

Real Property Law and Procedure in the European Union

Annotated Draft Questionnaire

Coordinators:

*Dr. Christoph Schmid, project coordinator of the European Private Law Forum, European University Institute, Florence (Christoph.Schmid@iue.it),
Christian Hertel, director of the DNotI, German Notary Institute, Würzburg
(c.hertel@dnoti.de)*

Objectives of this Study

There is only a limited number of comparative legal studies on real property law. This may be explained by a simple reason: *Lex rei sitae* governs the legal situation of all real property transactions. As a consequence, there are fewer conflict of laws questions and jurisdictional questions than in other areas of law. If you deal with real property questions, you mostly know into which legal system you have to look for an answer. And if necessary, you will consult a local lawyer.

Against this background, why do we undertake this comparative study? Is it a mere academic exercise motivated by scientific curiosity?

First of all, indeed, we think it worthwhile to get an **overview over real property law in the enlarged Europe of 25** (even if we cannot cover all the 25 member states). Such an overview might not only interest academics, but also lawyers counselling clients on real estate transactions in other EU countries.

Secondly, we expect some form of **harmonisation of contract law** in Europe to come about in the next ten years approximately. According to recent strategy papers of the European Commission on Contract Law,¹ there will be a common frame of reference and possibly also an optional code for European Contract Law. So, the question will arise whether the sale of real property can and should be included in the optional code – or whether it should be excluded (among other reasons) due to the differences in real property law. Furthermore, the coordination of harmonised European contract law and national real property law will certainly become a problem.

Thirdly, there have been several proposals to create a **European mortgage instrument** as a 26th model which might co-exist alongside the existing national instruments. Clearly, such an instrument would facilitate cross border credit for consumers and businesses. Against this background, we will examine whether it is feasible to design such an instrument – and examine possible obstacles in real property law, civil procedure, enforcement and insolvency law.

Our study is divided into seven main parts:

In a first part, we try to establish a brief **overview over the basic concepts** of real property law in the different European legal systems: Where do you find the relevant statutes? What are the existing interests in land? Our initial assumption is that that limited interests in land are basically the same in all European countries, whereas the concept of ownership differs greatly between civil and common law countries.

The second part seeks to provide an **overview over land registration**. Here, too, we may find very different systems ranging from mere registration of documents filed with the register to the German *Grundbuch* in which registrations have constitutive effect and are protected by

¹ COM (2001) 398 final, of 11/7/2001, and COM (2003), 68 final, of 12/2/2003.

public faith (*i.e.* transactions relating to registered property are always valid even if the registration turns out to be wrong).

The third and the fourth part concern the **sale of real estate**. The third part describes the general steps in a sale of real property, thereby demonstrating the combination of substantive law (contract law and real property law) and procedural law (land registration). The fourth part delves into some special problems in the sale of real estate.

In the fifth part, we discuss the **combination of a sales and construction contract (Bauträgervertrag)**: The sale of a piece of land by a building firm which also undertakes to build a house or an apartment there.

The sixth part addresses questions of **private international law**, including practical obstacles for EU-nationals who want to acquire real property in another EU Member State.

The seventh part is devoted to **mortgages**, or more generally speaking security rights over real property.

How to answer the enclosed Questionnaire

Dear author, you can help us if you use the **formats and styles** of this file. **Therefore, please save this questionnaire in a separate file and insert your answers there (after deleting all the notes and sample information, but not the questions).**

The following questionnaire has been endowed with some **notes**. Sometimes, we have also included a brief sample answer according to German law. Thus, you might get an idea of what kind of information we are expecting.

Quotations:

If there is a **statutory rule** on the issue at stake, please cite the exact article. In the bibliography, please also indicate where the statute may be found on the Internet. If there is no internet source, please include the wording of the articles you mention in a footnote in the original language and in an English translation (which may of course be your own), or send us a copy of the corresponding articles together with your report

If there is no statutory rule on an important question, we would ask you to indicate if there is any **supreme or high court decision** on the issue concerned. If there is no decision either, please quote major **academic writings** in this area, if available. Of course, you are also welcome to indicate and quote from academic writings in other cases, particularly if case law is criticised in the literature.

Style:

Please remember that the national reports should be drafted for a legal audience which does not know your national legal system and which might not be able to read national legal sources. This implies that when you quote from a national source (e.g. an article from a statute or the civil code), you should always explain its contents, either in the text itself or in a footnote.

Comparative Synopsis:

We have also drafted a comparative synopsis for our final report (with some sample entries). Please also insert the solution of your country there! The synopsis is meant to be a comparative study in a nutshell, which enables the reader to find out which national report is particularly interesting on a given subject.

Missing Countries:

Due to budgetary restraints, we are not able to appoint reporters of all EU Member States. However, if you have reliable first-hand knowledge about the law of a „missing“ Member State, you are most welcome to insert this information in the comparative synopsis as well.

Legal Terms:

In the **annex**, we have tried to give a list of some of the terms most commonly used in the questionnaire with translations in French and German (representing the other civil law languages). Please, try to stick to stick to these terms. If you think that the translation is not accurate, please send us an e-mail which indicates the translation you propose to use.

It would be helpful if you could also indicate the exact **legal terms in your language** – *in italics* in the text (or in a footnote) and a second time in the **glossary**. Thus, we might produce a useful glossary of real property law terminology as one of the results of our study.

Suggestions for Changes:

Some questions may not make any sense to you – either because the legal concepts are different in your country or we did not formulate our question clearly. In this case, please do not hesitate to contact us. Please also contact us if you feel that important information relating to your country is missing. We will of course consider to update the questionnaire in the light of your comments.

Suggestions for changes should reach us before June, 30th, 2004. After this date, a consolidated final version of the present questionnaire will be sent to all reporters if necessary.

Please **email** your questions or comments simultaneously to both coordinators:
christoph.schmid@iue.it
c.hertel@dnoti.de

1. Real Property Law – Introduction

Note: In your report, this introduction should ideally become a coherent text. Therefore, you are kindly invited to reproduce only the main headings (1.1. – 1.8.) in your text, whereas the answers to the subquestions should be integrated in the text (without repeating the questions and subheadings verbatim, as this would cause many “ruptures” in the text flow). Possibly, one paragraph in your text might thus take up a set of subquestions presented under one “dot” (“- ...”) here

1.1 General Features and Short History

The introduction of each national report should give general background information on the national rules in real property law and procedure. Points to be mentioned include:

- When were the main rules of your national real property law introduced? What have been the main reforms up to the present date? What are the relevant sources of the law as it stands now (civil code, special statutes, case law)?
- Is real property regulation uniform for the whole country or are there special rules applicable only in a certain region or to certain groups of the population? (if yes: what is the division of competencies?)
- On which constitutional foundations and/or legal and political traditions (or philosophies) are these rules based? Have there been basic policy or regime changes affecting private property (e.g. privatisation policies) in the last decades? Were they inspired by another legal system? Have the European Convention on Human Rights and/or European Community Law played a role?
- **Note:** If possible, your report should cover changes in the law up to July, 1st, 2004. Please indicate also if there are any plans for future reforms of real property law.

Note: Please find enclosed a first draft of a synopsis in which we plan to compile the information on national statutes in a single chart. Here, we would ask you to introduce only the main statutes, whereas in the bibliography you should list all the statutes you mention in your report (including a translation of the title, the publication in the official journal and, if possible, on the Internet).

1.2 Property and Estates

Note: This question addresses the different types of estates and interests in land existing in national legal systems. We assume that there is a big difference between civil law and common law concepts of ownership. Conversely, we think that limited interests in land (especially mortgages and encumbrances) are all based on ancient Roman legal concepts; therefore, they may be supposed to follow common principles.

Please find enclosed the first draft of a synopsis of how we plan to compile the information on the different types of estates and interests in land in a single chart.

1.2.1 Estate versus Property

- Under your legal system, is it possible for several persons to be „owners“ of the same real property (or to hold property rights relating to the same piece of land) other than in the form of joint ownership?
- What role, if any, do feudal rights play?

Note: This question should predominantly be relevant for the common law systems. Civil law systems normally have a concept of absolute ownership, based on Roman law. In **common law systems**, however, due to the feudal system, several persons can hold estates in the same piece of land, a “fee simple” (i.e. one person enjoying full and exclusive ownership) seems to be rather an exception. So, we would ask the reporters from the British Isles to explain the concept of estates. In addition, the Scottish reporter might tell us something about the abolition of feudal rights in **Scotland**.

1.2.2. Superficies solo cedit

- Does the ownership of a piece of land generally comprise also the ownership of all buildings erected on the land?
- What are the exceptions? Are these exceptions common?
- Can you indicate the approximate percentage of isolated ownership of buildings, i.e. without the land on which they are built (under 5% - 5-10% - 10-25% - 25-50% - more than 50%)?

1.3 Interests in Land

1.3.1. Numerus clausus

- Is there a numerus clausus of interests in land? Which interests are exclusively defined by law, and which can – and to which extent - be defined by contract?
- **Note:** We assume that all European legal systems recognize only certain types of interests in land as defined by law. Thus, whereas the parties may freely agree on contractual terms, they are limited to the interests in land as defined by law.

1.3.2. System of Interests in Land and Numerus Clausus

- Which are the different types of interests in land?

Note: In the enclosed draft synopsis, we distinguish:

- rights to use (easement) (*Nutzungsrechte*)
- security interests (*Verwertungsrechte*), i.e. mortgage and rent charge,
- pre-emption rights (*Vorkaufsrechte*)

The common law systems also distinguish legal and equitable rights – a distinction unknown to the civil law systems.

1.3.3. Servitudes (usus)

- Which are the different types of rights to use real property?

Note: Astonishingly, in most systems, there seems to be no statutory default regulation which comprises all proprietary rights to use real property. Most systems distinguish as to who is entitled to use the land:

- There are **easements in appurtenance**, i.e. to the benefit of the owner or possessor of other, especially neighbouring land (*Grunddienstbarkeit*, §§ 1018 ss. BGB). In this sense, one may speak of a dominant tenement (*herrschendes Grundstück*) and a servient tenement (*dienendes Grundstück*).
- There are **easements in gross**, i.e. to the personal benefit of another person (*beschränkte persönliche Dienstbarkeiten*, §§ 1091 ss. BGB).

The civil law systems also distinguish as to the extent of the use allowed:

- The extensive right to use is called *usufruct* or *Nießbrauch*.
- Limited rights to use are called **servitudes** (art. 578, 637 ss. CC) or *Dienstbarkeiten* (§§ 1018, 1090 BGB).

1.3.4. Mortgages and Rent Charges

- Which are the different types of mortgages? In particular: Does your system know
- accessory mortgages, i.e. mortgages whose legal existence depends on the existence of the debt to be secured?
- non-accessory mortgages, i.e. mortgages whose legal existence do not depend on the existence of the debt to be secured?
- rent charges?
- **Note:** There is a separate chapter on mortgages (chapter 6), so please indicate only the basics here. Most countries have only one (or only one important) security interest in real estate. So in England, you would just talk about the **mortgage**, in France about the **hypothèque**. Other systems, however, distinguish different security interests. Thus, **German law** divides the *Grundpfandrechte* (security interests in real estate) into the **Hypothek** (§§ 1113 ss. BGB) (the accessory type) and the **Grundschuld** (§§ 1191 ss. BGB) (the non-accessory type).

1.3.5. Rights in rem to Acquire Real Property

- Which rights in rem to acquire real property exist in your legal system?

1.3.6. Other Interests in Land

- Are there any other interests in land not yet mentioned which are rights in rem?

Note: Rank and priority notice will be treated only in chapter 2.6.

1.4 Apartment Ownership (Condominiums)

- Is there a statutory regulation on apartment ownership (condominiums)? When was it introduced? Did or do other forms of ownership of apartments or even rooms in an apartment exist?
- What is the legal construction of apartment ownership?

Note: In most countries, it seems to be joint ownership of the land, combined with individual ownership of the apartment. In others, the direct ownership of a particular room in a building exists (e.g. Czech Republic); in a third group of countries, “apartment owners” acquire a share in a co-operative, which holds the ownership of the land and the building, combined with an individual right to use the apartment which can be sold and mortgaged (e.g. Sweden, Poland).

Please also tell us if there are special rules on apartment ownership – such as in **Austria**, where no more than 2 persons may own an apartment and each of them may own only 50% (neither a bigger nor a smaller share is possible, which causes problems if there are more heirs).

- May the owners set up some agreements/rules governing their relations which are also applicable against a future owner (buyer) in case of transfer of ownership of an apartment? Are these rules registered in the land register? Are there statutory limitations on rules set up by the community of owners? In particular: May the apartment owners decide the following questions (by majority vote)?

- An apartment owner wants to use his apartment for a restaurant.
- The apartment owners want to change the distribution of the shared costs (e.g. from a per capita distribution to a distribution per square meter).
- The apartment owners want to forbid pets in the apartments.
- Can the apartment ownership right be freely mortgaged by its holder, or does he need the consent of the owners of the other apartments? How is the relation of mortgages or other interests on the apartment ownership right to mortgages and other interests in the land? What is the destiny of the apartment ownership right (or interests on it such as mortgages) in case the building is destroyed, e.g. by fire? Are there any substitute rights, e.g. on compensation payments from insurances or other sources?

1.5 Building Lease (*emphytéose* – *bail à construction*/ *Erbbaurecht*)

- Is there a statutory regulation on building leases?
- What is the legal concept? In particular: Is it a *ius in rem*?
- Who owns the house built under a building lease?
- Is the building lease usually limited to a certain time?

1.6 The Public Law Context of Real Property Transactions

- Are there significant public law restrictions on certain real property transactions including mortgages?
- Are there public subsidies and/or tax benefits aimed at promoting certain kinds of transactions? (e.g. benefits for family homes, for buildings to be rented etc.)

1.7 Brief Summary on "Real Property Law in Action"

- What is the general situation in regard to real property markets? (i.e. is there a shortage of offer? what is the role of real property as compared with other forms of housing (tenancies in particular?) are there strong local market divergences? is building (and renting or selling) houses an attractive business for landlords-investors?)
- What is the economic importance of mortgages and other limited rights in land?

Note: For example in Great Britain, it is estimated that 37% of all households are subject to some current mortgage liability.

- What is the role played by legal and other professions (notary publics, registrars, estate agents, mortgage banks etc.)? Are these professions subjected to professional rules and controls and a professional jurisdiction?
- Is real property law often enforced before courts? do - voluntary or compulsory - mechanisms of alternative dispute resolution exist and are they used in practice? are there peculiarities for the execution of judgements?
- To what extent does a fair and effective access to courts exist? (what is the situation concerning legal fees, legal access, legal aid, the average length of procedures; is there a special jurisdiction for real property law or are the ordinary courts competent? what are the possibilities of appeal?)

- How about legal certainty in real property law (are there significant gaps in the law or contradicting statutes; is there secondary literature usually accessible to all lawyers)?

Some of these issues will be discussed in more detail in cases below. Therefore, to avoid repetition, only basic features should be stated here, and references to the following parts are of course possible.

2. Land Registration

2.1 Organisation

2.1.1. Statutory basis

- What is the statutory basis for land registration?
- Is there a different system in a part of your country?

Note: E.g. in France, a system derived from the German *Grundbuch* is still in use in the departments of Haut-Rhin, Bas-Rhin and Moselle, as is the old Austrian register system in the former Austrian provinces in North-Eastern Italy. In England, Wales and Scotland there are different system for registered and unregistered land.

2.1.2. Relevant institutions

- Which institutions deal with the registration of land in your country? What are their basic competences?

Note: In this questionnaire, we use the term „land register“ as the general term. In your national report, please use the exact legal term in your own language.

E.g. in **Germany**, there are two relevant institutions: In the *Liegenschaftskataster* (cadaster), one may find a technical survey of the land. In the *Grundbuch* (land register), ownership and other legal rights in plots of land are registered, but the Grundbuch refers to the cadaster for the position, borders and size of the cadaster parcel that make up a plot of land in the Grundbuch. The notary plays an indispensable role in drafting most of the applications for registration.

2.1.3. Land register/registre foncier/Grundbuch

- How is the register structured? What (legal) training have the people working at the register authority?

Note: If there is a separate cadaster, please limit your answer to the land register where rights in land are registered.

Sample answer for Germany:

In Germany, the land register (*Grundbuch*) is a part of the court system in non-contentious matters (*Freiwillige Gerichtsbarkeit*), not an administrative authority. The register is administered by the *first instance court (Amtsgericht)* (§ 1 GBO – *Grundbuchordnung* = land register regulation)².

The registration is made by registrars (*Rechtspfleger - RpflG*) who do not have a general law degree (*Befähigung zum Richteramt - § 5 DRiG*), but who have passed a special three years legal training enabling them to work at the register (which also encompasses the company register and some matters concerning execution and succession).

2.1.4. Is all real property registered?

Note: Please indicate the percentage of registered land (less than 5% - 5-25% - 25-50% - 50-

² The *Grundbuchordnung* (Land register law) may be found on the internet, edited and updated by the German ministry of Justice: <http://bundesrecht.juris.de/bundesrecht/gbo/index.html>

Sample answer for Germany:

In Germany, all real property has to be registered in the land register (Grundbuch) (§ 3 I GBO). The only exception applies to property owned by the state, by local authorities and churches, rivers and railways: These properties are registered on the application of the owner only (§ 3 II GBO). In practice, however, most of these properties have also been registered. All in all, in practice, more than 95% of the land is registered.

2.2 Contents of Registration

2.2.1. Which data are registered?

2.2.2. Sample of Registration

- Please include (if possible as an annex to the answers to this questionnaire) a **sample copy** of a registration (rsp. an abstract of title) and explain how to read it!

Note: You might use the registration of a piece of land which is available online or scan a sample registration from any source. If possible, we would appreciate if that sample copy could be published in our study (i.e. is neither protected by privacy law nor by copyright). If it were impossible to include a sample copy in electronic format, you could also mail a paper copy to us. If none of these possibilities exists, please quote a source where a sample registration has been published. For some countries, a sample registration is available on the website of the EULIS-project (www.eulis.org).

2.3 Registration Procedure

2.3.1. Application for Registration

Please describe the application procedure:

- Is there any form required for the application for registration?
- Is it usually a lawyer or a notary who applies for the registration on behalf of the parties?

2.3.2. Duties of the Registrar

- What does the registrar control?
- How are the applicants informed about the registration?

2.4 Access to information

- Is the registration done on paper or electronically?
- How can you get access to land registration information? Is it in the public domain or is the access restricted?
- In particular: Can you get access to the register :
 - if you have a *ius in rem* in the real property,
 - if you are negotiating with the owner about the purchase of the property - or if you want to find out who owns a property in order to make him an offer for purchasing or renting the property,
 - if you have an enforceable title against a debtor and are inquiring about the existence of real property to be seized in an execution procedure,

- if a bank wants to check whether an applicant for a loan owns real property,
- if the press wants to inquire on how much real property a politician owns.-
- Can you search for information by address, by registration number of land and/or by holders of rights on it?

2.5 Substantive Effects of the Registration

- What are the substantive effects of the registration?
 - Is the registration necessary for the creation or the transfer of the right (constitutive effect) or for its opposability against third parties - or is it merely declarative?
 - Does the registration confer a presumption or proof for the existence of the right? (if this is different for different rights and interests, please give the information for each interest.
- Is the reliance in good faith on the registered rights protected?

Note: If your system requires the registration merely to render a real property right opposable to third parties, please explain this concept in detail. E.g. in France, if the owner sells the same property twice, whoever registers first becomes the new owner. Please note that further below there is also a case on the acquisition of property in good faith (4.2.2).

- Is it necessary to search for additional information apart from the content of the registration to get a full picture?
- How are parties that have relied on the information from the register (abstract of title) protected if this information proves to have been wrong?

2.6 Rank and Priority Notice

2.6.1. Rank (rang/Rang)

- How is the rank of registrations determined?
- Please quote the applicable article verbatim (and translate it into English)!

Case: Owner grants first a mortgage to A, afterwards another mortgage to B. After that, creditor C has a third mortgage registered on the same property in an execution procedure. The time of registration is as follows: First B, then C, then A. What is the respective rank of the mortgages?

2.6.2. Priority Notice

- Is there any possibility to secure a future registration (or at least its rank)?
- Please quote the applicable article verbatim or include a copy in the original language and in an English translation (if there is no Internet source).
- Is the effect of this priority notice limited to a certain period of time?

Note: In some countries, a provisional priority notice (e.g. the *anotación preventiva* in Spain) exists which is limited to a certain period of time (e.g. 60-180 days). In other countries, a priority notice is not subject to any temporal limitation (e.g. the *Vormerkung* in Germany, § 883 BGB). In a third group of countries, there is just a block to the register for a certain period (“freeze” in England, Wales and Scotland). Please explain how your system works.

3. Sale of Real Estate among Private Persons (consumers)

3.1 Procedure in general

3.1.1. Main steps of a real estate sale

Please describe first the procedure for a standard sales contract relating to real estate: Private owners (e.g. a married couple) sell their residential home to other private owners. Follow the steps of the questionnaire, if possible, but also mention if there are any peculiarities in your country, which we did not consider in any of the subquestions.

Note: Please state in particular if a preliminary contract is usually concluded.

Sample answer for Germany: Often, the seller uses the services of a real estate agent in order to find a buyer. When the seller has found a buyer, the parties ask a notary to draft the contract. The **sales contract** is concluded in an oral hearing at the notary's office in the presence of both parties and laid down in a notarial document. Afterwards, the notary applies for registration of a **priority notice** (*Vormerkung*) in the land register (*Grundbuch*). Now, the buyer **pays** the purchase price to the seller. After payment, the seller allows the buyer into possession and the notary has the transfer of ownership **registered** in the land register (*Grundbuch*). The registration entails the transfer of the property.

3.1.2. Time frame

How long do these steps normally take in your country?

3.2 Real Estate Sales Contract

3.2.1. Form

- Is there any form required by law – either for the sales contract or for the transfer of ownership (e.g. writing, deed, notarial act or any other authentic instrument)? Must it be done in an oral hearing with both parties present?
- What are the consequences if the contract does not meet the formal requirements?

Note: The real estate sales contract might be invalid if it is not concluded by notarial instrument (e.g. in Germany § 311b BGB). In other systems, only the registration (not the contract) might require a notarial act.

3.2.2. Who drafts the contract for a real estate sale normally?

The draftsman might be

- a notary (Latin type) (also two notaries, one for the seller, one for the buyer, such as in France),
- an attorney (one attorney for both parties; or seller's attorney drafts the contract and buyer's attorney checks it),
- a real estate agent,
- the parties themselves, who buy a contract form in a stationery shop, fill it in and sign it.

3.2.3. Preliminary contract

- Is there a preliminary contract?

- What legal effects does it have?

3.7.1. Typical Real Estate Sales Contract

- Is there any standard form for a sales contract? Or is there any other form used quite often or published e.g. in a commonly used manual?
- If possible include a **copy** of one or two typical sales contract forms (preferably as annexes to this questionnaire)!

Note: E.g. the British Law Society edits „Standard Conditions of Sale“ („SCS“), the fourth edition of which was published on October, 13th, 2003. (The Law Society also edits a yearly updated handbook on conveyancing).

In most countries, there seems to be no official standard form. However, you might mention the manuals most frequently used.

3.3 Transfer of Ownership and Payment

3.3.1. Requirements for Transfer of Ownership

What are the requirements for the transfer of ownership?

- valid obligation contract (causa),
- payment of the purchase price,
- consent on the transfer of ownership,
- registration with the land register.

Note: Here, we try to elaborate on the distinction between „causal“ systems requiring a valid causa (as under the Code Napoléon) and „abstract“ systems (as in Germany), where the transfer of ownership is valid irrespective of the validity of the sales contract (however, if the sales contract was invalid, the seller may reclaim the property on grounds of unjust enrichment).

3.3.2. Payment due

- How do you manage to make the payment and the transfer of ownership happen at the same time – or at least to minimize risks for both seller and buyer?
- When is the payment due under a typical contractual agreement?
- Is the payment effectuated via an escrow account or directly among the parties?
- Is an insurance for risks inherent to the payment and the transfer of the property possible, usual or even obligatory?

Note: If the property is transferred with the conclusion of the sales contract, then the payment has to be made before or at least during the conclusion of the contract itself. If, however, the transfer of the property takes place only after the registration, then the seller does not run any risks if the payment is made only after the conclusion of the contract (provided that the payment is made before the registration).

The deposit of the purchase price on an escrow account (in particular a notarial escrow account, *Notaranderkonto*) can be another method to synchronize the payment and the transfer of the property.

3.3.3. Ways of the seller to enforce the payment

- How can the seller enforce the payment (e.g. by execution)?

Note: In many countries, the obligations arising from a notarial act are directly enforceable

(that is without a previous judgement). In other countries such as Germany, they are enforceable only if the parties explicitly agree on the submission to direct enforcement in the contract (*Zwangsvollstreckungsunterwerfung*, § 794 I n° 5 ZPO), which they normally do.

3.3.4. Transfer of possession to the buyer

- How, on the other hand, may the buyer be sure to get possession when he pays the purchase price?

3.4 Seller's Title

3.4.1. Title Search: Ascertaining the seller's title

- Which facts does the buyer (or the buyer's lawyer, the notary or the agent) have to ascertain before he can be sure that the seller has a valid title?

Note: Here, we try to elaborate on the distinction between „causal“ systems requiring a valid causa (as under the Code Napoleon) and „abstract“ systems (as in Germany) under which the transfer of ownership is valid irrespective of the validity of the sales contract. Under a causal system, the notary must usually check all prior transfers up to the period of prescription/adverse possession (regularly for 30 years) - whereas, under an abstract system, the seller's registration as the owner provides absolute certainty for a buyer acting in good faith.

3.4.2. Title Search: Absence of Encumbrances

- How does the buyer ascertain that he will acquire the property without encumbrances?

Note: This question encompasses two steps: First, the existence of encumbrances will be scrutinized. Second, payment will be made dependent on the deletion of existing encumbrances. If a system protects good faith in the registration, the research for existing encumbrances is facilitated. If, conversely, a system provides for the transfer of the property at the conclusion of the sales contract, the buyer will have to pay the purchase price during the conclusion of the contract; therefore, the deletion of existing encumbrances will need to be assured even before the conclusion of the contract (and vice versa).

3.4.3. Title Insurance or Liability

- Why did your system develop title insurance (or why is title insurance not necessary in your system)? In which cases is it used?
- If title insurance exists: How much does it cost in a typical real estate sale?

Note: Title insurance is typical for common law countries. Our hypothesis is that title insurance is unnecessary in all those countries which have an efficient registration system (enabling bona fide acquisitions) and/or sufficient liability of the notary (draftsperson) who researches the seller's title.

3.4.4. Leases

- How does the buyer make sure that there are no leases on the sold property?
- What are the consequences for the buyer if such contract exist?
- How may problems related to leases be dealt with in the drafting of the contract?

Note: In many countries, the buyer is bound to a lease if the tenant has already occupied the premises prior to the transfer of the property. Existing leases, therefore, are a defect in the seller's title. Apart from that, a tenant might have a statutory pre-emption right under certain conditions.

Unless a lease contract is registered (which is compulsory in some countries and facultative,

though not usual, in others), there seems to be no other way for the buyer but to ask the seller whether there are leases and to check the situation personally when visiting the premises.

3.5 Defects and Warranties

3.4.1. Legal rules

What are the buyer's legal rights against the seller, intermediaries (estate agents) and/ or notaries,

- concerning a defect of title,
- concerning defects affecting the quality of the property,
- concerning restrictions by zoning law, environmental law and other administrative regulations, which have not been considered in the contract?

3.4.2. Typical contractual clauses: the scope of *caveat emptor*

- What kind of contractual clauses on warranties are typically agreed upon in a real estate sale among private persons?
- Is it possible to exclude the remedies of the buyer? Does it make a difference if the seller or the buyer acts in the course of his trade, business or profession?
- To what degree do courts exercise control over the fairness of such clauses?
- **Note:** Typically, the legislator has in mind the sale of new goods when regulating the buyer's statutory rights in case of defects. However, in a real estate sale concerning an existing house between two private persons, normally all warranties are excluded. The *caveat emptor* rule applies. However, in the case of a professional seller, national implementation legislation of Directive 93/13/EEC on unfair contract terms might become applicable, which provides for protection of the buyer.

3.4.3. Liability of the Buyer for Debts of the Seller

Is the buyer liable for arrears of the seller, regarding in particular

- real estate taxes
- other taxes, e.g. related to buildings on the property or the business of the seller conducted on the property
- charges for garbage collection, water and gas delivery,
- charges for the administration of condominium apartments

How are these problems treated in typical contractual clauses?

3.6 Administrative Permits and Restrictions

Note: In this chapter, we try to explore the influence of administrative law measures on real estate transactions. However, you are not asked to mention all permits that might be required for a sales contract, but only those usually checked in the course of the conclusion of a contract.

In particular, this section covers:

- administrative permits required for the validity or for the performance of the contract,
- zoning ordinances, building permits and restrictions affecting the real property sold,
- pre-emption rights granted by statute to public authorities, which might be exercised

when the real property is sold.

3.6.1. Standard Requirements

In a typical conveyance of a residential estate:

- Which permits are required?
- Does the draftsman (notary) check the building permit, zoning ordinances and/or environmental issues (e.g. in France asbestos contamination)?
- Are there any statutory pre-emption rights for public authorities?

3.6.2. Requirements for certain types of real estate sales only

- Please state briefly the additional administrative permits and restrictions for other typical cases, e.g. the sale of agricultural or industrial land.

3.6.3. Control of administrative permits and restrictions

- Is the control of administrative permits and restrictions left to the buyer's own responsibility, or is it carried out by the notary or another lawyer?

3.7 Transfer Costs

3.7.1. Contract and Registration

Please indicate the approximate costs for the sale of a real estate in your country (in general and for a property of (a) 100.000 and (b) 300.000 Euros). Please specify the costs for:

- drafting and executing the contract (e.g. the fees of an attorneys or notary),
- title insurance (if usual in your country),
- registration in the land register.

3.7.2. Transfer Taxes

- How high are taxes on the transfer of real property? On what is the tax based (on the real value, on the purchase price etc.)?
- Is the due payment of the taxes a requirement for the registration of the transfer of a property?
- Does the notary/lawyer collaborate in the collection of the tax?

3.7.3. Real Estate Agents

- How often is a real estate agent involved in the sale of residential property among private persons?

Note: Please indicate the range (less than 5% - 5-25% - 25-50% - 50-75% - 75-95% - more than 95%)

- How much is the agent's fee?
- Who usually pays the agent – the seller or the buyer?

3.8 Buyer's Mortgage

- In order to finance the purchase price, buyers usually have to mortgage the house. Under which conditions and modalities is this possible?

Note: Granting a mortgage to the buyer requires the reconciliation of contradicting interests: The bank wants to have the mortgage registered before it pays out the loan for the purchase

price. The seller, however, wants to receive the purchase price before he transfers ownership and (thereby) enables the buyer to set up a mortgage. In addition, other banks may have financed the seller and want their loan repaid before agreeing to delete the old mortgage (or assign it to the new bank, if it is a non-accessory mortgage), so as to enable the buyers' mortgage to occupy the first rank.

4. Special Problems concerning the Sale of Real Estate (Cases)

4.1 The Conclusion of the Contract

After inspection, the buyer tells the seller that he wants to buy the house. Thereafter, both of them sign a written contract, which states that the seller will sell and the buyer will buy the house under usual conditions. The purchase price is also indicated in the written document. What, if any, legal effect does this document have?

Note: With this question, we want to discuss in further detail the formal requirements of a sales contract and the effects of a preliminary contract.

4.2 Seller's title

4.2.1. Consequences of an invalid Sales Contract

A has sold real property to B. Now, B wants to sell it to C. However, before entering into the contract, C finds out that the sales contract concluded between A and B was invalid,

- a) because it lacked the required form;
- b) because A did not possess legal capacity;
- c) because an administrative permit required for the contract has never been applied for.

May C go ahead with the contract and acquire the property validly?

Note: This question discusses in further detail the consequences of causal and abstract systems.

4.2.2. The Seller is not the owner

A sells his property to B, who pays the purchase price and has the transfer registered with the land register. Only afterwards, it turns out that A was not the owner, with B having however relied in good faith on A's title. (This may happen e.g. when the seller was believed to have inherited the property from his uncle by a will, but a subsequent will is found in which the uncle leaves his entire assets to a charity. To make it a case, let us suppose further that the seller has become insolvent and cannot repay the money.)

- How is B protected?
- May he retain the property?
- How is the buyer protected if, already during the transaction, it turns out that the seller is not the owner?

Note: This question discusses in further detail the problems of reliance in good faith on the land register.

4.2.3. Execution against the Seller

After the parties have signed the sales contract, but before its registration, a creditor of the seller distrains upon the property in order to enforce a judgement against the latter.

- Are there risks for the buyer (e.g. to lose his payment)?
- How may the buyer be protected (e.g. in drafting the sales contract)?

4.3 Payment

4.2.1. Delay in payment

The buyer pays late. What are the seller's remedies?

- May the seller rescind the contract?
- Does the buyer have to pay a (statutory) penalty or is he liable for damages?

4.4 Defects and Warranties

4.4.1. Misrepresentation

- Half a year after the buyer has moved in, a water pipe breaks and floods parts of the house. The water pipe was put in when the house was built some decades ago.
- In spring, the basement is flooded. Neighbours tell the buyer that the seller complained to them that the flooding happened every other year in spring.
- An extension of the house has been built without the necessary permit of the building authority. Now, the authority asks the buyer to tear down the extension. The seller claims that he did not know that the permit was missing, since the extension had been built years ago by the previous owner.

For which of these defects is the owner liable if the contract contains a clause which excludes the seller's liability, i.e. by stating that the buyer accepts the property in the state in which it is at the date of the conclusion of the contract? What are the buyer's remedies?

4.4.2. Destruction of the house

After the parties have signed the sales contract, the house burns down. What are the consequences for the contract?

- May the buyer rescind the contract or does he have to pay the purchase price?
- May the seller rescind the contract? Is he liable for damages? Is there a voluntary or mandatory insurance for these cases?

5. Sale of a house or apartment by the building company **(vente d'immeuble à construire/Bauträgervertrag)**

5.1 Statutory Basis

5.1.1. National Law

Do any special rules (e.g. on consumer protection) apply if the seller also constructs the house which he is selling? When do these rules apply?

Note:

- In **France**, art. 1601-1 CC governs the *vente d'immeuble à construire*.
- In **Germany**, the Makler- und Bauträgerverordnung (MaBV) applies to the Bauträgervertrag.
- In **Spain**, there are the statute no. 57/68 of 27 July 1968, decree no. 515/89 of 21 April 1989 and statute no. 38/99 of 5 November 1999.

5.1.2. Influences of EU law

What, if any, are the influences of existing EU law, in particular the consumer protection directives, on the national law of the *vente d'immeuble à construire*?

Note: In case C-237/02, *Freiburger Kommunalbauten*,³ the European Court of Justice (ECJ) refused to scrutinize the compatibility of a clause in a building contract (stipulating that the buyer had to pay the purchase price even before the building works started, the buyer's rights being however protected to a large extent by a bank guarantee covering violations of the contract as well as the insolvency of the builder) with Art. 3 of the Unfair Terms Directive. So the control of unfair terms in this field seems to remain largely national.

5.2 Procedure in general

5.2.1. Single houses

Please describe the procedure for a standard contract: A construction company (the „builder“) buys a large piece of land and splits it up into several small parcels. On these small parcels, it plans to build town houses. Now, the builder sells the small parcels with the houses (which have not yet been built) to several buyers. Let us assume that all the buyers are consumers, and that the builder uses his own standard contract terms.

- Is the contract governed by any special regulation?
- When does the buyer have to pay the purchase price (e.g. after termination of the building or according to the state of the building)?
- Are there statutory warranties for material defects?

5.2.2. Condominiums

Let us assume that the builder does not sell a single house, but an apartment in a condominium which he is planning to build. Are there any differences as compared with the previous case?

³ Available online at <http://www.curia.eu>.

5.2.3. Renovation

Another variation: Let us assume that the builder has bought an old house which he wants to renovate and split up into separate apartments. He sells the apartments before completing the renovation. What, if any, are the differences as compared with the first and second case?

5.3 Conclusion of the Contract

- Is there any **formal requirement** for the conclusion of the contract?
- Is there any preliminary contract?
- Is there any mandatory **waiting period** before the contract can be concluded?
- Has the buyer a **right to withdraw from the contract** (in particular, if the buyer acts as a consumer)?

Note: In **France**, the sales-building-contract (*vente d'immeuble à construire*) requires a notarial act, although in general a sales contract on real property is valid also in writing. The preliminary contract (*contrat de réservation*) may be done in writing; in that case, however, the buyer has the right to withdraw within 7 days after conclusion of the preliminary contract.

In **Germany**, § 17 par. 2a BeurkG stipulates that the buyer must receive a draft of the contract two weeks before concluding the notarial act.

5.4 Payment

5.4.1. Payment date

- When is the payment due under usual contractual arrangements?
- Is the payment made directly by the buyer to the builder or is deposited on an escrow account?
- Is it usual or possible to make the contract directly enforceable without the intervention of a court? (E.g. may the buyer submit to immediate enforceability in the sales contract?)

5.4.2. Securities

- Are there any securities for the buyer, such as guarantees or insurances?

Note: In **France**, if the buyer pays before the building is finished, the builder has to provide a surety (*garantie d'achèvement* or *garantie de remboursement*). In **Germany**, a guarantee (normally from a bank) is required only if the parties agree upon payment to be made before the buyer's priority notice is registered in the *Grundbuch* or if the buyer has to pay more or earlier than under the usual instalment plan fixed by statute (which foresees certain instalments payable according to the state of progress of the construction, § 7 MaBV).

5.4.3. Acquisition of Ownership

- How is it ensured that the buyer only has to pay if it is certain that he will become the new owner?
- How is it ensured that the buyer is granted ownership free of existing liens (in particular free of a mortgage which has been granted by a bank to the construction company to finance the building)?

5.4.4. Building

- Under usual contractual arrangements, does the buyer have to pay before or only after the building is finished, or does he have to pay instalments according to the state of

progress of the construction?

5.4.5. Financing of the Buyer

- How can the buyer finance his purchase? (e.g. Can he set up a mortgage on his future property? From what moment on? How is his mortgage related to a prior mortgage granted to the construction company? Do the banks have special duties of care when granting loans secured by a mortgage to the construction companies (because a future buyer may thus be prevented from taking up a loan on the parcel bought from the company?)

5.5 Builder's Duties - Protection of Buyer

5.5.1. Description of the Building

- How does the contract usually describe the building if it has not yet been completed (e.g. floor plan and written specifications)? Is this description sufficient in practice (in ordinary cases)?

5.5.2. Late Termination of the Building

- Does the contract usually provide for an exact delay for the termination of the building?
- Which claims does the buyer have in the event that the delay is not respected?

5.5.3. Material Defects

- Which claims does the buyer have if there are material defects of the building? What is the limitation period for these claims?
- Does the buyer have any claims against third parties other than the builder (e.g. against the companies commissioned by the builder or against a guarantor)?

5.6 Builder's Insolvency

5.6.1. Unfinished Building

- Let us suppose that the buyer buys an apartment on the third floor of a building yet to be built and that the builder goes insolvent after completing the basement. Is there any protection for the buyer?

5.6.2. Repayment

- Let us suppose that the buyer rescinds the contract because the builder is late in finishing the building and that there are many material defects in the already completed parts of the building. However, after the buyer has terminated the contract, the builder goes insolvent. May the buyer expect repayment if he has already paid some instalments?

6. Private International Law

6.1 Contract Law

6.1.1. Conflict of Law Rule

- Does your legal system allow the choice of the applicable law also for contracts on real property?
- In the absence of a choice of the applicable law by the parties: Is the *lex rei sitae* applicable also to contractual obligations concerning real property (e.g. to the obligation to transfer real property or to set up a mortgage on it)?

Note: Art. 3 paragr. 1 and 4 paragr. 3 of the Rome Convention and the draft of the Rome I-regulation stipulate these rules.

- If the *lex rei sitae* governs the real property rights, can the parties choose a different *lex contractus* which is however related to other parts of the transaction (e.g. for a loan contract if the mortgage securing it follows the *lex rei sitae*, or a construction contract for a property to be sold – “dépeçage”)

6.1.2. Formal Requirements

- If, in your legal system, any formal requirements for the obligation to transfer real property exist: Is the obligation valid if the form prescribed by domestic law has not been respected, but only that prescribed by the law of the place where the contract has been celebrated? Is this so even when the law of the place where the contract has been celebrated allows the contract to be done in writing without any other formal requirements?
- **Note:** See on this question Art. 9 of the Rome Convention.

6.2 Real Property Law

6.2.1. Conflict of Law Rule

- Does your legal system apply the *lex rei sitae* rule to immovable property?

Please quote the applicable article verbatim if it is not available on the Internet and translate it into English!

Note: We assume that in all old and new EU Member States, the *lex rei sitae* applies to immovable property. It is also the rule proposed by the draft of the Rome II-regulation.

6.2.2. Formal Requirements

- Is it possible to register the transfer of real property in your land register if the act of transfer has been celebrated in another State? If not: What are the reasons given for the exclusive jurisdiction of the national system?

Note: In some states, only acts of transfers celebrated by a national notary are considered valid (e.g. Germany, § 925 BGB, the Netherlands, BW 3:89). In other countries, only acts made or deposited by local notaries may be registered (e.g. Italy).

6.3 Restrictions for Foreigners to acquire Land

6.3.1. Restrictions limited to Foreigners

- Are there any restrictions for foreigners to acquire real property?
- If so: Do these restrictions also apply to nationals of other EU Member States? Have these restrictions been challenged under EU law? If relevant: When will the restrictions for EU-nationals end?

Note: Some of the new Member States still have restrictions for foreigners to acquire real property, which also apply to nationals of other EU Member States. These restrictions will be phased out during the next years. In other Member States such as Austria, similar restrictions have already expired.

6.3.2. Other Restrictions

- Are any other permits required which play a role particularly for foreigners acquiring real property (or about which foreigners complain more than nationals)?

Note: The European Court of Justice has recently decided some cases concerning restrictions on the sale of farm land in **Austria**.⁴

In **Greece**, there have been complaints that the public administration does not treat EU nationals equal to Greek citizens when granting permits to acquire real property in border areas.⁵

6.4 Practical Case: Transfer of Real Estate among Foreigners

Let us suppose that a couple of nationals of another EU Member State own a vacation home in your country. They consider to transfer the ownership either to their children (as a gift) or to another couple, who are nationals of the same Member State as them. If possible, the parties want to conclude all necessary contracts in their state of origin. They ask a local lawyer/notary there to prepare the transaction. This lawyer/notary asks you about the easiest way for the parties. What way do you recommend – or what is considered to be the best practice?

Note: Even if it may be possible to conclude the contract abroad, it might be better to advise the parties to conclude it with the help of a local notary or lawyer. Alternatively, it might be advisable that the parties conclude the contract abroad, but have the registration done by a local notary or lawyer (and that the parties grant power of attorney to the buyer to conclude the necessary steps in the country where the real estate is situated).

⁴ ECJ Case C-302/97 (Konle – GrdStVG Tirol); 15.5.2003 – Case C-300/01 (Salzmann); Case C-515/99 (Reisch – GrdStVG Salzburg); 30.9.2003 - Case C-224/01 (Köbler – GrdStVG Vorarlberg); Case C-452/01 (Ospelt GrdStVG Vorarlberg).

⁵ PAPACHARALAMPOUS/LINTZ, *Immobilien in Griechenland*, MittBayNot 2003, 464, 471.

7. Encumbrances/Mortgages (and Land Charges)

Terminology:

- In this study, the usual English term “mortgage” is used in a double meaning. Usually, it is understood in a wide sense and refers to all kinds of securities in real estate. However, when it comes to the distinction between accessory and non-accessory securities, the term “mortgage” is used for the accessory type where the expression “land charge” is used for non-accessory securities.
- In many examples, the mortgagee has been called „bank“, because she normally is a bank. If special regulation on consumer credits is applicable, please indicate if the answer is different for a consumer or a professional creditor.
- The debtor is also the land owner unless explicitly stated otherwise.
- If it matters for your answer, you may assume that the secured claim is a bank loan. However, if you make this assumption, please explain if other claims may be treated differently (Otherwise, we would suppose that your answers apply to all types of money claims secured).

7.1 Types of mortgages/land charges

7.1.1. Types of mortgages

- Which types of mortgages (or land charges) exist in your legal system?
- Which is the most common type of mortgage?
- Please indicate also the respective statutory bases!

Sample Answer for Germany: In Germany, the general term is *Grundpfandrecht* („pledge on real property“). It encompasses the *Grundschild* (§§ 1191 ss. BGB) and the *Hypothek* (§§ 1113 ss. BGB). The *Hypothek* is an accessory security whereas the *Grundschild* is a non-accessory security. In the Civil Code, the default model is the *Hypothek* whereas the *Grundschild* is regulated largely by references to the rules on the *Hypothek*. In practice, however, the *Grundschild* prevails, as it is more flexible and may also be used to secure later debts with the same creditor. Conversely, the *Hypothek* is not used very often, and banks in particular have a firm preference for the *Grundschild*. Further subtypes of the *Hypothek* are the *Sicherungshypothek* (§§ 1184 ss. BGB), a strictly accessory mortgage, and the *Höchstbetragshypothek* (§ 1190 BGB). Whereas an ordinary *Hypothek* registered in the land register may be acquired by an assignee in good faith even if the underlying claim is no longer existing (§§ 892, 1157 BGB), the *Sicherungshypothek* can be acquired only if the underlying claim exists (§ 1184 BGB). The *Höchstbetragshypothek* (§ 1190 BGB) is a special type of a *Sicherungshypothek* according to which only a maximum amount of the mortgage is registered whereas the secured claim may be changed. A subtype of the *Grundschild* is the *Rentenschuld* (§§ 1199 ss. BGB), which is however hardly ever used. Under the terms of a *Rentenschuld*, the owner has to make regular payments. However, the owner may choose to pay a lump sum instead (which is why for regular payments normally a rent charge – *Reallast*, § 1105 BGB – is chosen). Another important distinction applies between the *Briefrecht* (a mortgage documented by a separate certifi-

cate) on the one hand and the *Buchrecht* (a mortgage documented only in the land register) on the other hand. Unless agreed otherwise, a *Brief* (mortgage certificate, § 1116 BGB) must be issued. Both the *Hypothek* and the *Grundschuld* can exist in both forms (“*Briefhypothek* – *Buchhypothek*; *Briefgrundschuld* – *Buchgrundschuld*”). However in practice, the land charge without certificate (“*Buchgrundschuld*”) prevails today.

7.1.2. Legal nature

- What is the legal nature of mortgages (or land charges)? (*Ius in rem* or *in personam*; title or lien etc.)

Note: Under old common law-theories, liens are considered equal to ownership under the *conditio subsequens*; however, these theories do not seem to have practical effects any longer.

7.2 Setting up a mortgage

7.2.1. Example

- The bank grants a loan to the debtor. What steps does the bank have to follow in order to establish a security right over real property owned by the debtor?

Sample Answer for Germany:

Under German law, a mortgage is set up under the following three conditions (with a fourth condition for the *Hypothek* only):

- Normally, the owner of the real estate and the mortgagee consent on the setting up of a mortgage (*Einigung* - § 873 BGB). Alternatively, the parties may agree on the setting up also at a later stage. To register a mortgage in the register, only a unilateral statement of the owner is necessary. This must be authenticated by a notary. As long as no consent to use the mortgage for a certain loan has been reached, the owner remains entitled to the mortgage himself (“*Eigentümergrundschuld*”).
- The mortgage is registered in the *Grundbuch* (§§ 873, 1115 BGB).
- In the case of a *Briefgrundpfandrecht* (mortgage with certificate), the mortgagee acquires the mortgage only when the mortgage certificate (*Hypothekenbrief* or *Grundschuldbrief*) is handed over to him by the land owner (or by the *Grundbuchamt* with the owner’s consent). In the case of a *Buchgrundpfandrecht* (mortgage without certificate), however, the mortgagee acquires the mortgage with its mere registration provided that the register entry also mentions that no certificate has been issued (§ 1117 BGB).

For the *Hypothek* only, the fourth condition is required that the claim to be secured by it exists. If there is no valid claim, but the other three preconditions are fulfilled, a mortgage for the land owner (*Eigentümerhypothek*) comes into existence (§ 1163 BGB). Conversely, a *Grundschuld* comes into existence and is acquired by the mortgagee, whether or not the secured claim exists.

7.2.2. Legal requirements for the loan contract affecting the mortgage

- Which legal requirements does the bank have to respect when granting a mortgage loan? In particular: Must the bank give some minimum information to the customer before a valid loan contract can be signed? Are there minimum periods between the release of the information, the signature of the contract and the setting up of the mort-

gage? Can the mortgage be erased within certain periods if the customer wants to cancel it?

7.2.3 Formal requirements

- Is there any formal requirement for the setting up of a mortgage? Sample Answer for Germany:

The consent on the setting up of a mortgage (*Einigung*) is valid without any formal requirements. However, for the registration in the *Grundbuch*, the signature of the owner shall be certified by a notary (*Unterschriftsbeglaubigung* - § 29 GBO).

In practice, most mortgages are set up by notarial instrument (authentic act), because only this instrument allows the debtor to submit to immediate enforcement (§ 794 sec. 1 n° 5 ZPO).

The mortgagee's acceptance is normally made informally (not even in writing).

7.2.4 Registration

- Is the registration of the security in the land register (or any other register) necessary? If so, which indications does the registration need to contain?

Sample Answer for Germany:

The mortgage comes into existence only upon registration (§ 873 BGB). The registration must contain the following information (§ 1115 BGB): the name of the mortgagee, the amount of the mortgage, the interest rate (if applicable); the time as of which the interest is due has to be stated either in the *Grundbuch* or in the instrument creating the mortgage (and has to be referred to in the *Grundbuch*).

7.2.5. Time and Costs

- How long does the registration of a mortgage normally take?
- What can be done to speed up the process? (e.g. In Germany, the notary can give an opinion to the effect that the registration of the mortgage in the foreseen ranking position is secured. This opinion is usually accepted by banks. In other countries, lawyers' opinions about the validity of the mortgage are used.)
- Is it possible to use priority notices or similar devices? How effective are they to secure the mortgage and its rank? (see 2.6)
- Is it possible to speed up the process with the use of the internet?
- What are the costs for establishing a typical security for (a) 100.000.- and (b) 300.000.- Euros?
- lawyer/notary fees,
- registration fee (*Grundbuchamt*),
- are these fees fixed by law?
- taxes (who collects the taxes?)

7.3 Causality and Accessoriness

7.3.1. Invalid loan contract

Let us assume that the loan contract is invalid. How does this affect the mortgage - assuming that all other requirements for creating a mortgage have been complied with?

Note: In Germany, the answer depends on whether it is a *Hypothek* or a *Grundschild*:

- The *Hypothek* comes into existence, but it belongs to the land owner, not to the mortgagee (even though it is registered for the mortgagee) (§ 1163 BGB).
- A *Grundschild* comes into existence irrespective of whether or not the underlying claim exists. However, if there is no claim to be secured, the land owner may claim that the mortgagee transfers the mortgage to him or that he consents to erasing the mortgage from the *Grundbuch*.

7.3.2. Right of withdrawal

Let us assume that the debtor-consumer has a statutory right to withdraw from the loan contract. The debtor exercises this right only after the mortgage on the real estate has already been established. (This might be possible if the bank did not inform the debtor properly about his right to withdraw and, as a consequence, the deadline for the withdrawal has not yet expired.)

- Can the bank still use the mortgage to secure her right for repayment of the loan?

Note: In case C-481/99, *Heininger* (ECR 2001, I-234), the ECJ decided that loan contracts were covered by the doorstep sale directive when concluded under „doorstep conditions“ - with the effect that the debtor may invoke the withdrawal right foreseen in that Directive against the bank. However, according to the ECJ, the consequences of a withdrawal from the loan agreement for the purchase of real property and the setting up of a mortgage were still to be determined by national law.⁶ This finding has however been challenged in a follow up-reference by the *Landgericht Bochum* under the principle of effective consumer protection.⁷ It is likely that the ECJ will revise the *Heininger* judgement accordingly. As a consequence, one may expect that the ECJ will establish European law minimum conditions as regards the legal consequences of the withdrawal from a consumer contract, which include the effects on security rights such as mortgages.

7.3.3. Changing the secured debt

- The debtor has repaid the loan for which the mortgage was granted. Now, he applies for another loan. Can the old mortgage be used to secure also the new loan (and if so, under which conditions)? Or is it necessary to set up a new mortgage?
- Let us assume that 30% of the mortgage loan have been repaid. Now, the mortgagee wants to take up another loan for his business, amounting to 25% of the old loan, but with a much higher annual amortisation and a different interest rate. Can the “free” part of the old mortgage be used to secure this loan? What has to be done for this?
- Let us assume that the debtor has agreed on a loan secured by a mortgage. However, the house to be financed is not yet build, but its completion has been agreed upon as a condition for the disbursal of the loan. Therefore, the debtors wants to take up an interim loan from another bank. Can the mortgage be used to secure this interim loan until it is replaced by the final mortgage? How can this happen?
- The bank and the mortgagor have agreed on a mortgage loan for a five year term at a fixed interest rate. Now, this period is over, and both sides want to agree on a new loan for another five years, but at a different interest rate. Can the old mortgage secure the new loan?

⁶ *Heininger Case*, op. cit., No. 35.

⁷ See *Neue Juristische Wochenschrift*, 2003, 2613.

- What if in the last example the mortgagee wants the new loan from another bank? Could the old mortgage be used for the new loan? If yes, what steps need to be taken? Is the consent of the old bank necessary?
- What if the new loan is not designed to finance a property but a car or the mortgagee's company and is subject to different conditions, e.g. a higher interest rate and a higher amortisation?
- The mortgagee runs a business and is in permanent need for credit. He agrees with his bank on a maximum credit line, which is used for different loans. Can this credit line be secured by a mortgage? Are there special forms of mortgages for it?

7.3.4 Independent/abstract promise of payment

- In your legal system, is there anything like an independent/abstract promise of payment (*garantie personnelle autonome/cédule abstraite*)? If so, can it be secured by a mortgage? 7.3.6. Mortgage for the land owner himself
- Can a mortgage be set up also for the land owner (*Eigentümergrundschuld*)? without a loan contract? Could he set up the mortgage "on stock" when negotiating with several banks? How is the pre-existing mortgage assigned to a later loan?
- May the owner reserve priority to himself for a future mortgage?

7.4 Enforcement and other rights of the bank

The debtor did not pay the interest or did not repay the loan. Therefore, the bank wants to enforce the mortgage/land charge.

- Please describe the main steps of the enforcement procedure!
- Is a court decision necessary to render the mortgage enforceable?
- How long does the enforcement procedure regularly take before the bank receives the proceeds of the mortgage? Can the debtor slow down the procedure, especially if the mortgage is on his residential home? Can the bank act in receivership in the meantime (*Zwangsverwaltung*)?
- Can the bank sell the real estate without foreclosure, i.e. without a court decision and a compulsory auction? Can the owner grant the bank the right to purchase or the power to sell the property by means of a normal real estate sales contract (in the event that the loan is not repaid)?
- Are there any instruments for public administration or courts to stop or suspend foreclosure for social or economic reasons?
- What happens in the event that insolvency procedures over the debtor's estate are initiated? Will the foreclosure procedure be stopped? How are the mortgagee's rights protected in an insolvency procedure?

7.5 Overriding interests and priority

7.5.1. Distribution of proceeds

- How are the proceeds from the enforcement procedure distributed among the creditors? Is the distribution different in case of legal foreclosure or insolvency of the owner or the debtor?

7.5.2. Overriding interests

- Are there any fiscal or other charges – imposed by statute in favour of privileged creditors such as the state or local authorities – that take preference over the mortgage without being registered?
- Can you indicate a percentage of how much of the value of the real estate these charges usually amount to?

Note: Such charges might comprise of:

- the costs of the foreclosure procedure,
- taxes levied on real estate (or other taxes owed by the owner),
- fees for electricity, heating, garbage collection or other utilities,
- the salary of workers if an enterprise is established on the land.

7.6 Scope of the mortgage

7.6.1. Buildings

- If there is a mortgage on a real estate, does the mortgage necessarily also encompass a house built on it? Are there separate mortgages on buildings without the land?

7.6.2. Machinery

- If there is a business on the mortgaged premises, does the mortgage also extend to its assets such as machinery, cars, raw material etc.?

7.6.3. Insurance

- If the house is destroyed e.g by fire, does the insurer have to pay to the owner or to the mortgagee (or only jointly to both of them)?

7.7.4. Right to redeem

- May the mortgagor redeem the mortgage at any time at will or only under certain conditions?
- Is it possible to restrict the mortgagor's statutory right of redemption?

7.7.5. Redemption after foreclosure

- May the mortgagor redeem the mortgage even after foreclosure?

7.8 Security granted by a third party

Let us assume that the debtor is not able to offer any kind of security for the loan. However, his wife is willing to mortgage her real estate.

- Are there any limitations on the liability of a third party according to statutory or case law, e.g. if the mortgage is to secure the debts of the husband's enterprise, including also all future debts?

7.9 Plurality of mortgages

- If the owner has already set up (and registered) a mortgage and then wants to set up a second mortgage for another bank, can he do so without the consent of the first bank? Would the holder of the second mortgage have a direct claim against the owner? What would happen if he wanted to execute the mortgage? Could he do so without the consent of the holder of the first mortgage? What would be the consequences for the first

mortgage? Would it become due – or would the property be foreclosed – auctioned with the first mortgage on it?

- What happens to the second ranking mortgage, if the loan of the first mortgage has been repaid completely or partially? Does the second mortgage get a better position or even the first rank? (Or does the owner get the right on the position for the refunded parts of the first mortgage, and the second mortgage remains at its position?)
- Can mortgages be of equal ranking? How can this be effected? (Only by applying for registration on the same day or even in the same minute or by a later change of the ranking?)
- Can the ranks of mortgages be exchanged or altered by agreement of the parties involved? Please describe the necessary steps.

7.10 Several properties

- Can one and the same mortgage cover several properties? Can a mortgage on one property be extended to another property of the same or another owner? In foreclosure, how far does the liability of each property go?

7.11 Transfer of the mortgage

7.11.1. Transfer of the mortgage in general

The debtor has set up a mortgage/land charge to the benefit of bank 1 to secure a loan granted to him. Now, bank 1 wants to refinance the loan with bank 2. How can bank 1 transfer the mortgage to bank 2? Please describe the necessary steps!

- Can bank 1 transfer the mortgage without transferring also the secured claim (i.e. the claim arising out of the loan contract)? If not, are there any other options for bank 1 to use the mortgage as collateral for its debt with bank 2?
- Does the transfer have to be registered? (Is the registration necessary for the transfer to be valid or to be opposable against third parties? This question applies particularly in the insolvency of the transferring bank (bank 1).) What other ways exist to make the transfer insolvency-proof?
- May the debtor or the land owner object to the transfer of the mortgage? Does the debtor or the land owner have to be informed about the transfer?
- What are the approximate costs for the transfer of a mortgage – and the time required?
- Let us assume that bank 1 does not have a valid claim (as in question 7.3.1). If it transfers the mortgage to bank 2, can the latter still acquire the mortgage in good faith?
- Let us assume that there is a valid claim, but the setting up of the mortgage is invalid. Can bank 2 still acquire the mortgage in good faith?
- If bank 1 has transferred the mortgage to bank 2, but bank 1 is still registered, how can bank 2 enforce the mortgage? (Or does bank 1 have to enforce the mortgage?)
- If bank 1 has transferred the mortgage to bank 2, but bank 1 is still registered, whose consent is necessary for any changes in the registration (the consent of bank 1 or of bank 2)?

7.11.2. Transfer to more than one creditor

- Typically the bank may want to split up and syndicate the loan. Can the loan and the mortgage be split up and only a portion be transferred to bank 2? Can portions be

transferred to different banks? Could those banks transfer the loans and the mortgage(s) to other banks later?

7.11.3. Administration of the mortgage by a trustee or fiduciary

- May The mortgage be administered by a trustee or fiduciary? In case of insolvency of the trustee, would the mortgage fall in the insolvency estate?
-

7.12 Conflict of Laws Issues

The real estate is situated on national territory whereas the debtor (who is also the owner of the real estate) resides in another EU-country.

7.12.1. Bank loan taken by a foreign debtor in the host country

- Which law is applicable when the debtor takes a loan with a bank in the host country where the real estate is situated (to the loan contract, the security contract and the mortgage)? Could a law different from the law governing the the property be chosen for the loan contract?

7.12.2. Bank loan taken in the debtor's country of residence

- Which law is applicable when the debtor takes a loan with a bank in his country of residence (to the loan contract, the security contract and the mortgage)?

7.12.3. Bank loan taken in a third EU-country

- Which law is applicable when the debtor takes a loan with a bank in a third EU-country (to the loan contract, the security contract and the mortgage)? Could a law different from the law governing the property be chosen for the loan contract?

7.12.4 National Restrictions on the Right of a Debtor to Secure Debt with a Mortgage assessed under EU Law

Note: The right of a debtor to secure debt with a mortgage has been dealt with by the ECJ in the *Trummer*⁸ case, which is a fundamental decision on the relationship of the basic freedoms and real sureties. In this case, an Austrian prohibition on registering mortgages in foreign currencies was at stake. In its decision, the ECJ first confirmed the extension of the scope of the free circulation of capital to mortgages, as these “represent the classic method of securing a loan linked to a sale of real property”.⁹ Then, the Court found a violation of the freedom right:

“The effect of national rules such as those at issue in the main proceedings is to weaken the link between the debt to be secured, payable in the currency of another Member State, and the mortgage, whose value may, as a result of subsequent currency exchange fluctuations, come to be lower than that of the debt to be secured. This can only reduce the effectiveness of such a security, and thus its attractiveness. Consequently, those rules are liable to dissuade the parties concerned from denominating a debt in the currency of another Member State, and may thus deprive them of a right which constitutes a component element of the free movement of capital and payments.”¹⁰

Following the ordinary scheme of analysis of the basic freedoms, the Court then went on to examine possible justifications of the violation. In this context, it made a statement of principle as regards real sureties:

⁸ Case C-222/97, *Trummer and Mayer*, ECR 1999, I-1661; confirmed in case C-464/98, *Stefan*.

⁹ ECJ, at no. 23.

¹⁰ ECJ, at no. 26.

“It should be noted that a Member State is entitled to take the necessary measures to ensure that the mortgage system clearly and transparently prescribes the respective rights of mortgagees *inter se*, as well as the rights of mortgagees as a whole *vis-à-vis* other creditors. Since the mortgage system is governed by the law of the State in which the mortgaged property is located, it is the law of that State which determines the means by which the attainment of that objective is to be ensured.”¹¹

In the remainder of the case, the ECJ did not, however, accept the Austrian prohibition as a proportional limitation of the free movement of capital. Assuming that the Austrian rule is designed to attain the objective of a clear and transparent mortgage system, the Court reproaches it to enable lower-ranking creditors to establish the precise amount of prior-ranking debts, and thus to assess the value of the security offered to them, only at the price of a lack of security for creditors whose debts are denominated in foreign currencies. In addition, Austrian law is criticised for not operating the choice consistently. Indeed, the Austrian rules allow the value of the mortgage to be expressed by reference to the price of fine gold, which is subject to fluctuations in the same way as the value of a foreign currency. As a result, the Austrian rule was declared incompatible with EU law by the ECJ.

Question: - Does your national law contain other restrictions or de facto disadvantages for foreign debtors which might negatively affect cross border transactions involving real property and therefore fall foul of EU law?

¹¹ ECJ, at no. 30.

8. Bibliography

Under the following headings, please list the books most commonly used – and/or most highly appreciated by yourself – concerning notarial practice in general, real property law, family and inheritance law, law of societies, private international law etc. - even if some of these have already been quoted (possibly in abridged form) in the footnotes.

8.1 Statutes cited

- Please give a short list of the **relevant statutes, including their major recent modifications**, concerning real property law! (Please cite the usual abbreviation, the statute's full title in the original language, the title's translation into English and the first publication in the official journal of your country.)
- Are these statutes published on the Internet? (Is this an official publication? Is a translation in English, French or any other language also available on the Internet?)

8.2 General Literature

8.3 Manuals and Formbooks

8.4 Real Property Law and Land Registration

8.5 Sales Contract

8.6 Sale of a building by the building company (*vente d'immeuble à construire/Bauträgervertrag*)

8.7 Mortgages

8.8 Private International Law

Note:

For Germany, the list of the statutes cited (8.1) might read like this:

All the mentioned internet editions of statutes are edited and updated by the German Ministry of Justice (*Bundesjustizministerium*) unless stated otherwise:

BeurkG – *Beurkundungsgesetz* (Notarial Procedure Law) -

http://www.bnotk.de/texte_berufsrecht/beurkg/beurkundungsgesetz_portal.htm

(edited and updated version by the *Bundesnotarkammer*, German Chamber of Notaries)

BGB – *Bürgerliches Gesetzbuch* (Civil Code) -

<http://bundesrecht.juris.de/bundesrecht/bgb/index.html>

(an English translation of the articles of the reformed law of obligations edited by the University of Oxford may be found on the Internet at

<http://www.iuscomp.org/gla/statutes/BGB.htm>)

BNotO – *Bundesnotarordnung* (Federal Notary Law)

http://www.bnotk.de/texte_berufsrecht/bnoto/bundesnotarordnung_portal.htm

(edited and updated version by *Bundesnotarkammer*, German Chamber of Notaries; here you may also find a French translation)

DRiG – *Deutsches Richtergesetz* (Law on Judges) -

<http://bundesrecht.juris.de/bundesrecht/drig/index.html>

ErbbauVO – *Erbbaurechtsverordnung* (Regulation on Building Leases) -

<http://bundesrecht.juris.de/bundesrecht/erbbauv/index.html>

FGG – *Gesetz über die Angelegenheiten der Freiwilligen Gerichtsbarkeit* (Law on Non-Contentious Jurisdiction [iurisdictio voluntaria]) -

<http://bundesrecht.juris.de/bundesrecht/fgg/index.html>

GBO - *Grundbuchordnung* (Land Register Law) -

<http://bundesrecht.juris.de/bundesrecht/gbo/index.html>

MaBV- *Makler- und Bauträgerverordnung* (Regulation on the Sale of Buildings by the Building Company) -

http://bundesrecht.juris.de/bundesrecht/gewo_34cdv/index.html

RpflG - *Rechtspflegergesetz* (Law on Registrars) -

http://bundesrecht.juris.de/bundesrecht/rpflg_1969/

WEG – *Wohnungseigentumsgesetz* (Law on Apartment Ownership) -

<http://bundesrecht.juris.de/bundesrecht/woeigg/index.html>

Other statutes may be found on the Internet on the homepage of the Ministry of Justice:

http://bundesrecht.juris.de/bundesrecht/GESAMT_index.html