UNIVERSITÀ DEGLI STUDI DI TRENTO
Facoltà di Giurisprudenza

FROM CONTRACT TO REGISTRATION

AN OVERVIEW OF THE TRANSFER OF IMMOVEABLE PROPERTY IN EUROPE

Edited by
ANDREA PRADI

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UNIVERSITÀ DEGLI STUDI DI TRENTO

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PREFACE

This volume wants to be an easy introduction to the principles governing Immoveable Transfers of Property in some European Countries. It aims to outline in a simple way the different transfer mechanisms adopted for dealing with legal certainty and lowering the costs involved in this complex type of transaction.

The volume 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 research on the Common Core of Transfer of Immoveable has been launched in the summer of 2006 at the Department of Legal Science, University of Trento, by Professors Elizabeth Cooke (Hon. Professor of Property Law, University of Cambridge) and Luz Martinez Velencoso (University of Valencia), who I reached in the editorial board the year after. The results should finally come out this year in the Cambridge University Press series dedicated to the Common Core, mainly thanks to the hard work of Luz.

The work deviate a bit from the methodology of 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.

After introducing the historical trends and the developed models in the regulation of the transfer and the publicity of real property, analyz-

ing their economic foundations and implications, the contributions included in this book are dedicated to the description of the regulatory model of Austria, Greece, Belgium, Italy, England and Wales, Ireland and Finland.

By reading this work it seems that despite the different legal systems have developed very different principles (e.g. consensualistic one vs. the registration principle) at a practical level we may observe that there is a broad convergence in entrusting the registration moment with a crucial role in the transfer process. However, the different national systems rely on publicity structures of different nature and with different characteristics to which they attach different value. Despite that, at a European level there seems to be a willingness to attribute the same value to registration.

The European suggestion seems more aimed at speeding up market exchanges than to create greater certainty on transfers. However it should to be take into account that land registration systems address the issue of compatibility with the financial and technological resources available. The assessment of legal institution aimed at create certainty around the property rights over immoveable has a cost that grows proportionally with the increase in reliability of the verification system adopted but which decreases in relation to the available technology. Thus as far as security is concerned, it rather depends on how accurate the data are and how broad is the spectrum of the interests that the Register could list. On this we must focus our attention if we want really to secure immoveable market transaction.

Other than the Department of Legal Science of University of Trento, in the persons of its Dean Prof. Giuseppe Nesi and its staff members, especially Valentina Lucatti, 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 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. I also want to thanks all those authors whose contri-

bution does not appear in this volume because they have found a different place of publication. Luz Martinez Velencoso, Sonia Martin Santisteban and Käre Lilleholt are for sure among them. I'm finally in debt with my friend and colleague Andrea Rossato who in addition to writing an introductory chapter on the economic foundation of the land registration institution helped me a lot to refine this volume.

Trento, New Year's Eve 2015

Andrea Pradi

TRANSFER OF IMMOVEABLES IN A EUROPEAN PERSPECTIVE

Andrea Pradi[*]

1. Transfer of Immoveable: the EU perspective

The issue of the transfer of immoveable is at the core of the process of harmonization of European law, despite the legal regime of property is formally excluded from the influence of European law[1].

When dealing with the transfer of property rights, legal systems aim at creating a legal framework for the market which is twofold: increasing its efficiency while preserving legal certainty. Considering that the European institutional goal is primarily directed to building a common market it is not surprising to see that, despite the formal exemption, the question of the transfer of property is central to the concerns of the European institutions[2].

The need for the harmonization of private law at the European level, and mainly of contract law, was indeed felt only for personal property, and in particular the corporeal (chattel), as the main candidate of this process[3], leaving aside the immoveable one, on the grounds that it was

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[*] Professor Ag. of Civil Law at the University of Trento and co-editor of the Common Core Group on Transfer of Immoveable Property.

[1] Article 345 of the Treaty on the Functioning of the European Union (TFEU), formerly Article 295 EC (before that Article 222 EEC), clearly stated that the Treaties "…shall in no way prejudice the rules in Member States governing the system of property ownership", suggesting that also the legal regime related to its transfer is included in that exemption. But this is a rather naïve conclusion.

[2] It clarifies the call for harmonization of legal rules related to property transfer see D. CARUSO, *Private Law and Public Stakes in European Integration: the Case of Property*, in *European Law Journal*, 2004, p. 751.

[3] W. FABER, B. LURGER (eds.), *Rules for the Transfer of Movables, A Candidate for European Harmonisation or National Reforms?*, München, 2008.

less involved in cross-border transactions due to its "stationary" (not moveable) nature[4].

However, this idea does not seem to be very convincing. Surely not in terms of economic values involved, if we think that the market of immoveable (real estate market) in 2014 was estimated at almost 1.150 million euro's, more or less the 10% of the GDP of the 28 EU Member States; nor because of the nature of immoveable. "Rights on land move with their owner" it has been said[5], pointing out that there is also a cross-border market for immoveable. It was precisely the increase in mobility of Europe's citizens within the borders of the Area of Freedom, Security and Justice, which means that European citizens acquire an increasingly great number of immoveable properties in other States of the Union, a good reason for harmonizing the legal regime of the transfer of immoveable.

The reduction of the uncertainty costs related to the knowledge of the foreign legal mechanisms can indeed booster the efficiency of the market of immoveable property.

Around these needs a series of academic or professional projects directed to create a common legal framework for a European market of immoveable have grown. Most of these projects are aimed at setting model rules in order to simplify the transfer system: the creation of standards (contractual or form of registration)[6] or the reduction of the

[4] *Lex rei sitae* is the rule governing the legal situation of immoveable property transactions. As a consequence, there are fewer conflict of laws questions and jurisdictional questions.

[5] D. CARUSO, cit., p. 757.

[6] See for example the projects conducted by ELRA (European Land Registry Association) an international non lucrative association that wants to promote mutual understanding and the knowledge of land registers, to help creating an open and secure market for Europe, serving and protecting citizens. The projects are: CROBECO (Cross Border e-Conveyancing) which concerns cross border registration in foreign Land Registers and IMOLA (Interoperability model for Land Registers) which aim to increase the accessibility and transparency of land registry information and to facilitate the registration of cross-border documents.

costs of conveyancing services[7], have been the tools to foster smoother market transaction. However, beyond the issues of efficiency, the impact of the economic and financial crisis, clearly linked to the immoveable property[8], has stressed the role of security in property transfers as a social and political priority that European institutions should have in their agenda.

Despite their difference in legal design, it may be easily observed that in order to secure market transactions European legal systems have surrounded transfer with legal institution functioning as a gatekeeper of legality and certainty such as contractual formalities, notarial body, land registers. These institutions have been developed over the time and they cannot be easily simplified or even eliminated. It is the role of a reliable comparative legal work to understand how the different legal systems have reached such an equilibrium over the years, how and why they have translated it into their legal rules, and how these principles and rules are working in practice[9].

[7] See ZERP et al. - COMP/2006/D3/003 – Conveyancing Services Market – Final Report, that compares and evaluates the different regulatory systems under which legal conveyancing services are provided.

[8] It is well known that the 2008 crisis was triggered by a large decline in home prices after the collapse of a housing bubble, leading to mortgage delinquencies and foreclosures and the devaluation of housing-related securities. Declines in residential investment preceded the recession and were followed by reductions in household spending and then business investment. Spending reductions were more significant in areas with a combination of high household debt and larger housing price declines. See A. MIAN, A. SUFI, *House of Debt*, Chicago, 2014.

[9] See the *Project, Real Property Law and Procedure in the EU* conducted by the EUI (European University Institute) coordinated by C. Schmidt and C. Hertel which aimed at studying the conveyancing process in different European countries: http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/GeneralReport.pdf.

And also the volume edited by L. MARTINEZ VELENCOSO, A. PRADI, *Transfer of Immoveable Property in Europe*, in *The Common Core of European Private Law series*, Cambridge, forthcoming.

2. The Immoveable Transfer Mechanism as a balancing between two opposite: efficiency and certainty

Transfer of ownership is a social transaction which structure can vary according to the nature of thing involved. Different institutional mechanisms are in charge to regulate the simple delivery of a book from those governing the transfer of immoveable. Despite that differences the problem of transfer is approached by legal institution by trying to find a balance between two important and often conflicting interests: on the one hand transfer mechanisms must be designed to be as simple and inexpensive as possible, in order to encourage market transactions; conversely there are strong reasons to regulate and monitor the transfer in order to secure transactions.

Just to describe the different mechanisms of the transfer of immoveable property comparative legal culture is used to divide them into two main categories: on the one hand there are systems based on the *titulus adquirendi*, basically a contract, as the main instrument for the transfer[10]; on the other those which elect as a principal moment the *modus adquirendi*, that today is expressed by registration[11]. Despite the importance of this taxonomy, it is worth noting that these different legal solutions are stemming from the same political need: namely the desire to simplify a mechanism that clearly prevented market transaction such as the feudal system.

The feudal system has been seen as a system restrained by excessively fragmented rights over the land and by a complex mechanism of transfer. All that has justified the ban against feudal entitlements, in favor of a unitary concept of ownership and of a strong reduction of the number of property rights, which have been standardized into a limited list (*numerus clausus*)[12].

[10] For a quick look see for example the essay on Belgium, Italy and Greece in this volume.

[11] See as an example the Austrian and the Finnish systems in this volume.

[12] The economic explanation has been the suggestion that the numerus clausus is a device for minimizing the effects of excessive fragmentation of interests, which prevents market transactions. See M.A. HELLER, *The Boundaries of Private Property*, 108 *YALE L.J.* 1163, 1176-78 (1999).

Moreover, for the sake of market transfers, legal systems have established only one moment when the ownership is transferred, thus simplifying the transfer mechanism developed in the medieval period that required both the *titulus* (a valid contract) and the *modus adquirendi* (the solemnity related to the delivery).

The coincidence of the boundaries of the rights with the physical boundaries of its object, associated with the fact that a single legal act together with the object also transfers all rights and obligations related to it, certainly promotes market transactions, but also requires a legal equipment which is capable of ensuring legal certainty.

While a simplified model based on physical possession could work well for simple transactions, such as those for corporeal movable property, for which physical control over the things can provide the legal presumption of ownership, the same can't said for the immoveable property[13]. Unlike what happen for movable property, only in a limited set of cases the person who physically finds himself on a given piece of land turns out to be the owner[14]. In this circumstance physical possession couldn't work as a title evidence so than the law should find other legal tools in order to obtain certainty over property rights.

In the domain of immoveable, the cost of the uncertainty determined by mere recognition of possession is significantly greater than the cost of creating instruments for providing legal certainty of the title. The social signal resulting from the physical occupation does not reflect the underlying legal actuality, so, unlike what happens with movable property, the law will have to prepare assessment tools different from that of possession. The delimitation of the proprietary spheres assumes the nature of a public good and it is therefore better guaranteed by collective mechanisms.

As a mechanism arranged by the legal system in order to make easier and with a sufficient degree of certainty the knowledge of legal transfer, immoveable transfer publicity presides over both, the protec-

[13] This is why legal system are protecting possession as a mere fact situation, see U. MATTEI, J. GORDLEY, *Protecting Possession*, 44 *Am. J. Comp. L.* 293, (1996).

[14] See report on question n. 1 of the volume edited by L. MARTINEZ VELENCOSO, A. PRADI, *Transfer of Immoveable Property in Europe*, in *The Common Core of European Private Law series*, Cambridge, forthcoming.

tion of public interests by delineating the boundaries of ownership (concerning both the content of the right as well as its title holder thereof) and the security of private interests by protecting the owner against unwanted disposals. Where, instead, these instruments have not been established, the burden of uncertainty is bearded by private parties, that only through costly instruments could minimize it[15].

All European legal systems have developed institutions to provide legal certainty to the transfer of immoveable property other than possession. Contractual formalities, the notarial validation and the registration in land registers are all mechanisms that different legal systems have combined in order to give legal certainty to these types of transactions[16].

Where the importance of the *modus adquirendi* (*roman traditio* or *german Auflassung*) has been maintained, the Land registers has become the institutions which provide a basis for the legal security of property transfers. Registration is actually the formal legal mechanism sufficient to produce legal consequences of the transfer[17]. On the other hand, all systems which find their reference in the Code Napoleon[18] have adopted the contract (*titulus adquirendi*) as the crucial moment for the transfer. Notarial formalities are still the main institution to give to the contract legal certainty.

Even legal systems where the need to break with the past was less felt, such as the common law systems, have gone through legal reforms that reduced the number of legal estates over the land for the sake of simplification. However, despite they have maintained the importance of the *modus adquirendi* as the main instrument to transfer immoveable property, thus nearing the German tradition, only recently they ended

[15] See for example in the most part of the United States where evidence of title is established through title reports written up by title insurance companies, which show the history of title (chain of title) as determined by the recorded deeds.

[16] Most of the European system required written form as a term of validity for the contract. Some of them require notarization in order to submit to the immoveable register. See answer on question 2 and 3 of the volume edited by L. MARTINEZ VELENCOSO, A. PRADI, *Transfer of Immoveable Property in Europe*, cit.

[17] See Austria and Finland in this volume.

[18] As for example Belgium, Italy and Greece in this volume.

up to give the registration the role of security provider in the transfer mechanisms.

In common law systems the transfer mechanism historically rested upon conveyance, a formal procedure which has its core in a solemn act, the deed, whereby legal title passed. Since what is conveyed is always an estate in the land and not the land itself[19], other contractual interest, most of them related to the trust, were not secured by the formalities required at law. These interests were protected by the equity jurisdiction (equitable interests). Given this duplication of legal positions and remedies, it can be well understood the difficulty of organizing a registration system that was really effective[20].

3. Registration of the Transfer

Rooted in to the legal discourse this institutional framework derived primarily from commercial needs and the economic theories has been fragmented by the various technical solutions legal traditions have adopted. Despite their different construction we can observe a huge convergence in assigning to the registration a fundamental role in the transfer mechanism. Even those legal systems that historically have not set the center of their transfer mechanisms around the registration sooner or later have adopted a system of public registers to provide some certainty to legal transaction. This happens either through explicit regulations or through courts decisions.

According to the Code Napoléon property is transferred upon consent without the need of creating a system of registration. It was a statute of 1855, based on a Belgian Law of 1851, which required the transcription of the transfers of immoveable property. In legal systems influenced by the Code Napoleon (like Italy, Belgium, or Greece), to the

[19] Since it has been widely assumed that property of land, as such, is not a conception internal to English land law (W. BLACKSTONE in his *Commentaries* stated "This allodial property no subject in England has"). The 1925 land reform legislation in England largely did away with the system of legal estates by reducing their number.

[20] See England and Wales as well as Ireland essay on this Volume all that start their description with the estate in land doctrine.

transcription has been given declarative effects, which means that it declares a transfer already happened by virtue of a contract. The transcription has the sole effect of making the right enforceable against third parties and not to constitute the legal right upon the buyer[21].

However, when taking into account the operational level, in the case of two subsequent sales (double sale) the first buyer, who transcribes as second his purchase, has only an action for damages (against the seller) and no real remedy for recovering the ownership from the second buyer. This means that, despite the declaratory effects, the transcription become practically an unavoidable moment in order to render the transfer perfect and effective towards third parties. As a result, in all the systems based on the consensualistic principle, the legal owner of an immoveable is not the first who buy it but the first who registers her acquisition. An analysis of operative rules confirms how legal systems based on the principle of consensus converge towards those that have made the land register the pivotal institution of their mechanism of transfer.

Other systems are converging to registration thorough legal reform such as Greece which is experiencing a migration from a French based model, centered on the contract, to a German based one centered on the land registration[22].

In England and Wales as well as in Ireland a system of registration has been introduced recently by legal reform which first simplified the system of legal estate on land in order to adopt a Land Register provided with a significant strength. Despite the reduction of the number of legal interest in land these systems are still having a parallel chain of interests on land created by equity jurisdiction[23]. One can thus understand the difficulty of introducing in the English law a land registration

[21] See A. CHIANALE, voce *Pubblicità Immobiliare*, in *Dig. Disc. Priv.*, *sez. Civ.*, Torino, 1997.

[22] Note that Greece is now migrating towards a real base title registration system through a complex restructuring of the Cadastral Data as described by A. Moraitis in this book.

[23] The dual system on interest in land is the starting point of both essays on common law systems in this volume: see M. Conaglen for England and Wales and U. Woods for Ireland at the very beginning of their exposition.

mechanism. At the beginning of the eighteenth century in some parts of Yorkshire and Middlesex a recording system had been created, adopting a personal-based Register where the deeds were recorded, but it proved to be ineffective due to its voluntary basis and the highly fragmentation of interests in land. Its replacement with a land registration system was possible only after a drastic reduction in the number of possible estates to be registered. Indeed only the Land Registration Act of 1925 created a land register system on which to base the whole land transfer mechanism. As a consequence of this reform all the legal interest on land should by compulsory registered at the first transfer and all the following registrations would have been based on it.

It should be immediately observed that, despite the high degree of reliance given to the registration, the subversion of property rights has itself a social cost: as we will see, all legal systems introduce some limits to the presumption that the registered owner is also legal owner in order to discourage opportunistic behaviors. Good faith is required to the non owner (non domino) purchaser. Even in the Austrian system in which to the Land Registers is given an almost absolute importance the third party purchaser by the registered owner is protected by law only if in good faith.

As we have seen registration is becoming more and more the core of the immoveable transfer system. Nevertheless the option of giving to the registration an essential role in the transfer process depends on its reliability. This reliability is highly determined by the presence of a suitable technology that can as precisely as possible identify the goods and their physical and legal changes without loosing accuracy.

A technology that ensures such accuracy allows to build a Register that rests on a database whose focus is the immoveable or, better, the rights (title) that insist on it. A “title registration system” is based on a precise survey of all the immoveable in a given territory.

The paradigmatic case is represented by Austrian Cadaster created when all the territory of the Habsburg Empire (300.000 sqKm) was surveyed in the XIX sec. and the data, thus collected, entered in the database of the Cadaster. The cadastral surveys assumed a key role in structuring the basis of the Austrian Land Register (Land Book). Born for tax purposes, the Cadaster had indeed as a reference not the legal

owner but the subject using the land, who does not always correspond to the legal owner. These data were then transferred (implanted) in the Land Register (Land Book) under the supervision of a professional judge, thus giving legal certainty to the title therein registered. Today the Cadaster and the Land Book together form a joint information system, which show the legal situation as well as the material one over almost every single parcel of land of Austria[24].

Built in this way it was possible to give a particular reliability to the records contained in the register. The main feature of the Austrian land system is, indeed, the principle of public faith attributed to the Land Books: the person who is registered in the books is the legal owner. The third parties who acquire the right by inspecting the Land Book can trust the completeness and correctness of the information contained herein and are protected from claims based on defects of the contract, provided they are in good faith.

A real basis model such as the title system may not been adopted in countries without the organizational requirements needed for the creation of the Austrian Land Registry.

It is usually the lack of an appropriate technology and the lifelong incompleteness of the Cadastral data that pushes towards a personal basis system: in Italy, Belgium or Greece the Register is indeed organized on a personal basis for this reason. The object of the transcription is not the immoveable (better, the right over it) but the legal instrument (e.g. the deed or the contract) from which the transfer has originated, plugged into directories organized by person and not by parcels of land. The result is a complex system whose consultation does not give either certainty about the consistency nor about ownership of the rights. In personal-based systems the certainty of the ownership is obtained only through a complicated research that reconstructs the chain of records and thus allows to go back up to a purchase by adverse possession[25].

[24] See N.J. SADJADI, *Land Registration and Cadastre in Austria*, in *Land Registration and Cadastre in selected European Countries*, Wien-Graz, 2009, pp. 27 and ff.

[25] See for example what is written about the Italian system in this volume.

4. Some Conclusion

The adoption of a land registration system is generally motivated by the need of certainty in legal transactions. The protection of the buyer and creditors of an immoveable property owner, obtained by means of a registration system gives greater efficiency to the immoveable market and allows the development of credit secured by real estate. Delimiting and securing property rights in the case of immoveable is a public good and service that can best be created by the State. Not all registration systems are equal and not all serve at best for the sake of economic efficiency.

If we look at the history of continental Europe we may observe that the development of Registers has followed the evolution of legal mechanisms related to the transfer of property. Where priority was given to the contract as the instrument around which to concentrate the immoveable transfer mechanism, contractual formalities (such as the English conveyancing system or the contractual notarization) acted as a security provider. Despite this, however, the need for instruments of a public nature has been felt. Registries were adopted but they were given a side effect in settling disputes between conflicting rights on the same parcel of land. Where, by contrast, the registration had constitutive effects it was the high technological precision of land surveys that lead to the same result. In other words, the real basis organization of the Registry is at the heart of the entire transfer mechanism.

With regard to the recent evolution it should be noticed that in all legal systems in which a legal reform on immoveable transfer system is taking place, the starting point has been a change in the structure of the registers: basically from a deed recording system to a land registration one.

The most evident example of this is the dichotomy which has been created in the common law world. The vast majority of states in the US employ systems of recording legal instruments transferring property that affect the title (not only deeds) as the exclusive means for publicly

documenting land titles and interests[26]. This system does not determine who owns the title or the interest involved nor, for instance, that there may be unrecorded legal claims which might take precedence over the registered ones. This kind of system has obviously proven ineffective and has led to forms of private protection of the title: typically, evidence of title is established through title reports written by title insurance companies, which show the history of title (property abstract and chain of title)[27] as determined by the publically recorded deeds[28]. Conversely in England and Wales, where a system of registration was introduced recently, the legal reform has led to adapt the rules of immoveable transfer to the needs of the new registration system[29]. Through a significant reduction in the legal positions susceptible of registration these systems have been able to adopt a Land Register provided with a significant strength: who appears as the owner has an indefeasible title (provided in good faith) and third parties can rely on it. That means that even if deprived of the right and until any modification of the registers he or she can perform effective alienation.

Coming back to civil law countries, Greece is a good example of how legal rules are adapted to the need of a registration system. This legal system is experiencing a migration from a French based model, centered on the contract, to a German based one centered on the land registration by restructuring the cadastral database. It is more the cost of the update of the cadastral data than the inability of the Greek legis-

[26] In the US nearby deeds and mortgages there is generally added a catch-all category of "other instruments affecting the title to real estate" to be recorded.

[27] A property abstract is a collection of legal documents that chronicle transactions associated with a particular parcel of land. A chain of title is the sequence of historical transfers of title, that runs from the present owner back to the original owner of the property.

[28] B.C. DENT, *Land Title Registration: An English Solution to an American Problem*, 63 *Indiana Law Journal*: 55 (1987) available at: http://www.repository.law.indiana.edu/ilj/vol63/iss1/2.

[29] It is said that the new English registration system find roots in the German one via Torrens, see E. COKE, *The new of Land Registration*, Oxford, 2003, p. 11.

lation to slow this transition[30]. In Italy the digitalization of the cadastral and register data has for sure simplified the legal transaction as it allowed to build a real basis searches. But still the inaccuracy of the Cadastral data prevents to rely on a system like the Austrian one, which is still in force in some Italian provinces and which, in a possible reform of the Italian Civil Code of 1942, would be the new reference model for the circulation of immoveable property.

Being a public services land registration systems address the issue of compatibility with the financial and technological resources available. The assessment of legal institution aimed at create certainty around the property rights over immoveable has a cost that grows proportionally with the increase in reliability of the verification system adopted but which decreases in relation to the available technology. The more a system is reliable the higher will be its cost. However these costs are inversely proportional to the available technology and the degree of precision with which this technology is able to reflect the characteristics of the good that is to be recorded. Certainly the digital revolution will help to improve the immoveable transfer system. An electronic transfer system associated with the digitalization of the Registers is a legal issue that all the European systems are addressing. The use of electronic signature to transfer and to register property rights over immoveable and the transition from paper to a digital platform of the data contained in the Register will permit to maintain registers, and maps associated to them, in an electronic form so as to reduce inefficiencies and complexities of the transfer, and the related search, mechanism. It could surely speed up the transfer mechanism and reduce the costs associated to it, but, as far as security is concerned, it rather depends on how accurate the data are and how broad is the spectrum of the interests that the Register could list.

[30] See P. CLEPP, *Reforming Greece easier said than done: The never-ending case of the land registry*, http://openeurope.org.uk/today/blog/reforming-greece-easier-said-done-never-ending-case-land-registry/.

THE LAW AND ECONOMICS OF THE TRANSFER AND THE PUBLICITY OF IMMOVEABLE PROPERTY: AN OVERVIEW

Andrea Rossato[*]

1. Introduction

Law and economics traditionally analyzes the legal issues related to the transfer of immoveable property – or the transfer of real estate to use an expression more familiar to common lawyers – within the framework of the transaction costs economics and the Coase Theorem. In other words, the transfer of ownership is viewed as a costly transaction, and the economic analysis of law is mainly focused at understanding the impact of the legal rules governing the conveyancing process on these costs.

The transfer of property rights is perceived, by economics, as the cornerstone of the production of wealth in society. Economic agents are depicted, by mainstream economics, as utility (or profits) maximizing entities, either individual or collective, whose utility (or profits) production functions are determined by exogenous variables, individual preferences or costs functions (these later mostly due to technological constraints). Since utility is related to preferences and preferences represent individual tastes, the consumption of the very same resource may produce different levels of utility for different individuals, which leads to the possibility of voluntary exchanges of resources – or property rights over resources and assets – by transferring them to the agent who values them the most.

This description of voluntary exchanges is usually referred to as the "Bargaining Theory", according to which, whenever there is a difference over the subjective values of a good by different economic agents,

[*] Researcher of Comparative Private Law at the University of Trento.

then there is the possibility of an exchange which will make every party better off[1]. This exchange will increase social wealth by the amount given by the sum of the difference between the subjective value of the resource each one is acquiring and the value of the resource they are renouncing to. This increase of social wealth is named "cooperative surplus", and its existence is what makes possible market transaction which are defined as Pareto efficient.

The Pareto efficiency, when related to market transactions, thus indicates a situation after which all the involved parties have seen their utility increased. The transaction itself is assumed to be costless, but this assumption is obviously unrealistic[2]. When its costs are, on the contrary, taken into account we may then conclude that many Pareto efficient transactions might not occur because the cooperative surplus they produce is less than their costs.

For our purposes transaction costs may be defined as the cost of concluding the transfer of a property right, and they basically involve search, negotiation, monitoring and enforcement costs. The notion of transaction costs was introduce by Ronald Coase in a seminal article, published in 1937, dealing with the nature of the firm[3]. In this contribution Coase was trying to understand the reason why market transactions are substituted by other form of hierarchical relations, like the firm, for coordinating human interactions aimed at production. Within the analytical framework provided by rational choice, we would expect only individual independent contractors to use the market for exchanging, through Pareto efficient transfers, goods and services: in other words the price system should be the only way to coordinate each individual productive activity. It is the presence of costs involved with these trans-

[1] For an introduction see R. COOTER, T. ULEN, *Law and Economics*, Boston, Mass., 2012, pp. 78 ss.

[2] On the realism of the assumptions in economic theories there has been a very long debate, started by the landmark contribution by M. FRIEDMAN, *The Methodology of Positive Economics*, *Essays on Positive Economics*, Chicago, 1953. For an introduction, from a Popperian perspective, see N. DE MARCHI (edited by), *Post-Popperian Methodology of Economics: Recovering Practice*, New York, 1992, and L. BOLAND, *Foundations of Economic Method: A Popperian Perspective*, Florence: Kentucky, 2003.

[3] R. COASE, *The Nature of the Firm*, 4 *Economica* 386 (1937).

actions which requires other institutional forms for the coordination of human activities.

Coase's analysis was purely descriptive and tried to capture the emergence of the firm as a market alternative for the coordination and the exchanges in response to the presence of transaction costs. This analysis can be generalized also to account for the institutional responses to other types of market failures, such as, for example, the problems of externalities.

Externalities involve the transfer of wealth, due to incompatible uses of resources, which takes place outside any market mechanisms and can be either positive or negative. A typical example of a negative externality is the air pollution caused by a given productive process, pollution which is a burden imposed on the neighborhood without compensation: the productive process requires the use of a resource, clean air, which is incompatible with its use by the neighbors. If the production of a widget is imposing an external cost which is not internalized, the private marginal cost of production is less than the total, private and social, marginal costs of production, with the consequence that the charged price of the widget will be lower than that which would be charged if the social cost of production would be totally internalized. This leads to overproduction[4].

A possible correction of this kind of market failure is the so called Pigou taxation: by imposing a tax on the productive process, its external cost is thus internalized and calculated by the profit maximizing firm as one of the costs of production. While this solution is theoretically sounded, fiscal remedies are not flexible enough to take into account the actual external cost generated by a given productive process.

Coase, in the most cited article «The Problem of Social Costs», analyzed other types of institutional solutions to the problem of externalities and, while noticing that without transaction costs the pricing system is expected to produce Pareto efficient reallocations of property rights which would induce the internalization of external costs, he also noted that firms and public institutions are the most common solutions, for

[4] In a purely competitive market, not internalizing social costs leads to extra-profits, a different cause of over-production.

example through zoning regulations, to what is indeed a market failure[5].

Mainstream (neo-classical) economics and law & economics translated the purely descriptive analysis of Ronald Coase into what it is now called the Coase Theorem, a policy guideline that can be thus summarized: 1. if there are no transaction costs the problem of externalities will be solved by the market through Pareto efficient reallocations of property rights; 2. if transaction costs are present, the initial allocation of property rights matters for an efficient outcome and that requires either efficient allocations of rights or institutional responses aimed at minimizing transaction costs[6].

Reduction of transaction costs implies addressing their different sources: clear definitions and allocations of property rights and appropriate remedies for their effectiveness and enforcement. For example, in a situation which involves a huge number of parties, liability rules should be preferred over injunctive remedies: while the former require compensation for any incompatible use of resources – but this use is not prohibited –, the second give to every party a veto power which may jeopardize the possibility of reaching an agreement with everyone involved in the situation – the last parties to agree would have the incentive of maximizing the price of their consent[7].

Clear and precise definition of property rights is probably the most important requirement for lowering transaction costs: land registers may thus be seen as the principal way of reducing transaction costs in the realm of the transfer of ownership of real estate.

[5] R. COASE, *The Problem of Social Costs*, 3 *J.L. & Econ.* 1 (1960).

[6] For an introduction see R. COOTER, T. ULEN, *Law and Economics*, cit., chap. 4; see also S.G. MEDEMA, R.O. ZERBE, *The Coase Theorem*, in B. BOUCKAERT, G. DE GEEST (edited by), *Encyclopedia of Law and Economics*, 836-92, Cheltenham Northampton, Mass., 2000; S.G. MEDEMA, *Coase Theorem*, in J. BACKHAUS (edited by), *Encyclopedia of Law and Economics*, New York, 2014.

[7] R. COOTER, T. ULEN, *Law and Economics*, cit., chap. 4.

2. The Economics of the Transfer of Property Rights and Land Registers

Transaction cost economics and the Coase Theorem represent the conceptual frameworks used by the law & economics literature to analyse the transfer of real property and the economic role of land registers.

Obviously any assumption of zero transaction costs must be ruled out when analyzing the complexity of the transfer of real property – the existence of a transaction industry provides clear evidence of that[8].

The early economic analyses of the land title systems for transferring real property assumed that the transaction was indeed inherently costly, and that different title assurance systems were equally efficient in providing title security[9].

Whitman analysed five different methods commonly used in the USA for title assurance. Some of these methods are based on private records, maintained by private title insurance companies or lawyers whereas others use public records maintained by county government or other local jurisdictions[10].

Among the methods based on public records a major distinction can be made between the so called Torrens systems (a land registration system) and the title recording system (a deeds registration system). The first consists in a register where every transfer of the title or successful claim of a property right over a parcel is annotated in an official register. It thus provides an indefeasible title if this is correctly included in the register as the last one[11]. The second system consists in the recording of all the instruments related to a parcel of land, thus the validity of

[8] J. JANCZYK, *An Economic Analysis of the Land Title Systems for Transferring Real Property*, 6 *J. Legal Stud.* 212-33 (1977).

[9] «It is assumed that the degree of title security is equal for a title processed in either the recording or the Torrens system, that is, that the benefits are the same». *Ibid.*, p. 215.

[10] D.A. WHITMAN, *Optimizing Land Title Assurance Systems*, 42 *The George Washington Law Review* 40-66 (1973), pp. 47 ff.

[11] For an account on the use of the Torrens system in the U.S. see B.C. SHICK, I.H. PLOTKIN, *Torrens in the United States: A Legal and Economic History and Analysis of Land-Registration Systems*, Lanham, Maryland, 1978.

a title depends on the proper execution of each instrument and the presence of a valid "chain of title", created by all the recorded documents, which must be ascertained.

According to Janczyk, while both systems provide the same level of title assurance, they have different managing costs and different costs for actually transferring the title: under a recording system the transfer of the title costs twice the cost of the transfer under Torrens system: the «Cook County [whose data were used in the model] could save $76 million by adopting the Torrens system»[12].

The second problem addressed by Janczyk was related to the managing costs of the system and the cost of switching from a recording system to a registration system. The author describes the switching process in the Cook County, to be carried out when a transfer of title takes place:

> «[t]o begin the process of registering a parcel, the Cook County Abstract Department collects information on all of the recorded and unrecorded property rights that have been asserted against it. For the property rights that have been recorded, the Abstract Department must search through all of the *grantor-grantee* and other alphabetical indices in the Recorder's Office to find the set of ownership and other claims for the particular parcel of property. For unrecorded claims such as adverse possession, as well as for a survey of the property, a real estate inspector of the Abstract Department must personally visit the property. Finally, all of this information on re- corded and unrecorded claims is assembled into an abstract […].
> This abstract is then examined by a judge of the Land Title Court to determine the current legal owner of the parcel of property as well as the set of legally valid claims that have been asserted against it. Each transfer of ownership and every property right must fulfill certain statutory conditions to be legally valid. If the judge has any difficulty evaluating these, owing to a lack of either information or legal precedent, he holds a court session. The results of this judicial process are summarized in a decree which states the identity of the current legal owner as well as a description of the validated claims. The decree is sent to the Registrar's Department, where it is typed onto a document called an "Official Certificate," and the property is henceforth considered to be in the Torrens system».

[12] J. JANCZYK, *An Economic Analysis of the Land Title Systems for Transferring Real Property*, cit., pp. 215 ff.

Using the number of real property transfers per year in the analysed county, the author concluded that:

> «[u]sing a social rate of discount of 4%, the present value of the net savings that could be realized by adopting the Torrens system in Cook County is $76 million in 1976 prices. In undiscounted terms this consists of approximately $102 million during the first 40 years and a further savings of $10 million annually, once all of the property in the recording system is registered into the Torrens system»[13].

When the scale of operation – the number of property transfers – is taken into account, Janczyk's analysis predicts that the savings from switching from a recording system to a Torrens systems are positive only when the number of transfers are higher than a certain threshold[14].

While Janczyk's contributions were the first to use the analytical framework of law & economics to address the issues related to the transfer of property, they ultimately consist in a financial analysis of the cost of different title assurance mechanisms, without any further investigation about the relationship between the legal rules governing the process of transferring real property and the resulting structure of transaction costs related to this process.

There is obviously a strong connection between the conveyancing – the legal process of transferring ownership – and the registration or recording of the title of ownership. The first relates to the prerequisites, the nature, and the requirements of the agreement transferring the ownership title: what if the seller is not the actual owner – acquisition *a non domino*? Acquiring from someone in possession is enough for taking a valid title? Is consent enough or consent also requires some other legal elements like material transfer of possession and/or title transfer registration? Title recording or registration, on the other hand, is related to the means for creating legal certainty about ownership. Both elements have an impact on the structure of transaction costs involved in the transfer of a property right over a given resource.

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[13] *Ibid.*

[14] J.T. JANCZYK, *Land Title Systems, Scale of Operations, and Operating and Conversion Costs*, 8 *J. Legal Stud.* 569-83 (1979) (accessed: October 2015), pp. 582-83.

A classical contribution, by Baird and Jackson, addresses these problems from the perspective of information economics:

> «[i]n a world where information is not perfect, we can protect a later owner's interest fully, or we can protect the earlier owner's interest fully. But we cannot do both. A rule that prevents an individual from becoming an owner if there is a thief in his chain of title protects present owners at the expense of would-be owners. (This cost is felt not only by prospective purchasers, but also by those who want to sell what they have, for they may find it difficult to convince prospective purchasers that they in fact own what they claim to own.) Alternatively, legal rules could ensure that we purchase assets without any risk of existing, superior claims. A rule that purchasers from a person in possession take good title provides such assurance by making other information (such as previous transfers of the property) largely irrelevant»[15].

The authors did not make an analysis of different title assurance methods in the transfer of property, but instead, and more abstractly, compared the economic and informational consequences of the presence or the absence of a recording – or registration – system. The differences between a land and a deeds registration system, indeed, only affect the consequences of registration: the second provides *evidence* of ownership rights, while the first *establishes* ownership[16].

In the case of what they call a possession system, a valid title is transferred if the purchaser acquired ownership from the possessor. This system has some costs:

> «[a] possession-based rule, for example, impedes temporal divisions of ownership of property. Under such a rule, one who acquires a remainder interest cannot easily take possession of the underlying property and ensure that his rights are superior to the rights of anyone else to whom his transferor might also try to convey the remainder interest. Moreover, a possession-based rule of title makes the tracing of claims for

[15] D. BAIRD, T. JACKSON, *Information, Uncertainty, and the Transfer of Land*, 13 *J. Legal Stud.* 299 (1984), p. 300.

[16] *Ibid.*, p. 308, nt. 25.

> more than one generation difficult and hence increases the risks of a thief in the chain of title»[17].

Another possibility is represented by what Baird and Jackson refer to as a filing system:

> «[p]ublic recording of interests in property may reduce the uncertainty concerning the transfer of property, because they contain virtually all relevant information, apart from that imparted by possession itself. Filing systems may also aid in the tracing of transfers over time and hence, compared to a possession-based system, reduce the risk of non-consensual transfers at the same time that they provide assurance to subsequent purchasers that they can in fact acquire good title»[18].

These two types of system are suited for different kinds of property: filing systems are more efficient for valuable property when it is not transferred often, when it can be shared between many individuals, when its physical use is important or when the underlying property right is abstract and unembodied: «[r]eal property is the paradigm of property for which a filing system of title claims is superior»[19], but other examples include intellectual property like patents or copyright[20]. This is due to the fact that maintaining a recording system is inherently costly and when transactions occur often a possession system is deemed more efficient, like in the case of money[21].

Recording and possession systems are not mutually exclusive, as there are obviously intermediate examples, like security interests.

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[17] *Ibid.*, p. 303.

[18] *Ibid.*, p. 303.

[19] *Ibid.*, p. 304.

[20] «Rather than try to change an abstract right into tangible property and rely on possession, one can also go in the other direction and keep the right abstract, but rely on a title-recording system. Under such a regime, rights to a patent, a copyright, or a trademark would turn on whether one's interest was properly noted in a public file». *Ibid.*, p. 311.

[21] «Money is the polar opposite of real property in that it is the best example of property that is not suitable for a filing system. Even though a $20 bill can be identified precisely by serial number, a recording system would be hopelessly impractical, as would a rule that did not recognize the paramount rights of someone who acquired it in good faith». *Ibid.*, p. 306.

As noted before there is a strong link between the conveyancing and the title assurance system. With reference to this relation the statutes regulating the filing systems in the United States are classified into three basic categories: "notice", "race-notice" and "race" statutes[22]. Under a "notice" statute a subsequent purchaser «with neither record notice nor actual or constructive knowledge of an existing property claim at the time of his purchase transaction prevails over a prior purchaser holding such existing property claim»[23]. Under a "race-notice" statues, instead, in order to prevail over a previous purchaser, a subsequent purchaser must record her claim first. Under a "race" system «knowledge gained outside the filing system (or from possession) is irrelevant. The first party to file – and hence the first party to give record notice – wins»[24].

An example may clarify the point: suppose O conveys her property to A and, at a latter time, to B. Under a purely "notice" statute if B doesn't have actual knowledge of A's acquisition B wins even if she records the deed after A. If A records *before* B's acquisition (which makes B to have constructive knowledge) or B has actual knowledge of it, then A prevails. Under a purely "race" statute always prevails who records first, regardless her knowledge. Under a "race-notice" statute, in order to prevail B must register first and have no actual knowledge of A's acquisition.

These different statutes relate the purchaser's knowledge to claims priority, and, «in general, there seems little to be gained from incorporating knowledge into priority rules with respect to most types of property»[25]. Moreover, «[i]ntroducing knowledge into the ordering of priorities […] creates insoluble circular priority problems when more than two parties are involved, one has knowledge of a prior interest, and another does not»[26].

More generally it must be also stressed the fact that under a purely "race" statute controversies are solved by taking into account objective

[22] *Ibid.*, pp. 312 ff.
[23] *Ibid.*, p. 313.
[24] *Ibid.*, p. 313.
[25] *Ibid.*, p. 317.
[26] *Ibid.*, p. 316.

facts easily ascertainable, while investigating the subjective element of the involved parties increases the administrative costs of the rule. On the other hand, these higher costs may be seen as a way for rewarding good faith in market transactions.

In the United States "race" statutes are very rare, the major exception being Louisiana, while the most common is the "race-notice" statute.

In a series of subsequent articles transaction cost economics has been used to address the problem of which title assurance system is more efficient, in terms of contributing to allocate it to the higher valuing users and increasing the value of property[27]. Miceli and his coauthors compared the recording system, under which legitimate claimants – with unrecorded claims – receive title to the land whereas current owners receive a monetary compensation, with the Torrens system, under which current owners who registered their title retain it whereas legitimate claimants are compensated. They concluded that when transaction costs are low,

> «the two land title systems differ only in the division of the surplus arising from the owner/possessor's valuation of the land in excess of its market value. […] Under both systems, the higher valuing user ends up with the land»[28].

On the other hand, in a situation with high transaction costs,

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[27] T.J. MICELI, C.F. SIRMANS, *The Economics of Land Transfer and Title Insurance*, 10 *The Journal of Real Estate Finance and Economics* 81-88 (1995); T.J. MICELI, C.F. SIRMANS, *Torrens vs. Title Insurance: An Economic Analysis of Land Title Systems*, 11 *Illinois Real Estate Letter* 1 (1997); T.J. MICELI, C.F. SIRMANS, G. TURNBULL, *Title Assurance and Incentives for Efficient Land Use*, 6 *European Journal of Law & Economics* 305 (1998); T.J. MICELI, H.J. MUNNEKE, C.F. SIRMANS ET AL., *Title Systems and Land Values*, 45 *Journal of Law and Economics* 565-82 (2002) (accessed: October 2015); T.J. MICELI, C.F. SIRMANS, J. KIEYAH, *The Demand for Land Title Registration: Theory with Evidence from Kenya*, 3 *American Law and Economics Review* 275-87 (2001); T.J. MICELI, J. KIEYAH, *The Economics of Land Title Reform*, 31 *Journal of Comparative Economics* 246-56 (2003).

[28] T.J. MICELI, C.F. SIRMANS, *The Economics of Land Transfer and Title Insurance*, cit., p. 85.

> «the system that awards the land to the possessor is generally more efficient because it entails lower transaction costs of arriving at the efficient assignment of the land. Indeed, if transaction costs are high enough, the system that awards the land to the true owner may not end up giving the land to the party that values it the most»[29].

In other words, the authors conclude that Pareto-efficiency, in a situation of high transaction costs, pushes for the Torrens system.

With regard to the value of land, according to Miceli's analysis the Torrens system, *ceteris paribus*, leads to higher values, even though this is inversely related to the level of transaction costs[30].

3. A European Approach to the Economics of Land Registers

In the law & economic literature there seems to be a consensus over the following points: a) title assurance systems are generally useful tools in lowering transaction costs; b) registration systems seem to work better than recording systems, both because they have lower managing costs and because, especially in situations with high transaction costs, they tend to lead to more efficient results in terms of higher land values and in allocating resources to higher valuing users.

The contributions so far analysed were centered on the American legal system, whose conveyancing is historically linked with the English common law tradition. Within the civil law tradition there are two major ways of dealing with the transfer of immoveable – real – property: 1) a simple contract (consensual principle) according to which the agreement between the seller and the buyer is enough for transferring ownership – typical examples of this approach are the French or the Italian legal systems, where contracts have *in rem* effect –; 2) contract plus transfer (*traditio*), according to which the contract will only have obligatory effects – obligation to transfer – and must be followed by

[29] *Ibid.*, p. 87.

[30] «[H]igher transaction costs associated with the registration, or Torrens, system tend to reduce the value of land in that system relative to the recording system». T.J. MICELI, H.J. MUNNEKE, C.F. SIRMANS ET AL., *Title Systems and Land Values*, cit., p. 579.

another independent act, the transfer of possession, which must be registered in a land register[31].

Still, European contributions have been mostly using the theoretical framework developed by American scholars. For instance, Arruñada classifies the French title assurance method as a recording (of deeds) system, whereas the German and the Spanish ones are classified as registration (of rights) systems[32]. The English system before the Land Registration Act of 1925 is instead classified as a "privacy" system, where contracts have *in rem* effects on third parties even if kept secret[33].

The author is more problematic with regard to the comparative efficiency of the recording and the registration system:

> «the social choice of title system is given by the net balance of the following effects: recording causes underassurance of higher-value land, while registration causes crowding out and overassurance of lower-value land. The net balance of these effects and, therefore, the optimal title system are determined by the relative cost-effectiveness and pricing of titling (including private title assurance services). Recording triggers underassurance of land that, given its greater value, would be efficiently registered. Conversely, crowding out happens under a system of registration because its higher price leads owners to keep private some lower-value land that otherwise would have been recorded. Similarly, some midvalue land that would have been recorded is registered, causing overassurance. These results are quite general, as they hold, with minor differences, for situations with and without private assur-

[31] See L.M. MARTÍNEZ VELENCOSO, *Transfer of Immoveable and Systems of Publicity in the Western World: An Economical Approach*, 6 *Journal of Civil Law Studies* (2013), <http://digitalcommons.law.lsu.edu/jcls/vol6/iss1/5> (accessed: October 2015), p. 157. The Spanish legal system adopts a mixed system, contract plus *traditio*, but these two acts are causally linked: «distinctive characteristic of the Spanish system is the causal relation between the contract and the transfer of title. If the contract is invalid, the transmission of ownership cannot be said to have taken place».

[32] B. ARRUÑADA, *Property Enforcement as Organized Consent*, 19 *Journal of Law, Economics, & Organization* 401-44 (2003), <http://www.jstor.org/stable/3555110> (accessed: October 2015), p. 408; see also B. ARRUÑADA, *Titling Systems*, in B. ARRUÑADA, *Encyclopedia of Law and Economics*, New York, 2014.

[33] B. ARRUÑADA, *Property Enforcement as Organized Consent*, cit., pp. 406 ff.

> ance services, land improvements, and information asymmetry between sellers and buyers of land»[34].

The presence of these trade-offs leads the author to the following conclusion:

> «[m]ore generally, this paper confirms that the choice of an efficient titling system is an empirical issue that cannot be solved on purely theoretical grounds»[35].

A similar theoretical framework is used by Martínez Velencoso, who classifies title assurance methods into two categories: registration of deeds and registration of titles[36]. With regard to their comparative efficiency the author agrees with Arruñada on the impossibility for a theoretical approach to individuate an optimal solution regardless an empirical analysis of the actual cost imposed by each system.

The terminology and the classification used by these authors may be misleading from a comparative perspective. The European recording (or deed registration) system does not entirely overlap with the U.S. recording system. At the operational level only a recording system under "race" recording statutes will produce the same effect of a European recording system. In other words, in order to compare the legal rules governing the transfer of property and the title assurance methods we need to take into account the external effects of deeds and their relation with the type of land registration system used. Thus we could classify this phenomenon into four categories: 1. deeds have *in rem* effects on third parties even if secret (England before 1925); 2. deeds have *in rem* effects on everyone if recorded or only on those who have actual knowledge of them if unrecorded (U.S. with "notice" or "race-notice" recording statutes); 3. deeds have *in rem* effects on third parties only if recorded (French, Italy, U.S. with "race" statutes); 4. rights *in rem* are

[34] B. ARRUÑADA, N. GAROUPA, *The Choice of Titling System in Land*, 48 *Journal of Law and Economics* 709-27 (2005), <http://www.jstor.org/stable/10.1086/430493> (accessed: October 2015), p. 724.

[35] *Ibid.*, p. 725.

[36] L.M. MARTÍNEZ VELENCOSO, *Transfer of Immoveable and Systems of Publicity in the Western World*, cit., p. 173 ff.

acquired with both a deed and its registration (Germany, Spain, Torrens and title registration systems).

The third and the second system differ only with regard to the role of knowledge and good faith, and the second introduces some administrative costs in managing the rule (investigating the subjective element) for rewarding *bona fide* purchasers.

The fourth system, instead, provides greater protection from the "wild deed" problem, better illustrated by an example: suppose O conveys her property to A, who doesn't register, and A later conveys it to B. O, after A's acquisition, conveys the same property to C. Under the second system the recorded deed between A and B is "wild" and does not provide to C constructive notice of A's acquisition from O, and thus C will prevail over B. Under the third systems C will prevail for the break in the chain of titles. Under the fourth system, instead, such an occurrence is made more improbable by the conveyancing process, since the registration is a constitutive element of A's ownership.

Moreover, while the first, classified by Arruñada as a "privacy" system, is deemed mostly obsolete and inefficient, the second and the third ones are inherently complex, since the deed registration process does not provide protection to the problems related to reconstructing the chain of title from the sequence of deeds between grantors and grantees, an error-prone task. This is a reason why, especially in the United States, a market for title insurance policies emerged, which is due to the fact that the costs of the system complexity is beared by the private parties involved in the transaction. In a title registration system, the fourth one, the reconstruction of the chain of title is instead part of the registration process, and its costs are part of the managing costs of the system, a public service. In other words, while recording systems externalize part of their administrative costs on the private parties involved in a conveyance, a title registration system may be seen as part of the public enforcement of property rights. Apart for considerations pertaining the overall comparative efficiencies of the analyzed models, and from the standpoint of transaction cost economics, there are strong arguments for considering title registration systems as having a greater impact on the reduction of transaction costs in the transfer of real property.

4. Titling in Less Developed Countries

We have seen that European authors are more prudent than American scholars in assessing the comparative efficiency of different titling systems. Nevertheless there seems to be a consensus on the economic soundness of title assurance systems to increase the value of resources and the social welfare by allocating them to higher valuing users. Another economic reason of titling systems is the use of the land as a collateral for getting access to credit, a way to increase agricultural productivity.

These are the foundations on which international institutions, and specifically international financial institutions, have been adopting policies that, aimed at the reduction of poverty and the economic advancement of developing countries, promote and incentive the adoption of legal institutions for recognizing and securing property rights on land. On the other hand an analysis of the consequences of the introduction of a titling system in a legal environment in which it did not spontaneously emerged may be seen as a testbed for empirically assessing these very foundations.

Clear definitions of individual property rights is described as a prerequisite for the access to land by poor people[37], and crucial to the establishment and the enforcement of property rights that can be traded and exchanged is the presence of a land titling system:

> «[t]he fact that informal rights cannot be traded and exchanged beyond the community is one of the reasons why, in many historical circumstances, they have been replaced by more formalized property rights

[37] «Access to land and the ability to make productive use of such land is critical to poor people worldwide. In addition to its direct effect on house- holds' welfare and their strategies for risk coping, together with other factors, the system of land tenure will also affect the scope for the emergence of markets and the structure of governance at the local level». These are the open words of K. DEININGER, *Policies for Growth and Poverty Reduction. A World Bank Policy Research Report*, 2003, <http://documents.worldbank.org/curated/en/2003/06/2457830/land-policies-growth-poverty-reduction> (accessed: October 2015), p. 1. Moreover, «[i]ndividual assignment of property rights is the arrangement that provides the greatest incentives for efficient resource use». *Ibid.*, p. 28.

> once resource values have increased sufficiently to justify the cost of doing so. The main mechanisms for formalizing rights have been land registries and title documents, which not only provide protection from challenges to individuals' rights, but also make transferring these rights easier, and therefore allow the emergence of secondary financial instruments, such as mortgages, that are built on the existing rights system»[38].

International development institutions like the World Bank are aware of the complexity, and the costs, of the creation of such a system:

> «[t]he formalized western land registration systems are basically concerned with identification of legal rights in support of an efficient land market and do not adequately address the more informal and indigenous rights to land found especially in developing countries where tenures are predominantly social rather than legal. Therefore, traditional cadastral systems cannot adequately provide security of tenure to the vast majority of the world's low income groups or deal quickly enough with the scale of urban problems. A new and innovative approach is found in the continuum of land rights (including perceived tenure, customary, occupancy, adverse possession, group tenure, leases, freehold) where the range of possible forms of tenure is considered as a continuum from informal towards more formal land rights and where each step in the process of securing the tenure can be formalized»[39].

Nevertheless some experiences proved to be encouraging in demonstrating the relationship between title registration, more efficient use of the land and greater access to credit:

> «[t]he Armenia Title Registration Project (FY99) has successfully promoted private sector development by implementing a transparent, parcel-based, easily-accessible, and reliable registration system for land and other immoveable property[40].

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[38] *Ibid.*, p. 33.

[39] K. DEININGER, C. AUGUSTINUS, S. ENEMARK ET AL., *Innovations in Land Rights Recognition, Administration, and Governance. A World Bank study*, 2010, <http://documents.worldbank.org/curated/en/2010/01/13088520/innovations-land-rights-recognition-administration-governance> (accessed: October 2015).

[40] WORLD BANK, *Land Policy: Securing Rights to Reduce Poverty and Promote Growth*, 2009, <http://documents.worldbank.org/curated/en/2009/07/11479948/land-policy-securing-rights-reduce-poverty-promote-growth> (accessed: October 2015), p. 3.

> The Kyrgyz Republic Land and Real Estate Registration Project (FY00) supported the development of markets for land and real estate for more intensive and effective use by introducing reliable property rights registration. The primary beneficiaries of this project have ranged from private farmers to small- and medium-sized enterprises and urban property owners. […]
> The number of mortgages, which were virtually nil prior to the Project, reached a cumulative annual total of 22,400 in the year 2002, the first year when most of the registration offices were operational, and doubled to 45,300 in 2007»[41].

And similar results were reported for other developing countries. Nonetheless some scholars have been criticizing the World Bank policies. For instance Migot-Adholla, with his coauthors, while assessing the result of the land registration programs in Kenya during the second half of the last century, concluded that possession of land titles was not perceived, by land owners, has being «very beneficial relative to the costs of [its] acquisition (including transaction costs)»; that «land disputes are frequent even after the systematic and comprehensive registration and titling of land»; that «possession of title was weakly related to the occurrence and terms of formal credit loans»; and that there seems to be «no evidence to suggest that possession of current registration or title deed is related to land productivity as measured by crop yields»[42]. The conclusion is that

> «governments must consider whether adjudication, registration, and titling of land, which is costly, is the best way to spend scarce resources. Expenditures targeted toward the improvement of rural infrastructure, health and education, and agricultural technology will not only improve the welfare of the rural population, but may also serve to increase the demand for land titles»[43].

[41] *Ibid.*, p. 3.

[42] F. PLACE, S.E. MIGOT-ADHOLLA, *The Economic Effects of Land Registration on Smallholder Farms in Kenya: Evidence from Nyeri and Kakamega Districts*, 74 *Land Economics* 360-73 (1998), <http://www.jstor.org/stable/3147118> (accessed: October 2015), p. 371.

[43] *Ibid.*, p. 372.

Migot-Adholla did not object the basic foundations of the World Bank policies for substituting indigenous – and mostly communal – land tenure systems, seen as a constraint on agricultural development, with individualized, formalized, and western based tenure systems. Indeed also the indigenous systems seem to evolve toward individualization of property rights under given circumstances:

> «the contrast between indigenous African tenure and Western property rights systems should be perceived not in terms of opposite extremes but as points along a continuum between communal rights systems and privatized rights systems. In response to population pressure, agricultural commercialization, and technological change, indigenous African tenure systems have moved along that continuum in the direction of greater individualization of land rights»[44].

Generally, taking into account localized and socially accepted rules leads to more positive results:

> «[f]ormal land tenure registration systems, particularly titling, tend to be expensive, badly tailored to local contexts and inaccessible for poor groups. Yet, the innovation documented in recent land tenure reform in Ethiopia, Mozambique and Niger shows how more enabling pro-poor frameworks can be developed. These and the localised initiatives documented in Uganda, Namibia and South Africa, illustrate more appropriate and more flexible land tenure systems, which build on positive aspects of socially embedded rules and on group organisation. In Ethiopia, Niger, Mozambique and Uganda, verbal as well as written evidence is accepted for registering land rights. In both Mozambique and Niger, collective rights may be registered and build on the principle of collective management of common property resources. Collective management options appear to be significant in reaching some of the poorest

[44] S.E. MIGOT-ADHOLLA, P. DN B.B. HAZELL, F. PLACE, *Indigenous Land Rights Systems in Sub-Saharan Africa: A Constraint on Productivity?*, 5 *The World Bank Economic Review* 155-75 (1991), <http://documents.worldbank.org/curated/en/1991/01/439369/indigenous-land-rights-systems-sub-saharan-africa-constraint-productivity> (accessed: October 2015), pp. 171-72.

and most disadvantaged groups, such as pastoral groups in the Niger case»[45].

On the other hand, importing individualized and formalized property right systems has been linked, by a growing number of scholars, to the so called «land grabbing» phenomenon. «Land grabbing» is defined as large-scale acquisitions of land in developing countries by companies or individual, which lead to land concentration in the hand of the few[46].

While some have been stressing the complex relationship between «land grabbing» and formalized land tenure and titling systems[47], others see the registration of individualized property rights as a prerequisite that makes land concentration possible[48]. This process strongly resembles the enclosure movement Europe in general, and England specifically, have been experiencing throughout the medieval and modern times[49].

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[45] N. KANJI, C. TOULMIN, D. MITLIN ET AL., *Innovation in Securing Land Rights in Africa: Lessons from Experience*, *International Institute for Environment and Development*, 2006, <http://pubs.iied.org/12531IIED.html> (accessed: October 2015), p. 11.

[46] For an introduction to «land grabbing» see L. COTULA, *The International Political Economy of the Global Land Rush: A Critical Appraisal of Trends, Scale, Geography and Drivers*, 39 *The Journal of Peasant Studies* 1-32 (2012); L. COTULA, *The Great African Land Grab? Agricultural Investments and the Global Food System*, London, 2013.

[47] P. HIRSCH, *Titling Against Grabbing? Critiques and Conundrums Around Land Formalisation in Southeast Asia*, *Paper presented at International Conference on Global Land Grabbing*, April 2011, <http://www.future-agricultures.org/papers-and-presentations?task=doc_download&gid=1283> (accessed: October 2015).

[48] See, for instance, S. LASTARRIA-CORNHEIL, *Who Benefits From Land Titling? Lessons From Bolivia and Laos*, *International Institute for Environment and Development, Gatekeepers Series*, 2007, <http://pubs.iied.org/pdfs/14553IIED.pdf> (accessed: October 2015); P. SAMRANJIT, *Land Grabbing and Impacts to Small Scale Farmers in Southeast Asia Sub*, *Paper series of the Conference Programme «Land Grabbing. Perspectives from East and Southeast Asia»*, 2015, <http://www.iss.nl/fileadmin/ASSETS/iss/Research_and_projects/Research_networks/LDPI/CMCP_60-Samranjit.pdf> (accessed: October 2015); M.B. DWYER, *The Formalization Fix? Land Titling, Land Concessions and the Politics of Spatial Transparency in Cambodia*, 42 *The Journal of Peasant Studies* 903-28 (2015).

[49] For a critical view see F. CAPRA, U. MATTEI, *The Ecology of Law. Toward a Legal System in Tune with Nature and Community*, San Francisco, Cal., 2015, chap. 3.

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TRANSFER OF IMMOVEABLE 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 19th 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[1]. 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*[2],

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[1] For an introduction to the development of the Austrian private law system see K. ZWEIGERT [H. KÖTZ], *Introduction to comparative law*, Oxford (3rd ed., 1998), 157-166; F. GSCHNITZER, *Allgemeiner Teil des bürgerlichen Rechts*, Vienna-New York (2nd ed., 1992), 9-28.

[2] T. 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 trough 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

though strongly affected by the natural law jurisprudence and by Kant's moral philosophy[3].

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[4] 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

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the Roman law through interpretation and fictitious constructions. In this regard, see F. GSCHNITZER, *Allgemeiner Teil*, 10.

[3] A. GAMBARO [R. SACCO], *Sistemi giuridici comparati*, Torino (2nd ed., 2002), 395.

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

more rights than he himself has[5]. 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 the fact that the owner has vested him with authority to dispose (*Verfügungsbefugnis*)[6]. 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[7].

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[8]. 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[9]. 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,

[5] 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 H. KLANG, in ID. (edited by), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Vienna (2nd ed., 1950), vol. II, § 442, 383.

[6] G. IRO, *Bürgerliches Recht. Sachenrecht*, Vienna-New York (3rd ed., 2008), vol. IV, 116.

[7] G. 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 W. FABER, *National Reports on the Transfer of Movables in Austria*, in W. FABER [B. LURGER] (edited by), *National Reports on the Transfer of Movables in Europe*, Munich (2008), 60.

[8] G. IRO, cit., 113.

[9] G. IRO, cit., 114; B. ECCHER, in H. KOZIOL [P. BYDLINSKI, R. BOLLENBERGER] (edited by), *Kurzkommentar zum ABGB: Allgemeines bürgerliches Gesetzbuch*, Vienna (2nd ed., 2007), § 424, 388. Same principle applies in case of annulment of the expropriation order (OGH SZ 69/39 = ÖJZ 1996/135 (EvBl)).

a valid title at the time of the transfer of the goods and before the declaration of its ineffectiveness[10]. 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 (*schuldrechtlicher Rückgabeanspruch*)[11]. 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 adquirendi*.

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[12]. On the one hand, there was the German Empire which during the end of the19th century and the beginning of the 20th 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 19th 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

[10] G. IRO, *ibidem*.

[11] K. SPIELBÜCHLER, in P. RUMMEL (edited by), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Vienna (3rd ed., 2000) vol. I, § 424, 630.

[12] The preparatory work for the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) started in 1881, but the Code became effective only on the 1st of January 1900. The Austrian Civil Code was enacted on the 1st 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.

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[13].

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 necessary for a valid ownership transfer. This is qualified as *modus adquirendi* and it consists of giving to the transferee the power to exercise an *erga omnes* power over the asset. Some scholars consider the *modus adquirendi* 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 adquirendi* 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[14].

This different understanding of the concept of *modus adquirendi* divided the scholars as for the transferor's possibility to change his mind. According to those scholars who argue that the *modus adquirendi* consists of the disposition agreement and delivery, the transferor is entitled *ex uno latere* to retain the ownership right in spite of the delivery alt-

[13] T. MAYER-MALY, cit., 168.

[14] G. IRO, cit., 114; T. KLICKA, in M. SCHWIMANN [B. VERSCHRÄGEN] (edited by), *ABGB. Praxiskommentar*, Vienna (3rd ed., 2005) vol. II, § 425, 219; B. ECCHER, in H. KOZIOL, P. BYDLINSKI, R. BOLLENBERGER, 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 H. KLANG, in ID., cit., § 425, 306.

hough the parties did not agree upon retention of title clause. On the other hand, scholars who identify the *modus adquirendi* 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 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[15].

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[16], 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)[17].

Finally, one has to underline that as for movable goods, the requirement of the *modus adquirendi* is fulfilled by means of the delivery under ABGB §§ 426 *et seq*. As for immoveable goods, the acquisition of the physical possession of the asset is not necessary but the acquisi-

[15] G. IRO, cit., 115.

[16] G. IRO, *ibidem*; H. KLANG, in ID., cit., § 425, 306.

[17] H. KLANG, in ID., cit., § 425, 307.

tive 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[18].

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[19].

The land register consists of the main register (*Hauptbuch*) and the collection of documents (*Urkundensammlung* – GBG § 1)[20], the map of the real estate (*Grundbuchsmappe*), the list of landowners (*Personenverzeichnis*), the list of addresses where the immoveables 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 §

[18] K. SPIELBÜCHLER, in P. RUMMEL, cit., § 431, 642.

[19] The Austrian State administrates other registers for specific immoveable 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, cit., 40; F. GSCHNITZER, *Österreichisches Sachenrecht*, Vienna-New York (2nd ed., 1985), 33-34. For a short introduction to the history of the land register, see F. GSCHNITZER, *Sachenrecht*, cit., 27.

[20] The *Urkundensammlung* contains all the documents that served as basis for the registration of an immoveable. It is a secondary source of information, since the entry into register constitutes the main source of information concerning the immoveable. However, in case the information in the documents cannot 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 F. GSCHNITZER, *Sachenrecht*, cit., 29-31.

6): 1) folio A (*Gutsbestandblatt 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 immoveable, '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 (AGAG § 11)[21]. 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[22].

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 immoveable 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))[23]. 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

[21] G. IRO, cit., 43; F. GSCHNITZER, *Sachenrecht*, cit., 32-33.

[22] G. IRO, cit., 50-51; F. GSCHNITZER, *Sachenrecht*, cit., 36-37.

[23] G. IRO, cit., 48.

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 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.*)[24].

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)[25]. 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[26]. They can be classified as follows:

1) 'principle of registration' (*Eintragungsgrundsatz*);
2) 'principle of public access' (*Öffentlichkeitsgrundsatz*);
3) 'principle of reliability' (*Vertrauensgrundsatz*);

[24] G. IRO, cit., 49.

[25] F. GSCHNITZER, *Sachenrecht*, cit., 35.

[26] F. GSCHNITZER, *Sachenrecht*, cit., 37.

4) 'priority principle' (*Prioritätsgrundsatz*);
5) 'speciality principle' (*Spazilitätsgrundsatz*);
6) 'principle of claim' (*Antragsgrundsatz*);
7) 'principle of legality' (*Legalitätsgrundsatz*).

As said above, the land register acquires remarkable relevance as for the constitution, transfer, and termination of any right *in rem* over immoveable goods. The entry into the land register indeed, fulfils the requirement of *modus adquirendi* necessary to the ownership transfer of an immoveable (GBG § 4)[27]. 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[28].

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))[29].

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. Specifi-

[27] G. IRO, 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 F. GSCHNITZER, *Sachenrecht*, cit., 28.

[28] 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.*). G. IRO, cit., 51-52; F. GSCHNITZER, *Sachenrecht*, cit., 39.

[29] G. IRO, cit., 52; F. GSCHNITZER, *Sachenrecht*, cit., 40.

cally, 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 immoveable. However, one has to underline that 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 immoveable. 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 immoveables (GBG § 15), is another exception to the 'principle of speciality'[30]. However, if the intention of the parties is to register an entry for a specific part of the registered immoveable, 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*)[31]. In the respect of the 'principle of speciality', if an immoveable 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 immoveable is joined to another immoveable the burden will extend to the new whole property[32].

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

[30] F. GSCHNITZER, *Sachenrecht*, cit., 38; E. FEIL, *Österreichisches Grundbuchsrecht. Eine systematische Darstellung*, Vienna-New York (1972), 78 and 149.

[31] G. IRO, cit., 50; E. FEIL, cit., 81 *et seq*.

[32] G. IRO, cit., 51; F. GSCHNITZER, *Sachenrecht*, cit., 37.

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 registration (GBG § 49) are examples of autonomous intervention of the court in the modification of the entries into the land register[33].

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[34].

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[35]. Specifically,

[33] G. IRO, cit., 58; E. FEIL, cit., 101.

[34] G. IRO, cit., 58-59; F. GSCHNITZER, *Sachenrecht*, cit., 38; E. FEIL, *ibidem*.

[35] The Austrian territory is divided in parcels. Each parcel, which is the smallest real estate unit, is registered under a unique identifying 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

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 immoveable 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)[36]. 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)[37]. 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[38]. Moreover, case law emphasises that good faith has to exist from

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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 R. MANSBERGER [G. MUGGENHUBER], *Geo-Data Infrastructure for Land Management in Austria*, FIG Working Week 2004, <http://www.fig.net/pub/athens/papers/ts10/TS10_3_Mansberger_Muggenhuber.pdf>, and E. 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>.

[36] G. IRO, 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 F. GSCHNITZER, *Sachenrecht*, cit., 41.

[37] G. IRO, cit., 124.

[38] 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 F. GSCHNITZER, *ibidem*.

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[39]. In addition, it is worth noticing that under GUG § 3 all the deleted entries are stored in an accessory register (*Verzeichnis der gelöscheten Eintragungen*). Therefore, the acquirer of a right over an immoveable has a duty to control every part of the land register in order to be deemed in good faith and then to receive full legal protection[40]. 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[41]. Specifically, ABGB § 443 provides that a person who did not examine the register may be affected by his gross negligence[42]. 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 immoveable. The rank in the land

[39] OGH SZ 67/37 = NZ 1994, 136.

[40] G. IRO, cit., 44; F. GSCHNITZER, *Sachenrecht*, cit., 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 F. GSCHNITZER, *Sachenrecht*, cit., 42; G. IRO, cit., 124.

[41] G. IRO, cit., 49-50 and 124; H. KLANG, in ID., cit., §§ 431-446, 348.

[42] 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 F. GSCHNITZER, *Sachenrecht*, cit., 41.

register is assigned by the court in charge to keep the land register (*Grundbuchsgericht*) 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 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)[43]. 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[44]. The 'cession of priority' can be in the form of either an ordinary registration (*Einverleibung*) or of a precautionary registration (*Vormerkung*)[45]. 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

[43] E. FEIL, cit., 50-51.

[44] 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 E. FEIL, cit., 53.

[45] E. FEIL, *ibidem*.

from the mortgagor[46]. 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 between the contracting parties[47]. 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))[48].

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[49]. 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[50]. 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

[46] E. FEIL, *ibidem*.

[47] G. IRO, cit., 55; E. FEIL, cit., 52-53.

[48] E. FEIL, cit., 54-55.

[49] G. IRO, cit., 194.

[50] G. IRO, cit., 195; F. GSCHNITZER, *Sachenrecht*, cit., 47.

the mortgage has been cancelled from the register[51]. 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 mortgage of a specified outstanding sum (GBG § 53)[52]. 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))[53]. After the elapse of this term, the court of the land register will delete *ex officio* the 'annotation of the ranking' (GBG § 57(2))[54]. 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))[55]. 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))[56]. 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[57]. As seen for the own-

[51] G. IRO, cit., 196; E. FEIL, cit., 56.

[52] K. SPIELBÜCHLER, in P. RUMMEL, cit., § 440, 666.

[53] M. HINTEREGGER, in M. SCHWIMANN, cit., § 440, 266; K. SPIELBÜCHLER, in P. RUMMEL, *ibidem*.

[54] 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 F. GSCHNITZER, *Sachenrecht*, cit., 49; E. FEIL, cit., 62; M. HINTEREGGER, in M. SCHWIMANN, *ibidem*; K. SPIELBÜCHLER, in P. RUMMEL, cit., § 440, 667.

[55] M. HINTEREGGER, in M. SCHWIMANN, *ibidem*.

[56] E. FEIL, cit., 75; F. GSCHNITZER, *Sachenrecht*, cit., 48. See also OGH SZ 39/106 = ÖJZ 1967/210 (EvBl).

[57] M. HINTEREGGER, in M. SCHWIMANN, cit., 267. See also OGH SZ 70/4 = WoBl 1997/242.

er, 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 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[58].

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[59]. 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)[60]. 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 regis-

[58] G. IRO, cit., 57.

[59] K. SPIELBÜCHLER, in P. RUMMEL, cit., § 440, 666.

[60] 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 H. KLANG, in ID., cit., § 440, 382-383.

ter is *prior in tabulatione potior in iure*[61]. 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 adquirendi*. 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 immoveable from one and the same seller, the buyer who first entered the contract in the register would be the one to acquire possession and hence to be considered as the legitimate owner[62]. Even if he was the last to acquire the immoveable, 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[63]. Moreover, he is entitled to bring a claim both for compensation and for the physical restitution of the immoveable *vis-à-vis* the transferee who was authorised to register his concurrent right. The latter will be obliged to return the immoveable in case he was aware of the agreement between the transferor and the plaintiff[64] and he (with or without the transferor's complicity) aimed at harming the plaintiff's acquired right[65]. 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,

[61] F. GSCHNITZER, *Sachenrecht*, cit., 44.

[62] H. KLANG, in ID., cit., § 440, 382.

[63] M. HINTEREGGER, in M. SCHWIMANN, cit., § 440, 269.

[64] 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 suspicious 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 immoveable as guarantee. See M. HINTEREGGER, in M. SCHWIMANN, cit., § 440, 270-271.

[65] M. HINTEREGGER, in M. SCHWIMANN, cit., § 440, 270.

if the plaintiff has acquired against payment whereas the defendant gratuitously[66]. 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 immoveable is not left without protection against the person whose entry into the register unlawfully harms his title. GBG § 61 and § 122 provide 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[67]. 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[68].

[66] M. HINTEREGGER, in M. SCHWIMANN, *ibidem*.

[67] F. GSCHNITZER, *Sachenrecht*, cit., 42.

[68] F. GSCHNITZER, *Sachenrecht*, cit., 43.

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 immoveable. 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 immoveable only if the court rules in his favour[69].

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 registration. Therefore, if a third party has demanded the registration of his right *in rem* to the immoveable 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[70]. 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 cancelation of the third parties title (GBG § 63)[71].

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 immoveable (*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

[69] F. GSCHNITZER, *Sachenrecht*, cit., 53.

[70] G. IRO, cit., 124-125; F. GSCHNITZER, *Sachenrecht*, cit., 43.

[71] G. IRO, cit., 126; F. GSCHNITZER, *Sachenrecht*, cit., *ibidem*.

(*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)[72]. 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 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 immoveable[73].

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[72] G. IRO, cit., 127; F. GSCHNITZER, *Sachenrecht*, cit., 44.

[73] G. IRO, *ibidem*.

HUBER G.], *Geo-Data Infrastructure for Land Management in Austria*, FIG Working Week 2004, <http://www.fig.net/pub/athens/papers/ts10/TS10_3_Mansberger_Muggenhuber.pdf>; MAYER-MALY T., *Kauf und Eigentumsübergang im österreichischen Recht*, ZNR 12 (1990), 164-168; RUMMEL P. (edited by), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Vienna (3rd ed., 2000), vol. I; SCHWIMANN M. [VERSCHRÄGEN B.] (edited by), *ABGB. Praxiskommentar*, Vienna (3rd ed., 2005) vol. II.

TRANSFER OF IMMOVEABLE PROPERTY IN GREECE

Anastasios Moraitis[*]

1. General Information

The main rule for the transfer of ownership of immovables in Greek law is found in art. 1033 of the Greek Civil Code (Astikós Kódikas; *henceforth*: 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 far as the basic principles of this transfer system are concerned, the principle of distinction applies[1], 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[2]

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[1] For the principle of distinction in the context of the transfer of movables, *see* Georgiades, Property Law (*Εμπράγματο Δίκαιο*), 2nd edition (2010), § 48 nos. 2 *et seq.* [*henceforth*: *Georgiades*, EmprD2, § xxx no. xxx].

[2] For the concept of the *causa* and the distinction between causal and non-causal legal transactions *in rem* in Greek law, *see Georgiades*, EmprD2, § 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

one: unlike the transfer of movable assets under Greek law[3], the transfer of immovables requires a valid *causa*, without which it cannot become legally effective[4]. Finally, the transfer agreement (according to the prevailing opinion, also the underlying *causa*) must be drawn up in a notarial deed (principle of formality) and it is subject to registration (principle of publicity)[5]; 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[6].

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for the transfer of movables – A candidate for European Harmonisation or National Reforms?, 59 *et seq*.

[3] *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*, EmprD2, § 48 nos. 1, 6 *et seq*.; *Spyridakis*, Property Law Vol. B'/1 (*Εμπράγματο Δίκαιο Τόμος Β'/1*), no. 141.1.1 [*henceforth*: *Spyridakis*, EmprD B'/1, no. xxx].

[4] This requirement is not as self-explicit as it appears to be; *see* below under 2.4.

[5] For more information on the specific emanations of the publicity principle, *see Georgiades*, EmprD2, § 2 nos. 15 *et seq*.

[6] *Georgiades*, EmprD2, § 43 nos. 1 *et seq*.; *cf. Filios*, Property Law (*Εμπράγματο Δίκαιο*)4, § 85α B. [*henceforth*: *Filios*, EmprD4, § xxx]; *Papasteriou*, Property Law Vol. II – Ownership (*Εμπράγματο Δίκαιο Τόμος ΙΙ – Κυριότητα*) (2008), § 45 nos. 5 *et seq*. [*henceforth*: *Papasteriou*, EmprD II, § xxx no. xxx].

2.1. Ownership of the transferor

The first prerequisite, the ownership of the transferor (coupled with the authority to dispose of such ownership), 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 μετάγει πλέον ούτινος έχει δικαιώματος*)[7]. However, the rule is not 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 Greek Code of Civil Procedure □Kódikas Politikís Dikonomías; *henceforth*: CPC□). More generally, according to art. 239 CC a transfer by a non-owner is valid, when the actual owner consents to it or, if his consent was not at hand at the time of the agreement, when he subsequently ratifies the transaction[8]. 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*

[7] Áreios Págos (Greek Supreme Court) [*henceforth*: AP] 934/2000, Archío Nomologías (Greek law journal) [*henceforth*: ArchN] 2001, 490 *et seq*.; Court of Appeals [*henceforth*: CA] Chania 178/2005, published in the Athens Bar Association Law Database *Isocrates* [*henceforth*: *Isocrates*]; CA Athens 5707/1997, ArchN 1999, 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, Nomikó Víma (Greek law journal) [*henceforth*: NoV] 1978, 703; CA Athens 5707/1997, ArchN 1999, 194 (195); MCFI Athens 99/1990, Armenópulos (Greek law journal) [*henceforth*: Arm] 1992, 900 (901). *Cf. Papasteriou*, EmprD II, § 45 nos. 17 *et seq.*

[8] For all those cases, *see Georgiades*, EmprD2, § 43 nos. 4 *et seq*.; *Papasteriou*, EmprD II, § 45 nos. 26 *et seq.*

seq. CC[9], or the case of mortgage, where both the mortgagor and the mortgagee may sell the mortgaged land[10]. In any case, it must be noted that Greek law until recently (*see* Part 3.2. below) did not acknowledge the possibility of good faith acquisition of immovable property *a non domino* and restricted it 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 is a minor, 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 occasionally 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 groups or belonging to Greek Muslims who were exchanged with Greek nationals from Turkey during the 1920s, etc.)[11].

2.2. Transfer agreement

The second prerequisite is a transfer (*in rem*) agreement which effects 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" and not "contract", legal doctrine affirms that what is meant is the contract *in rem* for transfer of ownership (apparently under the influence of the German Civil Code, on which the relevant Greek provi-

[9] *Spyridakis*, EmprD B'/1, no. 139.3.1. For cases of indirect representation, *see ibid.*, no. 139.5.2.

[10] *Papasteriou*, EmprD II, § 45 no. 22.

[11] For more details, *see Spyridakis*, EmprD B'/1, no. 139.6; *Georgiades*, EmprD2, § 43 nos. 6, 39 *et seq.*; *Papasteriou*, EmprD II, § 45 nos. 21 *et seq*. *Also see Georgiades*, § 6 nos. 28 *et seq*. for the general restrictions to the authority to dispose under the CC or specific laws.

sions are based)[12]. Greek law follows in this respect the principle of distinction of the personal and the *in rem* contract (*αρχή της διάκρισης της εμπράγματης από την ενοχική 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[13]. However, the two contracts need not necessarily be concluded simultaneously, nor do they have to be included in the same document.

2.3. Notarial form

One of the most important requirements of ownership transfer in immovable property is the necessity of a notarial deed (*συμβολαιογραφικό έγγραφο*). If the transfer contract is not recorded by a notary, the transfer is invalid (art. 159 § 1 CC), since the notarial deed is prescribed by law. The importance of this requirement is reflected in the fact that it is imposed both by the aforementioned rule for the transfer of 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 form 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[14]. This requirement aims at furthering

[12] *Georgiades*, EmprD2, § 43 nos. 31 *et seq*.; *Spyridakis*, EmprD B'/1, no. 139.2.1.; *Papasteriou*, EmprD II, § 45 no. 42. 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 4. 2. below.

[13] *Georgiades*, EmprD2, § 43 no. 24.

[14] *See e.g.* AP 652/2015, NOMOS Online Law Database [*henceforth*: NOMOS]; AP 1566/2001, Chroniká Idiotikú Dikéu (Greek law journal) [*henceforth*: ChrIdD] 2002, 24; AP 132/1971, NoV 1971, 620; AP 601/1971, NoV 1972, 54 (55); *Georgi-*

legal certainty in property relations in land, but also serves a cautionary 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 facilitates proof of the conveyance, 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 (*προσύμφωνο*), the contract granting the option to purchase an immovable in the future (*σύμφωνο προαιρέσεως*), 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.[15].

2.4. Justa causa

The fourth requirement 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[16]. 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 for this purpose, but it may also be a multilateral or unilateral legal transaction; examples include contracts for sale, barter, donation, the so-called "parental grant" (*γονική παροχή*)[17], settlement agreements, or testamentary

ades, EmprD2, § 43 no. 9; *Filios*, EmprD4, § 86. A. 1.; *Papasteriou*, EmprD II, § 45 nos. 67, 73.

[15] *Georgiades*, EmprD2, § 43 nos. 10 *et seq*.; *Papasteriou*, EmprD II, § 45 nos. 75 *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.

[16] *Georgiades*, EmprD2, § 43 nos. 22 *et seq.*; *Spyridakis*, EmprD B'/1, nos. 139.2.5.

[17] 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'

devises with an obligatory effect or even the articles of association of a company (whereby the partner's contribution consists of one or more immovables)[18]. 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 is deemed to never have taken place, the transferor remains the owner and, as such, he can bring the revendication claim (art. 1094 CC) against the transferee[19].

(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 case, the transfer initially took place under a

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25/18.02.1983, as amended; consolidated versions of the Greek laws are available only in online legal databases, such as Isocrates or NOMOS).

[18] *Georgiades*, EmprD2, § 43 no. 19; *Filios*, EmprD4, § 86. B. 1.; *Papasteriou*, EmprD II, § 45 no. 55. 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 [-*author of the abstract*], 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 920/2012, NoV 2013, 148; AP 999/1996, Ellinikí Dikeosýni (Greek law journal) [*henceforth*: EllDni] 1998, 847; AP 1315/1989, Efimerís Ellínon Nomikón (Greek law journal) 1990, 549; CA Larissa 781/2004, Isocrates; CA Athens 6827/1999, EllDni 2000, 479), which nonetheless becomes increasingly accepted in recent legal doctrine; *see Georgiades*, EmprD2, § 92 no. 9; *Spyridakis*, EmprD B'/1, no. 139.3.6. It is also noteworthy that the Greek legislator makes an explicit reference to transfers for security purposes in the new Insolvency Code promulgated in 2007, thus indirectly acknowledging those (art. 37 § 4 IC 2007, law 3588/2007, GGI A' 153/10.07.2007, as amended). *Cf. Filios*, EmprD4, § 257; *Papasteriou*, EmprD II, § 45 no. 55 (Fn. 100).

[19] *Georgiades*, EmprD2, § 43 no. 20; *Spyridakis*, EmprD B'/1, no. 139.2.5. (δ); *Filios*, EmprD4, § 86 B.3.

valid *causa* and it may 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, as in the case of a void contract[20].

2.5. Registration (μεταγραφή)

The fifth requirement of transfer of ownership in immovables, namely registration (or "transcription", as the Greek term would be lit-

[20] For the prevailing view, *see* AP 936/2007, ChrIdD 2008, 23; AP 252/2004, ChrIdD 2004, 704; AP 481/1960, NoV 1961, 227 (228); MCFI (Multi-member Court of First Instance) Athens 99/1990, Arm 1992, 900 (901); Georgiades/Stathopoulos [-*Georgiades*], AK V, Introduction to arts. 1033-1093 no. 37; *Georgiades*, EmprD2, § 43 nos. 21 *et seq.*; *Papasteriou*, EmprD II, § 45 no. 62. 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*)4, § 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 (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 (subsequent) 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 suggests 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 3. 1. [c] below). For the minority opinion, *see Filios*, EmprD4, § 86 B. 2.

erally 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 prevailing view affirms that the transfer contract alone does not even produce *inter partes* effects[21] and the acquirer, until registration has been completed, is deemed to have a mere expectant right of ownership[22]. The law treats registration as an indispensable means of publicity in immovables and qualifies it as an administrative act constituting a *conditio iuris* of the transfer, not as a legal transaction[23]. Being a mere *conditio iuris*, it cannot cure an invalid title from its flaws[24] and, therefore, the registrar is not obliged to register a transfer act when it shows obvious legal defects[25]. 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[26].

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

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

[22] *Spyridakis*, EmprD B'/1, no. 139.2.6. (στ); *Filios*, EmprD4, § 87 B.; *Papasteriou*, EmprD II, § 45 no. 105.

[23] AP 888/77, NoV 1978, 703; *Georgiades*, EmprD2, § 43 no. 33; Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, Introductory observations to arts. 1192-1208 no. 2; *ibid*. [-*Filis*], art. 1198 no. 5. *See, also, Papasteriou*, EmprD II, § 45 nos. 3, 90, 101; *cf. Filios*, EmprD4, § 85α B. I., who considers that contract *in rem* and registration are equal components of the uniform, two-fold transfer concept.

[24] CA Athens 6444/2003, EllDni 2005, 259; Georgiades/Stathopoulos [-*Stathopoulos*], AK VI art. 1192 no. 5; *ibid*. [-*Filis*], art. 1198 no. 5; *Filios*, EmprD4, §§ 87 A, 258 A.

[25] Expert Opinion of the Prosecutor of the Supreme Court no. 7/2007, Efarmogés Astikú Dikéu (Greek law journal) 2008, 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, EllDni 2005, 259 (260 *et seq.*).

[26] 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 3 immediately below.

justifiable legal interest therein, such as the parties to a transfer agreement, acting together or separately, the transferee's creditors, etc.[27]. 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 its conclusion[28]. 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 from the same transferor before him, the first transferee to register his or her title will be the one who acquires ownership (regardless of which conveyance title was concluded first)[29]. 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 cujus* (arts. 1199, 1710, 1846 CC)[30].

[27] *Georgiades*, EmprD2, § 43 no. 26; Georgiades/Stathopoulos [-*Filis*], AK VI, art. 1194 nos. 1 *et seq*.

[28] In an isolated case, the Greek Supreme Court (*Άρειος Πάγος*) affirmed the validity of the registration of a donation contract which had been concluded more than 30 years before (AP 125/1962, NoV 1962, 701 [703]: a contract concluded in 1919 was registered in 1956). *See*, *also*, AP 643/2003, EllDni 2004, 1058 (registration may take place even after the transferor's death); *Papasteriou*, EmprD II, § 45 no. 102.

[29] *Papasteriou*, EmprD II, § 45 no. 96. 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*.

[30] 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*; the justification behind this provision lies in 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 cujus* or another person. Registration in the context of the

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, 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)[31].

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

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*, EmprD4, §86 A., § 87 B.; 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, EllDni 2005, 808 *et seq*.; AP 645/2003, NoV 2004, 34 *et seq*.; AP 942/2000, EllDni 2001, 137; *cf*. CA Athens 5707/1997, ArchN 1999, 194.

[31] 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.

registered, as well, regardless of whether the condition is subsequent or precedent (*cf.* CC art. 1923 on inheritance trusts)[32]; 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[33]. In general terms, all legal acts creating, modifying, 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. 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 a voidable 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*[34]. 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[35]. Furthermore, subject

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

[33] 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".

[34] 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.

[35] 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, sub-

to registration are land 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[36]. The system was introduced for the first time with a statute in 1856, which followed the French system, and it was preserved after the entry into force of the CC in 1946. The personal registry system nowadays is organised and run according to the legislative decree 4201/1961[37] and the royal decree 533/1963[38], as amended, which form part of the various legislative efforts at modernising the system and adapting it to modern needs[39]. 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[40]:

- *Alphabetical registry of owners (γενικό αλφαβητικό ευρετήριο)*
- *Registration book (βιβλίο μεταγραφών)*

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ject 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.

[36] The only exceptions until the introduction of the National Land Registry (*see* Part 3.2. 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).

[37] GGI A' 175/19.09.1961, as amended.

[38] GGI A' 147/21.09.1963, as amended.

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

[40] 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*, EmprD4, § 260.

- *Registry of transactions entries by owner (ευρετήριο μερίδων)*
- *General book of reports (γενικό βιβλίο εκθέσεων)*
- *Expropriations index (ευρετήριο απαλλοτριώσεων)*
- *Mortgage book (βιβλίο υποθηκών)*
- *Attachment book (βιβλίο κατασχέσεων)*
- *Revendication book (βιβλίο διεκδικήσεων)*[41].

The personal character of the registry presupposes a complex system of consultation, while the person consulting it can never be sure that he or she 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 current owner of the particular immovable in question or even the name of any past owner[42]. With that piece of information, the interested person needs to go to the registry office of the district where the immovable lies and to consult the alphabetical registry of 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, forms the object of on-going ownership litigation, etc. 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 reports 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[43].

[41] 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.

[42] 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, with whom the research begins.

[43] *Argyriou*, The Law of the Land Registry: Theory – Case law – Samples (*To Δίκαιο του Κτηματολογίου: Θεωρία – Νομολογία – Υποδείγματα*)3, 2 (*henceforth*: *Ar-*

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 plain fact that transactions in immovables are made publicly known by means of their registration, while the second refers to a specific legal implication of such publicity, namely the question whether an acquirer of property in good faith from a non-owner is protected or not[44]. Contrary to the Land Registry currently being introduced in Greece, 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[45]. Therefore, an acquirer in good faith is in principle[46] 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 that includes the name of the owner of whom the interested party knows, but not whether other, irrelevant persons have registered transfer contracts or other titles on the particular land in question[47], nor can he become informed on an eventual acquisition by acquisitive prescription (which may not neces-

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gyriou, Land Registry3, 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 early on they were deemed by the courts 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, NoV 1957, 121; AP 205/1957, NoV 1957, 775.

[44] *Georgiades*, EmprD2, § 2 nos. 15 et seq.; Georgiades/Stathopoulos [-Stathopoulos], AK VI, Introductory observations to arts. 1192-1208, no. 4.

[45] *Filios*, EmprD4, § 258 A; *Georgiades*, EmprD2, § 2 no. 22.

[46] *See* immediately below for certain exceptions.

[47] 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. *But see*, for the way in which acquisitive prescription is treated under the new Land Registry system and the protection it affords to good-faith acquirers of land, Parliamentary Explanatory Statement on law 2664/1998, 12 (available at http://www.parliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/2664_1998.pdf, last accessed on 1 November 2015); *Argyriou*, Land Registry3, 211 *et seq.*; *Georgiades*, EmprD2, § 45 nos. 19, 26 *et seq*.

sarily be registered). Therefore, the personal registry system can only satisfy the principle of formal publicity[48], 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 (έκτακτη παραγραφή; art. 1045 CC), so that he can determine whether the transferor acquired ownership at least 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[49].

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 to immovable property:

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

(b) Secondly, art. 1202 CC offers a certain degree of protection in case of void transfer agreements: When a void transaction is recognised

[48] And even formal publicity is not satisfyingly served; *Filios*, EmprD4, § 258 B. II.; *Georgiades*, EmprD2, § 2 no. 19.

[49] 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 the respective testaments (if available), if the lot of land in question is eventually inalienable or burdened by construction restrictions, etc.; *see Filios*, EmprD4, § 258 B. II.

[50] *Spyridakis*, EmprD B'/1, no. 139.4.1.; *Georgiades*, EmprD2, § 43 no. 35; *Filios*, EmprD4, § 88 B α).

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[51].

(c) Perhaps the most important group of exceptions is that regulated in 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 decision becomes *res judicata* 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[52]. 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[53]. Alt-

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

[52] *Georgiades*, EmprD2, § 43 no. 36; *Spyridakis*, EmprD B'/1, no. 139.4.2.; *Papasteriou*, EmprD II, § 45 no. 111.

[53] Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, arts. 1203-1204, no. 5; *Spyridakis*, EmprD B'/1, no. 139.4.2.; *but see Filios*, EmprD4, § 264 E., who claims that

hough 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[54].

The claimant in an action for avoidance may achieve further protection prior to the point in time set by art. 1204 CC, either by enforcing 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 or she was in good faith, since he could and should have consulted all entries relevant and not simply the transfer title in the registration book[55].

(d) Finally, arts. 1962 *et seq*. CC also protect persons who acquired ownership or another right *in rem* from a person (inaccurately) 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

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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*.

[54] *Georgiades*, EmprD2, § 43 no. 36 Fn. 57 (with further references); *Spyridakis*, EmprD B'/1, no. 139.3.10. *in fine*; Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, arts. 1203-1204, no. 3.

[55] 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 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.

or revocation of the inheritance certificate under the terms of arts. 1965 *et seq*. CC[56].

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[57]. Therefore, the Greek legislator sought to change this intricate and complicated system; although the first efforts go back to the end of the 19th century[58], a more sophisticated and organised effort was initiated in the mid-1990s with the laws 2308/1995[59] and 2664/1998[60], which were amended with a series of subsequent laws, such as the laws 3127/2003[61], 3481/2006[62] and 4164/2013[63]. The National Land Registry is organised and managed, under the supervision of the Ministry for Environment, Energy and Climate Change, by the company "Ethiko Ktimatologio ke Hartografisi A.E. – EKHA S.A. (National Cadastre and Mapping Agency S.A.)"[64].

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[56] *Filios*, EmprD4, § 88 B. β); *Spyridakis*, EmprD B'/1, no. 139.4.3.; *Georgiades*, EmprD2, § 43 no. 5.

[57] *See Kousoulas*, The law of the Land Registry – The legal evaluation of "land cataloguing" (law 2308/1995) (*Το δίκαιο του Κτηματολογίου – Η νομική θεώρηση της «κτηματογράφησης» [N. 2308/1995]*), 9 *et seq*.; *Argyriou*, Land Registry3, 7; Georgiades/Stathopoulos [-*Stathopoulos*], AK VI, Introductory observations to arts. 1192-1208, nos. 1, 6.

[58] *Gazis*, The Land Registry and the land estate books (*Το Κτηματολόγιο και τα κτηματικά βιβλία*), NoV 1992, 1171 *et seq*.

[59] GGI A' 114/15.06.1995.

[60] GGI A' 275/03.12.1998.

[61] GGI A' 67/19.03.2003.

[62] GGI A' 162/02.08.2006.

[63] GGI A' 156/09.07.2013. The legal framework of the Greek Land Registry is complemented with a series of decisions of the Executive Board of the Greek Organisation of Land Registry and Mappings, ministerial decrees and circular letters by EKHA S.A.; for an overview of those, see http://www.ktimatologio.gr/aboutus/Pages/LqYyvusGBh2JgNdw.aspx (in Greek) (last accessed on 1 November 2015).

[64] The National Land Registry was initially under the jurisdiction of the Greek Organisation of Land Registry and Mappings (GOLRM; *Οργανισμός Κτηματολογίου και*

The transition from the old to the new system is carried out on a step-by-step basis[65] 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[66]; following those steps,

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Χαρτογραφήσεων Ελλάδας, *ΟΚΧΕ*), but the Minister of Environment, Spatial Planning and Public Works was empowered to cede certain prerogatives of the GOLRM to "Ktimatologio A.E." (art. 1 law 2664/1998). The GOLRM was abolished with art. 1 law 4164/2013, its competences were transferred in full to "Ktimatologio A.E." and the latter was also renamed to "National Cadastre and Mapping Agency S.A.".

[65] *Argyriou*, Land Registry3, 134 *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 – 3rd Panhellenic Congress of the Civil Lawyers' Association, 41 (43 *et seq.*).

[66] The legal framework of the Land Registry (the law 2308/1995 in particular) provides a complicated and elaborate process of declaration of all rights in real property by the respective owners or other title holders, which must be conducted according to 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 irrebuttable legal 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 arisen in the meantime. For more information, *see Argyriou*, Land Registry3, 9 *et seq*., 124 *et seq.*, 161 *et seq*., 307 *et seq.*, 857 *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 συνταγματικότητά του*), Arm 2000, 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*), Ιόnios Epitheórisi tu Dikéu (Greek law journal) [*henceforth*: IonEpDik] 2001, 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 της υποβολής των αρχικών δηλώσεων μέχρι τις πρώτες εγγραφές]*), Arm 1999, 785 *et seq.*; *Magoulas*, Land Registry entries – The correction of the first incorrect entries (Κτηματολογικές εγγραφές – Η διόρθωση των πρώτων ανακριβών εγγραφών)2, 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 law 2664/1998 (*Οι δυνατότητες διόρθωσης προδήλων σφαλμάτων των κτηματολογικών εγγραφών με βάση το τροποιημένο άρθρο 18 Ν. 2664/1998*), NoV 2006, 1627 *et seq*.

the old Registration Offices (*υποθηκοφυλακεία*) are replaced by the new Land Registry Offices (*κτηματολογικά γραφεία*). According to data provided by "EKHA S.A.", by the end of 2007 94 Land Registry Offices, covering a total area of 7.561.000 hectares and documenting 5.866.000 land property rights, were fully operational. The next phase, spanning the period 2008-2011, focused on completing land cataloguing and setting up the Land Registry Offices at least in the capital cities of the 52 Greek prefectures; the so-called "107 regions" phase included 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[67]. In March 2012, EKHA S.A. presented a business plan for the cadastral survey of the remaining areas that had not been included in the previous land cataloguing projects; as of 2014, EKHA has begun implementing it and the current phase is scheduled to be completed by 2020[68]. In recent years the completion of the Land Registry has suffered serious setbacks and delays as the result of the financial crisis and the scarcity of available funds.

The critical differences between the old and the new registration systems mainly consist in three points[69]. First, the Greek Land Registry (*Εθνικό Κτηματολόγιο*) is land-based, each land parcel is assigned a specific number (National Land Registry Code Number – *Κωδικός Αριθμός Εθνικού Κτηματολογίου, ΚΑΕΚ*), while the relevant charts and plans are updated on a regular basis. Second, the principle of substantial publicity is served, especially through the (rebuttable) presumption of accuracy of the registrations made in the Land Registry[70]. Third, the

[67] *See* http://www.ktimatologio.gr/cadastralsurvey/Pages/kuUtbigTQbkVTDd.aspx (in Greek) (last accessed on 1 November 2015).

[68] *See* http://www.ktimatologio.gr/aboutus/Pages/htSwFsW1ELgXfYD8.aspx (in Greek) (last accessed on 1 November 2015).

[69] *Argyriou*, Land Registry3, 4 *et seq*.; *see also Georgiades*, EmprD2, § 91 no. 9; *Filios*, EmprD4, §§ 266; *Doris*, Land cataloguing…, IonEpDik 2001, 7 *et seq*.

[70] 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

National Land Registry aims at serving multiple purposes, since it gathers 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[71]; the Land Registry is planned to 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 others are new (such as the protection of good faith acquirers), or even innovative (such as the principle of openness):[72]

- *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 a non domino in good faith)*
- *Principle of openness, meaning 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 (*κτηματολογικό φύλλο*) concerning each immovable[73]. The books and constituent parts of the new Land Registry system are the following[74]:

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the Land Registry, *see Filios*, EmprD4, § 274; *Georgiades*, EmprD2, § 91 nos. 20 *et seq*.

[71] *Argyriou*, Land Registry3, 133; *Doris*, Land cataloguing…, IonEpDik, 2001, 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…, NoV 1992, 1174.

[72] Art. 2 law 2664/1998; *Argyriou*, Land Registry3, 129 *et seq*.; *Georgiades*, EmprD2, § 91 nos. 9, 20; *Filios*, EmprD4, § 266 Γ.

[73] *See* art. 12 law 2664/1998 for the acts that are registered in the Land Registry Books.

[74] Art. 3 § 2 law 2664/1998.

- 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 in many respects[75]. It 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 law 2664/1998, as amended), form an irrebuttable legal 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 law 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[76]. 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

[75] 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 (mainly ownership, but also mortgages, mortgage annotations) or other restrictions on the authority to dispose (attachments, etc.) which were not duly registered during the cataloguing process; acquisitive prescription of land under the new system, etc. *See*, *e.g.*, *Argyriou*, Land Registry3, 161 *et seq*., 261 *et seq*., 301 *et seq*.; *Filios*, EmprD4, §§ 268 *et seq*., 276.

[76] *Filios*, EmprD4, § 274; *Georgiades*, EmprD2, § 91 no. 21.

good faith having acquired from the owner featured in the Land Registry 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 or she did acquire for consideration, if he or she 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 erroneously featured owner/transferor he only has a claim *ex* unjustified enrichment and eventually also tort (art. 13 law 2664/1998, as amended)[77].

4. Special Issues

4.1. Costs of the transfer of ownership

As far as the costs of the transfer altogether are concerned, there is no comprehensive legal regulation of 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[78]. In the past each party was required by law to hire a lawyer, when the transaction value exceeded certain limits; since 1 January 2014 representation of the parties by a lawyer is no longer re-

[77] *Filios*, EmprD4, § 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*.

[78] Georgiades/Stathopoulos [-*Filis*], AK IV, art. 1194 no. 19. For a detailed overview of the various categories of costs of registration as of 2009, *see Konstantinou*, Transcription Offices – National Land Register (*Υποθηκοφυλακεία – Εθνικό Κτηματολόγιο*)4, *passim*.

quired by law[79], but especially the buyer will usually need one in view of the title check that must be conducted ahead of the conveyance. If a party decides to engage a lawyer, the minimum lawyer's fees are determined as a percentage of the value of the transaction value stated in the transfer contract; this price usually coincides with the so-called "objective value" of the immovable[80]. The lawyers' fees rates range from 1% of a contract value up to 44.000 Euro to 0,01% for transaction values over 60 million Euro (arts. 73 *et seq.*, Annex II of the Lawyers' Code)[81]. Apart from that, the buyer's lawyer may charge additionally the control that he performs in the registry, so as to ascertain the legal status of the property.

With regard to notarial fees, those are usually borne by the buyer. Notarial fees consist of a standard deed fee of 20,00 Euros plus a percentage of the transaction value ranging from 1% (for up to 120.000 Euro) to 0,10% (over 20 million Euro) (art. 40 Notaries' Code[82]; art. 1 Ministerial Decree 111376/11.01.2012[83]), as well as standard fees for

[79] The statutory obligation to be represented by a lawyer in land conveyances was gradually abolished pursuant to law 4093/2012 (Middle-term Programme 2013-2016 and other provisions), GGI A' 222/12.11.2012, Para. ΙΓ΄, sub-para. ΙΓ.1 art. 8.a.

[80] 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; in the past, the nominal value was usually lower than the commercial value of the land, but in the great majority of cases the transfer contract always stated the respective objective value of the immovable sold, even if the buyer paid a higher price (actual value). However, since the outbreak of the Greek financial crisis and the ensuing government measures, it has become usual that the objective value is higher than the market value of the respective lots of land. In any case, all costs, fees, dues and taxes are calculated in principle on the basis of the value written in the contract. The Greek Supreme Court has long held that the indication in the contract of a price other than the actual one does not render the conveyance *per se* invalid (although it may affect the transferor's claim for the actual sale price); AP 656/2014, NOMOS; AP 1320/2011, NOMOS; AP 601/1971, 20 NoV 54 (55); AP 161/1999, NoV 48, 1406. *See Georgiades*, EmprD2, § 43 no. 16; *Spyridakis*, EmprD B'/1, no. 139.5.1.

[81] Law 4194/2013 (Lawyers' Code of Conduct), GGI A' 208/27.09.2013, as amended.

[82] Law 2830/2000, GGI A' 96/16.03.2000, as amended.

[83] GGI B' 13/11.01.2012.

the issuance of deed copies, etc. Notarial fees are subject to periodic review by Joint Decision of the Ministers for Justice and for Finance and Economics. Legal and notarial fees are also subject to VAT at the current rate of 23%.

The persons involved in real estate transactions must also pay a series of taxes and other dues: 1) Immovable transfer tax: Land conveyances for consideration concluded after 1 January 2014 are subject in principle to a 3% transfer tax (usually born by the buyer), calculated on the basis of the objective value of the land (or the price stated in the contract, if this is higher than the objective value)[84]. 2) Immovable surplus value tax: This tax is imposed on the capital gains resulting for the seller out of the conveyance; the taxed surplus value consists in the difference between the acquisition price that the seller initially paid and the price at which he sells the land. The resulting difference is taxed at 15% for the sum exceeding 25,000 Euro; the law contains detailed provisions on the determination of the respective prices, applicable depreciation rates, etc.[85]. 3) Value added tax: 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) after 1 January 2006, is subject to the VAT rate currently applicable (23%)[86]. The VAT is calculated on the difference between the construction costs and the sale price; in principle the constructor has to pay it, but the VAT costs are usually shifted, in whole or in part, to the buyer and thus affect the purchase price. In those cases where a land

[84] Art. 4 *et seq*. law 1587/1950, GGI A' 294/22.12.1950, as amended (last amended with art. 11 § 2 law 4223/2013, GGI A' 287/31.12.2013; prior to the latest amendment, the tax rate was 8% for the first 20,000 Euro of value and 10% for the value of the land exceeding this sum. *Also see* law 1078/1980, GGI A' 238/14.10.1980, as amended, for certain exemptions from the transfer tax (such as the first acquisition of a residential immovable).

[85] Arts. 41, 43 law 4172/2013 (Income Tax Code and other provisions), GGI A' 167/23.07.2013, as amended; also see Circular Letter by the Ministry of Finance Nr. 1251/05.12.2014, further specifying the modalities of the surplus value tax. This tax entered into force on 1 January 2014, but beginning on 1 January 2015 it was suspended until 31 December 2016 in order to stimulate the currently struggling real estate market in Greece; *see* art. 90 law 4316/2014, GGI A' 270/24.12.2014.

[86] *See* arts. 6, 19, 21 law 2859/2000, GGI A' 248/07.11.2000, as amended.

conveyance is subject to VAT, the seller is usually a professional and, therefore, no surplus value tax is imposed, since all professionals are taxed at a rate of 26% on their profits[87].

Finally, the fee paid to the registrar for the registration of the transaction is also calculated as a percentage ranging from 3‰ to 15‰ of the contract value, depending on the transaction type; moreover, the registering party has to pay standard fees for the issuance of the registration certificate and copies thereof, if needed[88]. Since 2013 in certain cases the transferor has to hire a civil engineer who shall attest to the fact that the property to be transferred is not in violation of the building legislation[89]. No equivalent duty is imposed on the buyer, but he or she may wish to hire a civil engineer in order to have the technical aspects of the property examined, as well as matters such as the eventual classification of the building as a protected edifice that may not be altered or demolished, whether the property is subject to expropriation, etc. If a real estate agent is involved, the market practice has set the fee at approximately 2% of the actual or the contract sale price (plus 23% VAT on the realtor fees), but diverging agreements are always possible; it is also almost standard practice that the buyer pays the realtor fees[90].

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[87] *Seimenis*, Taxes currently in force on land conveyances for consideration (6 April 2015) http://www.forologikanea.gr/news/posoi-foroi-metabibaseos-apo-epaxthi-aitia-uparxoun-simera/ (in Greek) (last accessed on 30 July 2015). For detailed information on the taxation, *inter alia*, of land conveyances, *see* the website of the Athens Accountants Association, http://www.lsa.gr/portal/ (in Greek) (last accessed on 30 July 2015).

[88] 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, and para. 2 of the joint Decrees of the Minister of Finance and the Minister of Justice 100132/22-22.8.1996, GGI B' 721/1996 and 23664, GGI B' 341, 2005, as amended. The actual fees are determined by reference to the transaction type and the objective value of the immovable and they are subject to review by Ministerial Decisions.

[89] Art. 3 law 4178/2013, GGI A' 174/08.08.2013.

[90] 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 30th, 2015), which provides *inter alia* that the agency fees are to be borne by both parties, although this is not followed in practice.

In the midst of the financial crisis that has hit Greece since 2010, a number of tax reforms have affected *inter alia* the real estate market. The taxation of real property has not yet been finalized, since according to the latest Memorandum of Understanding signed between the Greek government and its creditors on 19 August 2015 the Greek government is under a duty to re-examine the taxation of land conveyances and by September 2016 align all property assessment values with market prices, effective January 2017[91]. The precise measures to be taken have not yet (as of October 2015) been determined, but tax raises and the elimination or restriction of advantageous tax treatments are commonly included among the proposed tax reforms to be implemented starting in the autumn of 2015[92].

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 field the requisite of publicity in property relations is served by registration. However, delivery is not deprived of practical relevance[93]:

- To begin with, it is advisable to take delivery the soonest possible after conclusion of the contract, so as to enhance protection against

[91] Memorandum of Understanding between the European Commission, acting on behalf of the European Stability Mechanism, the Hellenic Republic and the Bank of Greece, detailing the economic reform measures and commitments associated with the financial assistance package, p. 9 (http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/01_mou_20150811_en.pdf; last accessed on 1 November 2015). By January 2017, the Greek government must also cross-check all ownership interests against the individual information listed in the Land Register. Also see law 4336/2015, GGI A' 94/14.08.2015.

[92] *Marina Founta*, Everything is about to change in real property taxation, http://news247.gr, 16 September 2015 (in Greek); *Marios Christodoulou*, Tax raises in real estate to come – Conveyances through parental grants, inheritance and gifts to become more expensive, (http://www.bankingnews.gr, 15 September 2015 (in Greek).

[93] *Georgiades*, EmprD2, § 43 nos. 27 *et seq*.; *Spyridakis*, EmprD B'/1, no. 139.2.7.; *Papasteriou*, EmprD II, § 45 nos. 12 *et seq*., 113.

the possibility of a defective title (e.g. the term for acquisitive prescription [arts. 1041 *et seq*. CC] begins when obtaining possession of the land; possession is also required for 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).
- However, delivery prior to registration is not only advantageous for the buyer: in the context of a contract of sale, the risk of accidental destruction or deterioration passes to the transferee under art. 522 CC already upon delivery, i.e. occasionally before ownership, depending on the case. The passing of the risk (and hence delivery) is also relevant for the seller's liability in the event of material defects or lack of conformity.

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 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, is 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[94].

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.) under certain conditions: the defendant in the execution proceedings must not challenge those or, when he does challenge them, the claimant must 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 levied[95].

4.4. Insolvency

The Insolvency Code of 2007 (law 3588/2007[96]; 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

[94] 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).

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

[96] GGI A' 153/10.07.2007.

been effected 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[97] 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[98]. Such possibility to register may be affirmed 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 Commercial Code (now obsolete), which imposed specific terms for the registration of mortgage titles in case of insolvency, but was not maintained in the new IC[99].

[97] As well as 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).

[98] *See* (for the law previously in force) CA Athens 9855/1978, NoV 1980, 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.

[99] *See* CA Athens 9855/1978, NoV 1980, 787, which adopts the view that art. 539 ComC is not analogously applicable, as being too specific and exceptional.

TRANSFER OF IMMOVEABLE PROPERTY IN BELGIAN LAW

Vincent Sagaert[*] *and Alexis Lemmerling*[**]

1. Transfer of immoveable property

1.1. Consensual system

The sale of an immoveable (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[1] 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"[2]. 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.

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[1] Meaning: a sale.

[2] 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, B. LURGER (ed.), *Rules for the transfer of movables. A candidate for European harmonization or national reforms?*, München, 2008, 9-46.

In consequence, transfer of ownership belongs to the essential features of a sales agreement[3].

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, postpones the transfer of ownership until the moment of the signing of the notarial sales deed. This is also the moment at which the purchase price is paid and the buyer takes effective possession of the premises, as well the moment on which the liability for the risk of the premises is transferred to the buyer.

The legal theory thus provides that the ownership is transferred immediately when the 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

[3] H. DE PAGE, A. MEINERTZHAGEN-LIMPENS, *Traité élémentaire de droit civil belge*, Brussels, 1975, IV n° 21.

to third parties – within four months after the agreement comes into existence. This certain date is usually given by signing a notarial deed[4]. 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[5], 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 has been fulfilled[6].

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, 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[7]. These taxes are diminished if the property is bought by a professional buyer who re-sells the property within some delay after the purchase.

The public Offices on Soil Pollution[8] 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 compliance with obligations arising from public law 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 of

[4] 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.).

[5] Article 32.4° of the Belgian Code on Registration Taxes.

[6] Article 32-33 Code on Registration taxes.

[7] Article 44 of the Code on Registration Taxes.

[8] 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.

compliance with the soil pollution requirements, and the notarial deed can only be concluded once these obligations have been complied with.

Also the municipal Town Planning Departments will have to intervene in the Flemish Region before concluding a private deed. The Flemish Town Planning Code[9] obliges the seller to mention certain information from Register of Plans and Permits in the private deed[10]. If such information is not yet available at the moment of the signing of the said deed, a condition regarding the obtaining of this information will have to be inserted in the deed.

2. Mortgage Register

2.1. Basic principles

Although the transfer of immoveable 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[11]. 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[12]. This means that a private deed must be authenticated before the transfer of ownership can be made enforceable towards third parties in good faith with competing rights

[9] Decree of 15 May 2009, published in the Official Belgian Bulletin on 20 August 2009.

[10] Article 5.2.5 of the Codex.

[11] Article 1 Mortgage Act.

[12] Article 2 Mortgage Act.

and that the intervention of the public notary is mandatory to this purpose[13].

The Mortgage Register is a deeds register, not only a title register. All deeds presented to the Mortgage Registrar are entirely copied[14]. 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 immoveable property. There is no similar register in Belgium for movable goods.

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 immoveable 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 immoveable to B and afterwards A sells the same immoveable to C, the latter will prevail if he is the first to register the transfer in the Mortgage Register and if he did not know and ought not to know that the immoveable had already been sold to B.

It is questionable whether creditors can be considered as third parties. For instance: A sells an immoveable property to B, and A is de-

[13] 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*).

[14] Copying is now organised by computer scan, but until only a few years ago by handwriting.

clared 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[15]. In the same sense, a creditor seizing an immoveable after its sale but before the transcription of the sale, must not take into account the sales agreement either (article 1577 Judicial Code).

Given the importance of the registration in the Mortgage Register, the public notary, when charged with drawing up a new sales deed, will have, as the first task, to search 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 one month after the signing of the said deed[16]. The Mortgage Registrar shall then register the deed within one month[17]. Afterwards, upon the request of the notary involved, the Mortgage Registrar sends a new certificate mentioning the transcription of the sales deed to the said notary. On the basis of this certificate, the notary is notified that the sales agreement has become effective in relation to third parties and he can close the file.

The Belgian Mortgage Register may be seen as 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

[15] See on this debate: E. DIRIX, *Faillissement en lopende overeenkomsten en*, *Rechtskundig Weekblad* 2003-04, 207.

[16] Article 2 *in fine* Mortgage Act.

[17] Article 126 Mortgage Act.

even not entitled to verify the validity of the agreement between parties. The Mortgage Registrar is obliged to register all deeds which formally meet the required criterion in order to be considered able to transfer property rights. 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[18]. 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 transferor has acquired ownership, determines the validity of this ownership and thus of the possibility to transfer it.

An example may clarify the point: 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 someone else's property is void)[19]. 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.

The Belgian Mortgage Register is person-based, which means that the Mortgage Register is structured alongside the name of the persons holding a property right on an immoveable property. Hence, searches in the registers can only be effected on the basis of the identity of a person holding rights on the immoveable. 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 then verify the provided information in the Mortgage Register. It is not a surprise that this way of research-

[18] Article 3 Mortgage Act.

[19] Article 1599 C.C.

ing information on real estate has been often criticised[20]: 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 immoveable 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 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 immoveable property are registered in the Mortgage Register.

Only transfers *inter vivos* are transcripted. The transfers *mortis causa* cannot be traced in the Mortgage Register: the transfer of inherited immoveable 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 immoveable 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 effects to 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 immoveable 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[21]. 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 immoveable property. From a legal point of

[20] A. VERBEKE, J. BYTTEBIER, *Onroerende en hypothecaire publiciteit – Organisatie en tegenwerpelijkheid*, *Rechtskundig Weekblad* 1997-1998, 1101.

[21] Article 35 of the Belgian Inheritance Tax Code.

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 immoveables are the object of publicity. The transfer of immoveable 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.

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)[22] to the competent Mortgage Registrar (depending on the situation of the premise)[23]. 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[24]. 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 be-

[22] Article 127 Mortgage Act.

[23] Article 82 Mortgage Act.

[24] 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.

fore 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.

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 immoveable property and subsequently offering a basis for real estate taxation and (ii) creating a proof of ownership for this immoveable property[25]. This explains why it is actually still a division of the Belgian Ministry of Finance[26]. 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 immoveable 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.

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[25] A. VERBEKE, J. BYTTEBIER, *Onroerende en hypothecaire publiciteit – Organisatie en tegenwerpelijkheid*, *Rechtskundig Weekblad* 1997-1998, 1119.

[26] *Federale Overheidsdienst Financiën / Service Public Fédéral Finances*.

Moreover, the Land Register is only updated several months (sometimes years) after the transfer of immoveable 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 immoveable property and a vital tool for the Belgian public notaries drawing up notarial deeds of sale. Besides, there is no other (e.g. 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 have a map. However, the map recorded in the Land Register is not always correct, due to the fact that these maps are merely copied from the notarial deeds. The maps 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 maps are con-

sidered 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 1/20th of the total surface of the land, and cannot give cause to any ground for voidness or compensation whatsoever[27].

Contrary to the Mortgage Register, the Belgian 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[28].

[27] 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 1/20th 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.

[28] 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.

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[29]. They can consult this information 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 immoveable 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 "immoveable 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[30] 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)[31]. Finally, the registration taxes due in relation to a transfer of

[29] Via the tool www.e-notariat.be from the Royal Federation of Belgian Notaries (*KFBN – FRNB*).

[30] Published in the Official Belgian Bulletin (*Belgisch Staatsblad* / *Moniteur belge*) on 22 December 1851.

[31] Published in the Official Belgian Bulletin on 11 October 2002.

immoveables are provided by the Code on Registration and Mortgage Taxes[32]. 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 (dutch version) and (French version), which is the website of the Official Belgian Bulletin.

Bibliographical References

The basic principles about the transfer of immoveable property in Belgium can be found in, amongst others:

DE PAGE H. (and A. MEINERTZHAGEN-LIMPENS), *Traité élémentaire de droit civil. Les principaux contrats (première partie)*, Brussels, 1997, IV; DUBUISSON B., WERY P. (ed.), *La mise en vente d'un immeuble. Hommage au professeur Nicole Verheyden-Jeanmart*, Brussels, 2005, p. 288; TILLEMAN B., FORIERS P.A (ed.), *De koop - La vente*, Bruges, 2002; LIMPENS J., *La vente en droit belge*, Brussels, 1960, 828 p.

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

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

[32] See for this Code: www.fisconetplus.be.

SALE AND TRANSCRIPTION IN ITALIAN LAW

Andrea Pradi[*]

1. The Consensualistic Principle

In the Italian Legal System the whole subject of transfer of property either moveable or immoveable, 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[1] 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 happen. No other formality is required: neither the

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[1] Although many doubts has 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.

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. 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 immoveable, we may find that the number of exceptions to the consent principle is so huge that its validity becomes questionable[2]. With respect to immoveable 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 immoveable. 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 immoveable property in Italy seems to be saying that the transcription in the Land register is necessary.

2. A System of Registration[3]

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

[2] 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*, Milan, 1978.

[3] On that topic the classic work is S. PUGLIATTI, *La trascrizione*, Milan, 1957.

of land static for centuries, made acute the need for a legal instrument that would restore legal certainty to the transfer of immoveable. Next to the principle of consensus, the French legislator already at the time of Revolution joined a publicity system that 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 affected 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[4] in Italy, the registration in Immoveable Property Registers has not constitutive effects, which means that it does determine the transfer of the right.

The function of transcription is primarily to make those facts that are designed for transfer rights over an immoveable 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 immoveable 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[5] for the purpose of protecting third parties in good faith[6] who want to acquire a property right over the immoveable. On the other side, the transcription of a contract which for any reason suffers of defects that may affect its validity

[4] See A. Greco on Austrian System in this book.

[5] *Cassazione*, n. 2445/1993; *Cassazione*, n. 6599/1998; *Cassazione*, n. 10133/2004.

[6] *Cassazione*, n. 5954/1996.

or effectiveness does not give validity to it nor makes it effective, except as we shall discuss later in relation to the effects of transcription[7]. 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 immoveable not burdened by excessive formalities[8] 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[9] pushed toward a system of land registration that had as its object not so much property rights over immoveable but the titles that has caused the transfer: what is transcribed is not the right over the immoveable 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 immoveable 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

[7] See art. 2652 n. 6 e 7 C.C.

[8] See L. FERRI, *Trascrizione*, in F. GALGANO (ed.), *Commentario del Codice Civile Scialoja Branca*, Bologna-Roma, 1995, pp. 2 ff.

[9] 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 immoveable property based on land survey. Its function is to allow the identification of single immoveable property, the assessment of their consistency and their value, primarily for tax purposes.

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, 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*)[10]. 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.)[11] 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[12], 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 state 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

[10] See art. 2657 C.C.

[11] Nowadays, this task is performed by the Agency of the Land ex l. 29\10\1991.

[12] The public officer is personally responsible for the delays and errors of transcription ex art. 2 l. 21.01.1983, n. 22.

whom transcription is purely optional[13], the transcription 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 immoveable 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 immoveable: 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 immoveable 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

[13] 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 c.c.).

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[14] 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 immoveable 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 immoveable property for all purposes, not who bought it first, but who has transcribed for first the act of purchase of such immoveable.

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 C.C. 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[15]. 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[16]. Following this

[14] Except the acquisition by adverse possession. See infra.

[15] See for example G. MIRABELLI, *Del diritto dei terzi secondo il Codice Civile italiano*, Turin, 1889, pp. 130 ff.

[16] See L. MENGONI, *Gli acquisti a non domino*, 3rd ed., Milano, 1975.

reasoning, the first buyer who transcribed for second is left without a real remedy which would allow him to recover ownership over the immoveable. The first 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[17]. 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[18].

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 produces 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 enforce against third party who had purchased from the simulated buyer if the relative

[17] 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.

[18] Cass. 76/82 in *Foro it.* 1982, I, p. 393.

claim for the finding of the simulation has been transcribed before the transcription of purchase of the third party.

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 immoveable property. In 1996 the legislator reformed the Civil Code providing for the transcription of the preliminary contract of sale of immoveable[19]. 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 an effective contract of sale of immoveable 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,

[19] See art. 3 par. 1 Legislative Decree 31.12.2001, n. 669.

as well as the transcription of the judgment granting specific performance of the preliminary contract ex 2932 C.C. 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 immoveable 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 C.C.) 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 immoveable 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 immoveable 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 immoveable 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 immoveable 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 cannot be said that the buyer hold all the proprietary prerogatives related to the immoveable purchased. Before the transcription the seller is indeed still entitled to validly sell the immoveable to a third person. Moreover, the immoveable 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 immoveable would still fall into the bankruptcy proceeding and leave the first buyer without any possibility to recover the immoveable[20].

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 immoveable. 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[21].

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[20] See supra.

[21] See on this point A. CHIANALE, *Obbligazioni di dare e trasferimento della proprietà*, Milano, 1990.

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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' or 'real property'. '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"[1]. Things which have been attached to the land for the use and enjoyment of the land 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"[2]. 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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[1] *Elitestone Ltd.* v. *Morris* [1997] 1 WLR 687 at p. 698

[2] *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 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[3]. 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 could 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 was delegated by the King 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 developed 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 the common law, but not vice versa. Equity's main contributions to land law are twofold:

the courts exercising a chancery jurisdiction were prepared to recognise interests as having been created in equity (hence them being 'equi-

[3] For discussion of the historical development of the chancery jurisdiction, and its interaction with the common law courts, see Baker, *An Introduction to English Legal History* (4th ed., 2002), Ch 6; Maitland, *Equity* (rev. ed. by Brunyate, 1936), Ch 1 & 2.

table interests') if the interests had been created with lesser formality than was necessary to create a formal legal interest; and

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 did not recognise B as having 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) and 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.

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)[4].

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 for value of a legal interest in the land without notice of the equitable interest. Furthermore, this protection would apply to people who acquired the land subsequent to the acquisition by the bona fide purchaser, even if the subsequent owners of the land had not paid value, and even if they were aware of the earlier equitable interest[5].

In the second half of the nineteenth century, a system of land registration was introduced in England and Wales[6], but it was not until the late twentieth century that registration on sale became compulsory for the whole of England and Wales[7].

In the meantime, in 1925, a system of registration of interests in unregistered land was introduced by the Land Charges Act 1925 (now re-

[4] 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.

[5] *Brandlyn v. Ord* (1738) 1 Atk 571 (26 ER 359); *Lowther v. Carlton* (1741) 2 Atk 242 (26 ER 549).

[6] Megarry & Wade, *The Law of Real Property* (5th ed., 1984), 194-195.

[7] Harpum, Bridge & Dixon, *Megarry and Wade's Law of Real Property* (8th ed., 2012), [7-001].

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[8], irrespective of whether the purchaser had notice of the interest[9]. Further, the registration of any interest in the Land Charges Register is deemed, by statute, to constitute actual notice of the interest to all persons[10]. This has the consequence that even if the interest was an equitable interest, which would not previously have bound a purchaser who bought without notice of the interest, it will bind a purchaser of the land even if the purchaser did not in actual fact know about the interest, because the statute deems all persons to have notice of the interests in the Register.

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[11]. In contrast, someone who purchases the land

[8] Section 4, Land Charges Act 1972.

[9] Section 199(1), Law of Property Act 1925.

[10] Section 198, Law of Property Act 1925.

[11] Section 28, Land Registration Act 2002 (hereinafter, "LRA 2002").

for valuable consideration and becomes the registered owner takes free of other preceding interests[12], *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 as a result of registration. The class of overriding interests is limited to the list contained in Schedule 3. Principal amongst them are short legal leases[13], legal easements and profits à prendre[14], and any interest (whether legal or equitable) where the interest holder is in actual occupation of the land at the time it is disposed of to the purchaser[15]. 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[16].

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

[12] Section 29, LRA 2002.

[13] Paragraph 1, Schedule 3, LRA 2002.

[14] Paragraph 3, Schedule 3, LRA 2002.

[15] Paragraph 2, Schedule 3, LRA 2002. See, e.g., *Williams & Glyn's Bank Ltd v. Boland* [1981] AC 487.

[16] For the difference between legal and equitable interests, see previous paragraphs.

Registry, around 85% of titles to land in England and Wales are registered[17].

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 identified 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).

If land is registered, technically legal title to that land can only be transferred by a deed[18], coupled with registration of title in the Land Register[19]. 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[20].

Thus, the Land Register is a register of titles, rather than of deeds, in the sense that it is the fact of registration (rather than the existence of any underlying deeds) that transfers legal title to land. In other words, registration is both constitutive, and conclusive evidence, of title. (It should be noted that it is possible to alter the Register, where the Regis-

[17] See Land Registry, *Annual Report and Accounts 20014/15* (London, TSO, 2006): the coverage of the registered land mass of England and Wales has extended to 85 per cent and completed the registration of our 24-millionth title. To put that in perspective, land registration has existed for years and by March 2005 only 48 per cent coverage had been achieved see. https://www.gov.uk/government/publications/land-registry-annual-report-and-accounts-2014-to-2015.

[18] 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.

[19] Section 27(1) & (2)(a), LRA 2002.

[20] Section 58(1), LRA 2002.

trar has made a mistake or to bring the register up to date[21], but the Register is conclusive until any such change is made.)

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[22]. Again, any defect in this regard does not affect the transfer if the transfer has nonetheless been registered[23]. In this sense, the English system of land transfer is an abstract system, rather than a causal system, although that phraseology 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[24]. The Land Registry can only register legal estates in land[25], 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[26], but this only acts to protect the priority of the interest – it is not constitutive of the interest itself, nor 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[27].

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 is a deed[28]. As is explained above, interests in the unregistered land may have been registered in the Land Charges Register, but

[21] See Schedule 4 to the LRA 2002.

[22] Section 2, Law of Property (Miscellaneous Provisions) Act 1989.

[23] 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.

[24] Section 53, LPA 1925.

[25] Section 2, LRA 2002.

[26] Section 32, LRA 2002.

[27] Section 33(a)(i), LRA 2002.

[28] Section 52(1), LPA 1925.

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 a writing signed by the transferor[29].

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)[30], and failure to do so within two months of the unregistered transfer renders the unregistered transfer void at law[31].

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[32].

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, 7th edn., 2008); R. ROPER (gen. ed.), *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (Lon-

[29] Section 53, LPA 1925.

[30] Section 4(1)(a), LRA 2002.

[31] 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.)

[32] Section 4(1)(c) & (g), LRA 2002.

don, 2005); and E. COOKE, *The New Law of Land Registration* (Oxford, 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.law com.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/.

THE TRANSFER OF IMMOVEABLES IN IRELAND

Una Woods[*]

1. Introduction

In Ireland the transfer of immoveables or 'real property'[1] 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[2], 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[3]. 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.

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[1] 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.

[2] See J.C.W. WYLIE, *Irish Land Law*, 5th ed., Dublin, 2013; F. DE LONDRAS, *Principles of Irish Property Law*, 2nd ed., Dublin, 2011; A. LYALL, *Land Law in Ireland*, 3rd ed., Dublin, 2010; R. PEARCE, J. MEE, *Land Law*, 3rd ed., Dublin, 2011.

[3] See J.C.W. WYLIE, U. WOODS, *Irish Conveyancing Law*, 3rd ed., Haywards Heath, 2005; LAW SOCIETY OF IRELAND, *Conveyancing – Volumes 1 and 2*, 5th ed., Dublin, 2010.

2. Fundamental Features of Irish Land Ownership

2.1. Feudal Tenure

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 the Norman invasion in the 12th century[4]. 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 17th 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 gov-

[4] See A. LYALL, *Land Law in Ireland*, cit., chapter 3 and J.C.W. WYLIE, *Irish Land Law*, cit., chapter 2 for a review of the feudal system of ownership.

ernment and its citizens[5]. 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.

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[6]. 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[7]. 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')[8] 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, 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. A long-standing fundamental feature of the fee simple is that it is freely alienable/transferable. Where testamentary restrictions are imposed on the sale of land held subject to a fee simple estate, these conditions are frequently declared invalid by the courts and severed from the testamentary gift so that it becomes unconditional. In making such a ruling, the courts traditionally relied on the doctrine of repugnancy (which declared a restraint on alienation to be repugnant to

[5] See LAW REFORM COMMISSION, *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004), para 2.01-02.

[6] See A. LYALL, *Land Law in Ireland*, cit., chapters 4, 8, 10 and 11 and J.C.W. WYLIE, *Irish Land Law*, cit., chapter 4.

[7] 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.

[8] These rules favoured the eldest son.

the nature of a fee simple estate)[9] or declared the restraint contrary to public policy[10]. This common law[11] approach, sometimes referred to as the 'rule against inalienability' is now replicated by a statutory rule set out in section 9(4) of the Land and Conveyancing Law Reform Act 2009 which declares that a fee simple remains freely alienable. 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[12]. Further measures were taken by the Land and Conveyancing Law Reform 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 trustees with the power to convey a fee simple estate in the land[13]. A purchaser dealing with two trustees or a trust corporation does not need to be concerned about those holding equitable interests under the trust of land as their interests are 'overreached' on the sale (i.e. their interests become detached from the land and attached to the sale proceeds)[14]. The 2009 Act also prohibits the creation of any new fee tails and converts most existing fee tails into fee simple estates[15].

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')

[9] *Byrne v Byrne* (1953) 87 ILTR 183; *Re McDonnell* [1965] IR 354.

[10] See *Re Dunne's Estate* [1988] IR 155.

[11] The term 'common law' is frequently used to refer to judge-made law.

[12] The Fines and Recoveries (Ireland) Act 1834 and the Settled Land Acts 1882-1890.

[13] S11(6) and s18(1)(a) of the Land and Conveyancing Law Reform Act 2009.

[14] S21 of the Land and Conveyancing Law Reform Act 2009.

[15] S13 of the Land and Conveyancing Law Reform Act 2009.

grants a lease to the lessee (or the tenant) for a fixed term[16] in consideration of rent and subject to certain covenants (i.e. promises contained in a deed)[17]. The lessee is regarded as the leasehold owner and is entitled to exclusive 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[18]. 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 against future owners of the land[19]. The grant of a long lease (for example, a lease for 500 years) gave a

[16] Periodic tenancies may also be created. Such tenancies are frequently created orally and run from week to week or month to month until a notice to quit is served by one party on the other.

[17] See J.C.W. WYLIE, *Landlord and Tenant Law*, 3rd ed., Dublin, 2014.

[18] A lease should be distinguished from a licence agreement which permits the licensee to use or occupy a property. Such an agreement will typically only bind the parties to the agreement and the licensee will not benefit from certain important statutory protections conferred on residential tenants and commercial tenants (see in, particular, the Residential Tenancies Act 2004; the Landlord and Tenant (Amendment) Act 1980, as amended). Occasionally, landlords have attempted to evade these statutory protections by labelling the agreement as a licence and couching it in licence terminology. In determining whether the agreement should be classified as a lease or a licence, the courts will look beyond the label and seek to determine its substantive effect, see *Gatien Motor Co. v Continental Oil Co. of Ireland* [1979] IR 406; *Irish Shell & B.P. Ltd v Costello Ltd* [1981] ILRM 66; *Govenors of the National Maternity Hospital v McGouran* [1994] 1 ILRM 521; *Kenny Homes & Co Ltd v Leonard* [1997] IEHC 230; *Smith v CIE and Irish Rail* [2002] IEHC 103.

[19] 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.

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[20], 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[21]. The most significant contributions of equity to land law was the recognition of the trust and the development of the equitable doctrine of notice[22].

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 al-

[20] A variant of the fee simple estate commonly found in Ireland is the fee farm grant. Although it confers a fee simple estate on the grantee, it creates a leasehold relationship between the grantor and the grantee. Historically, many fee farm grants arose through conversion legislation designed to avoid the expense and inconvenience associated with perpetually renewable leases. In more modern times, fee farm grants were frequently created to avoid the restrictions on enforcing positive covenants affecting freehold land against successors in title to the original transaction. The leasehold relationship created between the fee farm grantor and the fee farm grantee facilitated the enforcement of such covenants against future owners of the land. S12 of the Land and Conveyancing Law Reform Act 2009 prohibits the creation of new fee farm grants, although existing fee farm grants shall remain in force.

[21] See H. DELANY, *Equity and the Law of Trusts in Ireland*, 5th ed., Dublin, 2011.

[22] See A. LYALL, *Land Law in Ireland*, cit., chapter 6 and J.C.W. WYLIE, *Irish Land Law*, cit., chapter 3.

lowed 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[23]. 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 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 *cestui 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 ownership and equitable ownership[24]. 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[25] and eliminated the need to rely on a 'conveyance to uses' to vest legal ownership in the trustee[26].

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 enforceable by the Charities Regulatory Authority[27]. In addition, the law recognises that certain circumstances may give rise to a resulting trust[28] or a constructive trust[29]. For example, a purchase money resulting trust arises if someone contributes the purchase price of land bought in the name of another[30]. In such circumstances, the legal owner is required to

[23] This was not possible in Ireland until the Statute of Wills (Ireland) Act 1634.

[24] The 'use upon a use' was recognised as having this effect in *Sambach v Dalston* (1634) Tothill 168.

[25] S8 of the Land and Conveyancing Law Reform Act 2009.

[26] S62(2) of the Land and Conveyancing Law Reform Act 2009.

[27] See the Charities Act 2009. See also H. DELANY, *Equity and the Law of Trusts in Ireland*, cit., chapter 10.

[28] H. DELANY, *Equity and the Law of Trusts in Ireland*, cit., chapter 7.

[29] H. DELANY, *Equity and the Law of Trusts in Ireland*, cit., chapter 8.

[30] See *C v C* [1976] IR 254; *W v W* [1981] ILRM 202; *McC v McC* [1986] ILRM 1.

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[31].

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[32]. 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/ mortgagee or their solicitor to make enquiries to clarify whether any occupiers of the property have such an interest[33]. 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

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

[32] S86 of the Land and Conveyancing Law Reform Act 2009.

[33] *Northern Bank Ltd v Henry* [1981] IR 1.

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 (i.e. the deeds evidencing ownership) has been registered in the Land Registry or not. Once the title to a property has 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 'title plan') and sets out the owner and certain burdens (e.g. 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[34]. 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[35]. 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 ven-

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

[35] S72(1)(j) of the Registration of Title Act 1964, see *Williams & Glynns Bank v Boland* [1981] AC 487.

dor'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, e.g. a contract for sale, affecting such land in the Registry of Deeds[36]. 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[37].

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 93% of the land mass of Ireland is registered in the Land Registry[38]. Most agricultural land is registered as towards the end of the 19th 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, some valuable land in urban centres, such as Cork and Dublin, remains unregistered. In recent times efforts have been made to extend the registration of title system to the entire country by the passage of legislation which designated certain remaining counties zones of

[36] See A. LYALL, *Land Law in Ireland*, cit., chapter 7 and J.C.W. WYLIE, *Irish Land Law*, cit., chapter 24.

[37] S38 of the Registration of Deeds and Title Act 2006.

[38] See Property Registration Authority, 'Frequently Asked Questions' <http://www.prai.ie/faqs/what-is-the-difference-between-the-land-registry-and-the-registry-of-deeds-2> accessed 8 December 2015.

compulsory first registration[39]. Once land is brought within such a zone, on the next sale of the property[40] the purchaser's solicitor is required to apply for first registration of the title to the property.

The extension of the registered title system to the entire country is seen as essential in making progress towards an electronic conveyancing system[41]. 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 by the Property Registration Authority[42] which has introduced a range of services designed to facilitate the electronic registration of transactions affecting the land register. An obvious component of any eConveyancing system is the introduction of eRegistration. The Registration of Deeds and Title Act 2006 facilitated the introduction of eRegistration by permitting the register and maps to be maintained in an electronic format and providing a statutory basis for electronic communications and dealings with the Registry. The land register and map are now fully digitised and a number of on-line services are available through www.landdirect.ie and www.eRegistration.ie. An eDischarges system was introduced in March 2009 which allows a borrower's bank to apply electronically to the Land Registry to remove a charge from registered land once it has been paid off[43]. Plans are afoot to introduce an eCharges system and, already, it is possible for a charg-

[39] Registration of Title Act 1964 (Compulsory Registration of Ownership) Order 1969 (SI 87/1969); Registration of Title Act 1964 (Compulsory Registration of Ownership) Order 2005 (SI 605/2005); Registration of Title Act 1964 (Compulsory Registration of Ownership) Order 2008 (SI 81/2008); Registration of Title Act 1964 (Compulsory Registration of Ownership) Order 2009 (SI 176/2009); Registration of Title Act 1964 (Compulsory Registration of Ownership) Order 2010 (SI 515/2010). The entire country is now a zone of compulsory first registration.

[40] 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.

[41] See LAW REFORM COMMISSION, *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005), para. 1.06.

[42] The Property Registration Authority was established by the Registration of Deeds and Title Act 2006 to manage the Land Registry and the Registry of Deeds.

[43] Land Registration Rules 2008 (SI 326/ 2008).

ing order in favour of the Health Service Executive to be registered electronically where ancillary State support has been made available to persons in respect of long-term residential care[44]. In addition, in 2015 the Law Society of Ireland (the professional body which represents and regulates solicitors in Ireland) engaged a Canadian Land-Information Services Provider to design and build an eConveyancing system for Ireland.

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.

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[45].

3. Steps in a standard residential conveyance[46]

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

[44] S17(2) of the Nursing Homes Support Scheme Act 2009.

[45] 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). See also J.C.W. WYLIE, *The Land and Conveyancing Law Reform Act 2009: Annotations and Commentary*, Dublin, 2009.

[46] For more detail, see J.C.W. WYLIE, U. WOODS, *Irish Conveyancing Law*, 3rd ed., Haywards Heath, 2005; LAW SOCIETY OF IRELAND, *Conveyancing – Volumes 1 and 2*, 2nd ed., Dublin, 2003.

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[47]. 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 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 title plan 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[48] 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 in a rural location, he or she will check that there is access to a public road and that the services (e.g. 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 emp-*

[47] LAW SOCIETY OF IRELAND, *Guide to Professional Conduct of Solicitors in Ireland*, 2nd ed., Dublin, 2002.

[48] Law Society of Ireland, *General Conditions of Sale*, 2009 Edition.

tor or 'let the buyer beware'[49]. 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 (i.e. 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 Act 2009[50]. It is anticipated that the open contract position will influence future conveyancing practice and that the Law Society will, in due course, recommend that solicitors acting for purchasers should only insist on proof of 15 years title.

[49] When eConveyancing is introduced, substantive changes in the law and practice on this issue are planned. The vendor shall be subject to a duty of full disclosure and the negotiation and resolution of any title issues shall take place at the pre-contract stage of the transaction, see *Law Society Gazette*, July 2015, p. 22-23.

[50] 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.

Fluctuations in the property market mean that from time to time 'gazumping' may be a concern for purchasers at the pre-contract stage[51]. This danger arises because of the statutory formalities required to create an enforceable contract[52]. Until there is a written contract or at least written evidence of the essential terms of the contract[53] 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[54]. 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) Act 2011 provides the framework necessary to implement these proposals.

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 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

[51] Occasionally, sellers may be at risk of 'gazundering', which occurs when a purchaser demands a reduction in price just before the contracts are signed.

[52] Set out in s51 of the Land and Conveyancing Law Reform Act 2009.

[53] 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.

[54] *Report on Gazumping* (LRC 59-1998).

the contract under the doctrine of part performance[55]. 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[56] 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[57].

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, for example: 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 or civil partner is a family home which would necessitate the other spouse or civil partner to consent to the transaction[58]; whether someone in occupation has an equitable interest in 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 requi-

[55] See *Lowry v Reid* [1927] NI 142; *Mackey v Wilde* (1998) 2 IR 578. See also J.C.W. WYLIE, U. WOODS, *Irish Conveyancing Law*, cit., para. 6.48-6.60.

[56] H. DELANY, *Equity and the Law of Trusts in Ireland*, cit., chapter 17.

[57] See *Courtney v McCarthy* [2007] IESC 58; *An Cumann Peile Boitheimach Teoranta (Bohemians Football Club) v Albion Properties Ltd & Others* [2008] IEHC 447.

[58] Pursuant to s3 of the Family Home Protection Act 1976 and s28 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

sitions 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 chose instead to forfeit the deposit and re-sell 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[59]. 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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[59] The purchaser's solicitor also carries out a bankruptcy office and a judgments office search. For more detail, see J.C.W. WYLIE, U. WOODS, *Irish Conveyancing Law*, cit., para 15.39-15.48.

INTRODUCTION OF THE FINNISH LEGAL SYSTEM FOR THE TRANSFER OF IMMOVEABLE PROPERTY

Matti Ilmari Niemi[*]

1. Introduction

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.

As a civil law country, the Finnish legal system does not contain any rights in equity or difference between rights in law and in equity. Accordingly, there are no other rules constituting a transfer of ownership of a piece of real estate outside the legal rules.

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. On the other hand, there is no general civil code in Finland or in the other Nordic Countries. In this respect, the Nordic Countries differ from most of the other European Continental Countries.

The parcelling of land and other land survey are regulated by the Real Estate Formation Act (*kiinteistönmuodostamislaki*, 554/1995) the Finnish Cadastre by the Real Estate Register Act (*kiinteistörekisterilaki*, 392/1985) and both conveyances of real estate and land registration by the Code of Real Estate (*maakaari*, 540/1995). In this article, the focus is on the last one[1].

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[1] English translations of many Finnish statutes are available in the data bank Finlex. For instance, 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 (tra-

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 holysti conception of ownership (dominion). So far as real property is concerned, a particularly important model has been the German Civil Code and other legislation applied to registration[2].

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. In Finland, the electronic system of the exchange of real property has been adopted and it is functioning[3]. In other words, the system of online conveyancing is available. The electronic system is functioning as an optional system alongside the traditional system founded on paper documents. The electronic system is part of the open Internet but, on the other hand, it is founded on a closed and official platform and web sites maintained by the Finnish

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vaux 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: *Niemi* (2002, 2012 and 2010), *Jokela* et al. (2010) and *Tepora* et al. (2010).

[2] *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.

[3] The Finnish statute 96/2011.

register authority. Here, the focus is on the traditional system[4]. There are merely some references to the electronic exchange system below.

In addition, these developments have induced organisational changes in every Nordic country.

2. Transfer of Real Property

A title to a piece of land or a share or a parcel of it is acquired through a sale or trade, as a gift or as another conveyance[5]. 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[6]. According to the Nordic understanding, a contract as a conveyance contains a transfer of ownership as well.

The formal requirements of a valid transfer of the traditional conveyancing system 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[7]. 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 "deed", that is, the written 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

[4] The electronic conveyancing system is a subject of its own. In practice, the number of electronic transactions has been very small so far. During the year 2014 and by the end of August, altogether 549 electronic sales had been made electronically, which is 1.05 % of all sales.

[5] 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.

[6] Other types of acquisition, such as inheritance, are excluded here.

[7] Code of Real Estate 2:1.1.

the price or another consideration[8]. 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 merely limited significance in this respect. 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[9]. 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[10].

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. 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[11]. 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.

[8] Code of Real Estate 2:1.2.

[9] Code of Real Estate 2:2.1.

[10] Code of Real Estate 2:2.2.

[11] Code of Real Estate 2:2.2.

A purchaser shall register his or her title within six months of drafting the contract[12]. In the case of a conditional sale the application will be left in abeyance (be postponed)[13]. 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[14].

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[15].

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.

At the general level, the distinction between law of obligations and property law is important. It is a determining factor of systematics. At the level of obligations and property rights the situation is different. These rights are different but, nevertheless, the distinction has not been seen as a crucial one. In Nordic countries, this distinction does not affect the way in which courts interpret Private Law. Accordingly, the distinction between obligations and property rights is not adopted in the strong sense.

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

[12] Code of Real Estate 11:1.

[13] Code of Real Estate 12:2.1/1.

[14] Code of Real Estate 12:2.2.

[15] See Code of Real Estate 2:5.

between a sales contract and a deed[16]. A formally valid sales contract is considered a "deed", transferring ownership from the vendor to the purchaser[17]. 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[18].

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[19]. 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.

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[20]. It is clear that the invalidity of any

[16] 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.

[17] See Code of Real Estate 1:1 and 2:1.1.

[18] See Code of Real Estate 12:1.1.

[19] See Code of Real Estate 2:1.

[20] See Code of Real Estate 2:8.

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[21]. 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[22].

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 making 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-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

[21] See Code of Real Estate 2:7. There are many rules distinguishing the pre-contract from the final contract.

[22] See Enforcement Code 7:15.2.

ownership has not been adopted in Finland or in the other Nordic countries[23].

Instead, the effects of title registration are weaker and more limited. Registration declares and 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[24]. 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 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.

[23] On the German system, see BGB § 873 and 891.

[24] 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.

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 in Finland. One is the cadastre, the register of land units, that is, the *Real Estate Register* (*kiinteistörekisteri*), and the other is the register of titles and other property rights over land, that is, the *Title and Mortgage Register* (*lainhuuto- ja kiinnitysrekisteri*). Today, they both are national, electronic (digital) and public and maintained by the National land Survey Bureau (*Maanmittauslaitos*). Furthermore, these registers together constitute a uniform information system, and are a part of the information services provided for society. Later, perhaps, it is possible that these two registers will be unified like in Sweden. Until to the year 2009, the Title and Mortgage Register was maintained by the local courts (*käräjäoikeudet*) in accordance with the German model[25].

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. Today, a detailed and small scale digital map is part of the register. The map and the other register information are 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. Be-

[25] Similar decisions and amendments to statutes have been made both in Norway and Sweden.

sides, 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[26]. 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 (pIanttioikeus) can take place by handing over the mortgage instrument to a creditor by the owner[27].

In the frames of the new electronic exchange system, the delivery of the mortgage instrument is replaced by registration.

All significant limited 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 such rights capable of being registered 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[28]. In addi-

[26] Code of Real Estate 5:1.

[27] Code of Real Estate 16:2.1, 16:3.1 and 17:2.1.

[28] Code of Real Estate 14:1.1.

tion, it is obligatory to register the most important usufructs. They are, in practice, land leases for residential or industrial purposes[29].

Nevertheless, the numerus clausus principle is not acknowledged at a general level in Finland or in the other Nordic Countries. Moreover, overriding interests in the English sense are not recognized. On the other hand, easements (servitudes) are registered in the Real Estate Register.

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 Finnish Title and Mortgage Register is its up-to-dateness[30]. 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 few days) after the transaction in the form of acquisition information in the Title and Mortgage Register[31]. These entries are also made *ex officio* with the help of announcements made by public notaries.

There is no delay of registration in the electronic exchange system. The registration takes place immediately and automatically when a transfer of a piece of real property has taken place in the Internet, that is, on the official platform. In other words, there are no separate applications for title registration any more in the frames of the electronic system.

[29] Code of Real Estate 14:2.1.

[30] 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.

[31] Code of Real Estate 7:5.1.

5. The Nature of Title Registration

Finnish land registration has to be classified as a title registration but not as a deed registration system[32]. Nevertheless, 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.

No doubt, the Finnish system is not a system of registration of documents. In a sense, it is a system of registration of rights. More precisely, it is the legal consequence of a transfer or another agreement or an acquisition 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[33]. Hence, in practice, 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[34].

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

[32] The definitions of title and deed registration studied here are taken from *Henssen* (1995) and *Zevenbergen* (2002).

[33] 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.

[34] 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.

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 appear very seldom. This means that the Title and Mortgage Register is actually trustworthy.

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[35]. 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 a transferee and certain third persons. Disputes between the parties of a transaction are solved according to the rules of contract 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 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,

[35] Code of Real Estate 13:2.

the good faith of the transferee is required, as well. 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.

6. The Effects of Title Registration

The most important rules demonstrating the legal effects of title registration are substantial. In certain respects, they may decide the ownership of a piece of real estate. On the general level, they reinforce legal certainty for their part.

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. Accordingly, the main rule of transfer of ownership at the moment of a transaction (contract) is very strong. On the other hand, the effects of registration 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 or property by a void or voidable acquisition[36].

[36] Code of Real Estate 3:1.1.

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[37]. This regulation is even more favourable to the transferee because her or his good faith is presumed: the fact that she or he knew or should have known about the defectiveness of the vendor's competence has to be proved. On the other hand, the question about the possible wrongdoing of a purchaser is not relevant. A guilty purchaser cannot act in good faith.

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 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[38]. 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.

In this respect the Finnish and the other Nordic systems differ from the English as well as from the Torrens systems in a significant way.

It is worth of notice that in the frames of the system of electronic exchange of real property acting as another person, that is, using identification and authentication devices of another person is a forgery.

The public trustworthiness of the Title and Mortgage Register is guaranteed by the State of Finland. The State is liable as the register

[37] Code of Real Estate 13:4.1.

[38] Code of Real Estate 13:5.1.

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[39].

Whenever a double sale or another double conveyance of a piece of real estate takes place, priority is granted to the first transferee[40]. 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 previous conveyance at the time of acquisition[41]. 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 the frames of the electronic exchange system, a double conveyance is not possible: a completed conveyance prevents from making a competing conveyance.

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[39] 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).

[40] Code of Real Estate 3:6.1.

[41] 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).

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[42].

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[43]. 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[44]. 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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[42] Code of Real Estate 13:1.

[43] Code of Real Estate 13:10.1.

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IN CONCLUSION. SOME THOUGHTS ON FUNDAMENTAL PRINCIPLES GOVERNING IMMOVEABLE TRANSFERS

Ugo Mattei[*]

This volume focuses on *inter vivos* transfers of immoveable property. The papers deal with immoveable property in Italy, Greece, Finland, Ireland, Austria, Belgium, England and Wales. The first two chapters on fundamental comparative law and economic questions opens the book. This volume 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 immoveable property[1]. 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 stand-

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[1] 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).

ing. 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 impetuous of the corporate interests in attempting to conquer the market of services for immoveable transfers that, in the civil law countries, is currently the monopoly of highly trained branches of the legal profession. The paper contained in this volume show the tremendous complexity and the delicate equilibrium that governs the market of immoveable 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 immoveable 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 immoveable 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 immoveable 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[2], which in England is a traditional monopoly (though curtailed by the Courts and Legal services Act of 1991 in the middle of the Tatcherian 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 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 juris-

[2] For the mechanisms of registered conveyancing in England, see D.J. HAYTON, *Registered Land* (3rd ed.), 1981; K.J. GRAY, P.D. 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 D.G. BARNSLEY, *Conveyancing Law and Practice* (4th ed., 1996). As for U.S. Law R.A. CUNNINGHAM, B. STOEBUCK, D. WHITMAN, *The Law of Property*, St. Paul, Minn., 1984, 711 ff.

dictions, 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[3]. 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[4].

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[5].

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 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

[3] A collection of evidence for this statement can be found in D.J. HAYTON & AL. (eds.), *Principles of European Trust Law*, The Hague-Cambridge, 1999. See also M. GRAZIADEI, U. MATTEI, L. SMITH, *Commercial Trusts in European Private Law*, Cambridge, 2006.

[4] See the classic study of R. SACCO, *Legal Formants. A Dynamic Approach to Comparative Law*, 39 *Am. J. Comp. Law* 1 (1991).

[5] For a thorough comparative discussion, see A. CHIANALE, *Obbligazione di dare e trasferimento della proprietà*, Milano, 1992.

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 immoveable 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 immoveable 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[6]. 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 immoveable 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 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 con-

[6] See T.J. MICELI, C.F. SIRMANS, *The Economics of Land Transfers and Title Insurance*, 10 *Real Estate Finance and Econ*. 81 (1995).

tract that all contract law is contained in the book of the code devoted to "different ways in which property is acquired"[7].

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 immoveable 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[8]. 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[9].

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 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

[7] Book 3 of the Napoleonic Code.

[8] 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.

[9] See par. 873 BGB.

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 immoveable 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 immoveable 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 immoveable property[10].

Even the most sophisticated system of registration sometimes is not sufficient to offer a full certainty of the ownership of an immoveable. 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 immoveable 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 immoveable property that is capable to escape the voluntary logic reflected in the registration systems[11]. According to this fundamental principle ownership can be acquired by the long-term possessor.

Adverse possession, known in the civil law tradition as *usucapio*, is still very important everywhere even in the domain of immoveable 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

[10] German law requires full notarization (in the civilian sense!). See sec 313 BGB.

[11] See the classic rationale discussed by O.W. HOLMES, *The path of The Law*, 10 *Harv. L. Rev.* 457 (1897) 477.

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 immoveable 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[12].

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 immoveable[13]. 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[14]. 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 immoveable 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

[12] Thirty years is the tem 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).

[13] See J.G. RIDDALL, *Introduction to Land Law* (4th Ed 1988) 413 ff.

[14] See J. CARBONNIER, *Droit Civil, Les Biens*, 14th 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". N. HORN, H. KOTZ, H.G. LESER, *German Private and Commercial Law, An Introduction*, Oxford, 1982, at 171.

time starts to elapse[15]. 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[16].

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 immoveable property against the absent, uninterested owner. The former is actually economically exploiting the immoveable 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 of the owner makes impossible the transfer of the piece of immoveable 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 immoveable 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

[15] See R. SACCO, cit.

[16] See O.W. HOLMES, cit. supra.

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 immoveable 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[17]. 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 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 immoveable, 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 immoveable 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

[17] D.C. NORTH, *Institutions, Institutional Change and Economic Performance*, in D.W. GINGERICH, *Political Institutions and Party-Directed Corruption in South America. Stealing for the Team*, Cambridge, 1990.

insurance companies[18]. 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[19]. One should however be aware that a property law system is 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[20]. 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.

[18] See U. MATTEI, *Regole sicure. Analisi economico-giuridica comparata per il notariato*, Milano, 2006.

[19] See U. MATTEI, *The Rise and Fall of Law and Economics: an Essay for Judge Guido Calabresi*, 64 *Maryland Law Review* 220 (2005).

[20] See E.M. PEÑALVER, S.K. KATYAL, *Property Outlaws, How Squatters, Pirates, and Protesters Improve the Law of Ownership*, New Haven-London, 2010.

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