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Faculty of Law

Journal of Law

№2, 2019



**უნივერსიტეტის
განმცემლობა**

Acquisition based on Real Estate Ownership Deal in Georgian, German and French Law

In a legal system of any country while setting regulations related to the things determinant is found in its economic value. Precisely, economic value of things is a main sign of the rules of the emergence and forfeiture of ownership right. The more the thing is valued, the more interested the person is in its ownership. Various legal system relates ownership emerging on immovable thing to different procedures, respectively, rule of forfeiture varies. From the standpoint of Comparative Law, it seems interesting that analysis of German and French legal systems of purchasing immovable thing differs in connection with Georgian Law not only with a moment of ownership right emerging but also with the protection guaranties of bona fide purchasing immovable thing. The aim of the following paper serves to research the attitudes of these three states referring to immovable thing.

Key words: *Immovable property, public registry, complaint, agreement, registration, alienation, ownership right, bona fide purchaser.*

1. Introduction

Stability of immovable things market relies on the legal regulations and defense standards that serves to insure the risks related to civil turnover of such kinds of objects. Precisely, the risks shall be insured that may be accompanied by entitling ownership on immovable thing. In the following paper a rule of entitling ownership on immovable things is discussed based on the example of three countries. In the aforementioned ones not only do a rule and moment of ownership entitlement differ, but also the protection guaranties of the bona fide purchaser. Generally, participant of civil turnover shall be in good faith, however, law shall consider possible consequences of a mala-fide participator and suggest norms regulating such kind of relations. The mala-fide participator of civil turnover causes disturbances in legal relations, therefore legal system of any country shall be ready for finding the solution to the problems that are resulted by unwisely developed legal relations. "Law shall be capable of resolving any possible conflict of interests."¹ Accordingly, the purpose of the paper is to raise awareness of the rules of ownership entitlement on immovable thing in Georgian, German and French Law that considerably conditions protection guaranties of bona fide purchase. In Article will be discussed the decision of the Constitutional Court and the question of whether Georgian law is sufficiently equipped with these legal institutions without which the existence of a well-balanced institutional arrangement for the bona fide acquisition of immovable property is impossible. Taking into consideration the theoretical and less practical similarity of some levels of legal regulation, this issue will be discussed from the standpoint of German law. By consideration of limited format legal systems will not be reviewed in depth, focus will be placed on regulating legislation. From this standpoint, as far as I am concerned, analysis of Comparitve Law will be interesting.

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¹ Chachava S., Competition of Claims and Grounds of Claims in Private Law, Tbilisi, 2010, 7 (in Georgian).

2. Acquisition based on Real Estate Ownership Deal in Georgian Law

2.1. Deal and Registration as a Basis of Origin the Proprietary Right on an Immovable Thing

Georgian Civil code (hereafter - CC) differs the rules of the ownership rights emergence on the movable and immovable things. Unlike the movable things, while transfer of the ownership right occurs based on a valid right in order to gain a status of an owner, in case of the immovable thing, ownership right emergence is related to the deal made in writing and its registration in the Public Registry (CC. art:183). In order that a person is authorized to possess ownership right on a thing, the one is needed to be registered as an owner of the right at the Public Registry. By means of this enactment, Georgian Civil Code strengthens German cadaster.² Civil Legislation does not recognize another way of purchasing an immovable property.³ All the legal systems determining an advantage of registering the data, the ones consider that the parties of the agreement are placed under an obligation to register the rights they take interest in, emergence, change and abrogation of right is subject to registration.⁴

Before the legislative changes underwent in 2006, in order to purchase the immovable thing, notarial attestation of purchase agreement was compulsory that implies notorally attested agreement used to be registered at the Public Registry.⁵ It's worth stating that compulsory norms of notarial attestation of agreement of purchasing the immovable property is still in force in German Law.⁶ The purchase agreement is also subordinated to be notorally attested in French Law.⁷ In accordance with Georgian Law the parties are capable of deciding themselves to submit notorally attested document at the Public Registry or not. Parties of the deal are capable of signing the deal attended by an authorized person at the Public Registry and the one is sufficient to consider the deal to be valid (CC, 1st part of article 311¹). Modern Georgian law has rejected the obligation of notarial certification, which has had a negative effect on the credibility of the transaction process.⁸ Notarization through the provision of qualified legal advice aims at preventive control so that contracting parties do not make harmful mistakes to them.⁹ The registration authority only registers the rights and it is not responsible for checking whether the content of the deal is

² Zoidze B., Property Law of Georgia, Tbilisi, 2003, 144 (in Georgian).

³ See: Decision № AS-333-318-2012 of 19th July of 2019 of Supreme Court of Georgia.

⁴ Knieper R., Chanturia L., Schramm H. J., Das Privatrecht im Kaukasus und in Zentralasien, BWV, Berlin, 2010, 314.

⁵ Article 321, Amending the Civil Code of Georgia, № 3879 - CCMI, № 48, 22/12/2006.

⁶ Prütting H., Wegen G., Weinreich G., Bürgerliches Gesetzbuch, Kommentar, 13. Aufl., München, 2018, 577, Rn.10.

⁷ Kirner O., Macor K., Frankreichimmobilien, 7. Aufl., Freiburg, 2015, 72.

⁸ Phalavandishvili K., Real Property Acquisition Transformation in Georgian Law, "Journal of Law", № 2, 2012, 233 (in Georgian).

⁹ Chanturia L., General Part of Civil Law, Tbilisi, 2011, 38 (in Georgian).

in accordance to the will of any party. Notarial certification protects the party through the way he/she is fully informed about the legal consequences of the deal he/she signs.

2.2. Definition of Emergence Moment of the Ownership Right

In accordance with CC, the moment of the ownership emergence on immovable thing is related to the fact of registering the right at the Public Registry. Public Registry serves not only as registering a right, but also be basis of origin of this right.¹⁰ Precisely, registration provides the right with an absolute character and makes it obvious to everyone. The act of not registering ownership right by the purchaser originates relative right instead of absolute one. It implies that the purchaser under agreement is deprived of being capable of defending himself/herself from a possible action of the third party, he/she is authorized to request bona fide action from the seller. Is the registration of ownership right at the Public Registry obligatory in order to emerge the right over the thing or fact of registration is just a confirmation of sole intention that the right of the person is more protected due to its publicity and she or he is guaranteed to be safe from outrage of the third party? Referring to determining the moment of the right emergence over the immovable thing, the Appeal Court defined: registration is nothing else but the right of the purchaser to be protected from the third party or seller being in bad faith. By means of registration the person expresses a desire to turn his or her object of ownership into object of civil turnover. Thus, Respectively, the person is considered to be owner if this is confirmed with another evidence, firstly, purchase agreement. The person is capable of registering a right and the aforementioned right is not limited by any stipulation or condition including limitation.¹¹

By means of acquired right CC authorizes the purchaser to make his/her right absolute through publicity. Each participator of civil turnover is inclined with respect in relation to the owner of this right. By means of not registering his/her ownership right, owner endangers his/her right, since it is possible that an alianator transfers an alianated asset repeatedly. In such case good faith of the third party in relation to his/her unawareness causes legal status worsening of the new owner against his or her will. Precisely, CC not only advises but also obliges the purchaser to register the right, which is the subject of registration. On the one hand, by means of it, the one ensures the right protection, however, secondly – stability-steadiness of relationship related to the immovable thing.

3. German Rule of the Acquisition of Immovable Property and the Means of Protection

3.1. Deal and Registration

Regulated norms related to ownership entitlement on immovable things are found in the 873rd, 925th, 311th B paragraphs of the German Civil Code (hereafter - BGB). Paragraph 873rd of (BGB) defines

¹⁰ *Kochashvili K., Ownership and Possession – Fact and Right in Civil Law, Tbilisi, 2013, 200 (in Georgian).*

¹¹ Decision №2b/453-11 of 31th May of 2011 of Appeal Court of Tbilisi.

the prerequisites related to the acquisition of rights on the land¹² and the rights over these rights.¹³ It only acts in case of deal-based purchase and by means of law force or state act its purchase is excluded from the scope of application.¹⁴ In accordance with the paragraph 873rd, in order to transfer ownership right on the land, an agreement between an authorized person and the second party referring to the legal status changes (Einigung) and its registration in the cadaster (Eintragung) are needed unless the law implies another rule. The agreement referred to in § 873 (Einigung) is referred to as the “Auflassung” for the purposes of §925. According to §925, agreement between a transferor and purchaser on the immovable thing (Property Agreement or conveyance of property) (Auflassung) is needed to be registered by joint attendance of both parties at a respective administrative body. In accordance with the second alternative of the first part, any notorious is authorized. If a notary certified legal obligation of Property Agreement does not exist, such obligation is fairly defined for obligatory agreement. Namely, according to the first part alternative of §311^B of BGB, agreement undertaking the obligation to transfer the ownership right on land or purchase it, is in need of notary certification. For security reasons, notorious is involved not only in case of obligatory agreement, but also Property Agreement.¹⁵

§873 implies two means of legal status change related to the immovable thing desired effect may even be produced by a joint implementation.¹⁶ The means are following: deal as a limited abstractive agreement targeted to the changes of the property rights (Einigung)¹⁷ and registration (Eintragung) as an official statement.¹⁸ In case of the immovable things, principle of deal and registration acts (Einigung und Eintragung), however in the event of movable ones, principle of deal and transfer does (Einigung und Übergabe).¹⁹ Legal status change cannot only be made by means of deal, but coincidence of content and time of real deal and registration is needed.²⁰

¹² German Law implies the “lands” (Grundstück) in a concept of immovable thing. See: Artz M., Lorenz A., in Erman W., BGB, 15. Aufl., Band II, Köln, 2017, 3828, Rn.1; Stürner R., in Soergel H. Th., BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 91, Rn.1; Kohler J., in Müko, 7.Aufl., München, 2017, 97, Rn. 1; Brox H., Walker W. D., Allgemeiner Teil des BGB, 39. Aufl., München, 2015, 337, Rn.799; Prütting H., Wegen G., Weinreich G., Bürgerliches Gesetzbuch, Kommentar, 13. Aufl., München, 2018, 1886, Rn.4; Chanturia L., Ownership of the Immovable Thing, 2nd ed., Tbilisi, 2001, 163 (in Georgian).

¹³ Stürner R., in Soergel H. -Th., BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 105, Rn.1.

¹⁴ Ibid, Rn.2; Gursky K. H., in Gursky K. H., in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, 303, Rn.11.

¹⁵ Wolf M., Welenhoper M., Property Law, 29th ed., Chechelashvili Z. (Transl.), Tbilisi, 2016, 208, Rn. 1 (in Georgian).

¹⁶ Artz M., Lorenz A., in Erman W., BGB, 15. Aufl., Band II, Köln, 2017, 3831; Stürner R., in Soergel H. -Th., BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 91, Rn. 6; Gursky K.H., in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, 286, Rn.6.

¹⁷ Artz M., Lorenz A., in Erman BGB, 15. Aufl., Band II, Köln, 2017, 3832, Rn. 12; Stürner R., in Soergel H. -Th., BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 106, Rn.3; Palandt O., Bürgerliches Gesetzbuch, Band 7, 65. Aufl., München, 2006, 1356, Rn.9.

¹⁸ Artz M., Lorenz A., in Erman W., BGB, 15. Aufl., Band II, Köln, 2017, 3831.

¹⁹ Gursky K. H., in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, 300, Rn.4.

²⁰ Gursky K. H., in Staudinger Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, 300, Rn.6.

It is in need of being dissociated from a basic agreement, that obliges the person to implement the act of transferring the right.²¹ “Therefore property deal is an act that really transfer an ownership right.”²² It is a matter for discussion whether agreement and registration only jointly serves as a property deal or only a deal is already a property agreement and registration is only a prerequisite of legal status validity, it shall not be binding upon essential meaning.²³

All deal-based changes related to the land are subject to the compulsory registration principle, however, all legal changes shall be exempt of such obligatory registration, but as a rule, such changes shall be under registration.²⁴ Obligatory registration (Eintragungsbedürftigkeit) shall be dissociated from registrability (Eintragungsfähigkeit).²⁵ All legal registerable phenomena are not subject to necessary registration.²⁶ On the basis that statutory change is not subject to compulsory registration, but unreasonable coincidence between legal truth and the records in the Registry is frequently seen.²⁷ They may coincide by means of correcting the essential records in the cadaster.²⁸ Obligatory of such corrections is allotted by means of §82 of the Public Registry Law and hereafter paragraphs (Grundbuchberichtungszwang).²⁹

3.2. Preliminary Record as an Institute for Guaranteeing the Right

3.2.1. Securing Function of Preliminary Record

Institute of Preliminary Record³⁰ (§883 Vormerkung) in German Law related to the immovable thing serves as a special mean of provision.³¹ Obligatory claims have a binding force only between the parties to this legal relationship and are characterized by the "weakness" that the creditor will no longer be able to enforce his claim if the subject of the agreement is removed from the debtor's property or the debtor loses the right to dispose it.³² This threat is mainly actual on land rights, as legal changes to land rights are usually made through a public registry, and registration is often carried out after a lengthy procedure.³³ Due to the two-stage rule of land acquisition, simultaneous fulfillment of obligations is usually

²¹ *Shotadze T.*, Comparative Property Law, First Edition, Tbilisi, 2015, 42 (in Georgian); *Hirte H.*, BGB Allgemeiner Teil, 2. Aufl., Band 1, Hamburg, 2014, 18.

²² *Shotadze T.*, Comparative Property Law, First Edition, Tbilisi, 2015, 42 (in Georgian).

²³ *Stürmer R.*, in *Soergel H. -Th.*, BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 106, Rn.3.

²⁴ *Ibid.*, 92, Rn.9.

²⁵ *Ibid.*

²⁶ *Ibid.* Unregisterable rights are the ones that are not acknowledged as property rights and is action force-free of legal liability.

²⁷ *Stürmer R.*, in *Soergel H. -Th.*, BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 92, Rn.9.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Prior to 2007 the Institute of Pre-Record had also existed in CC (art: 315).

³¹ *Kohler J.*, in *Müko*, 7.Aufl., München, 2017, 204, Rn.1.

³² *Ring G., Griziwotz H., Keukenschrijver A.*, BGB Kommentar, Sachenrecht, Band 3, 3. Aufl., Baden-Baden, 2013, 150, Rn.1.

³³ *Ibid.*

impossible.³⁴ The intermediate phase between legal transaction and registration is a risk for the acquirer.³⁵ Prior to registration, he/she is in such a legal position that may be impaired if his/her contractual partner transfers a right to another against his/her contractual obligation or charges in favor of another.³⁶ Although acquirer has a contractual requirement of the transfer of right, this does not preclude the proper disposal of a non-owner or the compulsory disposal of a third party.³⁷ Until the acquirer is registered as the owner, he has only obligatory claim to the secured position. The essence of the pre-record is for the acquirer to guarantee his/her future property right.

The dispositions made against the prior record are characterized by relational nullity.³⁸ Relative nullity characterizes it insofar as it does not have legal force only against the authorized person, ie the acquisition of the right will only be null to the person, who had guaranteed his/her right by preliminary record (§883 (2)).³⁹ However, the disposal is null only to the extent that it will affect the secured claim.⁴⁰ The main strength of the pre-record is that the claim is secured against any subsequent and compulsory disposal (the so-called "Elisionkraft").⁴¹

Preliminary record is an accessorial, that means that for its existence it's essential to exist the request.⁴² The preliminary record as well as the complaint is an important tool for the protection of rights and although they are both of a securing nature, they differ in purpose. The preliminary record ensures a future legal change, and the complaint protests against the existing incorrect registration or incorrect removal of the right ("Preliminary Record Predicts, Complaint Protests").⁴³ The complaint protests the current state of the Public Registry, a preliminary record predicting the future state of the Public Registry.⁴⁴

The attitude between the preliminary record and the complaint is very interesting. Which is more powerful - a pre-record or later registered complaint? For example, a preliminary record in favor of conscientious B was registered. After that the real owner E registered a protest against B. Later B was registered as the owner. Did B become the owner?⁴⁵ § 892 I precludes bona fide acquisition in the event of a regis-

³⁴ Weirich H. A., Grundstücksrecht, 3. Aufl., München, 2006, 259, Rn.869.

³⁵ Ibid, 260, Rn.870.

³⁶ Stürner R., in *Soergel H. -Th.*, BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 160, Rn.1.

³⁷ Ibid.

³⁸ Weirich H. A., Grundstücksrecht, 3. Aufl., München, 2006, 276, Rn.921.

³⁹ Ring G., Griziwotz H., Keukenschrijver A., BGB Kommentar, Sachenrecht, Band 3, 3.Aufl., Baden-Baden, 2013, 164, Rn.57; Stürner R., in *Soergel H. -Th.*, BGB, Sachenrecht 1, Band 14, Stuttgart, 2002, 172, Rn.35.

⁴⁰ Ring G., Griziwotz H., Keukenschrijver A., BGB Kommentar, Sachenrecht, Band 3, 3.Aufl., Baden-Baden, 2013, 164, Rn.58.

⁴¹ Gursky K. H., in *Staudinger* Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, 97, Rn.135. With the Elision force pre-record invalidates the subsequent dispositions.

⁴² Weirich H. A., Grundstücksrecht, 3. Aufl., München, 2006, 267, Rn.894. For example, if the parties indicate an incorrect purchase price in a notarized document and register a preliminary record, then the certified document as simulates transaction will be void (§117) and the actual transaction - invalid due to form insecurity (§311 b I 1). Thus the right of the buyer to transfer does not arise and therefore a pre-registered record will be premature. Ibid, 264, Rn. 884; Vieweg K., Werner A., Sachenrecht, 5 Aufl., München, 2011, 486, Rn.5; Kropholler J., German Civil Code, Study Commentary, Darjania T., Chechelashvili Z. (Transl.), Chachanidze E., Totladze L. (ed.), Tbilisi, 2014, 675, Rn. 2 (in Georgian).

⁴³ Weirich H. A., Grundstücksrecht, 3. Aufl., München, 2006, 282, Rn.936.

⁴⁴ Werner A., Sachenrecht, 5 Aufl., München, 2011, 487, Rn.6.

⁴⁵ Weirich H. A., Grundstücksrecht, 3. Aufl., München, 2006, 288, Rn.957.

tered complaint before the transfer of ownership, and § 883 II precludes any subsequent objection to the acquirer after the pre-registration.⁴⁶ There is a difference of opinion as to whether the complaint has a predominant effect on the preliminary record and whether even after the registration of the preliminary record, the registered complaint may have the legal effect. In this case - if we give pre-record the advantage, then acquirer (B) will become the owner and no objection raised after registration of the pre-record will hinder good faith acquisition; And if we take advantage of the protest, then the acquirer (B) will not become the owner even though he has already protected himself from further disposal by prior record and the protest will have the ability retroactively alter the legal effects that should have caused the the pre-record. According to one view, a preliminary record which is obtained from the unauthorized person, protects him only against the further disposal by the unauthorized person, from the risk that the (unauthorized) person may reassign the land to a third party or charge it.⁴⁷ The safeguard function of §883 II cannot go so far as to extinguish the existing right (is meant the right of real owner E).⁴⁸ The second opinion is based on the assertion that the in good faith acquired pre-record would be of no value to the acquirer if it would be inadmissible to use it against the later registered complaint of the owner.⁴⁹ Proponents of this opinion proves that a protest cannot jeopardize the in good faith acquired pre-record, as it would be unjustified for the purposes of the security of civil turnover.⁵⁰

3.2.2. The So-called *Bona Fide* Primary and Secondary (Derivative) Acquisition of Preliminary Record

In terms of the acquisition of preliminary record, we must distinguish between primary and secondary acquisition.⁵¹ The bona fide primary acquisition of the preliminary record is in fact unanimously recognized, and the possibility of bona fide secondary acquisition is a subject of heated debate. Unlike the first acquisition of the preliminary record, at the second acquisition it is necessary grantor to have the authority to dispose the claim and to carry out the preliminary record.⁵² If there is no the claim which is ensured by the preliminary record, then because of the accessory a second bona fide acquisition is excluded.⁵³ I will illustrate one example that helps to understand the Essence of Primary and Secondary Acquisition: V is incorrectly registered in public registry as a landowner. He sells the land to an unconscientious K who knows that V is wrongly registered in the registry. A preliminary record was made in the public register in favor of K. Subsequently, K granted conscientious A a request for a transfer of land pursuant to a sale agreement with V. Did K buy the preliminary record and did A got it? A primary pre-record can be purchased bona fide without any problems, which means that if K were conscientious, it would have purchased a bona fide pre-record. Since the first acquisition was

⁴⁶ Weirich H. A., Grundstücksrecht, 3. Aufl., München, 2006, 288, Rn.957.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Weirich H. A., Grundstücksrecht, 3. Aufl., München, 2006, 288, Rn.957-958.

⁵¹ Werner A., Sachenrecht, 5 Aufl., München, 2011, 488, Rn.7.

⁵² Weirich H. A., Grundstücksrecht, 3. Aufl., München, 2006, 287, Rn.953.

⁵³ Ibid.

disrupted due to K's conscientious, we resolved the problem of bona fide secondary acquisition by third party (A). A may have obtained a preliminary record from K by assignment under §§ 401 I, 398. The preliminary record is accessorial to the claim, so in fact there is the acquisition of ensured claim and not the pre-record, pre-record follows to the claim under the law (§ 401 I). The preliminary record itself does not transfer, but it automatically transfers by analogy to § 401 as a "lateral right" ("Nebenrecht") when the secured claim is assigned.⁵⁴ In the process of assignment disposed is the claim, the preliminary record being followed by the law.⁵⁵ Unless there is a secured right, it certainly cannot be transferred.⁵⁶ For a functional understanding of this issue, it would be correct to say that there is "a deal acquisition of a combination of a claim and an accessorial preliminary record."⁵⁷ K has assigned to A the claim in accordance with the formal requirements of the law, to which followed the preliminary record. Since V was not the real owner and this fact knew K, so due to lack of authority, no valid preliminary record would exist. There is not either the first bona fide purchase, as K was unconscientious. Thus there is no preliminary record in favor of K, which he would have assigned to A. The question is, since A was conscientious, would he purchased the pre-record in good faith?⁵⁸ The prevailing opinion rejects the possibility of bona fide secondary acquisition of a preliminary record,⁵⁹ thereagainst judicial practice considers it possible.⁶⁰

3.2.3. Complaint as a Means of Defense against *Bona Fide* Acquisition

It may also happen that the public registry were incorrect, that means that the judicial reality of public registry would not be in accordance with the actual legal situation. In this case the Registry's inaccuracy should be corrected, which is provided by §894 - a person whose right is not or is not properly registered requires the consent for the amendment from the person to whom such amendment relates. If the incorrectly registered person does not agree to amend the record, such amendment shall be subject to appeal.⁶¹ Due to the dangers associated with making transactions using inaccurate registry data, the inaccuracy of a public registry allows to file a complaint.⁶² There are two ways to register a complaint: first - registration may be done with the consent of the person to whom rights will be changed with such registration, but this is usually uncommon in practice,⁶³ second - registration may be effected on the basis of a court decision; However, it is not necessary to justify the existence of a threat to the right (§899). This need is obvious in itself for the purposes for which the registration of the complaint is required. Bona fide acquisition is a risk that does not require excessive justification. The complaint does not say that the public

⁵⁴ Gursky K. H., in *Staudinger*, Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, 363.

⁵⁵ *Ibid*, 365.

⁵⁶ *Ibid*, 363.

⁵⁷ *Ibid*, 365.

⁵⁸ *Ibid*.

⁵⁹ Gursky K. H., in *Staudinger* Kommentar zum Bürgerlichen Gesetzbuch, Buch 3, Berlin, 2012, Rn. 58; Kohler J., in *Müko*, Band 7, München, 2017, Rn.73; Wilhelm J., *Sachenecht*, 6 Aufl., Berlin/Boston, Rn. 2263.

⁶⁰ Müller K., *Peter Gruber U.P.*, Sachenrecht, München, 2016, 583, Rn.2869.

⁶¹ *Ibid*, 507, Rn.2583.

⁶² Kohler J., in *Müko*, 8. Aufl., München, 2020, 379, Rn.3.

⁶³ *Ibid*, 378, Rn.1.

registry record is incorrect; it only serves to the insurance of the case, when it appears incorrect.⁶⁴ The complaint does not correct an incorrect record but is intended to correct such record, it protects the real owner's request to correct the record.⁶⁵ A registered complaint under § 892 (1) eliminates the presumption and therefore impedes a bona fide acquisition,⁶⁶ that means that because of the inaccuracy of public registry with the help of registration of the complaint creates the obstacle to a bona fide acquisition.⁶⁷ The complaint, by its legal nature, is neither a charge nor an absolute or relational restriction on disposal, but is a temporary securing mean of improperly registered or unregistered property right in the public register.⁶⁸ It does not provoke blocking the public registry.⁶⁹ If it is subsequently found that the public registry record is correct, then the complaint will be considered as absurd from the outset.⁷⁰ It only affects the existing presumption of illusory legal status.⁷¹

3.2.4. Reference to the Court Dispute

There is a great deal of diversity of opinion in theory and practice regarding the operation of the institutions, which are not directed regulated by law.⁷² This also applies to the Reference to the Court Dispute (“Rechtshängigkeitsvermerk”), which is discussed as inadmissible legal event by some scientists.⁷³ The possibility of Reference to the Court Dispute is not explicitly defined by law, but its admissibility is almost unanimously recognized.⁷⁴ The reference shall be registered in the Register and through the publicity it becomes public, thereby acquiring the capacity to oppose the lawful presumption of the Public Register.⁷⁵ In contrast to the complaint, it is not based on the applicant's material legal standing (his claim that he is the owner of the thing) but merely on his procedural position that he has a dispute in court.⁷⁶ The reference to a litigation gives rise to the same effects as the complaint and like the complaint it appears also in extraction of public registry.⁷⁷ There are different opinions regarding the regulation of this institution. Most scholars believe that Reference to the Court Dispute should not be allowed to be registered only by submitting a dispute document, as the complaint would lose its sense if

⁶⁴ *Wilhelm J.*, Sachenrecht, 6. Aufl., Berlin/Boston, 2019, 411, Rn.688.

⁶⁵ *Quiz T.*, Decision Analysis of Constitutional Court of Georgia - „Nodar Dvali against the Parliament of Georgia” – from a perspective of German Law, “Comparative Law Journal”, №1/2019, 3 (in Georgian).

⁶⁶ *Ibid.*

⁶⁷ *Wilhelm J.*, Sachenrecht, 6. Aufl., 2019, 364, Rn.599.

⁶⁸ *Bauer F., Stürner R.*, Sachenrecht, 18.Aufl., München, 2009, 225, Rn.12.

⁶⁹ *Müller K., Gruber U. P.*, Sachenrecht, München, 2016, 509, Rn. 2592.

⁷⁰ *Bauer F., Stürner R.*, Sachenrecht, 18. Aufl., München, 2009, 225, Rn.11.

⁷¹ *Sirdadze L.*, Complaint Against Public Registry Record, “Journal of Comparative Law”, №1/2020, 8 (in Georgian).

⁷² *Zeising J.*, Der grundbuchliche Rechtshängigkeitsvermerk - ungeregelt und entbehrlich?, ZJS 1/2010, 1.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, 2.

⁷⁵ *Rusiashvili G., Sirdadze L., Egnatashvili D.*, Property Law, The Cases, Tbilisi, 2019, 317 (in Georgian).

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

it would be sufficient for its registration only evidence of the dispute. In such a case, the applicant will always prefer the latter over a difficult-to-register complaint.

4. Acquisition based on Real Estate Ownership Deal in French Law

Various legal systems consider various actions to be sufficient to transfer the ownership right, a part of them – only entering into contract and respectively the ones consider the emergence of the rights,⁷⁸ part of them link further actions to right emerging. France belongs to a number of the countries considering that signing the agreement is sufficient in order that right emerges and further activities are not needed to be done. From the standpoint of ownership right emerging, registration is optional. Other countries possessing the code of France and Napoleon (Belgium, Italy, Luxembourg, Portugal and Spain) in order to purchase the immovable thing preliminary agreement is formed (compromis de vente or promesse de vent, in German: Vorvertrag) and as a rule initial payment is made within the scope from 5% to 10%.⁷⁹ Since then purchaser seeks sufficient finances, purchase agreement is formed in accordance with the notary act.⁸⁰ It's worth mentioning that preliminary agreements serves as a twisting effect for the parties.⁸¹ As a rule full payment shall be made for the moment the contract transfers the right to the purchaser.⁸² On the day of certifying purchase agreement, purchase amount shall be deposited on the account of notorious.⁸³ After this registration occurs, however, it carries declaratory nature.⁸⁴ Purchase amount shall be deposited on the account of the seller since then the change is reflected at the Public Registry.⁸⁵ Unlike German Law, ownership right is transferred by not registration but by a purchase agreement from the moment of signing it purchaser is considered to be owner.⁸⁶ Registration makes a fact of legal status change for the third individuals obvious,⁸⁷ it is only needed to transfer the effect of legal status to the third individuals.⁸⁸

⁷⁸ *Danelia E.*, Demarcation Principles based on the Example of a Gift Agreement: Review of Georgian Law – Special Edition 2008, Tbilisi, 32 (in Georgian).

⁷⁹ *Schmid C. U., Hertel C., Wicke H.*, Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 48.

⁸⁰ *Ibid.*

⁸¹ *Kirner O., Macor K.*, Frankreichimmobilien, 7. Aufl., 2015, 61.

⁸² *Schmid C. U., Hertel C., Wicke H.*, Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 48.

⁸³ *Kirner O., Macor K.*, Frankreichimmobilien, 7. Aufl., 2015, 72, It is the responsibility of notaries to draw up real estate contracts in France, as in most European countries, See: Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 50.

⁸⁴ *Schmid C. U., Hertel C., Wicke H.*, Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 48.

⁸⁵ *Kirner O., Macor K.*, Frankreichimmobilien, 7. Aufl., Freiburg, 2015, 72.

⁸⁶ *Ibid.*; *Schmid C. U., Hertel C., Wicke H.*, Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 52.

⁸⁷ *Chaduneli G.*, Action of Defective Record of Public Registry on the deals of Immovable Thing (Comparative-legal analysis), Journal “Junior Lawyers”, N 2, 2014, 7 (in Georgian).

⁸⁸ *Ibid.*

Registration may be carrying constitutional or declaratory content.⁸⁹ Constitutional principle of registration links ending of the process of transferring the rights over the land to the fact of registration.⁹⁰ In order that right emerges, declaratory principle of the registration does not consider the registration to be compulsory and deems it as means of demonstrating the real legal status for the third person over the immovable thing. In France registration does not carry declaratory nature, which implies that ownership right emergence over the immovable thing directly shall not connect to the fact of registration. Ownership right is transferred by means of the purchase agreement formed among the parties, however, until it is not registered, such ownership right shall not be valid for the third person. At the same time, in case the agreement shall be void, it prevents the real right from transferring.⁹¹ Changes of legal status shall be valid for the third individuals only after the registration. However, it's worth mentioning that in case the registration does not occur, with an aim of prevention financial penalties are laid.⁹² Countries possessing the Civilian Code system of Napoleon main aim of registration agency (the Cadaster) shall be ownership payment (Fiscal Cadaster) that has no legal cadaster function serving as a protector of ownership right.⁹³

5. Bona Fide Purchasing of Immovable Thing at Georgian, German and French Law

Protection of bona Fide purchaser of the immovable thing is influenced by the rule of ownership entitlement. This rule differs in the three countries. Georgian and German Laws protect the bona fide purchaser, but the French one - original owner. If accruing a right is linked to registration, in such case, as a rule bona fide purchaser is protected (Georgia, Germany) (Greece is excluded), however, if the right is transferred by not registration, but agreement, as a rule, bona fide purchaser is not protected (France), (Denmark, Finland, Poland, Portugal, Spain, Sweden are excluded).⁹⁴ The Laws of Georgia and Germany defend stable functionality of civilian circulation behind the purchaser by protecting bona fide purchaser, content of the French Law dwells in legal status and suggests that only real owner shall be able to transfer the right.

Institute of Bona Fide Purchase of Immovable Thing became a matter for discussion of Constitutional Court of Georgia.⁹⁵ Normative content of 185th article of CC was recognized uncon-

⁸⁹ *Schmid C. U., Hertel C., Wicke H.*, Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 33.

⁹⁰ *Ibid.*

⁹¹ *Schutte P.*, The Characteristics of an Abstract System for the Transfer of Property in South African Law as distinguished from a Causal System, PER/PELJ 2012(15)3, 139.

⁹² *Krimphove D.*, Das Europaeische Sachenrecht, Band 1, 1. Aufl., 2006, 157.

⁹³ *Lapachi E.*, Public Registry – Registration Agency of Rights on Immovable Things and Implemented Reforms in this Sphere, “Journal of Law”, №2, 2011, 95 (in Georgian).

⁹⁴ *Schmid C. U., Hertel C., Wicke H.*, Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 34.

⁹⁵ See. Decision № 3/4550 of 17th October, 2017, of Constitutional Court on the case: A Civilian of Georgia, Nodar Dvali opposes the Parliament of Georgia, <<https://www.constcourt.ge/ge/legal-acts/judgments/3-4-550-saqartvelos-moqalaqe-nodar-dvali-saqartvelos-parlamentis-winaagmdeg.page>> [25.03.2020].

stitutionally by Constitutional Court implying that “Transferor is considered to be an owner when the record in the Registry has been appealed and purchaser is aware of this fact.”

As a result of the Constitutional Court's decision, 185 and 312 Articles of the CC have become even more intertwined because of the fact that now both articles have in common "Complaint", but how do they manage to coexist peacefully is a different issue. Prior to the Constitutional Court's decision Article 185 of the CC provided only one condition to exclude a bona fide acquisition, and that was the acquirer's unconscientious, that is, when he knew that the seller was not the owner. Article 312 of the CC adds one more condition to the exclusion of bona fide acquisition, and that is a complaint against the correctness of the public registry. Generally, article 312 (2)nd of CC implies complaint that accords with the sense of the German complaint (Widerspruch, BGB §899) and means the protest against the Public Registry, which is fixed in a respective column and provides the party with information referring to the disputable rights.⁹⁶ The purpose of the complaint is to protect the real owner of an unregistered or incorrectly registered right from the bona fide acquisition in accordance with §892.⁹⁷ §312 (2) of CC as well as §899 of BGB refer to the existence of the complaint as being sufficient in itself in order to exclude further acquisition, whilst the new content⁹⁸ of of article 185th of CC refers to the awareness of the complaint. Both articles link the complaint to different outcomes - Article 185 requires knowledge (the complaint is filed and the fact is known to the acquirer), and Article 312 applies abstractly, regardless of knowledge (complaint filed). Understanding the complaint under article 185 contradicts to the abstract nature of the protest (complaint). The protest operates irrespective of whether the acquirer knows of its existence. Such contradictory but collaborative action of the norms creates a collision for the common courts and also uncertainty for any potential acquirer. As long as the complaint is not registered (impossible due to lack of procedural rules⁹⁹), Article 185 thus provides that when the acquirer receives information on the existence of a dispute in any way and from any source, he will lose the opportunity to ac-

⁹⁶ *Eberhard V., Sirdadze L.*, Vain Attempt of Bringing to Life of Fey Comparative Law Journal, №1/2019, 12.

⁹⁷ *Kohler J.*, in *Müko*, 8.Aufl., München, 2020, 378, Rn.1.

⁹⁸ The Constitutional Court's understanding of the complaint See: *Sirdadze L.*, Ownership Entitlement on the Immovable Thing by Authorised and Unauthorised Person, Comparative Law Journal, №2/2019, 44 and the following pages (in Georgian); *Eberhard V., Sirdadze L.*, Vain Attempt of Bringing to Life of Fey Comparative Law Journal, №1/2019, №1/2019, 12 and the following pages (in Georgian); *Quiz T.*, Decision Analysis of Constitutional Court of Georgia - „Nodar Dvali against the Parliament of Georgia” – from a perspective of German Law, Comparative Law Journal, №1/2019, 1 and the following pages; *Tavadze Z.*, Ownership Entitlement on the Immovable Property – Constitutional Balance between the Interests of Original Owner and Bona Fide Purchaser (Decision Analysis of 17th December of 2017 of the Constitutional Court) “Law and World”, №8/2017, 22 and the following pages (in Georgian); *Chachava S.*, Decision Assessment of 17th October, 2017 of the Constitutional Court regarding the Presumption of the Public Registry, 13 <https://idfi.ge/public/upload/IDFI_Photos_2017/rule_of_law/decision_of_constitutional_court_of_georgia_analyses.pdf> [25.03.2020] (in Georgian).

⁹⁹ The witness invited to the case also indicated this. See: Decision № 3/4550 of 17th October, 2017, of Constitutional Court on the case: A Civilian of Georgia, Nodar Dvali opposes the Parliament of Georgia, I 24; *Sirdadze L.*, Ownership Entitlement on the Immovable Thing by Authorised and Unauthorised Person, Comparative Law Journal, №2/2019, 56.

quire the thing in good faith.¹⁰⁰ If we tolerate the fact that it's permitted the acquirer to be informed in any way, there is a risk that someone will misuse this right, which will eventually block the institution of good faith.¹⁰¹ Under the organized legislative regulation complaint appears in a public registry extraction, so it is always known to the acquirer, as the extract is usually inspected prior to purchase, and if the acquirer does not inspect it, he becomes a risk-taker. The protest remains registered and whether the acquirer checks such registration before purchasing the item is under his/her free will his/her "right to risk". In the German model, the complaint is registered in the same column where the right is registered,¹⁰² so upon examination of the extract the legal defect becomes apparent to the acquirer. Under the right and organized registrational process this is the best way for the acquirer to obtain complete information on the legal status of the item, and if he/she is not aware of such a claim, it appears that he/she is not familiar with the record about the property and in this case he/she should take the risk related to disputed property.¹⁰³ It's worth indicating a legal practice of Georgian Courts with respect to broad interpretation of the extent of carefulness, that are not mentioned in neither 185 nor 312 articles.¹⁰⁴

Generally, regulation of *bona fide* purchaser's institute is one of the exempt cases whereas one party stays injured and it occurs in any legal system. "In order to maintain legal security, single justification has to be rejected. Roughly speaking, the phenomena and sacrifice for justification are alike. It can't be fair for the injured",¹⁰⁵ however, "Law acts so in the name of justification."¹⁰⁶ In order for such "sacrifice" to be justified, it is necessary to give the "injured" a real opportunity for self-defense, which is unfortunately not fully provided by Georgian law.

6. Conclusion

Law of each country regulates the matters related to the immovable things in a different way and respectively, the problems caused by such matters are resolved in a different manner. The means of finding solutions depends on the legal system selected by a particular state, whereas it is worth considering that "Rights of the parties are not closed space of legal relations, but they are encumbered by legal valid interests of the third party."¹⁰⁷ Generally, the more difficult it is to accrue a right, the more the one is protected, however, complication of obtaining a right is not a recourse, because in any case it is impossible to create an ideal system and by desire of creating such system a lawgiver shall not delay civil turnover of the immovable things by putting up factitious barriers. The fact that rights emergence and its forfeiture

¹⁰⁰ *Rusiashvili G., Sirdadze L., Egnatashvili D.*, Property Law, The Cases, Tbilisi, 2019, 321 (in Georgian).

¹⁰¹ *Ibid.*

¹⁰² *Eberhard V., Sirdadze L.*, Vain Attempt of Bringing to Life of Fey, "Comparative Law Journal", №1/2019, №1/2019, 1 (in Georgian).

¹⁰³ *Ibid.*, 2.

¹⁰⁴ *Zarandia T.*, Property Law, Second Edition, Tbilisi, 2019, 297-304 (in Georgian); *Zarandia T.*, Bona Fide Purchasing of Immovable Things by unaccredited expropriator in Georgian Court Practice 64-67, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566289>, [25.03.2020] (in Georgian).

¹⁰⁵ *Zoidze B.*, Practical Existential Cognition Attempt of Law, Tbilisi, 2013, 217-218 (in Georgian).

¹⁰⁶ *Zoidze B.*, Practical Existential Cognition Attempt of Law, Tbilisi, 2013, 218 (in Georgian).

¹⁰⁷ *Zoidze B.*, European Private Law Reception in Georgia, Tbilisi, 2005, 210 (in Georgian).

over the immovable thing are differently regulated does not imply that any of them consider the ownership right to be undervalued. Laws of Germany and Georgia link emergency of the right over the ownership right to registration, but the French one – signing the agreement, however, it does not imply that French lawgiver underestimate the risks related to ownership right over the immovable thing. Forfeiture of right over the thing always exists including the immovable things. In such case, German and Georgian lawgivers support the bona fide purchaser with an argument of stability-steadiness of civil turnover, French one protects the original owner proving that real right can be accrued by means of real alienation.

As for the practical points and recommendations related to the purchase of immovable property, it is necessary to reinstate the mandatory notarial certification, which is abolished with the aim to simplify the registration of rights and minimize costs, but as a result we got numerous litigation and the threat of encroachment of proprietary right.¹⁰⁸ In German law the mandatory notarial assertion ensures the safe transfer of rights in a transaction executed in accordance with the real will of the parties. Due to the importance of ownership right on land the person shall be protected from careless alienation without consultation.¹⁰⁹ France has a similar approach, where notary is involved in the process of buying real estate.¹¹⁰ As for the institution of good faith acquisition of immovable property, in light of the court's decision, deficiencies of the system of acquisition of immovable property and the necessity for its refinement became even more apparent. The court's decision showed that the institution of good faith acquisition of property is only superficially regulated and in fact there are no practical safeguards. Despite the being at the legislative level, there is no practical possibility of registering a complaint that would guarantee the owner protection from bona fide purchasing. Filing a complaint against the public registry should become a real opportunity for which legislative changes need to be made. Appropriate procedural preconditions for this institution to be “revitalized” must be established. Due to its immense function and importance of this institute it should not be left out of action. The complaint must be registered in the same way as a German protest, but it may also be registered with the consent of the person to whom rights with this registration will be changed (§ 894).¹¹¹ Without the action of a claim institution, it is impossible to speak of a balance between the interests of the bona fide acquirer and the real owner, because the latter has no practical possibility to protect his property against the disposal without his/her will. The institutions repealed by Articles 313 and 315 of the CC,¹¹² which are still operating in German law and which play a major role in the safe acquisition and protection of property, need to be reviewed and evaluated the feasibility of their cancellation.

¹⁰⁸ *Palavandishvili K.*, Real Property Acquisition Transformation in Georgian Law, “Journal of Law”, № 2, 2012, 232 (in Georgian).

¹⁰⁹ *Wolf M., Welenhoper M.*, Property Law, 29th ed., *Chechelashvili Z. (Transl.)*, Tbilisi, 2016, 208, Rn.1 (in Georgian).

¹¹⁰ *Schmid C. U., Hertel C., Wicke H.*, Real Property Law and Procedure in the European Union, General Report, Final Version, 31.5.2005, 48.

¹¹¹ Prior to 2007 there was an article in CC about the requirement to amend the record as well (Article 133).

¹¹² Article 313 - "Request for consent to correct inaccurate record", Article 315 - "Preliminary record in public register".

Simplicity of purchasing immovable thing and its affordability are really a legitimate purpose, however, it shall be achieved by reliable and proportional means. Undoubtedly, nowadays purchasing immovable thing is simplified, that is convenient for development of the immovable thing market, however, safety of civilian circulation shall not sacrifice to its affordability. Existing rule of registration over purchasing the immovable thing is significantly in need of being reviewed and in order to protect the original owner further certain procedural requirements shall be determined, at least, the Public Registry shall inform her or him compulsorily before legal status changes by law,¹¹³ without preventing the purchaser from unjustifiable protraction within the process of accruing the right that encourages him or her to lose patience and desire of purchasing the property. As stated by Sturmer: “No one will desist to build a durable and solid home just because it can't be registered in a day or two.”¹¹⁴

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¹¹³ See: Eberhard V., Sirdadze L., Vain Attempt of Bringing to Life of Fey, “Comparative Law Journal”, №1/2019, 19 (in Georgian).

¹¹⁴ Quiz T., Decision analysis by the Constitutional Court of Georgia – “The citizen of Georgia, Nodar Dvali against the Parliament of Georgia” – analysis from a perspective of German Law, “Comparative Law Journal”, №1/2019, 11 (in Georgian).

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