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The Law of Property Act — Cornerstone of the Civil Law Reform

Introduction

The Law of Property Act provides bases for the law of property. This act is considered to be the first step in the creation of the new Estonian civil law. The need to create firm bases for the state and its economy emerged upon regaining independence in 1991 and adoption of the Constitution in 1992. Land reform, started at the same time, brought pieces of land onto the market, however, the Civil Code of the Estonian SSR did not provide regulation for commerce of a piece of land. In order to regulate the commerce of immovables, in 1991, the Ministry of Justice engaged Peeter Kask, a lecturer from the University of Tartu, in drafting the Immovable Property Act.*[1] However, the draft did not meet the increasing needs of society. The main deficiency of the draft was its weak regulative power and its being a framework act; another problem was that the draft treated both the norms in private and public law in one and the same act — something characteristic of the Soviet legal order. A team under the guidance of Anre Zeno and Rein Tiivel which consisted of practitioners-students submitted an alternative draft.*[2] At the same time, it was understood that it should be aimed towards the creation of a new comprehensive civil code. A principal commission of Civil and Commercial Code guided by P. Varul, a professor from the University of Tartu, started work in 1992. The draft of the Civil Code*[3] which had been prepared under the guidance of professor Uluots for more than 15 years by the year of 1939, and could not be approved by the *Riigikogu* (Estonian parliament) because of the occupation, was taken as the model for the Code. The submission of this draft for the legislative proceeding of the *Riigikogu* was considered. A similar step was taken by the Latvians who effected the main parts of the Civil Code of 1938 with wording changes in 1992. The resolution of the *Riigikogu* concerning the continuity of legislation*[4] that recommended to follow the acts which were in force before 1940 became the essential resolution of legal policy guiding the selection of sources. Estonia preferred to elaborate new drafts since the draft of the Civil Code had neither been

1 P. Kask. Eesti Vabariigi kinnisvaraseaduse eelnõu. 1991 (Draft of the Immovable Property Act of the Republic of Estonia. 1991). Located in the Ministry of Justice (in Estonian).

2 A. Zeno, R. Tiivel. Kinnisvaraseaduse eelnõu. 1992 (Draft of the Immovable Property Act. 1992). Located in the Ministry of Justice (in Estonian).

3 A. Traat. Tsiviilseadustik (Civil Code). Tartu Ülikool, 1992 (in Estonian).

4 Riigikogu otsus "Õigusloome järjepidevusest" (Resolution of the *Riigikogu* concerning the continuity of legislation). – Riigi Teataja (The State Gazette) 1992, 52, 651 (in Estonian).

adopted as law nor applied in practice. Society's need did not afford time to elaborate a comprehensive civil code and it was determined in favour of its adoption by books. The first law was determined to be the Law of Property Act in order to create a foundation for the emerging immovable property commerce. The complementation of the drafts of Zeno-Tiivel by provisions on movables was started by Villu Kõve and Priidu Pärna. The Government of the Republic submitted the draft to the parliament in February 1993[*5] and the draft was passed on 9 June 1993 as the result of an expeditious proceeding.[*6] During the proceeding period, the draft was further processed by the expert group guided by Professor Varul. The Land Register Act was passed in the autumn of 1993[*7] and upon entry of the Law of Property Act into force on 1 December 1993, land registries commenced work.

The Law of Property Act follows the draft of the Civil Code both in its structure, content and abstract wording. The draft of the Civil Code was an advancement of the Baltic Private Law Code[*8] (1864), that was based upon the legal family of Middle Europe and applied until the occupation, followed primarily the Swiss Civil Code while modifying the part of property law.[*9] While compiling the draft of the Law of Property Act of 1992/93, the Civil Code was advanced primarily on the basis of the German Civil Code[*10] although the codes of, for instance, the Netherlands and Louisiana were also analysed. Professor G. Brambring and Dr. S. Erber-Faller[*11] delivered an expert opinion on the draft through the German Foundation for International Legal Co-operation. Still a claim can be made that the centuries-old tradition of rules of property law that follow the customs and understandings created with time are in effect again in Estonia. The phenomenon of the Law of Property Act is in the fact that it set the direction for all subsequent civil law acts and their sources. The passing of the Law of Property Act was a step of extreme importance in restoring the property relationships in private law.[*12] The Law of Property Act was novel notwithstanding its traditional solutions since lawyers had not been in touch with the majority of the main instrumentality of property law for 50 years. Therefore, even today, the application of the property law may end up being problematic. For certain, the text of the law reflects the lack of knowledge and the chaotic nature of the period.

Things

Definition and classification of things is the issue of general provisions of civil law, however it is located in the Law of Property Act on practical grounds. Namely, the General Part of the Civil Code Act[*13] was passed only in 1994, *i.e.* after the entry of the Law of Property Act into force, and it was necessary to regulate the objects of rights of the Law of Property Act — things — in order to establish real rights. Regulation of things in the Law of Property Act has a broader meaning that exceeds the need of the property law and establishes objects for the law of obligations, family law and succession law as well. The new draft of the General Part of the Civil Code Act also regulates things and therefore the first part of the Law of Property Act is subject to repealing.[*14]

The main deficiency of the applicable Law of Property Act is that it is concentrated solely on things and does not establish the place of things in the system of subjects of the civil law. We do not find a general definition of things and classification into things and rights.

A thing is a corporeal object (section 7). All things that fill space in the physical sense may be treated as things. An aggregate formation has no meaning. Things are objects that have a spatial scope, are perceivable by senses and are located under the discretion and supervision of people. Things that cannot be spatially defined such as open air, flowing water, sea, cannot be considered to be things but rather as common benefits. However, the Act violates this principle. So, section 9 regards things

5 Vabariigi Valitsuse istungi protokoll nr. 9 2. veebruarist 1993 (Minutes No. 9 of 2 February 1993 of the session of the Government of the Republic). Located in the Ministry of Justice (in Estonian).

6 Asjaõigusseadus (Law of Property Act). – Riigi Teataja (The State Gazette) I 1993, 39, 590 (in Estonian).

7 Kinnistusraamatu seadus (Land Register Act). – Riigi Teataja (The State Gazette) I 1993, 65, 922 (in Estonian).

8 V. Bukovski. Svod grazdanskih uzakonenii gubernii Bribaltiiskih s rasjasnenijami. Riia, 1914.

9 Sweizerisches Zivilgesetzbuch. NatR XVI, S. 1034/43.

10 Bürgerliches Gesetzbuch. RGBl, S. 195.

11 G. Brambring, S. Erber-Faller. Ekspertarvamus kinnisvaraseaduse eelnõu kohta. 1993 (Expert opinion on the draft of the Immovable Property Act. 1993). Located in the Ministry of Justice (in Estonian).

12 D. Liiv. Asjaõigusseadus – mis see on? (The Law of Property Act — What is It?). – Äripäev, 30. juuni 1993 (in Estonian).

13 Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). – Riigi Teataja (The State Gazette) I 1994, 53, 899 (in Estonian).

14 Tsiviilseadustiku üldosa seaduse eelnõu, 2001 (Draft of the General Part of the Civil Code Act, 2001). Available at: http://www.riigikogu.ee.

which due to their nature cannot be owned by anyone and may be used by everyone as common things. Declaration of ground water to be owned by the state is also questionable (section 134).

The main classification of things is their division into movables and immovables (*res mobile, res immobiles*). This division is the starting point for the separate treatment of real rights and is expressed in differences in the creation, scope and extinguishment of a right and distinct rules of form of transactions. Commerce of movables is determined by provisions on possession, commerce of immovables — by provisions of land register. The Act follows the principle of *numerus clausus* regarding immovables — the Act provides an exhaustive classification of movables. Immovables are plots of land together with their essential parts (section 8). Things which are not immovables are movables. A special classification of movables is accessories, which serve the principal thing and are related thereto through a common economic objective and their corresponding spatial relationship (section 18). The rights and obligations whose object is the principal thing extend to the accessory as well unless otherwise provided by parties. Provisions concerning immovables may be applied to certain movables with higher commercial value. Pursuant to the Law of Ship Flag and Registers of Ships Act*[15], vessels with a length of more than 12 metres may be one such exception. By law, provisions on things may be applied also to rights. Such exceptions are the right of superficies of frequent commerce (section 241) and the forms of divided common ownership resulting from the Apartment Ownership Act*[16]: apartment ownership (section 1) and apartment building lease (section 24). Property is defined through an aggregate of things, rights and obligations belonging to a person and it is important primarily in relationships of family and succession law (section 30).

A thing and its essential parts are not an object of different rights and obligations (subsection 15 (2)). This refers primarily to commerce in property law, not establishment of rights in the law of obligations. Essential parts of a thing are component parts which are permanently attached to the thing and which cannot be severed from the thing without the thing being destroyed or changed in character. This treatment is sort of narrow since it is important that the essential parts themselves are not destroyed upon severance. The essential parts of a plot of land are things permanently attached to it such as constructions, forest, other vegetation and unharvested fruit, and the real rights relating to the plot of land which belong to the actual owner of an immovable (section 16). A building erected on the basis of a real right (a servitude, a right of superficies) as well as buildings attached to a plot of land for a temporary purpose (on the basis of a right in commercial lease) are not essential parts of a plot of land. Pursuant to section 13 the Law of Property Act Implementation Act*[17], a significant exception is the commerce of buildings that are deemed to be movables until the entry of the plot of land under a building in the land register while returning or privatising it or while constituting the right of superficies for the benefit of the owner of the building. A building shall not be entered in the land register without land.

Possession and land register

The provisions of possession and land register create the general part for specific real rights or to the special part of property law. These are completely novel norms and they can often be underestimated in the practice. The commerce of movables is based upon the institute of possession, the commerce of immovables upon the institute of the land register. Both have been formed under the direct influence of Estonian legal traditions and the Germanic legal family.

Possession has three functions in the Estonian law of property. Firstly, the signal function pursuant to which possession indicates the ownership of movables. Pursuant to section 90, a possessor of a movable and any earlier possessor shall be deemed the owner of the thing during the possessor's possession until the contrary is proved. Secondly, the function of creating a right since the delivery of possession is a basis for the creation of the majority of rights in movables (transfer, occupation, *etc.*). Although several movables (cars, buildings, *etc.*) are registered in state registers, these entries do not have an influence of creating a right, at the same time, possession has no meaning upon the creation of immovable property ownership. Thirdly, the function of protection that provides owners

15 Laeva lipuõiguse ja laevaregistrite seadus (Law of Ship Flag and Registers of Ships Act). – Riigi Teataja (The State Gazette) I 1998, 23, 321 (in Estonian).

16 Korteriomandi seadus (Apartment Ownership Act). – Riigi Teataja (The State Gazette) I 2000, 92, 601 (in Estonian).

17 Asjaõigusseaduse rakendamise seadus (Law of Property Act Implementation Act) – Riigi Teataja (The State Gazette) I 1993, 72/73, 1021 (in Estonian).

of a movable or an immovable with the right to protect their possession. Certainly, possession is one of the transferable rights of an owner.

Possession (*possessio*) is actual control over a thing (section 32). Possession is not defined as a right and therefore it is not possible to waive possession by agreement, rather it is presumed that actual control over a thing or over the means which enable actual control over the thing is transferred (section 36). Exercise of possession does not require active legal capacity from the possessor nor a legal basis. It suffices to have intention to exercise possession, that there is visible or sensible spatial relationship between a person and a thing and readiness to protect the achieved actual relationship. Estonian law does not directly differentiate between possession of an owner and another, however there is gradual possession in the form of direct and indirect possession (subsection 33 (2)) that is created pursuant to some legal relationship (residential lease, pledge). The purpose of such gradual possession is to extend the circle of persons who apply the remedies of possession protection. Persons who serve possession and exercise actual control over a thing according to orders of another person are not deemed to be possessors.

Instrumentality of possession protection has the purpose of safeguarding legal peace and preservation of existing possession relationships and quick removal of any deviations. Possession is protected against any arbitrary action (section 40). Remedies of possession protection belong to all possessors irrespective of the fact whether their possession has a legal basis. Therefore, it may be the only protective remedy for a person to retain his or her actual position. Protection of possession may extend from the exercise of self-help against arbitrary action or using force in respect of the one who violated or deprived the possession up to the right of pursuing movables (section 41). Additionally, the possessor has the right to search for a movable that ceased to be under the control of the possessor on an immovable of another (section 42). There have been some erroneous applications in practice in exercising self-help that involves erroneous justifications sought in the insufficient legal basis of the possessor to possession, which occurs more frequently upon the expiry of commercial and residential lease agreements. Filing actions in protection of possession is a remedy of possession protection of low usage in practice that involves the reclaiming of a thing to a former possessor and where no rebuttal can be made founding it on insufficient legal basis for possession (section 43). The only rebuttal can be that the possession of the plaintiff was initially based upon an arbitrary action in respect of the remover of the possession. A person who was late with the exercise of self-help or who has no possibility to commence dispute on a legal basis due to its absence has to file an action for possession protection. Actions on possession protection can be filed within one year after the violation or removal of the possession.

Historic traditions and the draft of the Civil Code were determining in the creation of provisions of the land register. The latter followed Swiss law in modifying the system of land register. While compiling the Law of Property Act, this part was further developed following the model of the German Procedure of Land Register*[18] which supported the abstraction principle that has created substantial conflicts in unequivocal application of the act. The land register under creation had to become the foundation and central regulator of the commerce of immovables. Substantial norms of the law of land register are stipulated in the Law of Property Act and formal ones in the Land Register Act, however, this difference could not be ultimately maintained and so procedural norms can also be found in the Law of Property Act. The substantial law of land register provides for a so-called hard system of the law of land register, formal law of land register is a part of proceedings on petition (*freiwillige Gerichtsbarkeit*). The register is maintained by land registries in courts of first instance (city and county courts), entries are made by judges and assistant judges. The latter is an institution implemented from the year 1997*[19] corresponding to the nature of *Rechtspfleger* in the Germanic legal tradition. The creation of a judicial register was a significant advancement in fixing the facts in private law and subsequently the commercial register, the register of foundations, *etc.* have been created with courts. Although the court has to establish premises for entry during proceedings on petition and do it independently from the administrative power and be guided by law only, many think that maintenance of judicial registers is an inappropriate exercise of administrative function for the court system.*[20] Primarily this was the opinion of judges themselves which reflects their narrow approach to the mission of judicial power under the conditions of the state based upon the rule of law.

18 Grundbuchordnung. RGBl, S. 1073.

19 Riigi Teataja (The State Gazette) I 1996, 42, 811 (in Estonian).

20 Riigikohtu arvamus kohtute seaduse eelnõu (607 SE II) kohta, 5.03.2001 (Opinion of the Supreme Court concerning the draft of the Courts Act (607 SE II), 5.03.2001). Located in the Ministry of Justice (in Estonian).

A land register is maintained for immovables and related real rights. The obligation of entry exists for all immovables belonging to persons in private law. As a rule, the entry of immovables of the state and local governments is optional and it proves to be necessary in cases where their transfer is desired (section 51). Plots of land, rights of superficies, apartment ownership, apartment building leases are entered in the land register and sea vessels are entered in the ship register. The register part is maintained in the form of a fascicle and consists of four divisions (composition of an immovable, an owner, encumbrances and restrictions, and mortgages), in addition, a land registry file shall be started for each immovable to retain original documents. Maintenance of the land register has neither implemented a pure personal nor real folder principle. All plots of land owned by one owner and located in a land registry jurisdiction may not be entered on the same sheet, at the same time each plot of land may not be entered on a separate sheet. Entry of several separate plots of land in a register part would not enable their encumbrance by cadastral units. All plots of land have to be registered in the State Cadastre under the administration of the Ministry of the Environment and operations of which have been established by the Cadastral Register Act.*[21] The cadastre establishes technical-economic regime for plots of land and entries have no legal meaning, however, the land register establishes the regime of immovables in property law and the entries have legal effect. Unlike many countries in transition, Estonia has been able to avoid joining these two registers and has laid emphasis on IT solutions and cross-usage of databases.

The land register is public and everyone has the right to examine land register information and to receive extracts therefrom (section 55). Although the complete publicity extends only to the register part and not to the land registry file, the transparency of the regime of immovables in law of property is guaranteed to third persons by law. No one may be excused by ignorance of information in the land register.

Entries have been furnished with a positive and negative effect — a right that is not entered or that is deleted does not exist and anything entered is applicable and correct (section 56). The State provides entries with a guarantee and in order to actually safeguard it, the commerce in immovable property has been subordinated to notarial and judicial review. Anyone denying the premise of lawfulness has the onus of proof. The presumption of correctness of entries is not extended to cadastral information or restrictions in public law with no entry. The application of the principle of the presumption of correctness is unclear in cases where the transfer of ownership occurs on the basis of law or an act by the state authorities (succession, compulsory execution). Since the state safeguards the correctness of entries, expiry of claims arising from a real right entered in the land register shall not be applied (subsection 58 (3)). An ultimate expression of the positive effect of an entry is the acquisition of an immovable or a real right in an immovable in good faith relying on an entry, this principle is characteristic of only some procedures of land registers in Central Europe (subsection 56 (3)). Ostensibility of law that has been created by law (*Fiktionsschutz*) has to replace the insufficient right of a transferor and create certainty for investments as a solution of legal policy. Ostensibility of law does not cure other deficiencies that exist at a transfer (insufficient right of representation or active legal capacity) and these cases do not create possibility for acquisition in good faith. An acquirer is in bad faith if he or she knew about the unlawfulness of an entry or interfered with a notation entered pursuant to a good faith acquisition. The law has to specify at which moment should the acquirer be in good faith in order to acquire based upon the ostensibility of law. Lately, opinions against acquisition in good faith have become more frequent since this has been misused to transfer several immovables against intention of owners on criminal purposes on the bases of fabricated authorisations.

It is natural for a land register that is based upon the principle of entry and perfection of the register that real rights are created if these are entered in the land register and rights are not transferred between parties to a transaction without an entry (section 58). There are exceptions to this general rule relating to bases of creation of an ownership, outside the register, there are some mortgages, rights of pre-emption and real encumbrances. The land register allows establishing real rights in a thing owned and this may be created either from the beginning or the regaining of a real right by the owner subsequently (consolidation of real rights, subsection 66 (2)).

Entries shall receive a ranking in the land register and are placed in a ranking relationship that follows the timely order of registration in the land registry journal — the one who has an advantage in time, has an advantage in a right. The order of rights is moving (sections 59–61): upon deletion of fore rights, subsequent rights move ahead in ranking. Rankings may be changed upon the agreement of holders of rights not violating interests of intermediate holders of rights, thereby the owner has the opportunity to reserve a ranking.

21 Maakatastriseadus (Cadastral Register Act). – Riigi Teataja (The State Gazette) I 1994, 74, 1324 (in Estonian).

In the interests of clarity and revisability of the register, only entries permitted by law may be entered — real rights and related notations. Rights of obligation and restrictions in public law shall not be entered in the land register. Notations are divided into preliminary notations, objections, notations concerning prohibition and notations (section 63). Since a right shall be transferred only upon entry, a preliminary notation allows reserving a ranking for a future establishment or deletion of a real right. A preliminary notation shall not prohibit further transfer of an immovable, however, the signal function of a notation prevents its acquisition in good faith if contrary to it. The person entitled pursuant to a preliminary notation may request the deletion of disposals contrary to the preliminary notations and this is also applicable to transfers occurred on the basis of a court judgement. Entry of an objection is an opportunity for a possibly quick response by a person who alleges the incorrectness of the land register and in such a case he or she has not to prove the incorrectness of the register. At the same time, an objection does not prevent further transfer of an immovable, but it prevents its acquisition in good faith. However, a notation concerning prohibition prohibits the transfer of an immovable or a real right contrary to the notation of prohibition and as a rule, it shall be entered to secure an action by a court ruling. A notation makes visible certain circumstances concerning real rights that are permitted by law.

Entries shall be made, changed and deleted on the basis of a registration application which shall be a declaration of intention of persons to make an entry and directed to the land registry (section 64). Additionally, the land registry controls the existence of a declaration of intention or an agreement under law of property. An entry itself is a public act where the actual implementation of an intention in private law is set to be dependent on activity of state officials. The registration procedure as proceedings on petition is by its nature a procedure based upon consents. Any party may express a change in a right, but the party concerned has to give consent to the making of the entry. If no consent is given, the interested party has to commence an action where the pursued judgement shall substitute the missing consent for registration. A confusing exception is section 70 of the Land Register Act which allows the filing of a complaint with a circuit court against the entry itself. A registration application and a consent of a concerned person are subject to notarial control. A bilateral registration application including agreement for making of an entry is presumed to be formed in case of an entry creating rights (Land Register Act section 34). Section 64 of the Law of Property Act considers a real right contract to be a bilateral registration application if it includes an expression of an intention to make an entry. This norm creates much ambiguity in the relationship of substantial law of property and formal law of land registers and needs to be amended. The need to submit agreements in law of obligations to the land registry is also unclear due to the mixed norms borrowed from diverse legal orders (Land Register Act subsection 35 (1) 1)).

Ownership

Ownership (*dominium*) is the largest real right. The inviolability of the property is secured by the Constitution (section 32). Ownership is full legal control by a person over a thing (Law of Property Act section 68). An owner has the right to possess, use and dispose of a thing, and to demand the prevention of violation of these rights. In respect of the latter, the owner has the remedy of a vindication action in addition to remedies of possession protection (section 80) and the right to file an *action negatoria* (section 89). Ownership may be restricted only by law.

Following the object of ownership, it is divided into movable property ownership and immovable property ownership. Pursuant to the Law of Property Act, first the general rules concerning the ownership are provided and thereafter the special norms concerning movable property ownership and immovable property ownership. Dissimilarities exist namely in the bases of ownership creation. Still, the biggest discussion during the drafting involved the use of the notion ownership (*omand*) since presently it is synonymous to ownership (*omandiõigus*), but pursuant to the Civil Code of the Estonian SSR[*22] it meant the object of the ownership.

An ownership may belong to several persons and in that case it is referred to as a shared ownership. Shared ownership is divided into common ownership and joint ownership (section 70). In case of a common ownership, the shares of co-owners are determined in legal shares, in case of joint ownership the shares are not determined. If ownership belongs to several persons, it is presumed that common ownership is created in equal legal shares belonging to owners. Sections 71–79 of the Law of Property Act provide norms for common ownership. Joint ownership is created in cases provided by law and

22 Eesti NSV Tsiviilkoodeks (Civil Code of the Estonian SSR) – ENSV ÜVT 1964, 25, 115 (in Estonian).

provisions of common ownership are applicable to it as far as there are no special norms. A form of joint ownership exists between spouses in respect of property acquired during the marriage as far as they have not agreed otherwise by notarised marital property contract. If a right is owned by persons jointly (association), provisions of common ownership are applicable to it as well.

A special form of common ownership is the apartment ownership that allows the commerce of physical shares of a building as an exception. The first Apartment Ownership Act*[23] was passed in 1994, a new act complemented by the provisions of building administration entered into force on 1 July 2001. The German *Wohnungseigentumsgesetz**[24] was taken as a model for creating the Apartment Ownership Act. On the basis of an application, an owner has the right to divide the immovable property ownership into apartment ownerships. An apartment ownership consists of a physical share (residential or business premises) and a legal share of the common ownership related to it (section 1). Provisions on an immovable are applied to an apartment ownership and therefore, independent register part shall be opened for each apartment ownership in the land register and the apartment ownership shall be transferred and encumbered through it. Similarly, it is possible to divide a right of superficies into apartment building leases. Pursuant to section 13 of the Law of Property Act Implementation Act, objects similar to the apartment ownership are included in commerce as a temporary exception — such object consists of premises and related legal share of a building formed as a result of privatisation of residential premises without land.

Diversity exists among bases of creation a movable property ownership: delivery, occupation, prescription, finding, treasure, specification, confusion, accession, acquisition of natural fruits. They can be differentiated primarily by the fact whether the ownership is created for the first time or whether it involves a transfer of ownership. Transfer, occupation and prescription have the largest value in commerce.

Movable property ownership is created by delivery of a movable if the transferor delivers possession of the thing to the acquirer and they have agreed to the transfer of the ownership (Law of Property Act section 92). Ownership creation requires both the transfer of the actual control and the real right contract. The form of the real right contract is not determined and it may also be conditional providing conditions for transferring the ownership with reservations. Until 1999, a norm expressing the causality principle from the draft of Civil Code according to which a transfer of ownership has to have a legal basis. Motivation to repeal this provision was found in the need to implement the pure abstraction principle or the independence of an ownership transfer of a transaction in the law of obligations.

The are several exceptions to the general rule of transfer. Similarly to German law, delivery of possession may be substituted with the agreement by assignment of the right to demand delivery (section 93) or leave possession with the transferor (section 94). In the latter case, it is not prohibited to use the norm with the purpose of acquisition of security ownership as provided by section 717 of the Swiss Civil Code as well as section 968 of the draft of the Civil Code. An agreement in law of obligations is sufficient if the thing is already in the possession of the acquirer (subsection 92 (2)).

Special norms for the transfer of a building as a movable derive from section 13 of the Law of Property Act Implementation Act. A building or its part may be transferred as a movable until the entry of the land under the building in the land register but not later than 31 December 2001. The transfer transaction has to be notarised and registered in the State Building Register. However, an entry in the Building Register does not have an effect of creating a right. Ownership shall be transferred pursuant to the provisions of the Law of Property Act necessitating the delivery of possession and real right contract. In practice, the transfer of ownership through its actual control poses serious difficulties.

The central position is occupied by allowing the acquisition of movables in good faith. As a resolution of legal policy, a person acquires a movable in good faith as of the time of acquiring the possession even if the transferor was not entitled to transfer ownership (subsection 95 (1)). "Ostensibility of law" created by the legislator according to the model of the German legal tradition substitutes the absent right of the transferor to transfer ownership but does not remove other legal errors (insufficient representation, active legal capacity, *etc.*). A thing may be reclaimed from an acquirer in bad faith any time not applying the limitation of an action. There are substantial exceptions to this general rule. Acquisition in good faith shall not be effected if the thing was stolen from the owner, lost or dispossessed in any other manner from the owner against the will of the owner. Such thing may be reclaimed from a possessor in good faith until the possessor has acquired the thing by prescription.

23 Korteriomandi seadus (Apartment Ownership Act). – Riigi Teataja (The State Gazette) I 1994, 28, 426 (in Estonian).

24 Gesetz über das Wohnungseigentum und das Dauerwohnrecht. BGBl, I 175.

Ownership is created by prescription if a person or his or her legal predecessor possesses movables in good faith and without interruption for five years as an owner (section 110). However, such right of reclaim does not exist if a thing had been acquired by public auction. Law needs to be specified to determine the moment of good faith more precisely and how it applies to alternatives of transfer.

There are fewer bases for the creation of immovable property ownership. Most important is the creation and extinguishment by entry in the land register (section 118); occupation by state and prescription are less common. Outside the land register, an ownership shall be transferred in case of succession and upon acquisition by one spouse, the ownership is created also with the other spouse. In such cases, the land register shall become incorrect and needs to be corrected. The transfer of ownership upon compulsory execution is unclear and allegedly an ownership is transferred only by entry also in case of compulsory execution (Immovables Expropriation Act section 41[*25]). Irrespective of registration, ownership is created with the state and local governments. In case of prescription, the ownership may be created after registration when the possession that has been in good faith and without interruption for ten years becomes ownership (section 123). In addition to prescription of the land register, rare extra-land register prescription is known when a person, who has for thirty years possessed an immovable, may demand his or her entry in the land register as the owner if this is not evident from the land register (section 124).

However, the most important innovation of the ownership treatment is the provision of the real right contract (section 120) according to the model of German law and recommendation of foreign experts.[*26] A real right contract is an agreement between the transferor and the acquirer concerning transfer of immovable property ownership or for encumbrance of an immovable with a real right. Notarisation of the agreement is presumed. All norms of the general part of civil law are applied to the transaction in law of property. As an exception, it is not permitted to conclude a conditional real right contract for transfer of immovable property ownership that could start influencing the clarity and certainty of the land register. As the existence of such agreement is necessary for the establishment of all real rights, it would be more proper to place the norm in the general part of the law of property and not in the chapter on creation of immovable property ownership. Acquisition of real rights in good faith is regulated concerning the land register as well. German experts recommended the stipulating of general provisions concerning real rights in immovables and leave special norms on each real right in the special part according to the model of the German Civil Code, however, the drafters decided to follow the draft of the Civil Code.[*27]

In addition to the real right contract as a transaction of execution, a conclusion of a transaction in the law of obligations is presumed (primarily the contract of sale) that would create a *causa* to the ownership transfer and by which the acquisition and transfer of an immovable is required. Both agreements are usually included in the same notarised document. The Law of Property Act (section 119) provides also the requirement for notarisation of the causal transaction on the grounds that the Law of Property Act was effected before the law of obligations. The delivery of possession has no meaning in law of property in respect of immovables.

The purpose for clear distinction of the real right contract was the importation of abstraction principle to the Estonian civil law according to the model of German law. The idea that allegedly comes from Savigny has to serve legal certainty and clarity, so that errors in a causal transaction would not influence the legal status of an immovable and would allow the establishment of abstract real rights of the owner. While the causality principle recognised in many European legal orders involves invalidity of the transfer of an ownership in case of an invalid transaction in law of obligations, its absence or invalidity does not influence the legal basis of the ownership or real right contract only in some systems following the abstraction principle, except in cases which involve identical errors upon simultaneous execution of both transactions. An ownership may still be reclaimed based upon unjust enrichment. Consistency was missing while imposing the abstraction principle to the draft. Therefore, conflicts can be found in the law where the solutions following the Swiss law and causality principle do not coincide with the theory of abstract validity of an ownership of the German law. In respect of real rights in movable property, the nature of real right contract has not been clearly defined. Until 1999, section 120 of the Law of Property Act was in effect in a form that allowed the conclusion of a real right contract only on the basis of a causal transaction and section 64 of the Law of Property Act set the obligation to submit all agreements in the law of obligations to the land registry. In fact, the abstraction principle can be conclusively implemented only upon entry into force of the law of

25 Kinnisasja sundvõõrandamise seadus (Immovables Expropriation Act). – Riigi Teataja (The State Gazette) I 1995, 30, 380 (in Estonian).

26 G. Brambring, S. Erber-Faller (Note 11), p. 8.

27 *Ibid.*, p. 11.

obligations which would provide appropriate definitions for transfer transactions since the applicable Civil Code of the Estonian SSR did not recognise the principle of abstraction either. Regulation of unjust enrichment in the law of obligations is important as well.

Restricted real rights

Restricted real rights are divided into servitudes, rights of pre-emption, real encumbrances, rights of superficies and rights of security. It was discussed while drafting the Law of Property Act under which common headline these rights should be. An expert group under the guidance of Professor P. Varul recommended the use of a term "rights to things of another" that followed the Roman law (*jura in re aliena*).[*28] This solution would have been too narrow in the situation where the Estonian law of property recognises real rights to one's own thing. The notion of a restricted real right was used already by the draft of the Civil Code (Part 3 of Book 4).

Servitudes are divided into real servitudes and personal servitudes. Servitudes also presume a notarised agreement and entry in the land register. A real servitude exists between a servient and dominant immovable. Content of a real servitude is the right of the actual owner of the dominant immovable to use the servient immovable in a particular manner or the obligation of the actual owner of the servient immovable to refrain from the exercise of the owner's right of ownership or filing claims for the benefit of the dominant immovable (section 172). A real servitude shall not require the owner of the servient immovable to perform any activity except acts that have a meaning of assisting. Term and charge of servitudes is not regulated by law and therefore this may be determined by parties. As a distinction from other European Civil Codes, the Law of Property Act provides a list of real servitudes which is, however, not exhaustive. This solution can be explained by the purpose that the text of law has to make the nature of servitudes as a completely new real rights clear to appliers. Some servitudes are obsolete and do not justify their place in law (servitude of pasturage, servitude of watering livestock).

Personal servitudes are divided into the usufruct and the personal right of use. A usufruct entitles a person to use the encumbered thing and to acquire the fruits thereof (section 201). In fact it is a commercial lease in law of property. As an exceptional restricted real right, the establishment of a usufruct is also allowed to movables and rights in addition to immovables in order to allow the creation of a comprehensive right of use. The duration of a usufruct is limited by the lifetime of a natural person or the term of 100 years for legal persons. Generally, a usufruct as a personal right is not transferable. Usufruct may be transferred to a successor if it has been agreed upon establishment of the usufruct. As such, the usufruct substitutes the inheritable right of perpetual lease which was not provided for as a real right. The stipulated right of commercial let upon the owner's consent is an excessive restriction since it restricts the rights of usufructuary to a fruit of a thing. Several norms originating in the draft of the Civil Code were abridged while compiling the Law of Property Act and it was provided that rights and obligations resulting from a usufruct shall be determined by the transaction of establishment of a usufruct. This solution has to be considered to be a failure since such agreement shall not have influence in law of property in respect of the actual owner of an immovable.

A personal right of use provides a specific person with rights with respect to the immovable which in substance corresponds to a real servitude (section 225). The personal right to a residential building is provided separately and it refers by nature to a residential lease in law of property. A personal servitude is not transferable either, except in a case where a utility network or a construction has been constructed based upon it. This exception has been justified with needs of economic life. Establishment of personal rights of use in the benefit of owners of utility networks shall become a substantial trial for the land register since pursuant to section 15^2 of the Law of Property Act Implementation Act, servitudes in the benefit of the owners of the existing lines have to be established within ten years as of the registration of the plot of land.

Estonian law recognises a real encumbrance as an obligation to perform periodic registration acts in law of property the nature of which is registration acts by the actual owner of an immovable to pay periodic payments in money or in kind or perform acts (Law of Property Act section 229). Unlike a real servitude, an owner of an encumbered immovable is required to perform activity. Owner's liability in respect of executions is limited by the immovable, but in three years after the emergence

[28] Tsiviil- ja kaubandusõiguse komisjoni arvamus AÕS eelnõu kohta. 1993 (Opinion of the Commission of Civil and Commercial Law concerning the draft of the Law of Property Act. 1993), lk. 3. Located in the Ministry of Justice (in Estonian).

of a right of claim, the particular obligation becomes a personal obligation of the owner. A real encumbrance may be established in the benefit of a specific person or the actual owner of another immovable. A real encumbrance may be created on the basis of a notarised transaction upon entry in the land register or it may result directly from law in case of real encumbrances in public law. In practice, the establishment of real encumbrances is most common as securities of payments for the right of superficies.

Estonian law provides for the right of pre-emption as a right of acquisition in law of property (section 256) which provides the person entitled to pre-emption with the right to take the place of the transferor of an immovable. This right may be established for the benefit of a certain person or for the actual owner of another immovable. The right of pre-emption may be established for all cases of transfer and it may also be extended to succession. A right of pre-emption is created on the basis of a notarised transaction by entry in the land register or it may result directly from law. More common establishment of the right of pre-emption in practice is its establishment concurrently with constituting the right of superficies and pursuant to law, the right of pre-emption of co-owners of an immovable and a building as a movable. Section 20 of the Law of Property Act Implementation Act provides the general right of pre-emption for local government in respect of all transferred immovables within its administrative territory until 1 January 2002. The purpose of such right of pre-emption is to safeguard the formation of real market prices in transfer transactions which would secure correct collection of fees and determination of the assessed value of land.

The exercise of a right of pre-emption has been established upon entering a transfer transaction and subsequently the transfer of an ownership to oneself. The validity of a transfer transaction may not be dependent upon the exercise of the right of pre-emption. A seller is required to submit the sale transaction to the person entitled to pre-emption and the buyer has to form his or her opinion within two months. At the same time, the right of pre-emption does not prohibit the entry of the transfer of ownership to the buyer in the land register, but this is not an acquisition in good faith in respect of the person entitled to pre-emption. Uncertainty of authors of the draft in differentiating real rights and rights of obligation is evidenced in subsection 257 (4) of the Law of Property Act according to which it was possible to establish a right of pre-emption on the basis of a transaction only for a single transfer until 1999. A provision, according to which the owner of an immovable may request the deletion of a right of pre-emption if the right of pre-emption is not exercised, is debatable (section 258).

The right of superficies is the restricted real right of the most frequent commerce in the Estonian law. As the main right of construction on the land of another, it has been used in cases where the owner does not wish to relinquish the ownership or where the transfer of an ownership is restricted by restrictions in public law. The right of superficies is a transferable and inheritable right for a specified term to own a construction on the immovable or permanently attached to it underground which is deemed to be an essential part of the right of superficies. The right of superficies may be constituted for the benefit of an existing building or a building under construction. The right of ground lease provided for in the Baltic Private Law Code may be considered to be a predecessor of the right of superficies in the Estonian law of property, however, it has been provided in the Law of Property Act following primarily the German *Erbbaurecht* example.*[29] As the only exception among restricted real rights, provisions on immovables are applied to the right of superficies. Therefore, a register part shall be opened concerning a right of superficies by the land registry upon entry of a plot of land in the land register part through which the transfer and encumbrance of the right of superficies shall occur. In fact, apartment building leases created by the division of a right of superficies shall also be deemed to be immovables. Therefore, the nature of the right of superficies may be referred to as dual. The right of superficies may be encumbered by all restricted real rights except for the right of superficies itself. It may be agreed upon the constitution of the right of superficies that its transfer or encumbrance requires the consent of the owner of the plot of land. The right of superficies may also be constituted as an owner building lease by a unilateral application of the owner of the plot of land or by a notarised agreement. In both cases, the right is established by an entry in the land register. The right of superficies may only be established in the first ranking of the land register. The purpose of such restriction is to secure the continuation of the right of superficies in case of a compulsory execution of a plot of land. The right of superficies is a right for charge and the payment of periodic charge shall often be formulated as a real encumbrance on the right of superficies. The right of superficies may be constituted for the period of 36 up to 99 years and be extended upon the expiry of the term. Upon the constitution of a right of superficies, conditions may be agreed on upon the conditions when the building lessee has to transfer the right of superficies back to the owner. This

[29] Verordnung über das Erbbaurecht. RGBl, S. 72.

shall be primarily applied in case of not erecting the building by a due date or non-payment of the charge for the right of superficies. Upon the end of term of the right of superficies, the building becomes again an essential part of the plot of land if the owner has not demanded for removal of it by the building lessee.

Rights of security

One of the most problematic areas of the Estonian law of property is the area of the rights of security. While compiling the Act, a possibility to regulate both personal securities and securities in law of property was considered to be done in separate acts.*[30] The final choice still followed the traditional solution of civil codes where rights of security are a part of real rights and personal securities are a part of rights in obligations. Major amendments of the draft of the Civil Code have been done in respect of rights in securities. Rights of security are divided into the securities over movables and securities over immovables. Securities over movables are divided into possessory pledge, registered security over movables, pledge on securities and the legal right of retention in which case the creditor has the right to retain things of the debtor which have legally come into his or her possession. Real securities are divided into a mortgage and a judicial mortgage. Things, securities and proprietary rights may be objects of a pledge (section 277). Traditionally the right of security provides a claim with a meaning of a preferential claim (section 280).

The central right of security among securities over movables is the possessory pledge; although its relative importance in commerce is nominal (it is used primarily in pawnshops), the framework of the possessory pledge is also applied to other securities over movables and this involves especially the compulsory execution of claims. The possessory pledge is created by the transfer of possession of a movable and by conclusion of an agreement of establishment of a pledge which has to be formed in writing as a rule (section 282). The possessory pledge is strictly an accessory right of security. Upon non-fulfilment of the claim being secured, the pledgee shall have the right to sell the thing. A possessory pledge is convenient because of its easy sale — upon the creation of the right to sell, the pledgee can sell the thing by public auction. It is problematic only because of the fact that specific rules concerning sale by public auction are absent from the law of obligations. The norm that prohibits the transfer of a pledged thing without the transfer of the debt may be deemed to be erroneous since it does not correspond to the general nature of real rights (subsection 289 (5)). An excessive restriction is the provision in subsection 292 (3), which does not permit an agreement whereby the pledgee acquires the pledged thing for satisfaction of a claim. Its permission would be justified after the creation of the right to sell.

The registered security over movables is an essential upgrade to the draft of the Civil Code and it is difficult to find analogues to it in the legal families of Central Europe. The registered security over movables may encumber forms of intellectual property entered in the state registers (trademarks, patents, *etc.*), cars, aircrafts, and movable property of an undertaking as a general pledge. The registered security over movables resembles a mortgage since it is created upon its entry in the register and it allows the establishment of several registered securities over movables to one thing. Establishment of a pledge requires an agreement in writing since the provisions of a possessory pledge shall be applied to registered securities over movables in other respects, and its sale shall be effected by public auction without the approval of a court. The provisions of registered securities over movables are drafted in a hurry and there are substantial gaps in the norms. The norm provided in section 305 does not fit the regulation of the law of pledge pursuant to which a pledgor shall not transfer a thing on which registered security over movables is established. Upon compulsory execution of a movable, the continuation of the encumbering rights is not clear. The most important deficiency is that several of the state registers have not been initially created for the registration of information in private law and the entries in the register do not have the effect of constitution. It is not logical to provide an entry of a right of security with a meaning of creating rights while the ownership is transferred outside the register. A more detailed procedure for the registration of a right of security is absent. At the same time, it is not practical to create registers following the strict requirements of the land register. Commercial pledge created pursuant to the models of France and Scandinavia did not commence until the Commercial Pledges Act was entered into force in 1996*[31] which is substantially more regulative and pursues avoidance of conflicts of different requirements.

30 *Ibid*., p. 4.

31 Kommertspandiseadus (Commercial Pledges Act). – Riigi Teataja (The State Gazette) I 1996, 45, 848 (in Estonian).

For that purpose, the scope of the commercial pledge has been restricted — this does not extend to monetary funds, shares of a private limited company, shares of a public limited company, securities, forms of intellectual property, buildings, means of transport (section 2). There are more strict requirements for an establishment of a pledge — it is subject to full notarial attestation and the pledge is created by an entry in the commercial pledge register (subregister of the trade register) maintained in the first instance court. Unlike other registered securities over movables, the commercial pledge is a non-accessory one. A proper change for the future will be the registered pledge over movable to be independent of a claim and to subject it to the provisions of a mortgage instead of a possessory pledge. It is necessary to recognise several threats in respect of the registered securities over movables for a pledgor, a pledgee or a third person, the fact to which also foreign experts have drawn attention.[*32] The regulation of a commercial pledge allows a situation where all movable property of an undertaking has been pledged but in spite of the fact it is possible to transfer this property in the frames of regular economic activity. This causes the increased need of a pledgee to interfere with the economic activity of an undertaking. Conflict of several claims may occur, especially if there are movables in the possession of an undertaking the ownership of which has not been transferred to it, this may occur especially in trade activity. The legislator has therefore knowingly tried to make the commercial pledge less attractive claims secured by a commercial pledge are after the claims secured by a pledge, claims in labour law and tax claims (section 86[*33] of the Bankruptcy Act).

Pledge of securities is problematic. Initially it was planned to stipulate the pledge of rights in the Law of Property Act that would have embraced both the pledge of rights, claims and securities. By the speedy processing of the draft, it was not possible to elaborate the pledge of rights in full and so we can find provisions on the pledge of securities only. Although section 277 provides proprietary rights as an object of a pledge, we do not find such right of pledge in the catalogue of rights of pledge that could be applied here and the pledge of rights and claims is highly questionable. The stipulated pledge of securities does not follow the needs of real life since it regulates the pledge of documents on paper by transfer of possession. Today, the majority of securities are electronic and the norms of the draft of the Civil Code elaborated before 1940 would not work. The other problem is related to the fact that securities and their classification (warrants, promissory notes, *etc.*) have not been regulated by law so far, at the same time, the Law of Property Act provides for their pledge. The part of the Law of Property Act that regulates the pledge of rights shall be reformed. In respect of the pledge of electronic securities, the situation is so far solved by the Estonian Central Depository of Securities Act[*34] of 2000, pursuant to section 16 of which, a pledge of securities is created upon entry in the register on the order of the account administrator. A pledge does not prohibit the transfer of securities, however, the right of pledge moves along with it.

Section 13^2 of the Law of Property Act Implementation Act provides that a special right of pledge can be established for a building as a movable and no counterpart to it can be found in the Law of Property Act. A pledge of a building is created upon the notarisation of the agreement of pledge, but the existence of a pledge has also to be entered in the building register. The entry has merely an informative effect. A transfer of possession of a building is not necessary. A building may be encumbered with only one such accessory right of pledge. Unlike regular securities over movables, the compulsory sale of a pledged building has to be effected on the basis of a judgement, except in a case where it has been agreed to subject oneself to an immediate compulsory execution. If the land under the building is entered in the land register during the effect of a right of pledge, the pledgee has the right to request the reformulation of a pledge as a mortgage and an entry of a corresponding preliminary notation in the land register.

Stipulation of the mortgage had a purpose of creating a simple system of rights of pledge to immovables that would be as capable of commerce as possible. The real security on the basis of pledge instruments and the dual division of rights of pledge into an accessory mortgage and non-accessory hypothecary debt provided for in the draft of the Civil Code was given up. Recommendations of foreign experts in favour of the real security as of more capability in commerce were decisive. The chapter of the draft of the Civil Code on the hypothecary debt was taken as a foundation and modified according to the model of the German law. It was still decided to name the hypothecary debt as a mortgage, as a term more widespread among people. As a result, there might be confusion in understanding the nature of the Estonian real security.

32 M. Wenckstern. Gutachtens zum Kommertzpfandgesetz. 1995. Located in the Ministry of Justice.

33 Pankrotiseadus (Bankruptcy Act). – Riigi Teataja (The State Gazette) I 1997, 18, 302 (in Estonian).

34 Eesti väärtpaberite keskregistri seadus (Estonian Central Depository of Securities Act). – Riigi Teataja (The State Gazette) I 2000, 57, 373 (in Estonian).

A mortgage is a general right of pledge to an immovable, its essential parts and accessories, fruits, claims of residential or commercial lease, insurance benefits (section 325). The Estonian law of property recognises the combined mortgage to several immovables that shall provide a claim with a better security (section 359). A mortgage does not presume the existence of a claim to be secured which allows the establishment of an original owner mortgage for the purpose of reserving a ranking in the land register or its creation after the claim to be secured has been satisfied. In latter case, pledgees in lower rankings have a right to prohibit this, except if this is excluded by the entry. The non-accessory right of pledge is a good opportunity for the owner to maintain a continuous right of pledge on an immovable that can be relinquished in case of a need without any specific costs and that can secure cheap loans to refinance more expensive loans of lower rankings. At the same time, a mortgage does not prohibit the transfer of the immovable and does not require the transfer of a claim to a new owner. The pledge of a mortgage itself is permitted.

The mortgage is created by an entry in the fourth division of the land register on the basis of a notarised agreement. The legislator has attempted to avoid the creation of rights of pledge on the basis of law. The only exception here is the mortgage provided by section 334 to secure the expenses incurred by the pledgee on the same ranking with the main mortgage if the value of the object of pledge decreases.

A mortgage does not require anybody to perform a claim, rather it mandates to subject oneself to a compulsory execution of an immovable. In order to avoid the compulsory execution, in addition to the debtor, the claim may be performed by the owner of the immovable encumbered with a pledge or persons whose immovables are subject to rights ending in compulsory execution. Accordingly, they acquire the rights of a surety in respect of the actual debtor. The compulsory execution occurs pursuant to the procedure provided by the Enforcement Procedure Code*[35] and may involve the appointment of a compulsory administrator or subjection to the compulsory sale. Upon establishment of a right of pledge, the law allows to subject the immovable to immediate compulsory execution which has to be entered in the land register and in such case the recognition of sale by a court is not necessary. In case of a minor encumbrance of an immovable, "freehand sale" is used where the owner of an immovable transfers a thing under the control of the pledgee. As an excessive restriction, a prohibition is provided on an agreement to settle the claim with an immovable even after the creation of the right to sell (subsection 352 (2)). Only a sale on the basis of the Enforcement Procedure Code by a bailiff engaged in liberal profession may cause the extinguishment of rights lower than the right that caused the claim for payment (section 64^{20}). But, this is inevitable to receive a reasonable price upon the transfer of an immovable. Satisfaction of claims takes place according to rankings in the land register.

A judicial mortgage (section 363) is not different from a regular non-owner mortgage by its nature. It shall be established on the basis of a judgment for the purpose of securing a claim since it will provide the claim with the status of a preferential claim. A judicial mortgage is an accessory right of pledge.

A maritime mortgage has been provided separately in the third chapter of the Law of Maritime Property Act*[36] which resembles the mortgage provided in the Law of Property Act in general terms considering the specialities of a vessel as a movable. A maritime mortgage can only be established on vessels entered in the ship register.

35 Täitemenetluse seadustik (Enforcement Procedure Code). – Riigi Teataja (The State Gazette) I 1993, 49, 693 (in Estonian).

36 Laevaasjaõigusseadus (Law of Maritime Property Act). – Riigi Teataja (The State Gazette) I 1998, 30, 409 (in Estonian).