

The German "Grundbuchordnung": History, Principles and Future about Land Registry in Germany

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Summary

From an international perspective, the German land register is one of the most meaningful registers, as it has extensive disclosure effects, as provided by Article 873, 891, 892, German Civil Code. The principles enshrined in property law also influence the formal Land Registry Procedure (numerus clausus of real rights; compulsion of types in regard to content; principle of public disclosure; principle of clarity and definiteness). The legal basis of the recording process is the German Land Register Code (in German terms: Grundbuchordnung, or GBO) of 1897, which can rightly be regarded as a legislative masterpiece. The distinction between the principle of formal consensus, Article 19, German Land Register Code, and the principle of substantive consensus, Article 20, German Land Register Code, has proved to be especially significant. Innovations in Land register Law are provided by the new law about the area of *jurisdictio voluntaria* (in German terms: FamFG) and the introduction of E-conveyancing in the German Land Registry Procedure (in German terms: ERVGBG). The prospect of a land register database is already on the horizon (in German terms: DaBaGG).

Zusammenfassung

Im internationalen Vergleich ist das deutsche Grundbuch zu den besonders aussagekräftigen Registern zu zählen, weil es mit weitreichenden Publizitätswirkungen ausgestattet ist, §§ 873, 891, 892 BGB. Dabei wirken sich die im Liegenschaftsrecht verankerten Prinzipien auch auf das formelle Verfahren aus (numerus clausus der Sachenrechte; inhaltlicher Typenzwang; Eintragungsgrundsatz; Bestimmtheitsgrundsatz). Rechtsgrundlage des Eintragungsverfahrens ist die Grundbuchordnung (GBO) aus dem Jahr 1897, die zu Recht als gesetzgeberisches Meisterwerk bezeichnet werden kann. Als besonders bedeutsam erweist sich die Unterscheidung zwischen dem formellen Konsensprinzip (§ 19 GBO) und dem materiellen Konsensprinzip (§ 20 GBO). Grundbuchrechtliche Neuerungen ergeben sich aus dem Rahmengesetz zu den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG) und aus der Einführung des elektronischen Rechtsverkehrs im Grundbuchverfahren (ERVGBG). Bereits jetzt zeichnet sich am Horizont das Datenbankgrundbuch ab (DaBaGG).

Keywords: German Land Register Code, Land Register, Land Registry Procedure, Property Law

1 History of Land Registration

The start of any historical investigation is always the question of origins, in this case, the origins of the land register (on this subject, see Wilsch, *Die Grundbuchordnung für Anfänger* Chapter A, A Brief History of the Land Register). The literature on the German land register lacks any explanation of this and provides only a phenomenology of precursors and original forms. One answer can be gleaned from *Die Vermessung der Welt* [Measuring the World], a popular book by Daniel Kehlmann from 2005, in which Gauß is described as a cartographer and von Humboldt is described as a scientific world citizen. The two characters, Gauß and von Humboldt, could not be more different. But what both figures have in common is their endeavour to measure the world and thus also to archive it. Two hundred years later, Michel Foucault referred to archives as a "general system for the formation and transformation of statements" (Foucault, *The Archaeology of Knowledge*), a system that first emerged in the history of humankind in form of a simple list. Umberto Eco rightly sees this as an origin of culture, as compiling a list is an attempt to "make infinity comprehensible" and to create order. With appearance of the list, the concept of archiving is born. It represents a significant step forward, as summarised by Hernando de Soto in 2001: "It is fundamental to draw a distinction between a house and the title of ownership of a house. The house is in a physical, tangible world, but title of ownership is in a conceptual world."

This concept first appeared as early as 2300 BC in the form of Mesopotamian clay maps. These were created within the context of land sales and note their cartographic and legal features. This concept was continued in Attican pledge books and chronological document collections in the Roman province of Egypt. The earliest known precursors of contemporary land registers in Germany date back to 500 AD: they are the first records defining rights for revenues from particular properties, borders between properties and naming those who are entitled to use properties.

From 900 AD onwards, there was an increasing trend towards creation of a comprehensive property registration system, instigated by lively trade in urban properties. From 1200 AD onwards, in the late medieval period, the land register underwent a defining change, which should be understood in the context of the rise of the medieval cities. In the late medieval period, the city was a legal stronghold, a legal entity, a "city of law" each with its own city law in written form. For instance, in 1347 Munich city law stipulated that the transfer of property

ownership had to be registered in the court records in order to become valid. Hence, for the first time, registration in the property register was constitutive of a right, and thus decisive in its creation. This was a significant step forward for the concept, which had originally been intended only for archiving purposes. The legal concept was extended from a register of proof to a register of rights. The right to a property was not merely indicated!

It was only realized with recording it in the register! This means a significant change! From 1500 onwards, use of the land register visibly declined, which is attributable to the adoption of Roman law. Roman law did not prescribe any particular formalities regarding the purchasing of property, and registration was no longer regarded as significant.

The land register did not enjoy a renaissance until the late 18th century or the early 19th century, in the modified form of the mortgage register, in which only properties encumbered with mortgages were registered. On the other hand, changes of ownership were not registered – a real paradox in economic law!

The Prussian Land Register Code of 1872, which prescribed the registration of all property rights for the first time and provided a division into three categories, marked the switch to a “real” land register. This land register code provided the basis for the creation of the *Grundbuchordnung* [German Land Register Code] of 24.3.1897, which should be seen as a completion to the *Bürgerliches Gesetzbuch* (BGB) [German Civil Code]. Both the German Civil Code (BGB) and the German Land Register Code (GBO) came into force on 1.1.1900. Numerous state implementation laws were passed alongside the Land Register Code, as the individual German states insisted on maintaining their independence. For instance, in February 1905 Prince Luitpold of Bavaria enacted a *Royal Ordinance concerning the management of the land register in state regions to the right of the Rhine*. The GBO amendment of 1935 not only abolished all state implementation laws, but also introduced a uniform template based on the Prussian model, which is still the model for the land register in its current form. There were no associated ideological implications, so it was possible to retain the German Land Register Code after 1949 on the basis of Article 123, Paragraph 1, of the German Constitution (concerning pre-Constitution but entirely non-ideological laws). The German Land Register Code was amended significantly after the reunification of Germany by the Act of 20.12.1993, the *Registerverfahrensbeschleunigungsgesetz* [Act for Acceleration of Register Processes], which initiated the change from a paper land register to an electronic land register. Nevertheless, the significant principles of land register law have remained unchanged, so basically this can be seen as a change of media. When regarding the latest developments, the amendment of 2009 must be mentioned, which will be described nearer in this article.

2 Organization

2.1 Jurisdiction over the Subject and Local Authority, Article 1, GBO

When having a closer look at the general conditions for an efficient legality check it is necessary to focus on the jurisdiction over the subject and the local authority. In contrast to some other European countries where the Land Registry is an administrative body and the land registers are kept by the different municipalities, in Germany (pursuant to Article 1, Clause 1, German Land Register Code) the land registers are within the responsibility of the local courts. The local courts are responsible for the real estate within their area. This authority has developed already during the Middle Ages, especially from the 11th century it became common practice in large regions of Germany that the courts were called upon in matters of conveyance of real estate property. The reason for this was that the execution and control of the courts offered the advantage that in case of any objections against the sale or the claiming of own titles the courts could be appealed to directly. This gave the decision a higher degree of legal certainty. For example, in Munich, capital of Bavaria, the ancient town charter of 1347 provided for the involvement of the court. It is a great advantage that a neutral, independent government body is appointed to *administrate* the land register. Consequently in Germany the land register is administrated by legal experts who can only be overruled by a higher court. According to an amendment of law, this is the Supreme Court of the Land (in case of Bavaria, for example: the *Oberlandesgericht* in Munich, in Nuremberg or in Bamberg). In addition this guarantees that the German land register is reliable and stable.

2.2 Procedural Competence of the *Rechtspfleger*, Article 3, Number 1, Letter h, RpfLG and Article 9, RpfLG

Furthermore, the fact that the *Rechtspfleger* is competent procedurally guarantees that this procedure is in accordance with the rule of law. In accordance to Article 3, Number 1, Letter h, of the German “*Rechtspflegergesetz*”, the *Rechtspfleger* is assigned to handle all the tasks involved in keeping the land register. Same as a judge, the *Rechtspfleger* is objectively independent and only bound to law and order. This is set for expressively in Article 9 of the German *Rechtspfleger* law. Therefore the *Rechtspfleger* is objectively independent and works completely on his own which guarantees that the deeds are processed free of any inappropriate influences. Neither ministries, nor authorities, parliaments, nor governments, are authorized to issue directives to the *Rechtspfleger*. She or he is governed by the law only and processes all applications totally independent from the object. It should be pointed

out in particular that the *Rechtspfleger* responsibilities are of legal nature. In fact, keeping the land register is not an administrative task. Entries in the land register are legal acts and jurisdiction in a broader sense. Presently 49 *Rechtspfleger* in Munich process 110,000 deeds per year. At this moment there is a stock of 1,1 million land registers for the city and the administrative district of Munich.

3 General Principles of German Real Law

3.1 The Absoluteness of Real Rights

First of all we had to mention the absoluteness of real rights as being a prime general principle of German Real Law. In German law the real rights are called absolute rights because they apply to everybody, have to be followed by everybody, and are protected against everybody. For this reason the key indicator of real rights is the absolute power they convey to the owner of the real right. This way, the real rights are the exact opposite of the relative rights as they appear in the law of obligations, for example. While relationships of the law of obligations convey "weak" positions only which are mostly directed at compensation for damage, real law affords a stronger, an absolute legal position. As an example, this becomes apparent in enforcement or in case of insolvency.

3.2 The Numerus Clausus of Real Rights

The second general principle of German Real Law is the so called "numerus clausus" of real rights. The numerus clausus principle states that nature and content of the German real rights are regulated by law. Consequently German law includes chartered real rights only. While the law of obligations provides a generous freedom of contract, German Real Law does not. Therefore, in legal dealings rights have to be selected from a self-contained pool of real rights. This might appear as being restrictive or seem like Government paternalism, or as another expression of the proverbial *German Angst*. However, it is a fact that German 19th century lawmakers were ruled by a desire for legal certainty, clarity, and uniformity. As a consequence the privilege of the parties involved in creating real rights which were of discretionary content and totally imaginary had to stay *behind* this superior approach. At this point the legislator considered the difficulties the Land Registry procedure entails. The legislator has implemented a completely adequate pool of real rights in German Real Law. It includes servitudes, usufructs, land charges, right of pre-emption, priority cautions, hereditary building rights, property in a freehold flat, and last but not least accessory mortgages and non-accessory land charges, so called *Grundschulden*. Only

these rights are allowed to be recorded; a hiring contract, for example, or a marriage contract may not.

3.3 The Compulsion of Types in Regard to Content

Linked to the numerus clausus approach is the third general principle, i.e. the compulsion of types in regard to content. This fixation to types in German Real Law means that the real rights to be entered in the land register may have the legally permitted content only. Therefore, there is a limited freedom of designing the entry. Anything which exceeds the statutory framework can only be content of the real right which pertains to the law of *obligations*. The fact that the essential content of the real rights cannot be changed is due to this principle. However, additionally the legislator has considered the need for individual design by presenting a wide range of offers. A multitude of options is included in the individual real rights with many alternatives offered. For example: the servitudes. There are three different options: servitude as real right for utilization of real estate; servitudes as real right prohibiting certain actions in regard to the encumbered real estate; and finally servitude as a real right which excludes any related rights.

3.4 The Principle of Clarity and Definiteness

The next general principle, the principle of clarity and definiteness, could be defined as an additional principle with regard to the real rights. This principle states clear, that each act of disposal has to specify the concerned object. In addition to that, the content of the real right has to be specified clearly. This means that not only the attribution in terms of real property has to be clear but also the extent and content of the real right. Without any doubt, a great deal of legal certainty results from this! After all it is the land register's responsibility to provide complete, clear and reliable information on the legal relationships of the real estate. The more congruence there is in substantive law, the better for any legal deals. As a consequence, the Land Registry may use clear and unambiguous explanations only.

3.5 The Principle of the Abstract Nature of Rights in Rem

The next principle, the principle of the abstract nature of rights in rem, is a German principle only which can be traced back to the teachings of *Savigny* and it is criticized frequently. The circle of *Roman* law experts objects to this principle just as much as *Austria* or *Switzerland* does, although it is based on the thesis that for the transfer of real rights the terms *legal ground* (obligation) and *execution* (decree) have to be separated. The two procedures do not

depend on each other, but exist next to each other in a totally abstract way. Compared to the underlying business transaction, the agreement is of abstract matter. If the underlying business transaction pursuant to the law of obligation is missing completely or is invalid, the transaction under real law is not affected. Recent studies by professor *Krimphove* (see *Das europäische Sachenrecht*, page 163) investigate the economic advantages of this principle of abstract nature. Since the law of obligation and the contract under real law are separated, there may be more legal certainty when the contract under the law of obligation is invalid. In this case the integrity of the transfer of property is not affected and the costs of *information, investigation*, and legal counselling can be saved. It is because of the principle of the abstract nature that "Investigation and counselling expenses in legal matters to establish the actual owner" are not found (according to *Krimphove*, see above, page 165). As a result we can establish that not only a higher degree of legal certainty is granted but also costs are saved which normally would arise from clarifying the claims from this property.

3.6 The Principle of Legality

The principle of legality binds the Land Registry to check on the legality of each entry in the land register. This includes the Land Registry having to observe all relevant standards, whether the standards of the substantive law, or the standards of the procedural law. The Land Registry has the duty to watch over and grant the correctness of the land register. This includes that the Land Registry may not be involved knowingly in falsifying the land register by means of an incorrect entry. In particular, it may not knowingly allow the land register to become incorrect. This principle goes back to the fundamental idea of the German land register provisions and of Article 20, Clause 3, of the German Constitutional law (= Grundgesetz).

3.7 The Principle of Public Disclosure

Discussing the principle of public disclosure closes the circle of General principles of German Real Law. Since the real rights apply to everybody there is a need to demonstrate this to a third party. For this reason Article 873, Clause 1, BGB (= German Civil Code) provides that all property transfers and creations of real rights are subject to entry in the Land Register. It is the land register's responsibility to disclose the legal status of real estate. The entry completes the acquisition of a real right. Consequently the entry presents itself as a constitutive act instead of a declaratory act. Another case in point is Article 891, German Civil Code which leads to a legal assumption. It is assumed that real right entered in the land register exists and that the proprietor is entitled to this

real right. At the same time, it is also suspected that a real right discharged in the land register no longer exists.

4 Land Registry Procedure

4.1 Inspection of the Land Register, Article 12, GBO

The provision in Article 12, GBO contains a fundamental stipulation of German Land Register Law: the principle of the formal availability for inspection of the land register. By this we mean the framework conditions and requirements for viewing the land register, which seek to establish a balance between the conflicting interests of data protection and transparency. According to Article 12, GBO, not everyone is permitted to view the land register. Only those who demonstrate a legitimate interest have this permission. The sense and the purpose of this provision is to prevent improper viewings which could harm the interests of the real rights holders who are recorded. Figuratively speaking, before the land register data and files can be accessed, one must first pass through the legal *firewall*, or the security concept of Article 12, GBO (cf. *Hügel/Wilsch, GBO, 2nd edition*, overview of Article 12, GBO). In order to demonstrate a legitimate interest, it is sufficient for the applicant to demonstrate an understandable interest justified by the circumstances. It is always necessary to seek the right balance between the need for information and the fundamental right to informational self-determination, which is why the stipulation of Article 12, GBO is the subject of extensive casuistry and does not even spare Federal Presidents of Germany (as in the case of Mr. Wulff). The pursuit of unwarranted objectives and the satisfaction of mere curiosity must be seen to be forbidden. The scope of access is determined by the scope of the legitimate interest. The authentication clerk (in German terms: *Urkundsbeamter der Geschäftsstelle*) decides whether or not to grant access (Article 12c, Paragraph 1, Number 1, GBO). The provision of Article 12, GBO, which also has constitutional implications now (in the light of the fundamental right to informational self-determination), is in deliberately strong contrast to other national provisions, such as those of Austria, Great Britain and France, all of which provide unrestricted access to the Land Register. The stipulation in Spain, however, also provides that anyone has the right to view the land register, if he is able to demonstrate a legitimate interest.

4.2 Application Procedure, Article 13, GBO

German land register procedure is generally formulated not as an *ex officio* procedure but as an application procedure. This is laid down in Article 13, Paragraph 1, Sentence 1, GBO, according to which an entry should be made only in response to an application, provided that

the law does not stipulate otherwise. It is at the discretion of the parties concerned whether an entry in the Land Register is made or not. However, the principle of public disclosure described under point 3.7 provides a significant incentive to make an application. The entry has a constitutive effect, so property right and all kinds of other real rights came into existence by registration in the Land Register. De facto, this makes an entry imperative. This is one of the reasons why the German land register must be regarded as a particularly meaningful register. Because it is impossible to obtain the title to a property without a land register entry, legal relations can be based entirely on the content of the land register. Hidden charges of any kind are alien to the German Land Register. Everybody can trust into the Land Register (see point 5.1).

4.3 The Land Registry's Obligation of Legality Checks within the Scope of the Principle of Formal Consensus, Article 19, GBO

This takes us to the implementation of the law. As the Prussian Mortgage Act of 1783 has shown, the best principles may turn useless if they entail a long and tedious registration procedure. For this reason the Prussian Land Registry Law, amended in 1872, provided for the replacement of the major part of the "principle of substantive consensus" by the "principle of formal consensus", which then became the matrix for the uniform German Land Register Code of 1897. The related memorandum points out that widely introducing the formal principle of consensus will help to accelerate and to simplify the procedure.

The principle of formal consensus is laid down in Article 19 of the German Land Register Code (= GBO). It quotes: An entry will be made if the right of the party who grants it is affected by it. Afterwards, the principle of unilateral permission applies. In practice, this means: If the Land Registry is supposed to make an entry the party concerned must submit a notarized permission. This way the principle of formal consensus turns into some kind of rule of evidence, i.e. in such way as the existence of the agreement is deemed proven once the party concerned grants its permission. As a consequence, the Land Registry does not have to check whether or not the material consensus was actually supplied. Judging from experience: nobody will grant permission for an entry which will have negative effects on him, unless there is a respective consensus itself. Insofar as far as real rights shall be registered, under German law it suffices that the owner, being the party affected, grants his permission by instrument of a notary's deed. The Land Registry may act from there. Of course, this unilateral permission has to comply with all the general principles of German Real Law outlined above. In particular, it is not correct that within the scope of the principle of formal consensus the Land Registry has to check on procedural law only. Cor-

rect is: Although the Land Registry does not check on the material consensus it does definitely on the substantive content of the right to be entered. After all the legality principle outlined above enjoys top priority. The following checklist (according to Meikel/Böttcher, Land Register Code, 8. edition, volume I, preface, note H85) pursuant to Article 19, Land Register Code demonstrates this:

- 1) Application, Article 13, Land Register Code?
- 2) Permission, Article 19, Land Register Code?
- 3) Authority for giving such a permission?
 - a) the authority itself?
 - b) no restraint of power?
- 4) Authority in case of power of attorney ok?
- 5) Content of the permission, Article 19, Land Register Code:
 - a) numerus clausus principle?
 - b) compulsion-of-types-principle?
 - c) in case of a common real right: Article 47, Land Register Code ok?
- 6) Requirement of further permissions from third parties?
- 7) Description in accordance with Article 28, Land Register Code?
- 8) Tracto sucesivo, Article 39, Land Register Code?
- 9) Formalities/notarial certification, Article 29, Land Register Code?
- 10) Requirements of approvals?

The question arises where the principle of formal consensus pursuant to Article 19, Land Register Code, has to be applied. For example, this procedure will be followed with an entry of real rights if a usufruct, a servitude, a land charge, or a mortgage or a Grundschuld has to be registered. Thus this simplified procedure will be applied every time unless the Act provides for something else. The most important exception derives of Article 20, Land Register Code, which states the principle of substantive consensus.

4.4 The Land Registry's Obligation to Check within the Scope of the Principle of Substantive Consensus, Article 20, GBO

The provision of Article 20, GBO does not comply with the principle of formal consensus described above. Article 20, Land Register Code, states: "In case of conveyance of land or in case of creation, changing of transfer of a hereditary building right an inscription into the land register can only be made, if there is the agreement of the relevant parties." Consequently, within the scope of the principle of substantive consensus the situation is such that the submission of a unilateral permission is insufficient. Sufficient proof is provided by submission of the agreement only. In context with the registration procedure this means that the notary has to submit to the Land Registry the deed which certifies the agreement.

The question here is why a more severe procedure has been implemented here. The *German legislator* was guided by the following motives: There exists a specific need of legal certainty where the ownership of the real estate property is concerned. After all, this will have far-reaching consequences for public as well as in private law. In the German legislators' opinion, there is a special interest in the congruency of the land register and the real legal status which should be complete. This takes us to the following conclusion: With the other real rights (usufruct, land charge, servitudes, mortgage, Grundschuld) the possibility of an incorrect land register may just be tolerable, therefore a unilateral permission will be sufficient. However, this can not be tolerated in regard to ownership where the correctness of the Register is more important than the simplification of the formal procedure. As a consequence, the German legislation not only orders the parties concerned to check the correctness but also conveys responsibility to the Land Registry. This is why the checklist looks different for Article 20, German Land Register Code:

- 1) Application, Article 13, Land Register Code?
- 2) Agreement of the relevant parties, Article 20, Land Register Code?
 - a) all relevant parties have declared the agreement?
 - b) no restraint of power?
 - c) all powers of attorney ok?
 - d) content of the agreement: two corresponding declarations?
 - e) no condition, no time limit?
 - f) numerus-clausus-principle and compulsion-of-types-principle?
 - g) in case of common ownership: Article 47, Land Register Code ok?
- 3) Description in accordance with Article 28, Land Register Code?
- 4) Tracto sucesivo, Article 39, Land Register Code?
- 5) Formalities/notarial certification, Article 29, Land Register Code?
- 6) Certification concerning the real estate acquisition taxes, Article 22, Real Estate Transfer Tax Law?
- 7) Certification concerning the pre-emption right of the community, Article 28, Planning Code?

But what happens if the Land Registry detects an incorrect application while checking its legality? What has to be done, which procedural instruments are available to the Land Registry?

4.5 Procedural Instruments in the Event of Obstruction of Registration, Article 18, GBO

Article 18, Land Register Code outlines clearly, that if an entry applied for is obstructed, the Land Registry shall either refuse the entry, stating the respective reasons, or it shall grant a reasonable period of time for repair to the

applicant. Even though at first glance it may look as if the Land Registry has a free choice of the two instruments, this is not the case. Meanwhile, a complex casuistry has developed with Article 18, Land Register Code. Generally speaking, usually the interim provision applies, with *refusal* rather being the *exception*. Mostly this is due to the different implications of interim provision and refusal. While in case of an interim provision the effects of the applications remain valid in regard to the ranking (tempus principle), in the case of a refusal the effects are lost. To put in a different way: In the case of an interim provision, the application is still pending, in case of a refusal it is terminated. Cases for an immediate refusal:

- The applicant is not entitled at all to apply
- an incorrect application which was refused before is submitted again
- the obstacles were not remedied within a reasonable period of time
- the right cannot be entered (numerus clausus principle)
- the right has no content which could be entered (compulsion of types principle).

In all other cases there are mistakes in the application which can be repaired within a reasonable period of time. In a case like this the Land Registry issues an interim provision.

With the issuance of this interim provision it is required that *all* obstacles are stated. At the same time, an explanation is required of *how* the obstacles will be repaired. Also, a date of completion must be determined, the latter being the reason why the interim provision requires formal delivery.

In case of a counterstatement the interim provision may be nullified at any time. The legal instrument of complaint is permitted to counteract the interim provision, Article 71, Land Register Code. This means that an objection against the Rechtspfleger's decision at the district court is permitted. Thus the legal instrument is not dealt with on the same level of jurisdiction but on the next higher level (= amendment to the Act dated 6-8-1998, see Demharter, GBO, 28. edition, Article 71, note 5). This is Supreme Court, for example the Supreme Courts in Munich, Nuremberg and Bamberg.

After introducing the instruments of the Land Registry in case of incorrect applications the line of action when detecting incorrect entries has to be examined.

4.6 Procedural Instruments in the Event of Incorrect Entries, Article 53, GBO

Article 53, Land Register Code, provides *two procedures*. If the entry is inadmissible by content (see principle of compulsion of types), the entry has to be deleted ex officio, Article 53, Clause 1, Sentence 2, Land Register Code. This is the case every time the Land Registry has entered a right which is not possible to be registered (see numerus

clausus principle). The same applies when a real right with inadmissible content was entered (see compulsion of types). Experience shows that this occurs *very rarely*.

In contrary, if an entry was made which violates legal provisions in regard to registration but is admissible in regard to content, an objection *ex officio* against the legal compliance of the land register has to be made, Article 53, Clause 1, Sentence 1, Land Register Act. Such an incorrect registration may be the case if, for example, a right was entered, or deleted, by incorrect procedure. Because of the legal effects of registration which we will discuss later on there is a risk that the person who is truly entitled loses his right, and *bona fides* acquisition applies (for more details see part 5.3). This would result in a claim for damages against the Land Registry. In order to prevent such a *bona fides* acquisition the Land Registry has to enter an objection *ex officio*. On the other hand, rectification by the Land Register is not permitted officially since such an act would intrude upon the legal position of the entitled person.

5 Legal Effects of Registration

5.1 The Constitutive Effect, Article 873, BGB

This takes us to a primary effect of registration. Substantive law provides that every transfer of real estate property pursuant to the law of obligation, or each transfer, changing or discharging a real right, requires two things: First of all the agreement, secondly the registration. This is provided for in Article 873, German Civil Code (BGB). Both requirements must be complied with for the desired legal effects to be valid. Therefore registration has a constitutive effect. This applies also to the creation, the transfer, or the discharge of real rights.

5.2 The Fictive Assumption, Article 891, BGB (positive + negative)

In addition to this, Article 891, German Civil Code, establishes two effects. The first one is the positive assumption. If a real right is *entered* in the Land Register pertaining to a certain person it is assumed that this person is entitled to this right, Article 891, Clause 1, German Civil Code.

The other is the negative assumption. If a real right entered in the Land Register is *discharged* it is assumed that this real right does no longer exist, Article 891, Clause 2, German Civil Code. In this context it should be pointed out that these assumptions not only are valid in regard to legal dealings but also to the Land Registry itself. However, these assumptions can be proven wrong, too, i.e. this is particularly easy in the case of a mortgage. A case in point: It is proven by notarized receipt that a claim is settled. In such there is evidence that the registered person is no longer entitled to the mortgage.

5.3 The Good Faith Function/Bona Fides Effect, Article 892, BGB

However, the Land Register develops not only the fictive assumption outlined above but also the effects of *bona fides*, effects of good faith. Here, the faith in the correctness of the entry is protected. The faith in power of disposal is equally protected. This is why Article 892, German Civil Code, provides for the acquisition in good faith of a party which is not entitled but of which the entry in the land registry says it is. The land register is considered as being correct and true and is in favour of the party acquiring in good faith. The correctness of the land register is assumed in order to protect legal dealings. German law does not differentiate any further whether or not the acquisition was against remuneration.

Therefore one can trust that the Land Registry has duly fulfilled his task. This is why one can trust the land register, and this is immensely essential to the legal certainty. Because of this it is dispensable to check the title of the person entered in the land registry it is simply not necessary. To put it in another way: *the legal document substitutes the right*. By this, the legislator has made his decision. The German legislator is of the opinion that the protection of legal dealings is more important than the interests of the true beneficiary. He achieves a high degree of *security* by means of the law deploying a fiction. In consequence, the so-called root of title, i.e. a chain of deeds on the real estate property as it is provided by British law, is not required here. You can trust in the land register! This leads to the last topic, the *liability*.

6 Liability

6.1 The Objection of Office Pursuant to Article 53, GBO, in Regard to Preventing Acquisition in Good Faith

By entering the above mentioned objection any acquisition in good faith can be *prevented*. It is exactly the purpose of this objection to destroy the good faith in the correctness of the land register. The objection protests against the correctness of the legal status as entered. Furthermore, it is the task of the objection to avoid regress against the Government. This way any claims of damages against the state can be avoided.

6.2 Consequences of the Acquisition of a Real Right in Good Faith, Article 892, BGB

This refers to the claims of damages which may follow, any acquisition in good faith because the purchaser without notice acquires the real right indestructible and to the detriment of the entitled person. By such acquisition in

good faith the person who is really the owner loses his real property right. However, another consequence is that by acquisition in good faith the land register becomes correct again. In particular, this fiction is transferred into reality. *Legal Fiction becomes legal reality!* Thus the legal protection granted by the German land register extends further than the legal protection granted by British law. Under German law the purchaser in good faith does not have to fear the withdrawal or limitation of his real right. Also, he does not have to worry about any rectification which is often the case in England against some payment of damages. Thus his real right is *untouchable* and *indestructible*.

6.3 Claim of Damages Against the Land Register, Article 839, BGB in Conjunction with Article 34, German Federal Constitution

The government liability becomes reality, based on the provision of Article 34 of the German Federal Constitution (= Grundgesetz). This means that in principle the government is liable for its officers which turns out to be an *advantage* from a certain point of view. For legal dealings it is better to primarily claim from the *government* and not from an individual officer. At the same time the officer's liability towards the third party is omitted automatically. Liability is transferred to the government which is liable instead of (and not together with) the officer. In case of violation of duty by government officers the German Federal Constitution attributes liability to the government. However, this applies only if the officer did not act intentionally or grossly negligent. The respective limitation is not only provided in the mentioned Article 34, German Federal Constitution, but also in Article 839, Civil Code. Therefore, if the officer violates his duty of office intentionally or grossly negligently he will have to come up for the damage suffered by the third party, Article 839, German Civil Code. However, in all cases restitution in kind is excluded. This means that the injured party neither gets the property nor its real right. The injured party will be compensated in cash.

7 New Developments

7.1 Preface

On September 1, 2009, a comprehensive reform in the area of *jurisdictio voluntaria* became effective in Germany. This means the so-called *Gesetz zur Reform des Verfahrens in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*, shortened to the designation "FamFG". This law took the place of the old *Act on Voluntary Jurisdiction (FGG)* and brings with it not only changes in the area of the family court, probate

court, Commercial Registry procedures, but also changes in the area of the Land Registry Procedure.

7.2 Relationship of Framework Law (FamFG) and Special Law (GBO)

According to Article 1, FamFG the new law applies to the procedure in family matters as well as in matters of *jurisdictio voluntaria*, insofar they are assigned to the courts through federal law. Since Article 23a, Paragraph 2, Number 8 of the Jurisdiction Act (GVG) also assigns land register matters to matters of *jurisdictio voluntaria*, this also signifies the basic applicability of the new FamFG in Land Registry Procedures. However, the application of this is not unlimited, but only under the condition that the German Land Registry Code contains no deviating regulations. Therefore, the following relationship exists: the new FamFG is the general framework law; the GBO is in contrast the special law.

7.3 Some Examples

This is also the reason why the general appeal provisions (Article 58 ff., FamFG) do not apply, the more so as the German Land Register Code already provides more specific regulations (see Article 71, GBO). The same also applies to the suspension of the procedure, which is basically possible in the area of *jurisdictio voluntaria*, but not in the specific Land Registry procedure, because in the Land Registry procedure this would lead to significant ranking problems and significant processing delays. It is the same with the inspection of files, which is now regulated in Article 13, FamFG. However, the GBO also provides a specific regulation here, namely Article 12, GBO. In contrast, it is different with the disclosure of documents, which is now regulated in Article 15, FamFG and which also applies to the Land Registry Procedure. The interim provision of the Land Registry can therefore either be delivered formally or simply by post. However, it is the practice of the Land Registries to deliver formally in order to guarantee a secure procedure.

7.4 Content of the Decision and Instruction on the Right to Appeal, Article 38, 39, FamFG

There are other important new regulations contained in Article 38, 39, FamFG. According to Article 38, 39, FamFG, the decision (interim provision or refusal) must contain a formula and a justification. From now on, every decision must contain an instruction on the right to appeal. Therefore, the court where the right to appeal can be filed, is also to be indicated now. These are the Land Registry and the Supreme Court in the Land Registry procedure. In addition, the location of the competent court,

the form of the right to appeal and the term must also be indicated. Herein, the German legislator sees an expression of legal assistance.

7.5 Change in the Stages of Appeal

The change in the stages of appeal is also very important. Since September 1, 2009, the regulation in Article 72 of the German Land Register Code provides that the Supreme Court must decide on the appeal. Insofar as the area of the Free State of Bavaria is concerned, these are the Bavarian Supreme Courts in Munich, Nuremberg and Bamberg. The appeal against the decision of the registrar has to be filed at the respective Supreme Court, which means a significant strengthening of the role of the registrar. The regional court (Landgericht) no longer stands over the registrar; it is now the Supreme Court (Oberlandesgericht).

7.6 Introduction of E-conveyancing in the German Land Registry Procedure: an Overview

7.6.1 E-conveyancing and Electronic File (= electronic Grundakte), Article 135, GBO

On October 1, 2009, the law for introduction of e-conveyancing in the Land Registry Procedure became effective (ERVGBG). According to Article 135, Paragraph 1 of the Land Register Code (GBO), applications can be conveyed as electronic documents, in accordance with the following provisions. The individual state governments are authorised to meet the particular provisions through regulation, Article 135, Paragraph 1, Clause 2, GBO. This is not only due to the federal character of the Federal Republic of Germany, but also due to the different financial points of departure of the federal states.

Therefore it is necessary to design the electronic infrastructure first. Within the scope of such a regulation definite and directly addressable Land Registry facilities, which are responsible for the receipt of the documents, Article 135, Paragraph 1, Clause 2, Number 3, GBO, can also be named. In the following, the notaries must send certain data in structured form, in XML format, Article 135, Paragraph 1, Clause 2, Number 4b, GBO. The XML data record is the basis for the generation of a registration proposal, which the Land Registry must check comprehensively and independently (cf. also www.xjustiz.de). According to Article 135, Paragraph 2, GBO, it is now also possible to carry on the files in electronic form (in German terms: *elektronische Grundakte*). Once again, the individual countries can set the point of time from which the files must be carried on electronically.

We now know which German *Länder* will be the first to allow legal arrangements concerning property rights to be implemented electronically. These *Länder* are Baden-

Württemberg, North Rhine-Westphalia and Saxony. In North Rhine-Westphalia the test phase is scheduled to begin within 2012 (according to the German Federal Chamber of Notaries in the publication BNotK-Intern 4/2011). However, the test phase has already been set up in Saxony, in the land registries of the Local Courts of Dresden and Aue, and in Baden-Württemberg it is scheduled to start on 1st July 2012. In Baden-Württemberg it will go hand in hand with far-reaching land registry reforms, afterwards there will only be 13 land registries left. Regarding this development, other German *Länder*, including Bavaria, are waiting to collect further experiences. To document this development properly as well as the changeover of individual local courts, the German Federal Chamber of Notaries is going to compile an index and make it available online.

7.6.2 Receipt of Electronic Documents, Article 136, GBO

According to Article 136, Paragraph 1, GBO, an electronic document is received by the Land Registry, as soon as the technical facility meant for receipt has recorded it. The opening hours of the Land Registry no longer matter; the applications and the deeds can be conveyed at any time. The exact point in time of the receipt has to be noted with the aid of an electronic time stamp, Article 136, Paragraph 1, Clause 2, GBO. The receipt has to be confirmed to the applicant immediately with the specification of the point in time of the receipt, Article 136, Paragraph 3, Clause 2, GBO. This confirmation has to be provided with a corresponding electronic signature, Article 136, Paragraph 3, Clause 3, GBO.

7.6.3 Form of Electronic Documents, Article 137, GBO

The regulation according to Article 137, GBO regulates the form of the electronic documents and their equivalence with regard to the paper documents. This means not only the electronically certified copies of documents prepared by the notary, but also the request from other authorities, Article 137, Paragraph 1, and Paragraph 2, GBO.

7.6.4 Transfer of Documents, Article 138, GBO

The provision in Article 138, GBO regulates carrying on the electronic files (in German terms: *elektronische Grundakte*) and the conversion of incoming documents and/or documents which are already completed. According to Article 138, Paragraph 1, GBO, the Land Registries can transfer those documents, which come in paper form, into the form of an electronic document. The file formats, which may be used in electronic legal relations with the Land Registries, are defined by regulation, Article 138, Paragraph 2, GBO. If the e-conveyancing has

already been introduced, but the file (*Grundakte*) is still in paper form, the electronic documents submitted are to be printed out and taken to the file, Article 138, Paragraph 3, GBO. These regulations will become important in the transfer phase.

7.6.5 Inspection of the Files and Data Recall, Article 139, GBO

According to Article 139, Paragraph 1, GBO, inspection of the electronic file (*elektronische Grundakte*) can also take place at another Land Registry. The Land Registry at which the inspection is requested decides about the permission of the inspection, Article 139, Paragraph 2, GBO. It is the ratio legis to spare citizens from the inconvenience of long distance.

7.6.6 Electronic Decisions, Article 140, GBO

If the file (*Grundakte*) is managed electronically, the decisions (interim provision or refusal) can also be issued in electronic form, Article 140, Paragraph 1, GBO. These decisions have to be provided with a qualified advanced signature, Article 140, Paragraph 1, Clause 2, GBO.

7.6.7 Draft July 2011 about a Data Based Land Registry

The *Act for the Introduction of a Land Register Database (DaBaGG)*, the draft which was submitted in July 2011, will also bring far-reaching changes to the GBO. So far, there has only been a "draft for discussion" and no draft as yet from the relevant official in the German Federal Ministry of Justice. The changes are primarily technological, particularly the development of a real land register database, rather than merely scanned land register pages. Improved integration of the land survey register also plays a role, whilst the structure of the land register will remain unchanged (what is welcome). In order to achieve the desired objective of the land register database, it will be essential to convert a large number of scanned land registers. The legislator plans to implement this in a revised formulation, which will be accompanied by a major revision of purposeless or obsolete legal processes (according to §72a of the planned new land register law). It shall show only the current legal conditions. Land register experience suggests that a committee will be formed to assume responsibility for converting the land registers. The old data must not be deleted, as they serve as the source and evidence on which the conversion is based.

The primary purpose of the new amendment is "to convert to a new, structured data storage system" in order to provide new tools for legal arrangements. This means new opportunities for research, more effective use of stored data, and "improving the function of the land register", particularly with regard to compiling notarial documents or comprehensive research.

Likewise, among other things, the land registries shall be enabled to collect data directly from the land survey register, such as for the realisation of parts of a property. It shall also be possible to generate an overview of all encumbrances on a property using the land register. It is unclear when a draft bill or even a final bill, will appear. We can, however, rule out the possibility that the new law will come into force during the current legislative term (before the end of 2013).

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