7. Transfer of property *inter vivos*

Lars van Vliet

1. INTRODUCTION[1]

A. Overview

This chapter will give an overview of the various transfer systems for the transfer of movable property and immovable property. The chapter will focus on voluntary transfers based on a legal act between the transferor and transferee and will leave out automatic transfers e.g. from a deceased to his heirs or based on a merger of companies or demerger of a company. It will also leave out forced transfers based on seizure by a creditor for debt enforcement or a forced sale by an administrator in bankruptcy. The transfer of bank money and dematerialised financial instruments will be addressed separately, as these transfers should not be regarded as transfers in the property law sense of the word.

The chapter will address the difficulties encountered when undertaking research in this field. One of these difficulties is caused by differences in terminology or a lack of clear understanding of terminology.

B. Various Difficulties To Be Dealt With

In many legal systems the transfer of immovable property follows the same rules that apply to movable property. However, on top of those rules comes a complex of provisions about land registration. For that reason this chapter will first discuss movable property. As far as registration is a prerequisite of the transfer the rules about land registration have a direct impact on the transfer system itself.

Some legal systems use several transfer systems simultaneously, for example one for most categories of movables and another for immovable property, and yet another for the assignment of claims. But even within the category of movables more than one transfer system may be used. This happens in e.g. English law, US law and Scots law. Moreover, in Scots law the same transfer of movables may underlie two different transfer systems at the same time (van Vliet, 2008).

A more fundamental question is: what constitutes a transfer *system*? When do provisions about the passing of ownership form a system? The Scandinavian jurisdictions and US law do not intend to give rules when property passes, which should then form the point of reference (default rule) for the solution of all sorts of different conflict situations. To give some examples, typical conflict situations are the conflict

[1] Parts of this chapter are based on my Chapter 72 in: J.M. Smits, ed. (2012) Elgar Encyclopedia of Comparative Law.

between the seller and buyer about non-conformity and risk or about non-payment, the conflict between the seller's bankruptcy estate and the buyer, or the conflict between the buyer's bankruptcy estate and the seller. One could make separate rules for each possible conflict situation and thus do without any transfer system. The disadvantage is that no one can foresee all possible conflict situations and that it is therefore dangerous not to have a standard default rule about the passing of ownership that could function as a reference point for new cases. Once a legal system has a default rule when ownership passes it can be said to have a transfer *system* in the strict sense of the word. In practice the difference between having a transfer system (the so-called unitary approach) and the Scandinavian functional approach which does without a default rule need not be large, since many unitary systems have various exceptions to the default rule where the default rule would not give the desired outcome.

2. THE THREE MAIN TRANSFER SYSTEMS FOR MOVABLES

A. Overview

Many of the world's legal systems for the transfer of movable property fit into one of three types of transfer system: the causal consensual system, the causal tradition system and the abstract tradition system. Here two dividing lines intertwine: the distinction between causal and abstract systems and the distinction between consensual and tradition systems. As examples we will look at the transfer of movable property in German, French, English and Dutch law.

A causal transfer system (e.g. the Netherlands, Switzerland, Austria, DCFR) demands that the transfer be based on a valid legal ground, i.e., a legal reason justifying the passing of ownership (*iusta causa traditionis*). In the case of sale and transfer, the transfer should be based on a valid contract of sale. In an abstract system, on the other hand, the transfer is valid even if it is not based on a valid legal ground (e.g. a void or avoided contract). Under the influence of Savigny and his pupils, German law opted for the abstract system. Other legal systems which use an abstract transfer system for the transfer of movables are South African law and Scots law.

The sharp distinction between the extremes of causal and abstract has been in existence only from the beginning of the 19th century. In the learned law of the period from the rediscovery of the Digest up to the beginning of the 19th century no consistent transfer theories can be found, let alone the terms 'abstract' or 'causal' transfer (van Vliet, 2003).

In a consensual system a valid transfer of ownership in principle does not require any transfer or providing of possession (in common law systems often called 'delivery') (e.g. French law and the UK Sale of Goods Act 1979). In the current view ownership passes simply as a result of entering into a contract which imposes an obligation to make a transfer. A tradition system, on the other hand, distinguishes between the underlying contract and the legal act of transfer. Whereas in a consensual system the contract, i.e., consensus between the parties, suffices (hence its name), in a tradition

system the contract merely calls into being an obligation to transfer. In the latter system ownership will pass only after the legal act of transfer and *traditio* (delivery) have taken place.

The division between consensual systems and tradition systems is not as sharp as it might seem at first glance. The existence of fictitious *traditio* (constructive delivery) and exceptions to the requirement of *traditio* have reduced the difference between consensual and tradition systems to a distinction only of dispositive law. In both systems parties are able to let ownership pass when they think fit, provided the assets are specific and existing goods. Owing to the principle of specificity, ownership of generic goods cannot pass to the acquirer before the goods to be delivered to the acquirer have been ascertained. Ownership of future goods cannot pass to the acquirer: the transfer will be effective only from the moment the asset has come into existence.

B. Practical Differences Between Causal and Abstract Systems

If I sell my bicycle the contract of sale is said to be the *causa traditionis*, the legal ground, for the transfer. The *causa traditionis* makes clear what the legal reason for the transfer of ownership is: sale, barter or a gift, for example. Suppose now that one of the parties has entered into the contract under the influence of a mistake. According to Dutch, German, English and French law the party influenced by the mistake has under certain circumstances the power to annul or avoid the contract, that is to say, to render the contract void. Avoidance of the contract has retroactive effect: having been avoided, the contract is deemed never to have existed. In a consensual system, where the contract of sale itself is said to pass ownership, it is obvious that avoidance of the contract will inevitably lead to ownership reverting to the seller with retroactive effect. Moreover, if the contract is void from the outset, it has never been able to transfer ownership. So, in a consensual system, it seems as if the transfer of ownership necessarily depends on the validity of the contract. Such a transfer system that needs a valid *causa traditionis* is called a causal system.

In a tradition system the act of transfer is considered as a distinct legal act. Having made the distinction between the underlying contract, the *causa traditionis* and the transfer, a legal system is confronted with the question how the latter act relates to the former one. Does invalidity of the underlying contract affect the validity of the transfer? Legal systems in which the validity of the transfer does depend on a valid *causa traditionis*, the Dutch, Swiss or Austrian systems, for example, are called causal tradition systems. If in such systems the obligatory contract is void or has been avoided with retroactive effect, the transfer is invalid and either ownership has never passed (in the case of a void contract) or it is deemed never to have passed to the buyer (where the contract has been avoided). The seller is then able to claim back the bicycle on the basis of his ownership. In legal systems based on Roman law, he would be said to have an action of revindication (*rei vindicatio*).

In German law, on the other hand, the act of transfer is in principle independent of the validity of the obligatory contract. Systems like the German are called ‘abstract transfer systems’ because the validity of the transfer is judged abstractly, i.e., independently, of the contract. The invalidity of the obligatory contract has no effect on the validity of the transfer; the transfer will remain valid even if the legal act that

obliged the transfer to be made is void or has been avoided. Yet, where there is no valid *causa traditionis* the transfer, though valid, leads to an unjustified enrichment of the buyer. It obliges him to undo his enrichment by re-transferring the thing to the seller. It is a transfer similar to the first transfer and it should accordingly fulfil all requirements every transfer should meet. The *causa traditionis* of the re-transfer is the buyer's obligation based on unjustified enrichment.

If the contract of sale is avoided the entire transaction should be reversed: the money, if already paid, should be paid back to the buyer, and the bicycle should return to the seller. This applies to a causal system as well as to an abstract system. However, the way in which the transfer of ownership is reversed differs. Whereas in a causal system ownership of the bicycle reverts *automatically* to the seller when the contract is avoided, in an abstract system the validity of the transfer will not be affected. Here the buyer has an obligation based on unjustified enrichment and the seller a correlative personal right to the retransfer of ownership.

Yet this difference, however important, should not be overestimated. The difference will normally be limited to the transfer of the *thing*. As to the money paid to the seller, all three systems, the causal tradition system, the abstract tradition system and the consensual system, cope with two similar problems: if money is paid using coins and banknotes, the money will have been mixed with the rest of the buyer's money, rendering the money paid unidentifiable. As a result, the money cannot automatically revert to the buyer after avoidance of the contract. Second, if the money has been paid from one to the other bank account, ordering the banker to debit the first and credit the second account, no transfer of ownership takes place and no property can revert automatically.

C. Transfer of Bank Money and Dematerialised Financial Instruments

Bank money, or incorporeal money, is money in a bank account. It forms a claim against the bank. For that reason many legal systems do not use the term 'ownership', 'title' or 'property' in relation to bank money, as these terms are normally used to denote an interest with *erga omnes* effect. The claim against the bank is a mere personal right, which becomes patent in the bank's bankruptcy (for English law, see Fox, 2008).

In its simplest form, when both payer and payee hold a bank account with the same bank, the transfer of money from one to the other bank account takes place by the payer ordering his banker to debit his bank account and credit the payee's bank account. This is a set of administrative acts, in performance of the bank's current account contract with the payer and the current account contract with the payee, and is outside the realm of property law. It does not constitute a transfer in the property law sense of the word (see also Fox, 2008: c 5, B and C). The clearest example is a transfer ordered by a payer who made use of an overdraft facility and already has a negative bank account. If he orders the bank to transfer a sum to the payee, and the bank executes this order, no transfer in the property sense of the word can have taken place, as there was no money in the account to start with. The same applies to transfers of dematerialised financial instruments, such as shares and bonds. The transfer is similarly effected by debiting and crediting of accounts.

D. Importance in Bankruptcy

The difference between having a real or rather a personal right is important, especially in the case of bankruptcy. Let us take the example of the sale of a movable. The seller has entered into the contract under duress. As the transaction does not correspond to his true will the seller has the power to avoid the contract of sale. Where the thing has already been delivered avoidance will oblige the buyer to return the thing to the seller.

In the German abstract transfer system the seller merely has a personal right to the retransfer of the thing. As a result, the seller does not have any priority in the buyer's bankruptcy: he is an ordinary unsecured creditor. In a causal system, on the other hand, the seller will in principle be able to claim back the thing, relying on his right of ownership, which will normally revert to him as a result of the avoidance. When ownership reverts to the seller the thing does not form part of the buyer's goods available for realisation and satisfaction of the buyer's debts. It should be returned to its owner by the liquidator or trustee in bankruptcy. For that reason it is often said that a causal system gives a better protection to the transferor against bankruptcy of the other (i.e., the receiving) party.

We should bear in mind, however, that the protection against bankruptcy of the receiving party is rather imperfect. First, the seller's protection against the buyer's bankruptcy is limited by a few exceptions: as the protection depends on the transferor's ownership the protection is no longer available when for some reason it is impossible for ownership to revert automatically to the transferor. To give an example, the transferor's action of revindication may be frustrated when the transferee has sold the object to a bona fide third party: if available, third party protection will deprive the original owner of his right of ownership. The reverting of ownership to the transferor may also be barred as a result of original acquisition, for example when the thing has been mixed with identical assets in the hands of the transferee (*confusio* and *commixtio*), or if the thing has been used to make a new thing (*specificatio*) or if it has been attached to another thing (*accessio*).

Secondly, in German, Dutch and French law, the protection is in principle offered only to the transferor of the thing. The buyer, who has a duty to pay for the goods, is not given a similar protection against the seller's bankruptcy. The reason is the different nature of the assets both parties have to transfer: a thing and money. The claim for repayment of the purchase price will normally be an unsecured claim.

E. The German Transfer System

The German abstract system distinguishes between the contract containing the obligation to transfer property (*Verpflichtungsgeschäft*) and the transfer itself (*Übereignung, Veräußerung*). For the transfer of immovable property German law has the more specific term *Auflassung*. The transfer is valid even if the preceding contract is void or has been avoided with retroactive effect. If ownership has been transferred under a voidable contract, avoidance will not automatically revest ownership in the transferor. The German transfer system is at the same time a tradition system: apart from *Einigung* (real agreement) § 929 of the Civil Code (BGB) requires for the transfer of movables *Übergabe* (a transfer of possession). The transfer of possession needs the will

of the transferor to make the acquirer possessor, and the corresponding will of the transferee to acquire possession from the transferor. It is an act aiming at the passing of possession. As possession is not only a fact but also a right, the transfer of possession can be regarded as a legal act. Still, in German law this is recognised only in regard to the transfer of possession mentioned in § 854, subs. 2 BGB, a transfer of possession by mere agreement. On the other hand, the transfer of possession by providing actual power[2] is seen as no more than a factual act. For practical reasons German law provides that in some instances no transfer of actual power is needed as between the transferor and transferee. The instances are *Geheißerwerb, traditio brevi manu, constitutum possessorium* and the assignment of the *Herausgabeanspruch* (van Vliet, 2000: § 2.4).

As a rule, a valid transfer also demands that the transferor should have the right to dispose (*Verfügungsbefugnis*). Normally the owner of the thing will have the right to make a transfer, but he no longer has the right to do so if he is declared bankrupt.[3] On the other hand, a non-owner may, by law or by a legal act, be given the right to dispose. The pledgee, for instance, has a right to seize the pledged asset and sell and transfer it in execution.[4] However, in certain cases a person who has no right to dispose is nonetheless able to make a valid transfer. For if the acquirer is in good faith, and if all other requirements for third party protection are met, the transfer is regarded as valid. A non-owner is thus able to transfer a thing belonging to another. Here the transferor is the non-owner, yet the bona fide third party succeeds in a right (ownership) which previously belonged to the owner. We may call this ability to transfer 'the *power* to dispose'.

Although the principle of abstraction continues to apply in modern German law, it has been eroded in practice by the notion of 'identity of defect' (*Fehleridentität*) between contract and conveyance. It is accepted that the transfer, the conveyance, is independent and that defects in the underlying contract do not *automatically* spill over to the conveyance. At the same time, however, Wiegand[5] stresses that no artificial segregation should be made between the two legal acts. In every case it should be ascertained whether the transfer is affected by the same defect as the contract. If, as is often the case, both legal acts suffer from the same defect, this should be openly acknowledged, despite the obvious effect of eroding the abstract transfer system.

Under German law, serious defects of will, such as fraud, undue influence and duress, will normally affect both the contract and the transfer. As a result, the victim may annul the transfer as well as the contract. It is also accepted that usury renders a transfer void when the transfer gives effect to the usury. Transfers for the purposes of security can also be void for reasons of usury. Similarly, legislation on unfair standard form contracts may render void not only the contract but also the transfer itself. Identity of defect is, however, hardly ever accepted in respect of error or mistake, the most common defect of will, except in cases where the wrong thing has been transferred or a transfer has been made to the wrong person. Where a statutory provision entails

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[2] § 854, subs. 1 BGB.
[3] *Insolvenzordnung*, §§ 22, 24, 80, 81.
[4] § 1242 BGB.
[5] Wiegand (2011: § 929, nr. 18 and 28).

voidness it is vital to check whether or not the voidness is aimed only against the contract or also at the transfer itself. Moreover, in German law parties to the contract and transfer may opt out of the abstract transfer system by treating them as a unitary transaction (*Geschäftseinheit*) in the sense of § 139 BGB, or by making the transfer under a resolutive condition that the underlying contract is and remains valid.

One effect of these developments is to erode the main policy reason for including the abstract transfer system in the German Civil Code. For if third party protection is provided in some other way, the need for the abstract system is reduced accordingly (van Vliet, 2008).

Under § 932 BGB a third party in good faith may acquire ownership if the transferor is not the owner. Similarly, § 363 of the Commercial Code (HGB) protects against the transferor not having the right to dispose. These cases of acquisition are regarded as forms of derivative acquisition. The provisions enable a non-owner to transfer the owner's right of ownership to a bona fide third party (for more details see van Vliet, 2012: c 9).

F. The French Transfer System

The French causal and consensual transfer system does not require a transfer of possession. Here consensus between the parties suffices.[6] Traditionally in this system the contract itself is held to pass ownership. Ownership passes at the moment the contract is made. Yet, there are some very important exceptions to this principle. As a result of the principle of specificity, ownership of generic goods can pass only when certain goods are separated and appropriated for delivery to the acquirer.[7] And, where there is a contract for the transfer of future goods, ownership can pass only after the goods have come into existence.[8] Furthermore, it is often overlooked that, in the case of sale, the 'translative effect of obligations' applies only to the passing of ownership of the thing, not the transfer of the money due in exchange.

The French causal system originated in the consensual system of the *Code civil*: where the contract itself passes ownership a valid transfer necessarily depends on the contract being valid. Even so, the choice of a causal system was not deliberate: it was merely a logical consequence of opting for a consensual system, a consequence one did not realise when the Code was enacted.

Where the transferor lacks the right to dispose, a bona fide acquirer may be protected by Article 2276 *Code civil* and acquire ownership. In French law this acquisition is not seen as derivative but rather original (see van Vliet, 2012: c 9, II.B.2). A parallel provision exists for double sales,[9] which protects the second buyer in good faith if he was the first to acquire actual power over the object.

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[6] Art 1138 *Code civil* (France). For sales the principle is repeated in art 1583 *Code civil*.
[7] Cass civ 1e, 19 February 2002, no de pourvoi 99-12585.
[8] Cass civ, 1 August 1950, S 1951.1.100.
[9] Art 1141 *Code civil*.

G. The English Transfer System

Another example of a consensual system is the Sale of Goods Act 1979, which applies in England, Wales and Scotland. Outside the sale of goods the transfer of movables in English law is based on the ancient common law system of transfer: a tradition system requiring a transfer of possession. As in French law, in the consensual system of the Sale of Goods Act immediate passing of ownership is possible only as regards specific existing (in contrast to future) things.[10] As in French law, the purchase price will not pass to the seller when the contract is made. The rule that ownership of generic goods cannot pass to the buyer before certain goods have been appropriated to the buyer led, in 1995, to an amendment of the Sale of Goods Act. Where the contract stipulates that the goods should be taken from a specified bulk the buyer will under certain conditions (among which payment) become co-owner in the bulk.[11]

The question whether the tradition system of the Sale of Goods Act is causal or abstract is not discussed in English law. Still, on systematic grounds, it can be demonstrated that the system is causal (van Vliet, 2000: § 4.5; van Vliet, 2008).

Outside the area of sale of goods movable property should be transferred on the basis of the ancient common law system of transfer, which requires a transfer of possession (delivery or *traditio*). An important instance to which the ancient requirement still applies is the gift from hand to hand (in contrast to the gift by deed). Here *traditio* may take the form of providing actual power, but in some cases a fictitious transfer of possession will suffice (van Vliet, 2000: § 4.8). It is difficult to ascertain whether transfers outside the scope of the Sale of Goods Act need a valid legal ground. As to the ancient common law transfer by *traditio* no conclusion is possible: there is no legislation, case law or literature which could give us any clue whatever (van Vliet, 2000: § 4.5).

Third party protection in cases of acquisition from a non-owner is available in English law but scattered over a large number of different and very complicated provisions. It is generally accepted that English law should be revised to have a broader general protection rule. It makes comparative law in this area particularly challenging. The main provisions are to be found in the Factors Act 1889, the Sale of Goods Act 1979 and the Hire Purchase Act 1964. In addition the doctrine of estoppel is used (see Swadling, 2012: Chapter 9).

H. The Dutch Transfer System

For a valid transfer of movables Dutch law in principle requires the providing of possession to the acquirer. Furthermore, every transfer needs a valid legal ground.[12] As a result, the transfer system may be classified as a causal tradition system. Moreover, Article 3:84 BW (Civil Code) requires that the transferor should have the right to dispose (*beschikkingsbevoegd*).

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[10] Sale of Goods Act 1979, ss 16–18.
[11] Sale of Goods Act 1979, ss 20A and 20B.
[12] Art 3:84 BW.

There is some controversy whether the transfer of ownership needs a real agreement (*goederenrechtelijke overeenkomst*). Most authors assert that a real agreement is essential to any transfer. The act of transfer, the act aiming at the passing of ownership to the acquirer, should be regarded as a legal act the nucleus of which is formed by the real agreement. Any formalities required in addition to the real agreement should be seen as *condiciones iuris* (conditions required by the law rather than conditions stipulated by the parties). They suspend the effect of the legal act until certain additional requirements, such as *traditio*, have been met. Possession may be provided by giving actual power or by using a form of fictitious *traditio*. In one instance, Article 3:95 BW, not even a fictitious tradition is needed: here a simple deed suffices.

Dutch law offers a broad general protection rule for good-faith acquirers from a non-owner.[13] The acquisition is seen as a derivative acquisition: the non-owner is able to transfer the right of ownership directly from the owner to the third party without himself becoming owner. The third party is protected if he acquired in good faith, for valuable consideration, on the basis of a valid legal ground and according to the formalities of delivery. Apart from these general requirements a special rule is made for stolen goods.[14] Where the object has been stolen the acquisition by the bona fide third party is postponed for three years, even though all requirements of Article 3:86(1) BW have been met. If during the three-year period the original owner revindicated the thing, bona fide acquisition is blocked. However, this special rule does not apply to money and negotiable instruments and, generally speaking, to a consumer who buys from a merchant in a shop (see van Vliet, 2012: Chapter 9).

3. TRANSFER OF IMMOVABLE PROPERTY

A. Terminology

The legal systems reviewed below all offer third party protection against incorrectness or incompleteness of the land register to varying degrees. The differences are mostly gradual (amount of protection) rather than fundamental. One more fundamental difference is that French law in certain cases even protects third parties in bad faith.

As regards 'title by registration' systems, the term sounds more radical than justified. These systems often have a mechanism to rectify incorrect registration. As far as these remedies have third party effect, so that the original legal situation is restored, the effect of such a system does not differ much from a system where registration does not create or alter titles.

Another distinction often made within registration systems is the one between 'deeds registration' and 'title registration'. Deeds registration means that every deed relevant to a certain parcel can be or must be registered. Title registration means that for every parcel the current legal status is recorded. A deeds register without a complementary title register may be cumbersome in that third parties have to check all relevant deeds to reconstruct which is the current legal status of the parcel. In Dutch law, for example,

[13] Art 3:86 BW.
[14] Art 3:86(3) BW.

third parties should check the deeds register, but the relevant deeds can only be found by first checking the title register of the parcel in question, which mentions the registration number of the relevant deed in the deeds register.

These labels bring more confusion and misunderstanding than clarification. They often suggest large differences between legal systems which in reality do not exist, or at least are much smaller than suggested.

B. The Mirror Principle

In German law the terms 'positive' and 'negative' are used to describe the protection offered by the land register. 'Positive publicity' means that bona fide third parties should be able to rely on the *existence* of a registered right, whereas 'negative publicity' means that these third parties should be able to trust that non-registered rights *do not exist* (completeness of the register). Ideally, a land register should mirror the legal status of each parcel of land. However, for various reasons many legal systems allow certain unregistered rights to be set up against bona fide third parties. Some of these exceptions are treated explicitly in legislation and textbooks about property law. However, it should be noted that often land registration systems do not allow the registration of personal rights. Since in many legal systems leases are not seen as real rights but rather as contracts, they cannot be registered. Nevertheless, in many of these systems leases, though being mere contracts, work against third parties. Often the buyer of a leased property is bound to the lease even if he did not know nor could have known about the lease (e.g. because the premises is unoccupied). This subject is normally discussed in books about lease contracts. In English law, where the lease is regarded as a real right, the outcome need not be different. Most leases up to seven years cannot or need not be registered but nonetheless bind future owners of the legal estate or holders of a mortgage.[15] Furthermore, there may be public law restrictions, or pre-emption rights of a local authority, which are binding without registration. This will normally be dealt with in books on planning law and administrative law.

Even if the mirror image is exact and complete the mirror principle does not guarantee that the buyer who buys land from a registered owner will become the owner. At the time of the sale and conveyance the seller might have lost the power of disposition, e.g. as a result of bankruptcy. Or the seller might have been declared mentally incapable so that the sale and conveyance are void or voidable. This information is often to be found in separate registers (outside the land register) which professionals, such as notaries, must check on behalf of the buyer.

C. Boundaries

Even legal systems with strong third party protection do not always give protection regarding the exact boundaries of the registered land. Sometimes the land register does not contain information about the exact boundaries between two or more neighbouring properties, or the information cannot be relied on. Although the information in the German land register was often copied from older 19th-century land tax registers of

[15] Land Registration Act 2002 (UK), ss 11(4)(b), 12(4)(c) and Schedule 1 [LRA 2002].

varying quality (Ziegler, 1989: 65), German law has a presumption that the information about the boundaries, if available in the cadastral map (*Katasterkarte*), is correct. Moreover, if the land is conveyed to a bona fide third party, the boundaries are deemed to be correct so as to protect the third party (see Kohler, 2013).[16] In other systems where this information is not readily available or is not reliable (French,[17] English and Dutch law[18]), the legal system may choose to protect a third party, e.g. a buyer, in a different way, namely through acquisitive prescription (adverse possession). The more difficult it is to obtain the information, the more likely it is that the buyer can claim to have been a bona fide possessor.

D. German Law

The German transfer system set out for movables above also applies to immovables. Thus the transfer is not effected by the contract requiring the transfer to be made (e.g. the contract of sale) but an additional act of transfer is needed, the so-called *Auflassung*. In addition a third element is needed, namely registration in the land register (*Eintragung im Grundbuch*).[19] It ensures that the land register is kept up to date. The transfer and registration is abstracted from the underlying legal ground, e.g. the contract of sale. Therefore the transfer is valid even if the underlying contract of sale is void and the transfer remains valid even if the contract of sale is avoided with retroactive effect.

The contract of sale or any other contract requiring a transfer of immovable property is in principle void if it is not laid down in a notarial deed.[20] The provision is intended to protect both the transferor and the transferee against entering into such a contract without due deliberation and against unfair conditions in such a contract (Kanzleiter, 2016: § 311b, nr. 1 and 2). However, if such a contract is void only for want of a notarial deed and the contract has been followed by a transfer of ownership and registration in the land register, the contract will be affirmed.[21]

The conveyance, that is the transfer of ownership, consists of two elements: the real agreement about the transfer,[22] and the entry in the land register.[23] The real agreement, the so-called *Auflassung*, should in principle be laid down in a notarial deed. However,

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[16] The presumption of § 891 BGB and the public faith of § 892 BGB also cover the information in the cadastral map. See Kohler, 2013, § 892 nr. 17 and BGH 2 February 2005, V ZR 11/05, NJW-RR 2006, 662 and BGH 12 October 2012, V ZR 187/11, NJW-RR 2013, 789.

[17] The French land register does not contain maps indicating the boundaries of the parcels. The cadaster, which is not part of the land register, does contain maps, but these are not decisive for the boundaries and are only used for public administrative purposes.

[18] The Dutch land register does contain for each parcel a cadastral map showing the boundaries, but this information cannot be relied on. If through acquisitive prescription the boundaries have shifted after the map was made, good faith in the correctness of the map will not be protected.

[19] § 873(1) BGB.

[20] § 311b(1) BGB.

[21] § 311b(1) BGB.

[22] §§ 873 and 925 BGB.

[23] § 873 BGB.

the declaration of conveyance can also form part of legal proceedings or a distribution plan made by an administrator in bankruptcy. The purpose of these formalities is to ensure that there is written evidence of the conveyance. Therefore, the lack of form does not lead to voidness (Kanzleiter, 2016: § 311b, nr. 16). The land register will only register the conveyance if the transferor declares that he agrees to the registration[24] and both transferor and transferee agree to the conveyance.[25] The registrar will not check the validity of the conveyance and will register simply on the basis of the transferor's agreement to the registration.

A registered right is not created solely by its registration (no 'title by registration'), nor does the registration give the registered person a right of disposal. As a consequence, a conveyance or a creation of a mortgage by a person who was wrongly registered as owner but who is not the owner, is invalid (*nemo plus* rule). However, German law offers bona fide third parties ample protection against incorrectness and incompleteness of the land register in § 892 BGB. The provision protects third parties unless they had actual notice of the incorrectness or incompleteness. If so protected, the damaged party (e.g. losing ownership or suffering from the burden of a limited real right) has an action of unjustified enrichment against the person who wrongly made the disposition,[26] but he will not get any indemnity from any public body. Thus the English law 'mud or money' question does not arise in German law.

If a non-owner who has been registered as owner fulfils all requirements for a valid conveyance, other than his right of disposal, § 892 BGB triggers the *fiction* that the right of ownership belongs to the registered owner. This is a mere fiction so that if the genuine owner (who is not the registered owner) makes a disposition, such as a conveyance, that disposition is valid.

§ 892(1) first sentence reads: 'In favour of a person who by disposition acquires a right to an immovable property or a right to such a right, the contents of the land register is deemed correct, unless a denial against the correctness has been registered or the incorrectness was known to the acquirer.' The fiction that e.g. the registered owner is the real owner is called the public faith of the register (*öffentlicher Glaube*). It should be distinguished from good faith (or rather lack of actual notice) which is required in addition to the public faith ('incorrectness was known to the acquirer'). The genuine owner, whose right is not registered, can demand rectification of the register,[27] but that procedure will take some time. To prevent the registered owner from making valid dispositions in favour of bona fide third parties the genuine owner may protect his right by having a denial registered.[28] A registered denial annuls the public faith of the denied fact or right so that protection under § 892 BGB is blocked.[29]

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[24] § 19 Land Register Code (*Grundbuchordnung* (GBO)).
[25] § 20 GBO.
[26] § 816 BGB.
[27] § 894 BGB.
[28] § 899 BGB.
[29] In the German system the registration of the denial does not automatically lead to actual notice. However, third party protection is blocked by taking away the public faith. In some other legal systems such a registered denial automatically leads to a lack of good faith because a third party cannot claim to be in good faith regarding information (such as the denial) entered in the land register (see e.g. art 3:23 BW for Dutch law). In such systems 'good faith' is not only

No public faith is created in the rare case that a person is registered as the owner of a piece of land whereas another person has also been registered as the owner of that same piece of land on a separate file in the land register (*Doppelbuchung* or double booking). Both entries cancel each other out, so that third parties cannot rely on either of these entries. Therefore a bona fide purchaser is left unprotected. Only the purchaser who contracted with the genuine owner can acquire ownership. For the bona fide purchaser it is near impossible to find out that there is another concurring entry (Westermann, Gursky and Eickmann, 2011: § 83 nr. 17).

E. French Law

The statute on land registration of 11 Brumaire an VII (1 November 1798) introduced for all parts of France a system of land registration requiring registration of among other things mortgage deeds and conveyance deeds.[30] Although Article 28 provides that the registration itself passes ownership to the buyer, this provision was soon to be overruled by the 1804 Civil Code, which in various provisions laid down the so-called consensual transfer system in which the contract of sale itself passes ownership.[31] Any doubt whether or not the system of the statute of 11 Brumaire an VII had really been abolished by the Civil Code was taken away by a ruling of the *Conseil d'État* that a right of mortgage granted by the former seller of land after the sale of the land cannot be registered, even if at that moment the sale is still unregistered (Colin and Capitant, 1930: 949–950). So, the *Conseil d'État* clearly applies the consensual system and the *nemo dat* rule. Equally, in a double sale scenario, where the owner A first sells his land to B and then sells the same land to C, B acquires ownership immediately without registration being needed, and C can only acquire *a non domino*.

The requirement of registration of transfers of immovable property, abolished by the Civil Code in 1804, was reintroduced by the Land Registration Act 1855.[32] In two judgments from 1925[33] the *Cour de Cassation* held that in principle the second buyer who registers his contract first will take preference over an earlier unregistered sale (first registration takes preference) but that this rule does not apply 'if it is proven that the second sale is the result of a conspiracy characterised by fraudulent acts aimed at robbing the first buyer'.[34] However, Cass civ. 7 December 1925 adds that mere knowledge of the previous sale does not amount to fraud.

The French 1955 decree[35] on land registration (successor to the 1855 statute) offers protection against unregistered rights. Article 30(1) reads as follows:

> If legal acts or judgments which should be published according to the first paragraph of article 28 are not published, they cannot be invoked against third parties who received on the

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lacking when the third party has actual notice of the incorrectness, but also when he should have known the incorrectness.

30 Arts 26 and 28.

31 Arts 1138 and 1583 *Code civil*.

32 Loi du 23 Mars 1855 sur la transcription en matière hypothécaire.

33 Cass req, 6 April 1925 and Cass civ, 7 December 1925, both published in DP 1926.1.185.

34 Cass civ, 7 December 1925. Cass req, 6 April 1925 contains a similar formulation.

35 *Décret n° 55-22 du 4 janvier 1955* portant réforme de la publicité foncière.

> same immovable from the same person a conflicting right on the basis of legal acts or judgments subject to the same duty of publication and which have been published, or who have had registered privileges or mortgages. Nor can they be invoked if they are registered, provided that the legal acts, judgments, privileges or mortgages invoked by these third parties are registered previously …

According to the text of the decree only the date of registration is decisive. It may surprise the reader that the text does not contain any exception for third parties who knew of the unregistered right.

In many cases ownership will already have passed to the first buyer under the consensual transfer system in which the contract of sale passes ownership, so that the second buyer bought from a non-owner. Without any special protection rule the latter cannot acquire ownership. Article 30 has the effect of giving ownership to the second buyer if he has his contract of sale registered first (Revet, 2011: 369).

From 1968 the French *Cour de Cassation* held that a third party who knew of an unregistered right could not rely on the protection offered by Article 30 of the decree.[36] Since 1974 the *Cour de Cassation* has based the rule on delict, holding that the second buyer's registration with knowledge of the previous transfer to the first buyer constitutes a delict against the first buyer.[37]

This case law protecting the first buyer against a second buyer in bad faith is often justified by saying that a registration system is for informing those who do not know, so that a person with knowledge of a previous sale should not be able to rely on the absence of registration of the first sale. However, there was also fierce criticism against the new approach of the *Cour de Cassation*. The core of this criticism is that it diminishes legal certainty whereas legal certainty is the main goal of a registration system which makes third party effect depend on registration (see e.g. Gobert, 1979: 207 e.v., 224 e.v.; Aynès, 2011: 851).

This criticism may be the reason why from 2010 onwards the *Cour de Cassation* reversed this case law, holding that even if the second buyer knew of an earlier sale, he was protected if his acquisition was registered first. Previously, the *Cour de Cassation* had already taken the same approach in the case of protecting the acquirer of a mortgaged property against an unregistered mortgage which he knew existed and in the case of protection against an unregistered long lease (*bail emphytéotique* and *bail à construction*). In 2013 the *Cour de Cassation* held that an unregistered servitude cannot be set up against a subsequent buyer who knew of the servitude.[38]

F. English Law[39]

The question of what kind of transfer system applies to English land law is foreign to the debate in England. As English land law and its Land Registration Act 2002 (LRA)

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[36] Cass civ 3e, 22 March 1968, Bull civ III, nr. 129.

[37] Cass civ 3e, 30 January 1974, Bull civ III, nr. 50.

[38] Cass civ 3e, 2 July 2013, nr. 12-20.681.

[39] The author is indebted to Elizabeth Cooke, Principal Judge of the Land Registration Division of the First Tier Tribunal (Property Chamber), for her valuable comments on this section.

have not been drafted on the basis of one of the transfer systems set out above it could be misleading to describe the system of the LRA 2002 in terms of one of these transfer systems. However, a few careful remarks on this topic might be made.

If a legal estate, e.g. a freehold, is sold, the transfer requires a deed of transfer and registration of that deed at the Land Registry. The legal estate only passes to the buyer when the buyer has been registered as the new owner of that estate.[40] However, that does not mean that this disposition is indefeasible. The registration may be rectified if the registration of the transaction was a mistake, a broad notion that includes the registration of a forged disposition and other instances where the transfer was void.

The effects of registration and the availability of rectification and third party protection as set out in the LRA 2002 deviate substantially from the general principles of property law. Currently, there is a strong tendency of the courts to interpret the LRA 2002 in a way that brings it more into line with these general principles (see e.g. Goymour, 2013; Cooke, 2013, 2014). The reader is warned that this movement could have far-reaching consequences for the law in this area. The following account focusses primarily on the system of the LRA 2002 itself.

Where the registered owner A sold and transferred ownership of land to B under the influence of fraud, misrepresentation or undue influence, rendering the sale and transfer A–B voidable rather than void, A may request the court to avoid the sale and transfer to B. The avoidance inseparably affects both the sale and the transfer. If the court avoids the sale and transfer, it will direct the Land Registry to bring the register up to date by reinstating A. If B sells and transfers the land to C before the avoidance of the transaction A–B, in principle the transaction might be avoided and the register altered, but the court will lean very heavily against avoiding a transfer if that avoidance will prejudice a purchaser for value. The fact that both the sale and the transfer can be avoided, and that, at least theoretically, avoidance of the transaction A–B could prejudice C is incompatible with a purely abstract transfer system. In German terminology, there is an automatic identity of defect, so that the practical outcome is the same as in a causal transfer system.

There are two major reasons why the register does not offer a perfect mirror image. First, some non-registered rights may still burden the registered title and bind its successive owners (overriding interests). Secondly, the register may be rectified causing a loss for the registered owner. Examples of unregistered overriding rights are legal leases for a term not exceeding seven years, proprietary interests of persons in actual occupation, legal easements (servitudes) and profits à prendre and local land charges.[41]

Even though the English system of land registration is called ‘title by registration’, in certain cases the register may be altered. If this alteration corrects a mistake and prejudicially affects a registered proprietor it is called rectification.[42] A key feature of the LRA 2002 is indemnity payable by the Land Registry in cases of rectification of the register and a mistake or failure by the Land Registry itself.[43] The availability of indemnity for rectification hinges on the definition of ‘rectification’ in Schedule 4, para

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[40] LRA 2002, s 27(1), 27(2)(a) and Schedule 2, para 2(1).
[41] LRA 2002, Schedule 3.
[42] LRA 2002, Schedule 4, para 1.
[43] LRA 2002, Schedule 8.

1 and Schedule 8 para 11(2) LRA 2002. The definition of rectification covers transactions that are void because of forgery. One might expect that a forged disposition, which is void for that reason, does not pass ownership to the transferee. However, under the system of the LRA 2002 the registration based on the forged disposition passes ownership to the transferee despite the disposition being void. This does not leave the former owner empty-handed though. He has a right, or at least a claim, to have the register altered in his favour, and that right operates as an overriding interest if he was in actual occupation at the time of the forged disposition. If the register is altered so that the transferee loses his title, he may claim indemnity from the Land Registry. Where a forged disposition is removed from the register in this way the LRA 2002 deems that the transferee or chargee of the removed title has suffered a loss[44] and therefore indemnity is available.[45]

By contrast, if the former owner recovers his title by virtue of having another type of overriding interest (i.e. an overriding interest not based on a forged disposition), the alteration of the register is not seen as causing a loss, because the overriding interest was already binding on the owner before alteration of the register. For that reason no indemnity is available.[46] In the case *Re Chowood's Registered Land*[47] a piece of land was transferred, part of which had been acquired by a third party through adverse possession. The entire parcel, including a strip belonging to this third party, was registered in the name of the transferee. Clauson J held that, as the third party's overriding interest had always been binding on the registered owner of the land, alteration of the register did not lead to any loss for the registered owner.

Rectification will normally not be made against the owner of a registered estate if that owner is in possession of the land.[48] The rationale is that rectification to the detriment of an owner in possession is seen as causing more loss than the refusal to rectify the register to take account of an unregistered right of a third party without possession of the land. Note, however, that the third party whose right is lost as a result of the refusal to rectify does not always qualify for indemnity. Rectification against an owner in possession is, however, available if '(a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or (b) it would for any other reason be unjust for the alteration not to be made'.[49]

Similarly, the right to indemnity is subject to two exceptions. According to Schedule 8, para 5(1) '[n]o indemnity is payable under this Schedule on account of any loss

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[44] LRA 2002, Schedule 8, para 1(2)(b).

[45] This right to indemnity was confirmed by the Court of Appeal in its recent judgment in *Swift 1st Ltd v The Chief Land Registrar* [2015] EWCA Civ 330, a case in which a forged charge had been registered. After deletion of the entry in the charges register, the chargee, Swift 1st Ltd, sought indemnity from the Land Registry, which declined the request. The Court of Appeal, however, held that Swift 1st Ltd had a right to indemnity.

[46] Law Commission No 271 (2011) *Land Registration for the Twenty-first Century: A Conveyancing Revolution – Land Registration Bill and Commentary*. London: House of Commons Papers at 10.7 and 10.16, referring to *Re Chowood's Registered Land* [1933] 1 Ch 574.

[47] [1933] 1 Ch 574.

[48] LRA 2002, Schedule 4, paras 3(2) and 6(2).

[49] Ibid.

suffered by a claimant (a) wholly or partly as a result of his own fraud, or (b) wholly as a result of his own lack of proper care'.

Similarly to German law,[50] in the case of double entry or 'concurring registration' English law does not offer any third party protection nor does the registration offer any possibility of acquiring ownership by way of adverse possession, as the possession is not adverse. The problem of concurrent registration should be solved by rectification only, and not by adverse possession and prescription.[51]

G. Dutch Law

The transfer system which applies to the transfer of movables also applies to the transfer of immovable property. The only difference is that registration in the land register is substituted for transfer of possession. To maximise reliability of the land register every legal act by which a real right in land is created, transferred or released must be entered onto the register in order to have legal effect. This rule applies equally to full ownership and limited real rights. The legal effect of the notarial deed embodying the transfer (i.e. deed of conveyance) creation or release is postponed until the date of registration of the deed.

As the transfer is causal the conveyance and its registration should be based on a valid legal ground, which in the case of sale is the sales contract. Registration does not heal any defect in the sales contract, nor defects in the conveyance. If the sale is void or if the conveyance is void the registration has no effect and will cause the register to be wrong. If after the registration a voidable sale or voidable conveyance is avoided, ownership will revert to the transferor with retroactive effect and the register will be wrong.

These examples already show that Dutch law does not have a system of 'title by registration'. Moreover, some rights do not appear in the register while having full effect against third parties. On the other hand the register may show rights that no longer exist. Examples are the acquisition or the lapse of ownership or limited real rights by prescription, and the transfer of a mortgage by assignment of the secured claim. If a servitude is created by way of prescription it has full effect against bona fide third parties without registration. There is no third party protection against that.[52]

Although in principle the register cannot be relied on, important provisions exist which protect the innocent third party against incorrect or incomplete information in the register. As a result, in most situations the third party will be protected.[53] However, if and in so far as the protection of third parties does not apply the third party will be unprotected.

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[50] The outcome may be different from the outcome in German law, since in German law the general rules of property law decide who is the owner and how the land register will be rectified. Rectification will even be granted against a person in actual occupation.

[51] *Parshall v Hackney* [2013] EWCA Civ 240.

[52] Art 3:24(2)(e) BW.

[53] Asser/Mijnssen/DeHaan/Van Dam, no. 378.

There is no State guarantee of title, nor is there any general right to indemnity.[54] However, under certain conditions Article 117 *Kadasterwet* (Cadaster Statute) offers compensation if civil servants of the Land Registry have made a mistake. Moreover, in rare instances, such as destruction of deeds by fire at the Land Registry, the State will give compensation.[55] Apart from these cases the English debate as to who gets the mud and who gets the money is unknown to Dutch law. Nevertheless, the Dutch registration system gives fairly accurate information about the legal status of land.

Let us take the following example: A sells and transfers his land to B. Subsequently, B sells and transfers the same land to C. A entered into the contract A–B under the influence of a mistake, rendering the contract voidable[56] (rather than void from the outset).[57] The mistake gives A the power to avoid the contract. The voidable contract is valid until A exercises his power to annul the contract. After avoidance, which has retroactive effect, it is deemed that the contract has never been valid. As a valid underlying contract is a requirement for a valid transfer of ownership, the transfer becomes void with retroactive effect as well. It is deemed that A has always remained owner of the land and that B has never been able to give ownership to C (the *nemo dat* rule). The same problem occurs in the two following instances: the contract A–B is *void from the outset*, or, second, there is a defect in the *transfer* between A and B (formal requirements have not been fulfilled).

Still, C may be protected under Article 3:88 BW and acquire ownership if two conditions are met. First, the acquirer should be in good faith. Secondly, the fact that the transferor has no right to dispose of the land should be the result of *voidness of an earlier transfer*. The article does not protect, however, when the earlier transfer was void because the then transferor had no right to dispose. The provision will not give protection if all the problems in a chain of transactions started with the first transferor not having the right to dispose. Article 3:88 BW does protect the bona fide third party if the voidness of the previous transfer was caused by voidness of the contract underlying that previous transfer. That is exactly what happened in the above example. If C is protected he will become[58] or remain[59] owner of the land. A will not be compensated by the Land Registry, but he will normally have a personal action against B for damages.

Article 3:24 BW offers a broad protection against incompleteness of the register. If at the moment a transaction regarding land is registered a certain fact or right which can be registered has not yet been registered, this fact or right cannot be set up against the acquirer under the transaction, unless he knew the fact or right. An example: A

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[54] However, the State or the registry office may under certain conditions be liable for compensation, for example if the register is incorrect or incomplete due to a mistake made by a civil servant working at the Land Registry (see art 3:30 BW and art 117 Kadasterwet).

[55] Art 3:30 BW.

[56] Unlike in English law mistake renders the contract voidable rather than void.

[57] The same reasoning applies to contracts entered into under the influence of other defects of will, such as fraud, duress and undue influence. The sanction in all these instances is voidability rather than voidness.

[58] Where the earlier transaction is void.

[59] Where the earlier transaction is voidable.

transfers ownership of his land to B under a resolutive condition (condition subsequent). If the resolutive condition is fulfilled, ownership revests automatically in A. By mistake the condition itself is not entered onto the register. Afterwards B transfers the same land to C, who does not know the condition subsequent between A and B. A is unable to set up (the fulfilment of) the condition against C.

Article 3:25 BW protects against certain mistakes in notarial deeds (thus incorrectness of the register). An example: X intends to sell and transfer A's land to B using either a false passport or equivalent identification paper, or a false deed of mandate. The notary must verify X's and B's passport or equivalent identification paper (see Blokland, 2001: 88–90),[60] and, if a mandate is used, the notary has to check A's signature on the written mandate.[61] If B is in good faith, paid the purchase price and it turns out that X is a swindler, B did not become and cannot become the owner of the land, as X is unable to give him a good title. Although B is now the registered proprietor of the land, he has no legal title in reality.

If B (who is registered as being owner of the land) transfers the land to C or creates a charge in favour of C, Article 3:25 will protect C because as an outsider to the transaction X–B he should be able to rely on the identity of X and X's power of disposition as ascertained officially by the notary. Note that the protection is not available to B himself, as he is a party to the transaction X–B rather than a third party (deferred indefeasibility).

Another provision giving protection against incorrectness is Article 3:26 BW. If at the time the acquisition of a right in land is registered an incorrect fact has been registered, the person who could reasonably have applied for rectification of the register cannot set up this mistake against a third party, unless the latter knew of the mistake or could have known the mistake when consulting the register.

An example: A sells and transfers his land to B under a condition precedent. At a later stage it is entered onto the land register that the condition has been fulfilled, vesting ownership in B. Now B transfers ownership to C. In reality the condition had not yet been fully fulfilled. A knew this but did not bother to have the register rectified. If C is an innocent third party within the definition of Article 3:26 BW, he will become owner of the land.

The protection given in Articles 3:24, 25, 26 and 88 BW do not depend on the question whether the innocent third party acquired his right for valuable consideration nor on the question whether the third party or the owner is in actual possession of the land. Nor is actual possession relevant for rectification of the register.

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[60] Art 39 Wet op het notarisambt.

[61] Where the registered owner is a legal person such as a corporation, partnership or foundation, the notary should check the Business Register (*Handelsregister*) as to whether or not the person in question has the power to represent this legal person.

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