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Significance of the State Registration for the Acquisition of the Real Estate Title

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Abstract
The relevance of the research topic related to the registration of rights to real estate is due to the development of Ukrainian legislation in the field of civil turnover and different approaches to understanding the moment of acquisition of ownership (Part I). In writing this article, the author used the instrumental research method and the comparative analysis method, which allowed comparing Ukrainian and German legislative approaches to the acquisition of property rights. The Ukrainian legislation on state registration of property rights and their encumbrances is based on the principle of entry, i.e. introduces a negative title system. State registration is essential for the acquisition of the real estate title and its protection, as it is the final legal fact with which the law links the acquisition of ownership. This is preceded by the conclusion of an agreement, which is the basis for the acquisition of ownership, and therefore the basis for making an entry in the state register of real rights to immovable property and their encumbrances. Since an agreement for the alienation of real estate is subject to notarisation, a notary performs both a notarial act to certify the agreement and a registration act to enter the relevant information into the register. If the agreement on the basis of which the entry was made in the register is challenged, the question arises as to what legal consequences will occur and whether this will affect the ownership of the person in whose name it is registered. This is all the more important if the property has already been alienated by a party to a transaction that has been declared invalid and acquired by a third party who relied on the correctness of the entry in the register. Ukrainian court practice holds that vindication by a person who disputes the real estate alienation agreement and is considered to be the owner of his property is permissible against an acquirer who is unlawfully listed in the register as the owner. The legal regulation of real estate acquisition in Germany is different from that in Ukraine, and therefore the legal consequences of challenging the title to property are different (Part II). Under German law, two fundamental

principles must be observed when acquiring real estate property: The separation and abstraction principle as well as the public faith of the land register and the protection of bona fide acquisition. According to the principle of separation and abstraction, the sale and purchase agreement (under the law of obligations) and the legal transaction (in rem) for the transfer of ownership are strictly separated from each other. They are also not dependent on each other in terms of their existence. The entry in the land register is only one Part of the legal transaction in rem for the transfer of ownership. The public faith of the land register means that the bona fide purchaser of a right entered in the land register may rely on this entry - even if it is not correct under substantive law. Consequently, a person who proved the invalidity of a sale and purchase agreement is not entitled to vindication but to condictio, as the transfer of ownership is valid. In case of resale of the real estate to a bona fide third party, the original seller is only entitled to a compensation in money: The entry in the land register is of paramount importance to all those who relied in good faith on its correctness, believing that they were entering into an agreement with a person who has the right to alienate the property as its owner.

Keywords: *immovable property; title; state registration of rights; moment of acquisition of rights; property transfer agreement.*

Значення державної реєстрації для набуття права власності на нерухомість

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Анотація

Актуальність тематики досліджень, пов'язаних з реєстрацією прав на нерухомість, обумовлена становленням українського законодавства у сфері цивільного обороту і різними підходами до розуміння моменту набуття права власності (частина І). При написанні статті було використано інструментальний метод дослідження та метод порівняльного аналізу, який дозволив порівняти український та німецький законодавчі підходи до набуття права власності. Законодавство України про державну реєстрацію речових прав та їх обтяжень спирається на принцип внесення, тобто запроваджує титульну негативну систему. Державна

реєстрація має істотне значення для набуття права власності на нерухоме майно та його захисту, оскільки вона є кінцевим юридичним фактом, з яким закон пов'язує набуття права власності. Цьому передує укладення договору, що є підставою набуття права власності, а відтак – підставою для внесення запису до державного реєстру речових прав на нерухоме майно та їх обтяжень. Оскільки договір про відчуження нерухомості підлягає нотаріальному посвідченню, то нотаріус вчиняє і нотаріальну дію з посвідчення договору, і реєстраційну дію – внесення відповідних відомостей до реєстру. При оспоренні договору, на підставі якого було внесено запис до реєстру, виникає питання про те, які правові наслідки матимуть місце, і чи вплине це на право власності особи, за якою воно зареєстроване. Це має тим більше значення, якщо нерухомість уже була відчужена стороною правочину, визнаного недійсним, і набута сторонньою особою, яка покладалась на правильність запису в реєстрі. Українська судова практика дотримується позиції про допустимість віндикації особою, яка оспорює договір відчуження нерухомості та вважається власником свого майна, від набувача, який неправомірно значиться в реєстрі як власник. Правове регулювання Німеччини відносин з набуття нерухомості принципово відрізняється від українського, а тому різняться й правові наслідки оспорення титулу права на майно (частина II). За німецьким законодавством, крім договору купівлі-продажу, який є зобов'язальним правочином, укладається й речовий договір з передання нерухомості, який також посвідчується нотаріально. Крім того, нотаріус посвідчує заяви відчужувача та набувача нерухомого майна про внесення запису до реєстру прав. Це дозволяє майже унеможливити випадки оспорювання як запису в реєстрі, так і договору, на підставі якого відбувся перехід права власності на нерухомість. Проте навіть у випадку, якщо це було б гіпотетично можливо, особа, яка довела недійсність договору купівлі-продажу, не має права на віндикацію, оскільки запис в реєстрі має першочергове значення для всіх, хто покладався на його правильність, вважаючи, що укладає договір з особою, яка має право на відчуження цього майна як його власник.

Ключові слова: *нерухоме майно; право власності; державна реєстрація прав; момент набуття права; договір передання майна.*

Introduction

To acquire the real estate title, the law requires its state registration. Accordingly, both at the stage of creation of property and during its turnover, as well as in case of destruction of property or waiver of rights to it, it is necessary to make a corresponding entry in the register of real rights to immovable property (hereinafter – the Register) about the person who has the right to own this property. This raises questions about the significance of state registration of real rights to immovable property and their encumbrances (hereinafter – Registration of rights) as a legal fact in the legal structure, the moment of acquisition of the real estate title, the

possibility of challenging the right registered in the register for one person by another person and the legal consequences of this, establishing an appropriate way to protect persons involved in legal relations on acquisition and change of ownership, etc. The issues arising from the application of the rules on acquisition of the real estate title and registration of rights to it are actually numerous and their range is constantly expanding. This is especially evident when it comes not to the acquisition of the real estate title per se, but to mortgages or the recognition of a real estate transaction as invalid, or if the real estate was sold at auction to enforce a court decision, or if the real estate is subject to state ownership, and etc.

It is impossible to cover and analyse the entire range of issues related to registration of rights in this article, so we will focus on the first two. The main issue is whether registration of rights is a fact establishing or confirming the right. The Article will provide a comparative analysis of the acquisition of property rights under the German and Ukrainian legal orders, as well as the ways to protect the rights of a person who considers his or her right to real estate to be violated and the entry in the register to be untrue. The Article consists of two parts, the first analysing the legal mechanism of acquisition of ownership under German law, and the second – under Ukrainian law.

The purpose of the Article is to analyse the significance of the state registration for establishing the moment of acquisition and termination of the immovable property title.

The Article will address the following issues: characteristics of state registration of real rights to immovable property as a legal fact; determination of the moment of acquisition of ownership in the laws of Ukraine and Germany; legal consequences of making an entry in the register and establishing the absence of grounds for such an entry.

Problem solving stage

Civil lawyers are cautious about studying the importance of state registration for the acquisition and termination of the real estate title, perhaps because in Ukraine there is still an approach to sectoral studies – civil law and public law. Since registration of rights falls outside the scope of civil law regulation, its study is almost ignored. Among those who have touched upon this topic are O. Korovaiko [1], Ya. Tamaria [2], O. Martyniuk [3], N. Maika [4], V. Djafarova [5], D. Spyesivtsev [6], O. Letnieva [7], V. Kysil [8] etc. It has repeatedly been the subject of our scientific research [9-12]. At the same time, the issues related to the registration of rights to real estate have become more acute due to the legal positions of the Grand Chamber of the Supreme Court (hereinafter – the GC SC). This applies not

only to the moment of acquisition of the real estate title, but also to the ways of protecting a person's rights to property due to a disputed entry in the register.

The state of development of the issues under study in the German doctrine is provided in the text of this article.

Materials and Methods

The Article uses a number of scientific methods which made it possible to analyse the issues of acquisition of property rights and identify the key questions, the answers to which allow us to understand the causes of problems in the law enforcement practice of Ukraine. The author used the instrumental research method, which is based on the view of legal norms as a means of achieving certain goals driven by certain economic and social needs. Accordingly, an objective assessment of the legal regulation mechanism, including the legal positions of the Supreme Court, is possible from the standpoint of the extent to which this mechanism ensures or is capable of ensuring the achievement of the goals set when regulating relations on acquisition of property rights. In particular, this concerns the stability of civil turnover, the security of property rights and, in general, compliance with the approach to ensuring the right to peaceful ownership of property.

The Article uses the comparative method and the method of comparative analysis, and also applies a comparative approach to identify the key principles of adequate legal regulation of the transfer of ownership and the place of state registration in the legal mechanism for acquiring this right. By comparing the Ukrainian and German approaches, and taking into account the well-established experience of German law, which has proved to be effective in that litigation over challenging entries in the real estate registers is almost non-existent in German courts, it became possible to identify the mistakes made by Ukrainian court practice.

Results and Discussion

I. Transfer of the title under Ukrainian law

History of the issue; consequences of legal regulation of registration of rights to real estate and transactions with it

The current Ukrainian realities prove certain complications of the significance of registration, which was formed in the second decade of the 2000s. Therefore, first of all, we should give a brief historical overview of the regulation of registration of rights to real estate.

– Prior to the adoption of the Civil Code of Ukraine (hereinafter – the CCU) in 2003, the Civil Code of the Ukrainian SSR (1963) did not require

registration of rights to real estate (and did not contain such a concept at all), but only provided that the buyer should register the residential building with the technical inventory bureau.

– Articles 182 and 210 of the CCU provide for state registration of rights to real estate and transactions with real estate. Moreover, Art. 182 of the CCU only states that ownership (and other actions and rights) to real estate *are subject* to state registration. And Art. 334 of the CCU states that state registration is required at the time of acquisition of ownership.

– With the adoption of the Law of Ukraine of 2004 "On State Registration of Real Property Rights and Encumbrances" [13] the title to the real estate shall be registered, which follows from its name. However, before this Law came into force (from 03.08.2004) the Temporary procedure for *state registration* of transactions was in force, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 671 dd. 26 May 2004 (expired on 1 January 2013) [14]. According to this bylaw, transactions, not rights, were subject to registration. In other words, despite the adoption of the said Law, registration has not changed.

– Changes in approaches to state registration occurred only with the adoption of the Resolution of the Cabinet of Ministers of Ukraine "On State Registration of Real Property Rights and Encumbrances" dd. 25 December 2015 No. 1127 [15], which already refers to the *registration of the* real estate title.

– Therefore, two points are noteworthy. First, at the level of law (the CCU and the 2004 Law of Ukraine "On State Registration of Real Rights to Real Estate and Their Encumbrances"), it was established that ***a right*** is *subject to registration*. Instead, at the level of a subordinate legal act, it was established that a ***transaction*** *is subject to registration*. As a result, real estate transactions were subject to registration for a certain period of time, and later real estate ownership became subject to registration. Secondly, all the time before the adoption of the CMU Resolution "On State Registration of Real Property Rights and Encumbrances", transactions were registered, but the right was not registered, and the register did not contain information on the ownership of previously acquired property. The adoption of the CMU Resolution did not clearly and unambiguously regulate how the register of transactions should be handled and whether the information should be entered into the register of rights accordingly. Ukrainian law did not contain a requirement to enter the relevant information into the register of rights, and there were no negative consequences for persons who registered transactions and did not subsequently register their ownership. However, controversial situations arose, and different positions were expressed not only by the GC SC [16], and even by judges of the GC SC in separate opinions [17] (2020). In other words, the echo of changes in

the legal regulation of registration of rights and transactions is still being heard today.

As a result, the register of rights was formed a new, and the information in it did not correspond to the proper rights to real estate that arose before 2015.

Cases where Ukrainian legislation bypasses the issue of regulating the acquisition of the real estate title without linking it to state registration

There are other reasons why the information in the register of rights is not true, such as the *acquisition of rights to immovable property as a result of a prescription of the law in the cases specified in it.*

The first example is the acquisition by a member of a cooperative of ownership of an apartment in a housing cooperative building, a garage in a garage cooperative or a garden house in a garden cooperative, subject to payment of their value.

This was envisaged back in 1991 in the Law of Ukraine "On Property" [18] (Art. 15). The CCU of 2003 has a similar provision (Part 3 of Art. 384), which states that a member of a housing cooperative becomes the owner of an apartment in case of its redemption. Little is clear from this provision, since, firstly, it refers only to *the condition* and *not to the moment of acquisition of* ownership of the property. Secondly, it refers to redemption, the concept of which does not exist in the CCU, and one can only assume that it means payment of the apartment price or payment of share contributions. In addition, this provision narrows the range of similar opportunities for members of other cooperatives, such as garage and gardening cooperatives, as was the case in the Law of Ukraine "On Property".

Therefore, the fact that a member of a housing cooperative paid the cost of an apartment in a housing cooperative building can hardly be perceived as the legislator allowing a situation where the acquisition of ownership of an apartment is associated not with the state registration of the right to it, but with the final settlement between the housing cooperative and its member. Therefore, it is quite possible to believe that even in the absence of a clear and unambiguous indication in the CCU of the moment of acquisition of ownership of an apartment in a housing cooperative building, the general rule should apply that such moment is the state registration of the right to an apartment by a member of the housing cooperative who has purchased the apartment.

The situation is more complicated with the acquisition of the real estate title by way of inheritance. There are two levels of difficulty. The first one

is when an heir inherits real estate from an heir who has permanently resided with the testator and has inherited passively (Part 3 of Art. 1268 of the CCU [19]); the second – in case of inheritance by minor and underage children (Part 4 of Art. 1268 of the CCU), who are considered to have accepted the inheritance unless their legal representatives refuse to accept it. In both cases, acceptance of the inheritance took place, and therefore, legal succession took place. Therefore, logically, the heir as successor has already acquired the property right. However, he is obliged to apply to a notary and obtain a certificate of inheritance (Art. 1297 of the CCU), although this obligation is not of a civil nature. Moreover, the legislator deliberately avoids regulating the moment of acquisition of the real estate title by inheritance, and in 2013 excluded Art. 1299, which regulated this issue, from the CCU. Therefore, it is not clear from the CCU when the heir becomes the owner – either upon the expiry of the six-month period for acceptance of the inheritance if he did not apply to a notary (the heir who lived with the testator) or could not apply in principle (a minor child), or when he received a certificate and the relevant information was entered into the register.

Thus, it can only be stated that Ukrainian legislation allows for cases of existence/acquisition of the real estate title without state registration of the right, at least this is not mentioned in the CCU.

It seems that in these cases, no exception should be made to the general rule that the acquisition of ownership is associated only and exclusively with the entry of the relevant entry in the register, as rightly noted in the literature [20; 21]. If the heir does not make an entry in the register (does not receive a certificate of inheritance), he does not become the owner, and his right to the inherited property should be characterized as possession, and in case of disputes, the protection of the right to peaceful enjoyment of property should be applied. This will allow both to protect the rights of such persons and not to destroy the general approach to the meaning of the register, and in case a person who peacefully possesses the inherited property applies for the acquisition of the title of owner by entering information in the register, he or she can always do so, since he or she has exercised the right provided for in the CCU to actually accept the inheritance.

Algorithm for acquiring the real estate title under Ukrainian law

It is well known that in order to acquire a right, a legal fact is required to give rise to that legal consequence. To acquire the real estate title, a legal fact is required, which differs depending on the basis on which ownership is acquired - whether it is for an apartment in a built-up building, or in

the case of acquisition under a contract, or by inheritance, or pursuant to a court decision and sale of real estate at a public auction. In all of these cases, the legal composition includes the action that serves as the basis for the acquisition of ownership (contract, inheritance, etc.), and the last legal fact will always be the registration of the real estate title [22].

However, such a universal scheme was not accepted in Ukrainian court practice for a long time. In numerous cases, the Supreme Court has stated that *the fact of title is not the state registration of a right itself, but a contract* or other transaction. And there is no objection to this, because registration must have a basis, and this basis must be provided in order to enter information into the register. As a result, it is pointless to challenge the entry in the register itself – it is necessary to challenge the grounds on which the entry appeared.

Instead, none of this concerns the importance of state registration as a fact that is associated with the moment of acquisition of ownership – only with it, and not with the conclusion of an agreement or its certification. This has already been clearly established by the legislator by amending in 2024 Part 2 of Art. 3 of the Law of Ukraine "On State Registration of Real Rights to Real Estate and Their Encumbrances", which states that real rights to real estate, an object under construction, a future real estate object and their encumbrances, which are subject to state registration in accordance with this Law, arise, change and terminate *from the moment of such registration* [23]. At the same time, no changes were made to clause 1 of Part 1 of Art. 2 of this Law, which defines state registration of real rights to immovable property and their encumbrances as official recognition and confirmation by the state of the facts of acquisition, change or termination of real rights to immovable property, encumbrances of such rights by entering the relevant information into the State Register of Real Property Rights. In other words, the legislator sees no discrepancy between the definition of state registration and the moment of acquisition of ownership of real estate. And this logically follows not only from the meaning of state registration, but also from the rules of law that preceded the Law. In particular, Part 4 of Art. 334 of the CCU previously established that rights to real estate subject to state registration arise from the date of such registration in accordance with the law.

Nevertheless, for a long time the Supreme Court has not only perceived, but generated this discrepancy, insisting that since state registration is defined as the official recognition and confirmation by the state of the facts of acquisition of property rights, this means that a person's right has already arisen before state registration and does not depend on its state registration. Somewhat similar is the case in French law, which requires proof of ownership of land,

and therefore proof of possession or ownership, as registration of title is not used for this purpose [24]. The situation is similar under Polish law, according to which an entry in the land register is declarative. Therefore, registration has rather an explanatory effect, which consists mainly in recording information on the acquisition of ownership. This approach raises the question of whether it should be retained or replaced by the rule of constituent entry [25]. At the same time, Polish researchers are concerned with the public reliability of land registers, which is considered one of the fundamental principles of the Polish land registry system [26].

This interpretation of the Law has led to a number of court decisions over the past five years, in which the courts have relied on the fact of entering into a real estate contract rather than the fact of state registration and, accordingly, have considered the buyer under the contract to be the owner, rather than the person indicated in the register as the owner.

This interpretation was incorrect, and the decisions made on the basis of this legal position are illegal. The incorrectness of this interpretation is also evidenced by the fact that in other similar cases, where a legal provision requires state registration of a right, the acquisition of this right is linked exclusively to registration, and not to the existence of a basis for registration. For example, Part 1 of Art. 462 of the CCU states that the acquisition of intellectual property rights to an invention and utility model is certified by a patent, and to an industrial design by a certificate. However, hardly anyone would dare to argue that intellectual property rights to these objects arise before or regardless of the grant of a patent. The court practice has not interpreted that the term "the right ... is certified" means that the right has already arisen and is only certified by the patent. Of course, this is nonsense. Meanwhile, the Ukrainian Supreme Court has not been upset by such nonsense in the area of acquisition of property rights.

Significance of the state registration

The significance of the state registration is to ensure that the information in the register is true and can be relied upon for the purposes of real estate turnover – the acquisition of rights to it [27].

State registration of rights is important not only for the acquisition of property rights, but also for other private law relations (protection of the rights of persons living in housing, for lending, etc.), as well as public law relations – for taxation, in the context of measures to prevent corruption, etc. Therefore, the area in which state registration of rights becomes crucial is very broad, and a brief classification of the areas in which it is used indicates the mega importance of addressing these issues in private and public interests. As such, we can point to the following: a) determination of

the proper subjects of real estate rights (which is necessary for its disposal, taxation, control by authorized bodies, including environmental protection measures); b) establishment of the proper object for real estate transactions (not only its material characteristics, but also the rights of other persons to it, and therefore the encumbrances that the real estate owner has), and in certain cases - the emergence of such an object (in the case of unfinished real estate) c) the type of registered right, its scope, the moment of acquisition, change and termination, which is important for the acquirers both in general and for risk assessment; d) the possibility of forecasting real estate markets and budget revenues; e) the impact on unauthorized construction, etc. Each of these areas is worthy of an in-depth professional study. In this article, we will limit ourselves to the following fundamental aspects, such as the importance of state registration for the acquisition of ownership of real estate.

Accordingly, if ownership of real estate is acquired on the basis of information contained in the register, the acquirer should be considered bona fide and his right cannot be challenged.

German Professor Wieacker points out that while the protection of the state of peace is left to the physical possession of the real estate (§§ 854 et seq. of the GCC), the legitimation and transfer functions of the old Gewere have been transferred to the Land Register [28].

How to resolve disputes over registered rights to the real estate

Ukrainian court practice shows that it is difficult to resolve disputes arising when a buyer or a lender relied on the data in the register when entering into a mortgage agreement, and subsequently a person not listed in the register as the owner proved or tried to prove that he or she had ownership of the real estate that was the subject of the relevant sale and purchase or mortgage agreements. In this case, the courts hesitate between the protection of the owner's rights (if the person proves that the entry in the register on the right of another person to the property appeared without any basis, and in fact he is the owner of the property) and the right of a bona fide purchaser [29] or bona fide mortgagee.

The GC SC gave preference in the protection of rights to a person whose ownership of the property was not in the register, but who, in the court's opinion, was the owner of the real estate [30]. Another person, identified in the register as the owner, entered into a mortgage agreement to secure the performance of the loan agreement, and the mortgagee intended to foreclose on the property. As a result, the mortgagee found itself in a position where its claim was not satisfied by the court because the mortgaged property did not belong to the mortgagor, but to another person.

Reflecting on these and similar circumstances, which indicate that the registry data does not play the role for which the registry exists, two emphases should be made. The first is the significance of the register of rights to real estate as publicly reliable information, which is guaranteed by the state. The second is that those who rely on the information in the register are bona fide participants in civil legal relations (purchasers, mortgagees).

Therefore, good faith is alpha (A) and omega (ѿ) in civil legal relations [31]

Therefore, bona fide buyers or mortgagees should not be allowed to bear the negative consequences of the fraud of others. According to all the canons of civil law, negative consequences are incurred by the offender. Therefore, in any case, it is necessary to find out who committed the offence. It may be a party to a contract that has defects and therefore has grounds for invalidation, or a registrar who has not fulfilled his or her duties in good faith when making an entry in the register, or it may be a state or local government body on the basis of an act of which such an entry was made in the register. The court must check all these links for the good faith and legality of the actions of the relevant persons, officials or bodies.

Indeed, there is a dilemma when deciding who to protect: a person who has every reason to believe that he or she is the owner or a bona fide mortgagee, as both suffer negative consequences due to unlawful actions of third parties. Instead, these third parties themselves are left out of the dispute over the protection of the rights of the persons related to the disputed property – the owner and the mortgagee. This is a violation of the principle of justice – the second important principle of civil law.

The protection of the owner's right seems fair, but it is unfair that the rights of a bona fide mortgagee are unprotected. Therefore, in this situation, such a way of resolving the dispute indicates a lack of balance. Preferring to protect the rights of a person whom the court considers to be the owner in the absence of a relevant entry in the register, and vice versa, refusing to protect the rights of a mortgagee in the presence of an entry in the register of his right, leads to the conclusion that the entry in the register is unreliable and threatens to put those who relied on this entry at a disadvantage. The infringer, on the other hand, remains completely free from the consequences that result from the violation of the owner's rights caused by him. The violator may be a criminal who forged documents for making an entry in the register or for notarizing a property alienation agreement, or it may be a public authority or local government body that issued the decision on the basis of which the entry was made in the register.

In all such cases, it is they who should bear the negative consequences. After all, it was their actions that provoked further violations – entering incorrect information into the register, and then entering into a mortgage agreement, which led the mortgagee to believe that the loan was secured, relying on the register data.

Therefore, it is hardly fair and reasonable to exclude from the zone of threat of prosecution the state or local government body that made the unlawful decision on the basis of which the entry was made in the register and/or the person who provided false information for making such an entry. After all, the registration of rights to real estate is regulated by public law and is under the control of state authorities, which is generally recognized [32]. They should be held liable to a bona fide mortgagee who may demand from them, in the event of the debtor's failure to pay the loan agreement, to repay his debt, since it became impossible to foreclose on the mortgaged property due to their unlawful actions.

The situation becomes more complicated if it is impossible to bring to justice the person whose unlawful actions resulted in the entry in the register as a result of his or her death, and if it is established that there are no grounds to consider the decision of the state or local government body on the basis of which the entry was made in the register to be unlawful. It seems that in these cases, it would also be unfair to impose negative consequences on a bona fide mortgagee and assume that there was a mishap. If the state has guaranteed the accuracy of an entry in the register, it must be consistent and take on the negative consequences of an incorrect entry.

Conclusions

The approach to the significance of state registration of rights should be universal for all civil legal relations – acquisition of property rights, mortgage relations, corporate relations, etc.

Neglecting the importance of state registration as a fact that is associated with the moment of acquisition of property rights is unacceptable, otherwise it will lead to a complete collapse in civil turnover and protection of the rights of bona fide persons.

The basis for the acquisition of ownership is a contract/transaction, not state registration, but only state registration should be the moment of acquisition of ownership.

If legally significant actions have been taken in reliance on the data in the register, the negative consequences should not be for the person who acquired the right to the property (buyer, mortgagee), but for the person or public authority whose actions led to the incorrect data on ownership in the

register. At the same time, the mortgagee or buyer who relied on the register data acquires the right to real estate (ownership or mortgage), and the person whose right to real estate is violated is entitled to full compensation for its value.

Transfer of Ownership of Movable and Immovable Property Property under German Law

A. Legal transactions and principles of the transfer of ownership

I. Obligation and performance (*Verpflichtungsgeschäft – Verfügungsgeschäft*)

This distinction between a transaction of obligation and a transaction of performance is fundamental to German law:

II. Different principles of the transfer of ownership

1. Principle of separation – principle of unity (*Trennungsprinzip – Einheitsprinzip*)

The question of separation – unity is about whether the obligation and the performance legally form a unit or whether they are two separate contracts [33][1].

a. Principle of separation

Under German law, both transactions – obligation and performance – are independent legal transactions that are clearly separated from one another. Both are contracts, but with different content [34][2].

aa. Obligation[3]

Only rights and obligations are created by the obligation contract[4]. The best-known example is the obligation of the seller to transfer the item and the obligation of the buyer to pay the purchase price. Conversely, the buyer has a claim to the transfer of ownership of the item and the seller has a claim to the transfer of the money[5].

bb. Performance

A right is transferred, encumbered, amended or revoked by means of the performance [35][6]. The legal situation in rem is changed by the performance

[1] Soergel/Stöcker, p. 413.
[2] Prütting, margin number 28, p. 18 f.
[3] Other terms are "contractual" or "obligatory" legal transaction, Prütting, margin number 28, p. 18.
[4] Prütting, margin number 28, p. 19.
5Soergel/Stöcker, p. 412.
[6] Medicus/Petersen, margin number 25, p. 13.

to fulfill the claims from the obligation. It is a contract under property law[1]. The performance therefore has a double effect[2]:
– Fulfillment of the claims from the obligation contract: The claims and obligations from the obligation contract are fulfilled by the performance. Using the example of the performance of the purchase contract, this is the transfer of ownership of the item by the seller and the transfer of ownership of the money by the buyer. The performance is therefore also referred to as a "fulfillment transaction".
-– Change in the legal attrribution of the item: Ownership of the object of purchase is transferred from the seller to the buyer. Similarly, ownership of the money is transferred from the buyer to the seller. This is why the performance transaction is also called a "property law" or "in rem" legal transaction[3].

This is, for example, the transfer of ownership of the object of purchase in order to fulfill the obligation arising from the purchase agreement: Two obligations arise from the purchase agreement:
– After conclusion of the purchase contract, the seller is obliged to transfer ownership of the purchased item to the buyer.
– At the same time, the buyer is obliged to pay for the purchased item, i.e. to transfer ownership of the money to the seller.

The transfer of ownership of the purchased item and the transfer of ownership of the money are each carried out by means of separate performance transactions. These performance transactions are carried out to fulfill the obligations arising from the obligation transaction.

The transaction for the transfer of ownership[4] (*Übereignung*) consists of two parts: The agreement in rem (*dingliche Einigung*) on the transfer of ownership and an element of publicity[5]: In the case of movable property, the handover (*Übergabe*)[6], in the case of real estate, the entry in the land register[7].

b. Principle of unity (*Einheitsprinzip*)

Other legal systems follow the principle of unity [36][8].

The purchase agreement not only creates the obligation to transfer ownership and to pay the purchase price: The purchase agreement also

[1] Prütting, margin number 28, p. 19.
[2] Soergel/Stöcker, p. 413.
[3] Prütting, margin number 28, p. 18.
[4] The purchased item and the money.
[5] The change in the absolute right of ownership should be externally recognizable in the interest of secure legal transactions; Prütting, margin number 371, p. 162.
[6] The procurement of direct possession.
[7] Prütting, margin number 371-374, p. 162-164; margin number 354 - 358, p. 155-157.
[8] Also referred to as the consensus principle, Baur/Stürner, § 5 margin number 42, p. 56.

brings about the change in title at the same time: ownership of the object of purchase and the deposited purchase price are transferred upon conclusion of the purchase agreement [37][1].

2. Principle of causality – principle of abstraction (*Kausalitätsprinzip – Abstraktionsprinzip*)

If one follows the principle of separation, then the relationship between the two *separate* contracts (obligation – performance) must be clarified. This is done using the concepts of causality and abstraction[2].

a. Principle of causality

The term "causality" (*Kausalität*) originates from the *causa* [38][3] of Roman law. Roman law understood this to mean the legal reason for the (property law) change in the legal attribution of an object or a right[4]. Austrian law, for example, follows this principle.

The causal principle states that a performance of property cannot be made per se, but only on the basis of a reason recognized by the legal system. In other words, the transfer of property rights must be based on a valid title (legal ground, *Rechtsgrund*, *causa*) [39][5]. Neither the reason for acquisition (the obligatory transaction) nor the method of acquisition (the transaction of performance) on their own, but only both together bring about the transfer of ownership [40][6].

If the title (*causa*) is invalid or is revoked retroactively (*ex tunc*), the right in rem ceases to exist retrospectively. In other words, the lack of title prevents the transfer of rights and what has been transfered can be reclaimed on the basis of property law[7]. In simple terms: The transferor – e.g. the seller – has never lost his ownership and can therefore, as the owner, demand the return of the item from the purchaser (vindication).

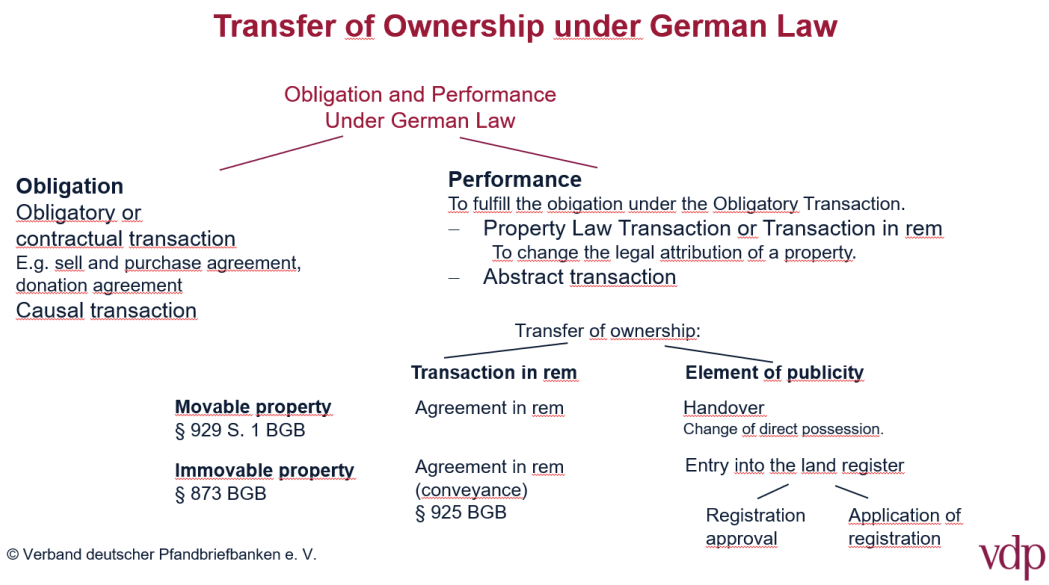
b. Principle of abstraction

In contrast, the principle of abstraction applies in German law: the validity of the transaction under property law, e.g. the transfer of ownership, remains unaffected if there is no valid *causa*[8].

[1] Baur/Stürner, § 5 RN 42, p. 56. Soergel/Stöcker, p. 413 with an example from Polish law. On the principle of separation or unity in French law Stadler, p. 29-31.
[2] Soergel/Stöcker, p. 414.
[3] On the causa: Zwalve/Sirks, pp. 273-276.
[4] Soergel/Stöcker, p. 414.
[5] Thus for Austrian law: Heindler, RN 54, p. 18. The title is the obligatory legal transaction (transaction of obligation). The title is not the agreement on the transfer of ownership (transaction of performance), ibid.
[6] For Austrian law: Gschnitzer, p. 100, no. 1
[7] Heindler, margin number 55, p. 18.
[8] Soergel/Stöcker, p. 414.

If the principle of abstraction applies, the validity of the transaction under the law of obligations and the performance under the law of property (in rem) must be considered separately: Thus, the ineffectiveness of the obligation[1] does not result in the ineffectiveness of the performance; however, claims for restitution (condiction, *Kondiktion*) of the object[2] and the money[3] may arise[4]. If the transaction of performance is ineffective[5], the claims arising from the obligation remain in force[6].

The implementation of the principle of separation and the principle of abstraction in German law is a constructively complicated choice. However, the effects protect legal and commercial transactions through the clear attribution of ownership through the constitutive publicity act – the handover or the land register entry[7].



[1] E.g. the purchase contract.
[2] Of the object of purchase.
[3] Of the purchase price.
[4] This will be explained in detail in section C.
[5] Example: A sells B a car (obligation). The purchase contract is valid. A then transfers ownership of the car to B to fulfill the purchase contract (performance). It later transpires that the performance is void. This means that ownership has not been transferred. A is still the owner. However, A is still obliged under the purchase agreement to transfer ownership of the car.
[6] Soergel/Stöcker, p. 412-415.
[7] Baur/Stürner, § 5, margin number 42, p. 57.

III. The acquisition of ownership of movable property under German law

Under German law, the transfer of ownership of movable property under property law requires agreement (*Einigung*) and handover (*Übergabe*) (§ 929 BGB), the so-called transfer of ownership (*Übereignung*)[1].

1. Agreement (*Einigung*)

The agreement is a contract in rem in which the contracting parties agree that ownership of a specific object is to be transferred to the purchaser. The agreement must relate to a specific object[2]. The agreement is called "in rem" because it is intended to bring about a change in the legal situation in rem.[3]

In the case of movable property, the agreement is not bound to any form and in practical legal transactions is not usually expressed in words at all, but is tacit[4].

The abstract nature of the transfer of ownership, i.e. the independence of the existence and effectiveness of the causal transaction (*Kausalgeschäft*)[5], exists for movable as well as immovable property[6].

2. Handover (*Übergabe*)

According to § 929 sentence 1 of the German Civil Code (BGB, *Bürgerliches Gesetzbuch*), the transfer of ownership of the movable property requires not only an agreement but also a handover of the property, i.e. a change of direct possession[7]. The transfer requires a change of direct possession that is intended by both parties[8]. This handover is the act of publicity (*Publizitätsakt*) for movable property.

B. The acquisition of ownership of immovable property under German law

Under German law, the transfer of ownership of a (immovable) property also requires a performance transaction. As with movable property, this transaction consists of an agreement in rem and an act of publicity (*Publizitätsakt*).

[1] Prütting, margin number 371, p. 162.
2Prütting, margin number 372, p. 163. This is an expression of the principle of certainty (*Bestimmtheitsgrundsatz*) and the principle of specialty (*Spezialitätsprinzip*) in German law, ibid.
[3] E.g. the transfer of ownership of the purchased item from the seller to the buyer.
[4] Prütting, margin number 372, p. 163.
[5] E.g. the purchase contract.
[6] Prütting, margin number 373, p. 163.
[7] Prütting, margin number 375, p. 164.
[8] Prütting, margin number 376, p. 165. In most cases, this is done by handing the object over to the acquirer, ibid.

However, there are special regulations for the agreement in rem (*Einigung*) of real estate. Publicity is also established for real estate through entry in the land register (*Grundbucheintragung*). In the case of movable property, this takes place through possession.

I. Significance of the land register (*Grundbuch*) [41][42][1]

1. Structure of the land register

Legal relations and business require a large number of transactions in rem for the purpose of transferring existing rights, establishing new rights or terminating existing rights. One of the necessary foundations of secure legal transactions is the certainty that the contractual partner with whom a performance is agreed is the true beneficiary. In the case of real estate law, the land register serves this purpose as a public register of the legal relationships in rem of the property [43][44][2].

It is therefore not surprising that the state declares the registration of real estate and the legal transactions affecting it to be a matter for which it is responsible[3].

The land register implements the principle of publicity (*Publizitätsprinzip*) in real estate law: In order to be effective, a legal transaction must be entered in the land register (§ 873 BGB).[4] Neither the BGB nor the Land Register Regulations (*Grundbuchordnung,* GBO) contain a statutory provision specifying which rights and legal relationships can be registered. When determining the group of rights that can be registered in accordance with § 892 BGB, one must therefore start from the purpose of the land register, which is to represent the legal relationships to land[5].

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[1] On the land register systems in Europe and some non-European countries: This is dealt with in detail by the Round Table on Security Rights over Real Property (*Runder Tisch Grundpfandrechte, RTG*):
app.vdpgrundpfandrechte.de - Questionnaire - Chapter II - Public Disclosure Requirements and Protection of Trust – passim.
In this database, the Round Table on Security Rights over Real Property at the vdp (RTG) makes the results of its work known to the public. In the RTG, experts from over 35 countries in Europe, Japan and North America examine and compare the dogmatic foundations and practical use of security rights over real property in various countries.
The activities of the Round Table were most recently described by Stöcker/Stürner, passim and Lassen/Seeber, passim (in comparison with other approaches to comparing mortgage law regulations).
About the Round Table: https://www.vdpgrundpfandrechte.de/en/.

[2] Prütting, RN 204, p. 89 f. For the foundations and historical development of the concept of the "land register", see Brinkmann/Schmoeckel, passim and Nossek, passim.

[3] Baur/Stürner, § 14 margin number 2, p. 167 f.

[4] Baur/Stürner, § 14 margin number 11, p. 170.

[5] Baur/Stürner, § 15 margin number 28, p. 178.

The following, in particular, are eligible for registration[1]:
– Ownership (*Eigentum*) of the property (*Grundstück*) and rights equivalent to real property (*grundstücksgleiche Rechte*)[2],
– limited rights in rem (*beschränkte dingliche Rechte*) to real estate[3],
– Restrictions on performance (*Verfügungsbeschränkungen*) and prohibitions on acquisition (*Erwerbsverbote*).

2. Protection of good faith (*Schutz des guten Glaubens*) in the land register

An inaccuracy in the land register can occur for the following reasons, for example:
– Incorrect action by the land registry,
– legal changes outside the land register (e.g. inheritance),
– nullity of a legal transaction in rem.

The entries in the land register are initially presumed to be correct (§ 891 BGB). This applies in two directions: A registered right is presumed to exist and to be attributed to the registered beneficiary. A deleted right is presumed not to exist. However, except in the case of acquisition in good faith (*gutgläubiger Erwerb*), there is no presumption that the land register is complete: there is therefore no presumption that no rights other than those registered exist[4].

[1] Baur/Stürner, § 15 margin number 29 - 34a, p. 178 - 180; see also Baur/Stürner, § 19 margin number 6, p. 236 f.

[2] These are rights that are treated like real estate: They can be sold and encumbered like immovable property. Examples are
– the heritable building right (*Erbbaurecht*). The beneficiary of the heritable building right can physically erect a building on someone else's land plot; legally the building is erected on the heritable building right. This is a special regulation: In principle, under German law, the owner of the land plot is also the owner of the erected building (*superficies solo cedit*).
– residential property (*Wohnungseigentum*). However, this is disputed: the prevailing opinion does not see residential property as a right equivalent to real property, but as "real ownership" (*echtes Eigentum*).
S. Baur/Stürner, § 15 margin number 26, p. 177 f.; overview: Baur/Stürner, § 3, margin number 46, p. 31.

[3] These are rights of use and exploitation that are "split off" from ownership. Examples are easements (*Dienstbarkeiten*) or mortgages (*Grundpfandrechte*). See Baur/Stürner, § 3 margin number 35-41, p. 27 f. Under German law, liens (pledges, charges) on movable and immovable property are always rights in rem; Baur/Stürner, § 3, margin number 46, p. 31 (Übersicht).

[4] Prütting, margin number 210, p. 91. The reverse is the case with the acquisition in good faith of a right to the land: In this case, the public faith of the land register creates a fiction of the completeness (*Fiktion der Vollständigkeit*) of the land register: the purchaser acquires the right to the land, e.g. ownership, free of all encumbrances that are not evident from the land register (Prütting, margin number 228, p. 97).

The BGB increases the presumption to an irrefutable fiction of the accuracy of the land register if legal transactions are carried out in good faith with a person entered in the land register as the legal owner: The BGB stipulates that the content of the land register is deemed to be correct in these cases[1]. An indispensable prerequisite is that the purchaser is in good faith, i.e. believed in the accuracy of the land register (*Richtigkeit des Grundbuchs*). Good faith[2] does not have to be proven by the purchaser. The party disputing the validity of the acquisition must prove that there was no good faith. Good faith is excluded, for example, if an objection (*Widerspruch*) to the right is entered in the land register[3].

The "content of the land register" (*Inhalt des Grundbuchs*), which is covered by the protection of good faith, is the legal information. Factual information, such as the size, location or development of the property are not included. Of the legal details, only those that belong in the land register according to their content enjoy good faith (e.g. not about a person's legal capacity)[4].

Public belief (*öffentlicher Glaube*) has a positive and a negative effect:

The positive effect is that if someone acquires a property right in good faith from the person entered in the land register as the entitled party, this right is transferred to the acquirer as if the seller had actually been the entitled party (§ 892 (1) sentence 1 BGB). Registration (*Eintragung*) and good faith replace the transferor's missing right[5]. The acquisition in good faith is effective. This means that the acquirer of the property or property right can effectively transfer it onwards, even to someone who could not have acquired it directly due to bad faith[6].

The negative effect is a fiction of the completeness of the land register. The purchaser acting in good faith acquires the property right, e.g. ownership, free of all encumbrances that are not evident from the land register. If, for example, a mortgage has been wrongly deleted, ownership is transferred to the purchaser unencumbered by this mortgage. The mortgage expires[7].

To compensate for the loss of rights, the former true beneficiary has a claim against the unauthorized seller for unjust enrichment[8]. If the

[1] Prütting, margin number 212, p. 92.
[2] Anyone who does not know and does not need to know that the land register is incorrect is deemed to be acting in good faith.
[3] Prütting, margin number 213 f., p. 92 f.
[4] Prütting, margin number 219, p. 94.
[5] Prütting, margin number 225, p. 96.
[6] Prütting, margin number 231, p. 98.
[7] Prütting, margin number 228, p. 97.
[8] As a rule, this will be a condictio of the former true beneficiary against the unauthorized seller. The claim is for the return of what is obtained (*Herausgabe des Erlangten*) through the performance transaction (§ 816 (1) sentence 1 BGB).

transferor himself was acting in bad faith, claims for damages in tort[1] are also available[2].

In the event of breaches of official duty by the land registrar, the state shall be liable instead of the civil servant under the same conditions and to the same extent as the civil servant would be liable[3].

3. View on other countries

In Europe, there are two groups when it comes to the question of whether the land register entry is constitutive for the transfer of ownership.

Registration is not constitutive in the countries of the Romanic jurisdictions (France, Italy, Spain, Belgium), the Nordic countries and Poland.[4] On the other hand an acquisition in good faith is possible in Poland and Spain, but not in the Netherlands[5].

Similar rules apply for creation, transfer and bona fide acquisition of mortgages[6].

II. Transaction of obligation

The transaction of obligation under the law of obligations for the legal acquisition of ownership is usually a purchase agreement. A contract under the law of obligations for the transfer or acquisition of ownership of immovable property requires notarization[7].

III. Transaction of performance

In the case of immovable property, the rule applies that the acquisition of ownership requires agreement (*Einigung*) and the entry of the new owner in the land register (*Eintragung ins Grundbuch*)[8].

[1] In other words, if the seller knew that he was not the owner of the right but wanted to harm the true beneficiary (§§ 823; 826 BGB).
[2] Prütting, margin number 234, p. 99.
[3] § 839 BGB; Art. 34 GG. The state is only entitled to recourse against the land registry official if the official has acted with intent or gross negligence; Art. 34 S. 2 GG. See Prütting, margin number 256, p. 108.
[4] app.vdpgrundpfandrechte.de - Questionnaire - Chapter II - Public Disclosure Requirements and Protection of Trust – Q.18.
[5] app.vdpgrundpfandrechte.de - Questionnaire - Chapter II - Public Disclosure Requirements and Protection of Trust – Q.19.
[6] app.vdpgrundpfandrechte.de - Questionnaire - Chapter II - Public Disclosure Requirements and Protection of Trust – Q.21 to Q.29.
[7] § 311b (1) sentence 1 BGB.
[8] § 873 BGB. Prütting, margin number 354, p. 155.

1. Agreement – *Einigung* (conveyance; *Auflassung*)

The agreement[1] (*Einigung*) must be declared in the simultaneous[2] presence of both parties (*gleichzeitige Anwesenheit beider Teile*) before a competent authority[3]. This agreement is called "conveyance"[4] (*Auflassung*) in the case of the transfer of ownership of real estate[5]. Any German notary is competent to accept the conveyance (*Entgegennahme der Auflassung*)[6].

In the case of real estate, too, the transaction under the law of obligations must be clearly separated from the transaction in rem (the performance). It is stipulated that the conveyance should only take place if the deed (*Urkunde*) of the obligatory transaction – e.g. the notarized purchase agreement – is presented[7].

In practice, conveyance is carried out at the notary immediately after the purchase agreement has been notarized. The purchase agreement and the conveyance are two separate legal transactions[8].

2. Entry (*Eintragung*)

In the case of movable property, in addition to the agreement in rem (*Einigung*), it is also necessary to hand over (*Übergabe*) the property to the purchaser in order to effect the transfer of ownership [45][9].

In the case of real estate, only the agreement in rem (conveyance, *Auflassung*) and the entry in the land register (*Eintragung ins Grundbuch*) together can effect the change in title[10]. In this way, the legislator ensures that the actual legal situation and the book status generally correspond[11].

The land registry officials are subject to special inspection obligations for the entry: For example, the deed of causal transaction[12] and the notarial

[1] In other words, the contract in rem as part of the performance transaction.
[2] Attendance does not have to be in person, representation is possible.
[3] § 925 BGB.
[4] § 925 BGB.
[5] § 29 GBO requires that the conveyance be evidenced by a "public or publicly notarized deed" for entry in the land register. Therefore, in practice, the conveyance is notarized; Prütting, margin number 355, p. 155 f.
[6] Prütting, margin number 355, p. 155; Baur/Stürner, § 22 RN 2, p. 284; margin number 3, p. 285.
[7] § 925a BGB. Prütting, margin number 356, p. 156.
[8] Prütting, margin number 356, p. 156.
[9] On registration systems for real estate: Lassen/Seeber, p.117 f.; for movable property: Lassen, Registration, passim.
[10] The necessary publicity of the transfer of ownership is therefore not achieved by the change of possesion (as with movables), but by the entry in the land register (principle of publicity or disclosure; *Publizitätsprinzip or Offenkundigkeitsprinzip*); Prütting, margin number 38, p. 22 f.
[11] Baur/Stürner, § 19 margin number 22, p. 241.
[12] E.g. the notarized purchase contract.

deed of conveyance[1] must be submitted[2]. The effect of the entry is that ownership is transferred to the purchaser. The economic unity of the property is preserved by the fact that essential components and accessories are also transferred with the transfer of ownership[3].

In addition to the substantive legal (*materiell-rechtlich*) requirements, entry in the land register is also subject to formal requirements[4].

The first requirement for an entry is an *application* (*Antrag*)[5]: As a rule, the land registry does not act ex officio, but should only effect an entry upon application[6]. This also applies if, apart from the application, all substantive legal bases for the entry are present. The application is neither a legal declaration of intent (*weder eine rechtsgeschäftliche Willenserklärung*) nor any other substantive legal requirement (*noch sonst ein materiell-rechtliches Erfordernis*)[7]: The application for registration (*Eintragungsantrag*) is merely addressed to the land registry and is not bound by any form [46][8].

Both the holder of the right concerned and the person in whose favor the right is to be registered are entitled to file an application[9].

The second requirement for entry in the land register is *registration approval* (*Eintragungsbewilligung*). This is the consent of the party affected by the entry[10]. Only the passive party comes into consideration here[11]. The *registration approval* is a unilateral declaration addressed to the land registry[12]. The registration approval must be clearly distinguished from the declaration of intent of the substantive legal agreement (the conveyance)[13].

C. The abstraction principle in practice

The effect of the principle of abstraction (*Abstraktionsprinzip*) becomes apparent if the contractual obligation (*schuldrechtliches Verpflichtungsgeschäft*) is null and void (*nichtig*).

[1] § 29 GBO.
[2] Baur/Stürner, § 22, margin number 13-15, p. 287 f.
[3] Baur/Stürner, § 22, margin number 22, p. 290.
[4] Prütting, margin number 273, p. 114.
[5] Prütting, margin number 274, p. 114.
[6] § 13 (1) sentence 1 GBO.
[7] However, it is a formal requirement.
[8] V. Civil Senate of the Reichsgericht, decision of 16 May 1903, RG Z, 54, p. 378-386 (384).
[9] Passive and active parties, § 13 para. 1 sentence 2 GBO. Prütting, margin number 274, p. 114.
[10] § 19 GBO.
[11] This is, for example, the seller in the case of a real property sale; Prütting, margin number 276, p. 115.
[12] Prütting, margin number 277, p. 115.
[13] Baur/Stürner, § 16, margin number, p. 194. On the legal nature of the registration approval: ibid., § 16, margin number 25-31, p. 195 f.

Example: V sells a plot of land to K (purchase agreement 1) and declares conveyance. K is entered in the land register as the new owner.

K later sells the property to D (purchase agreement 2) and declares conveyance. D is entered in the land register.

V contests (*anfechten*) purchase agreement 1 between V and K.

Situation 1: The avoidance (*Anfechtung*) takes place after the conclusion of purchase agreement 2 between K and D, conveyance and entry of the change of ownership to D in the land register.

Situation 2: The avoidance takes place after the conclusion of purchase agreement 2 between K and D, but before the conveyance and land register entry of the change of ownership to D.

Situation 3: Purchase agreement 1 is not contested. After the entry of D in the land register, it turns out that the performance under property law is invalid.

It should be noted that the abstract nature of the performance transaction does not mean that a legal change made without legal grounds – in this case without a valid purchase agreement – must be accepted. Rather, it is the task of the institute of unjust enrichment[1] to "reverse" such unjustified performances.[2]

1. Ownership situation after conclusion of purchase agreements 1 and 2

In the example case, purchase agreement 1 represents the contractual transaction of obligation (*Verpflichtungsgeschäft*) between V and K. The transfer of ownership of the property with entry in the land register is the performance transaction under property law (*Erfüllungsgeschäft*) to fulfill the seller's obligation under purchase agreement 1.

The same applies to purchase agreement 2 and the conveyance and land register entry in favor of D. As a result of the entry, D becomes the owner of the property.

2. Effect of the challenge (*Anfechtung*)

According to German law, challenge (*Anfechtung*) is a right of disposition (*Gestaltungsrecht*). It has the effect that the contested (challanged) legal transaction is invalid from the outset (*ex tunc*) [12][3].

The contractual obligation (*Verpflichtungsgeschäft*) – the purchase agreement – is invalid from the outset due to the challenge (*Anfechtung*).

[1] The condictio, § 812 BGB.

[2] Baur/Stürner, § 5, margin number 44, p. 57.

[3] For detailed information on rights of formation under German law: Lassen, Перетворювальні права, passim; on challenging (Anfechtung): ibid., pp. 196-197.

3. Condition claim after avoidance

However, due to the principle of abstraction, the performance transaction in rem (*dingliches Erfüllungsgeschäft*) remains effective after the purchase agreement has been contested: K became the owner of the property through its entry in the land register. D therefore acquired the property from the true owner.

In such cases, reverse (*Rückabwicklung*) is effected via the law of unjust enrichment, i.e. condictio[1]. The principle here is that the condictio is undoubtedly only made between the partners of the void causal relationship (*nichtiges Kausalverhältnis*), i.e. in the relationship between V – K[2].

Otherwise, the person who has obtained something through the performance (*Leistung*) of another person without legal grounds is obliged to return what he has obtained.[3]

a. Through the performance of another person (*Durch Leistung eines anderen*)

Performance (*Leistung*) is the deliberate, purposeful increase of third-party assets[4]. *The condictio indebiti* refers to payments made to settle a liability.

In the present case, the performance was the transfer of ownership from V to K. V performed to fulfill its liability under purchase agreement 1.

b. Obtained something (*Etwas erlangt*)

What is obtained can be anything that can be the subject of legal transactions [47][5].

In the example case, K acquired ownership of the property.

c. Without legal grounds (*Ohne Rechtsgrund*)

The legal reason for the benefit was missing from the outset[6].

[1] Medicus/Petersen, margin number 669, p. 351.
Under German law, condictions are divided into performance condictions (*Leistungskondiktionen*) and non-performance conditions (*Nichtleistungskondiktionen*). In the present case, this is a performance condition, as V has effected a performance (*eine Leistung bewirkt*) for K. A performance is the deliberate, purposeful increase of third-party assets (Medicus/Petersen, margin number 666, p. 350).

[2] Medicus/Petersen, margin number 669, p. 351. An exception may exist if K had given the property to D as a gift. In this case, the so-called direct recourse (*Durchgriffshaftung*) according to § 822 BGB comes into consideration; ibid.

[3] Performance condictio pursuant to § 812 para. 1 sentence 1 var. 1 BGB; Medicus/Petersen, RN 664, p. 348. This is the so-called *condictio indebiti*, Medicus/Petersen, margin number 689, p. 363.

[4] Medicus/Petersen, margin number 666, p. 350.

[5] Medicus/Lorenz, § 61, margin number 11, p. 411.

[6] Medicus/Petersen, margin number 689, p. 369.

Purchase agreement 1 was invalidated by the challenge from the outset, i.e. retroactively to the date of conclusion of the purchase agreement. There was therefore always no legal basis for performance[1].

d. Duty to surrender of what has been obtained (*Verpflichtung zur Herausgabe des Erlangten*)

The legal consequence is that V can demand the surrender of what K has obtained. The debtor of the condictio is solely K. He must return what he has obtained through the enrichment. This is precisely the legal position that he acquired without legal grounds through the performance[2].

Anything that is tangible can be considered as "obtained": If, for example, the debtor in possession has obtained ownership, restitution means retransfer of ownership. Due to the principle of abstraction, this also frequently occurs in the case of ineffective obligations[3].

In our example case (situation 1), K therefore basically owes the retransfer of the property to V.

e. Compensation for lost value (*Wertersatz*)

Now, however, K is no longer the owner of the property. He has sold it on to V and transferred ownership.

Due to the principle of abstraction, K was also true owner (*rechtmäßiger Eigentümer*) at all times. D therefore acquired from the owner and thus became the true owner himself.

It should also be noted that in the case of reverse of a transaction, the condictio is only between the parties to the obligatory transaction. In this case, this is purchase agreement 1 between V and K.

However, if the debtor is unable to surrender what he has obtained, he must reimburse the value.[4] This is the case, for example, if the item obtained has been resold.[5]

The amount of the value to be compensated is the objectively determined market value[6]. If the debtor of the condictio has sold the item for more than

[1] It is also conceivable that the legal reason for the performance ceases to exist at a later date. In this case, too, there is a claim of unjust enrichment, the condictio ob causam finitam (§ 812 (1) sentence 2 var. 1 BGB).
[2] Medicus/Lorenz, § 67, margin number 2, p. 434.
[3] Medicus/Lorenz, § 67, margin number 3, p. 434.
[4] § 818 (2) alt. 2 BGB.
[5] Medicus/Lorenz, § 67, margin number 11, p. 436.
[6] Medicus/Lorenz, § 67 margin number 12, p. 436.

the market value, any proceeds from the sale that exceed the *market value* are generally not to be compensated[1].

This means that K must pay to V the market value of the property in cash.

f. Synallagma and balance (*Saldo*)

As a result of the challenge (*Anfechtung*), purchase agreement 1 has become invalid. As a result, V's obligation to provide K with ownership of the property has lapsed.

However, the obligation of K to pay the purchase price to V is also invalid.

I.e.: V has a claim against K for retransfer of the property[2]. K also has a condictio claim against V: for repayment of the purchase price paid.

If K were still the owner of the property, he would have to transfer the property back to V. For his part, V would have to repay the purchase price[3].

In principle, the debtor od the condictio is obliged to return what he has obtained – i.e., the ownership of the property. However, since in situation 1 K only owes compensation in money, in practice the *balance* (*Saldo*) can be formed between the two monetary claims: Both monetary claims are offset against each other. Only the excess must be paid[4].

4. Challenging prior to closing transfer of title to D

The legal situation is different in situation 2: The challenging takes place after the conclusion of purchase agreement 2 between C and D, but before the conveyance and land register entry of the change of ownership to D.

Such a case is very theoretical in nature. The notarization of the purchase agreement (here purchase agreement 2), the conveyance and the registration approval are usually carried out in one appointment with the notary. The time gap required for this constructed case does not regularly exist in practice.

In this theoretical case, K would still be the owner of the property. As a result of V's claim to condictio, K must transfer ownership of the property back to V. K also receives the purchase price back from V.

However, purchase agreement 2 between K and D continues to exist. D still has a claim to ownership of the property. And to precisely this property, not just any property.

[1] Medicus/Lorenz, § 67 margin number 12, p. 436. This may be the case, for example, in the event of a breach of public morals (*gute Sitten*) or bad faith (*Bösgläubigkeit*).
[2] Or if K has already resold the property, V is entitled to compensation for the market value in money.
[3] So-called "enrichment law synallagma"; Medicus/Petersen, margin number 223, p. 107.
[4] Medicus/Petersen, margin number 224, 225, p. 107 f.

The rules on the impossibility of providing a performance (*Unmöglichkeit zur Erbringung der geschuldeten Leistung*) owed apply here. In individual cases, it must be examined whether D could be entitled to compensation for non-performance. However, it would also have to be taken into account that D saves the purchase price.

5. Invalidity of the in rem performance transaction between V and K

Situation 3 is similar theoretic to the case in situation 2: Purchase agreement 1 is not challenged. However, after D's entry in the land register, it turns out that the performance transaction (*Erfüllungsgeschäft*) under property law is invalid.

The agreement in rem (the conveyance) usually takes place at the same time as the notarized purchase agreement is concluded. A situation in which the purchase agreement is effective but the conveyance is ineffective is somewhat contrived.

The legal situation in this case would be as follows:

K has not become the owner of the property.

D therefore did not acquire the property from the true owner. However, K was entered in the land register. D was entitled to rely on this entry and therefore acquired ownership in good faith. V has lost the ownership.

In addition, various claims for compensation under the law of obligations may exist between the parties involved.

D. Excursus: The procedural situation

In the above example case, variant 1, V can assert his claim for retransfer of the property against K in court.

I. Retransfer of the property

German civil procedure law provides for the action for performance (*Leistungsklage*). The action for performance serves to enforce claims [48][1]. This can be a claim for the surrender – for conveyance and handover – of a property. Only a judgment for performance can be enforced[2].

In principle, in civil proceedings, each party bears the burden of assertion and proof for all facts that are a prerequisite for their claim[3]. It is not necessary to prove legal principles. The court must be aware of these[4].

[1] According to § 194 (1) BGB, a claim is the right to demand an action or omission from another party.
[2] Jacoby, ch. 7, margin number 4, p. 87.
[3] Jacoby, ch. 14, margin number 11, p. 181.
[4] *Iura novit curia*. Jacoby, ch. 14, margin number 12, p. 181.

There are exceptions to this principle of the burden of proof if the law expressly stipulates this. This is the so-called reversal of the burden of proof[1]. This applies, for example, if the claimant demands that the defendant surrenders a property on the grounds that he himself (the claimant) is the owner: if the defendant is entered in the land register, the plaintiff must prove the facts on which his assertion of ownership is based.

In our case, this means that V must prove that
– he has challenged the purchase agreement 1,
– facts existed on the basis of which he asserted the challenge.

V can sue directly for performance, namely retransfer of the real property. It is not necessary for him to first bring an action for a declaratory judgment on the legal situation following his challenge in order to then - based on the declaratory judgment – bring the action for condictio.

V's claim is for the retransfer of the property.

II. Claim for compensation in money

In the example case, K has already sold the property on to D. V then only has a claim for compensation for value in money against D.

Alternative 1: If V knows that K has resold the property, V can only bring his action directly for compensation. This is his claim under substantive law.

Alternative 2: If V is unsure whether K has resold the property, there is the following possibility:

He can submit a main request (*Hauptantrag*) for retransfer of the property. Alternatively (*Hilfsantrag*), he can also apply for the value of the property to be compensated to him in money if K is no longer the owner of the property.

Such an auxiliary request (*Hilfsantrag*) can be filed by the claimant in the event that he does not prevail with the main request (*Hauptantrag*). This is permitted if the main and auxiliary requests are legally or economically related[2].

Alternative 3: V only learns during the process that K had sold the property in the meantime.

In this case, V can change the claim from retransfer of the property to payment of compensation in money.

Such a conversion is possible if, instead of the original subject matters of action (*Klagegegenstand*), a different subject matters of action or interest

[1] Jacoby, ch. 14, margin number 42, p. 189.
[2] Jacoby, ch. 8, margin number 22, p. 112.

is now claimed due to a subsequent change[1]. The claimant can no longer demand the original object of the action; instead, to avoid a new lawsuit, he now demands a different object, i.e. a different object of the procedural claim [49][2]. In the case of a condictio claim, this includes when the surrender of the enrichment is now demanded instead of performance[3].The change must have occurred or become known to the claimant after the action was filed[4].

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[3] Baumbach/Lauterbach/Albers/Hartmann, § 264, margin number 11, p. 1044.

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