

How the Belgian legal system fights in a rather simple way fraud on double sales and overlapping registration of property.

It is of utmost importance for an economy that property and tenure rights are registered in an unambiguous way.

In recent times many people involved in Land registration all over the world have realized that there is no single perfect system to register rights on land. Instead of trying to implement everywhere a state of the art system a land registration system should be as perfect as necessary to provide people security of tenure in the given circumstances. It should be "Fit for Purpose". Naturally if we look on the scale of insecure to secure tenure, all centrally kept systems are at the "Secure" side.

Nevertheless there are big differences. A system providing title as a result of the inscription is the utmost example of delivering legal security. However systems that only collect, archive and index deeds or contracts seem lately to be a rather interesting choice. The disadvantages these systems had in former times were mainly linked to the problem of archiving paper documents. These systems were to disappear sooner or later if no technological revolution would have occurred.

We may have had the impression that the proof of our ownership was documented very meticulously. In reality it was often much less than that! There were a lot of reasons why archives lost their value. Due to a lack of capacity or interest they were not kept up to date as they should have been, or got destroyed, even deliberately.

Natural disasters may have caused flooding or collapsed buildings. But these archives were often even more vulnerable to war and civil crisis situations. Some parties may have had interest in breaking the legal system and the rule of law. It is well known that destroying land registration archives was one of the ways to destabilise a country.

IT solutions have changed the situation. As well the security and vulnerability of the archives as the costs to keep them have dramatically been reduced. If the data are kept in a state of the art way, they can easily be exported to new IT driven programs, if necessary. Also the possibilities to index and search have increased the value of the documentation.

Naturally registration of deeds or contracts alone does not provide title. It only proves the existence of a contract at a certain date. Whether you are the rightful owner or not will have to be proven when discussion occurs. Was the person, you contracted with, the owner? Was he in a position to contract? Were all terms of the contract executed?

To have full security of tenure it should be backed by a document that allows legal enforcement. Of course it is utopian to try to cover all rights on land in this way. Practice learns that a centrally kept, written document, documenting the right, maybe missing unambiguous legal value, but makes a world of difference in the field, since it at least informs parties on existing claims.

The proof of title can only be delivered in a deed archiving system by building up a chain of title until certainty is delivered, generally prescription or a judicial decision.

Theoretically one has to control every contract until the period of acquisitive prescription. This may seem to be a very time and money consuming investigation. But in practice, certainly in Belgium this does not cause many problems. In every deed this chain of title has to be explained. And in fact in a new deed there only has to be added a reference to the last contract that has been

registered. This reference immediately refers to the numbers under which the transaction is known in the Land Registry.

Deed systems are characterised by a very limited guarantee by the state. On the other hand they can be organised quite cost saving. First of all at the moment of registration there does not have to be a deep investigation on the legality of the contract by highly qualified personal.

On the contrary in a title providing system the registration is often seen as a kind of a judgement. Very often it is under the authority of the Ministry of justice. There is a thorough control on the legality of the contract at the moment of entry. This is a quite expensive operation and it deals with problems that are not likely to occur. In a lot of countries these systems are a bit under fire because of the cost. Privatisation is for this and other reasons a serious issue. As a result we see a strong privatisation movement in Australia and Canada. Also in the UK it has been on the table.

Also the final decision taken by registration, which attributes the Right in Rem, in a definitive way, to a certain party, may have very unpleasant results for the rightful owner. He may have a claim against the fraudster, but loses his property anyway. Generally, if only the deed is registered there are more ways out to solve fraud or mistakes in a way that the legitimate owner does not suffer loss of ownership.

Though delivering less security, a deed system generally provides a certain guarantee against double sale. Since it is generally public it is also possible to detect the alleged owner very easy.

The Belgian land registry may be representative for one of the systems that adhere the deed system in a rather pure form and it performs rather well.

One of the most important issues of a land registration system should providing legal security by safeguarding people for double sales or sales by unauthorised persons, in other words prevent from fraud. Although excluding fraud for a 100% may be impossible.

To be effective a land registry has to be able to identify properties and holders of rights in a unique way. This does not mean that all boundaries have to be 100% undisputed. It all depends on the needs and the value. A property in centre Manhattan has to be described more detailed than land in the desert.

But in general, identification has to be seen in concurrence with the adhering parcels. The best way is to count on an area – covering map. Perhaps at first not too detailed but later on getting more and more detailed. Perhaps at the start not all parcels will be known as owned by someone.

Of course in countries where a cadastre exists, this offers a very good way to identify the property, for as far as it is covering the whole territory. This identification should allow someone who's intending to buy real estate to get information from the land registry.

It might be at first interesting to give some explanations on the differences between land registration and cadastre. Of course this a theoretical approach. A cadastre has to inform the state on how the wealth in real estate is distributed. The main goal may be raising taxes but also deliver information for policy making. Land registration on the contrary works in the field of private law, where the state is delivering the citizen and capital markets security upon real estate titles. It informs on how Rights in Rem are distributed to private and legal persons. However there are differences between land registry and cadastre, they mainly work with the same data and co-operation is very advisable.

The cadastral map may also be the base for a lot of geo- spatial information that as well can be used by the state as by the citizen. By adding different layers to the basic map it can become a very valuable source of information.

In present time it may not be enough to know who owns rights and on what parcel. In order to make an investment decision it may be necessary to get other information from the state as well as from private sources. It is a trend that land registries and cadastres try to give broader information to possible investors than only on Rights in Rem. A geo- spatial way of presenting this information may be very practical. Some of these data may be guaranteed by the state others may be purely informative.

The role of a land registry is also providing interested parties information on the property and lease situation of a property. The legal situation of a property may have a lot of consequences for its value and possibility to be treated as a marketable object.

It may also be possible to register in this way competitive rights. We see that the bundle of rights that may exist on land, not always provides exclusive rights. A formal right may appear as well as a customary one on the same parcel. There may perhaps be a pasture right or a rangeland right or there may exist a right to grow trees on a property. When they come into concurrence there has to be a court decision based on the existing property law. But fact is, that even when conflicting interests may appear, in practice they will probably only will finalize in a judicial pursuit in a minority of cases.

In order to avoid these conflicts one should be able to depend on a clear and unambiguous national legislation on existing rights and their hierarchy. This may affect the whole legal system. Not only the laws on registration law but also property law, matrimonial law and so on.

Recently we also see that the belief that a public service should be delivering this certainty is disappearing. New technologies as the Blockchain and new ways of organising the Registration by privatisation may be the sign of a fundamental change in the way this certainty is going to be delivered in the future.

In the case of Belgium every sale of land has to be described in an authentic deed that is drawn up by a notary. He is obliged to register that deed practically immediately after signing it. Since it happens electronically, the period he has time to do so is reduced to some 5 days. Generally it is done earlier. An even better security can be provided when registering the deed is constitutive. This means that without registration the contract is not fulfilled. In The Netherlands and Greece that is a condition.

So before signing a new contract, one has the possibility to control if he, who pretends to be entitled to a right, really is. It is possible through investigation in the land register. As in most countries where a deed system is used, the land registry is public in Belgium.

It is of course of utmost importance that the documentation in this office is kept up to date. The date of registration is very important for dealing with priority. Therefore in Belgium the deposition of a contract has to be entered a register the same day it is presented by a Notary Public. But one could obtain the same results by any other legal practitioner alleged the same power. Afterwards, anyone asking information out of the register will be prevented of the existence of a contract. The final registration has to be handled in about maximum 14 days.

In the contract the property has to be described referring to the unique number a person or company got form the administration and to the unique identifier on the digital national cadastral map. Whenever the configuration of the sold property is not identical to the one of an already

uniquely identified parcel, before drawing up the final contract, parties have to inform the cadastre, with help of the notary, by sending electronically a map drawn by a surveyor. Then a new number is attributed to all emerging parts and parties get informed on that. In the deed the new number has to be entered when referring to the property. This method sometimes may look time consuming, but later on it saves a lot of discussions. It avoids overlapping parts of properties to be sold twice. It also provides an unambiguous description of the involved properties on how they appear after the transaction took place.

All of this may help to be able to find out if the pretended owner really has the right to alienate, but it does not preserve one from the risk of double sales at the same moment. It must be clear that these cases of fraud cannot be avoided entirely; only fast and obliged registration may help.

But what if that kind of fraud really occurs? Naturally that will cause a difficult relation between the seller and the two buyers. But in the end the real rights on the property have to be delivered to one of them. Naturally a court decision will probably be necessary to allow a financial compensation to the other one, who has a rightful claim.

Well here the law that installs the deed system of registration generally offers a solution, which in Belgium goes as well for real rights as for mortgages and other priorities and liens.

The first one who registers the contract is entitled to the real right. For at least if he acts in good faith. This is another the reason why the date of deposition of the contract in the Registry is so important. Furthermore there is a regulation setting up the priority rules for deposits on the same day and also for making a decision dealing with the way the deposit has been done. This is necessary because in Belgium legally, notaries have to deposit their deeds electronically. But in some occasions it is still allowed to have a deposit in paper, sent by post to the land registry. This system may finally not attribute the "Right in rem" to the buyer that may seem to be the most entitled. But at least it provides a clear solution when this kind of fraud appears. This is very positive for the legal security.

Land Registry itself provides guarantee, with financial compensation, if loss is suffered in the event a requested inscription to the Register has not been effectuated or if the chronology of deposit was not respected. It may also be clear that such a system can only work when it is part of a coherent legal system that allows the land registration to be organised in a consequent manner.

The Belgian system provides legal security on real estate transactions in close co- operation with the notaries. Indeed only an authentic deed, produced by a Notary Public can be registered, which is obligatory for every transfer of Rights in Rem. Several legislations oblige this legal professional to do investigations and make notifications even before the deed is signed. The purpose is twofold. On one hand to identify and inform the parties on the transaction, the trustworthiness of parties and the particularities of the asset. All this information is compulsory included in the deed. It enjoys authenticity. Among others there is information on matrimonial systems of the parties, urban planning rules, soil pollution, degree of thermal insulation, existing rights of pre-emption and so on. In this way the legislator obliges the Notary Public to inform the parties on what he assumes that they should be informed. Since this responsibility is personal, these obligations are carried out very meticulously without much responsibility of the public service itself. The only problem is that this information remains static and that its validity is only proved at the time the deed is signed.

On the other hand it serves to inform the Government in order to be able to take the necessary precautionary measures. Several notifications have to be made in order to allow the tax authorities to execute their claims on the sums of money that are transferred through the hands of the Notary Public. So he gets a fiscal role as well.

The Notary Public is also made responsible for the execution of the legislation on money laundering, financing of terrorism and identifying the beneficiary owners. Whenever there is any suspicion, the Notary Public has to prevent an autonomic administrative service under control of the Ministry of Finance and the Ministry of Justice. He also has to refuse his co-operation in case of serious doubt of these offences. Furthermore he has to trace the origin of the money involved in the transaction and describe this in the deed. Using cash is prohibited. The proof of the investigations he did, has to be archived during at least five years. The Chamber of Notaries Public controls him regularly on the execution of all these legal obligations.

Once more the Belgian system proves to solve the problems in a simple way by using the notarial system. It puts a lot of responsibility in the hands of the Notary Public himself, without much risk to financial claims for the authorities.

Of course it is necessary this control has to be executed, if not by the state itself, by a legal professional. But technically it has not necessarily to be a Notary Public. When registration of agreements is constitutory for the contract itself; one can very easily imagine a Land Registrar, with that qualification, takes up the task to prevent the authorities in case there is any risk of money laundering or financing of terrorism or to detect the beneficiary owner in obscure cases.