

Introduction

Establish clear title and obtaining ownership rights For private home with land

In market economies and private property ownership development period real estate has become a major area of business. Different countries represent various scopes of terms, participants, paperwork and documents, conditions and requirements of appropriate contracts for sale and purchase procedures.

Most legal systems distinguish different types of property especially between land and all other forms of property: immovable property, estate in land, real estate real property and goods and chattels, movable property or personal property. Also there is such distinction as tangible and intangible property.

The terms real property and real estate are used primarily on common law, while civil law jurisdictions refer instead of immovable property. In British usage, however, “real property” often shortened to just “property” refers rather to land and fixtures as such while the term “real estate” is used mostly in the context of probate law.¹ In French, Italian, Portuguese and French real estate is called “immovables”. Russian Civil Code includes in the scope of term “real property” also isolated water objects, entrails and uncompleted instructions.

Terms

1. Clear title: clear title is the term used to state that the owner of real property owns it free and clear of encumbrances (the property may be encumbered by a mortgage).

¹ www.wikipedia.org

2. Cadastral register: A cadastre or cadaster is a comprehensive register body of the real property of the current country, which register rights of ownership of the property and commonly includes details of the ownership.

3. Notarization/notarial attestation: Public notary is the body of certification and authentication of contracts and documents.

Description of contracts of alienation of immovable property.

- a. Contract of Purchase and Sale of immovable property; Contract of Barter of immovable property; Contract of Gift of immovable property. In many countries under the contract for purchase and sale of immovable property the seller undertakes the duty to transfer to the ownership of the buyer a land parcel, building, structure, apartment, or other immovable property
- b. Required form of the contracts for alienation of immovable property. Majority of laws required the written form of real estate contract. E.g. in the United state of America real estate contracts must be in written form to be endorsable in. Some other countries require notarial certification (Republic of Armenia) or State registration.
- c. Notarial certification of the contracts for alienation of immovable property (depends on the requirement of legislation).
- d. State registration of the transfer of the right of ownership (depends on the requirement of legislation).

Problems to be represented and analyzed

1. The situation when one of the required steps (notarization of the contract, representation of necessary documents, state registration of the property rights) was not made by parties and possible consequences.
2. The situation when there are several registered persons in current real estate. For the alienation of the property the owner, need to have the written content of mentioned people.

The residence of the one of registered persons is unknown. In common features the legislation of majority of the countries gives the similar solution of such problems. In this case the important issue is the state registration of the right of use of property.

Armenian Legal Framework and Implication

Republic of Armenia as civil law country regulates transactions of ownership rights by Civil Code of RA and several other laws and regulations (Law of RA on State Registration of Property Rights, and Instructions on Performance of Notarial Actions by Public Notary).

Art. 134 of the Civil Code of RA use “immovable” and “movable” property terms for the division of property types.

Immovable property (immovables) are land parcels, subsoil parcels, separate water objects, forests, perennial plantings, buildings, structures, and other property firmly connected with land, i.e., objects whose movement without disproportionate damage to their use is impossible.

Movable property is property not classified as immovables.²

In Armenia the right of ownership and other property rights to immovable property, limitations on these rights, their arising, transfer, and termination are subject to state registration. Subject to registration is considered to be not only the right of ownership, but also the right of use, mortgage, servitudes, and also other rights to immovable property in cases provided by the Civil Code and other statutes.

In some cases provided by statutes rights to movable property are also subject to state registration.

According to Art. 163 of the Civil Code of RA *the right of ownership is the right recognized and protected by statute and other legal acts of a subject at its discretion to possess, use, and dispose of property belonging to it.³*

² Article 134 of Civil Code of RA

³ Article 163 of Civil Code of RA

The right of possession is the legally supported possibility to exercise actual control of the property.

The right of use is the legally supported possibility to extract from the property its natural useful characteristics and to also use the benefits from it. The benefits may occur in the form of income, growth, fruits, offspring, and in other forms.

The right of disposition is the legally supported possibility of determining the legal fate of the property.

The owner has the right at its discretion to make in connection with the property belonging to it any actions not contradicting a statute and not violating the rights and interests protected by statute of other persons, including alienating its property to the ownership of other persons, transferring to them the rights of possession, use, and disposition of the property, to give the property in pledge or to dispose of it in another way.

The owner of real property can own the land of the located above property by rent (lease, right to use) right or by ownership.

The territorial boundaries of a land parcel shall be defined by the procedure established by statute, on the basis of documents issued to the owner by an empowered state body.

Unless otherwise established by a statute, the right of ownership to a land parcel extends to the surface (or soil) layer and closed bodies of water located within the boundaries of this parcel, forest and plants located on it.

The owner of a land parcel has the right to use all that is located above and below the surface of this parcel unless otherwise provided by a statutes or it violates the rights of other persons.

The issues to be discussed in this current topic are in the frame of possible ways of alienation of immovable property and obtaining new deed. The possible transactions of alienation of real property are contracts of Purchase and Sale, contract of Barter of immovable property, contracts of Gift of immovable property, also ownership can be granted as the result of mortgage contract.

According to Art. 561-563 of the Civil Code of RA under the contract for purchase and sale of immovable property the seller undertakes the duty to transfer to the ownership of the buyer a land parcel, building, structure, apartment, or other immovable property. The contract for sale of an immovable shall be concluded in written form by the making of one document signed by the parties.

The contract of Purchase and Sale of an immovable is subject to notarial certification. The transfer of the right of ownership to an immovable to a buyer under the contract of Purchase and Sale of an immovable is subject to state registration.⁴

According to Art.564 of the Civil Code of RA under the contract of Purchase and Sale of a building, structure, or other immovable, the rights to the part of the land parcel that is occupied by this immovable and is necessary for its use are transferred to the buyer simultaneously with the transfer of the right of ownership to such an immovable.

In case when the seller is the owner of the land parcel on which the immovable property being sold is located, the right of ownership or the right of lease or some other right provided by the contract for the sale of an immovable to the respective part of the land parcel shall be transferred to the buyer.

If the contract does not define the right to the respective land parcel transferred to the buyer of the immovable, the right of ownership to the part of the land parcel that is occupied by the immovable and is necessary for its use shall pass to the buyer.

There is a necessity also to note requirements of the Art.570 of the Civil Code of RA which provides that *An essential term of a contract of sale of a dwelling house, an apartment, part of a dwelling house, or part of an apartment is a list of persons whose right of use of the housing premises was registered before the conclusion of the contract by the procedure established by a statute.*⁵

⁴ Articles 561-563 of Civil Code of RA

⁵ Articles 570 of Civil Code of RA

The other contract, which also refers to the transaction of immovable property, is the gift contract. Under the contract of gift one party (the donor) without compensation transfers or undertakes the duty to transfer to the other party (the donee) property in ownership or a property right (or claim) against itself or against a third person. A contract of gift of immovable property is subject to notarial certification. The rights of ownership are subject to state registration.

These issues concerned immovable property transaction also regulated by regulations “Regulation of Governance on keeping and monitoring of Cadastre Data of State Committee of Real Estate Cadastre” Regulation “On the Affirmation of the Form of Providing the Information by the State Committee of Real Estate Cadastre” and orders “Order of Minister of Justice on Affirmation of the Form of performing Public Notary Acts”.

There is a need to detail the definition of clear title and deed of property. Clear title is the term used to identify that the owner of real property owns it free and clear of encumbrances. For example an immovable property can be encumbered by mortgage or by servitude. In order to perform the procedure of alienation/obtaining of real estate in Republic of Armenia there is a need to inquire for encumbrances from State Committee of Real Estate Registration Cadastre and get the appropriate certificate. The phrase “clear title” implies that ownership is not subject to claims by anyone but the person holding title. It is also called marketable title, or title that can be easily transferred or sold because of its lack of encumbrances. The details of this procedure will be discussed later.

In the transfer of real estate the deed conveys ownership of the old owner to the new owner and can conclude several documents (contracts, warranties, particularly in Armenia deed is considered to be a certificate of registration of property rights).

According to law of the Republic of Armenia “On state Registration of rights to the property” *State Registration is the registration of origination, modification or termination of the right of*

ownership to the property. Only after the state registration the owner gets the deed /certificate of the ownership rights to immovable property.⁶

Rights originating from real estate transactions, such as the right of ownership, right of use, mortgage, hypothec, servitude, other encumbrances shall be subject to state registration within 30 days from the day of transaction in the Territorial Subdivision of Real Estate State Registration, where such real estate is located. Otherwise the transaction shall be deemed invalid hence such transaction shall be deemed null and void.

Cadastre Files compiled for each real estate unit include documents evidencing rights and encumbrances to particular real estate unit which are agreements on real estate alienation (acquisition), mortgage, exchange and servitude also documents evidencing ownership rights to real property and encumbrances of rights.

According to Art.25 of the law of Republic of Armenia “On state Registration of rights to the property” *immediately after the state registration of rights to the real estate, a Certificate on registration of the Ownership (Use) Right to the Real Estate in other words deed, shall be issued.*

⁷The Certificate on the Ownership (Use) Right to the Real Estate shall include the name of the owner (user) of the real estate, reference to the codes of the real estate units, the state registration number, rights to the property, servitude, targeted use, sizes. The form of the Certificate o the Ownership (Use) Right to the Real Estate shall be approved by the RA Government.

Territorial subdivisions of state register of real estate, in cases of mortgage and servitude, also based on the letters (decisions) of investigators, prosecutors, courts, bodies implementing the liquidation and restructuring of legal persons, shall carry out the state registration of encumbrance as defined by the Legislation, until a decision is made by the relevant institution to terminate the encumbrance.

Encumbrances shall be registered in the appropriate section of the Registry registration page of the real property unit, subject to encumbrance.

⁶ Article 3 of law of RA “On state Registration of rights to the property”

⁷ Article 25 of law of RA “On state Registration of rights to the property”

After the state registration of the encumbrance the territorial subdivision of the State Register of Real Property shall put an attachment and inform the interested parties in written form thereof.

According to Art. 52 State register officials have responsibility to provide credibility, integrity, availability and publicity of real estate cadastre data, also to provide reports and document copies from the compiled cadastral file on real property upon the upon the payment of the prescribed fees.

There is a need to mention the “Form of Providing the Information by the State Committee of Real Estate Cadastre” which is affirmed by the regulation 155 of the governance of Armenia. According to the provisions of the Form all the documents, certificates and deeds, which are subject to state registration, are kept in the bank of data of Cadastre. Due to point 6 of the Form the information of the Cadastre data bank is available for the bodies of legislature, executive and judicial power, banks, foreign states, international organizations, legal enteritis and individuals. Bodies responsible for the provision of the appropriate information should answer to the request /application during 15 days.

Therefore interested parties; particularly the buyer/ seller of real property have the right inquiry for an appropriate document/certificate and extraction identifying the absence or presence of encumbrances on the real estate- establishing clear title.

In Armenia the procedure of sale/purchase of real estate includes three steps: 1) the signing of contract in written form, 2) notary certification of the contract, 3) state registration of the ownerships rights. The first step signing of the contract is prescribed by Civil Code of RA, about state registration was mentioned above.

To clarify the notary certification there is a need to mention the law on “Public Notary”. According to Art 36 of the law on “Public Notary” notary besides other functions ratifies the contracts, consents citizens in cases prescribed by law.

The “Order of Minister of Justice on Affirmation of the Form of Performing Public Notary Acts” prescribes the detailed procedural actions toward notary certification. Notary certification of contracts is obligatory in cases prescribed by Civil Code and

in case when one of the parties demands such certification. The subjects of compulsory notary certification are the contracts concerning immovable property, pledge and servitude. Contracts concerning immovable property can be notarized only after representing the deed/ certificate of ownership rights to immovable property and extraction about encumbrances. In the extraction should be mentioned the name, surname of owner, address, information about the people who have right of use/ dwellers, mortgage and servitude.

In case of purchase/ sale of flat, private home the obligatory condition for notary certification is the list of persons/ dwellers that have the right of use, whether their rights were registered properly and their consents in written form. In case of common joint ownership the written consent of the other owner e.g. of the spouse is obligatory for the performing of notarization.

The third necessary element of notarization of the contracts is the clear title of immovable property – the document provided by Real Estate Cadastre verifying the absence of encumbrances (pledge, servitude).

In this process can arise some problems and difficulties, one of them is the situation when there is no information about the other owners (common joint ownership) or the persons who have the right of use/dwellers. In such case the owner should get the information from the Cadastre whether the ownership rights or rights of use were registered properly or not. In case when the ownership rights or rights of use are not registeredⁱ the owner can alienate the immovable property without consent of the other dwellers. In case when the ownership rights or rights of use are registered properly the consent in written form is necessary. If there is no information about the place of residence of other owners or dwellers the owner/purchaser should represent identifying evidence about the absence of any information about the place of residence of the other owners or dwellers, but these actions will take much time. According to Armenian legislation the person can be considered as missing person when during 2 years there is no information about his/her place of residence.

Case Study

Two cases are represented below concerning real property transaction requirements and possible consequences for not performing legal provisions of property legislation.

In 2006 Alla Grigorian brought a suit to Nork-Marash 1st instance court against her husband Mher Grigorian for declaring void the contract of Purchase and Sale of the apartment. They were married since 1987 and during this time they conduct joint economic activity and acquire an apartment. The plaintiff claimed that her husband knowing that she would not give her consent to alienate the apartment, mislead the notary concerning his marital status by assuring that he is not married, then authorize another person to sell the apartment. Based on these facts A. Grigorian claimed to declare void the contract of Purchase and Sale.

Step by step analysis

Court dismissed her claim based on the consideration that all necessary steps were made by parties: obtaining certificate On Combined Statement on Rights' Limitation from Real Estate Cadastre. The seller follows the requirements of Armenian legislation and got the certificate on Combined Statement on Rights' Limitation from Regional Real Estate Cadastre.

The next step is notarization of the contract Purchase and Sale, which also has been done; the notary legally affirmed the contract.

The final step for obtaining ownership right is state registration of property rights. The buyer properly registered his right in appropriate Regional Real Estate Cadastre.

The court find out that the transaction was valid in spite of that the notary did not take necessary steps to clarify the marital status of M.Grigorian. The court also noted that the plaintiff could bring a monetary claim against her husband.

This case emphasizes the importance of required documents, particularly in cases of marriage/joint ownership. According to the "Order of Minister of Justice on Affirmation of the Form of Performing Public Notary Acts" the notary among other documents should require also the written consent of husband/wife or other owners.

Second case presented.

Plaintiff H. Harutyunyan brought a suit against Regional Real Estate Cadastre for not registering her ownership rights.

Step by step analysis

In 2002 she bought the private home with land from S.Kirakosyan. According to law the seller represented the certificate on Combined Statement on Rights' Limitation, which showed that the home is encumbered by 3rd persons (the property was under **DAHK** ban), and as a result the notary did not notarize the contract. After the seller applied to **DAHK** and got the confirmation that it was a mistake and the Regional Real estate Cadastre provide new certificate on Combined Statement on Rights' Limitation. According to this new certificate on Combined Statement on Rights' Limitation a notary certified the contract. According to law requirements after notarization of the contract ownership rights should be registered during.

The buyer H. Harutyunyan had to leave to St.Peterburg for 2 months and when she came back and tried to register property rights the Regional Real Estate Cadastre reject her application. Hence the plaintiff complains against Regional Real Estate Cadastre in order to register her ownership rights.

Step by step analysis

In this case the plaintiff missed the 30 days requirement for registration of property rights. According to law of the Republic of Armenia "On state Registration of rights to the property" rights arising from immovable property transactions are subject to state registration within 30 days from the day of transaction in the Territorial Subdivision of Real Estate State Registration Cadastre, where such real estate is located.

After analyzing all evidences the court found out that all required procedural steps had been made properly, i.e. H. Harytyunyan obtain clarified certificate on Combined Statement on Rights' Limitation, based on this notary certificate the transaction, but he missed registration of his rights of ownership within required 30 days period of registration in Territorial Subdivision of Real Estate State Registration Cadastre and held that the delay of property right registration was based on respectful reasons and ordered to register H. Harytyunyan's rights of ownership.

International Best Practice

The procedures of establishing clear title and obtaining new deed for purchase of immovable property are different depending on whether the transactions of immovable property are taking place in civil or common law countries.

The institute of notarization and state registration occurs in Europe in middle centuries and now it is considered to be the part of legislation. Due to expert analysis notarization and state registration of property rights is typical for countries with developed market economy because the notarization and registration is considered to be an additional protection of ownership rights.

In United States of America title evidence is essential for the protection of a buyer, whether provided as a valid abstract or insurance form. The seller of real estate is responsible for proof of title. Abstracts are the official public records of real estate ownership history. Attorneys use abstracts to indicate the validity of the title. An attorney examines the abstract, and a title opinion is made. The attorney examines the abstract to secure marketable title, by objecting to irregularities and requiring judgments, liens, or encumbrances to be satisfied before transferring the title, consents of other owners or dwellers. The title opinion based on the abstract states the proof of title, and lists requirements that need to be met to establish clear title to the real estate. The requirements would make note of any liens or judgments against titleholders or against the real estate. For example, if the seller has a mortgage on the real estate, the abstract would show the mortgage. Then the examining attorney would require that the mortgage be released of record to clear title to the real estate. The abstract used in conjunction with the title opinion provides the same protection as title insurance. In case when the place of other dweller is unknown due to the Protected Estates Act, 1983 it is possible to declare the person missing after a person has been missing at least 90 days,

A notary public in the United States of America has powers that are far more limited than the role of a civil law notary in the rest of the world, with the exception of Louisiana. The most common notarial acts in the United States are the taking of acknowledgements and oaths certification of copies of non-government documents. Notary in US has no authority to certify contracts or documents relating to transactions of immovable property. In case when

The role undertaken by notaries in civil law countries is much greater than in common law countries. Majority of civil law countries property legislation have similarities concerning current topic. In Civil law countries (Spain, France, Germany, Russian Federation,) these issues are regulated by Civil Codes and other statutes.

In Spain the real estate can be obtained by legal entities, by individuals, residents and non-residents. Any kind of the real estate in Spain should be registered in Registro de Propiedad (Register of the property), which is similar to State Committee of Real Estate Registration Cadastre of Armenia where you can receive the complete information on the one who is the owner of the real estate, what is the exact price, exact area, and also about any possible debts of the owner/clear title. There is made a main official document named Escritura Publica/deed to address to the owner, with the given registration number, registration number, sheet and volume for entering Escritura in the Register is appropriated.⁸

In Spain the real estate can be sold only by its owner or by the person with the power of attorney certified by notary. As a rule, the right of sale is entrusted to a Real Estate Agency/ Registro de Propiedad. In this case the agency should have the appropriate License. Each company or agency also has its own Escritura that is kept in the Register of the property, where you can get the information.

If the real estate object suitable and you have come to a decision to purchase, there is made a private contract of sale and purchase, which includes specified conditions and payment conditions. Escritura subscribes by the buyer and seller in Notarial office at the presence of the Spanish Notary. A name of the owner and also all the members of his family can be brought in

⁸ www.runiga.com

the Escritura. After the procedure of signing it is necessary to register your real estate in the Register of the property. The process of registration usually takes about three months.

As it has been noted the sale of property in Spain is entrusted to special body Real Estate Agency, which make easier for purchaser to perform all necessary procedural steps, since in Armenia purchasers/sellers intend to perform procedural actions by themselves. This situation has its reasons: mistrust to real estate agencies, bureaucratic mechanisms and bribery of state bodies and Public Notary. The other difference is the duration of registration process, which is quiet long in Spain- three months. The problem discussed above concerning missing people who are dwellers

According to French legislation every contract on Sale or Purchase of immovable property should be notarized by notary. The seller/purchaser should apply to Notary for registration of contract, then to Hypothec Bureau for the registration of property. Purchaser should represent several documents very similar with Armenian legislations requirements: document in details prescribing the real estate, list of persons who have rights to property, their consent to purchase the property. In comparison with legislation of other countries French legislation does not consider that the registration of contract in Hypothec Bureau is sufficient for ownership rights appearance, only after property right registration the procedure is considered to be final. By this feature French Legislation is similar to Armenian legislature.

In contrary the German legislation (paragraphs 873-875 of Civil Code)⁹ prescribed that the registration of appropriate contract in Records Book is sufficient for ownership right occurring. In Germany the Notary plays an important role in contractual agreements relating to special laws such as property law, land charge certification. According to § 311 b of the German Civil Code all transactions of immovable property must be signed and sealed at the office of the notary public.

Due to German legislation the notary is legally bound to act as an impartial middleman between buyer and seller. He or she checks the land register to see whether the property can be

⁹ Articles 873-875 of German Civil Code

sold at all; and if it can be, whether there are any restrictions on its use/ establishing clear title. The contract spells out the obligations of each party and the measures to be taken in the event of default. Once it is signed, the notary registers the change of ownership with the municipal government and enters the property in the land register.

Russian Federation also has the institute of notary and state registration. According to the 2nd paragraph of the 8th article in the Civil Legislation of Russia the rights arise from the moment of their registration if the law doesn't say differently. The main legal consequences of the registration are the rights for realty & the title. The following rights are subject to the registration according to the §1, article 131 & 216 in the Civil Legislation of Russia:¹⁰ ownership; a right to run the property; a right to manage the property operatively; a right owning the land. For notary certification of contracts, Public notary requires following documents, which are very similar with Armenian legislation requirements: contract, copy of deed, written consents of other dwellers, certificate establishing clear title. In case when there is no information about the place of residence of other owners/dwellers the court declare the person as missing when during 1 year there is no information about the place. In Russia there was a practice of deprivation from property rights persons, who during 6 months did not live in registered place of residence, but in 1995 this provision of Housing Code was declared as unconstitutional and now these cases are subject to court.

Conclusion/ Possible reforms

Armenian legislation regulates the transactions of property in sufficient proper form: by notarial attestation/certification of contracts and state registration of ownership rights. The real property transactions are regulated both by Civil Code of RA and several statutes. According to legislation if parties of transaction do not follow the legal requirements the contracts of real property transactions can be declared void. But this sphere need to be more regulated by legal provisions, since in certain cases the rights of other owners e.g. of the one of spouses can be

¹⁰ Article 131 & 216 of Civil Code of RF

infringed during real property transaction (the case of Alla Grigorian). In current situation the notary has the responsibility to control and verify the necessary documents. There should be certain provisions, which will enlarge the scope of notary authorities in order to eliminate the cases of misleading.

The other problem, which can be raised in transactions of real property, is the situation when persons whose written consent is necessary for performing sale/purchase contract are out of country and there is no information about their place of residence. In this case the procedure requires 2 years for proving that there is no information about the place of residence of current person.

The legislation should have provision for protection of owners/sellers in such situations e.g. to shorten the duration of necessary time for resolving such situation or to adopt legislation which will provide additional protection of owner's rights in such cases.

Taking in account that the ownership right is considered to be one of the basic civil rights and the immovable property is one of the important objects of civil law, the issues concerning real property transactions should be regulated in more detailed form in order to avoid situation when the rights of owners can be violated.

Abstract

This paper describes procedural steps needed for real estate transaction: signing the appropriate contract, notarization of the contract, state registration of ownership rights to immovable property and emphasizes the importance of legal regulation of this type of transactions. The paper contains comparative information both for Armenia and some common and civil law countries. Issues representing in the paper are related to possible and also factual situations when in the result of not performing legal requirements, transaction can be declared void or in the result of one party's actions the rights of other individuals are violated.

References

1. Civil Code of the Republic of Armenia (1998 Yerevan)
2. Law of RA on State Registration of Rights to the Property (1999 Yerevan)
3. Instructions on Performance of Notarial Acts by Public Notary.
4. Гражданский кодекс РФ (1994 Москва)
5. Закон РФ о Государственной регистрации прав на недвижимое имущество и сделок с ним (1997 Москва).
6. Институт Государства и Права Российской Академии наук «Комментарии к Гражданскому праву» под редакцией д-р. юр. наук профессора Т. Е. Абовой (Москва 2006).
7. «Договорное право» М.И Брагиский, В.В. Ветрянский 2006
8. Жилищный кодекс РФ (2004 Москва)
9. Protected Estates Act, 1983 of United States

Internet sources

1. parliament.am
1. wikipedia.org
2. ec.europa.eu
3. runiga.com
4. www.lectlaw.com