against the falsely featured owner he only has a claim *ex unjustified enrichment* and potentially, also tort (art. 13 law 2664/1998).<sup>75</sup>

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(mainly ownership, but also mortgages, mortgage annotations) or other restrictions on the authority to dispose (attachments, etc.) which were not registered during the cataloguing process, acquisitive prescription of land under the new system, etc. See Argyriou, *Land Registry*<sup>2</sup>, 99 *et seq.*, 131 *et seq.*, 170 *et seq.*, 198 *et seq.*; Filios, *EmprD*<sup>2</sup>, §§ 268 *et seq.*, 276.

<sup>74</sup>Filios, *EmprD*<sup>2</sup>, § 274.

<sup>75</sup>Filios, *EmprD*<sup>2</sup>, § 275. The author restricts the cases of good faith acquisition to acts with a transactional character and consequently excludes acquisition by universal succession, *ex lege* or in the context of execution proceedings. For an analytical presentation of third party protection under the new Land Registry, as well as in the various stages of the land cataloguing process, see Tsolakidis, *Avoidance and third party protection*, 165 *et seq.*, 255 *et seq.*

## 4. SPECIAL ISSUES

### 4.1. Costs of the transfer of ownership

As far as the costs of the transfer altogether are concerned, there are no particular provision on the matter. Arts. 526 *et seq.* CC contain certain provisions on the costs of the contract of sale; of particular interest for the sale (and transfer) of immovable property is art. 527 CC, which provides that both parties have to bear the costs and dues resulting from the drafting of the agreement in writing, while the buyer of immovable property or any right to an immovable must bear the costs of registration.<sup>76</sup> In practice, it is usual that each party pays his lawyer, when the representation of the parties by a lawyer is imposed by law (this is the case for contracts with a value exceeding 29.347,0286 Euros in Athens and Piraeus or 11.738,81144 Euros in the districts of all other Bar Associations in the country<sup>77</sup>), while the buyer also has to bear the notary public fees. The minimum lawyer's fee is determined as a percentage of the value of the contract transaction value, which usually coincides with the so-called "objective value" of the immovable<sup>78</sup>; this percentage ranges from 1% of a contract value up to 44.020,5429 Euros to 0,01% for transaction values over 58.694.057,2296 Euros (art. 161 Lawyers' Code<sup>79</sup>). Apart from that, the buyer's lawyer may charge additionally the control he will perform in the registry, so as to ascertain the legal status of the property. As far as

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<sup>76</sup> Georgiades/Stathopoulos [-*Filis*], AK IV, art. 1194 no. 19. For a detailed overview of the various categories of costs of registration as of 2006, see Konstantinou, Transcription Offices - National Land Register (Υποθηκοφυλακεία - Εθνικό Κτηματολόγιο)<sup>3</sup>, *passim*.

<sup>77</sup> Those "detailed" values result from the conversion of the respective drachmic sums of 10.000.000,00 and 4.000.000,00 Drachmas into Euros.

<sup>78</sup> The "objective value (*αντικειμενική αξία*)" of land in Greece is determined according to tables published and reviewed on a regular basis by the Ministry of Economy and Finance. The nominal values are the minimum values at which land may be sold and in the great majority of cases the price written in the transfer contract consists in the respective objective value of the immovable sold, even if the buyer actually pays a higher price (actual value). All costs, fees, dues and taxes are calculated in principle on the basis of the value written in the contract, hence the practice to stipulate in writing this price. The Supreme Court has long ago ruled that the indication in the contract of a price other than the actual one does not render the conveyance invalid; AP 601/1971, 20 NoV 54 (55). See Georgiades, EmprD I, § 43 no. 16; Spyridakis, EmprD B'/1, no. 139.5.1.

<sup>79</sup> Legislative Decree 3026/1954, GGI A' 235/08.10.1954, as amended.

the notary public's fee is concerned, it consists in a standard deed fee of 12,00 Euros plus 1,20% of the contract transaction value (art. 40 Notaries' Code<sup>80</sup>; art. 1 Ministerial Decree 40330/18.04.2005<sup>81</sup>); these fees are subject to periodic review by Joint Decision of the Ministers for Justice and for Finance and Economics. The buyer of the real estate must also pay a series of taxes and other dues, the most important of which is the immovable transfer tax, which in general terms and aside from the specific constellations, is equal to 9% of the contract value up to the amount of 15.000 Euros and 11% of the value exceeding the sum of 15.000 Euros.<sup>82</sup> Finally, the fee paid to the registrar for the registration of the transaction is also calculated as a percentage ranging from 3‰ to 9‰ of the contract value<sup>83</sup>; moreover, the registering party has to pay a standard fee of 28,85 Euros and 5 Euros for the issuance of the registration certificate. The buyer may optionally hire a civil engineer, who will examine the technical aspects of the property, as well as matters such as the eventual classification of the building as a protected edifice that may not be altered, demolished, etc.; the question whether the property is subject to expropriation. If a real estate agent is involved, the market practice has set the fee at approximately 2% of the actual or the contract

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<sup>80</sup> Law 2830/2000, GGI A' 96/16.03.2000, as amended.

<sup>81</sup> GGI B' 599/15.05.2005.

<sup>82</sup> Art. 4 *et seq.* law 1587/1950, GGI A' 294/22.12.1950, as amended, in conjunction with art. 1 Legislative Decree 3563/1956, as amended (both were last amended with law 2948/2001, GGI A' 242/19.10.2001). *Also see* law 1078/1980, GGI A' 238/14.10.1980, as amended, for certain exemptions from the transfer tax. It is also noteworthy that the acquisition of new buildings or other rights *in rem* in new buildings, the construction permit for which was issued (or reviewed, insofar as the construction works had not begun) from January 1<sup>st</sup>, 2006 onwards, is subject to the VAT currently applicable (19%); *see* arts. 5 *et seq.* law 2859/2000, GGI A' 248/07.11.2000, as amended with law 3427/2005, GGI A' 312/27.12.2005. This tax is paid in principle by the constructor, but it is evident that the cost is shifted to the buyer and indirectly affects the purchase price.

<sup>83</sup> Law 325/1976, GGI A' 125/28.05.1976, as amended, in conjunction with art. 20 law 2145/1993, GGI A' 88/28.05.1993, as amended. The actual fees depend on the transaction type and the objective value of the immovable and they are subject to review by Ministerial Decisions; the registration fees for a transfer title by virtue of sale currently amount to 4,75‰ of the contract value.

sale price, but other agreements are always possible; it is also almost standard practice that the buyer pays the realtor fees.<sup>84</sup>

#### 4.2. *The role of delivery*

Interesting questions arise in respect of the consequences of delivery of the transferred immovable to the transferee prior to registration. Unlike chattels, delivery does not play a primary role in the transfer of immovables, since in this domain the requisite of publicity in property relations is served by registration. However, delivery is not deprived of practical relevance. First, it is advisable to take delivery the soonest possible, so as to obtain protection in the event of a defective title (e.g. so that the acquisitive prescription term begins to run [arts. 1041 *et seq.* CC] or so that the transferee is able to bring the *actio publiciana* [art. 1112 CC]). Apart from that, if the transferor surrenders actual control of the transferred property to the transferee, the latter, does not become owner prior to registration, but, if sued by the owner, has a right of retention, because as against the owner he is entitled to possess the immovable (arts. 1095 and e.g. 513 [contract of sale] CC). Moreover, in the context of a contract of sale, delivery prior to registration means that the risk of accidental destruction or deterioration passes to the transferee under art. 522 CC prior to ownership.<sup>85</sup>

#### 4.3. *Procedural issues*

In view of the fact that conveyances, attachments, and mortgages are recorded in different registration books, certain issues may arise in respect of the hierarchical relationship between a transfer or mortgage title and an attachment registered on the same day in the respective

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<sup>84</sup> When determining the fee, the provisions of arts. 703 *et seq.* CC have to be observed; *also see* Presidential Decree 248/1993 (GGI A' 108/28.06.1993), which sets a basic framework for the exercise of real estate agency; *cf.* the Deontology Code of the Association of Greek Real Estate Agents (<http://www.sek.gr/KodikasDeont.aspx>; last accessed on July 29<sup>th</sup>, 2009), which provides *inter alia* that the agency fees are to be borne by both parties, although this is not followed in practice.

<sup>85</sup> *Georgiades*, EmprD I, § 43 nos. 27 *et seq.*; *Spyridakis*, EmprD B'/1, no. 139.2.7.

books, since the latter actually deprives the owner of his authority to dispose of his right. The question is of particular interest with regard to transfers that were concluded, but not registered before the imposition of an attachment. The CC, as mentioned above, only regulates the hierarchy between transfers or between a transfer and a mortgage registered on the same day. The relation to attachments, on the other hand, as addressed in art. 997 CPC: § 3 of the said article provides that any registration of a transfer or a mortgage title after an attachment of the property in question has been registered is not valid as against the creditors who levied execution (which means that the invalidity is only relative), while § 4 provides that, in respect of registrations performed on the same day, the first act to be registered prevails, even if it precedes the others by a very short time period.<sup>86</sup>

Another issue that emerged in the context of court practice was the question whether execution on property is possible, when the owner is a heir or devisee who has accepted the inheritance or the devise, but has not registered his title (in this case, usually the acceptance of inheritance by notarial deed or the court-issued certificate of inheritance); the question was posed exactly in view of the fact that registration in the context of the law of succession exceptionally has an *ex tunc* effect. The courts and the prevailing opinion in legal doctrine rather affirm the legality of the relevant execution acts (attachment, sale by auction, etc.), provided that the defendant in the execution proceedings does not challenge those or, when he does challenge them. If the claimant manages to have a registration performed until specific stages of the proceedings, depending on the doctrinal view adopted. Therefore, in order to avoid possible complications, it is advisable that the creditor judicially requests the registration in his capacity as a third party having an interest in the registration under art. 72 CPC before the execution proper is initiated.<sup>87</sup>

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<sup>86</sup> Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, art. 1192 no. 24. Art. 997 § 4 CPC came to resolve a long-standing dispute on attachment issues, which was fueled exactly by the lack of any legal rule on the matter (*cf.* Georgiades/Stathopoulos [-*Filis*], AK VI, art. 1207 no. 13).

<sup>87</sup> For more details, *see* Georgiades/Stathopoulos [-*Filis*], AK VI, art. 1199 no. 6, with further references.

#### 4.4. *Insolvency*

The Insolvency Code of 2007 (law 3588/2007<sup>88</sup>; IC 2007) provides that the insolvency of any person listed as an owner of immovables either in the new Land Registry or the old personal registration books must be notified by the insolvency administrator to the competent Registration Authority (art. 9). In respect of pending synallagmatic contracts, namely contracts that have been concluded prior to the declaration of insolvency, but the respective performances of which have not been affected yet, insolvency in principle does not affect their validity (art. 28); this provision also applies on contracts for the transfer of ownership of immovables. Consequently, the insolvency administrator may choose whether to uphold or disclaim a contract for acquisition of land, in accordance with the prerogatives accorded to him under art. 29 IC 2007. The question whether it is possible to proceed to the registration of a contract for the transfer of land concluded before the declaration of insolvency, when the insolvent person is the transferor, is somewhat more complicated. Under the previous law in force, it had been suggested that this should be possible under certain conditions. More specifically, taking into account the fact that registration is a mere *conditio iuris* and not an act of disposition proper. A contract which is concluded before the declaration of insolvency (and also before the so-called “period of suspicion”, namely a period determined by the judge which can go back to two years prior to the declaration of insolvency; contracts concluded during this period may be subject to the so called “insolvency revocation” [*cf.* arts. 7, 41 IC 2007]) can be registered without any problems, because the actual act of disposition by the insolvent took place while he still had the authority to dispose. Part of the legal doctrine and case law subscribed to this view, while other authors rejected it.<sup>89</sup> This view can be adopted in respect of the insolvency law currently in force, especially in view of the fact that its opponents invoked the analogous application of art. 539 of the

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<sup>88</sup> GGI A’ 153/10.07.2007.

<sup>89</sup> See (for the law previously in force) CA Athens 9855/1978, 28 NoV 787 *et seq.*, affirming the acceptability of registration after the declaration of insolvency; Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, art. 1192 no. 25, with further references.

Commercial Code (now obsolete), which imposed specific terms for the registration of mortgage titles in case of insolvency, but was not upheld in the new IC.<sup>90</sup>

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<sup>90</sup>See CA Athens 9855/1978, 28 NoV 787, which adopts the view that art. 539 ComC is not analogously applicable, as being too specific and exceptional.

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## THE TRANSFER OF IMMOVEABLES IN IRELAND

*Una Woods\**

### *1. Introduction*

In Ireland the transfer of immoveables or 'real property'<sup>1</sup> is governed by two branches of law known as land law and conveyancing law. Although they are two separate subjects, land law and conveyancing law are closely related and inter-dependent. A knowledge of both is essential for a solicitor acting on behalf of a client who wishes to enter into a transaction in relation to land. Land law is generally understood as defining the types of ownership (known as 'estates') or other interests which arise in relation to land,<sup>2</sup> while conveyancing law is more concerned with the procedures that owners should follow to dispose of their interests and the precautions that purchasers should take in acquiring such interests.<sup>3</sup> This chapter begins by outlining some basic features of land ownership and the conveyancing system in Ireland. It also highlights recent developments which have taken place in this area of law. Finally, the reader is taken through the basic steps of a residential conveyancing transaction.

### *2. Fundamental Features of Irish Land Ownership*

#### *2.1 Feudal Tenure*

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<sup>1</sup> In Ireland, following the common law tradition, property is classified as real property (or realty) and personal property (personalty), which corresponds roughly with the distinction made in civil law jurisdictions between immoveables and moveables.

<sup>2</sup> See De Londras, *Principles of Irish Property Law* 2<sup>nd</sup> ed. (Dublin, 2011); Lyall, *Land Law in Ireland* 3<sup>rd</sup> ed. (Dublin 2010); Coughlan, *Property Law* 2<sup>nd</sup> ed (Dublin, 1998); Wylie, *Irish Land Law* 4<sup>th</sup> ed. (Dublin, 2010).

<sup>3</sup> See Wylie and Woods, *Irish Conveyancing Law* 3<sup>rd</sup> ed (Haywards Heath, 2005); Law Society of Ireland, *Conveyancing – Volumes 1 and 2* 2<sup>nd</sup> ed (Dublin, 2003).

The Irish system of land ownership is derived from the feudal system which was introduced by the Normans in England following the Battle of Hastings in 1066 and introduced in Ireland following their invasion in the 12<sup>th</sup> century.<sup>4</sup> The Norman conquest of Ireland was a more drawn out affair than in England and the feudal system was not imposed over the entire country until the 17<sup>th</sup> century. The feudal system of landholding or 'tenure' was based on the notion that the Crown held the underlying title to all land and so all land was held from the Crown. In Ireland the State has occupied the position of the Crown since 1922. In the aftermath of the Norman conquest, the King made grants of land to his followers, known as tenants in chief, on terms which required the tenant to perform certain services for the King and allowed the King to claim certain rights, known as 'incidents,' over his tenants. The King's tenants, in turn made sub-grants of the land on similar terms and this process, known as 'subinfeudation,' continued until the entire country was subject to a feudal pyramid structure with the King at the top of the pyramid and the tenants in possession of the land at the bottom of the pyramid. Tenure refers to terms under which a person holds land and the most common type of tenure was 'free and common socage' which originally required a tenant to perform agricultural services for his immediate lord. This type of tenure later became known as 'freehold' and the Tenures Abolition Act (Ireland) 1662 converted all existing tenures into freehold. Freehold tenure is very common today, although all feudal incidents or services have been abolished or are no longer of any practical significance. Feudal tenure, in so far as the concept has survived, was abolished by section 9 of the Land and Conveyancing Law Reform Act 2009. The Law Reform Commission was of the opinion that the notion that all land was held from the State was out of step with the modern relationship between the government and its citizens.<sup>5</sup> However, feudal tenure has left its imprint on the common law approach to land ownership as it was directly responsible for the introduction of the doctrine of estates.

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<sup>4</sup> See Lyall, *Land Law in Ireland cit.*, chapter 3 and Wylie, *IrishLand Law cit.*, chapter 2 for a review of the feudal system of ownership.

<sup>5</sup> See Law Reform Commission, *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34 -2004), para 2.01-02.

## 2.2 The Doctrine of Estates

Absolute (or allodial) ownership of land was not possible under the feudal system as the Crown owned the underlying title to all land. It was necessary to come up with an abstract entity called an 'estate' to describe what the tenant in possession of the land owned. There are three different freehold estates: the life estate, the fee tail and the fee simple.<sup>6</sup> The type of estate determines the duration of time for which the person owns the land. A person who holds a life estate is entitled to enjoy ownership for a lifetime.<sup>7</sup> Under a fee tail estate, on the death of the current holder of the estate, ownership passes to the direct descendants (as identified by the ancient heirship rules known as 'primogeniture'<sup>8</sup>) of the original grantee and the estate comes to an end when no direct descendants survive. The third estate is the fee simple which is the closest to absolute ownership; if the owner of this estate does not dispose of it during his lifetime,<sup>9</sup> it will pass to his successors as identified by his will or by the modern intestacy rules set out in Part IV of the Succession Act 1965. The life estate and the fee tail were commonly used in the creation of certain family settlements, known as 'strict settlements.' Strict settlements were used by landowners to keep land in the family as both estates were not very marketable commodities. Strict settlements led to the deterioration of land and buildings and the impoverishment of the landed classes. As a result, legislation was introduced which would allow the holders of these lesser estates to sell a fee simple estate which brought settled land back onto the market.<sup>10</sup> Further measures were taken by the Land and Conveyancing Act 2009 to simplify the purchase of settled land. It provides that a life estate can only take effect behind a trust of land which confers the

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<sup>6</sup> See Lyall, *Land Law in Ireland cit.*, chapters 6, 8 and 9 and Wylie, *IrishLand Law cit.* chapter 4.

<sup>7</sup> Usually the lifetime of the grantee, although it is possible to create a life estate *pur autre vie* which lasts the lifetime of another named person.

<sup>8</sup> These rules favoured the eldest son.

<sup>9</sup> The rule which prevents restrictions being placed on the powers of alienation of a fee simple owner is a fundamental principle of Irish land law, see s9(4) of the Land and Conveyancing Law Reform Act 2009.

<sup>10</sup> The Fines and Recoveries (Ireland) Act 1834 and the Settled Land Acts 1882-1890.

trustees with the power to convey a fee simple estate in the land.<sup>11</sup> A purchaser dealing with two trustees or a trust corporation does not need to be concerned about those entitled under the trust of land as their interests are 'overreached' on the sale (ie their interests become detached from the land and attached to the sale proceeds).<sup>12</sup> The 2009 Act also prohibits the creation of any new fee tails and converts existing fee tails into fee simple estates.<sup>13</sup>

### 2.3 Leasehold ownership

The leasehold estate developed after feudalism went into decline and it arises where a person (known as the 'lessor' or the 'landlord') grants a lease to the lessee (or the tenant) for a fixed term<sup>14</sup> in consideration of rent and subject to certain covenants (ie promises contained in a deed).<sup>15</sup> The lessee is regarded as the leasehold owner and is entitled to possession of the land during the term. The lessor retains ownership of the superior estate (also known as the 'reversion') and is entitled to recover possession on the expiry of the term. Frequently, the lease includes a forfeiture clause, which allows the lessor to terminate the lease before the expiry of the term if the lessee is in breach of certain covenants. A lease is more than a contractual relationship as it can affect persons who were not party to the original agreement. A person who purchases the lessor's estate will usually be bound by the lease. Also, the lessee is entitled to sell the remainder of the term of the lease so that the purchaser becomes bound by its terms or, alternatively, the lessee may grant a lease for a shorter term known as a 'sub lease' which creates the relationship of landlord and tenant between the lessee and the sub-lessee. Blocks of apartments are frequently subject to leasehold ownership schemes as up until recently, positive covenants affecting freehold land could not be enforced

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<sup>11</sup> S11(6) and s18(1)(a) of the Land and Conveyancing Law Reform Act 2009.

<sup>12</sup> S21 of the Land and Conveyancing Law Reform Act 2009.

<sup>13</sup> S13 of the Land and Conveyancing Law Reform Act 2009.

<sup>14</sup> Periodic tenancies, which are frequently created orally and run from week to week or month to month until a notice to quit is served by one of the parties, may also be created.

<sup>15</sup> See Wylie, *Landlord and Tenant Law* 2<sup>nd</sup> ed (Dublin, 1998).

against future owners of the land.<sup>16</sup> The grant of a long lease (for example, a lease for 500 years) gave a purchaser a marketable interest in the apartment but also ensured that a covenant to pay a service charge towards the upkeep of the common areas was enforceable against successive owners of the apartment. Freehold ownership schemes in relation to blocks of apartments may become more widespread in the future.

In a typical conveyancing transaction the title being offered by the vendor is a fee simple estate, a grant of a lease or an assignment of the residue of the term under a lease.

#### *2.4 The recognition of the trust and the equitable doctrine of notice*

Equity as a body of law was developed by the Courts of Chancery due to certain deficiencies in the common law system, in particular the narrow range of actions and remedies available.<sup>17</sup> The most significant contributions of equity to land law was the recognition of the trust and the development of the equitable doctrine of notice.<sup>18</sup>

The modern day trust developed from a medieval conveyancing device known as the use. Under a use, land was conveyed to the 'feoffee to uses' to be held to the use of 'cestui qui use.' Although the feoffee was recognised as the common law or legal owner who could, if required, make a conveyance of the legal title, equity recognised cestui que use as the equitable (or beneficial) owner and would force the legal owner to use the land for his or her benefit. The use became popular as it allowed for the avoidance of certain feudal dues, the creation of early family settlements and substantially reproduced the effect of a will before it was possible to leave land by will.<sup>19</sup> The use was not popular with the feudal lords as it deprived them of their feudal revenue. As a result, the Statute of Uses 1535 was passed in England. In Ireland equivalent legislation, the

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<sup>16</sup>New provisions governing the enforceability of freehold covenants are set out in Part 8, chapter 4 of the Land and Conveyancing Law Reform Act 2009.

<sup>17</sup> See Delany, *Equity and the Law of Trusts in Ireland* 4<sup>th</sup> ed (Dublin, 2007)

<sup>18</sup> See Lyall, *Land Law in Ireland cit.*, chapter 4 and Wylie, *IrishLand Law cit.*, chapter 3.

<sup>19</sup> This was not possible in Ireland until the Statute of Wills (Ireland) Act 1634.

Statute of Uses (Ireland) Act 1634, was passed by the Irish Parliament. This legislation was designed to 'execute' the use or vest the legal ownership in cestue que use. Conveyancers succeeded in circumventing the Statute of Uses by devising a 'use upon a use' to exhaust the effects of the statute, thereby facilitating once again the division of ownership into legal and equitable. The use upon a use, also known as a 'conveyance to uses,' became the formula of words used to create a modern day trust under which the legal owner is known as the 'trustee' and the equitable owner is known as the 'beneficiary.' The beneficiary can enforce the trust and seek damages from the trustee for any breach of trust. The Land and Conveyancing Law Reform Act 2009 repealed the Statute of Uses<sup>20</sup> and eliminated the need to rely on a conveyance to uses to vest legal ownership in the trustee.<sup>21</sup>

Many trusts are expressly created by a deed of trust or in a will. Although, they are often created for the benefit of persons, it is also possible to create a trust for charitable purposes and such trusts are enforced by the Attorney General.<sup>22</sup> In addition, the law recognises that certain circumstances may give rise to a resulting trust<sup>23</sup> or a constructive trust.<sup>24</sup> For example, a purchase money resulting trust arises if someone contributes the purchase price of land bought in the name of another.<sup>25</sup> In such circumstances, the legal owner is required to hold the property on resulting trust for those who contributed to the purchase price. The equitable shares of the beneficiaries reflect their respective contributions. The courts recognise a constructive trust if it is necessary in the interests of justice and good conscience. It is long established, for example, that when a purchaser enters into an enforceable contract to purchase land the vendor is deemed to hold the land on constructive trust for the purchaser.<sup>26</sup>

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<sup>20</sup> S8 of the Land and Conveyancing Law Reform Act 2009.

<sup>21</sup> S62(2) of the Land and Conveyancing Law Reform Act 2009.

<sup>22</sup> Delany, *Equity and the Law of Trusts in Ireland cit.*, chapter 10.

<sup>23</sup> Delany, *Equity and the Law of Trusts in Ireland cit.*, chapter 7.

<sup>24</sup> Delany, *Equity and the Law of Trusts in Ireland cit.*, chapter 8.

<sup>25</sup> See *C v C* [1976] IR 254.

<sup>26</sup> See *Tempany v Hynes* [1976] IR 101 and s52(1) of the Land and Conveyancing Law Reform Act 2009.

The existence of equitable interests in land may complicate dealings with that land and the equitable doctrine of notice was developed by the Courts of Chancery to govern such dealings. Although the trustee has the power to sell or mortgage the legal estate, in certain circumstances the purchaser or the mortgagee will take the interest subject to the trust. The purchaser or the mortgagee will be bound by the trust unless he or she was a purchaser for value without notice of the equitable interest (otherwise known as 'equity's darling'). Purchasers will be deemed to have notice of all equitable interests that they would have discovered if they had inspected the land and made enquiries of those in occupation or if their solicitors had adequately investigated the title to the land.<sup>27</sup> An obvious danger is the possibility that someone in occupation of the property may have contributed to the purchase of property put in the vendor's sole name giving rise to an equitable interest under a purchase money resulting trust. The doctrine of notice requires a purchaser or his or her solicitor to make enquiries to clarify whether any occupiers of the property have such an interest. Another danger is the possibility that the vendor may have already entered into a contract to sell the land to another purchaser who is therefore deemed to be the equitable owner under a constructive trust. Although such an interest may not be revealed by the enquiries necessitated by the doctrine of notice, it is possible for the first purchaser to ensure that his or her interest binds a subsequent purchaser by registering the contract in the Registry of Deeds, or by registering a caution if the land is registered in the Land Registry. A solicitor acting for the subsequent purchaser is therefore required to carry out certain searches in the Registry of Deeds or the Land Registry to protect his client.

### *2.5 The difference between registered and unregistered conveyancing*

The approach taken to a conveyancing transaction depends on whether the title to the property (ie the deeds evidencing ownership) has been registered in the Land Registry or not. Once the title to a property has

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<sup>27</sup> S86 of the Land and Conveyancing Law Reform Act 2009.

been registered in the Land Registry for the first time, a folio is opened which describes the property by reference to a map (known as a 'file plan') and sets out the owner and certain burdens (eg a charge or a right of way) affecting the property. The register provides a conclusive state guaranteed record of the title of the registered owner.<sup>28</sup> Future transactions in relation to such land are dramatically simplified for two reasons. First, it is much easier for the purchaser's solicitor to investigate vendor's title as a search of the Land Register will reveal whether he or she is the registered owner and most of the burdens affecting the land. However, the existence of 'overriding interests,' which are interests that bind a purchaser even though they are not apparent from an inspection of the register, make it necessary for a purchaser to investigate certain other matters. For example, the equitable interest of a person in occupation of the land will bind a purchaser of a registered estate unless enquiries are made of that person and the interest is not disclosed.<sup>29</sup> Second, the task of drafting the deed transferring ownership is more straightforward as a deed dealing with registered land must be submitted in a standardised form, known as a deed of transfer. A deed of transfer is shorter and less complicated than the deeds drafted in relation to unregistered land. An important feature of the registration of title system is that legal ownership does not pass until the deed of transfer is registered in the Land Registry.

If the vendor's title is unregistered, the purchaser's solicitor's task in investigating the vendor's title is more challenging. Typically, the vendor's solicitor will send copies of certain title deeds with the contracts for sale and the purchaser's solicitor will try to establish if the vendor has a good and marketable title to the property. The execution and delivery of the deed is effective to transfer an unregistered title to the purchaser. However, a separate registration system operates in relation to unregistered land. It allows for the registration of deeds and other documents, eg a contract for sale, affecting such land in the Registry of

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<sup>28</sup> S31 of the Registration of Title Act 1964. See Fitzgerald, *Land Registry Practice* 2<sup>nd</sup> ed (Dublin, 1995) and [www.landregistry.ie](http://www.landregistry.ie).

<sup>29</sup> S72 (1)(j) of the Registration of Title Act 1964.

Deeds.<sup>30</sup> Registration of the deed does not guarantee its validity; its sole purpose is to secure priority for the purchaser over other unregistered transactions in relation to the same piece of land.<sup>31</sup>

The transfer of immoveables in Ireland is governed by an abstract system. In the case of unregistered land, the transfer of ownership is effected through the execution and delivery of a deed but, in the case of registered land, the purchaser does not become the owner until the deed of transfer is registered in the Land Registry. Although a valid contract for sale is not a pre-requisite for the transfer of ownership, most sales are preceded by a contract, which governs the rights and obligations of the parties during the period before completion.

## 2.6 *Recent developments*

It is estimated that 90% of the land mass of Ireland is registered in the Land Registry. Most agricultural land is registered as towards the end of the 19<sup>th</sup> century the Land Purchase Acts were enacted which enabled tenant farmers to purchase their holdings from their landlords but made it compulsory to register the land purchased in the Land Registry. However, quite a lot of valuable land in urban centres, such as Cork and Dublin, remains unregistered. In recent times efforts have been made to extend the registered title system and legislation has been passed to bring more counties within the zone of compulsory registration.<sup>32</sup> Once land is brought within such a zone, on the next sale of the property<sup>33</sup> the purchaser's solicitor is required to apply for first registration of the title to the property.

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<sup>30</sup> See Lyall, *Land Law in Ireland* cit., chapter 5 and Wylie, *Irish Land Law* 3<sup>rd</sup> ed (Dublin, 1997), chapter 22.

<sup>31</sup> S38 of the Registration of Deeds and Title Act 2006.

<sup>32</sup> Statutory Instrument 87 of 1969, Statutory Instrument 605 of 2005, Statutory Instrument 81 of 2008 and Statutory Instrument 176 of 2009, made pursuant to section 24 of the Registration of Title Act 1964 have extended compulsory registration to the entire country with the exception of Dublin and Cork.

<sup>33</sup> S53 of the Registration of Deeds and Title Act 2006 amends s 24 of the Registration of Title Act 1964 and facilitates an extension of the range of transactions which would trigger the requirement to apply for first registration.

The extension of the registered title system to the entire country is seen as essential in making progress towards an electronic conveyancing system.<sup>34</sup> An on-line paperless conveyancing system, which would reduce the inefficiencies and complexities in the current system, is part of the government's vision for the future. The first steps towards eConveyancing have already been taken. The Registration of Deeds and Title Act 2006 permits the register and maps to be maintained in an electronic format and provides a statutory basis for electronic communications and dealings with the Registry. Recently an eDischarges system was introduced which allows a borrower's bank to apply electronically to the Land Registry to remove a charge from land once it has been paid off. This represents a decisive move in the direction of eRegistration, an obvious component of an eConveyancing system. Although it is envisaged that the Registry of Deeds will eventually become obsolete, the Registration of Deeds and Title Act 2006 also simplified and modernised the procedures for registering deeds which had been formulated over 300 years ago when that system was introduced by the Registration of Deeds Act (Ireland) 1707. The Property Registration Authority, a new authority which was established by the Registration of Deeds and Title Act 2006, manages both the Land Registry and the Registry of Deeds.

Another recent development in this area was the enactment of the Land and Conveyancing Law Reform Act 2009 which came into force on December 1, 2009. The aim of this legislation was to simplify and modernise land law and conveyancing law. It repeals over 150 pre-1922 statutes, re-enacts certain legislative provisions in modern language and clarifies or abolishes other legislative and common law (judge-made) rules in line with law reform commission recommendations.<sup>35</sup>

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<sup>34</sup> See Law Reform Commission, *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74 - 2005), para. 1.06.

<sup>35</sup> See the Law Reform Commission, *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34 -2004) and *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74 - 2005).

### 3. Steps in a standard residential conveyance<sup>36</sup>

#### 3.1. Pre-Contract stage

A person who wishes to sell a house typically engages an estate agent and a solicitor. An interested buyer is usually asked to pay a booking deposit to the vendor's estate agent who then instructs the vendor's solicitor to draft the contract for sale. In the meantime, the purchaser goes to his or her bank to negotiate a mortgage loan and engages a different solicitor to act on his or her behalf. There are ethical difficulties with allowing one solicitor to act for both parties.<sup>37</sup> Although theoretically the parties are not obliged to engage a solicitor and could act for themselves, the complexity of such transactions and the requirements of lenders make this a very unrealistic prospect.

The vendor's solicitor's will have to examine the vendor's title before he will be in a position to draft the contract for sale. If the land is registered the vendor's solicitor can apply for an up-to-date folio and fileplan but if it is unregistered he or she will have to examine the title deeds. If there is a mortgage on the property the title deeds will be with the bank. In such circumstances, the vendor's solicitor will have to obtain the client's authority to take up the deeds and give an undertaking to the bank that he or she will not part with the deeds without discharging the outstanding loan affecting the property.

The vendor's solicitor will invariably use the Law Society Contract for Sale<sup>38</sup> which includes standard conditions on issues, such as, the timetable for the rest of the transaction, the evidence of title required and the penalties for breaching any of the conditions. Two copies of the contract for sale are sent to the purchaser's solicitor who usually makes a number of pre-contract enquiries. For example, if the house is out in the country, he or she will check that there is access to a public road and that

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<sup>36</sup> For more detail, see Wylie and Woods, *Irish Conveyancing Law*, 3<sup>rd</sup> ed (Haywards Heath, 2005) Law Society of Ireland, *Conveyancing – Volumes 1 and 2*, 2<sup>nd</sup> ed (Dublin, 2003).

<sup>37</sup> Law Society of Ireland, *Guide to Professional Conduct of Solicitors in Ireland* 2<sup>nd</sup> ed (Dublin, 2002).

<sup>38</sup> Law Society of Ireland, *General Conditions of Sale* 2001 (Revised) Edition.

the services (eg a well or septic tank) are within the boundaries of the property. The purchaser's solicitor also negotiates the terms of the contract on behalf of his or her client. If, for example, the purchaser is buying a site in order to build a house it may be possible to negotiate the insertion of a condition which makes the sale subject to planning permission being obtained. If a second hand property is being purchased, the purchaser's solicitor will advise his or her client to engage an engineer or architect to carry out a structural survey of the property, as the basic rule in relation to structural defects is *caveat emptor* or 'let the buyer beware.' The purchaser's solicitor will also find out how his client intends to finance the purchase. If the purchaser is obtaining a loan from his bank, the purchaser's solicitor will also be acting on behalf of the bank and will be required to do the work necessary to complete the mortgage in favour of the bank.

Although technically the vendor's duty to prove his title only arises after the contracts have been executed, typically a special condition is included in the contract for sale setting out the title being furnished and copies of certain title documents are sent with the contracts to the purchaser's solicitor. As a result, the purchaser's solicitor usually investigates the vendor's title before the contracts have been executed. As mentioned earlier, this investigation of title is greatly simplified in the case of registered land as the ownership and most burdens affecting the property are revealed by the register. If the vendor's title is unregistered, the purchaser's solicitor usually insists on proof of 20 years title commencing with a 'good root.' A conveyance for value which adequately identifies the property will be considered a good root. However, a voluntary conveyance (ie a gift) is not considered to be sufficient, as a solicitor acting for a person receiving a gift will not usually investigate the title or 'look a gift horse in the mouth.' If the contract does not deal with title issues, for example, if it was drafted without the help of a solicitor, it is described as an 'open contract' and the purchaser is entitled to insist on proof of 15 years title under the Land and

Conveyancing Law Reform Bill 2006.<sup>39</sup> It is anticipated that the open contract position will influence future conveyancing practice and that solicitors acting for purchasers will more readily accept a special condition in a contract that only provides proof of 15 years title.

A sellers' market prevailed in Ireland until recently and the possibility of 'gazumping' was a concern for purchasers at the pre-contract stage. This danger arises because of the statutory formalities required to create an enforceable contract.<sup>40</sup> Until there is a written contract or at least written evidence of the essential terms of the contract<sup>41</sup> which has been signed by the vendor or his agent, the agreement usually cannot be enforced and the vendor is free to negotiate more favourable terms with another purchaser. Most communications between solicitors at the pre-contract stage are headed 'Subject to Contract/Contract Denied' as otherwise there is a risk that the court could treat the communication as sufficient to satisfy the formalities required. The Law Reform Commission published a report in 1999 investigating proposals to deal with the problem of gazumping.<sup>42</sup> It rejected certain radical proposals, such as making 'subject to contract' agreements binding, on the basis that gazumping was a temporary and infrequent phenomenon. Instead, it recommended legislation designed to ensure that purchasers were better informed and which would regulate the payment of booking deposits. The Property Services (Regulation) Bill 2009 will, when enacted, provide the framework necessary to implement these proposals. In today's buyers' market the tables have turned and sellers are at risk of 'gazundering,' which occurs when a purchaser demands a reduction in price just before the contracts are signed.

Once the purchaser signs both copies of the contract they are sent to the vendor's solicitor with a deposit, usually 10% of the purchase price. The vendor then signs both copies and one copy is returned to the

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<sup>39</sup> Pursuant to s56 of the Land and Conveyancing Law Reform Act 2009 which replaced the requirement under s1 of the Vendor and Purchaser Act 1874 for proof of 40 years title.

<sup>40</sup> Set out in s51 of the Land and Conveyancing Law Reform Act 2009

<sup>41</sup> The written evidence must identify the parties, the price, the premises and any other terms which were considered by the parties to be essential elements of the contract.

<sup>42</sup> *Report on Gazumping* (LRC 59-1998).

purchaser. In most cases, the deposit is held by the vendor's solicitor and is not released to the vendor until the sale has been completed.

If the parties entered into an oral agreement for the sale of land and there is insufficient written evidence of the agreement to satisfy the statutory formalities, it may still be possible for a purchaser to enforce the contract under the doctrine of part performance.<sup>43</sup> The court may order the vendor to perform the contract (known as an order for 'specific performance') if, for example, the purchaser moved into possession of the property and carried out improvements to it and the vendor encouraged such actions or stood by while they were taking place. Alternatively, the purchaser may be entitled to a remedy under the doctrine of proprietary estoppel<sup>44</sup> if it can be proved that the vendor made a representation that he or she would have an interest in the land and the purchaser relied to his or her detriment on that representation in circumstances where it would be unconscionable for the vendor to insist on the strict legal position.<sup>45</sup>

### 3.2. *Post-Contract Stage*

Once both parties have executed the contracts the next stage of the conveyancing process begins. The purchaser's solicitor makes certain standard enquiries about the property, known as 'requisitions on title.' The requisitions are designed to elicit information on practical and title matters in relation to the property: whether all developments on the property were carried out in compliance with planning and building regulations; whether there is any litigation pending in relation to the property; whether a property in the sole name of one spouse is a family home which would necessitate the other spouse to consent to the transaction;<sup>46</sup> whether someone in occupation has an equitable interest in

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<sup>43</sup> Wylie and Woods, *Irish Conveyancing Lawcit.*, para. 6.48 – 6.60.

<sup>44</sup> Delany, *Equity and the Law of Trusts in Irelandcit.*, chapter 17.

<sup>45</sup> See *Courtney v McCarthy* [2007] IESC 58; *An Cumann Peile Boitheimach Teoranta (Bohemians Football Club) v Albion Properties Ltd & Others* [2008] IEHC 447.

<sup>46</sup> Pursuant to s3 of the Family Home Protection Act 1976.

the property; whether the property is let; whether any tax incentives apply etc. It also allows the purchaser's solicitor to list the documents which he or she will require on completion. The purchaser's solicitor is usually responsible for drafting the deed and it is sent to the vendor's solicitor for approval with the requisitions on title. Once the vendor's solicitor has satisfactorily replied to the requisitions and approved the draft deed the parties are in a position to complete the transaction.

### 3.3 *Contractual Remedies*

If one party fails to complete the transaction, the other may be able to get an order for specific performance of the contract. If the purchaser is in default, the vendor may choose instead to forfeit the deposit and resell the property. If a loss is made on the re-sale, it may be recovered from the purchaser. If the vendor refuses to complete, the purchaser may, instead of trying to enforce the contract, seek the return of the deposit and damages for breach of contract.

If the purchaser was induced to enter the contract as a result of a misrepresentation or if the contract contains a misdescription, he or she will be entitled to rescind the contract and recover the deposit or to proceed with the transaction and sue for damages, depending on the nature of the misrepresentation or misdescription.

The Law Society Contract for Sale includes specific provisions dealing with the consequence of a delay in completing the transaction. For example, a delaying purchaser is liable to pay interest on the balance purchase price from the closing date. Also, if a completion notice has been served requiring the delaying party to complete within 28 days and the notice has expired, the other party may be entitled to treat the contract as rescinded and to forfeit or seek recovery of the deposit as appropriate.

### 3.4. *Completion of the Sale*

If the purchase is being financed by a mortgage, the purchaser's solicitor arranges for the loan cheque to be sent by the bank in time for

completion. He or she also carries out certain title searches in the Land Registry or the Registry of Deeds to ensure that the vendor has not engaged in any undisclosed recent transactions which could have priority over the transaction in favour of his or her client.<sup>47</sup> The vendor's solicitor is required to satisfactorily explain any transactions which are revealed by these searches. The completion of the transaction or 'closing' typically occurs in the vendor's solicitor's office. The closing documents and the keys to the property are exchanged for a bank draft for the balance purchase price. If there is an existing mortgage on the property the vendor's solicitor undertakes to discharge it out of the sales proceeds.

### 3.5. *Post-Completion Stage*

The purchaser's solicitor arranges for stamp duty to be paid on the deed and then for the deed to be registered in the Land Registry or the Registry of Deeds as appropriate. Once registration has taken place, if the purchase was financed by a mortgage the solicitor will forward the title documents to the lender together with a 'certificate of title,' whereby the solicitor certifies that the borrower has acquired a good marketable title to the property.

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<sup>47</sup> The purchaser's solicitor also carries out a bankruptcy office and a judgments office search. For more detail, see Wylie and Woods, *Irish Conveyancing Law, cit.*, para 15.39-15.48.

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### 1. *The Consensualistic Principle.*

In the Italian Legal System the whole subject of transfer of property either moveable or immovable, is governed by the notion of consent. The only consent is needed and sufficient to transfer property. This principle finds its expression in the part of the Civil Code related to the contract in general and specifically where it regulates the effects of the contract, where it is said that in a contract having as its object the transfer of property, such property either immovable or movable, is transferred and acquired as a result of the consent lawfully expressed (art. 1376 Italian Civil Code (C.C.)).

In compliance with this general principle, the notion of the contract of sale contained in article 1470 C.C. provides that the object of the contract of sale is the transfer of ownership or other rights over a thing in exchange for a price. It is said that the contract has real effect which means that agreement<sup>1</sup> of the parties is sufficient to transfer ownership. As soon as the object and the price have been agreed upon, the contract is perfected and produces its effects: ownership is acquired as of right by the buyer with respect to the seller.

With specific regard to the sale of immovable property, the only requirement for the validity of the contract seems to be the written form (art. 1350 n1 C.C.). Once the parties have agreed to buy and sell an immovable property and have formalized the agreement in a written contract, the transfer happens. No other formality is required: neither the delivery that is a mere incidental obligation of the seller after the transfer (art. 1476 n.1 C.C.), nor the payment of the price that the parties may agree to postpone at a future time after the conclusion of the contract (art.

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<sup>1</sup> Although many doubts have been raised about identifying the notion of contract with that of agreement the former is considered sufficient to transfer ownership in Italy. See for a deep discussion R. Sacco & G. Denova, *Il Contratto*, 3rd ed. Turin, 2008.

1498 C.C.), nor the notarial formality that is required for the sole purpose of registration in public records (art. 2657 C.C.) or the transcription which registers a transfer that has already happened (art. 2643 C.C.).

However, as soon as we move from the level of general principles to specific rules governing the sector of transfer of immovable, we may find that the number of exceptions to the consent principle is so huge that its validity becomes questionable<sup>2</sup>. With respect to immovable what renders practical law different from theoretical statements is the effect of transcription of the contract of sale into the Land Register. In respect to the rule of transcription, consent seems no more sufficient to transfer property of immovable. In addition to the written form that is required as we have seen above, the validity of the contract and the notarial formality is required as a practical matter in order to register the contract in the Land Register, to transfer immovable property in Italy seems to be saying that the transcription in the Land register is necessary.

## 2. *A System of Registration*<sup>3</sup>

Together with the Codes born during the Enlightenment period the Italian Civil Code shares the same basic philosophy for the purpose of facilitating the circulation of wealth: from one side it has regrouped property rights into a single conceptual idea of ownership free from feudal constraints and on the other it has elected the sole agreement as the main tool for transferring it. In spite of this, the decline of the legal formalism culminated with the affirmation of the consensualistic principle, combined with the great development, at that time, of the market of land static for centuries, made acute the need for a legal instrument that would restore legal certainty to the transfer of immovable. Next to the principle of consensus, the French legislator already at the time of Revolution joined a publicity system that

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<sup>2</sup> See. A Gambaro, *Le transfert de la propriété par acte entre vifs dans le système italien*, in *Italian National Reports, X Congress International Academy of Comparative Law*, Giuffrè, Milan, 1978.

<sup>3</sup> On that topic the classic work is S. Pugliatti, *La trascrizione*, Milan, 1957.

constituted the guarantee of certainty: the transcription system has been the instrument that the French legal science made available. This system of publicity was not designed with the intent to affect the effectiveness of transfer. Transcription indeed is not an element of validity of the contract but it would make known the existence and the effects of it on third parties.

The transcription's system has been organically introduced in the Italian Legal System for the first time with the former Civil Code of 1865 and reflects essentially what has been achieved in France with the statute of 23 March 1855. This set of rules was then perfected and reproduced, without substantive changes by the Italian Civil Code of 1942 currently in force which did not affect the theoretical framework of the previous code, for which property is transferred only with the consent of the parties. The transcription in Immoveable Property Registers intervenes to give evidence that is to make public, a transfer which has already occurred. Differently from what happens in the legal systems of Germanic type<sup>4</sup> in Italy, the registration in Immoveable Property Registers has not constitutive effects, which means that it does not determine the transfer of the right.

The function of transcription is primarily to make those facts that are designed for transfer rights over an immovable known to third parties. By saying that should be made public by means of transcription all those acts that have effects on the transfer of ownership over immovable property and primarily the contract of sale art. 2643 C.C., make evident that the transcription is not necessary for the transfer of ownership over immovable but it's only an element designed to give notice of the transfer. Better, to declare that a transfer has occurred<sup>5</sup> for the purpose of protecting third parties in good faith<sup>6</sup> who want to acquire a property right over the immovable. On the other side, the transcription of a contract which for any reason suffers of defects that may affect its validity or effectiveness does not give validity to it nor makes it effective, except

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<sup>4</sup> See A. Greco on Austrian System in this book

<sup>5</sup> *Cassazione*, n. 2445/1993; *Cassazione*, n. 6599/1998; *Cassazione*, n. 10133/2004.

<sup>6</sup> *Cassazione*, n. 5954/1996.

as we shall discuss later in relation to the effects of transcription<sup>7</sup>. This is perfectly logic in the systematic of the Civil Code that requires the consensus validly expressed as the only element sufficient to transfer immovable property.

Despite part of legal scholars wanted to see behind this solution a clear political choice aimed to promote rapid movement of the rights over immovable not burdened by excessive formalities<sup>8</sup> is perhaps the lack of technical instruments for land surveying which have most influenced these choices and the consequent organization of Immoveable Registers.

The lack of appropriate technologies and the consequent state of backwardness and incompleteness of cadastral data<sup>9</sup> pushed toward a system of land registration that had as its object not so much property rights over immovable but the titles that has caused the transfer: what is transcribed is not the right over the immovable but the document (act) from which the transfer has originated. The Italian Immoveable Register is indeed not set on a real basis; that is on the basis of a cadastral survey of the entire national territory so that next to each immovable unit it can be write the sequence of legal transfers.

The Italian Immoveable Register is organized on a personal basis, namely that the transfer is registered and identified through the names of those who have been part of the transfer (i.e the seller and the buyer). The term transcription indicates indeed the reproduction in the Register of a document (means the title) that due to it is made known to third parties. The content of this document may be a contract of sale which transfers ownership, a unilateral act or a judgement that would produce the same effects. The Code however requires that it can be transcribed only acts with a certain degree of authenticity. Indeed, in order to be transcribed,

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<sup>7</sup> See art. 2652 n. 6 e 7 C.C.

<sup>8</sup> See L. Ferri, *Trascrizione*, in Galgano (ed.) *Commentario del Codice Civile Scialoja Branca*, Bologna - Roma, 1995, pp. 2 ff.

<sup>9</sup> Even though cadastral data are used in practice to identify premises that are object of sales agreement, they are not constituting evidence of ownership, nor have as function the declaration of its transfer. The Cadastral system is the general inventory of immovable property based on land survey. Its function is to allow the identification of single immovable property, the assessment of their consistency and their value, primarily for tax purposes.

the document must present specific formal requirements: it must be a judicial decision or a notarial deed (*atto pubblico*) or a private agreement with signatures authenticated by a notary or judicially certified (*scrittura privata autenticata*)<sup>10</sup>. Once the title suitable for the transcription has formed, its transcription will be performed at the office of Immoveable Registers in which the immoveable are situated (art. 2663 C.C.)<sup>11</sup> and will be accompanied by a note which contains the essential component of the contract (the name of the parties and the legal effect they wanted) and the indication of the immoveable object of it.

This title will be transcribed in the registers by a public officer<sup>12</sup>, who shall assign to the same a progressive number in the name (in favour) of the purchaser and against the seller: so if I want to know if someone who is offering me an immoveable for acquisition shall have the legal faculty to do so, I need to search under his name if there are transcriptions in his favour. However, this did not ensure me against possible acquisition by adverse possession that may have occurred against my seller. This is why once I find the transcription in favour of my seller, I will have to discover the name of his predecessor and from this the predecessor even earlier up to a period of twenty years before the last transcription. In other words, once I have found the registration of the title of acquisition in the name of my seller, I should look backward in order to check if it is a continuous sequence of transcriptions that cover a period of time sufficient for the acquisition by adverse possession. Hence, the importance of the chain of transcriptions that is required by the Code in order to make effective the transcriptions of the last purchaser. Art. 2650 c. 1 of the Civil Code states precisely the principle of continuity of the transcriptions providing the ineffectiveness of the last transcription until when the previous transfer, pertaining the same immoveable, is not transcribed. Just to encourage individuals for whom transcription is purely optional<sup>13</sup>, the transcription

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<sup>10</sup> See art. 2657 C.C.

<sup>11</sup> Nowadays, this task is performed by the Agency of the Land ex l. 29\10\1991.

<sup>12</sup> The public officer is personally responsible for the delays and errors of transcription ex art. 2 l. 21.01.1983, n.22.

<sup>13</sup> Not so however for the notary or other public officer who has received or authenticated the document, which must ensure that the transcription is performed as soon as possible personally liable for delays and errors of transcription (art. 2671 cc)

that is not preceded by the transcriptions of prior acts will not make the purchase binding for third parties but this effect will only happen when the chain is completed.

### *3. The Effects of Transcription*

As we have already seen who validly buys a property right over an immovable could be considered the owner of that right on the basis of the consensualistic principle and the publicity of the contract does not give or affect the validity of the same. In this systematic framework the function of the contract and that of transcription are quite distinct: while the function of the contract is to transfer the ownership, the transcription in the first place makes this transfer knowledgeable to third party, allowing to the buyer the possibility to know the legal situation of the seller. However, in regulating the effects of transcription it is easy to understand how the function of transcription is to resolve the conflict between buyers of the same right (or incompatible rights) over the same immovable: between different buyers of the same right is preferred who for first "made public his purchase by means of transcription" even if the purchase is of later date. Article 2644 C.C provides indeed, not only that a valid contract of sale have no effect to those third parties who have acquired a rights over the same immovable thorough an act which have been transcribed before but more important, in its second paragraph states that it does not have effect in respect of who has transcribed first, all subsequent transcriptions of rights acquired from the same predecessor, even though the first acquisition goes back to an earlier date.

It is said that transcription has predominantly (but not exclusively) a declaratory effect, in that it performs the function of resolving conflicts between multiple buyers of the same goods from the same predecessor to the benefit of whom transcribed the act of purchase in his favour for first. Thus, if the first buyer does not proceed to transcribe his acquisition, he will not be able to claim it against a third party when for example conflicts arise from a double sale.

Observed through the effects that it produces, the function of transcription is to lock down the acquisition by establishing a general unenforceability of any adverse event<sup>14</sup> not previously made “apparent” with the system of transcription. The consequence is that the person who first made public his acquisition ensures for himself legal protection also against those who had previously acquired by the same author a conflicting right over the same immovable but have proceeded to a late transcription. By making transcribed acts not only knowledgeable but primarily opposable to third parties, the rule on the effects of transcription are thus an obvious exception to the principle of consent: the effects of transcription essentially determine the validity and the effectiveness of a second contract of sale if the second buyer transcribes his acquisition for first, even though the original owner has already transfer his right and could not be more considered the owner. The result is that it will consider the legal owner of the immovable property for all purposes, not who bought it first, but who has transcribed for first the act of purchase of such immovable.

As can be easily understood, the rules on the effects of transcription appear from a dogmatic point of view difficult to reconcile with the principle of consent contained in art.1376 CC. so much so that, legal scholars have immediately rushed to explain and clarify that the contract transfer ownership only between the parties to the transaction while its transcription transfers it in front of the entire world<sup>15</sup>. Nevertheless, beyond formalistic explanation, it is in terms of remedies which we can fully verify the discrepancy between principles and operational rules. Courts have always held the second sale valid and fully effective if it had been transcribed first, despite the principle of consensus pushed in the opposite direction. In this way has been given legal significance to transfers made formally by the non owner<sup>16</sup>. Following this reasoning, the first buyer who transcribed for second is left without a real remedy which would allow him to recover ownership over the immovable. The first

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<sup>14</sup> Except the acquisition by adverse possession. See *infra*.

<sup>15</sup> See for example G. Mirabelli, *Del diritto dei terzi secondo il Codice Civile italiano*, Turin, UTET, 1889, pp.130 ff.

<sup>16</sup> See L. Mengoni, *Gli acquisti a non domino*, 3ed, Milano 1975.

buyer is given only an action for the refund of the price paid in addition to compensation for further damages. Even against the second buyer, he will not have a remedy that will allow him to recover ownership and that regardless of the subjective state of good or bad faith of the latter<sup>17</sup>. For a long time to the first purchaser has been given a revocatory remedy ex 2901 C.C., that allowed him only the possibility to sell the property through a public sale in order to recover the price paid. Today, even though courts recognize the second buyer liable in torts, if he has bought with the knowledge of first sale, they only require him to pay damages but do not require the transfer of the property to the first buyer<sup>18</sup>.

#### 4 *Other effects of Transcription*

Although the function of solving conflicts between multiple buyers from the same predecessor is the main function of the transcription, as we have seen above in the previous paragraph, it does not exhaust here its functions. Art. 2652 of the Civil Code states those that are subject to transcription civil claims that concern acts subject to transcription ex 2643 C.C., always in order to oppose the effects of the related judgment to third parties. In this case we talk about “booking effect” (*effetto prenotativo*) of claim's transcription. This means that if the court decides in favour of the plaintiff, the transcription of the judgment will produce its effects retroactively back to the time of the transcription of the related claim. Due to this the effects of the judgment may be enforced against third parties by the date of the transcription of the claim. For example, in the event of a sale being simulated, if the court finds that a simulated sale occurred, this judgment can be enforced against third party who had purchased from the simulated buyer if the relative claim for the finding of the simulation has been transcribed before the transcription of purchase of the third party.

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<sup>17</sup> The case law is unequivocal in stating that the second buyer which transcribe for first prevails on the first buyer even if he has not bought in good faith Cass. 352/74, Cass. 3110/78; Cass. 5194/85.

<sup>18</sup> Cass. 76/82 in *Foro it.* 1982, I, p. 393.

Noteworthy is the fact that this rule also applies to the contract void if 5 years have elapsed from the transcription of the contract without being transcribed the demand for claim for nullity. In principle, a judgment declaring the nullity of a contract eliminates retroactively all the effects of it, including all the rights acquired by third parties of good faith even though the third had transcribed its purchase before the transcription of the claim for nullity. However if the void contract, has been transcribed and five years have passed without being performed the transcription of the claim for nullity, the judgment declaring void the contract shall not affect rights acquired by third parties of good faith under a void contract and transcribed before the claim for nullity has been transcribed as stated by art. 2652 n. 6 C. C. This is called curing effect of the transcription (*pubblicità sanante*), although legal scholarship stresses the fact that the nullity of the contract here is not cured but only that the judgment declaring the nullity of the contract although perfectly valid and enforceable between the parties, is not enforceable against a third bona fide purchaser who has transcribed his acquisition after the passage of five years from the transcription of the void contract, without having been transcribed the claim for nullity. As a matter of fact, the transcription of the purchase of third bona fide purchaser ensure to the invalid contract to produce its effect.

A booking effect is also produced by the transcription of the preliminary contract of sale of immovable property. In 1996 the legislator reformed the Civil Code providing for the transcription of the preliminary contract of sale of immovable<sup>19</sup>. The new article 2645 bis C.C. provides that the preliminary contracts which has not as effects the transfer of ownership between the parties but oblige the parties to conclude a effective contract of sale of immovable property in the future could be transcribed if completed in the form of notarial deed. The transcription of the preliminary contract has so “booking effect”: the subsequent transcription of the final contract of sale, if the two parties voluntarily perform the obligation descending from the preliminary contract, as well as the transcription of the judgment granting specific

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<sup>19</sup> See art. 3 par.1 Legislative Decree 31.12.2001, n.669.

performance of the preliminary contract ex 2932 CC in the case in which one of the parties refuses to perform the preliminary, shall prevail over the transcriptions made by third parties to which the seller has sold the immovable in the meantime, if they have been made after the transcription of the preliminary.

Finally for other acts, the transcription is required merely to give evidence that is to make public, to a transfer that already occurred and already produced their effects (pubblicità-notizia). It is the case of the acts of acceptance of inheritance (art. 2648 CC) or the acquisition by adverse possession (art. 2651 C.C.). In all these cases the acquisition is always enforceable against third parties who had acquired the same immovable from the registered owner even if is not made public nor through a judgment declaring the acquisition by adverse possession nor through the transcription.

##### *5. Some conclusion.*

The transfer of immovable property in Italian law is based on two simplifying assumptions: a unitary concept of ownership and the sole contract as a sufficient mean in order to operate the transfer of ownership. Like all the codes that are part of the natural law tradition, also in the Italian Civil Code the boundaries of property coincide with the physical boundaries of its object and the contract with the good transfers all the rights and obligations related to it. To this institutional framework it has been associated a land registration system (transcription) that theoretically does not impair the transfer itself but makes it effective against all those who enjoy a right incompatible with the one made evident with the registration. However, by looking to the effects of transcription we suddenly realize that the transfer of immovable property is a much more complex legal transaction than is commonly recognized, in which it's very difficult to look at the contract as the sole mean that realize the transfer and where the unitary conception of property is being dismantled.

The registration requirement makes clear that the transfer of immovable property is a much more complex legal transaction than is commonly recognized in which the dissociations of proprietary attributions come into light. Considering property as a bundle of rights and obligation and not treating it as a unitary concept, we may safely say that only a part of them is transferred by contractual agreement. Indeed, as the illustration of the effects of transcription has shown us, contrary to what is provided by the consensualistic principle, until the conclusion of the transcription's formalities, it can not be said that the buyer hold all the proprietary prerogatives related to the immovable purchased. Before the transcription the seller is indeed still entitled to validly sell the immovable to a third person. Moreover, the immovable continue to constitute a general guarantee for the debts of the seller. Consequently, if a second buyer transcribes his purchase for first, he will become the owner, as well as if the application for bankruptcy against the seller was recorded before the transcription of the first purchase, the immovable would still fall into the bankruptcy proceeding and leave the first buyer without any possibility to recover the immovable<sup>20</sup>.

By analyzing the operational rules we may observe that the idea of unitary transfer gives way to that dissociation of proprietary attribution along the all process of transfer in which we can find a plurality of holders of proprietary attributions on the same immovable. Contrary to what is declaimed at the level of principles it is only with transcription that we may safely consider the transferred of all proprietary attribution<sup>21</sup>.

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<sup>20</sup> See supra

<sup>21</sup> See on this point A. Chianale, *Obbligazioni di dare e trasferimento della proprietà*, Milano 1990

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## SALE OF IMMOVABLE PROPERTY IN NORWAY

*Kåre Lilleholt\**

### *1. Introduction*

The purpose of this paper is to give an overview of Norwegian law concerning transfer of ownership of immovable property by sale, including the rules on registration of the transfer and the effects of the registration.<sup>1</sup>

A short presentation will be given of the Land Register and also of the Cadastre, although the latter is only of indirect interest to the rules on transfer of property (Section 2).

The contractual relationship between seller and buyer is regulated in legislation, mainly along the same lines as sales of movables. An overview will be given in Section 3. In Norway, there are no professionals corresponding to the continental notaries. However, it is quite common for the parties to employ intermediaries for marketing, contract negotiation, settlement of payment, and registration. These intermediaries – real estate agents and practising lawyers – are presented in Section 4.

The requirements for registration and the legal effects of registration in the Land Register are discussed in Sections 5 and 6. The effects of registration will be discussed regarding four different relationships. First, registration has effects for the relationship between the buyer and the true owner of the property in cases where the seller had no right or only a voidable right to the property. Second, registration has effects for the relationship between the buyer and persons who have earlier acquired rights to the property – an earlier buyer, mortgagee etc., or the seller's general creditors. Third, the registration has effects for the relationship between the buyer and general creditors of the seller trying to satisfy their claims at a time later than the conclusion of the sale contract. Fourth,

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<sup>1</sup>A general reference is made to T. FALKANGER and A. T. FALKANGER, *Tingsrett*, 6. ed., Oslo 2007 and K. LILLEHOLT, *Godtruerøvev og kreditorvern*, 3. ed., Oslo 1999.

the registration may have effect even for the relationship between the seller and the buyer's general creditors.

In Norway, there is no 'principle of unity' regarding the passing of ownership.<sup>2</sup> The buyer's position must therefore be discussed for different relations at any given point in time. It would be misleading to argue that the buyer is protected in a certain relation *because* he has become the 'owner'. In normal cases, however, the buyer gains protection in all relations more or less simultaneously.

## 2. Registers of immovable property

There are two registers of immovable property: the Cadastre (*matrikkelen*) and the Land Register (*grunnboka*).<sup>3</sup> The Cadastre is a register with *factual* information about immovable property, while the Land Register is a register of *rights* concerning immovable property. In addition, there is a particular register of rights concerning power lines that will not be dealt with here. According to new legislation under implementation, it will become clearer that the Cadastre is decisive for formation of new units of immovable property. When the new unit is established in the Cadastre, it is automatically established as a unit in the Land Register. The two registers are managed by the same organisation. Only the Land Register will be discussed.

The Land Register was fully centralised a few years ago. Traditionally, there was a Land Register for each local court district. The Land Register has also been digitalised, and there are on-going pilot projects preparing an on-line registration procedure with digital signatures.

The Land Register has developed over several hundred years and it covers all immovable property in Norway. The legislation on registration and effects of registration has remained more or less the same since 1935.

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<sup>2</sup>J. H. BEEKHUIS, "Structural Variations in Property Law. Civil Law", in *International Encyclopedia of Comparative Law*, vol. VI (ed. F. H. Lawson), ch. 2 I, Tübingen. Mouton. The Hague. Paris 1972 no. 10.

<sup>3</sup> Cadastre Act (*lov om eigedomsregistrering (matrikkellova)*, 17 June 2005 no. 101); Judicial Registration Act (*lov om tinglysning*, 7 June 1935 no. 2).

### 3. Contractual relationship

The rules concerning the contractual relationship between seller and buyer of immovable property were codified in 1992.<sup>4</sup> The rules were to a great extent harmonised with the Sale of Goods act,<sup>5</sup> which in its turn was based on the UN Convention on Contracts for the International Sale of Goods.

There are no formal requirements for a valid contract of sale of immovable property, although in practice most contracts are made in writing. Up to now and still for some time, a paper document signed by or on behalf of the seller is also necessary to have the transfer registered in the Land Register.

There are no provisions in the Act Relating to the Sale of Real Property concerning the time for transfer of ownership. The parties usually agree (and there are some default rules in the act) on the time for payment of the purchase money, the time for the seller's taking control of the property, and the time for registration of the transfer of the right to the property (or, more precisely, for delivery of the document making registration possible). Again, asking at which point of time the buyer becomes owner does not make sense. The buyer has a right under the contract of sale from the time at which the contract was concluded, and for the rest, it is a question of protection against acquirers in good faith and creditors.

The bulk of the provisions in the Act Relating to the Sale of Real Property deals with the parties' obligations and with remedies for non-performance (lack of conformity, delay).

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<sup>4</sup> Act Relating to the Sale of Real Property (*lov om avhending av fast eiendom*, 3 July 1992 no. 93).

<sup>5</sup> Sale of Goods Act (*lov om kjøp*, 13 May 1988 no. 27)

#### 4. Intermediaries

There is no professional group in Norway corresponding to notaries, as we know them from Continental Europe.<sup>6</sup> The contract for sale is valid without any participation by third parties. It is a requirement for registration in the Land Register that the seller's signature on the document for registration is confirmed, but such confirmation may well be given by the couple living next door. The document may be sent to the Land Register by the buyer, the seller or by a representative; in practice it is often done by the real estate agent.

It is common to employ intermediaries, although there is no duty to do so. Only practising lawyers and authorised real estate agents are allowed to act regularly as intermediaries in sales of immovable property. In addition, banks may assist in settling the purchase price.<sup>7</sup>

The intermediary is normally engaged by the seller, but it is a professional duty of the intermediary to take care also of the buyer's interests. The intermediary handles the marketing of the property, and assists in negotiations between the seller and prospective buyers and in the conclusion of the sale contract. In most cases the intermediary takes care of registration of the transfer of the property and the settlement of the purchase price. In particular, the intermediary usually receives money from the buyer and releases the money in favour of the seller only when the transfer has been registered and (mostly) the buyer has obtained access to the property.

The intermediary's remuneration may be agreed freely. About 2.5 per cent of the purchase price seems to be quite normal for ordinary dwelling houses and flats (advertising etc. included). In addition, there is a tax on registration in the Land Register, amounting to 2.5 per cent of the purchase price. Total transaction costs then sum up to around 10 per cent of the purchase price.

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<sup>6</sup> The title 'notarius publicus' exists, but it denotes certain competences held by the local judge, of which the competence to perform weddings is the most important.

<sup>7</sup> Act Relating to Real Estate Agency (*lov om eiendomsmegling*, 29 June 2007 no. 73) s. 2-1.

## 5. Registration in the Land Register

Registration in the Land Register is based on document control only. A prerequisite for registration is that the seller (or transferor or originator of another right in the property) has a register title.<sup>8</sup> A document expressing the transfer of the right as an owner to the property is usually called *skøyte* (or *skjøte*), a word that only with caution should be translated as 'deed'. The document has no other function than the enabling of the registration and – contrary to popular belief – may perfectly well be thrown away once the registration is in place. The register authority will check that the document has a witnessed signature that purports to stem from the person who has the register title. Any identity check will in practice be performed by the *buyer* or by the intermediary on behalf of the buyer.

## 6. Effects of registration

### 6.1 Relationship between seller and buyer

Registration in the Land Register of a transfer of ownership has no direct effect whatsoever regarding the validity of the contract between seller and buyer. Registration has an indirect effect on the contractual relationship, though, in that termination for non-performance of the obligation to pay the purchase price may be precluded when the transfer is registered (or made possible, cf. subsection 6.5).

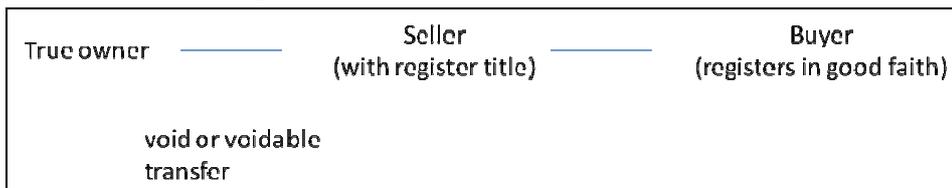
### 6.2 Relationship between buyer and true owner

If the seller's register title as owner of the property is based on a void or voidable document (i.e. a document expressing a void or voidable transfer) the buyer's position vis-à-vis the true owner depends on the ground of invalidity and on what was known or ought to have been

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<sup>8</sup> Judicial Registration Act s. 13.

known to the buyer.<sup>9</sup> The main rule is that the buyer is protected against claims from the true owner in such situations if the buyer has registered his right and at the time of registration whether knew or ought to have known about the invalidity. There are exceptions where the seller's title is based on a forged document or a document that is voidable because of threats of violence or because the true owner was under age; in such cases the true owner's right is intact.



A couple of illustrations: (1) The seller (or an earlier party in the chain of transfers) has fraudulently persuaded the true owner to sell the property. If the buyer has registered his right to the property in good faith, the true owner loses his right to the property and has no claim against the buyer. The true owner may have a claim against the seller for damages. (2) It turns out that the seller (or an earlier party in the chain of transfers) has forged the signature of a 'deed', without this having been detected by the register authority. The buyer has no right to the property, even if he registered his right in good faith, and the true owner may demand a correction of the register. The buyer has a claim for damages against the seller. Further, the buyer may have a claim for compensation from the Land Register (i.e. the State) for loss caused by the buyer's confidence in the seller's register title.<sup>10</sup>

### *6.3 Relationship between buyer and holders of earlier established rights derived from the seller*

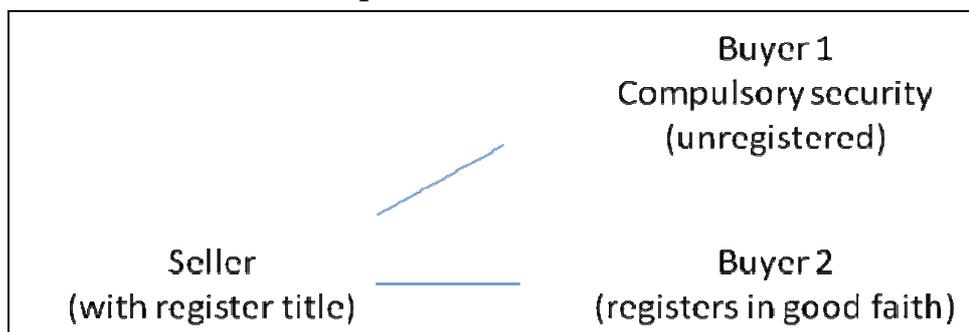
The main rule is that the buyer who has registered his right in good faith does not have to respect rights that have previously been derived from a seller with register title, when such rights are not registered at the latest at

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<sup>9</sup> Judicial Registration Act s. 27.

<sup>10</sup> Judicial Registration Act s. 35(1)(d).

the same day as the buyer's right.<sup>11</sup> This rule covers, *inter alia*, the classical double sale. Where the seller concludes two sale contracts, first with buyer 1 and then with buyer 2, buyer 1 will lose his right to the property if buyer 2 registers first and buyer 2 at the time of registration whether knew or ought to have known about the first sale. It must be noticed that buyer 2, even if he registers his right before buyer 1 does, must respect the 'older' right if he is *not* in good faith. The requirement of good faith in this situation is one illustration of the functional (or 'relational') approach to transfer own ownership.



The rules described in the previous paragraph apply whether the right first derived from the seller is based on contract or a court order, for example where a compulsory security right is established for the satisfaction of a claim from one of the seller's general creditors. Also the latter right has to be registered to acquire protection against a buyer registering his right in good faith. There are a few exceptions to the rule, most important for rights acquired by continuous possession.<sup>12</sup> Further, if insolvency proceedings are opened over the seller's estate, a registration on the same day or later will not protect the buyer.<sup>13</sup>

#### 6.4 Relationship between buyer and the seller's general creditors

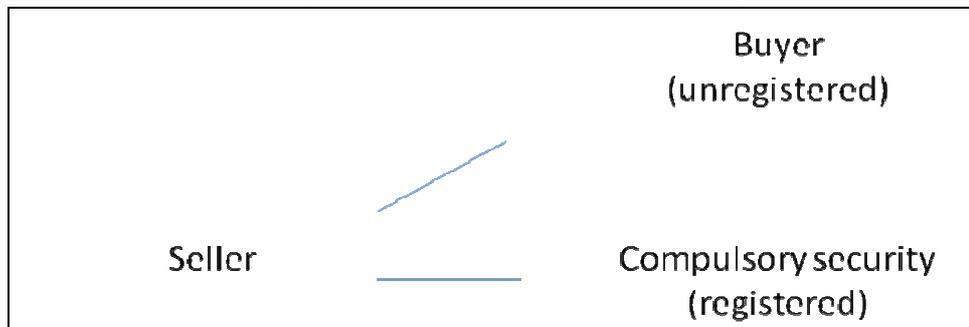
Registration is necessary to protect the buyer against the seller's general creditors. If a compulsory security right is established, after the conclusion of the sale contract, the buyer will be protected only where the

<sup>11</sup> Judicial Registration Act ss. 20 and 21.

<sup>12</sup> Judicial Registration Act s. 22.

<sup>13</sup> Judicial Registration Act s. 23.

transfer to him is registered in the Land Register at the latest the day before the compulsory security right is registered.<sup>14</sup> The creditor's possible knowledge of the earlier sale is of no importance. Further, the buyer's right must be registered at the latest the day before the opening of insolvency proceedings over the seller's estate to gain protection.<sup>15</sup>



### 6.5 Relationship between the seller and the buyer's general creditors

The seller may no longer terminate the contract because of delayed payment of the purchase money once the buyer has taken control of the property *or* has received the 'deed', ready for registration.<sup>16</sup> This will be decisive for the relationship between the seller and the buyer's general creditors as well.<sup>17</sup> After this point in time, the seller has only a claim for payment. The parties to the contract may agree on an extended right of termination (something that will in real terms amount to a security right). This extended right of termination will have to be respected by the buyer's creditors if it is registered at the latest the same day as the transfer to the buyer is registered.<sup>18</sup>

### 6.6 Practical consequences

It follows from what has been discussed in 6.2-6.5 that the purchase money should not be made available to the seller before the transfer of

<sup>14</sup> Judicial Registration Act s. 20.

<sup>15</sup> Judicial Registration Act s. 23.

<sup>16</sup> Act Relating to the Sale of Real Property s. 5-3(4).

<sup>17</sup> Act Relating to Creditors' Right to Satisfaction of Claims (*lov om fordringshavernes dekningsrett*, 8 June 1984 no. 59) s. 7-7(2).

<sup>18</sup> Judicial Registration Act s. 21(3), cf. s. 23.

the property from the seller to the buyer has been registered. A buyer who in good faith acquires a 'clean' register title is, from that moment, protected to a certain extent against claims from the true owner where the seller's title was based on a void or voidable document (6.2), against rights earlier derived from the seller (6.3) and against the seller's general creditors (6.4). On the other hand, the seller should not allow the buyer to register the transfer (or to take control of the goods) before the purchase money has been settled (6.5). It might seem tempting to regard the registration of the transfer as 'passing of ownership'. However, such a characterisation would be unnecessary (and not in line with terminology in legislation) and, besides, it would be misleading in the situation where the buyer must respect a prior unregistered sale of which he has or ought to have knowledge.

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**SALE OF IMMOVABLE PROPERTY IN POLAND  
GENERAL REGULATION IN THE CIVIL CODE**

*Jakub J. Szczerbowski\**

*1. Introduction*

Contractual transfer of immovable property is regulated by, inter alia, the Articles 155 – 158 of the Civil Code. The main principles of immovable property transfer of contract are: 1) the principle of double legal effect, 2) the principle of causality, 3) the principle of solemn form.

Article 155 § 1 of the Civil Code<sup>1</sup>, which expresses the principle of double legal effect, provides that the contract in which a party is obligated to transfer property causes property transfer even though the acquirer may not be in the possession of the thing. There are two exceptions to this rule: 1) the subject of contract are generic things, 2) the parties stipulated otherwise. This provision applies to transfer of immovable property and, as immovables are never considered generic things the contract always transfers immovable property if the parties did not specify otherwise.

The principle of causality conditions the validity of act in law aimed to transfer property on the existence of *causa* (literally: the reason for property transfer). Four kinds of *causa* can be distinguished: 1) *causa solvendi* (performance of an existing obligation), 2) *causa obligandi vel acquirendi* (to acquire a right or other interest), 3) *casusa donandi* (to give a right to the other without receiving an equivalent), 4) *causa cavendi* (to

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<sup>1</sup> § 1. Umowa sprzedaży, zamiany, darowizny lub inna umowa zobowiązująca do przeniesienia własności rzeczy co do tożsamości oznaczonej przenosi własność na nabywcę, chyba że przepis szczególny stanowi inaczej albo że strony inaczej postanowiły. (§1 A contract of sale, donation, or other contract which obligates a party to transfer a property of a specific thing transfers the property to the acquirer, unless a special provisions states the contrary or parties has stipulated otherwise.)

secure a claim). The principle is expressed in the Article 156 of the Civil Code<sup>2</sup>.

The principle of solemn form means that a contract to transfer immovable property has to be drafted as a notarial deed before the notary public. The form of the notarial deed is regulated in the Chapter 3 of the Act on Notarial Services of February 14<sup>th</sup> 1991. The notarial deed contains information on the date and time the contract is made. The deed can be drafted in presence of the parties or their proxies and the notary. There is no requirement for witnesses to be present. A contract drafted in any other form will not transfer property nor provide a claim for the transfer.

## *2. Contract of sale*

The contract of sale is a contract where the seller is obligated to transfer property of a certain thing and the buyer is obligated to pay certain price. The regulation is contained in the Articles 535 – 602 of the Civil Code. The above-mentioned principles of double legal effect, causality, and solemn form apply to the contract of sale.

### *2.1 Protection of the purchaser against physical defects*

The seller is responsible for physical defects of the immovable based on the Articles 556 and the following of the Civil Code. The seller is responsible if the physical defect diminishes the value or usefulness of the object of sale or in the case that the object of sale does not have the properties promised in the contract. The seller is not responsible for physical defects if the purchaser knew about the defect at the moment of celebrating the contract of sale.

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<sup>2</sup> Jeżeli zawarcie umowy przenoszącej własność następuje w wykonaniu zobowiązania wynikającego z uprzednio zawartej umowy zobowiązującej do przeniesienia własności, z zapisu, z bezpodstawnego wzbogacenia lub z innego zdarzenia, ważność umowy przenoszącej własność zależy od istnienia tego zobowiązania. (If a contract to transfer property follows and obligation derived from a previous obligational contract, legacy, unjust enrichment, or other event, the validity of the contract to transfer property depends on the existence of the obligation.)

The purchaser, however, is not protected against legal defects as he is fully able to check for them in land and mortgage register.

## 2.2 Termination of sale

Ceasing the legal bound between both parties can have a form of unilateral act (withdrawal from contract) or a bilateral act (termination of contract). Some opinions of the Polish legal doctrine consider termination of contract a new agreement (*actus contrarius*).

The Supreme Court of Poland states in the decision from the 30<sup>th</sup> November 1994: “It should not be doubtful that contracts with only obligational effects are subject to all rules concerning obligations, particularly expressed in art. 353<sup>1</sup> of the Civil Code<sup>3</sup> rule of contractual freedom, rules on performance of contract and breach of contract. While contracting parts can use their contractual freedom, in particular by including conditions and a right of withdrawal from contract. They can also terminate the contract and cancel its effects *ex tunc*<sup>4</sup> or *ex nunc*<sup>5</sup>. The rules on statutory withdrawal from contract also apply.”

The problems occur when we try to apply mentioned legal institutions to the contracts with real effect.

The Supreme Court of Poland in its decision from 30<sup>th</sup> November 1994 stated: “Termination of contract on base of which, according to art. 155 § 1, the right of property of immovable was transferred is possible only if the contract is not completely performed, i.e. in the situation when there exist other obligations between contracting parties stipulated in this contract.”

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<sup>3</sup> Strony zawierające umowę mogą ułożyć stosunek prawny według swego uznania, byleby jego treść lub cel nie sprzeciwiały się właściwości (naturze) stosunku, ustawie ani zasadom współżycia społecznego. (Parties celebrating a contract may arrange the legal relationship according to their discretion, provided that its content or object does not infringe the properties (nature) of the relationship, the law, or the principles of community life.)

<sup>4</sup> As if the contract never existed.

<sup>5</sup> Termination with effects from the moment of termination.

This shows, that in the doctrine of the Supreme Court of Poland the double effect of contract of sale, or contracts which transfer property in general, influences the possibility to terminate the contract.

Contracts with obligational effects are subject to the law of contracts and the rule of contractual freedom applies; also when it comes to contract termination. The difficulty arises when a contract has a double effect. In the moment when such a contract is completely performed its termination has no subject. This is perfectly logical, because in the moment of performance of all obligations the contractual bond ceases to exist.

The reasoning of Polish Supreme Court was also criticized. For example, S. Drozd raises the question "what that the complete performance of contract mean?". He asserts that the contractual relation between parties is a sum of various obligations and rights, some of which are the contents of the contract, others are implied by the law, others by the customary rules. The importance of each obligation is not equal and some of them are not essential for the core of the contract. How can we know if in all situations the contract has been performed completely? Why should a little difference between payment and the price enable the contracting parties to terminate the contract and a lack of this little difference would not?<sup>6</sup>

The contract is not completely performed if any of the mentioned obligations are not met. So even a very little difference between payment and the price results in non performance of the contract. Also, there is no difference if the obligation has its source in statute, contract or customary rules. If we understand the decision of Polish Supreme Court in this literal manner the importance of each obligation for the core of the contract is irrelevant for the legal possibility of its termination. The only important issue is to determine whether all contractual obligations were performed.

In extreme cases, where the only obligation left before the complete performance of a contract is secondary and non-essential for the contract

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<sup>6</sup> S. Drozd „Rozwiązanie umowy przenoszącej własność nieruchomości”, Warszawa-Kraków 1974, p. 13.

in general literal interpretation of this decision should enable parties to terminate the contract and the performing of this minor obligation should disable parties of this possibility. This problem is similar to the very antique question posed by Socrates: how many hair need to fall out for the man to be bald? It is sure that this kind of decision was made to ease interpretation of law, but still every case has to be interpreted separately.

The question of S. Drozd is even more valid if we look at an older sentence of the Supreme Court (7<sup>th</sup> April 1975) "It is not impossible, that a contract of sale of immovable property - apart from the declarations of parties of their will to sell and to buy - were various stipulations regulation eg. payment and the date of installments or matter of possession transfer of the particular parts of land. In this cases we cannot say it is a term or a condition in the sense of Article 157 of the Civil Code<sup>7</sup>". This sentence shows, that it is possible to include a variety of obligations in a contract of sale of immovable property.

The Supreme Court of Poland decided that "Complete performance of a contract which has a double (obligational and real) effect causes that termination of such a contract is purposeless. It is a fact that that the contract still exists after the performance, but lack of obligational bond renders termination insignificant from the legal point of view".

This sentence touches an important question about the nature of contract. In this view a contract exists from the moment of reaching of the agreement in a proper form *ad infinitum*, with exception of termination or cancellation of the contract. This view ascertains that the existence of every contract has two phases, first, when there still exist obligations, and the second, when the contract is performed and consequently there are no further obligations.

The view of the Supreme Court of Poland is justified. The contract even after its complete performance constitutes a title by which a party acquired a right. It can be said, that while after performance the contract still exist its termination would not lead to logical consequences. We can ask, what is the difference between right acquired on a contractual basis

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<sup>7</sup> § 1. Własność nieruchomości nie może być przeniesiona pod warunkiem ani z zastrzeżeniem terminu. [...] (Immovable property may not be transferred on condition or a term.)

being transferred back to the vendor and the same right transferred to a third party. As there are no obligations between the vendor and the acquirer there is no legal difference between the vendor and the third party.

Why it is impossible to terminate a contract which is completely performed? Because it is impossible to tell the difference between the termination and a new contract. The effect of the termination after complete performance would be the same as of a new contract. Admissibility of the above-mentioned kind of termination would infringe the trust of the Land and Mortgage Register.

If we think, that lack of competence or factual possibility of the notary to check if the assertion of a party is true or false does not make the institution of proxy meaningless, we need to take into account that the same lack of competence in case of contract termination does not interfere with the nature of this legal construction.

The main effect of the termination of contract is regulated in the Article 494 of the Civil Code<sup>8</sup> obligation to restitute all what the parties have received on basis of the contract and to pay the damages.

According to the sentence of the Supreme Court of Poland "Termination of contract extinguishes the legal bound with *ex tunc* effect, which is the same as if the contract was never celebrated. [...]" Termination of contract, then, causes all obligations of the parties to extinguish. The parties are not bound by the contract anymore and are obligated to return all what they have received and to pay the damages according to the general rules of contractual liability.

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<sup>8</sup> Strona, która odstępuje od umowy wzajemnej, obowiązana jest zwrócić drugiej stronie wszystko, co otrzymała od niej na mocy umowy; może żądać nie tylko zwrotu tego, co świadczyła, lecz również naprawienia szkody wynikłej z niewykonania zobowiązania. (A party who is terminating a reciprocal contract is obligated to restitute all what is acquired from the other party; the party can claim not only the restitution of consideration but also damages for the loss incurred from non-performance of the obligation.)

### *3. Acquisition of immovable property by foreigners*

#### *3.1 The Act on Acquisition of Immovable Property by Foreigners*

According to Polish law all cases concerning immovables located on the Polish territory are adjudicated according to the norms of Polish law. Acquisition of immovable property by foreigners is regulated by the Act of March 24<sup>th</sup>, 1920 on the Acquisition of Immovable Property by Foreigners. The Act was enacted in the period between the World Wars, while the social and political realities were quite different, and that is why it was amended many times. The most important changes derived from the principle of equality and non-discretionary decision-making. The norms of the Act provide a list of clear requirements for obtaining a permit, and principles of issuing it<sup>9</sup>. Before these novelizations there existed a bad practice of discretionary choice of documents by the Minister necessary to present to obtain the permit. That practice is not possible in the current state of law<sup>10</sup>.

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<sup>9</sup> Article 1a: 1. Zezwolenie, o którym mowa w art. 1 ust. 1, jest wydawane na wniosek cudzoziemca, jeżeli: 1) nabycie nieruchomości przez cudzoziemca nie spowoduje zagrożenia obronności, bezpieczeństwa państwa lub porządku publicznego, a także nie sprzeciwiają się temu względy polityki społecznej i zdrowia społeczeństwa; 2) wykáže on, że zachodzą okoliczności potwierdzające jego więzi z Rzeczpospolitą Polską. [...] (The permit mentioned in the Article 1 section 1 is issued on request of the foreigner only if: 1) the acquisition of the immovable by the foreigner does not endanger the defense of the state of public order, and does not infringe the public policy and public health; 2) the foreigner proves circumstances affirming his bond with the Republic of Poland.)

<sup>10</sup> Article 3f: Minister właściwy do spraw wewnętrznych określi, w drodze rozporządzenia: 1) rodzaje dokumentów, o których mowa w art. 1a ust. 4, 2) szczegółowe informacje dotyczące okoliczności wskazanych we wniosku, 3) wzory oświadczeń składanych przez cudzoziemców w związku z prowadzonym przez ministra właściwego do spraw wewnętrznych postępowaniem w sprawie wydania zezwolenia oraz wykazów dołączanych do tych oświadczeń - uwzględniając zróżnicowany zakres informacji i dokumentów składanych przez cudzoziemców, o których mowa w art. 1 ust. 2. (Minister competent for internal affairs will specify, by mean of regulation 1) the kinds of documents mentioned in the Article 1a section 4, 2) detailed information on circumstances indicated in the application, 3) examples of declarations given by foreigners related with the procedure of issuing a permit - taking into account the diverse scope of information and documents provided by the foreigners mentioned in the Article 1 section 2.)

The most important changes occurred in regard to the introduction of different rules for the foreigners who are citizens of the European Union. The general principle is that foreigners from the European Union are not obligated to obtain a permit in order to acquire immovable property in Poland. This principle does not apply to agricultural land and forests<sup>11</sup>, in which case European Union citizens must follow the general regime.

### 3.2 Core definitions

The term “foreigner” in the Act of the Acquisition of Immovable Property by Foreigners means a natural person with foreign citizenship, a legal entity with its seat abroad, a cooperative with its seat abroad, a legal entity with its seat in Poland but effectively controlled by a foreign natural person or a legal entity. The first three categories are quite obvious. It is the fourth one that makes the definition very broad. It was introduced to the Act in order to avoid frequent practice of evading the law by constitution companies in Poland in order to purchase land<sup>12</sup>.

The concept of immovable is not defined in the Act; thus it is needed to use the definition of the Civil Code: “Immovables are parts of land being subject of property right, also buildings and parts of building if on the basis of separate provisions they constitute a separate object of property”.

The concept of acquisition of immovable property does not consist of only the transfer of property. It also includes the acquisition of the right of perpetual usufruct (a temporal right to the surface of maximum

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<sup>11</sup> Article 8 section 2.: Nie jest wymagane uzyskanie zezwolenia przez cudzoziemców, będących obywatelami lub przedsiębiorcami państw - stron umowy o Europejskim Obszarze Gospodarczym albo Konfederacji Szwajcarskiej, z wyjątkiem nabycia: 1) nieruchomości rolnych i leśnych, przez okres 12 lat od dnia przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej; 2) drugiego domu, przez okres 5 lat od dnia przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej. (Permit is not required for foreigners who are citizens or entrepreneurs in the countries parties of the The Agreement creating the European Economic Area or Confederation of Switzerland, with exception of 1) acquisition of agricultural and forestal immovables in the period of 12 years from the day of accession of Poland to the European Union; 2) second home in the period of 5 years from the day of accession of Poland to the European Union.)

<sup>12</sup> Cf. J.J. Skoczylas, *Cywilnoprawny obrót nieruchomościami przez cudzoziemców*, Warszawa 2004, pp. 32 - 37.

duration of 99 years). The provisions of the Act do not apply to servitudes and other restricted real rights. The acquisition can occur in any way with the exception of intestate succession<sup>13</sup>.

The character of the regulation is mostly administrative. It illustrates very well a general tendency of administrativization of civil law; that is, the contracting parties in modern law need to pay more and more attention to the norms of administrative law.

### 3.3 General rule

The current state of law stipulates a general rule that a foreigner needs an administrative permit to acquire property of immovable in Poland. This rule is also extended to the acquisition of perpetual usufruct; the *ratio legis* is that the perpetual usufruct is from the economical point of view almost the same as property. The acquisition that is subject to the regulation of the Act can occur as a result of any occurrence as legal as well as illegal<sup>14</sup>. It is hard to understand this very broad definition and it provides a possibility for inaccurate interpretation of the provision. The scope of the legislator was to include all possible modes of immovable property acquisition into the Act in order to prevent malpractices of evading the law. Skoczylas proposes that the provision of the Article 1 Section 4 should be "Acquisition of immovable, according to this law, is acquisition of the right of property of an immovable or the right of perpetual usufruct." In his opinion this provision would be easier to interpret; it would be at least clear that the Act does not apply to the restricted real rights like usufruct.

The lack of permit to acquire immovable property in Poland creates effects in the sphere of civil law. The permit creates a right to acquire property by a foreigner, *a contrario*, lack of permit effects in subjective inability to acquire a certain immovable i.e. the contract which would normally produce transfer of property does not produce legal effects. The permit should be attached to the notarial deed. The permit does not

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<sup>13</sup> Article 7 section 2.

<sup>14</sup> Article 1 section 4.

create any more rights than a right to eventually acquire a specified immovable; especially, the permit itself does not create any obligations on the side of future vendor.

#### *3.4 Exceptions from request of permit*

Permit is not required in several cases. For example: 1) acquisition of residential premises, 2) acquisition of a garage, 3) acquisition by a foreigner residing in Poland after at least 5 years from the date of issuing residence permit, 4) acquisition by a foreigner married with a Polish citizen and residing in Poland for at least 2 year from the date of issuing residence permit, if the immovable is going to constitute a joint marital property, 5) acquisition by a foreigner who is an intestate heir of the seller and the seller is the owner or holder of perpetual usufruct right for at least 5 years, 6) acquisition by a foreign bank who is a mortgage creditor and the sale of the immovable in the execution proceedings was ineffective.

### *4. Role of the notary public and the register*

#### *4.1 Land and mortgage register*

Land and mortgage register regulated by the Act of July 6<sup>th</sup>, 1982 on Land and Mortgage Registers is a public, open, register of the legal status of immovables aimed to guarantee security of transactions.

#### *4.2 General principles*

Land and mortgage registers are kept by each provincial court. Each land and mortgage register is divided into four sections: 1) designation and of the immovable and easements benefiting the immovable, 2) owner or owners of the immovable, 3) indicates any restricted real rights (like usufruct) of third persons, other claims, and restrictions in the disposition of the immovable, 4) indicates any mortgages encumbering the property.

For every immovable there should be an entry in the land and mortgage register, but there are some rare cases of immovables where there is no information in the register. The information contained in the register has a declarative character regarding the transfer of property and a contract is sufficient to transfer the right.

#### *4.3 Principle of public credibility of land and mortgage registers*

The principle of public credibility of land and mortgage registers is expressed in the Articles 5 to 9 of the Act of July 6<sup>th</sup>, 1982 on Land and Mortgage Registers. This principle states that a person who trusts the legal status of an immovable disclosed in the Land and Mortgage Register is protected. The principle also silently asserts that discrepancy between the Register and real legal status may occur.

The principle becomes important in cases of double sale. It is possible that a person buys an immovable from another, who is disclosed in the register as the owner. According to the principle of public credibility of land and mortgage register the buyer acquires property, however, this is the case only when the buyer acts in good faith. If he knows about the discrepancy between the register and the actual legal status of the immovable he does not acquire property.

#### *4.4 Real estate development contracts*

In the Polish legal system there is no typical real estate development contract so these contracts are based on the principle of contractual freedom and classified as innominate contracts. In general, the rules on transfer of immovable property and acquisition of immovable property apply to the development contract if content of the contract aims at the property transfer.

In practice real estate development contracts may contain many abusive clauses, which are treated as non-binding. Among the abusive clauses are those which e.g.: exclude or limit responsibility of the developer; enable the developer to cede his rights and obligations to a third party without the acquirer's consent; grant the developer the only

right to interpret the contract; enable the developer to change the contract without the acquirer's consent; provide that the developer is the only party allowed to terminate the contract; provide that only the acquirer is obligated to pay termination fee; enable the developer to change the price without the acquirer's right to withdraw from contract; exclude the jurisdiction of Polish courts.

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**TRANSFER OF IMMOVEABLE PROPERTY IN SPAIN:  
FROM THE AGREEMENT TO THE REGISTRATION**

*Sonia Martín Santisteban\**

*1. Contract, Delivery and Transfer of Property*

The Spanish system for transferring property represents an intermediate solution between the French consensual system and the German delivery system. According to the Spanish system of “title and tradition”, indeed, property is considered to have been transferred when a valid contract has been celebrated and the property has been delivered.

In Spain, like in other causal systems, the transfer of ownership is linked to the contract validity<sup>1</sup>. The contract may be a contract of sale or any other type of contract involving transfer of ownership. It may be a written agreement or an oral agreement and doesn't require conforming to any formal requirement. Of course, if the agreement is set down in writing; it will be easier to utilize and prove its existence if one of the parties refuses to perform and denies that there was an agreement, but, with a few exceptions, written word's not a requirement for the contract to be considered valid<sup>2</sup>. By contrast, mere consent is not sufficient to ensure the contract validity and therefore, may not be used for ownership to be transferred. Along with the parties' consent and a certain object -or the party's intent to be legally bound and a sufficient agreement, using the terminology which found its way into the PECL (art. 2:101) and the

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<sup>1</sup> Art.609.2 Spanish Civil Code states that “Property and rights *in rem* are acquired and transferred by law, gift, testate and intestate succession and by certain contracts through tradition”.

<sup>2</sup> In the few cases where a writing is required, the writing document takes the form of a notarial deed. Sometimes, such a requirement is necessary for the contract to be valid (eg. donation of immovable property: art.633 Spanish Civil Code), others it plays the role of a prerequisite for compulsory registration (eg. mortgages: art.145 Spanish Mortgage Act).

Unidroit Principles (art.3.2)-, the *causa* or legal ground requirement must be fulfilled<sup>3</sup>.

In Spain, along with a valid contract, the delivery of the property is necessary for the ownership to be transferred. However, a physical delivery is not required. It may be done by the handing over of the keys of the property (symbolic delivery) or the execution of a notarial deed (instrumental delivery) and sometimes, only an agreement is sufficient. For example, if the buyer was already living in the property as a tenant (*traditio brevi manu*<sup>4</sup>) or if the buyer and seller agree that the seller will continue to live in the property as a tenant (*constitutum possessorium*<sup>5</sup>)<sup>6</sup>. Nevertheless, besides these few exceptions and by contrast to the transfer of movables -where Spanish law has moved, in practice, to the consensual system-<sup>7</sup> the transfer of immovables requires an outward signal to third parties that possession has shifted or the fulfilment of an additional formality (notarial deed).

Even though the parties cannot transfer the property of immovables if they fail to fulfill the valid contract and delivery requirements, they can still play an important role in modifying the ordinary process for the

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<sup>3</sup> The legal requirements of transactions are stated in art.1261 Spanish Civil Code: consent, cause and object.

<sup>4</sup> This possibility is expressly stated by art.1463 of the Spanish Civil Code regarding movable assets.

<sup>5</sup> Although not statutory expressed, scholars and case law have admitted this possibility on the basis of analogy with art.1463 Spanish Civil Code.

<sup>6</sup> *Traditio brevi manu* and *constitutum possessorium* are also accepted by some scholars regarding the transfer of immovable property: LASARTE, C., *Propiedad y derechos reales de goce*, t.IV, Madrid, 8<sup>a</sup>ed., p.31. Nevertheless, it would be unwise not to attest the private contract of sale as a notarial deed in order to avoid possible actions by the seller's creditors.

<sup>7</sup> Art.1463 of the Spanish Civil Code accepts the "mere consent" of the parties when the asset that has been sold cannot be physically delivered at the moment of the purchase. Scholars give to this provision a wide scope, considering that the parties may decide on the transfer of ownership at their convenience. Nonetheless, again, this mere agreement cannot prejudice third parties that could not have notice of its existence: DIEZ-PICAZO, L., *Fundamentos del Derecho civil patrimonial*, Madrid, 1995, p.787. The Spanish Supreme Court has confirmed this position and requires, along with the contract of sale, actual delivery of the goods in order to hold the transfer against the seller's creditor. Normally, the tribunal considers that delivery based on the mere consent has not been sufficiently proved by the buyer: STS. 28/10/2003 (RJ 2003/7771), 25/2/2004 (RJ 2004/854), 1/12/2004 (RJ 2004/7904), 28/3/2006 (RJ 2006/1864).

transfer of property. Indeed, they may exclude or postpone the transfer, despite if the asset has already been delivered, through the inclusion of retention of title clauses in the private or public document that attests the existence of the contract. Art. 1462 of the Spanish Civil Code states that “transfer may be accomplished by the execution of a notarial deed, so long as the parties have not expressly excluded this effect”.

The parties may be interested in postponing the moment of property transfer as a guarantee towards full payment. So long as the retention of title clause has been registered in the Land Register, the seller will be able to enforce it before third parties, either the buyer’s creditors or subsequent transferees<sup>8</sup>. Nevertheless, in practice the title retention clause is normally included in a private document that does not have access to the Land Register. Actually, the parties prefer to postpone the registration in the Land Register until the moment the full price has been paid, which means that the immovable is still registered in the seller’s name even though the requirements for the property transfer (valid contract and delivery) have been completed.

The title retention clause included by the parties under art.1255 of the Spanish Civil Code<sup>9</sup> can be held by the seller against the buyer<sup>10</sup>, the

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<sup>8</sup> Spanish scholars hold different theories regarding the nature of retention of title clauses. Some consider that the property transfer only occurs after full payment. In the meanwhile, the buyer can enjoy the property as an owner but cannot transfer it. If he does, the seller will be entitled to claim the asset through the *reivindicatio* (if the defendant is possessing the asset and alleges to be the owner) or the so-called “third party ownership action” (if the purpose is to oppose to the seizure in executive proceedings). The defendant will only be protected if fulfilling the requirements of art.34 Spanish Mortgage Act (acquisition in good faith, for value, from a person named in the Land Register as entitled to transfer ownership; and registration of the acquired right) According to a second position, the property transfer occurs at the moment the contract has been celebrated and the property delivered but if the buyer does not fulfil his obligation, the seller can recover the property of the immovable from whoever possesses it. A third position holds that the title retention clause plays the role of a guarantee, similar to a mortgage. Case law does not hold a unique position but most decisions support the first theory.

<sup>9</sup> This article states the principle of parties’ private autonomy: “The parties can state the agreements, clauses and conditions they deem convenient, so long as not in contradiction with statutory provisions (*only mandatory rules*), morality or public order”.

<sup>10</sup> Spanish Supreme Court, 19/10/1982 (RJ 1982/5563): the tribunal considered that the seller of a sale contract including a title retention clause was –as the single owner-

buyer's creditors<sup>11</sup> and subsequent transferees<sup>12</sup> until full payment. Nevertheless, the Spanish Supreme Court does not always recognize the title retention clause when the action comes from the seller's creditors<sup>13</sup>. Actually, the title retention clause is considered a seller's guarantee towards full payment, whose effects should be limited in the event that the price is not paid.

Because of the necessity of a valid contract and the *traditio* element, as one of the forms legally accepted, if the parties involved in the transaction come to an agreement to sell and buy the property at a specified price, the agreement is valid and binding by the parties. However, if the contract does not come along with the delivery of the property, the handing of the keys or the execution of the notarial deed, ownership will not have been passed on. In such a case, the buyer may apply to a court to enforce performance, that is, to enforce the seller to deliver the property; or, if not

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authorized to sign the notarial deed necessary to enter into the condominium system. The consent of the buyer was not required.

<sup>11</sup> The seller is entitled to oppose to the seizure in individual executive proceedings, by means of the "third party ownership action" but the Spanish Mortgage Act does not treat him as a owner *-separatio ex iure domini-* in insolvency proceedings. Art. 90.1.4<sup>a</sup> only recognizes the seller a privileged claim..

<sup>12</sup> Spanish Supreme Court, 14/10/2003 (RJ 2003/6498): the tribunal stated that the seller was entitled to the *reivindicatio* against the buyer's subsequent transferee, although the title retention clause was not registered in the Land Register. The Supreme Court held that subsequent transferees were required a minimum of care, such as to ask the buyer for the exhibition of the document that entitled the seller to transfer the property. Especially if we bear in mind that the seller was not the registered owner. The exhibition of the sale contract would have revealed the existence of the title retention clause.

<sup>13</sup> In most cases, the Spanish Supreme Court has considered that the buyer was entitled to oppose to the seller's seizure in individual executive proceedings, by means of the "third party ownership action". The tribunal held that, despite not being an owner, the buyer was possessing the asset as an owner and therefore, so long as he continued paying the instalments, his possession had to be protected: 19/05/1989 (RJ 1989/3778), 16/07/1993 (RJ 1993/6450), 2/07/1994 (RJ 1994/6423), 23/02/1995 (RJ 1995/1701), 21/03/2003 (RJ 2003/2761).

In STS. 11/03/1991 (RJ 1991/2210), the tribunal denied to the joint-tenant who sold his interest in the property, with a title retention clause, the possibility to exercise his preferential right to acquire the cojoint-tenant's interest. The Supreme Court considered that, for the purpose of the joint-tenants preferential acquisition right, the seller could not be considered a joint-tenant anymore. The title retention clause only played the role of a guarantee towards full payment, preventing the seizure of the asset by the buyer's creditors.

interested in the contract anymore, the buyer may also apply to the court to rescind the contract by reason of breach, and, in either case, seek damages.

It might also be the case that the parties have entered into a contract of sale involving a deposit of earnest money, known in Spanish as a *contrato de arras*. This transaction is again a sale, entailing obligations for both parties – the seller to deliver the property, the buyer to pay the price (art.1445 Spanish Civil Code) – but, unlike a firm sale, where, if one party fails to perform, the non-breaching party may either enforce performance or rescind the contract, under a sale involving earnest money either party is free to abandon his or her obligation. If the buyer abandons, he or she is released only by forfeiture of the earnest money deposited; if it is the seller who abandons, he or she is released by refunding the buyer with double the amount of the earnest money. The earnest money, termed *arras*, is usually 5 to 10% of the original price of the property; if the sale is completed, *arras* count towards the total agreed price.

## 2. *Contractual invalidity and restitution*

Contractual invalidity interferes with the process of ownership transfer, either, at the origin or once accomplished. Depending on the degree of invalidity, contracts are deemed to be void or avoidable<sup>14</sup>. They are considered to be void (absolute nullity) because in contradiction with mandatory rules, morality and public order (that is, because not respecting the limits of the private autonomy stated in art.1255 of the Spanish Civil Code), because of an absolute lack of the legal requirements of transactions (consent, cause and object (art. 1261 CC), an unlawful cause or object or an omission of the formal requirements when necessary for the validity of the contract (eg. donation of immovable property). In contrast, contracts are considered to be avoidable for defects related to the consent of one of the parties to the contract (lack of

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<sup>14</sup> We won't refer here to rescission. Actually, although it is one of the cases where the contract can be declared judicially ineffective, because causing a detriment to one party or to a third person, the contract is perfectly valid.

capacity, mistake, fraud threat or duress). Besides the different regimes (a time limit of 4 years within which the avoidable contract can be invalidated judicially, by means of an action or a defence invoked by the party who suffered the defect of consent, in contrast to the non existence of a time limit and no personal limitation to destroy the appearance of legal effect, in the case of a void contract), in both cases, invalidity obliges the parties to return what they received under the contract, in accordance with the rules stated in arts.1301-1307 of the Spanish Civil Code<sup>15</sup>.

If the contract is void (absolute nullity), property cannot pass to the *accipiens*. Therefore, if the possession of the immovable property had been delivered, the owner may claim its restitution to the counter-party in the contract, within a time limitation period of fifteen years (art.1964 Spanish Mortgage Act), and the *accipiens* can withhold performance so long as they do not get back what they delivered under the contract. If the immovable is not in their possession anymore, the defendant should restore the value of the asset at the moment they lost possession, along with the monetary interests.

Nevertheless, the mutual restitution obligation encounters an exception when the contract is void because the cause was unlawful or against morality. The Spanish Civil Code punishes the party or parties responsible on the ground of nullity with the impossibility to recover what they had already delivered under the contract, independently of the counter-party's state of performance (arts.1305 y 1306 Spanish Civil Code). Additionally, the party who relied on the validity of the contract can claim tort for the damages caused by the counter-party.

Alternatively to the personal mutual obligation of restitution, the owner can address a *reivindicatio* or claim *in rem* to their counter-party or to a subsequent transferee, who will have to return possession unless protected by the rules of a *non domino* acquisition (that is, unless the subsequent transferee acquired it in good faith, for value, from a person named in the Land Register as entitled to transfer ownership; and

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<sup>15</sup> GONZÁLEZ PACANOWSKA, I & DÍEZ SOTO, C., "Contract and Transfer of Ownership", Vaquer, A., *European Private Law Beyond the Common Frame of Reference*, European Studies in Private Law, Europa Law Publishing, Groningen, 2008, pp.187-194.

registered the acquired right: art.34 Spanish Mortgage Act). *Reivindicatio* requires the asset to still exist, proof of ownership and the defendant to be in possession. The owner will be successful so long as the defendant does not fulfil the requirements of art.34 of the Spanish Mortgage Act or seek protection in the rules on acquisitive prescription (*usucapio*)<sup>16</sup>.

In contrast, if the contract is voidable, property is transferred to the *accipiens*. So long as the contract has not been invalidated by the party who suffered the defect of consent (or his legal representative) within the time limitation of 4 years, the contract is valid. The contract can also be confirmed within this time limitation period, expressly or impliedly, by the party entitled to avoid it, excluding the possibility of avoidance (1309-1313 Spanish Civil Code). However, if the contract is invalidated, the property will be considered to have never passed to the *accipiens*: the plaintiff may plead for restitution as a consequence of the declaration of nullity<sup>17</sup> or may decide to use the rules on protection of property. Both remedies are available<sup>18</sup>.

Avoidance of a voidable contract has retroactive effects at the moment the contract was celebrated. The contract will be treated as never having been made and subsequent transfers that occurred when the contract was still valid will also be affected by the declaration of invalidity. Therefore, the subsequent transferee may be required to restore possession, unless protected by the rules of a *non domino* acquisition (art.34 Spanish Mortgage Act) or by acquisitive prescription (*usucapio*)<sup>19</sup>.

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<sup>16</sup>30 years in possession (art.1959 Spanish Mortgage Act).

<sup>17</sup>Nevertheless, if the ground for avoidance was the incapacity of one party, the minor or the party lacking capacity to enter into the contract is only liable for his/her actual enrichment: art. 1304 Spanish Civil Code

<sup>18</sup>Regarding the relationship between the rules on concurrent restitution in case of avoidance and the rules on protection of property: GONZÁLEZ PACANOWSKA, I & DÍEZ SOTO, C., "Contract and Transfer of Ownership", Vaquer, A., *European Private Law Beyond the Common Frame of Reference*, European Studies in Private Law, Europa Law Publishing, Groningen, 2008, pp.187-194.

<sup>19</sup> 10/20 years in possession and good faith (arts.1957-1958) or 30 years in possession (art.1959 Spanish Mortgage Act).

### 3. *The registration system*

Under Spanish law, registration with the Land Register is not compulsory. The Land Register provides information to interested parties and the community at large on ownership rights and other rights *in rem*, in previously registered immovable properties. But registration does not have constitutive effect, with the exception of mortgages. Ownership can be acquired and rights *in rem* can emerge and exist to full effect outside the Land Register and sometimes, in contradiction with it. Even if a person is named in a Register entry as the owner of a property, he or she might not be. This person might have transferred ownership of the property -through a valid contract and delivery- to someone else who has not registered the deed of sale with the Land Register and this would not prevent the person who did not register his ownership right from being the actual owner.

The registered act may also be void, for instance, because it contravenes a statutory prohibition. A void act should not attain registration. But, if it does, the registration does not make valid an act that, under the law, is invalid<sup>20</sup>. A court could declare the sale void, and this would affect the registered ownership.

However, even though registration is not necessary for property to be transferred, it does protect the purchase against third parties. Through registration, the purchaser is protected against the transferor and against third parties because the Land Register protects those who trusted its content. Indeed, the law applies a rebuttable presumption of accuracy of the Land Register in favour of the presently registered owner.<sup>21</sup> And that presumption becomes non-rebuttable in favour of a purchaser satisfying the requirements of article 34 of the Spanish Mortgage Act<sup>22</sup>. This means that, if the sale is done by the registered owner and the buyer acts in good faith (because he truly believes the registered owner is entitled to sell) and, in turn, the buyer registers the deed of sale with the Land Register,

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<sup>20</sup> Article 33 Spanish Mortgage Act.

<sup>21</sup> Article 38 Spanish Mortgage Act.

<sup>22</sup> Those requirements are acquisition in good faith, for value, from a person named in the Land Register as entitled to transfer ownership; and registration of the acquired right.

then their acquisition is protected. If the buyer fails any of those requirements –for instance, they don't register the sale– they nonetheless enjoy the benefit of the presumption of accuracy of the Land Register. It is anyone claiming that the Land Register is inaccurate who must prove 1) that the Register entry or the title giving rise to it is void, false or mistaken, or 2) that there exists a non registered title that modifies the facts as registered, or 3) that the registered right is extinct.

Therefore, even though it is not compulsory, registration is necessary to ensure the full effectiveness of the contract because what is not registered cannot prejudice third parties. In Spain, any transaction involving real property should start by applying to the Land Register for a certified abstract (which will disclose the registered owner and any charges or encumbrances on the property) and it should end with the execution of a notarial deed.

With a few exceptions, notarial deeds are not a requirement for the contract to be valid but they are a requirement for subsequent registration in the Land Register. Therefore, if the buyer wants to take advantage of the Land Register's protection, they should compel the seller to engage a civil-law notary to attest the private contract of sale as a notarial deed. Actually, the normal procedure followed by the parties to a transaction involving the transfer of immovable property is to sign a private contract and to postpone the fulfilment of delivery until the moment of final payment. The *traditio* requirement takes place in front of a notary, through the execution of a notarial deed and sometimes -in the case of urban property-, simultaneously, through the handing over of the keys of the property.

The purchaser is the person required to apply for registration but in order to prevent gaps between the moment of the execution of the notarial deed, which frequently coincides with the moment of the property transfer, and the time of publication in the Register, the notary immediately informs the Land Register through an electronic or a fax connection. This prevents problems such as the registered owner selling the same property twice before the first buyer has had time to register it. In fact, under Spanish law, when the person who appears as the

titleholder in the Register sells the property twice, the buyer registering first will be the owner, provided he acquired in good faith, even though he was not the first one the property was transferred to. If neither of the buyers registered their rights, the first one to possess the property in good faith will be the buyer (art.1473 Spanish Civil Code).

The possibility to fulfil the delivery requirement through the execution of a notarial deed and the fact that the public document is normally registered in the Land Register immediately afterwards has led to the misunderstanding that, in Spain, registration could be a substitute for the title and tradition system. It is necessary to bear in mind the distinction between the role played by the notarial deed, as a form of *traditio* necessary to complete the property transfer, and the role played by registration –once the property transfer has taken place–, as a formality necessary for the full effectiveness of the contract<sup>23</sup>.

#### *4. Civil law notaries, registrars, Cadaster and other professionals engage in the process of property transfer*

Both, registrars and notaries participate in the process of the property transfer of immovables. First, the notary, who is chosen by the buyer, controls the legality of the documents presented to them in order to authenticate the content of the deed of sale. they sets out the identities of the parties, a description of the property, the price, the terms of payment, any charges or encumbrances on the house, the date of handover of the property, and any penalty clauses that would apply in the event of breach. The parties could in fact go straight to the notary, without first signing a private contract, but this would be unwise if there was a considerable lapse of time between the agreement and the parties' appointment with the notary, or if the buyer needed to apply for a mortgage. It is in the buyer's interest to make sure that, if the seller has a

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<sup>23</sup> CAMARA LAPUENTE, S., "Registration of Interests as a Formality of Contracts: Comparative Remarks on Land Registers within the Frame of European Private Law", *European Review of Private Law*, 6-2005, p.835.

change of heart, the existence of the contract will be proved, and this is far easier to do if there is a written document to rely on.

Once the notarial deed has been executed by the notary, it is submitted to the land registrar, whose authority is established by law, depending on the area the property is located in. The registrar verifies the formal validity of the documents, checks that the contract complies with the existing legislation and that there is no conflict with other registered entries. In Spain there is a registration of title system organised by immovable property (*real folium* system). The documents are submitted to the registrar but only property rights and rights *in rem*, not in contradiction with some other right previously recorded can be registered, regardless of who is the actual owner. If the content of the Land Register, in conflict with the intended new right, is wrong, the applicant has to prove the mistake and require the correction of the Land Register's entry in order to be able, successively, to register the new right.

Notaries and registrars are public servants appointed by the government after a state examination but the notary attends to the requirements of the parties, according to the law, whereas the registrar looks after the interests of third parties and the community at large. Their fees are normally paid by the buyer and amount to about 2 to 3% of the total value of the sale. The transfer of immovable property also involves other costs, such as the Transfer Tax (*Impuesto sobre Transmisiones Patrimoniales*), at a rate of 7% of the value of a resale property or the VAT (*Impuesto sobre el Valor Añadido*), currently calculated at 7%, plus a Stamp Duty (*Impuesto sobre Actos Jurídicos Documentados*) at 1%, in the case of a new build property. Either of these taxes are paid by the buyer, in contrast to the Loan Capital Gain Tax (*Impuesto sobre el Incremento de Valor de los Terrenos de Naturaleza Urbana*), a tax on the difference between the value of the cadastral value when the property was purchased and when it is sold, which is normally paid by the seller.

In contrast to the Land Register, which provides information on ownership rights, the Cadaster (*Catastro*) provides information both on the physical description of the properties (surface area, location and boundaries, year of construction, and so forth) and on its economic

specifics (value of the underlying land, value of the building and cadastral value). The cadastral value is composed of the value of the land and the value of the building, and is used in Spain for the purposes of tax matters.

The owner of the property is the person bound to register it with the Cadastre but today the Land Register is coordinated with the Cadaster and when property is registered, the land registrar reports the change of ownership.

Together with the notary, the registrar and the Cadaster, other professionals may be engaged to complete the purchase. Of course, if necessary, estate agents will be pleased to help seller and buyer to get in touch, in exchange to a considerable percentage (5 to 10%) of the total sale price. And if the property is under a mortgage that, under the transaction, is now paid off or passed on to the new owner, or if it is clear of charges but the buyer is using a new mortgage to buy it, then it is especially common for the parties to retain a firm known as a *gestoría*. This firm handles the steps required to complete the sale and – if applicable – to pay off any existing mortgage or create a new one; such steps include paying taxes and filing documents with the Land Register. If the buyer is using a mortgage, the *gestoría* firm attached to the mortgage lender handles the loan application. The buyer is generally asked for a downpayment to cover the expenses of the sale and the mortgage loan and the *gestoría*'s own fees. Any surplus is returned to the client at the end of the process.

Spanish law contains no requirement of physical inspection of the property prior to sale. But if the buyer wishes to use a mortgage, the mortgage lender retains a surveyor to value the property, at the buyer's expense. This surveyed value, which is as a rule higher than the cadastral value but slightly lower than market value, is the bank's reference figure for the purposes of considering the buyer's loan application.

## 5. Conclusions

In conformance with Roman law tradition, Spain belongs to those systems which require, along with *consensus*, the *traditio* element to transfer property. Nevertheless, different forms of *traditio* are accepted (symbolic *traditio*, instrumental *traditio*, *traditio brevi manu*, *constitutum possessorium*) and the party's private autonomy may play a decisive role regarding the exact moment when property is considered to have been transferred.

The invalidity of the contractual agreement interferes in the process of ownership transfer, in different ways, depending on the degree of invalidity. Nevertheless, the contract's effects may be maintained as a punishment to the party responsible of the invalidity or to protect the bona fides purchaser who fulfils the requirements established in art.34 of the Spanish Mortgage Act, leaving aside the case of acquisitive prescription.

Registration is not compulsory. Ownership can be acquired and rights *in rem* can emerge and exist to full effect outside the Land Register and sometimes, in contradiction with it. But the lack of registration undermines the efficacy of the contract with respect to third parties. This efficacy relies, on one hand, on the participation of highly trained professionals in the registration system, who control the basic legality and form of the documents presented to them and, on the other hand, on the presumption of accuracy of the Land Register.

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**IN CONCLUSION: SOME THOUGHTS ON FUNDAMENTAL PRINCIPLES  
GOVERNING IMMOVEABLE TRANSFERS.**

*Ugo Mattei\**

This volume focuses on *inter vivos* transfers of immovable property. The papers deal with immovable property in Italy, Spain, Greece, England, Poland, Finland, France, Ireland, Austria, Belgium, England and Wales. A chapter on fundamental economic questions opens the book. This book can be seen as an interesting contribution in the growing field of comparative law and economics.

Property transfer is a dynamic transaction that involves the legal system, in all its complexity, in creating a framework for the market. While use justifies the economic value of a given property (e.g., houses have a market value because people like to live in them; books have a market value because people like to read them), transfer is the mechanism through which the value (both individual and social) of property becomes concrete. Consequently, an efficient and secure system of transfer of ownership is crucial for the development of a reliable market for immovable property<sup>1</sup>. The explosion of foreclosures and mortgage frauds especially in the US through the current dramatic global crisis shows how much such a secure system is essential to safeguard savings from corporate rapacity. Highly qualified legal officials such as notaries or registradores, lacking in the US system where an oligopoly of insurance companies and corporate banks governs the housing market, have a crucial role to play in keeping such a complex system in good

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<sup>1</sup>Its implications might go beyond efficiency. See R.Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer Seller Relationship*, 43 *Stan L.Rev.*361 (1991).

standing. Much family savings are invested in the principal dwelling and the security of such a market is therefore to be protected as a top social and political priority. The recent emphasis at the EU level on liberalization of professional services shows the tremendous impetuosity of the corporate interests in attempting to conquer the market of services for immovable transfers that, in the civil law countries, is currently the monopoly of highly trained branches of the legal profession. The papers contained in this book show the tremendous complexity and the delicate equilibrium that governs the market of immovable in Europe. It is the role of comparative legal culture to understand such diverse legal *equilibria* and to protect them against the dangerous ideology of professional liberalization that hides an undue intervention of EU law into immovable property law, a domain not included in its Treaty jurisdiction.

From the perspective of the legal system, the reason why property is transferred is less significant than the fact that the transfer has occurred. Whether I transfer my home for money or for free, the legally important fact is that the house now has a new owner. Once a transfer of ownership occurs, most of the social transactions related to that particular property must be conducted with a different person. The property, along with all its positive or negative consequences belongs to someone else. A new owner is in charge of that property.

As we see from the reports in this book, transfers of ownership can be rather complex social transactions and their structure can vary significantly according to the deep structure of the legal system. Particularly in more complex transfers such as those of immovable property, it is often the case that not all of the attributes of the right of ownership are transferred at the same moment. Consequently, the transfer of ownership cannot accurately be described as a simple, one shot, black-and-white happening after which owner B substitutes for owner A. Legal systems approach the problem of transfer of ownership by trying to balance two opposite and extremely important interests. On the one hand, there is the need to make transfers of ownership as simple,

cheap, and easy as possible in order to stimulate transfers and the consequent flourishing of markets. On the other hand, there are different reasons to monitor the transfer; a) to make sure that people transfer their property rights only if they really wish to do so, b) to ensure that the social signals after the transfer are correct so that third parties can rely on the effective owner of property, and c) to make sure that the seller actually has good title. In striking the balance between these different interests legal systems depart significantly from one another.

Any transfer of immovable property, be it a house, a piece of land or a factory, appears as a complex procedure spread over time and organized in different phases. This complex legal transaction is handled by legal systems in different ways by means of different areas of the law. In Anglo-American legal systems (in this volume England, Wales and Ireland are surveyed), for example, transfers of real property have traditionally been a central part of the law of property. Such transactions are handled by a specialized activity, known as conveyancing<sup>2</sup>, which in England is a traditional monopoly (though curtailed by the Courts and Legal services Act of 1991 in the middle of the Thatcherian liberalization frenzy aimed at favoring Banks) of one branch of the legal profession, that of solicitors.

For historical reasons, mostly due to a more limited reception of Roman law, common law countries have approached and solved a number of problems within the law of property that their civilian colleagues have solved within the law of obligations. Consequently many rights that in civil law are seen as merely personal (i.e., as part of the law

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<sup>2</sup>For the mechanisms of registered conveyancing in England, see DJ Hayton, *Registered Land*, (3rd ed.) 1981; KJ Gray-PD Symes, *Real Property and Real People-Principles of Land Law* 1981, 319-352. A vast literature has always been available on the topic of conveyancing in general. For a classic H Potter, *The Principles and Practice of Conveyancing under the Land Registration Act 1925*, 1934; for an updated view of the matter, see DG Barnsley, *Conveyancing Law and Practice* (4th edn, 1996). As for U.S. Law R.A. Cunningham, B.Stoebuck, D.Whitman, *The Law of Property*, 1984, 711 ff.

of obligation), in common law countries are considered real and can be claimed against the whole world because they are property rights.

In civil law countries the topic of transfer of property was traditionally outside property law and was handled within the law of contracts. However, given the recent reception of the trust in many civil law jurisdictions, we observe a phenomenon of convergence between the common law and the civil law when we consider as property rights a number of rights previously considered merely contractual<sup>3</sup>. Leaving aside a number of other important implications, we may observe here that this convergence highlights a phenomenon already observed by the best comparative law scholarship: in the course of transfer, the different attributions of property rights tend to circulate disjointly by being allocated to different individuals. This is why it is difficult to focus on a single moment in which ownership is actually transferred. The transfer of the attributions of ownership (all of which are property rights) may be seen as a continuum from the moment of the contractual agreement to that of the actual registration of the buyer as the new owner. Asking at which point of this continuum ownership actually "passes" may be a merely formalistic exercise<sup>4</sup>.

Let us consider a simple transaction to buy a house. Even leaving aside the phase of pre-contractual bargaining, Abraham, who wishes to buy a home from Jacob, will be featured in at least three different phases of the ownership transfer process<sup>5</sup>.

In a first phase, Abraham and Jacob will sign a paper which summarily describes the piece of property and the price. Typically this paper, which may or may not be considered a contract according to the different legal systems, will be a standard form offered by a middleman, if one is

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<sup>3</sup>A collection of evidence for this statement can be found in D.J. Hayton & al (Eds) *Principles of European Trust Law*, 1999. See also M. Graziadei, U. Mattei, L. Smith, *Commercial Trusts in European Private Law*, Cambridge UP, 2006.

<sup>4</sup> See the classic study of R. Sacco, *Legal Formants. A Dynamic Approach to Comparative Law*, 39 *Am.J. Comp. Law* 1 (1991).

<sup>5</sup> For a thorough comparative discussion, see A. Chianale, *Obbligazione di dare e trasferimento della proprietà*, Milano (1992).

involved, or simply purchased by the seller or the buyer. In this phase the buyer will usually tender some money to the seller. The money can be transferred or kept in escrow.

A second phase will typically take place before a legal officer, either a notary in the civil law or a conveyancer in the common law. In this phase there is a search for the title. The mentioned legal official will require and examine all the documents that are necessary to ensure that the seller is the actual owner or, at least that he has the power to sell the property. In this phase the description of the property is more accurate and the existence of other property rights belonging to someone else (such as servitudes, mortgages, etc.) becomes officially known to the buyer. Usually in this phase the balance of the price is paid and the physical delivery of the immovable occurs either by passing over the key or by a formal declaration that the previous owner renounces any further physical interference with the property.

In the third phase, which usually falls under the care of the legal official, the new title is registered and recorded according to the system of registration established in the place where the immovable is located.

There may be many intermediate phases, such as if Abraham and Jacob were to agree on making intermediate payments. There may be other institutions involved, such as when, due to the shortcoming of the public registration system (as in most American states), Abraham has to purchase title insurance<sup>6</sup>. He may also have to borrow the money from a bank that will claim a mortgage on the property and may require that he purchase some other insurance. Usually the state has a stake in transfers of immovable property since this is an easily taxable transaction. In most systems all tax liabilities are cleared at the moment of ownership transfer.

As this rough description shows, the process is complex and is usually diluted over time and can be better represented by a continuum in which

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<sup>6</sup> See T.J. Miceli, C.F. Sirmans, *The Economics of Land Transfers and Title Insurance*, 10 *Real Estate Finance and Econ.* 81 (1995).

different attributes of ownership are transferred to the buyer (or to other subjects such as when Abraham borrows money pledging the house in mortgage).

Despite this nature of a continuum process, legal systems nevertheless determine a precise moment in which ownership is transferred. In France, the fundamental assumption of the Civil Code is that ownership is transferred in phase one by the contractual agreement. Under French law, preliminary contracts are equated to definitive contracts from this perspective. The French code so favors transfers of ownership by contract that all contract law is contained in the book of the code devoted to "different ways in which property is acquired."<sup>7</sup>

Italian law follows the approach of the French Napoleonic Code but lacks the French unity of approach. The Codice Civile establishes two main phases in the transfer of immovable property. In one, ownership is transferred between the parties (in phase two before the notary), and in the other the ownership transfer can be claimed against the whole world (in phase three after registration). For Italian law, phase one does not affect the transfer of ownership but creates only an obligation to proceed to phase two<sup>8</sup>. The same approach of considering phase two crucial for the transfer is followed by English law which considers ownership transferred at the moment of the conveyance. In Germany, ownership is transferred only in phase three at the moment in which the contract is registered in the official book<sup>9</sup>.

Such emphasis on different phases of a very similar, continuous process overemphasizes differences among legal systems that in practice are not that important. Whether the preliminary contract has actually transferred ownership (as in France) or whether it has only created a specifically enforced obligation to transfer it (as in Italy), the practical

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<sup>7</sup> Book 3 of the Napoleonic Code

<sup>8</sup> A recent reform made it possible to register already the preliminary contract after phase 1. See A. Chianale, *Registrazione del preliminare e trasferimento della proprietà*, Torino, 1999.

<sup>9</sup> See par. 873 BGB

difference is minimal. Of course, when the process gets interrupted (e.g., if Abraham and Jacob have not negotiated in advance what happens in such cases) the different rules of different legal systems may work as different defaults producing different behavioral incentives. If, for example, Abraham knows that ownership is not transferred in phase one, he may be encouraged to keep shopping around for a different piece of property that he might like better. Indeed if the obligation of the seller is specifically enforceable while that of the buyer is not, the latter is receiving an incentive to behave opportunistically.

On a normative ground, scholars say that the most efficient default rules are those which do not separate the costs and benefits of being the owner but try to keep both benefits on the same individual. This is the only way to avoid encouraging opportunistic action in the course of transfers of ownership. In practice, because the title to ownership comes with liability, we should prefer those rules that approach the ideal of the owner decision-maker who is also responsible for the consequences of his decision. In the majority of cases the decision making power related to a given property comes from the physical control thereof; usually, the transfer of physical possession of the property occurs at the conclusion of the complex process that we have described. Therefore, the German solution, closely followed by Poland and Austria, of waiting until phase three before actually transferring ownership seems to be preferable. However, until that very last moment the parties are given an incentive to keep their eyes open for alternatives. Thus the German solution carries less of an incentive to actual transfers. Nevertheless, knowing that whoever is actually registered in the official land register is actually the owner and has therefore the full set of powers and liabilities stemming from it introduces a higher degree of security of property rights. This has a beneficial impact on the overall efficiency of the system. Of course, the more one relies on official registration, the greater the potential disruption caused by corrupt practices and inefficient book-keeping.

Moreover, maintaining leeway for prospective buyers or sellers to find better deals in the course of transacting may favor efficient breaches and the consequent better allocation of property. Interestingly, most legal systems exercise some caution before binding the parties to an immovable transaction. While in general contracts do not require a particular form to be binding, all legal systems surveyed agree that when it comes to transfers of immovable a mere handshake is not enough. The importance of these kinds of transactions, third parties' needs to rely on transfers, and the need for protection of the parties involved in the transaction, compel the use of a form for contracts that transfer property. While the written form may not be enough to protect these interests, it may well be the way to move in that direction at minimal transaction costs. This is the reason why modern legal systems, in the common law as well as in the civil law, share the requirement of written forms in contracts aimed at transferring immovable property<sup>10</sup>.

Even the most sophisticated system of registration sometimes is not sufficient to offer a full certainty of the ownership of an immovable. This aspect remained somewhat in the shadow of the different Chapters but it deserves at least a cursory treatment. In all legal systems, there is a tension between title and physical possession that in the case of immovable property is most often solved in favor of the former. However, an important exception must be considered because it contains a counter-principle capable of defeating even the most reliable and professionally handled system of registration. The principle of adverse possession, as this hypothesis is known in the Anglo-American world, is the most important case of outright involuntary transfer of immovable property that is capable to escape the voluntary logic reflected in the registration systems<sup>11</sup>. According to this fundamental principle ownership can be acquired by the long-term possessor.

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<sup>10</sup> German law requires full notarization (in the civilian sense!) See sec 313 BGB.

<sup>11</sup> See the classic rationale discussed by O.W. Holmes, *The path of The Law*, 10 *Harv. L. Rev.* 457(1897) 477.

Adverse possession, known in the civil law tradition as *usucapio*, is still very important everywhere even in the domain of immovable property, though limited in its potential because of a very long requirement for the elapsing of time. The mere physical location of an individual on a piece of the earth's surface is not enough to create a reasonable *prima facie* signal that he is the owner. Moreover, the costs of avoiding the principle of adverse possession possibly are much higher than the measuring costs created by it. A necessary but not sufficient thing to do in order to eliminate the principle thus avoiding involuntary transfers, would be to organize a completely reliable land register that conclusively proves that whoever appears listed therein is the owner. In practice, the adverse possession principle is not abolished even in German law where such a kind of land register exists. However, the importance of the principle is reduced by paragraph 927 of the BGB under which a thirty-year adverse possession is required to acquire ownership. A similar term of thirty years is required by article 2262 of the French Napoleonic Code, whereas Italian law (article 1165 of the Codice Civile) and the basic rule in common law countries reduce the adverse possession period to twenty years. In these legal systems (perhaps the English Land Registration Act creates a major exception within the common law), where the organization of immovable transfer cannot rely on principles of registration of title as secure as in Germany and Austria, adverse possession is a much more lively area of property law. A common core principle is that in the case of good faith possession, the time requirement is substantially reduced at a rate that varies among legal systems between one third and one half<sup>12</sup>.

In order for the principle of adverse possession to work, possession also should be qualified in terms of its intensity. The common-law description is that possession must be "open, and hostile" in the sense that the possessor should behave socially as the owner of the

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<sup>12</sup> Thirty years is the term for German Law (927 BGB) and French law (art 2262 Code Nap) reduced to 20. Twenty years reduced to a half for Italian law ( Art. 1165). Twenty years is also the basic rule for American Law. There are however a number of further reductions at play. See J.M. Netter, P.L. Hersh, W.D. Manson, *An Economic Analysis of adverse possession statutes* 6 *Int. Rev. Law Econ* 217 (1986).

immovable<sup>13</sup>. This intensity requirement, shared by all of the legal systems, simply means that possession should not be hidden or ambiguous in order for time to elapse. Moreover, possession should not be derivative as in the case of a lease or of other title coming from the owner<sup>14</sup>. The hostility requirement specifies that there should not even be an informal understanding by which one tolerates it. In other words, the average owner should be perceived socially as unfriendly towards the possession (and vice versa) because the possessor is actually threatening his right. There should be a potential conflict between the owner and the possessor over the immovable property. A number of technical doctrines give content to these principles. If, for example, possession has been acquired by violence or by a hidden strategy (such as breaking into a cellar during the absence of its owner), violence or clandestinity should cease before time starts to elapse<sup>15</sup>. The rationale is that even though the owner is challenged by a hostile possession, it should not be physically impossible for the owner to claim his right. Not claiming the right should be socially qualified as a lack of actual (although not potential) interest on the side of the owner towards his property<sup>16</sup>.

On theoretical grounds, it is not difficult to reconstruct the reason why all legal systems recognize adverse possession or similar doctrines as the most important involuntary transfer from the owner to the possessor, capable to defeat a later voluntary transfer. The law prefers to grant possession to the individual who is actually using the immovable property against the absent, uninterested owner. The former is actually economically exploiting the immovable while the latter is keeping it idle. In social terms, this justification is obvious as a way to avoid economic waste and even to solve some problems of unequal distribution of property. Also, the justification is reinforced by the fact that the absence

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<sup>13</sup> See J.G. Riddall, *Introduction to Land Law* (4<sup>th</sup> Ed 1988) 413 ff.

<sup>14</sup> See J. Carbonnier, *Droit Civil, Les Biens*, 14<sup>th</sup> ed. (1998) at 208 ff. As to German Law see however par. 868 BGB "it must be said that this extension "to the mediate or indirect possessor has destroyed the usefulness of possession as publicity" Horn-Kotz-Leser, *German Private and Commercial Law, An Introduction*, Clarendon Press, 1982 at 171.

<sup>15</sup> See Sacco, *cit*

<sup>16</sup> See Holmes, *cit supra*

of the owner makes impossible the transfer of the piece of immovable property from whoever values it less to whoever values it more within a voluntary transaction. The prolonged absence, whatever its reason, shows that the owner appreciates his property very little, or at least less than the possessor. While the owner is doing nothing in terms of investments to improve the property, the possessor at a minimum invests in occupying the property by periodically policing to eject other possible claimants of it. Most probably, the possessor is actually economically exploiting it by putting labor into the maintenance of the immovable in proper conditions. Once the problem of adverse possession is framed in such a way, it becomes clearly justifiable also within a theory of just desert. At this point one could argue, on a normative ground, that by having such long terms, legal systems are possibly overprotective of the absent owner. Possibly, the needs of stability of ownership that counterbalance the principle of adverse possession would be served also by shorter terms, such as, for example, five years. This is particularly true because a variety of devices (like suspension of the terms in given circumstances, or maintaining long term for bad faith possession) are available to protect the absent but "deserving" owners, such as those whose emigration has been forced by dramatic events or similar occurrences.

A shorter term would give an incentive to put labor into abandoned immovable property, something very much needed in the current shortage of dwellings. Moreover, the security and reliability of signals coming from property rights would not be impaired, but generally would be promoted by shorter terms that merge ownership and possession in the same person. Among other things, long terms make the proof of title to land extremely difficult, and increase what in economic terms are known as measuring costs.<sup>17</sup> Moreover, such a reform would be extremely cheap in terms of administrative costs due to the structure of this area of the law. In few areas a simple legislative fiat would be as effective as one which shortens the time requirement in adverse possession. Indeed there is no room for interpretation (five years means five years), which makes it

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<sup>17</sup>D.C. North, *Institutions, Institutional Change and Economic Performance* (1990).

impossible for an incremental case law development to follow the needs of justice and efficiency. Finally there is no reliance to protect.

In this area of property law, one wonders if the convergence of legal systems on very long terms, short of being a proxy for efficiency, is not the product of inefficient path-dependent tradition proving the incapacity of property law to adapt to the social requirements of a more just distribution of access to wealth.

To be sure, property law, especially in the domain of immovable, has always worked to protect the bottom line. Within this logic the will of the owner is sacred and the voluntary nature of the transfer of title should be the object of as little exception as possible. As the Chapters of this book have shown with considerable technical detail and precision, systems of transfer of immovable property (which is still the most important asset of family savings) should be designed to safeguard the will of the owner and the peace of mind of the buyer, and in this perspective there is no question that a thorough inquiry on the title is better performed by highly trained officials rather than by banks or insurance companies<sup>18</sup>. Today the global dynamic of property law shows a radical process of concentration of ownership in corporate hands, most often as a result of transformations in the law of takings (classic case in the US is *Kelo v. City of New London*) or as a result of predatory or outright fraudulent lending practices that makes the indebted titled owner the usual victim of foreclosure. In this scenario, a good property law system must protect both the ordinary seller and the buyer (physical persons) from interests conflicting with their secure transfer of personal ownership. Such corporate interests are those that today challenge the professional monopolies on transfers in the name of efficiency, competition and consumer satisfaction rarely corrupting even the academic legal discourse<sup>19</sup>. One should however be aware that a property law system is

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<sup>18</sup> See U. Mattei, *Regole sicure. Analisi economico-giuridica comparata per il notariato*, Milano (2006)

<sup>19</sup> See U. Mattei, *The Rise and Fall of Law and Economics: an Essay for Judge Guido Calabresi*, 64 *Maryland Law Review* 220, (2005)

a more complex structure of social organization and that distributional issues cannot be entirely overlooked by legal systems that aim to remain legitimately based on principles of equality among the people. This is why the issue of property law transfer, despite its technicality, must be appreciated as being at the center of the political struggle between concentration and distribution of social wealth, which is between exclusion and inclusion. In a legal system that honestly values the principle of equality, inclusion and distribution of social wealth call for systems of ownership transfer that, while being a secure guard to the status quo, are not completely closed to challenges that assert more fundamental social needs such as fighting against homelessness or asserting other fundamental rights of non proprietary nature<sup>20</sup>. This is why the tension between title and possession must be mediate by a ripe legal culture aware of the challenges that it must face. This book has shown the work of some of this aware scholars.

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<sup>20</sup>See E. M. Peñalver and S. K. Katyal, *Property Outlaws, How Squatters, Pirates, and Protesters Improve the Law of Ownership*, 2010

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