

Los efectos de la inscripción y la entrega en las transacciones de bienes inmuebles en el Derecho civil chino

The effects of registration and delivery in the transactions of immovables in Chinese Civil Law

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Resumen: De acuerdo con el Código Civil de China, la propiedad del bien inmueble se transfiere a través de la inscripción tras la firma del contrato de compraventa. La entrega del bien inmueble no tiene el efecto de transferir la propiedad del bien inmueble. El comprador no tiene ningún derecho real sobre el bien inmueble antes de la inscripción después de la entrega del bien inmueble, y su derecho se limita a los derechos de crédito sobre el vendedor basados en el contrato de compraventa. La posesión, el uso y el disfrute del bien inmueble por parte del comprador se basan también en los derechos de crédito derivados del contrato. En las prácticas judiciales, sin embargo, existen circunstancias en las que esta doctrina general no puede respetarse plenamente. Esto ha sido a menudo fuente de controversia entre los autores.

Palabras clave: Inscripción, entrega, transacciones de bienes inmuebles, Derecho civil chino

Abstract: According to Civil Code of China, the ownership of immovable is transferred through registration after the sales contract was signed. The delivery of immovable does not have the effect of transferring the ownership of immovable. The buyer has no real right to the immovable before registration after delivery of the immovable, and his right is limited to the creditor's rights on the seller based on the sales contract. After the delivery, the possession, use and enjoy of such an immovable by the buyer are based on the creditor's rights to the seller derived from the sales contract. In judicial practices, however, there are circumstances in which this general doctrine cannot be fully adhered to. This has often been a source of controversy among scholars.

Keywords: Registration, delivery, transactions of immovables, Chinese civil law.

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real estate. A) A condition for the validity of the transfer of ownership of real estate. B) Publication and credibility. C) The presumption of the correctness of real rights. D) The effectiveness of prioritized protection. V. The Role of the Delivery in Real Estate Transactions in Chinese civil law. 1. The delivery cannot produce the effect of transferring the ownership of immovable. 2. The delivery is an obligation of the seller of real estate. 3. The delivery marks that the risk passes from the seller to the buyer. 4. The delivery determines the attribution of the fruits of immovable property. VI. The Debate on the Effects of Delivery of Real Estate. 1. The reality of the issues of the effects of delivery and possession. 2. Common elements about the theories of delivery effects. 3. The registration as a necessary but not sufficient condition for the transfer of ownership of real estate. 4. Publication and refutability of registered real rights. VII. Unicity of the effect of registration and concept of social equity. 1. The unicity of the registration effect. 2. The problem that the acquisitive prescription is not recognized in Chinese civil law. 3. Identification of the true owner outside the registration. 4. The ideal of the effectiveness of registration is difficult to be realized in judicial reality.

I. Introduction

1. In China, it is accepted that the normative models of the transfer of ownership caused by juristic acts in the civil laws of different countries can be generally classified into three categories: Intentionalism of Creditor's Right; Formalism of Creditor's Right; Formalism of Real Right. The Civil Code of China in principle adopts the model of formalism of creditor's right. According to this model, the transfer of ownership due to juristic acts become valid when two requirements are met: there must be an agreement of creditor's right between two parties, and the legal form: registration for immovables or delivery for movables.

2. In Chinese civil law, the real estate transaction is completed after the registrant in the register of immovables changes from the seller to the buyer, and at the same time the ownership of the real estate as the subject matter of the sales contract is transferred from the seller to the buyer. At the same time, the delivery is an obligation of the seller of real estate but cannot produce the effect of transferring the real rights of immovable. The delivery means that the risk passes from the seller to the buyer and determines the attribution of the fruits of immovable property.

3. Even if the registration is a necessary element for the transfer of ownership of real estate, it is sometimes argued that the delivery has a certain effect of transferring some rights of the real estate. The buyer thereby acquires extra-contractual rights to the immovable property when he or she has possessed it. Some authors believe that the authentic interpretation of the legislation has not been fully complied with when it is implemented in practices. In judicial practices, the delivery and possession still occupy an important place in the process of transferring the ownership of real estate. And as well, some authors believe that the legislative doctrine of registration effectiveness is thought to have some disadvantages, and the value of delivery and possession has not been recognized as it should.

4. The Civil Code of China shows that the registration is a necessary but not a sufficient condition for the transfer of ownership of real estate. In many cases, the registration is reduced to a kind of proof: the registration only provides a certification to the registrant to prove that he is the owner of the real estate. In this sense, the registration becomes an evidentiary mechanism, and it is of factual nature and refutable. Therefore, the ideal goal of the system of real estate registration, to provide clear and unified criteria for judicial judgments, is often frustrated in judicial reality.

5. Since the registration can be voided, the registrant may not end up being recognized as the true owner of the real estate. As a result, the concept of the true owner is often used in judicial practices to differentiate it from the registered owner. And the concept of true owner has a tendency to be used in a generalized way, resulting in further weakening of the effectiveness of registration. And it could easily lead to a confusion, the public may wonder whether it is still necessary to keep an eye on the existence of a true owner outside of the register, which means that there tends to be an increased obligation on those

who want to transact with the registrant. In particular when there is someone other than the registrant who is in possession of the immovable property.

II. Models of the transfer of ownership in the theory of Chinese civil law

6. The transfer of ownership caused by juristic acts is the most important type of change to real rights. In the Chinese civil law theory, the normative models of the transfer of ownership caused by juristic acts in the civil laws of different countries can be generally classified into three categories: Intentionalism of Creditor's Right; Formalism of Creditor's Right; Formalism of Real Right. As Wang Yi said: «When it comes to the civil law system, there are two representative models of the transfer of ownership, namely the model of intentionalism and the model of formalism. Among them, the model of formalism includes the formalism of creditor's right and the formalism of real right»¹.

1. Intentionalism of Creditor's Right

7. According to the theory of intentionalism, the transfer of ownership of property can occur when the sales contract between two parties is valid, the effect of transferring the ownership is generated by the declarations of will, without the need for another act of real right. In other words, the agreement between the two parties not only creates a relationship of creditor's right, but also makes the transfer of ownership of the property.

The typical example of legislation of this model is the French Civil Code, whose article 1138 says: «*L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant où elle a dû être livrée, encore que la tradition n'en ait point été faite...*»²; and its article 711 says: «*La propriété des biens s'acquiert et se transmet par succession, par donation entre vifs ou testamentaire, et par l'effet des obligations*»³. This similar criterion is contained in article 176 of the Japanese Civil Code, which stipulates: «The creation and transfer of a real right becomes effective solely by the manifestations of intention of the parties»⁴.

2. Formalism of Real Right

8. According to the model of formalism of real right, to successfully transfer the ownership of property between the parties of the contract, it requires, in addition to the coincidence of the declarations of will of forming creditor's rights, the agreement to transfer the ownership of property independent of the act of creditor's right, and combined with a legal form, namely, the delivery for movables or the registration for immovables in the Real Estate Register. The legislative example of this model is represented by the German Civil Code. The transfer of ownership of property is based on agreement of real right. The article 873 (1) of the German Civil Code stipulates: «*Zur Übertragung des Eigentums an einem Grundstück, zur Belastung eines Grundstücks mit einem Recht sowie zur Übertragung oder Belastung eines solchen Rechts ist die Einigung des Berechtigten und des anderen Teils über den Eintritt der Rechtsänderung und die Eintragung der Rechtsänderung in das Grundbuch erforderlich, soweit nicht das Gesetz ein anderes vorschreibt*»⁵.

¹ W. YI, *On the Change to the Real Right*, 1st edition, Renmin University of China Press, (Beijing), 2001, p.11.

² A. NÚÑEZ IGLESIAS/ F.J. ANDRÉS SANTOS/ A. GARRIGUES WALKER, *Código Civil francés = Code Civil, bilingüe edición*, Editorial: Marcial Pons, Ediciones Jurídicas y Sociales, (Madrid, Barcelona), 2005, pp.533-534.

³ A. NÚÑEZ IGLESIAS/ F.J. ANDRÉS SANTOS/ A. GARRIGUES WALKER, *Código Civil francés = Code Civil, bilingüe edición*, Editorial: Marcial Pons, Ediciones Jurídicas y Sociales, (Madrid, Barcelona), 2005, p.373. La propiedad de los bienes se adquiere y transmite por sucesión, por donación entre vivos o testamentaria, y por efecto de las obligaciones.

⁴ <https://www.japaneselawtranslation.go.jp/en/laws/view/3494>

⁵ https://www.gesetze-im-internet.de/bgb/_873.html

3. Formalism of Creditor's Right

9. The model of formalism of creditor's right has an eclectic characteristic between the former two models. According to this model, the transfer of ownership due to juristic acts become valid when two requirements are met: an agreement of creditor's right between two parties, and the legal form: registration for immovables or delivery for movables. Legislative examples adopting this model include the General Civil Code of Austria and Swiss Civil Code. The article 656 (1) of the Swiss Civil Code states: «The acquisition of land ownership must be recorded in the land register». And its article 714(1) stipulates: «Transfer of chattel ownership requires the delivery of possession to the acquirer».

10. The characteristics of the legislative model of formalism of creditor's right are as follows:

Firstly, this model does not require an agreement of real right to transfer the ownership of the property independent of the agreement of creditor's right included in the contract. It is only necessary that the two parties reach an agreement in the sales contract on the transfer of ownership. At this point, it is the same as the model of intentionalism of creditor's right, as opposed to the model of formalism of real right.

Secondly, in order to transfer the ownership of property effectively, the mere existence of declarations of will of creditor's right is not sufficient. Certain formal requirement needs to be met, namely the completion of the registration or the delivery. Usually, the ownership of movable property is transferred by the delivery and immovable property by the registration.

Thirdly, since the existence of an independent act of real right is not recognized, the act of creditor's right as the cause will affect the validity of the transfer of the ownership of property. If the contract is not valid, the transfer of the ownership will also be invalid. That is, the delivery or the registration is not in itself an abstract act independent of the act of creditor's right.

11. It is generally believed that for the change of real rights based on juristic acts, the Property Law of China explicitly adopted the model Formalism of Creditor's Right⁶. Subsequently, this model continued to be adopted by articles 208, 209 and 224 of the Civil Code of China⁷.

4. El título y el modo

12. It is believed by Spanish scholars that there are three main models of transferring the ownership in European countries: *consensual (francés e italiano)*, *real abstracto (alemán)* y *de título y modo (español)*⁸. The model adopted by the Spanish Civil Code corresponds to the system of *el título y modo*: «*El sistema de transmisión mediante traditio vinculada casualmente a un negocio jurídico que le sirve de causa, al que se denomina sistema del título y el modo*»⁹.

13. From the view of Chinese authors, the model of transferring property in the Spanish Civil Code can also be classified as formalism of creditor's right. One big difference is that in the model *El título y el modo* of the Spanish Civil Code, *el modo* refers only to the delivery, which does not apply different models to distinguish between movable and immovable property: «*en el ordenamiento jurí-*

⁶ M.JUNJU/Y.YANMAN, *The theory of civil law*, fourth edition, Law press, (Bei Jing), 2010, p.304.

⁷ Article 208 of Civil Code of China (2020): The creation, alteration, alienation, or extinguishment of the real rights in immovable property shall be registered in accordance with law. The creation and alienation of real rights in movable property shall be subject to the delivery of the movable property in accordance with law. (https://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html)

Article 209 of Civil Code of China (2020): The creation, alteration, alienation, or extinguishment of a real right in immovable property shall become effective upon registration in accordance with law, and shall not take effect without registration, unless otherwise provided by law.

Article 224 of Civil Code of China (2020): The creation or alienation of a real right in movable property shall take effect upon delivery, unless otherwise provided by law.

⁸ I. FERNÁNDEZ CHACÓN, *La transmisión de la propiedad en la compraventa*, Editorial: Thomson Reuters Aranzadi, (Navarra), 2018, p.40.

⁹ J.F.DELGADO DE MIGUEL, *Instituciones de derecho privado*, 1ª edición, Editorial: Thomson Civitas, (Madrid), 2004, p.135.

*dico español se establecen las reglas de la transmisión de los bienes con carácter genérico, esto es, con independencia de la naturaleza mueble o inmueble del bien*¹⁰. The registration is not an element for the transfer of the ownership of property: «*La inscripción no forma parte del proceso transmisivo, es ajena a él. La transmisión opera fuera del Registro y antecede a la inscripción*»¹¹.

The model for the transfer of ownership in Civil Code of China distinguishes the movable and immovable property. The model of the contract plus delivery is applied to the transfer of ownership of movable property, and the contract plus registration to the transfer of the ownership of immovable property.

14. In addition, it is worth mentioning that in the case of the double sale of an immovable, in Spanish Civil Law it is also considered that the registration has priority over the delivery in terms of the acquisition of the ownership of real estate, and the registration becomes the factor decisive in determining the acquisition of ownership of the real estate. According to art. 1473(2) of Spanish Civil Code: «*la inscripción se superpone a la tradición o traspaso posesorio del inmueble como momento decisivo para determinar su adquisición*»¹². In this respect, from the perspective of the final attribution of the ownership of the real estate, the conclusions of Spanish civil law and Chinese civil law are the same. That is, whoever registers first will acquire the title to the immovable.

15. However, an important difference between the civil laws of the two countries is that: in Chinese civil law, the ownership of immovable property is acquired through the registration, the delivery does not have the effect of transferring title of immovable. In other words, even if the real estate has been delivered to the first buyer, the ownership still belongs to the seller, thereby the second buyer can still obtain the ownership directly from the seller by registration¹³. In the concept of Chinese theory, if the ownership of the immovable property is also transferred through delivery, it would require complex arguments and even special theoretical constructions to explain why, after the delivery of the immovable to the first buyer, the second buyer could still be able to obtain the ownership of it by registration, which means that the second buyer acquires the ownership from the seller who no longer has it.

III. The Model Adopted by the Civil Code of China

16. In the Civil Code of China, in relation to the transfer of real right caused by juristic acts, the model of formalism of creditor's right is adopted generally. At the same time, as an exception, the change of some real rights follows the model of intentionalism of creditor's right.

1. The model of formalism of creditor's right for the transfer of ownership

17. The Property Law of China that came into effect in 2007 and expired in 2020. The articles 6¹⁴, 9¹⁵ and 23¹⁶ of the Property Law of China are the main provisions that stipulated the means of trans-

¹⁰ J. SÁNCHEZ CEBRIÁN, *La teoría general de la transmisión de bienes y el registro de la propiedad en España*, Revista de Derecho, Universidad del norte, 30: 3-29, 2008, p.5.

¹¹ J.F.DELGADO DE MIGUEL, *Instituciones de derecho privado*, 1ª edición, Editorial: Thomson Civitas, (Madrid), 2004, p.163.

¹² J. SÁNCHEZ CEBRIÁN, *La teoría general de la transmisión de bienes y el registro de la propiedad en España*, Revista de Derecho, universidad del norte, 30: 3-29, 2008, p.16.

¹³ W. ZEJIAN, *The Double Sale*, Contented in Study of Civil Law Doctrines and Cases, Volume 4, Peking University Publishing House, December 2009, 1st edition.

¹⁴ Article 6 of Property Law of the People's Republic of China: The creation, change, transfer or elimination of the real right of a real estate shall be registered according to law. The creation or transfer of the real right of a movable property shall be delivered according to law. (https://english.www.gov.cn/services/investment/2014/08/23/content_281474982978047.htm)

¹⁵ Article 9 of Property Law of the People's Republic of China: The creation, change, transfer or elimination of the real right of a real property shall become effective after it is registered according to law; it shall have no effect if it is not registered according to law, except it is otherwise prescribed by any law. The ownership of the natural resources which are owned by the state according to law are not required to be registered.

¹⁶ Article 23 of Property Law of the People's Republic of China: The creation or transfer of the real right of a movable property shall become effective upon delivery, except it is otherwise prescribed by any law.

ferring the ownership by juristic acts clearly distinguishing the movable property and the immovable property.

According to these terms, the transfer of ownership must meet certain legislative mode of publication, that is, the delivery of movable property and the registration of immovable property. Under the system established by the Property Law of China, this model of the transfer of ownership corresponds to the formalism of creditor's right, that is to say, the "combination of the intentionalism and the delivery or the registration"¹⁷. The Civil Code of China continues to adopt this model.

18. Prior to the enactment of the Property Law of China, the method of transferring the ownership of property was stipulated in the General Principles of Civil Law of China (adopted in 1986 and expired in 2020). Its Article 72(2) stipulated: «Unless the Law stipulates otherwise or the parties concerned have agreed on other arrangements, the Ownership of property obtained by Contract or by other Lawful means shall be transferred simultaneously with the property itself». This clause does not distinguish between movable and immovable property.

19. However, this clause contains the flexibility provision "Unless the Law stipulates otherwise". This provision refers to the provisions in other laws. For example, the article 6 of the Regulations on the Management of Urban Private Houses (Issued by State Council in 1983) stated: «The owner of urban private house shall go through the procedures of ownership registration at the housing management authority where the house is located, and obtain a certificate of house property ownership after examination and verification. In the event that the ownership of the house is to be transferred, the present state of the houses is to be changed, the house owner must go through the registration procedures for the transfer of the ownership, or for other changes, at the administrative department for real estate in the place where the said house is located. For urban private houses jointly owned by several people, the house owner shall obtain the certificate of undivided co-ownership or divided co-ownership of the house». The article 60 of Urban Real Estate Administration Law of China (implemented from 1995) provided that: «The State practices the registration and certificate issuances system for the right to use land and title to a housing property».

20. These laws stipulated from the perspective of administrative management that the changes in the real rights of real estate must be registered. But strictly speaking, from a civil point of view, as for the effects of the registration in the change of real rights, it was not certain, until the promulgation of the Property Law of China.

2. The intentionalism of the creditor's right applied for the change of some real rights

21. The formalism of creditor's right is adopted as the model of the transfer of ownership of property based on juristic acts. The intentionalism of creditor's right is adopted for the change in some other real rights. For example, the constitution of the mortgage on personal property: «Where a movable is mortgaged, mortgage is created at the time when the mortgage contract becomes valid; and if it is not registered, it shall not be set up against a bona fide third party»¹⁸. The registration is the element of effectiveness against a bona fide third party in this case. In addition, since the ownership of the land belongs to the state, with respect to the creation of the conventional usufruct on rural land for agricultural operations¹⁹, the creation of Servitude²⁰, the Civil Code of China adopts the model of intentionalism of creditor's right.

¹⁷ L. HUIXING, *Real Right Law*, the fifth edition, Law Press, Beijing, 2010, p.81.

¹⁸ Article 403 of Civil Code of China (2020): A mortgage on movable property shall be created at the time when the mortgage contract enters into effect; without registration, such a mortgage may not be asserted against a bona fide third person.

¹⁹ Article 333 of Civil Code of China (2020): A right to contractual management of land is created at the time when the contract on the right to contractual management of land enters into effect.

²⁰ Article 374 of Civil Code of China (2020): An easement is created at the time the easement contract enters into effect. Where the parties request for registration, applications may be filed with the registration authority for the registration of the easement; without registration, such an easement may not be asserted against a bona fide third person.

IV. The Registration of Ownership of Immovable Property and Its Effects

1. The value of real estate registration in Chinese civil law

22. The article 605 of the Spanish Civil Code states that «*El Registro de la Propiedad tiene por objeto la inscripción o anotación de los actos y contratos relativos al dominio y demás derechos reales sobre bienes inmuebles*». Regarding the value of the registration of real estate in Spanish civil law, Tartière says: «*En el sistema español, como regla general, la inscripción no es factor esencial, constitutivo, para que se produzca la constitución o transmisión de los derechos reales inmobiliarios: la inscripción cumpliría, pues, una función de publicidad... el principio de inscripción lo sería de oponibilidad, aspecto este en cuya virtud todas las situaciones jurídicas inscritas alcanzarían eficacia jurídico-real, eficacia frente a terceros, sin que estos puedan alegar el desconocimiento de lo publicado, la falta de directa o personal consulta a los libros del Registro*»²¹. In Spanish civil law, «*la fehaciencia pública se organizó en un doble sistema: notarial y registral*»²². The registration system can create a legal system with a public guarantee of true title.

23. In Chinese civil law, as M. JUNJU said: «The registration is the act of the state registration authority to record and examine the facts of the creation, modification, transfer, disposal and extinction of the real rights of immovable property and special movable property between civil subjects, and to give them legal effectiveness by law»²³. As a comparison, the notarization system of China is simply to ensure the authenticity and legality of a legal act, a document or a fact²⁴. In addition to guaranteeing the authenticity and reliability of the registered title in real estate transactions, the registration of real estate in Chinese civil law is also a constituent element of transferring the ownership of real estate: «The various changes in real rights require not only juristic acts of the parties, but also the registration, and these dual legal facts of juristic act and registration determine the effectiveness of the changes of real right»²⁵.

24. That is to say, the real estate transaction is completed after the registrant in the register of immovables changes from the seller to the buyer, and at the same time the ownership of the real estate as the subject matter of the sales contract is transferred from the seller to the buyer. In this function, the registration system in Chinese civil law is the same as the registration system in the German civil law, «*se ordena la inscripción constitutiva, de suerte que no existe modificación jurídico real sin que se proceda previamente a la inscripción*»²⁶. In other words, «*...un negocio jurídico sobre bienes inmuebles no está completamente en regla mientras le faltaba la inscripción en los libros oficiales, de que, por ejemplo, una transmisión de propiedad sin inscripción no era una verdadera transmisión*»²⁷, which is different from Spanish civil law. Generally speaking, in Spanish civil law, the registration is not constitutive.

2. The characteristics of the registration of real estate in Chinese civil law

The registration of real estate in the Civil Code of China has the following characteristics:

²¹ G. DE REINA TARTIÈRE, *El derecho registral inmobiliario y el registro de la propiedad*, La Notaria, 2012(2), pp.53-54.

²² J. A. ÁLVAREZ CAPEROCHIPI, *El registro de la propiedad y el sistema de las preferencias crediticias*, Editorial: Comares, (Granada), 1995, p.1.

²³ M.JUNJU/ Y.YANMAN, *The theory of civil law*, forth edition, Law press, (Bei Jing), 2010, p.310.

²⁴ Article 2 of Notarization Law of the People's Republic of China: «*Notarization means the act performed by a notarial institution, upon the application of a natural person, legal person or other organization and following statutory procedures, to certify the authenticity and legality of a civil juristic act or a fact or document of legal significance*». (https://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474983042417.htm)

²⁵ Interpretation of the Civil Code of the People's Republic of China, Edited by Huang Wei, Law Press, 2020, p.415.

²⁶ M. MEDINA DE LEMUS, *Derecho civil. Tomo III, Derechos Reales e Inmobiliario Registral*, Editorial: Dilex, (Paracuellos del Jarama), 2006, p.263.

²⁷ J. W. HEDEMANN, *Tratado de derecho civil vol. II. derechos reales*, Editorial: Revista de Derecho Privado, (Madrid), 1955, p.77.

25. Publicness. One function of the registration is to make the rights clearly defined and protect the security of transactions. Therefore, the information of the registration should be made public, which is an important feature that the registration is different from the notarization and the administrative approval in Chinese laws²⁸. Similarly, the publicity of registry in Spain is also of great importance. The registration in Spanish civil law has the similar purpose. As Luelmo says, «*se puede definir el Registro de la Propiedad como la institución destinada a dar publicidad de la situación jurídica de los inmuebles, con la finalidad de proteger el tráfico jurídico*»²⁹.

26. Entitlement. Laws often confer registered rights the effect of being effective against a bona fide third party. Or take the registration as an element for the transfer of ownership of immovable property. The registration completed has binding force on the parties in the acquisition and the forming of the real right. At this point, it is different from the notarization³⁰.

27. Formality. If the parties have reached an agreement on the transfer of the ownership and the legal conditions required for registration are met, the registration authority shall carry out the registration in accordance with legal procedures. The examination of the registration authority is limited to the scope of the applicant's application, and is mainly based on written examination, which has the characteristics of formalism. This is different from the administrative approval³¹.

3. legal effects of the registration of real estate

28. In the Civil Code of China, the registration of real estate has at least the following legal effects: a condition for the validity of the transfer of ownership of real estate; publication and credibility; the presumption of the correctness of real rights; the effectiveness of prioritized protection.

A) A condition for the validity of the transfer of ownership of real estate

29. In German civil law, the principle of registration means that «*la inscripción es un presupuesto para la adquisición del derecho. No hay adquisición sin inscripción*»³². With regard to the transfer of ownership of immovable property by juristic acts, this principle is also followed by Chinese civil law. According to article 209 of Civil Code of China: «The creation, modification, transfer, or extinction of a real right in an immovable shall become valid after it is registered in accordance with the law; it shall have no binding force if it is not registered in accordance with the law, except as otherwise provided for by any law. The ownership of natural resources belonging to the state in accordance with the law is not required to be registered».

However, the registered ownership of real estate may not coincide with to the true state of the right. The reason for this non-conformity may be a registration error, or the act of creditor's right which is the cause of the transfer of the ownership is invalid, etc. The idealized goal of the principle of registration is: even so, «only registered rights rather than factual rights perform the transactional function of the ownership of real estate»³³, «only the transactions of registered rights are recognized the transactions of correct rights and protected by law»³⁴.

²⁸ M.JUNJU/ Y.YANMAN, *The theory of civil law*, forth edition, Law press, (Bei Jing), 2010, p.310.

²⁹ A.DOMÍNGUEZ LUELMO, *Comentarios a la ley hipotecaria*, 3ª edición, Editorial: Thomson Reuters Aranzadi, (Navarra), 2019, p.48.

³⁰ The notarization system of China is simply to ensure the authenticity and legality of a legal act, a document or a fact.

³¹ In the procedure of administrative approval, the administrative authority should examine the substance of the matter in order to determine whether to approve the application.

³² J. W. HEDEMANN, *Tratado de derecho civil vol. II. derechos reales*, Editorial: Revista de Derecho Privado, (Madrid), 1955, p.116.

³³ S. XIANZHONG, *Contemporary German Real Right Law*, Law Press China, (Bei Jing), 1997, p.135.

³⁴ S. XIANZHONG, *Contemporary German Real Right Law*, Law Press China, (Bei Jing), 1997, p.135.

B) Publication and credibility

30. Since the real right is the absolute right, the transfer of ownership will affect the interests of the third party. Therefore, the transfer must be published in a certain way to protect the interests of the third party: «Real rights and the publication are inseparable, the publication is the basis of real rights. Therefore, the principle of publication is a basic principle of the real rights system. The registration is the basic means of publication of real rights of immovable. Through the registration, the third party can know the information of the transfer of real rights, which not only creates a credibility of the changes in rights and makes the new right a clean right. More importantly, it enables third parties to know the state of the rights and whether there are burdens on the rights through registration, which could provide a risk warning for the parties involved in the transactions, so that they can decide whether to engage in the transactions with the registered right holder»³⁵.

Based on this idea, in terms of the dynamic publication of real rights, the article 214 of the Civil Code of China provides: «The creation, modification, transfer, or extinction of the real right in an immovable shall, if it shall be registered in accordance with the provisions of laws, become valid from the time when it is recorded in the register of immovables». In terms of static publication of real rights, the article 216 of the Civil Code of China provides that: «The register of immovables is the basis for determining the attribution and content of a real right. The register of immovables shall be managed by the registration authority».

C) The presumption of the correctness of real rights

31. In the understanding of Chinese authors, the presumption of correctness of registration means that once the ownership of real estate has been registered, the registered ownership will be presumed to represent the true state of the ownership of the real estate. The registered right holder is the true owner of the real estate. This understanding in Chinese civil law is affected by German civil law. In German Civil Code, the presumption of correctness of the registration is reflected in the article 891: «(1) *Ist im Grundbuch für jemand ein Recht eingetragen, so wird vermutet, dass ihm das Recht zustehe.* (2) *Ist im Grundbuch ein eingetragenes Recht gelöscht, so wird vermutet, dass das Recht nicht besteht*». In Spanish civil law, the similar idea is embodied in the article 38 of *la Ley Hipotecaria*: «*A todos los efectos legales se presumirá que los derechos reales inscritos en el Registro existen y pertenecen a su titular en la forma determinada por el asiento respectivo*».

The principle of presumption of correctness of registration in Chinese civil law is stipulated in Article 217 of the Civil Code of China: «The certificate of ownership of an immovable is the certificate proving that the right holder is entitled to the real right in the immovable. The items recorded in the certificate of ownership of the immovable shall be consistent with those recorded in the register of immovables; in the case of any discrepancy, the item recorded in the register of immovables shall prevail, except that there is any evidence to prove that there is any error in the item». Thus, on the one hand, when it is recorded in the register of immovables that a person enjoys a certain real right, this person is to be presumed that is the correct owner of that right, and the content of his right is also subject to what is the record in the register. On the other hand, «the presumptive ability of the register of immovables is only limited to a presumption of right, and the first paragraph of the article 16 of the Property Law (article 216 of the Civil Code of China) is only a norm that allocates the burden of proof, so that this presumption is not final, definitive and irrebuttable»³⁶.

³⁵ H. SONGYOU, *Understanding and application of the provisions of the "Property Law of the People's Republic of China"*, People's Court Press, (Beijing), 2007, p.83.

³⁶ C. XIAO, *Presumptive correctness of real estate register*, Chinese Journal of Law, No.8(2005), p.106.

D) The effectiveness of prioritized protection

32. As says Wang Zejian: «Several real rights with the same content are not allowed to coexist in the same subject matter, and the real right that occurred first has priority»³⁷. According to the article 415 of Civil Code of China: «Where both a mortgage and a pledge are created on the same property, the priority order of payment with the proceeds obtained from auction or sale of the property shall be based on the priority in time of registration and delivery of the property».

V. The Role of the Delivery in Real Estate Transactions in Chinese civil law

1. The delivery cannot produce the effect of transferring the ownership of immovable.

33. According to the article 209(1) of the Civil Code of China: «The creation, modification, transfer, or extinction of a real right in an immovable shall become valid after it is registered in accordance with the law; it shall have no binding force if it is not registered in accordance with the law, except as otherwise provided for by any law». That means, with few exceptions, the registration is the decisive criterion for the creation and the transfer of ownership of real estate. The exceptions include:

34. First, the ownership of property owned by the state as provided for by laws does not need to be registered. The paragraph 2 of article 209 of the Civil Code of China says: «The ownership of natural resources belonging to the state in accordance with the law is not required to be registered». But at the same time, the ownership of natural resources belonging to the State cannot be transferred. According to the article 242 of the Civil Code of China: «No organization or individual may acquire the ownership of an immovable or movable exclusively owned by the state as provided for by laws».

35. Second, the real rights of property owned collectively are transferred through contract. As paragraph 2 of the article 330 of the Civil Code of China says: «The system of land contracting for agricultural operations shall, in accordance with the law, be applied to arable land, forest land, grassland and other land for agricultural use, which are owned by farmers collectively. or owned by the state but are used by farmers collectively». According to paragraph 1 of the article 333 of the Civil Code of China: «A conventional usufruct on rural land for agricultural operations shall be created from the date when the contract for the usufruct on rural land for agricultural operations becomes valid», and the article 335 of the Civil Code of China stipulates: «In case of the exchange or transfer of the conventional usufruct on rural land for agricultural operations, the party may apply to the registration authority for registration; and if it is not registered, it shall not be set up against a bona fide third party». The conventional usufruct of rural land for agricultural exploitation in China is created and transmitted through signing the contract, the registration is the element of resistance to third parties.

36. Third, the transfer of ownership of real estate that is not produced by juristic acts does not require registration. As the article 229 of the Civil Code of China says: «Where a real right is created, modified, transferred, or extinguished in accordance with the legal document of a people's court or an arbitration institution or an expropriation decision made by a people's government, among others, it shall have binding force from the time when the legal document or expropriation decision, among others, becomes valid». The article 230 of the Civil Code of China says: «Where a real right is acquired through succession, it shall have binding force from the time of succession».

37. In these methods for the transfer of ownership or other real rights of real estate, there is no legal provision directly stipulating that the delivery can transfer real rights of real estate.

³⁷ W. ZEJIAN, *The Real Right in Civil Law*, China University of Political Science and Law Press, 2001, p.62.

2. The delivery is an obligation of the seller of real estate

38. According to the article 598 of the Civil Code of China: «A seller shall perform its obligation of delivering the subject matter or the documents for taking delivery thereof, and transferring the ownership over the subject matter to the buyer». It is generally agreed that «the delivery is a basic obligation of the seller alongside the obligation to transfer the title of the subject matter»³⁸. From the literal expression of the clause, it does not distinguish between movable and immovable property. That is to say, the obligation of delivery stipulated in this article also apply to the delivery of immovable property.

This understanding could have practical implications in the discussion of some issues. For example, the article 188 of Civil Code of China stipulates: «The limitation period for a person to request the people's court to protect his civil-law rights is three years, unless otherwise provided by law». Does this extinctive prescription apply to a buyer's claim for registration after the delivery of immovable property? It has been argued that the registration is a subordinate obligation as compared to the obligation of delivery as the main obligation. Thus, the claim for registration is not subject to the prescriptive period³⁹. However, if the registration represents a transfer of title to immovable property, the textual expression of the article 598 does not support this view.

3. The delivery marks that the risk passes from the seller to the buyer

39. According to the article 604 of the Civil Code of China: «The risk of damage to or loss of a subject matter shall be borne by the seller prior to the delivery of the subject matter and by the buyer after delivery, except as otherwise stipulated by law or agreed upon by the parties». And according to the article 605 of the Civil Code of China: «Where a subject matter fails to be delivered within the agreed time limit owing to the buyer's reason, the buyer shall bear the risks of destruction, damage, or loss of the subject matter from the time he breaches the agreement».

The delivery results in the transfer of the risk of damage or loss of the subject matter of the contract. Furthermore, this article does not distinguish between movable and immovable property, assuming that this rule applies to both movable and immovable property. As Cui Jianyuan said, «as long as the real estate is delivered to the buyer, even if the registration of the transfer has not been completed, the risk of loss will be transferred to the buyer»⁴⁰.

40. The risk of loss of or damage to the subject matter has passed, but title has not yet transferred. The seller will remain the owner of the subject matter. If the subject matter is lost or damaged, the loss should be borne by the buyer. A problem that can arise is that if a third party, such as an insurance company, is obligated to make compensation or indemnification, then to whom will this third party compensate or indemnify? In accordance with the idea of the unity of right and risk, it is the buyer that should receive the payment of compensation or indemnity. However, since the legal owner of the immovable property is still the seller and, moreover, the insurance contract was signed by the third party directly with the seller, logically, normally the third party will first pay the compensation or indemnification to the seller.

4. The delivery determines the attribution of the fruits of immovable property

41. According to the article 630 of the Civil Code of China: «Any proceeds accrued from the subject matter before delivery shall belong to the seller and any proceeds accrued from the subject matter after delivery shall belong to the buyer, unless otherwise agreed by the parties». This article adopts

³⁸ Interpretation of the Civil Code of the People's Republic of China, Edited by Huang Wei, Law Press, 2020, pp.1164-65.

³⁹ C. JIANYUAN, *Contracts of sale and purchase of houses and the limitation period*, People's Court News, 13 June 2003.

⁴⁰ C. JIANYUAN, *Contract Law*, fifth edition, Law Press, 2010, p404.

the principle of unity of risks and benefits. The principle of allocation of risk through delivery is set out in Article 604. In accordance with this principle, the article 630 links fruits and risks⁴¹.

VI. The Debate on the Effects of Delivery of Real Estate

1. The reality of the issues of the effects of delivery and possession.

42. Despite the legislative reforms of the Property Law of China (2007), which sought to establish criterion for the transfer of ownership of immovable property by adopting clearly the registration as an element of the transfer of ownership of immovable property, whether the delivery has the effect of transferring rights in real estate transactions is still discussed by scholars.

43. According to the general theory of the legislation, the buyer who only acquired the possession of the property through delivery does not have any real right over the real estate, and his possession of the immovable property is based solely on the creditor's right arising from the sales contract. However, it is still argued that even if the registration is an element of the transfer of ownership of real estate, that delivery has a certain effect of transferring some kind of right of the real estate. The buyer thereby acquires extra-contractual rights to the immovable property and the buyer's possession can resist or destroy a third party's claim to the real estate.

44. On the one hand, this is due to natural features of the possession. The possession is externally observable and recognizable, giving the society a cognitive foundation and thus gaining the recognition of moral legitimacy of the society.

On the other hand, before the enactment of the Property Law of China, although the criterion of the effect of registration lacked a clear and firm expression in the laws, it had been generally recognized as an element for the transfer of ownership of real estate⁴². Problems that have historically arisen on the issue were due to deficiencies in the registration system itself, so they will not disappear with the legislative confirmation of this system.

2. Common elements about the theories of delivery effects

These opinions mainly have two common characteristics:

45. First, recognize the existing legislative model of the transfer of ownership of real estate based on the doctrine of the effectiveness of registration. However, it is believed that the authentic interpretation of the legislation has not been fully complied with when it is implemented in practices. In judicial practices, the model of registration as an element of the transfer of ownership of immovable property has been modified, and the delivery and possession still occupy an important place in the process of transferring the ownership of real estate⁴³.

46. Second, the legislative doctrine of registration effectiveness is thought to have some disadvantages, and the value of delivery and possession has not been recognized as it should. As said C. YONGQIANG: «The traditional doctrine has fallen into an «all or nothing» mode of argument, which has prevented the buyer who has a right of intermediate form due to his possession of the immovable from being properly protected»⁴⁴. In cases of double sale of immovables, if registration is used as the sole cri-

⁴¹ Interpretation of the Civil Code of the People's Republic of China, Edited by Huang Wei, Law Press, 2020, p.1214.

⁴² See D. JUAN, *Study on the effects of real estate registration*, Journal of Tian Jin University, Jun 1999, Vol.1, No.2, pp.132-133.

⁴³ See L. JINGYUAN, *The justification of the effect of change to real rights caused by the delivery of immovables and the analysis of its opposing effect*, Political science and law, Issue 10, 2015, p.30.

⁴⁴ C. YONGQIANG, *Protection of the rights of a buyer who possessed a house but has not registered it*, Global law review, Issue 3, 2013, p.60.

terion for judging who owns the real estate, the value of delivery and possession will not be recognized. This will result in a buyer who is already in legal possession of the real estate will be treated in the same way as other unregistered buyers who have only signed a contract with the seller. These views are based on emphasizing the tension between the judicial reality and the ideality of the legislative theories, which requires that the legislative dogma be revised to varying degrees in judicial practices.

3. The registration as a necessary but not sufficient condition for the transfer of ownership of real estate

47. The registration is seen as a necessary condition for the transfer of ownership of real estate, however, not as a sufficient condition. In other words, although the transfer of ownership of immovable property under the Civil Code of China must be registered to be effective, the registration does not necessarily mean that the ownership of the real estate can be acquired by the buyer. In accordance with the characterization of the registration according to the provisions of the Civil Code of China, there are several situations that can determine that after a property has already been registered, the buyer still cannot acquire the title, or the registrant is not acknowledged as the true owner.

48. The first case refers to the assumption in which the contract is invalid. Due to the fact that the abstract theory of real right is not accepted by Chinese civil law doctrine, the contract is still the cause of the transfer of ownership. The validity of the transfer of ownership still depends on the validity of the contract, and the invalidity of the contract will result in the transfer of the title also invalid⁴⁵.

49. The second possible situation is that it was later proved that the seller did not have the title of the real estate. So that even if the buyer has changed the registration from the seller, he cannot acquire the ownership of the real estate⁴⁶. Unless his registration fulfills the conditions of bona fide acquisition, he will be able to acquire the ownership of immovable property through the system of bona fide acquisition based on the protection of the public credibility of the registration.

50. The third anomalous situation derives from the fact that the procedures by which the buyer obtains the registration is inherently flawed. This will also be the target of attacks, especially when the interests of a third party are deemed to have been prejudiced, resulting in the registration being seen as lacking legitimacy⁴⁷. For example, the buyer's registration itself is defective, such as failing to comply with legal procedures or requirements, or even completing the registration through illegal methods, such as providing false materials.

51. Therefore, the ideal goal of the system of real estate registration, which is to provide clear and unified criteria for judicial judgments, can only be achieved in simple cases. In cases of ownership dispute which are more complicated, especially when involving a third party to claim the ownership of the real estate, the validity of the sales contract, whether the seller had the ownership to sell the real estate, and the legality of the registration procedures will all become precisely the focus of the dispute.

⁴⁵ Article 157 of Civil Code of China (2020): Where a civil juristic act is void, revoked, or is determined to have no legal effect, the property thus obtained by a person as a result of the act shall be returned, or compensation be made based on the appraised value of the property if it is impossible or unnecessary to return the property. Unless otherwise provided by law, the loss thus incurred upon the other party shall be compensated by the party at fault, or, if both parties are at fault, by the parties proportionally.

⁴⁶ Article 597 of Civil Code of China (2020): If the ownership of a subject matter is unable to be transferred owing to the fact that the seller fails to obtain the right of disposal, the buyer may rescind the contract and request the seller to bear default liability.

⁴⁷ Article 222 of Civil Code of China (2020): A party who provides false materials upon application for registration and thus causes damage to another person shall be liable for compensation. Where damage is caused to another person due to a clerical error upon registration, the registration authority shall be liable for compensation. After having made such compensation, the registration authority has the right to indemnification against the person who has made the error.

52. At such a time, the register of immovables does not turn out to be a clear guide to determine the ownership of the real estate. In general, the court should no longer rely solely on the register to identify the registrant as the true owner of the real estate, but should check the entire transaction process to determine if there is a situation for which the registration should be denied, or verify the evidence fully to determine who is the real owner, or more qualified to be the owner between the third party and the registrant. As expressed in the Supreme Court's judgment: «In litigation, the certificate of ownership an immovable has only a probative function, and in cases where there is evidence that the real state of rights to the immovable does not correspond to that recorded in the certificate of ownership of the immovable, the real state of rights should be confirmed in accordance with the law»⁴⁸.

4. Publication and refutability of registered real rights.

53. The registration has the effect of publicizing the ownership and the presumption of its correctness. This is compatible with the other side of the registration, namely that the registration is a necessary but not sufficient condition for the acquisition of the ownership of real estate, and what is registered in the register of immovables can be refuted. This creates a contrast: on the one hand, for the acquisition of real estate, the registration is constitutive, thus the register of immovables offers authoritativeness. It is not that the ownership is first acquired and then outwardly publicized through the registration, but the registration is a condition of obtaining the real estate, which means that the ownership of real estate is obtained at the same time as the registration. However, on the other hand, the registration is reduced to a kind of proof element: the registration only provides a certification to the registrant, which proves that he is the owner of the real estate.

The former is intended to emphasize the authority and the certainty of the registration, but the latter can obviously weaken it: if the registration is only an evidentiary mechanism, even if it has the presumptive effect, the evidence itself will imply that it is of factual nature and refutable. As long as there is other evidence to the contrary, its weight of proof and authoritativeness can be undermined or revoked.

54. Although it is considered that the registration of real estate is the evidence that has preferential effect. «The statements in the register of immovables have much higher weight of proof in determining the ownership of real rights than other evidence... On the other hand, since it is a fictional fact, the state of rights demonstrated in the register of immovable does not always necessarily reflect the true real right relationship of immovable. And then the parties should be allowed to disprove the state of real rights demonstrated in the register of immovables by way of proof. Therefore, in civil proceedings, the attribution of real rights of immovables should be comprehensively determined in accordance with the provisions of the Civil Procedure Law and its judicial interpretations on the rules of evidence and the burden of proof»⁴⁹.

VII. Unicity of the effect of registration and concept of social equity.

1. The unicity of the registration effect.

55. According to the legislative doctrine of the effect of the registration for the transfer of the ownership of immovables, the registration is characterized by being singular for this purpose. That is, the buyer obtains the ownership of the real estate after registering, and before registering does not have

⁴⁸ Lanzhou Taisheng Real Estate Development Co., Ltd. and Jingtai County People's Government, Jingtai County No. 5 Middle School, Dispute over Contract, (2013) Civil Final Judgment No. 45, Supreme People's Court.

⁴⁹ «Further improving the degree of legalisation to protect property rights and the safety and efficiency of market transactions: the head of the First Civil Division of the Supreme People's Court answers journalists' questions on the judicial interpretation of the Property Law», People's Court Daily, 24 February 2016. *Collection of Judicial Views of the Supreme People's Court*, Civil Vol. I, China Legal Publishing House, (2017), p.242.

any direct real right over the immovable⁵⁰, only has the right of claim of obligatory nature based on the sales contract. During the performance of the contract, from the signing of the contract to the completion of the registration procedures, the buyer has neither the ownership of the real estate nor any other real rights. The possible legal consequences of this conclusion in certain cases will severely conflict with people's notions of fairness in current trading environment.

56. For example, a point of contention is the separation of ownership and the burden of risk after delivery: the buyer must bear the responsibility for the risk of loss of the subject matter that does not belong to him. The authors who hold a critical view argue that this responsibility cannot be justified if the buyer does not have the ownership of the immovable: «If the risk of the subject matter is borne by the possessor, it is highly likely that the possessor will only have the right to possess and use the property without acquiring the ownership, but he will then bear the risk that should have been borne by the person with title. This method of risk allocation lacks a right basis»⁵¹.

57. This debate is not just a theoretical game but has important practical implications. Since the seller remains the owner of the real estate, after delivery, the risk of loss of the immovable will be borne by the buyer, but logically the damages or insurance compensation due to the loss of the immovable will be paid directly to the owner. This makes it difficult for the court to find a direct basis in positive law to make a judgment in favor of the buyer. Although the court can always decide, through indirect reasoning, that the replacement value of the lost real estate finally be paid to the buyer. But the reasoning behind these judgments is always often conclusion-oriented. That is to say, certain conclusion is reached first on other grounds, and then the reasoning is carried out in order to obtain this particular conclusion, bypassing the obvious and direct logical reasoning. Such reasoning is often difficult to be logically consistent, using arguments that are not solid.

2. The problem that the acquisitive prescription is not recognized in Chinese civil law

58. The possession can show the social order of properties in a more direct and intuitive way, especially the possession based on legitimate reasons, which carries considerable weight in the concept of social justice. Reflected in the legal system, in some civil law countries, their civil laws contain a system of acquisitive prescription. «*La usucapión es un modo de adquirir la propiedad u otro derecho real, mediante el ejercicio de la posesión, (provista de ciertos requisitos) durante un tiempo previamente determinado*»⁵². «*Cuando se dan determinados requisitos y transcurren los plazos legales, acaba triunfando respecto de la propiedad u otro derecho real y generando un derecho real nuevo en cabeza del usucapiente*»⁵³. Once the possession is of *bona fide* and has continued uninterrupted for a specified period of time, the possessor can obtain ownership of the real estate. This establishes a direct connection between the possession in the transaction and the acquisition of ownership of the subject matter possessed.

59. For example, the article 609 of Spanish Civil Code stipulates: «*La propiedad y los demás derechos sobre los bienes... Pueden también adquirirse por medio de la prescripción*». And the article 1957 of the Spanish Civil Code says: «*El dominio y demás derechos reales sobre bienes inmuebles se prescriben por la posesión durante diez años entre presentes y veinte entre ausentes, con buena fe y justo título*». The article 2258 of the French Civil Code establishes: «*La prescription acquisitive est un moyen d'acquérir un bien ou un droit par l'effet de la possession sans que celui qui l'allègue soit obligé*

⁵⁰ See C. YONGQIANG, On a theory of three-stage of change to the ownership, *Studies in Law and Business*, Issue 4, 2013, p. 127.

⁵¹ Z. JIAYI/ C. HUATING, "Delivery" and "shift of risk" in the Chinese sales contract, *Studies in Law and Business*, No.2(2003), p.78.

⁵² A. HERNÁNDEZ GIL, *La posesión como institución jurídica y social*, Editorial: Espasa-Calpe, (Madrid), 1987, p.358.

⁵³ MORENO-TORRES HERRERA, *La usucapión*, Editorial: Marcial Pons, (Madrid), 2012, p.75.

d'en rapporter un titre ou qu'on puisse lui opposer l'exception déduite de la mauvaise foi»⁵⁴. This article gives a definition of acquisitive prescription. At the same time, its article 2272 stipulates: «*Le délai de prescription requis pour acquérir la propriété immobilière est de trente ans. Toutefois, celui qui acquiert de bonne foi et par juste titre un immeuble en prescrit la propriété par dix ans*»⁵⁵.

60. A central element of the acquisitive prescription is the possession. The acquisitive prescription is a consequence of protection granted to the possessor. In essence, the acquisitive prescription is a system that maintains the established social order of properties. As Philippe Malaurie and Laurent Aynès said: «*L'usucapion est une institution d'ordre social: elle interdit la prolongation indéfinie d'un divorce entre la possession et le droit de propriété, en faisant coïncider, après un certain temps, le droit et le fait*»⁵⁶.

61. Under a legislative system with an acquisitive prescription system, «*en caso de confrontación entre un comprador que ya ha poseído tiempo suficiente para consumir una prescripción, y otro comprador, aunque sea titular registral, será propietario el beneficiado por la usucapión*»⁵⁷. However, there is no provision for acquisitive prescription in the Civil Code of China. What the system of possession protection maintains is only a temporary factual state of possession. Therefore, in the real estate transaction, no matter how long the buyer has possessed the real estate, the basis of his possession is always the creditor's rights provided by the sales contract. It is impossible for time to give the possessor any direct real right to the subject matter. In Chinese civil law, the connection between the possession of the buyer and the ownership of the real estate is completely disconnected.

62. In addition, due to the nature of the registration as a necessary and unique element, the legislative doctrine of its effectiveness will incidentally produce some inferential effects. According to the legislative doctrine of the registration, a buyer who already has the possession of the real estate by delivery, even if he has held such possession for a quite long time, when faced with a claim by a third party to certain rights - creditor's rights or real rights - of the real estate, he will not have any legal advantage to defend against such a claim.

This situation often contradicts notions of social equity. Although these notions of fairness may be intuitive, they can be powerful. As a result, when a court is faced with such cases, it often adopts a method of distorting the usual legislative doctrine to achieve the ultimate goal of protecting the interests of the buyer in possession of the immovable.

3. Identification of the true owner outside the registration

63. Since the registration can be voided, a direct result of this is that the registrant may end up being not recognized as the true owner of the real estate. For example, if the contract between the seller and the buyer is not valid, logically, even if the buyer has registered his name in the register of immovables, the nullity of the sales contract will prevent the buyer from obtaining the ownership of the real estate. In this case, even if the buyer has registered the immovable property in his name, he has never obtained ownership of the real estate and the true owner has always been the seller of the real estate.

64. The concept of the true owner is often used in judicial practices to differentiate it from the registered owner. As a conclusion and guide to judicial practices, the Supreme People's Court expressed in article 2 of the judicial interpretation: «Where a party has evidence that the information recorded in a register of immovable property is inconsistent with the true status of a right and the party is the true

⁵⁴ <https://www.legifrance.gouv.fr/codes/id/LEGIARTI000019017143/2008-06-19>

⁵⁵ <https://www.legifrance.gouv.fr/codes/id/LEGIARTI000019017143/2008-06-19>

⁵⁶ P.MALAURIE/ L. AYNÈS, *Cours de droit civil: les biens*, Editorial: Cujas, (Paris), 1990, p.146.

⁵⁷ C. SANCIÑENA ASURMENDI, *La usucapión inmobiliaria*, 1ª edición, Editorial: Aranzadi Thomson Reuters, 2009, p.278.

holder of the real right in the immovable, the party's request for confirmation of the party's real right in the immovable shall be supported»⁵⁸.

65. The judicial interpretation above can easily lead to confusions. For the public they may wonder whether it is still necessary to keep an eye on the existence of a true owner outside of the register. Does this mean that there is an increased obligation on those who want to transact with the registrant? But perhaps this is exactly what the judicial interpretation intends to mean: there may be a separation of the true owner from the registered owner of the real estate. In a case⁵⁹, Beijing High Court made a distinction between real right *de jure* and real right *de facto*. This seems to be contrary to the basic principle of the property law: one property one right.

66. Under the shelter of this interpretation, as long as the non-registrant can prove that he is the true owner of the immovable, he is able to challenge the registration⁶⁰. The effectiveness of the registration will be weakened, the presumption that the registrant is the owner can no longer be relied upon as the starting point for the legal actions of others. This will encourage the non-registrant, as a plaintiff, to put all his effort into demonstrating that he is the true owner of the immovable. Especially when a third party as a non-registrant claiming the ownership is involved, the burden of proof and the relationship of rights in relation to immovable property between the so-called true owner and the third party can change subtly but profoundly. When the extension of true ownership expands unconsciously, even the buyer of the immovable property who has possessed but not registered possibly claim to be the true owner. This sometimes just facilitates the judge providing him with a convenient way of argumentation to achieve the judgement he expects.

67. This concept of true owner has a tendency to be used in a generalized way, resulting in a weakening of the effectiveness of registration. When there is just a simple dispute, the registration is a registration, but once complicated disputes arise, the registration is likely to be easily disposed of for a specific purpose.

For example, in the case of Lanzhou Taisheng Real Estate Development Co., Ltd. v. the People's Government of the Jingtai District, The Supreme People's Court held that: «The certificate of ownership of an immovable is the certificate proving that the right holder is entitled to the real right in the immovable. The certificate of ownership of an immovable does not have the function of representing the real right in an immovable, its function is only to prove that the legal fact or legal act recorded in the certificate have occurred. And the existence or non-existence of the certificate cannot directly determine the existence or non-existence of the substantive legal relationship. Therefore, in the proceedings, the certificate of ownership of an immovable only serves as proof, and in the event that there is other evidence to prove that the actual state of rights in the immovable does not correspond to that recorded in the certificate of ownership of the immovable, the actual state of rights shall be confirmed in accordance with the law»⁶¹.

68. In this judicial opinion, the registration is merely a piece of evidence. In reality, this greatly increases the possibility of deviating from the original standard of property law. According to the legislation on the ownership of real estate, the registration is a constitutive element for the acquisition of real estate. After the registration becomes just an instrument of proof, a convenient door is opened, and the

⁵⁸ *Interpretation I of the Supreme People's Court on Several Issues concerning the Application of the Property Law of the People's Republic of China*, Interpretation No.5 [2016] of the Supreme People's Court.

⁵⁹ W. CHONGFAN/Z. LEI, Appeal Case on Dispute over Ownership Confirmation, No.862 (2008), Final, the Civil Trial of the Beijing Municipal High People's Court.

⁶⁰ L. DEQUAN, *Collection of Judicial Views of the Supreme People's Court*, Civil Vol. III, China Legal Publishing House, 2017, p.243.

⁶¹ Lanzhou Taisheng Real Estate Development Co., Ltd. v. The People's Government of Jingtai District, appeal case regarding dispute over a sales contract, Civil Judgment No.45 (2013) of Supreme Court.

configuration of the true ownership can be recognized outside the register of immovables. In this way, the Supreme People's Court has publicly emphasized the role of the possession of real estate⁶².

4. The ideal of the effectiveness of registration is difficult to be realized in judicial reality

69. The ideal that the legislative doctrine of the effectiveness of registration pursued in its conception is difficult to realize it in judicial reality in the way that remains its original essence. The disadvantage of the role of the registration regarding the transfer of ownership is that it is very easy to deviate due to concurrent circumstances.

70. In some cases that the buyer has already possessed the immovable for a long time, it is very likely that the concept of fairness will have an influence on the judicial decision, making it difficult to fully implement the legislative doctrine of the effectiveness of the registration⁶³. In addition, due to the lack of necessary theoretical content between the contract and the registration as a buffer zone, the judicial precedents that do not conform to that legislative doctrine, and the theories developed with the accumulation of these cases, are the factors that make it more difficult for the application of the legislative doctrine. This leads to directly questioning the effectiveness of the registration in different ways, which in turn leads to damage to the ideal of uniformity and the authoritativeness of the registration.

71. In terms of legislative design, the registration is constitutive. That means, as long as the two elements of the registration and the valid sales contract have been met, the effect of the transfer of ownership of the real estate is determined. Even if the seller has no actual ownership of the immovable, because the seller is the registrant, the buyer is protected by the system of bona fide acquisition and can obtain the ownership. However, the constitutive effect of registration has been weakened in many court cases, which has logically led to the dilution of the value of the registration. The presumption of registration has been changed and its effect has been reduced to *prima facie* proof of ownership.

72. This change will have a secondary effect on judicial practices, especially when there is a third party competing to claim the ownership of the immovable. For example, the court may consider that the effectiveness of the registration should be limited; or that the registrant must first undertake a further burden of proof and add more evidence to prove his ownership in addition to the registration, otherwise the effectiveness of the registration must be denied.

73. On the other hand, that is, in judicial reasoning, the registration is only a *prima facie* evidence, which can possibly lead to a preconceived denial of the registrant as the true owner. And then, since there is already the presupposition that the registrant is not the true owner, there must be some flaws in the registration or the transaction process. Moreover, when the judge believes that some evidence can show the existence of the true owner, he will be more convinced of the existence of possible flaws and they can be justified by the existence of a true owner. If the registrant has noticed this possibility of existence of a true owner, then he was not in good faith; and if the registrant did not notice it, then he was probably at fault. On the one hand, this is an inverse inference aimed at denying the registrant as the owner of the immovable; on the other hand, there may be a circular argument here to some extent.

⁶² L. DEQUAN, *The Collection of the Supreme People's Court's Judicial Rules (2nd)*, Civil Vol. III, China Legal Publishing House, 2014, p.1441.

⁶³ For example, In the case regarding dispute over contract of Shi Lu Ping v. Jiangsu Suo Yi Te Textile Co., Ltd (Civil Ruling No.44[2013], Objection to Enforcement, Changzhou), San Jing Garment Factory claimed that although the real estate had not yet been registered under the name of San Jing Garment Factory, there was no fault of San Jing Garment Factory for not registering the real estate, and San Jing Garment Factory had legally possessed, used and benefited from the real estate in accordance with the contract of real right, and had exercised all the rights of ownership in full, and the real estate was already the legal property of San Jing Garment Factory according to law. After hearing the case, the Court held that Sanjing Garment Factory's objection was valid and should be upheld.

74. One of the fundamental causes of these problems is the contradiction between the registration of real estate and the delivery: the registration has a unique status on the issue of transferring ownership of real estate, while the possession plays an important role in the concept of social justice, but the effect of delivery and possession on this issue is completely ignored by the legislator, leaving only the monologue of the registration on this matter.

75. In the traditional legislative doctrine, in transactions of real estate, the buyer either has title to the immovable after registration or has no title to it without registration. In judicial practices, this criterion is often frustrated. The courts often give the possessor a higher level of protection than that afforded by the contract, even to the extent of going very close to protection of real right. One way to solve the problem is to widen the theoretical space between the contract and the registration, to clarify the relationship between the delivery and the registration of the real estate, and to provide a theoretical basis to adequately protect the interests of the buyer in possession of the real estate without registration.