

# **Real Property Law and European Private Law - A Sketch of an Unsurveyed Territory -**

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## **I. Introduction**

Real property law is not, at least not yet, in the focus of developments and discussions on European private law. Rather, it still retains its quite parochial flavour – and, may be, with good reason. Some will even point to art. 295 EC-Treaty which states: “The Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.” However, art. 295 EC-Treaty only looks straightforward but in reality has been very much diluted so that its real bearing is far from being clear<sup>1</sup>. It may even be that it does not concern private law issues at all but rather expropriation and enterprise ownership. In the context of the Timesharing Directive 94/47<sup>2</sup> the question of art. 295 EC-Treaty has been raised in legal writing and in the European Parliament<sup>3</sup>; however, that Directive leaves the definition of the legal character of timesharing to the Member States and only aims at protecting the consumer, property questions thus are not really dealt with by the directive and a possible conflict with art. 295 EC-Treaty would be far fetched.

At any rate, real property law is not exempt from European primary law, especially the freedoms and the principle of non-discrimination. This has important consequences: Restrictions on acquisition of real property by foreigners normally are infringements of the freedom of establishment and the free movement of capital. The ECJ has had to deal with such situations already in a number of cases<sup>4</sup>. The same applies where in some countries of transformation restitution of expropriated property by national legislation might be limited to the nationals of the restituting state and other persons are excluded; freedom of establishment and principle of non-

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<sup>1</sup> See Oliver Remien, *Zwingendes Vertragsrecht und Grundfreiheiten des EG-Vertrages*, Tübingen 2003, 208-213, 448-450 and 458.

<sup>2</sup> Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ 1994 L 280/83-87.

<sup>3</sup> See with references Remien 208f.

<sup>4</sup> ECJ 22.8.1997 – case C-302/97 (Konle *./.* Republik Österreich), Rep. 1999 I-3099; 13.7.2000 – case C-423/98 (Albore), Rep. 2000 I-5965; 5.3.2002 – case C-515/99 (Reisch et al. *./.* Bürgermeister der Landeshauptstadt Salzburg), Rep. 2002 I-2157; 15.5. 2003 – case C-300/01 (Salzmann), Rep. 2003 I-4899; recently see Stefan Lange, *Europarechtliche Vereinbarkeit von Grunderwerbsbeschränkungen*, EWS 2004, 389-398; Andreas Knapp, *Diskriminierende Grunderwerbsbeschränkungen in der EU*, EWS 1999, 409-417.

discrimination require the equal treatment of victims of another European nationality. This may not yet have been fully realized everywhere.

But what, in a European perspective, is real property law? Regulation 1346/2000 of 29<sup>th</sup> May 2000 on Insolvency Proceedings<sup>5</sup> in its artt. 5 and 8 gives some kind of answer. Article 5 concerns Third parties' rights in rem, and art. 5 (2) and (3) explain:

“2. The rights referred to in paragraph 1 shall in particular mean:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;

(d) a right in rem to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.”

Charges such as hypothec or mortgage (lit. a), the vindicatio following from the property right (lit. c) and servitudes (lit. d) thus seem to be acknowledged as (real) property rights. Art. 5 (3) seems to add such devices as e.g. the Vormerkung of §§ 883ff. BGB. Art. 8 of the Regulation concerns contracts relating to immoveable property. What is immoveable and what moveable however remains open.

## II. Registration

Whereas in matters of movable property, possession sometimes has an important role to play, in matters of real property possession very often is replaced by registration. Registration of real property has a long tradition<sup>6</sup>, and systems diverge<sup>7</sup>. The object of registration may be the title – so one can speak of land title registration – or the legal instrument made between the parties, be it a deed or contract or conveyance; it can have constitutive or declaratory effect only. Whereas in France the contract is decisive and registration declaratory, Switzerland with its diverging cantonal traditions has with its Swiss Civil Code opted for the constitutive Grundbuch

<sup>5</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ 2000 L 160/1-18.

<sup>6</sup> For a comparative and historical study see Murray Raff, *Private Property and Environmental Responsibility, A Comparative Study of German Real Property Law*, The Hague 2003. Also Bernd von Hoffmann, *Das Recht des Grundstückskaufs*, Tübingen 1982, 50ff.

<sup>7</sup> For an international overview see Raff 8ff.

system, similar to Germany and Austria<sup>8</sup>. Classification of a given national system from a comparative point of view can be difficult<sup>9</sup>. With regard to land title registration systems the Torrens, the English and the German Grundbuch system are frequently distinguished<sup>10</sup>. With all these divergencies, European uniformity in this respect appears as somewhat utopian. Though it may theoretically be an attractive idea, it probably is not even urgently needed in reality. Acquisition of real property means taking roots in a certain territory; thus, one can justifiably be required to acquaint oneself with the applicable local legislation. What, after all, is more territorial than rights affecting territory?

A project called European Land Information System – EULIS – seeks to make information on real property rights in a number of member states electronically available anywhere<sup>11</sup>. However, also persons involved in the project acknowledge that the information provided is of different legal value depending on the kind of registration system of the relevant country<sup>12</sup>. Thus, the system apparently cannot replace local advice and research. This casts considerable doubt on the legal value of the system as a whole. That the “next logical step” would be “the harmonization or even integration of the national land registries within the EU in one European land registry”<sup>13</sup> therefore is a rather bold statement. It first would have to be shown that this is useful and worthwhile.

### **III. Sale of Real Property**

#### **1. Impact of EC-Directives?**

Europe does not have a uniform contract law and the United Nations Convention on the international sale of goods of 11<sup>th</sup> April 1980 is limited to goods and thus movable property, excluding real property. However, some European Directives could have an

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<sup>8</sup> See Tuor/Schnyder/Schmid in: Peter Tuor/Bernhard Schnyder/Jörg Schmid/Alexandra Rumo-Jungo, *Das Schweizerische Zivilgesetzbuch*, 12<sup>th</sup> ed. Zürich etc. 2002, § 90 I p. 768f.

<sup>9</sup> Cf. e.g. on the Netherlands Raff 14f. and Jaap Zevenbergen, *Registration of property rights; a systems approach – Similar tasks, but different roles*, *Notarius International* 2003, 125-137 (133ff.).

<sup>10</sup> Raff 9ff.

<sup>11</sup> See a demonstration at <http://www.eulis.org>; on the project Hendrik Ploeger/Bastiaan van Loenen, *EULIS – At the Beginning of the Road to Harmonization of Land Registry in Europe*, *ERPL* 2004, 379-387.

<sup>12</sup> Ploeger/van Loenen *ibid* 385f.

<sup>13</sup> Ploeger/van Loenen *ibid*. 386f.

impact on real property sales and possible effects of the Principles of European Contract Law (PECL) should be looked at<sup>14</sup>.

Some directives clearly do not apply to sales of real property. Thus, Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises<sup>15</sup> according to its art. 1 (1) shall apply “to contracts under which a trader supplies goods or services”. And art. 3 (2) states explicitly that the directive shall not apply to “(a) contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property.” Contracts relating to goods to be incorporated into the immovable property or to its repair, however, are within the scope of the directive, according to sentence 2 of art. 3 (2) (a). Directive 97/7 on the protection of consumers in respect of distance contracts<sup>16</sup> in its art. 3 on exemptions states in sub-paragraph 1, 4 th indent that the directive shall not apply to contracts “concluded for the construction and sale of immovable property or relating to other immovable property rights, except for rental”. Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees<sup>17</sup> is limited to sale of consumer goods, and the latter are defined as “any movable item” in art. 1 (2) (b), with certain exceptions. Also the consumer credit directive 87/102<sup>18</sup> excludes credit agreements intended primarily for acquiring or retaining property rights in land or in an existing or projected building and even intended for the purpose of renovating or improving a building as such (art. 2 (1) (a)); and, it further excludes application of some of its provisions to mortgage secured credit, art. 2 (3). Further, Directive 2000/35 on combating late payment in commercial transactions<sup>19</sup> also appears to exclude sale of real property. At least, art. 2 no. 1 defines commercial transaction as “delivery of goods or provision of services for remuneration”. And, the commercial agents directive 86/653<sup>20</sup> according to art. 1 (2) is limited to commercial agents

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<sup>14</sup> For a short description of some general facts on the PECL and further references see my report in the framework of the Tenancy Law Project of the European Private Law Forum.

<sup>15</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31-33.

<sup>16</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19-27.

<sup>17</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12-16.

<sup>18</sup> Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ 1987 L 42/48-53.

<sup>19</sup> Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, OJ 2000 L 200/35-38.

<sup>20</sup> Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ 1986 L 382/17-21.

involved in “the sale or the purchase of goods”. Thus, one could at first sight have the impression that sale of real property is practically systematically excluded from the scope of the directives. But this is not always the case.

The Directive 93/13 on unfair terms in consumer contracts<sup>21</sup> in its considerations sometimes refers to the seller or sale of goods, but it does not exclude contracts relating to land from its scope of application. Though, according to art. 3 (1) it only applies to a “contractual term which has not been individually negotiated”, but this can be the case also when real property is sold. Thus, the Unfair Terms Directive has the potential of influencing the sale of real property. However, with the exception of the *Freiburger Kommunalbauten* case to be considered infra this does not appear to have become a matter of practice already.

But in the field of financing of real property acquisitions at least in Germany European consumer law has already found much attention – and this via the already mentioned Directive 85/577 on contracts negotiated away from business premises. It is the *Heininger* saga. Georg and Helga Heininger purchased a flat and for this purpose took out a loan secured by an abstract real property charge, a *Grundschild*. Nearly five years later, the Heiningers declared to revoke their declaration of intention to enter into the loan agreement, referring to the German transposition measure of the Doorstep-selling Directive 85/577. And, they sued the bank for reimbursement of the sums they had paid to the bank by way of capital and interest. This means, they wanted to get back from the bank what they had paid to it, as one may suppose against handing over to the bank the flat. The background are unprofitable investments in flats and alleged very close cooperation between banks and certain agents involved in sale of real property. The – then – German *Verbraucherkreditgesetz* or Consumer credit act gave the consumer a right to revoke his declaration of intention, but not in case of credit agreements secured by a charge on immovable property. Thus, the case went to the ECJ<sup>22</sup> which ruled that the right of cancellation according to art. 5 Doorstep-selling Directive also applied to a secured credit agreement, and further that the national legislator may not impose a time-limit for the cancellation when the consumer has not been duly informed about his right of

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<sup>21</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29-34.

cancellation. Thus, the Heiningers could revoke their declaration of intention concerning the loan and many consumer lawyers rejoiced – but forgot, that loan agreement and sale of the real property, the flat, are different contracts with different parties. Or, aren't they?

German law knows cases where cancellation of one contract can have effects on another contract which is so closely linked that economically there is just one transaction – be it in the sense of the effect of the cancellation of a sale or service contract on the loan agreement or the cancellation of the loan agreement on the sale or service contract. However, with regard to financed real property transactions, the standard is rather strict. Is this still a question of domestic law only or does the Doorstep-selling Directive come into play again? Does the Doorstep-selling Directive have an effect on the question when loan agreement and sale are so closely linked that cancellation of one of the two affects also the other one? This is the, in Germany, hotly debated issue of the cases following Heininger. In the Schulte case submitted by the Landgericht Bochum<sup>23</sup>, the Advocate General has proposed giving a negative answer<sup>24</sup>; the effect of cancellation under the Doorstep-selling Directive is left to Member State law. But another request for preliminary reference has already been made by the Oberlandesgericht Bremen, in the case Crailsheimer Volksbank<sup>25</sup>. In Germany, the Heininger saga goes on – and the issue of the “Schrottimmobilien” – or scratch-flats – is economically important and legally hotly debated. What position ever one takes, this issue is a link between real property sector and European private law. Though, it appears that at least until now the problem is a particular German one and has not yet found much attention or interest in other Member States. Whether this will change or is in a sublime way linked to the fact that many of the scratch-flats are failed post-reunification investments and situated in the area that from 1945 until 1990 constituted the Soviet zone of occupation and then GDR is an open question...

## **2. Contract and transfer of property**

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<sup>22</sup> ECJ 13.12.2001 – case C-481/99 (Heininger./Bayerische Hypo- und Vereinsbank AG), Rep. 2001 I-9945.

<sup>23</sup> LG Bochum 29.7.2003 – case 1 O 795/02, NJW 2003, 2612.

<sup>24</sup> Opinion of the Advocate General Léger delivered on 28.9.2004 – case C-350/03.

<sup>25</sup> OLG Bremen 27.5.2004 – joint cases 2 U 20/02, 2 U 23/02, 2 U 53/02, NJW 2004, 2238; at the ECJ this is case C-229/04.

The United Nations Convention on the International Sale of Goods in its art. 4 lit. b) expressly says not to regulate the effects that the sale may have on the property in the good sold. This mirrors the well-known and traditional divergencies in the matter of sale and passing of title and thus is of interest also in the context of real property. Indeed, some systems make a distinction, or better separation between the obligatory contract and the “real contract” (dinglicher Vertrag) which effects the transfer of title (Trennungsprinzip)<sup>26</sup>. If no such separation is made title may pass on mere agreement or on fulfillment of a further prerequisite such as transfer of possession or registration<sup>27</sup>. If such a distinction is made the two contracts can as to their validity be considered independently from each other, i.e. in an abstract way (Abstraktionsprinzip), or in their connection, i.e. validity of the obligatory contract which is the causa for the real contract is necessary for the validity of the real contract and thus transfer of title (Kausalitätsprinzip). Whether a further prerequisite such as transfer of possession or registration is required for the transfer of title logically is not precluded by the choice of Abstraktionsprinzip or Kausalitätsprinzip<sup>28</sup>. France with no separation and strict causality and Germany with separation, abstraction and the further requirements of transfer of possession of movables or registration in case of immovables are two strongly opposite systems in this respect. The merits of these principles have often been debated, especially with regard to movables<sup>29</sup>. Separation and abstraction are often considered as artificial, but also strict causality without separation has the surprising side of giving absolute effect erga omnes to an in principle only relative contract<sup>30</sup>. European private law does not (yet ?) touch upon this question. How English real property law fits into this picture seems an interesting question. May it take a position even more extreme than the German one because perhaps the registration alone is decisive? In case the further Europeanization of private law also touches on property law, these questions need to be addressed. And even if regard may first or only be had to movables, real property should not be forgotten. The system adopted for movable property should also be workable for real property.

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<sup>26</sup> See Fritz Baur/Rolf Stürner, *Sachenrecht*, 17th ed. 1999, § 5 nos. 40ff.; with respect to movables Lars P.W. van Vliet, *Transfer of movables in German, French, English and Dutch Law* (2000) 23f., 31f.

<sup>27</sup> For movables see Baur/Stürner § 51 no. 2; also van Vliet 23.

<sup>28</sup> See on movables and assignment of claims Baur/Stürner § 51 no. 2 with examples.

<sup>29</sup> For a short reasoned statement see Baur/Stürner § 5 no. 43; see also the thesis of van Vliet.

<sup>30</sup> On this see François Terré/Philippe Simler/Yves Lequette, *Droit civil, Les obligations*, 4<sup>th</sup> ed. Paris 2002, no. 492.

### 3. Form of the sale

For the sale of real property, some Member State laws require a certain form. Where a form is required, this may protect seller, buyer or both of them and there may be a possibility to heal a lack of form<sup>31</sup>. The PECL, however, in principle do not have a form requirement. However, the form requirement has already found some kind of backing in existing European Community private law. Art. 9 (1) of the Electronic Commerce Directive 2000/31 of 8<sup>th</sup> June 2000<sup>32</sup> provides that Member States shall ensure that their legal system allows contracts to be concluded by electronic means without obstacles, but Art. 9(2) lit. a) states: “Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories: (a) contracts that create or transfer rights in real estate, except for rental rights; ...” Thus, European Private Law allows that real property contracts may not be validly concluded by simple electronic means and thus acknowledges form requirements imposed by Member State law.

### 4. Notarial deed and right to withdraw

Form requirements for real property transactions shall inter alia protect the parties, but on the European level there have also already been slight attempts to look at real property contracts from the more general angle of consumer protection<sup>33</sup>. This has, as in some Member States, led to considering a right to withdraw from the contract, just as in some other instances of consumer contracts. However, it seems that these ideas are not on the table at the moment, and probably rightly so. As has been pointed out already years ago in discussions on the Timesharing-Directive, the form requirement is an even stronger means of protection than a mere right to withdraw<sup>34</sup>.

### 5. Title

According to a story of a German comparative lawyer, he once has been approached by an American enterprise engaged in title insurance and wondering about extending its business to Germany. Unfortunately, he had to tell the enterprise that due to the

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<sup>31</sup> For a comparative assessment see von Hoffmann 134ff.

<sup>32</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ 2000 L 178/1-16.

<sup>33</sup> For some references see Remien 328.

<sup>34</sup> Ulrich Drobniĝ, *Neue rechtliche Konzepte für den europäischen Verbraucherschutz*, Notarius International 1998, 98-106 (103f.); Michael Martinek, *Das neue Teilzeit-Wohnrechtgesetz* –

registration system with the Grundbuch there was not any need for title insurance in Germany. Due to the – alongside the real contract - constitutive effect of registration, the Grundbuch is nearly always correct and it also enjoys public faith, i.e. a person in good faith can rely on its content. England apparently goes so far to look at the fact of registration alone and thus protects even the acquiror in bad faith. It seems that this may be regarded either as a kind of state insurance against the given dangers of the registration system or as an unjustified expropriation of the former owner against compensation. Here is not the place to decide whether the solution is in conformity with the proportionality principle. Sweden apparently has opted for a combination of the different models<sup>35</sup>.

#### **IV. Specific problems**

The sale of real property can bring with it some further specific problems. Some of them shall be briefly mentioned here.

##### **1. Validity of the contract and reality of the price mentioned in the deed**

It is a classic theme that where a contract for sale of real property is made up in some formality, parties do not always mention the price really agreed on. They sometimes want to save on taxes or fees. One can ask what is the effect on the contract. In Germany, not the simulated (low price), but the hidden (real price) contract would be the one which has been concluded, but the latter one would be invalid due to lack of notarial form... if that lack is not healed. Thus, in case of refusal to transfer ownership the contract could not be enforced. According to reports from other Member States, such private law sanctions for cheating on taxes or fees are unknown of, but the phenomenon itself not at all... In case of further Europeanization of contract law, this may be an interesting topic first for finding the European solution and then for looking whether a uniform rule results in a uniform European practice.

##### **2. Price**

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mißratener Verbraucherschutz bei Time-Sharing-Verträgen, NJW 1997, 1393-1399 (1396); generally also Remien 329f.

<sup>35</sup> See Hans-Heinrich Vogel, Gutgläubenserwerb, Fälschung, Staatshaftung und Identitätsfeststellung im schwedischen Grundstücksrecht, 1065- 1074 in: Aufbruch nach Europa, 75 Jahre Max-Planck-Institut für Privatrecht, Tübingen 2001.

Inadequacy of the price is another old theme in matters of sale of real property, as evidenced by the *laesio enormis*<sup>36</sup> and also already explored in comparative legal writing<sup>37</sup>. Art. 4.109 PECL deals with “Excessive or grossly unfair advantage”. A further Europeanization of contract law in this respect could also influence real property sales.

### **3. Warranty**

Warranty for defects and for lack of title are an important issue in sales. From the perspective of PECL, the general rules on non-performance would apply.

### **V. Buildings to be erected (Bauträger)**

Not only the acquisition of the property of a piece of land, but also the erection of a suitable building on it is important. For a private person, the relevant contract generally is the biggest contract of patrimonial law that he or she ever concludes, but that building contractors may run into problems with liquidity and possibly face insolvency is an only too common phenomenon. Therefore, protection of the private master may be called for. In the case *Freiburger Kommunalbauten* which concerned the Unfair Terms Directive 93/13 these issues have been brought before the ECJ. Ludger and Ulrike Hofstetter had by notarial contract bought a parking space located in a multi-story car park that the seller *Freiburger Kommunalbauten* was to build. Under clause 5 of the contract, the whole of the price was due upon delivery of a security by the contractor, and the Hofstetters received that security in the form of a bank guarantee, but refused to effect payment, because they considered clause 5 as invalid. For this, they referred to the general clause about unfair general conditions of contract, § 9 AGB-Gesetz, now § 307 BGB – the German equivalent of art. 3 (1) Unfair Terms Directive. The Hofstetters finally paid the price when they had accepted the parking space free of defects more than a year later, but *Freiburger Kommunalbauten* now claimed default interest for late payment. The first and second instance courts reached different results, the *Bundesgerichtshof* referred to the ECJ the following question: “Is a term, contained in a seller’s standard business conditions, which provides that the purchaser of a building to be constructed is to pay the total price for that building, irrespective of whether there has been any progress in

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<sup>36</sup> See Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Cape Town etc. 1990; Christoph Becker, *Die Lehre von der laesio enormis in der Sicht der heutigen Wucherproblematik*, Köln etc. 1993; see generally on price rules Remien 390ff.

the construction, provided that the seller has previously provided him with a guarantee from a credit institution securing any monetary claims the purchaser may have in respect of defective performance or non-performance of the contract, to be regraded as unfair within the meaning of Article 3 (1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts?" The ECJ here had the chance to give life to a real harmonization of control of unfair standard terms in Europe. This task is not easy, but follows from the Unfair Terms Directive. But on 1<sup>st</sup> April 2004 the ECJ responded<sup>38</sup>: "It is for the national court to decide whether a contractual term such as that at issue in the main proceedings satisfies the requirements for it to be regarded as unfair under Article 3 (1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts." In the *Océano* case concerning choice of court clauses the ECJ had been braver. It is highly questionable whether the ECJ here has fulfilled his task as guardian of the law in Europe. But how ever that may be, the case shows that the Unfair Terms Directive has at last the potential of influencing the content of real property related contracts. The result in *Freiburger Kommunalbauten* may, perhaps, only be an episode.

## **VI. Private International Law**

Real property contracts find special mentioning in the Rome Convention on the law applicable to international contractual obligations. Art. 4 regulates which law is applicable if there is no choice of law by the parties. This is the law of the state with which the contract is most closely connected, and this generally is presumed to be the law of the state of the party effecting the characteristic performance. But for this latter presumption sub-paragraph 3 brings a modification for real property contracts: the law of the state where the property is situated is presumed to be the most closely connected. Questions of form are regulated in art. 9 Rome Convention, and a specific rule on real property contracts is given in sub-paragraph 6. The rules on International Insolvency Law have already been referred to above.

## **VII. Mortgage Credit and Encumbrances**

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<sup>37</sup> Von Hoffmann 149ff.

<sup>38</sup> ECJ 1.4.2004 – case C-237/02; see also notes by Michael Volmer, *Klauselkontrolle am Beispiel der MaBV-Bürgschaft*, ZfIR 2004, 460-462; Robert Freitag, *EWiR* 2004, 397-398; Karsten Markward, *Inhaltskontrolle von AGB-Klauseln durch den EuGH – Zugleich Besprechung EuGH, Urt. v. 1.4.2004 – Rs C-237/02*, ZIP 2005, 152-157.

As a measure concerning financial services in the internal market, on 1<sup>st</sup> of March 2001 the Commission has issued a Recommendation on pre-contractual information to be given to consumers by lenders offering home loans<sup>39</sup>. It covers domestic and cross-border home-loans, excluding consumer credit agreements falling under the consumer credit directive 87/102/EEC (art. 1 (1) and (2)). For the encumbrances securing the credit, art. 2 has an open definition: "For the purposes of this recommendation, a home loan means a credit to a consumer for the purchase or transformation of the private immovable property he owns or aims to acquire, secured either by a mortgage on immovable property or by a surety commonly used in a Member State for that purpose." This at least has the merit of including not only classic mortgages but also other security devices such as the abstract Grundschild. Thus, account has been taken of the divergencies in the European real security sector. The recommendation concerns general and personalised information to be provided by the lenders (art. 3), and in doing so makes use of a Code of Conduct stemming from an agreement negotiated and adopted by European associations of consumers and the European Credit Sector Association offering home loans. For the general information, reference is made to an annex I. It points to the lender (A 1 and A 2), but above all to the home loan (B 1 to B 12); on certain terms, information shall be given. The personalised information shall be presented in an "European Standardised Information Sheet" as set out in annex II (art. 3). It concerns inter alia interest, duration, repayment, costs and further terms. In accordance with art. 5 a central register of lenders offering home loans has been established. Meanwhile, also an academic study has been presented and in March 2003 the Commission has created a "Forum Group on mortgage credit" which has made some 48 recommendations in December 2004. Interestingly, Consumer Representatives and most Industry Representatives appear to advocate harmonisation of Early Repayment Fees (no. 4); however, whereas "Specific Consumer Representative Recommendations" favour granting a right to early repayment, that is termination of the mortgage credit agreement (no. 10), related "Specific Industry Representative Recommendations" aim at removing legally enforceable caps on Early Repayment Fees and fully harmonising and limiting (!) the right of early repayment, especially for fixed interest rate loans, to circumstances involving sale of the property, unemployment and death (no. 18). The Annual Percentage Rate Charge should be

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<sup>39</sup> OJ 2001 L 69/25-29.

harmonised (no. 5); but again, on the definition and the question of minimum or full harmonization, there is no agreement (nos. 11 and 16). On conflicts of law issues, the proper law of the credit agreement is in dispute (nos. 19ff.). All charges affecting real estate should be registered in a Public Register (nos. 30ff.). And according to recommendation no. 36 “links between mortgage debts and the collateral security” should be made more flexible, i.e. strong accessoriness between the loan and the collateral should be replaced by a private accessoriness agreement. Transferability of mortgages shall be encouraged by “introducing pan-European Security Trust Instruments” (no. 39). It can be said that these recommendations really address some of the core questions of credit contract and mortgage security law – whatever their fate may be.

The plans for a Eurohypothek are well-known<sup>40</sup> and subject of another paper at this conference. Whereas the European Commission had obtained comparative law opinions on mortgage law in the 1960ies and 70ies, its current attitude to mortgage law appears less clear. For Foreign Currency Mortgages, the ECJ has intervened in some cases<sup>41</sup>. But the uniform currency, the Euro, already has made this become legal history to a large extent.

However, where there are already now abstract real property charges such as the German Grundschuld or if an perhaps abstract Euromortgage should be introduced, another question of European private law can arise. A Grundschuld – and perhaps other charges or a Euromortgage – mostly is granted to secure a certain debt, but there may be contract clauses saying that the charge shall also secure other debts, perhaps all debts arising out of the banking relationship. Then, one can ask whether this clause is fair under art. 3 (1) of the Unfair Terms Directive. At least in Germany such questions have been asked and the reluctance of the Bundesgerichtshof to strike out such clauses has met with criticism in legal writing<sup>42</sup>. Though in view of Freiburger Kommunalbauten intervention by the ECJ seems improbable, the same theme could perhaps be taken up in other Member States which know such a kind of

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<sup>40</sup> Recently Peter Meyer, *Einheitliches europäisches Grundpfandrecht oder Wettbewerb der Rechtsordnungen*, EuZW 2004, 389-391; for a monograph see Otmar Stöcker, *Die Eurohypothek*, Berlin 1991.

<sup>41</sup> ECJ 16.3.1999 – case C-222/97 (Trummer und Meyer), Rep. 1999 I-1661; 11.1.2001 – case C-464/98 (Westdeutsche Landesbank Girozentrale), Rep. 2001 I-173.

<sup>42</sup> See Karl Heinz Schwab/Hanns Prütting, *Sachenrecht*, Ein Studienbuch, 31st edition München 2003, p. 367f. no. 767.

all monies clause. Perhaps, the Unfair Terms Directive and national practices could thus at least be a source of inspiration.

### **VIII. Conclusion**

The European lands form a rich and manifold continent, and so do its Member States' real property laws. But as unsurveyed as the continent from the standpoint of comparative law and European harmonization of laws may be with regard to real property law, there are nevertheless some and slowly growing European Community influences. The Insolvency Convention gives a hint to what (real) property law means. Registration schemes still are diverse. But the Unfair Terms Directive has a potential on sales and other real property related contracts. On the right of withdrawal of the Doorstep-selling Directive and mortgage secured credit agreements there are, at least in Germany, hot discussions and several ECJ-procedures. Form requirements for real property contracts are tolerated by the Electronic Commerce Directive. The security sector already since many years is at least the object of initiatives like the Eurohypothek and discussions and the relevant Recommendation seems really interesting. Real property law in general is Member State law, but - even without excessive Europeanization pleas - it is useful to look at it in the context of European Private Law – in the interest of real property law and European private law.