

Spanish Private Law from an International Perspective

3. Real Property



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Property Law: *iura in re aliena* vs. personal rights (art.1095CC)

- **Real right:** a power which a person exercises directly upon a thing and that the others have to tolerate.
 - Direct power: possibility to enjoy and use the right directly, without the need of anybody's intervention with that purpose
 - Exclusion power: exclusion of anybody's actions over the right in prejudice of it.
 - Efficacy *erga omnes*: possibility to oppose its existence in front of everybody
 - Universal and pursuit power: possibility to pursue the right from whoever possesses it and wherever it is
- **Personal right:** permits the holder to claim a certain performance from a sole person, the debtor. The debtor is the only person bound to perform, although everyone has to respect the right of the creditor. There is no equivalent to the right of pursuit.

Property Law: types of real rights

- **Ownership.** *Cf. fee simple*
- **Limited real rights (*iura in re aliena*)**
 - **R.R. of enjoyment:** allow the holder to use and sometimes to obtain the profits of the thing. Normally the thing is possessed by the person holding the limited real right, but possession of the thing is not necessary for the right to exist
 - **R.R. of guarantee:** are intended to guarantee the fulfilment of an obligation. If the debtor does not perform the obligation guaranteed, the creditor, who is the holder of the real right, can promote the sale of the thing in order to recover what was due to him. The creditor who receives the thing given as a guarantee cannot use it or dispose of it.
 - **R.R. of acquisition:** give the holder the faculty to obtain the ownership of the property which belongs to someone else, with priority to others.

Property Law: real rights of enjoyment

- **Usufruct:** broad right to use and enjoy someone else's thing, that entitles the person holding it (usufructuary) to receive the fruits of the asset in usufruct. The owner of the thing given in usufruct keeps the bare ownership (*nuda propiedad*). At the time of extinction of the usufruct, the owner recovers the faculties of enjoyment that were assigned to the usufructuary (art.467CC.). *Cf. life estate*
- **Use:** grants its holder only in as much of the use & profits of a thing -that belongs to someone else- as is necessary for the sustenance of the title holder (art.524.1CC.)
- **Habitation:** right to use the rooms of someone else's dwelling, that the title holder and his/her family might require as a dwelling (art.524.2CC.)
- **Easement:** burden imposed upon a real property for the benefit of another real property belonging to a different owner. The immovable property having the right to impose the burden is known as dominant estate, and the land which is subject to the easement is known as the servient estate (art.530CC.).

Property Law: real rights of guarantee

- **Pledge:** delivery of a movable property by the debtor to the creditor or pledgee as a guarantee for the performance of an obligation (art.1864CC.). The thing pledged has to be transferred (except in the case of goods whose possession is necessary for the profession or business of the debtor).
- **Mortgage:** a security granted over an immovable property providing a guarantee for the performance of an obligation (art.1876CC.). However, there is the exceptional possibility to mortgage the movable goods stated in the Law (commercial establishments, cars and other motor vehicles, airplanes, industrial machinery and intellectual and industrial property). Mortgages are not valid until the public deed in which they are created is registered with the Property Registry (art.1875CC.)

Property Law: real rights of acquisition

- **Option:** grants its holder the right to buy the thing which is the object of the option contract within the agreed period of time and paying for it the price agreed with the grantor of the option. The option can also regard the sale of a thing at an agreed price and time.
- **Preemption:** grants the possibility to acquire a certain thing when the owner has decided to sell it. The holder of the right can acquire the thing at the price and in the same terms and conditions as those contained in an offer made by a third person.
- **Redemption:** grants the possibility to acquire a certain thing when it has already been sold to a third party for the price and on the same conditions as it was sold to the third party.

Land Law/Property Law in England

- **Estates & Interests = rights**
- **Estates:** rights to possession of goods (ownership rights)
 - Freehold: ownership in land for an indefinite period of time
 - Fee simple (D. propiedad)
 - Life estate (D. usufructo)
 - Leasehold (tenancy): ownership in land for limited duration
 - Lease (D. del arrendatario)
 - Licence (D. del precarista)
- **Interests:** less extensive rights (easements, mortgages, restrictive covenants...)

Property Law: acquisition and transfer of real rights (art.609CC.)

- **Occupancy:** taking hold of a thing that does not belong to anybody (art.610CC). Applies to the acquisition of the right of ownership over movables goods without an owner
- **The law:** sometimes real rights may be acquired by law (eg. legal usufructs, legal easements or acquisitions derived from community property)
- **Donation:** does not require the delivery of the thing, with the exception of the oral donation of a movable good. The valid donation of an immovable good requires a public deed.
- **Succession** (testate & intestate)
- **Contract (title) + tradition (delivery):** the contract has to be valid; delivery may be real, symbolic or *ficta*. *Cf consensual systems & abstract delivery systems*
- **Adverse possession (acquisitive prescription):** acquisition of real rights by the mere possession of the good, in the conditions and during the periods established by law. It may be ordinary/extraordinary

Property Law: title and tradition

- **Title:** the contract (purchase, swap, gift...) must comply with the basic requirements stated by law (art 1261CC: 1) Consent of the contracting parties; 2) A certain object which is the subject matter of the agreement; 3) Cause of the obligation established). No requisite with regard to the form (freedom of form).
- **Tradition**
 - Real or physical
 - Symbolic: the handing over of the keys of the property, handing over of the ownership titles, the execution of a public deed (art. 1463CC.); when the buyer makes use of the right with the seller's consent (art.1464CC.)
 - *Ficta*: if the good cannot be handed to the buyer; if the buyer was already living in the property as a tenant (*traditio brevi manu*) or if the buyer and seller agree that the seller will continue to live in the property as a tenant (*constitutum possessorium*) (art.1462CC.)
- *Nemo plus juris ad alium transferre potest quam ipse habet*

Property Law: title and tradition. Ordinary steps

1) Private contract, which may be

- a firm sale (if one party fails to perform, the non-breaching party may either enforce performance or rescind the contract), or a
- *contrato de arras*: contract of sale involving a deposit of earnest money (either party is free to abandon his or her obligation. If the buyer abandons, he or she is released only by forfeiture of the earnest money deposited; if it is the seller who abandons, he or she is released by refunding the buyer with double the amount of the earnest money. The earnest money (*arras*), is usually 5 to 10% of the original price of the property; if the sale is completed, the earnest money counts towards the total agreed price (art.1454CC.)

2) Notarial deed, along to final payment and handing over of the keys (urban property)

3) Registration of the transferred right within the Land Register

Property Law: *adverse possession*

- **General requirements**
 - taking possession of the thing alleging to be the owner (art.447CC.). This implies to appear as the owner or the holder of the real right in front of everybody (art.430CC.)
 - holding public, peaceful and uninterrupted possession of the thing (art.1941CC.).
 - holding possession during the period established by law
- **Specific requirements**
 - Possession with just title & in good faith (art.1940CC.)
 - movable goods: interrupted possession in good faith and with just title for a period of 3 years (art.1955.1CC.)
 - immovable goods: interrupted possession in good faith and with just title for a period of 10 years between persons who live in the same country and 20 years between those who do not (art.1957CC.).
 - 6 years of possession for movable goods/ 30 years of possession for immovable property (arts.1955 &1959CC.)

Property Law: *the role of the Land Registry*

- **Registration is purely voluntary, except for the constitution of mortgages**
- **However, there are important consequences attached to registration**
 - A rebuttable presumption (*iuris tantum*) of accuracy of the Land Registry in favour of the presently registered owner (art.38SMA)
 - A non-rebuttable presumption (*iuris e de iure*) in favour of a purchaser satisfying the requirements of a good faith acquisition (art.34SMA). That is, that
 - the transfer was for value,
 - the sale was done by the person registered as the owner,
 - the buyer behaved in good faith (because he truly believed that the seller registered as the owner was entitled to sell) and,
 - the buyer registered the deed of sale with the Land Registry

Property Law: *the role of the Land Registry*

- **Consequences of the rebuttable presumption.** It is anyone claiming that the Land Registry is inaccurate who must prove
 - that the Registry entry or the title giving rise to it is void, false or mistaken, or
 - that there exists a non registered title that modifies the facts as registered, or
 - that the registered right is extinct.
- **Consequences of the non-rebuttable presumption**

The system covers the acquisition of registered rights from who had no right to transfer them,

 - because the right had previously been transferred to who did not register the acquisition or
 - because the act giving rise to the transferor's right was void.

Steps of the conveyancing process in England

1. Contract

- Production of contract papers
- Searches, enquiries & arranging funding
- Report and signature of contract documentation
- Exchange of contracts (binds legally the parties to the transaction)

2. Completion

- Completion
- The buyer moves in

3. Registration. Mandatory for freehold & lease over 7 years

Exercises

- “The transfer of Immovable Property in Europe”, in Martínez Velencoso, L.B. & Pradi, A., *The transfer of Immovables in Europe*, Cambridge University Press., 2017 (in stamp).
- Wyatt, R., *Check your English vocabulary for Law*, A & G. Black Publishers, Ltd., London: pp.52-53. ISBN:100713675926.
- Lindner, A.K. & Firth, M., *Introduction to International Legal English*, Cambridge University Press, 2008, pp.72-79. ISBN: 9780521718998

Property Law: property protection

- ***Actio reivindicatoria***: to recover possession of the good and the judicial acknowledgment of the property right. Burden of proof :
 - Identification of the person who is possessing as the defendant
 - Identification of the thing which possession is being claimed
 - Identification of the property right
- ***Actio negatoria***: to declare that the claimant's property is free of charges that someone is claiming to have over the property. B. of pf:
 - Identification of the property right (the property is presumed to be free of charges)
 - Defendant's interference
- ***Declarative actio***: the owner wants the Judge to declare the existence of his right of property and condemn the defendant to acknowledge such right. Burden of proof:
 - Identification of the thing
 - Identification of the right of property
- ***Actio to settle boundaries***
 - Evidences on the (material) extent of the property titles

Property Law: possession

- **Possession:** *de facto*, the control over a property/good, regardless of the underlying right to exercise it
- **Possession effects**
 - Protection against any dispossession exerted by third parties (aer.441 & 446SCC). Prohibition of self help.
 - Certain possessory behaviours entitle the possessor to be deemed the holder of a right to possess (*possession vaut titre*) and enable third parties to rely on the appearance created by possession (art.464SCC)
 - Uninterrupted possession for a certain period of time is likely to mean the acquisition of title to property through adverse possession, either extraordinary or ordinary (art.1940SCC)

Property Law: protection of possession

- **Summary proceeding**
 - Faster than a plenary proceeding
 - *Res iudicata* (no further action discussing the same topic can be brought before a court between the same parties) does not apply
- **Statute of limitations**
 - Within 1 year of having being dispossessed
- **Claimant's burden of proof**
 - Possession of the property before the defendant took control over it; and
 - The defendant deprived him/her of said possession.