

§ 2 Important elements of land law in Germany

I. The *plot of land* [Grundstück] as the central reference point of land law

- Under the German Civil Code [Bürgerliches Gesetzbuch], plots of land constitute *immovable things*.
- They include as *essential parts* [wesentliche Bestandteile] all things firmly attached to the land, esp. *buildings*, and also the produce of the land, as long as it is connected with it (sect. 94 BGB).
- As inseparable essential parts, buildings cannot be the subject of separate rights (cf. sect. 93 BGB).
- Thus, unlike in many former socialist states, *ownership of a building* can only be **transferred by transferring ownership of the land**.
 - exceptions: heritable building rights [Erbbaurecht] (its holder is the owner of the building) and condominiums
- Farm equipment, livestock, fertiliser produced on the farm and agricultural produce necessary for the farming are considered *accessories* [Zubehör] (sect. 98 no. 2 BGB).

II. The Land Register [Grundbuch]

- operated by the local district court [Amtsgericht] as land registry office on the basis of the *German Land Register Code* [Grundbuchordnung].
- shall provide *transparency* about the legal relationships to a plot of land
 - anyone with a legitimate interest may inspect it
- every creation, transfer or cancellation of land ownership, condominiums, heritable building rights or other rights in rem to plots of land [dingliche Rechte] needs to be registered, making it visible to the public (principle of publicity)
 - but not the underlying contracts under the law of obligations: German private law distinguishes strictly between obligation transaction and disposition transaction (→ principles of separation and abstraction)

III. Types of land tenure rights in Germany

- note that in English the term "land tenure rights" is used heterogeneously, either in- or excluding land ownership

1) Land ownership (real estate ownership) [Grundstückseigentum]

- grants owner the power to *deal with the plot of land at his discretion and exclude others* from exercising any influence whatsoever (sect. 903 BGB)
 - but only insofar as this does not conflict with statutes or third-party rights
- actually, this power is *significantly restricted* by
 - provisions in the German Civil Code and other private-law statutes
 - statutory environmental law and urban land-use planning law
- land owner's power extends to space above & subsoil under the surface, but...
 - not to groundwater and most natural resources (→ water legislation, Federal Mining Act)
 - he cannot exclude influences so high or deep (→ air traffic, mining) that he has no interest in excluding them (sect. 905 phrase 2 BGB)

2) Rights equivalent to land ownership [grundstücksgleiche Rechte]

- rights in rem that are legally treated like ownership
 - registered separately in the Land Register
 - can be alienated, inherited and encumbered themselves with rights in rem

a) Heritable building right [Erbbaurecht]

- the right to have a building on or under the surface of the land, for an agreed period of time and against payment of a regular ground rent
 - regulated in the *Heritable Building Rights Act* [Erbbaurechtsgesetz]
 - usually for a term of 50 to 99 years, which is often prolonged
 - an alternative to buying land, for citizens with little own capital, allowing them to live in their own home

- the erected building constitutes an essential part of the h.b.r., not of the plot of land, and thus falls exclusively into the ownership of the h.b.r.'s holder (sect. 12 HBRA)
- after expiration of the h.b.r., land owner must pay compensation for the building, which now becomes an essential part of his plot of land (sect. 27(1), 12(3) HBRA)

b) Condominium ownership [Wohnungseigentum]

- of residential apartments (under the *German Condominium Act* [Wohnungseigentumsgesetz])
- a combination of separate property (the apartment) and a share of the collective property (the plot of land and the communal parts of the building)

3) Other rights in rem to plots of land [dingliche Rechte]

- are also *absolute rights* (directed and defensible against everyone) but *limited*
- types regulated conclusively in the German Civil Code and a few complementing laws (numerus clausus of rights in rem)
- the order of priority among several registered rights follows the sequence or date of their registration but can be altered by agreement plus entry of the change in the Land Register (sect. 879, 880 BGB).

a) Easement (sect. 1018 et seq. BGB) [Grunddienstbarkeit]

- encumbrance of a plot of land *to the benefit of the respective owner of another plot of land* in such a way that
 - the latter may use it in certain respects (e.g. *right of passage* or to install pipes or cables)
 - certain acts are prohibited on the servient land (e.g. to erect certain kinds of buildings or conduct certain kinds of business)
 - certain rights towards the dominant land that arise from the ownership of the servient land cannot be exercised

b) Restricted personal easement (sect. 1090 et seq. BGB) [beschränkte persönliche Dienstbarkeit]

- encumbrance with a content such as an easement, which entitles a *specific beneficiary*
- example: *right of residence* in a building on the encumbered land (sect. 1093 BGB)
- a generally personal, non-transferable right (sect. 1092 BGB)

c) Usufruct (sect. 1030 et seq. BGB) [Nießbrauch]

- encumbrance entitling the *usufructuary to draw the benefits* of the plot of land (and its buildings & accessories)
- a generally personal, non-transferable right, but exercise may be ceded (sect. 1059)
- examples:
 - a *right to harvest* the fruit in a garden
 - a *lifelong right of residence* of the wife in the husband's house after his death
 - a *right of the creditor to collect the rent* in the debtor's apartment building
 - common: *transfer of the farm* to the son *against reservation to continue to run it*
- usufructuary may possess the land but not transform or substantially alter it
- usufructuary must upkeep the land, uphold its previous economic purpose and proceed in compliance with rules of proper management (sect. 1036, 1037, 1041 BGB)
- usufructuary can defend against third-party encroachments like the owner (cf. sect. 1065, 1004 BGB)

d) Right of preemption (sect. 1094 et seq., 463 et seq. BGB) [Vorkaufsrecht]

- *right to enter into a valid purchase agreement* between the owner and a third party under the terms agreed between them
- can relate to the purchase of a plot of land or of a right in rem to a plot of land
- beneficiary can also be the respective (!) owner of another plot of land
- exercised by declaration to the owner

- complemented by *statutory preemption rights of the municipality* under the Federal Building Code [Baugesetzbuch] (sect. 24 et seq.)
 - an important instrument to protect public interests, esp. to prevent land speculation
 - not in case of sale within the family
 - exercise within 3 months after notification of the purchase agreement
 - exercise can be averted by the buyer

e) Recurrent charge on land (sect. 1105 et seq. BGB) [Reallast]

- encumbrance of a plot of land with *recurring acts of performance*
 - in favour of a specific person or the respective owner of a specific plot of land
- examples:
 - payments (e.g. *maintenance, pensions*)
 - services (e.g. care)
 - benefits in kind (e.g. harvest yield)
- owner is in addition personally liable (sect. 1108 BGB)
- can lower the value of the land considerably

e) Security rights in rem

aa) Mortgage (sect. 1113 et seq. BGB) [Hypothek]

- the classic security right for securing real estate loans
 - comprehensive regulation in 78 sections of the German Civil Code
 - special provisions for *numerous special kinds* of mortgage
- an *accessory* land charge: payment obligation under mortgage depends on the existence of a monetary claim that does not itself arise from the mortgage
 - land owner is *liable* even if he is *not* the *debtor*, but he may assert any defences of the debtor against the claim (sect. 1137 BGB)
 - claim cannot be transferred without the mortgage, mortgage not without the claim (sect. 1153 BGB)
- usually a mortgage certificate [Hypothekenbrief] is issued and creditor acquires mortgage only when certificate is handed over to him (sect. 1116 et seq. BGB)
- creditor is satisfied from the plot of land by foreclosure (sect. 1147 BGB)

bb) Non-accessory land charge (sect. 1191 et seq. BGB) [Grundschuld]

- the most common security right
- obliges to pay a specific sum of money from the plot of land irrespective of an underlying claim
 - yet often created to secure a claim (claim-securing land charge [Sicherungsgrundschuld], sect. 1192(1a))
- can also be created for the owner (sect. 1196 BGB)

cc) Annuity land charge (sect. 1199 et seq. BGB) [Rentenschuld]

- a means of old-age provision that often goes hand in hand with the transfer of real estate to one's own children
- a non-accessory land charge obliging to pay an annuity rather than a fixed sum from the encumbered plot of land
- a redemption sum must be specified in the Land Register

4) Rights under the law of obligations

a) Lease (rent) (sect. 535 et seq. BGB) [Miete]

- entitles lessee to *use* the rented land but not to enjoy (harvest & utilise) its fruits (products & other yields); therefore unsuitable for agriculture

b) Ordinary usufructuary lease (sect. 581 et seq. BGB) [Pachtvertrag]

- entitles usufructuary lessee to use the land and *enjoy the fruits of the land* (to the extent that they are deemed to be the yield under the rules of proper management)
- usufructuary lessee must maintain the inventory (sect. 582 BGB)
- if lease period is not specified, termination only for the end of the lease year (sect. 584)

- c) **Farm lease** (sect. 585 et seq. BGB) [Landpacht]
- usufructuary lease of farm land or an agricultural business (land plus residential & utility buildings that serve its cultivation) mainly for agriculture purposes
 - *very common*: farm lease from land owners who have given up farming, in order to increase the area to be farmed by the lessee's farm business
 - *has continuously changed agricultural structure in Germany* from a large number of small farms to a small number of highly technologised big and medium-sized farms that resemble industrial operations
 - *needs to be notified* to the agricultural authority who may object if...
 - the farm lease would lead to an unhealthy distribution of land use
 - contiguous plots of land would be divided up uneconomically in terms of use
 - the rent is not in reasonable proportion to the achievable yieldproceedings: *notice of objection* requests parties to cancel the farm lease agreement within a certain period, after which the agreement is deemed to have been rescinded, unless a party applies for a court decision at the request of a party, the district court as agricultural court will finally decide (see the federal Law on the notification and objection of farm lease agreements [Landpachtverkehrsgesetz], which may be replaced in the future by Land legislation)
 - without lessor's permission, lessee may not make the farm resp. farm land available to a third party or change its agricultural purpose (sect. 589, 590 BGB)
 - in case of a later lasting change of the relevant circumstances, each party may demand an adjustment of the usufructuary lease agreement (sect. 593 BGB)

IV. Acquisition and alienation of land ownership

1) General rules

- Although the necessary declarations of intent [Willenserklärungen] are usually recorded in a single contractual document, German law distinguishes between two legal transactions: the *land purchase agreement* (the obligation transaction) and the transfer of ownership (the disposition transaction); both are independent of each other (principle of abstraction).
- The transfer of ownership of a plot of land requires
 - ▶ an *agreement* between transferor and transferee (conveyance [Auflassung]) and
 - ▶ the *entry* of the change in the *Land Register* (sect. 873 BGB).
- The purchase contract and the conveyance require *notarisation* (sect. 311b(1), 925 BGB).

2) Special rules for the acquisition and alienation of ownership of agricultural and forestry land: land transaction law

- an important instrument to preserve & improve the agrarian structure, esp. to prevent the fragmentation and sell-off of agricultural land
- legal basis: *Land Transaction Act* [Grundstücksverkehrsgesetz]
 - a federal law which may be replaced in the future by Land legislation
- the purchase contract, the transfer of ownership and also the creation of usufruct of a plot of agricultural or forestry land *require the approval of the competent authority* (sect. 2)
 - the competent authority is determined by Land law
 - the approval can be given in advance
 - the authority must decide within one month or the approval is deemed to be granted (sect. 6)
- the approval may be refused or restricted (by conditions and requirements) if...
 - transfer would cause unhealthy distribution of land
 - transfer would uneconomically reduce or divide a plot or contiguous plots of land
 - price is grossly disproportionate (sect. 9);in this case the parties may apply for a decision by the district court as agricultural court
- another instrument: the *judicial allocation of inherited farms to individual co-heirs* (sect. 13)
 - where intestate succession has created a community of heirs, the court may, at request of a co-heir and against compensation, *allocate the entirety of the land undivided* to one of the co-heirs (sect. 13)

3) Land consolidation [Flurbereinigung]

- a powerful but also sensitive instrument for a more appropriate organisation of rural areas for efficient agriculture and forestry
 - has led to larger and *easier-to-farm plots of agricultural land* but significantly *reduced diversity* by the elimination of hedges, groves, waterholes and other biotopes and landmarks
 - in East Germany there are some *boring landscapes* with individual fields that stretch for kilometres!
- legal basis: Land Consolidation Act [Flurbereinigungsgesetz]
 - a federal law which may be replaced in the future by Land legislation
- definition: *reorganization of rural land ownership* in a specific land consolidation area
 - by the land consolidation authority in an administrative land consolidation procedure
 - with participation of the land owners, representatives of public interests and agricultural professional representatives
 - for the improvement of production and working conditions in agriculture and forestry or to promote the general land cultivation or development
- a redistribution of land: the affected land owners contribute their plots of land but are compensated with land of equal value (sect. 44)
 - exception: they must contribute without compensation, in proportion to their land's value, to the communal & public facilities on the land (sect. 47)
- the land owners form a *community of participants* as a public body which is responsible for their common affairs (cf. sect. 2, 10, 16 et seq.)
 - it constructs & maintains the common facilities (§ 42) and carries out necessary land improvements
- the most important procedural steps:
 - *land consolidation order* [Flurbereinigungsbeschluss] (by Higher Land Consolidation Authority)
 - *valuation* of the individual plots of land
 - preparation, adoption and execution of a *land consolidation plan* [Flurbereinigungsplan]
 - provisional assignment of possession of the new plots of land
 - correction of the Land Register (and other public registers)
 - final determination that the plan is implemented and parties no longer have claims
 - some of these steps can be challenged by objection
- *types of land consolidation procedure:*
 - a) comprehensive redesign of the land consolidation area (sect. 37)
 - standard procedure; takes often 10 to 15 years and is rare today
 - requires *comprehensive balancing* of the interests of all land owners and other parties, of land culture & development and of numerous economical, ecological and other public interests
 - includes comprehensive consolidation of fragmented or uneconomically shaped landholdings, creation of roads and other communal facilities, measures of soil protection & improvement and landscape design, and the reorganisation of the legal situation
 - b) *simplified land consolidation procedure* for limited land development measures (sect. 86)
 - e.g. for village renewal; more focused and much faster
 - c) *land consolidation procedure for large-scale projects* of public interest (sect. 87 et seq.)
 - distributes the loss of land among a large group of land owners
 - d) *accelerated pooling procedure* (sect. 91 et seq.)
 - just redistribution of the land, if there is no need for new roads or facilities
 - e) *voluntary exchange of land* (sect. 103a et seq.)
 - with consent and on application of the land owners