

Spain

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1. Real Property Law – Introduction

1.1 General Features and Short History

The main legal text on private law in general and on real estate law is the Civil Code, passed in 1889. It was based on Spanish legal tradition which itself was modernized in accordance with the most rational principles introduced during the time of codification. This law has not undergone any serious modifications with respect to rights *in rem* (or encumbrances on property).

The Land Registry and mortgages are defined and regulated in the so called Mortgage Law (*Ley Hipotecaria*, or LH, from now on) and in the Mortgage Regulations (*Reglamento Hipotecario*, or RH, from now on) both of which contain rules about other rights *in rem* or encumbrances. The first LH was passed in 1861, being supplanted by new Mortgage Laws in 1909 and 1994. The current text is from 1946, although it has undergone partial modifications. The current RH dates back to 1947, although it has been modified on numerous occasions. The most recent modifications were due to the introduction of new laws on urban real estate development and on the operation of the Land Registry, in order to make it run smoother.

The deed, notarial act or public document used to formalize the transfer of real property (the so called *escritura pública*) is regulated by the 1862 Notaries' Law—although owing to its antiquity, many of its rules are not applied—and the current Notaries' Regulations (*Reglamento Notarial*, or RN, from now on), which was approved in 1944, and underwent serious reform and modernization in 1984. Since then, it has been partially modified on numerous occasions, especially in recent years, because of the introduction of the electronic signature and because of the need to organize and coordinate the notary's actions and the Land Registry.

The Law on Horizontal Property (*Condominiums*) of 1960 is important in the realm of real estate and was recently modified (1999).

Civil Law is not the same throughout Spain. There are small variations in some regions (Catalonia, parts of the Basque country, Galicia, Aragón, Navarra, and Balears) which all have certain laws that correspond to the legal traditions of that region. There are small differences with respect to the rights over real estate, although in recent years the Parliaments of some of these regions—especially Catalonia—through the use of the competence granted by the Constitution, have reformed their legal texts on private law and thus increased the differences, while still following the same principles and legal tradition. In any event, the regulation of notarial acts and of the Land Registry is the State's exclusive competence, and in these matters, therefore, the legal regime is the same in all of Spain.

The regulation of the Civil Property Law is based on the principles of 19th century liberalism. In recent decades though (since the 1978 Constitution), laws limiting property rights, as well as administrative intervention in the use and transformation of real property, have increased in importance.

1.2 Property and Estates

In theory, in Spanish law there are institutions, derived from feudal law, in which for a single real property many ownership titles are given. There are the old ground rents (*censos*), still regulated by the Civil Code, in which the direct owner has a property right allowing him to cultivate and exploit the lands. Additionally, the beneficial owner has the right to receive certain annual fruits (for example, an amount of money, a few kilos of wheat, or a chicken and two rabbits every year) from the land (that is, from the direct owner). In any event, these institutions have almost disappeared and only survive in some cases in Catalonia, especially as regards the exploitation of vineyards. Current laws endeavour to put an end to these institutions because of their poor economic performance, instead allowing the direct owner to get full and free ownership through a compensatory payment to the beneficial owner.

The general rule is *superficies solo cedit*, which entails that the owner of a plot of land always owns whatever is built on his plot.

In some cases, the new building, or the additions to a pre-existing building, can belong to someone other than the owner of the plot; as long as he has been given a right *in rem* to build and acquire definitively, or he has a so called surface right (*derecho de superficie*, or plot or building lease) which allows him to build and own that construction for an established period of time (50, 75, or 99 years), after which the free ownership of the construction would return to the owner of the plot with or without a compensatory payment.

Cases of surface rights are rather infrequent. They make up less than 1% of constructible properties and appear mainly in the context of actions of different public authorities and administrative entities.

1.3 Interests in Land

In Spain, there is a *numerus apertus* system in place. In theory, it is possible to create any type of right *in rem* or encumbrance above and beyond those already defined in the legal texts.

Nevertheless, some important limitations must be taken into account: in order to be a true right *in rem*, that is, an encumbrance enforceable *erga omnes*, any new kind of right that might be created must be constructed with absolute clarity, clearly defined in its content, and in the limitations that it creates for the encumbered property, in such a way that third parties can know and understand without difficulty the limitations of the ownership that they may acquire. Moreover, due to the existence of the Land Registry, the enforceability against future purchasers can only be granted if the right has been registered in the Registry itself, and this can only be done if it has been properly defined as set out above.

In any event, the special rights usually created which differ from those defined in the law tend to fit in the most general or abstract cases of rights *in rem*, such as easements (that is, special limitations on the use of real estate established for the benefit of another property or of a natural or legal person) or pre-emptive rights.

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For this reason, an important portion of the scientific doctrine tends to consider that, although the Spanish system is *numerus apertus* in theory, in practice it is really *numerus clausus*.

Anyway, limitations and special rights on real estate ownership are quite frequently created, above all in the urban context, since the fact is that whenever there is a need for them these rights are easily and effectively granted by notarial acts, as well as being literally transcribed in the Land Registry, which enormously facilitates their efficiency.

There are numerous rights *in rem* or encumbrances that burden the use and enjoyment of another's real estate:

- **Usufruct:** According to Art. 467 of the Civil Code, “The usufruct gives the right to enjoy another's goods with the obligation of conserving its form and content, unless otherwise authorized by its title of granting or by the law.”

That is, the usufruct gives the right to all of the fruits and utilities that property may yield, be it movable or immovable. The only limitation is that the property must be used in a way such that its value is not lost or reduced.

The duration of the usufruct is subject to important limitations: the law imposes that when granted, it must last for a limited period of time, in order to avoid unlimited temporal division of ownership rights. For this reason, if it is granted in favor of various successive people, then these people must all be alive at the time; or if they are *nasciturus* or *concepturus*, it may not be granted to more than two successive generations within the same family. And if granted to a company or institution, it cannot last for more than 30 years, although some exceptions do exist in the case of usufructs formed by a public corporation in favor of another analogous entity.

The most frequent cases are those in the family context (inheritances, donations from parents to children), where the usufruct is kept for the life of the donor, his husband or wife, or some other person.

- **Right of Use:** This right is analogous to the usufruct, but with a more limited content. According to **Art. 524 of the Civil Code**, “The use gives the right to collect, of the fruits of a thing belonging to someone else, those needed to cover the necessities of the user and his family, even if the family grows larger (...)”.

This right, on the other hand, is non-transferable.

- **Rights of Habitation:** Again this right is analogous to the usufruct, on inhabitable real estate, also with a more limited content. According to **Art. 524 of the Civil Code**, “(...) Habitation gives to whoever has this right the ability to occupy in a house the necessary portions for himself and for the members of his family”.

This is also a personal and non-transferable right.

- **Easement:** These are limitations imposed on the ownership of real estate, in favor of other real estate (the so-called appurtenance easements) or in favor of one or several persons (easements in gross): The Civil Code defines them in the following way:

Art. 530: “The easement is an encumbrance imposed on real estate to the benefit of other real estate belonging to a different owner.”

other real estate belonging to a different owner.

The real estate in whose favor the easement is created is called dominant tenement; the other one is called servient tenement.”

Art. 531: “Easements can also be established to the advantage of one or more persons, or of a community, to whom the encumbered real estate does not belong .”

The main purpose of the easement is to allow for the greatest utilization of properties. The Civil Code regulates the most frequent types of easements (i.e. water channeling, vehicle or pedestrian rights of way, dividing walls, access to light, views, and the distance between buildings), although the granting of new types of easements necessary for the use of real estate is frequent (*numerus apertus*).

Personal easements are much rarer, although there are some cases. For example, the right *in rem* in favor of a family to use the balcony of an apartment to view bull fights celebrated in the square of some town.

- Ground rent: This institution dates from the middle ages and has almost disappeared, but it is regulated by the Civil Code and the civil laws of some regions (mentioned above under 1.1).

In Spanish law, all mortgages are accessory: they cannot exist without a specific main obligation guaranteed by the mortgage. The floating mortgage and the owner’s mortgage, established up to a certain value in order to guarantee any future debt up to this value, are not acceptable, the reason being that third parties wishing to acquire ownership or other rights to the real estate should be able to know not only the value or extent of the liabilities directly affecting the property, but also the character and precise identification of whatever obligations it guarantees.

This is the so-called speciality principle. Nevertheless, in fact, ways are found to create more general mortgages able to guarantee various future debts. These are based on the *current account contract*, to which various obligations, correctly identified upon creation of the contract, can be charged. What is guaranteed in this case is the final balance or liquidation of the account on a specific date (or even earlier should the debtor fail to comply with the agreed payment schedule).

Rents guaranteed by real estate are also frequent, and are easy to grant under Spanish law:

- Through ground rents, as stated above (under 1.1), which date from medieval law and are in fact based on the idea that the real estate produces rents, one part of which goes to the beneficial owner and as a result creates an encumbrance on the real estate.
- Through the transfer of ownership of the real estate to another person in exchange for the obligation to pay a rent during the life of the transferor, who gets the possibility *erga omnes* of recuperating his property whenever the rent is not paid.
- Through a mortgage meant to guarantee the periodic payment of a rent, such that in the case of a default in payment, the mortgage would be foreclosed in order to cover payments already made?, and remain in force, in assurance of the future payments.

Fundamentally with the call option, which is frequently agreed. It gives the right

erga omnes to acquire ownership of the real estate by paying an amount previously agreed upon and by giving the possible purchaser a limited period of time, no longer than four years, to execute this right.

In sales with a deferred price, the defeasance clause is frequently used. It gives the seller a right *erga omnes* to recuperate ownership of the sold real estate, in cases where the amount to be paid later is never received.

1.4 Apartment Ownership (Condominiums)

The ownership of houses for apartments is regulated by the Law on Horizontal Property of 21 July 1960 which has been modified by the Law dated 6th April 1999, in order to bring up to date certain matters such as the procedures used to make decisions relevant to the Community and more specifically on the obligations of apartment owners in the building. Under this law, a similar system and set of regulations can be used for private communities where both shared components (installations and common streets) and exclusive ones (plots and houses, or buildings divided into apartments) exist.

The legal statute on apartment property is based on the following fundamental principles:

1. Each owner is the exclusive owner of his respective property (whether it is an apartment, a store, a parking space, etc.)
2. Each property is assigned a title share or a percentage in the community which defines its rights and obligations within that community. This title share is set up, by agreement of the owners, in function of the area, value, use of common elements, etc. of each property.
3. The plot belongs to the owners in the proportion defined by the title shares or percentages of their respective properties. Thus, if the building collapses, they would be co-owners of the remaining plot in the accepted proportions.
4. The definition of the several independent properties, the common elements of the building, as well as the title shares corresponding to each property, are set out in the community's statute or bylaws, which are usually established by the developer before sale of the apartments. Afterwards, this statute can only be approved or modified by the unanimous agreement of all of the owners. These bylaws can also regulate limitations with respect to the use of the property (i.e. the prohibition against installing a restaurant on the ground floor) and establish rules on the organization and administration of the community.
5. Some times, internal rules are also set up, by majority vote in the Meeting. They compel all owners, and regulate the details of life together and the adequate use of services and common things.
6. For building operation and maintenance, the community tends to act through three organs: the General Meeting, or owners' meeting, where each votes according to his community share or percentage; the President, executive and representative organ of the community; and the Administrator, in charge of building maintenance and of

community income and expenses.

There have also been recent developments in *time sharing*, regulated by the Law dated 15 December 1998. In any event, its progress has not been particularly important. It is limited to a few specific tourist areas, and even here remains infrequent. Its regulation is distinctively concerned with consumer protection and ensuring proper services and maintenance of the purchased property rights. This reveals that, in this domain at least, obligation aspects are predominant over real estate aspects.

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

Renting buildings is specially regulated by the Law on Lease of Urban Property (*Ley de Arrendamientos Urbanos*) of 24 November 1994. For social reasons, renting regulations have always fiercely protected the tenant, only becoming progressively liberalized from the year 1985 on.

In the renting of houses, the tenant has the right to remain in occupation, revising the rent annually, for a minimum of 5 years, unless a longer period of time was agreed upon. Moreover, at his death, family members that lived in the building have the right to continue occupying the building.

In all rental agreements, unless otherwise agreed, in the case of the sale of the real estate the tenant has the right to acquire the property according to the conditions agreed upon with the buyer.

In theory, the rights of the tenant are not rights *in rem* or encumbrances, but purely personal rights, and the property itself continues to belong to the landlord. However, the effectiveness of these rights against third parties is so great that they are frequently seen as a *ius ad rem*, or a *tertium genus*, between personal rights and encumbrances. Whenever the property rented out for residential use is sold within the first five years of the rental contract, the buyer must respect the contract until it comes to an end. In other cases (that is, if the housing has been rented out for more than five years, or if the property is used for something other than residential purposes), the buyer need only respect the tenant's rights if they are registered in the Land Registry.

1.6 The Public Law Context of Real Property Transactions

Some pre-emptive rights in favor of the public administration are being progressively introduced in the sale of plots located in areas protected for their ecological interest. These rights, being restrictions on legal ownership, are effective against anyone with the same force as if they were true rights or encumbrances.

Another area in which very important restrictions on the transfer of property are found is in so called Subsidized Housing (VPO). In these cases, in exchange for aid received (such as plots sold at below market value, fiscal exemptions, and help for paying off mortgage loans contracted for their purchase) very important limitations are imposed on the rights of the buyer, especially as regards future transfer of the property. The limitations vary according to the type of aid received, but they tend to

consist in requiring the housing to be used solely as the habitual residence, the existence of an upper limit for prices in later sales of the housing (with serious sanctions like the requirement of returning all of the aid received if these limitations are not respected), prohibitions against selling the property within the first five years, and preemptive and redemption rights for the public administration if sale takes place in the first 10 or 15 years, etc.

This sort of housing is relatively common. Periodically, housing plans are drawn up and a significant number of residences are financed for this purpose. The legal limitations produce all of their effects *erga omnes*, with more force than a right *in rem*, because they are obligations imposed by law. However, the system generates certain uncertainties because of the difficulty of knowing exactly what the system of obligations and limitations for each housing unit is. In any event, this is of limited importance, since to date the public administration has been far from rigorous in its control of compliance with these legal obligations.

1.7 Brief Summary on "Real Property Law in Action"

The price of property has risen greatly in the last six years, to such an extent that family debt has become clearly excessive in relation to available income. Nevertheless, this is compensated in large measure by the recent low interest rates (it is not rare to sign a loan with a Euribor rate plus half a percentage point, and the average may probably be around Euribor plus one point) which have eased efforts to pay off these mortgage loans.

There are multiple causes of the rise in prices. Perhaps the most relevant can be summarized as follows:

- Scarcity of land due to control of urban development by Town Halls, inefficiently administered because of problems of excessive control and bureaucracy and used to obtain important sources of finance.
- Rapid and sustained economic growth that has caused important increases in available income, giving rise to large price increases (as in 1986-1992 and in 1996-2004).
- Notable flexibility in the rise of real estate prices because of the strong public preference for ownership over renting and the decrease in interest rates over the period 1994-2003 making the paying off of mortgage loans much easier.

Nevertheless, it must be noted that there are a large number of empty housing units that are not put up for sale on the market. The cause is the frequent recourse to real estate investment with speculative ends or in view of long term savings.

Mortgages have a fundamental role in financing the purchase of real estate. More than 80% of new family housing can be estimated to have been financed through mortgage loans. The main cause is surely that in Spain there is an especially large and competitive mortgage loan market, as we shall later see.

In real estate acquisitions the public notary plays a primary role, being present at in almost all instances; he draws up the contract and checks the encumbrances of the

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real estate, as we will see below. Alongside of him, the Land Registry is fundamental; as it ensures that any possible encumbrances or rights on the real estate that are not duly registered do not affect the buyer.

Frequently real estate agents play a commercial role, putting the two sides of the market in contact, the offer and the demand.

The cases of legal conflict in real estate matters are very scarce. The reason is that the mechanism of preventive legal security operates reasonably well, with the public notary who draws up the contracts and ensures the absence of encumbrances on the real estate and the Land Registry, which informs of any effective encumbrances. The proof of this is that a market for insurance to protect against any possible cases of loss of acquired property has not developed, because so far it has not been necessary, and that insurance for public notary liabilities comes at very little cost (perhaps 15 € per operation).

Access to Courts in order to defend property is guaranteed in conditions of reasonable equity. Nevertheless, the cost and the delay of the legal solutions make them rather inefficient. Despite this, no alternative resolution mechanisms have been developed in any important measure.

There aren't important problems of uncertainty or appearance of encumbrances or limitations on the rights to property that is acquired, with one exception: urbanism, owing to the fact that in areas under urban development it is frequently impossible to obtain from the current administration precise and detailed information about the property. Sometimes, in the process of urban development, solutions end up being produced that are not entirely fair, excessively benefiting certain interested parties in comparison to others in the same or nearby areas.

2. Land Registration

2.1 Organisation

The statutory regulation of the Land Registry is contained in the *Ley Hipotecaria* (LH) of 8 February 1946 and in the *Reglamento Hipotecario* (RH) of 14 February 1947. Both have been subject to several modifications in order to adopt them to new institutions and rules on real estate property. Recently an important Royal Decree of 4 July 1997 concerning the registration of urban conduct was added.

The legal registration of land and property in Spain is carried out by the Land Registry, when rights that are acquired and transferred concerning distinct real estates are registered. The Registrar is in charge of the Land Registry: he is a legally certified government employee who is functionally autonomous and gets paid fees for each registration.

Next to the Land Registry, there is the Cadastre, which is a descriptive database of the physical layout of the distinct properties. Its goal is fundamentally fiscal: it exists in order to make real estate evaluations and calculate the appropriate taxes. It has very little legal status and frequently the title of the properties in the Cadastre do not match up with the real ones.

The Land Registry is divided into some one thousand independent Registries, each corresponding to a specific portion of Spanish territory. At the head of each Registry there is a Registrar who is a qualified government employee, having attained the position only after passing a very hard entrance exam. The Registrars are organized into a National Official Association, although this also depends on the Ministry of Justice. Each Registrar works in an autonomous way, and decides independently whether or not, according to the law, he must register a real estate transaction. Nevertheless, his decisions can be questioned before an organ of the Ministry of Justice, although this system is highly inefficient, making the Registrar's decision difficult to oppose or modify. This provokes serious inefficiencies in the real estate market, occasionally justified by the legal guarantees that the system affords, although many could likely be avoided without any affect on this legal guarantee. The problem is that any change to the statute of the Registrars of deeds is always very difficult to make.

In terms of area, between 75 and 90% of real estate property is registered. However, in terms of value more than 95% of the property is registered. All of the valuable properties are registered, and only marginal properties whose minor value does not justify the cost of the registration remain unregistered.

2.2 Contents of Registration

The Land Registry is organized in books in which each property receives a consecutive number. The first registration occurs when a transfer of the real estate takes place, and certain circumstances are met that make it possible to register the transfer in the Registry (chiefly, the rights of the transferor and the existence of the real estate in the Cadastre must both be proved). After this, the rights over the same plot are reg-

istered in successive entries, whether it be a transfer of the property or other limited rights that burden it. Additionally, the modifications of the description of the real estate are also registered, i.e. modifications to the area or boundaries, divisions, new constructions, etc.

With this system the Land Registry has a great advantage: it collects with great precision the legal situation of any particular property, since any encumbrances that might successfully affect it must appear on the same plot-page. Its main inconvenience from the point of view of the information it offers is that traditionally the physical descriptions of properties that were accepted by the Registry were those written by the owners themselves, and they were very seldom accurate or complete. For this reason, the Registry does not give any trustworthy information on the physical existence of the real estates, nor does it offer any guarantees. Thus, although it might state the sale of a terrain of 10,000 sq. mt., there can be no guarantee that this is the actual area of the purchased property. To be sure of the physical description, it is necessary to consult the Cadastre.

Currently, though, for any new entry to be possible, the law requires proof of the physical data of the real estate, with a certificate from the Cadastre or from an architect.

2.3 Registration Procedure

The registration application does not exist in form of a particular document. It is enough to bring a document to the Land Registry, and at that time, it must be written into a daily log-book, with an indication of its date and entrance order. This indication is of the greatest importance, since its order decides the priority of rights due to the various titles that may be registered in the Land Registry.

The registration application can be drawn up by anyone who has an interest in it or by anyone who manages such issues: the public notary, a lawyer, or an agent. The Law of 24 December 2001 states that the public document can be remitted by the notary to the Registrar with an electronic signature and, that once the registration is done, the Registrar must send certification of the registration back to the notary. After this, the notary writes out the document as well as the Registrar's entry on paper, puts his signature to it and returns it to the interested party. The system can be very convenient as not only does it save time for the user of the legal security service, but it also ensures that as soon as the document is signed it enters the Land Registry, avoiding the risk that other contradictory documents are presented. For this reason, when the system is functioning, surely the most frequent registration procedure will be that the notary, as soon as he signs the document, will send the electronic document to the Registry. However, this system has not yet been put into practice for reasons that I feel are unjustified, such as a lack of agreement on the procedure of dispatch of electronic public documents to the Registry (which needs to be legally defined).

The Registrar has the duty to register the document in the space of 15 days from the time the document is presented. However, frequently this time frame is not respected and it may take up to a month, or even more, depending on the Registry.

The decision not to register the document may be based on the following: the transferor is not the title holder of the rights to be transferred according to the Land Registry, the document presented is not a true public document (signed and authorized by a notary, a judge, or an administrative authority within his competence), or the content of the contract is null.

In cases where the Registrar decides not to register the document, he must notify his decision to whoever presented the document to the Land Registry, as well as to the notary, judge or government employee that authorized the document.

Thus, it is said in the *Ley Hipotecaria*:

“Art. 18.1. The Registrars will determine under their responsibility the formal legality of documents of any type, in whose virtue the registration is requested, as well as the capacity of the grantors and the validity of the acts of disposal contained in public documents, according to them and to the contents of the Land Registry.”

This system has in fact operated very well historically, because it has generated remarkable legal security and the number of legal conflicts generated in these matters is minimal. Lately, however, a process of strengthening the control of the Registrar due to the risk aversion of professionals (who have no economic incentive when taking a risky decision) and an attempt to strengthen the legal concept of the Land Registry have jammed up real estate traffic all too often for reasons that do not appear to have justification. For example, when the notary has written that something, such as the concession of an administrative license or a power of attorney meant for the act, has been proved to him, it is not uncommon that the Registrar requires it to be proved again in the register, entailing paralysis of the process and ensuing costs.

2.4 Access to information

“Art. 221 L.H.: The Land Registers will be public for those who have a special interest in finding out the state of the registered properties or encumbrances. Interest is presumed in the case of any authority, employee or public servant that acts according to his office or duty.”

All of the entries of the Land Registry are made on paper, although electronic consultation is possible by sending an application that is answered by e-mail the next day. The Law of 24 December 2001 also foresaw the possibility of consulting the content of the Land Registry online, but the development of this system has also run into obstacles.

The interest of the individual requesting information is checked by the Registrar. There is no doubt that an individual has a rightful interest in obtaining information on the content of the Land Registry if –whether he acts for himself or on behalf of someone else- he intends to buy or seize the property. In practice, however, the interest of the individual requesting information is not very tightly controlled, as the simple claim that the information is necessary for one of these purposes shall be enough.

A reporter attempting to obtain information about someone’s estate does not have a legal interest, as the citizen’s right to privacy is most important. Nevertheless, as in

practice it is not possible to judge the intentions of someone asking for information, this control is not usually effective.

Usually, the search for specific real estate can only be carried out by the number that the real estate was registered under, which means that it is necessary to know its register data. Additionally, there is a persons file where in theory it would be possible to investigate what properties or rights someone owns in the area corresponding to a particular Register. However, these files have been quite incomplete for many years, so such a consultation is highly likely to be misleading.

2.5 Substantive Effects of the Registration

The principles that regulate the effect of registration are the following:

- Registration is never constitutive: the property or rights over real estates are acquired without the need to register them. Registration is voluntary. (There are very specific exceptions, such as mortgages, for which registration is constitutive, although the meaning of this rule is debatable.)
- Registration does not validate the defects or invalidity of the document that is registered. If the registered contract was null and void, this can always be declared in court.
- However, registration does protect the buyer. If the title was void, but the real estate was nonetheless sold, the buyer who consults the Land Registry and checks the documents is protected; so that even if the transferor's contract may be nullified, his rights will not be affected.
- Preference among the successive buyers depends on the order in which their respective titles were entered in the Land Registry.
- Registration creates the presumption that whoever registers a particular property holds and owns it.
- Specialty principle: This principle, although not explicitly formulated in law, implies the expectation that the various features and elements of the encumbrances published in the Land Registry are expressed clearly and in full, so that any third parties contracting on the basis of Registry information are able to accurately grasp the real legal situation of the specific property.

I now transcribe the principle articles of the *Ley Hipotecaria* on this question:

Art. 17

Whenever a declarative title or a conveyance concerning real estate or encumbrances on real estate has been definitely or provisionally registered, no other one of the same or previous date that opposes it can be registered or annotated.

Art. 38.1

For all legal effects, it shall be presumed that any registered rights *in rem* exist and

belong to their owner in the way defined by the Register. It shall as well be presumed that whoever has a property or encumbrance under his name, has the possession of it.

2.6 Rank and Priority Notice

As it is made clear in the articles that have been transcribed from the *Ley Hipotecaria* and from the principles mentioned above, the rank among diverse rights is determined by the date and hour of presentation of each of the documents at the Land Registry.

In principle, according to the Spanish law, it is not possible to ensure a future contract by reserving a registration rank in the abstract.

In order to guarantee to the buyer that he will acquire the real estate without encumbrances a system that is not based on the reservation of registration rank, but on information is used. The notary asks the Registrar to inform him about any encumbrances that might exist. The application is sent by fax (although it should soon be possible to do this using an official electronic signature and thereby attaining direct access to the content of the Land Registry book). The Registrar, in the next 3 days, sends fax in reply informing the notary about any encumbrances he finds on the real estate; and for the next nine days he continues to inform the notary about any documents that might have been presented at the Register referring to the same real estate, as well as about any other information that other Notaries might have requested (in order to prevent the real estate from being sold twice on the same day before two different notaries).

It is possible to ensure some special preference in rank by registering a *ius ad rem*, which according to the specialty principle of registration must be properly portrayed: all the distinct elements of this right published by the Land Registry must appear clearly described. These elements are, most importantly, the content of the right, its amount, the person in whose favor it is being granted, etc.

A particular case of registration is the so-called precautionary or preventive annotation, normally of a *ius ad rem*, which is intended to protect a right that is being formed, but which is still incomplete, for formal or material reasons. They are used in cases such as the claim of a right before the court, the seizure of a property to cover a debt of a specific amount, or a conveyance that cannot be registered because of some defect that can still be corrected. Caveats have a limited time span of several months depending on their type.

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

3.1 Procedure in general

The main steps in the sale of real estate are the following:

The two parties, buyer and seller, go to a notary that they freely choose. If they have employed the services of a bank to finance the acquisition, frequently the bank will recommend a notary with whom it routinely works, although it is the consumer who always has the ultimate right to choose the notary. This right is not always respected by businessmen and professionals, creating problems as to the quality of notarial advice for the consumer.

The document is drawn up according to the will expressed by the parties to the notary, and containing the specific agreements (on property transfer, delivery of possessions, costs of sale, defects in the real estate, guarantees, etc.) made by the parties. Quite frequently, questions arise at the time of signing which will require modifications to the document in order to attend to the requirements of the contract. The price tends to be paid in full at the time of the signing. The system of deposits held by the public notary is not used because the system of information dispatch by fax to the Land Registry is quite secure. Especially, when consulting the Registry and sending the signed documents can be taken care of online, security problems will be minimal and the reservation of handing over the price will be unnecessary.

3.6.1. Time frame

The preparation of the document before the notary, along with the verification of the registration circumstances of the real estate, and therefore the payment and the transfer of the property is done on average within a time frame of 3-4 days. Nevertheless, when the process is urgent, and provided the Land Registry sends the information about the encumbrances of the real estate (something that tends to be achieved by the next day), the document can be signed the day after it is drawn up by the notary, or even on the same day, without any problem.

3.2 Real Estate Sales Contract

In Spanish law, the transfer of property is carried out following the Roman system of *titulus and modus*: The valid contract of transferral of the property, together with the delivery of possession (or other formalities such as the completion of a notarial act), transfers the property in favor of the buyer.

Registration in the Land Registry, as stated above, does not bring about the transfer of the property, nor does the validation of possible defects in the transfer contract. However, it does protect the buyer, if he is in good faith and has paid a true price for the purchase, against possible defects in the transfer rights.

The registration can only be done by notarial act (or in some special cases, by a judicial or an administrative document). If the transfer contract is not in the form of a no-

tarial act, but is contained in a private document, it cannot be registered. However, either of the two parties has the right to oblige the other to convert it into a notarial act by signing the document before a notary. If the other party does not comply, a judge may be petitioned to order its registration, once he has checked that the contract was effectively approved and signed by both parties.

The deeds, in notarial acts, are always drawn up by the notary. In many cases though, a preliminary contract is agreed, normally drawn up by the lawyer or the real estate agent involved in the transaction.

There is no typical sales contract, because contracts are drawn up by the notary according to the specific requirements of each particular case.

However, contracts drawn up by notaries do share a very important part of their content. In each of them, the notary undertakes a significant number of controls and administrative acts on behalf of the parties or the public administration, and these are always repeated.

For instance, several controls are made in all conveyances, such as the verification of the existence of encumbrances at the Land Registry, the seller's declaration that the real estate is not rented out, nor subject to the consent of his or her spouse to sale, the possible existence of debts to the building community of owners (condominiums), the declaration of the conveyance to the Cadastre so that the real estate is put under the buyer's name, the payment of taxes generated by the contract, etc.

Moreover, the notary having drawn up the contract and being a public servant, has a duty to inform the public administration of certain data that may be important to public interests. He sends a monthly list of all transfers to the Cadastre so that its databases can be automatically updated, he sends to each tax collecting office a list of the transactions that should require tax payments, and he sends to the Ministry of Interior information regarding transactions that might, under certain conditions, be suspected to involve money laundering, etc.

Alongside this, a new process allowing the notary to pay the relevant taxes online at the time of signing the contract is slowly being put in place. This will entail enormous savings for the contracting parties. Moreover, it has important value for the public administration, as it would allow for control of information on real estate transactions, for statistical and tax collection purposes.

3.3 Transfer of Ownership and Payment

Transfer of ownership takes place according to the Roman system of *titulus* (a valid and consistent contract that generates the transferral of the object) and *modus* (the physical delivery of possession or of something representative of it, or the granting of the public deed or notarial act, which is legally equivalent to the transfer of possession).

The obligation to pay the price is merely an effect of the contract. Non-compliance with payment clauses does not make the transfer of ownership ineffective *inter partes* or *erga omnes*. However, the lack of payment of the deferred part allows the

seller to dissolve the contract and recover ownership of the object sold, as long as it is still owned by the buyer (that is, with *inter partes* effects, but not *erga omnes*). Anyway, it must be noted that very frequently the delayed payment is secured by means of a so called *condición resolutoria explícita*, or expressed resolving cause.

Art. 1124 C.c.: *The power to dissolve the obligation is implicit in any reciprocal obligation, in case one of the parties does not comply with his obligation.*

The affected party can opt for compliance or for dissolution of the obligation, with a right to compensation for any damages, and in either case with a payment of interest. The party can also demand dissolution, even after requesting compliance, when compliance becomes impossible.

The Court will order the claimed dissolution as long as there is no reason justifying a term.

This must be understood without contravention of the rights of a third party purchaser, according to articles 1295, 1298 C.c. and the Ley Hipotecaria.

Art. 1504 C.c.: *In the sale of real estate property, even when the right of dissolution of the contract has been stipulated in the case of a default on price payments, the buyer can pay even after the term runs out, as long as he hasn't been required otherwise by notary or Judicial act. Once the requirement is made, the judge cannot concede another term.*

Art. 11 L.H.: *The statement (in the Land Registry) of a deferment of payment will not imply consequences affecting third parties, unless it is guaranteed by mortgage or by a right to resolve, expressly agreed upon in the case of payment default. In either case, if the deferred payment refers to the transfer of two or more properties, it will be distributed between both of them.*

As we have seen, the price is usually paid in full at the same time that transfer of ownership takes place. The rights of both parties are ensured, as long as the information from the Land Registry is available at that moment (which is always the case, or else the deed is postponed). Consequently, payment is usually made directly by the buyer to the seller.

When payment is financed through a mortgage loan, both notarial acts (the deed of sale and of mortgage) are usually signed in the same act, and the bank pays the loan in that moment, even if the mortgage is yet to be registered.

The non-existence of serious risks, thanks to the system of information from the Land Registry and the immediate reporting to the Land Registry of notarial acts that have been signed, removes any difficulties for the interested parties, the buyer or, the bank to immediately deliver the money. For this reason, insurance to protect the buyer in the face of risks stemming from purchase is non-existent.

In principle, the obligation to pay the deferred price does not have any stronger guarantees or effects than any other payment obligation.

Nevertheless, some advantages are frequently available:

- As the sale is normally formalized by a notarial act, the obligations resulting from

it are enforceable directly before the Courts.

- As we have seen, Art. 1124 C.c. allows the seller to dissolve the contract, after which he can recover ownership of the sold object if it still belongs to the buyer.
- However, some special form of security in order to protect the deferred payment is frequently established: it can be a mortgage, although more frequently the so called *condición resolutoria explícita*, or expressed resolving cause (or condition), is used. The latter allows the seller, if he has not been paid, to recover ownership of the property with true *erga omnes* effectiveness. When both parties have agreed to add this *erga omnes* effect to the resolving cause (or condition), it shall be literally registered in the Land Registry, and consequently any other buyer of the property will not be protected by Art. 34 LH. In this way, recovery of ownership can occur automatically: it is enough for the seller to request via a notary that the buyer pays the outstanding amount. He then shall be entitled to register the property back under his name if the buyer has not paid, or has not opposed the resolution claiming that the buyer has not complied with his obligations (for example, because of defects appearing in the object sold).

It is common practice to effect formal transfer of possession (with the handing over of keys) to the buyer at the same time as the signing of the notarial act.

Some times, transfer can be postponed by a few days so that the seller can remove his belongings from the property. Transfer of possession usually does not create problems, although, in order to prevent any, it is common to agree on a penal clause that forces the seller to pay the buyer an important amount of money for each day transfer is delayed.

3.4 Seller's Title

Normally, the seller presents to the notary his own notarial act, which is the title that proves that he acquired the property on a specific date. If this deed is lost, a new copy can be easily obtained from the notary that authorized the original sale, as the notary always keeps in his official file the original documents signed by both parties (and he always issues copies, officially certified, of this documents).

It is not necessary for the notary to confirm the validity of the chain of previous titles –during the period of prescription- since, although the registration in the Land Registry is not constitutive nor does it validate defects on titles, it does protect the good faith buyer against possible cancellations of his transferor's title (Art. 34 LH).

The notary confirms the property's situation and encumbrances at the Land Registry in order to ensure that the property stills belongs to the seller and that there are no subsequent charges. This is done by fax via the information request system described earlier.

Frequently there are other previous charges that have to be cancelled before registering the current purchase or at the same time: a usufruct in favor of another person, a mortgage securing a previous loan, etc.

If the charge can only be cancelled with the consent of its holder (for example, with the waiver of the usufruct if the individual is still alive, or with a deed signed by the creditor acknowledging that the loan has been paid, or by abstract consent to the cancellation of the mortgage) it is normal to require notarial deeds to be signed at the time of the sale.

In any event, in cases of mortgage cancellations, banks tend to impose their own law and on many occasions refuse to be present at this act. In this case, the buyer frequently agrees to sign the sale on the condition that he receives a certificate from the bank indicating the quantity necessary to cancel the debt; he retains this amount, plus the cancellation costs, and he pays the debt himself, while the creditor bank signs the notarial act of mortgage cancellation later. The system is not very secure, as there may be errors in the bank certificate, and the certificate itself is not a document with sufficient formal guarantees. Nevertheless, it is the only available solution in many cases as there is no possibility of obtaining anything else.

We have already seen that cases of legal conflict in real estate matters are very rare. The reason is that the mechanism of preventive legal security functions reasonably well: the notary draws up the deed and controls the existence of charges on the property, and the Land Registry reports any possible encumbrances.

For this reason, no insurance market has developed protecting against the risk of loss of acquired property, since there has been no need for one. In the event that information given to the buyer is incorrect due to an error by a notary or Registrar, or if the notarial act has errors or defects that impede its registration and result in losses to the purchaser, the notary and the Registrar could be liable.

However, the risk of liability is very small, which is why the notary's insurance for civil liability has such a low cost (about 15 € per deed).

As has been stated, when renting a dwelling, the tenant has the right to remain there, revising the rent yearly, for a minimum of 5 years, unless a longer period of time was agreed upon. Moreover, on his death, the family members that lived in the same building have the right to continue living there.

If the property rented for housing was sold within the first five years of the signing of contract, the buyer must respect the lease agreement until the term elapses.

If it has been rented out for more than five years, or if the property was to be used for something other than residential purposes, the buyer need only respect the rental agreement if the tenant's rights are registered in the Land Registry. If this is not the case, he has the right to terminate the rental agreement.

In all rentals, unless otherwise agreed, if the property is to be sold the tenant has the right to acquire it under the same conditions agreed by the buyer. The seller must notify him of the intention to transfer the property and the conditions of sale. The tenant has 30 days to decide whether to buy it under the same conditions, after which the originally planned sale can be carried out. However, if this notice is not given, or if the sale is carried out differently than planned, the tenant, for the 60 days following the compulsory notice of the conditions of sale, once it has been formalized, through delivery by the notary of a copy of the notarial act, has the right to undo the sale and acquire the property under the conditions that were finally agreed upon.

In any event, tenant rights cause few problems in practice, since the tenant always occupies and possesses the property; and normally, the buyer has visited and examined it before deciding to buy it, which allows him to be aware of the tenant's existence. The notary always asks if any tenancy exists, since for the sale's registration at the Land Registry the seller must declare in the notarial act that the property is not rented; or if it is, a notary must notify the tenant, so that he can decide whether or not to exercise his right to acquire the property.

3.5 Defects and Warranties

- If the buyer's rights are affected by a defect in the seller's title deed, or by some ignored charge, the seller will be liable in the civil courts for any losses caused, and the buyer, if the entire object bought or the most important part of it has been denied to him, should have the right to cancel the contract and to demand that the seller return the amount paid and the costs that the sale incurred.

If there has been negligence on behalf of the notary who prepared the notarial acts or the Registrar who reported the state of charges, they will also be liable (although on occasion the responsibility of the Registrar has been declared inexistent if his acts were limited to sending information by fax and not to officially certifying it. However, this doctrine seems unlikely to hold in the future because professional responsibility for erroneous information given to citizens should without doubt exist).

- If there are defects in the quality of the object, in the case of a very old residence, normally it is agreed that the buyer acquire it in its current state and accept any possible defects due to its age. It would be useful to hand over a technical report to the buyer on the state of the house, consumption of energy, etc. However, for the moment, nothing of this sort is done, and consequently all the risk of bad information falls on the buyer. Certainly, if the buyer could prove that bad faith on the part of the seller existed, he would have the right to compensation for the damages incurred. However, as this proof tends to be difficult, it is on the buyer that most of these risks fall, despite the fact that he is the one with the least information about the actual state of the property.

If the property is sold by a developer, or sold in the years following the completion of construction, the situation is distinct. We will consider this issue further under the relevant section below.

- Constraints stemming from urban rights or environmental regulations tend to be difficult to discover, because the authorities are not always able to issue exact reports in due time. In these matters, the agreements will be followed, and if nothing was agreed, it is understood that the buyer acquires the property with the corresponding legal regime, although this implies constraints on his powers. However, if it is proven that the seller acted in bad faith by withholding relevant information, the buyer can receive compensation for losses, or even the dissolution of the contract if the loss is essential. The problem remains proving bad faith.

As regards the scope of caveat emptor, see the information on consumer protection.

Even if the property has been sold, the buyer shall be liable for certain previous

debts, such as taxes that directly encumber it or expenses from condominiums that affect the building or common services, but not for costs pertaining to other services or supplies.

- In tax matters, the buyer is liable for taxes due over the past 2 to 5 years, if the seller has not paid them. Normally, proof that these taxes have been paid is given by presenting the annual receipts. In any event, the Town Council can certify if the tax has been paid, or how much is due from unpaid taxes. And we can reasonably expect that in a few years time most of the Town Councils will be able to issue this certificate to the notary online, and accept payment of these taxes in the same way, by means of a computer platform that the General Notaries' Council is developing.

It is more difficult to provide the buyer with guarantees that no liabilities for other types of taxes encumbering the property exist, such as those involved in the transfers by sale or by inheritance that have been carried out over the last 5 years. In this case, the payment of taxes is easily confirmed as it appears on the seller's title deed (notarial act). The problem is that, since the authorities can re-evaluate the settlement of these taxes as when it is considered that the object was worth more than declared and demand an additional amount, the buyer has no way to find out whether or not this may happen.

- The property is also liable for the expenses agreed under a building's condominium statute, for the current and previous year. The standard practice is that the seller delivers a report from the administrator of the condominium indicating whether or not there are any outstanding charges. The notary must require this report unless the buyer expressly waives it.

3.6 Administrative Permits and Restrictions

Requirements of permits to sell property are very rare in Spanish law. Only the following exist:

- In certain regions protected for their ecological value, in accordance with the regulations of the respective region, a right of previous acquisition in favor of the public administration of the respective autonomous region tends to be established.
- In areas of military interest, such as islands and certain coastal areas, the purchase of lands by foreigners not belonging to the European Community requires previous military authorization.
- In some particular cases of foreign investments in real estate, when done by citizens who are not members of the EU, they must make a previous or subsequent declaration to the Ministry of Economy, for statistical and tax control purposes.
- In the purchase of some Subsidized Housings (VPO) within the first 5 to 10 years after its first acquisition.

Permits for certain preparatory procedures involved in a sale are more important. Any acts having an urban effect, such as the division of rustic or urban plots and the written declaration of the construction of a building, require previous licensing by the

corresponding Town Council. The notary is not usually required to attain this, but he does ensure that it was effectively given, since without it, he cannot sign the corresponding deed (nor can it be registered).

As we said, administrative authorization is necessary for the acquisition of some real estate property, such as property located in ecologically protected areas, in areas of military interest, and Subsidized Housing property (VPO).

If previous administrative authorization is required from some act, the notary must ensure that it has been given and if not, he must refuse to authorize the deed.

3.7 Transfer Costs

Estimation of the costs of conveyancing in Spain

Conveyance	NOTARY	PR.REGISTER	TAX
75.000 €	240 €	156 €	5.250 €
100.000 €	350 €	210 €	7000 €
300.000 €	450 €	270 €	2100€
Mortgage	NOTARY	PR.REGISTER	TAX
75.000 €	300 €	195 €	600 €
100.000 €	470 €	285 €	2.000 €
500.000 €	575 €	345 €	4.000 €

The tax incurred by real estate transactions depends on the region.

Normally, it is 7% of the value of the property. This is the value stated in the notarial act. However, if the administration considers that the real value, calculated according to certain objective criteria, is greater, it will demand that the difference be paid. The majority of the regions offer the possibility of asking in advance what the estimated real value of the property is. And, although there are differences, normally the estimated value is around 70-80% of the market price.

Along with the former, in sales of urban real estate another tax exists, burdening the supposed increase in the value of the plot. Legally it must be paid by the seller and its cost depends on the time elapsed since the seller bought the property.

Many purchases are financed with mortgages or other securities constructed as encumbrances. The granting of this land charge is subject to a tax which in the majority of regions is 1% of the value of the secured amount (or some 1.5-2% of the loan). This must be criticized because of the severe distortions it generates in markets. It seems acceptable to burden with a tax effective conveyances, which in themselves

constitute or disclose a source of wealth. However, it does not seem correct to burden operations that have no other ends than the financing of the conveyance.

If some of the above taxes have not been paid, it is not possible to register the transfer at the Land Registry.

On some occasions, the payment of taxes is entrusted to the notary. Other times, professionals specialized in this type of procedure (agents) are commissioned to deal with them. The notary also collaborates with the administration in a very important way, because every month he sends a list of the acts he has authorized that are subject to taxation, in order to facilitate the control of the corresponding payments. It seems inevitable that as the online tax payment system is developed, the notary will be in charge of such payments as he will be able to make them at the lowest cost.

The involvement of real estate agents is very common. They are present in perhaps 25-50% of transactions.

They receive a commission that is freely agreed upon with the seller, as he is the one who will pay it. This commission tends to be from 3-6%.

3.8 Buyer's Mortgage

Very frequently, the buyer finances a part of the price (up to 80%) through a mortgage.

As was stated above, when the payment is financed through a mortgage loan, both the notarial acts of sale and of mortgage are normally signed at the same time. The bank therefore pays the loan amount at this time, even if the mortgage has not yet been registered.

The non-existence of serious risks thanks to the information system of the Land Registries and the immediate report by the notary stating that the deeds have been signed removes any important security problems for the buyer and the bank, and nearly always they agree to the immediate payment of the price. For this reason, insurance guaranteeing the buyer against any risks stemming from the sale is non-existent.

In case there are previous mortgages which must be cancelled, it is desirable that a representative of the bank that granted the initial loan be present at the signing, so that he can collect the amount left to be paid and cancel the mortgage loan. But if the bank is not present at the time, which happens quite regularly, the buyer keeps the money or hands it over to the bank advisor who grants the new loan. The notarial act cancelling the original mortgage is then signed at some later date. This, at least in theory, can be risky for the buyer and his lender, although I haven't seen cases where problems have actually arisen.

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

4.1 The Conclusion of the Contract

The contract may be a simple promise to conclude a future contract, which forces the end of negotiations and the formalization of a definitive contract of sale, or a 'buying and selling' promise, in which both parties are obliged immediately to carry out the sale if the other party so decides at any moment.

However, it is common practice, for both parties to sign a real sales contract once they have reached agreement as to the sale of the property, although this is a private document, which partly limits its effects. As we stated before, this private contract (and, at least in theory, verbal contracts too, supposing problems of proof could be overcome) is enough for the transfer of ownership transfer as long as it is accompanied by the transfer of possession or by some formality that substitutes for such transfer, as the notarial act.

But the private contract has limited effects, in that it cannot certify the authenticity of the signatures or the validity of the wilful statements therein. The notarial act does prove these matters, as the notary, acting as a public official as well as a professional adviser, must find out what the true will of the parties is, ensure that it conforms to legal standards, refusing its signature if illegal, draw up the contract in accordance with the law, and confirm the identities of the parties who sign it in his presence.

For these reasons, a private contract cannot be registered directly in the Land Registry, nor is it directly enforceable in court. But it does give the right to either of the parties who signed it to require that the other make it public and ratify it before a notary. If this wish is not complied with, the contract may be taken to a judge who, proving its authenticity and validating the wilful statements made in it, can either order the other party to go to the notary and sign the contract, or can sign it on his behalf, declaring him to be in default. The judge can also plainly declare in his judgment that the property belongs to the buyer by virtue of the contract and of possession. In all of these cases, the acquisition can then be registered in the Land Registry.

4.2 Seller's title

If C acquired from B a property in good faith (that is, unaware of the invalidity of B's deed) and B's purchase was registered in the Land Registry, C's purchase would be protected, producing a true *adquisitio a non domino*.

But otherwise, that is if B's contract of acquisition is invalid, and he hasn't sold his property, B's acquisition would not be consummated, since a null contract is not capable of transferring ownership, even if accompanied by the *modus*: an abstract business transfer does not exist.

The defects of the deeds that are indicated in the questionnaire, nevertheless, must be differentiated, since not all of them cause the deed's nullity.

- Form is never essential in Spanish law. Consequently, an error of form, as we just said, can only cause certain effects such as the lack of a direct proof of its validity or the impossibility of registering the sale, but it cannot impede transfer of the ownership.
- The lack of legal capacity of the seller, on the other hand, makes the contract non-existent, as his wilful statement will be null. For this reason, the transfer of ownership to B cannot be carried out, and C cannot acquire the property from him, except in the said cases of *adquisitio a non domino* (thanks to the protection granted by the Land Registry).
- Lack of administrative permits can have one of two effects, depending on the legislation that regulates it: either, because it is a procedure prohibited by law, it is null (and therefore, B never acquired the property, nor in principle can C later acquire it), or a sanction (such as a fine) is imposed on whoever did not follow the legal obligation, in which case C can acquire the property without any problems.

As stated above, if B acquired a property in good faith (that is, unaware of the invalidity of A's deed) and A's property was registered in the Land Registry, B's purchase would be protected, producing an *adquisitio a non domino*.

In the case of claim for ordinary credit, the principle of universal patrimonial liability is applied. (**Art. 1911 C.c.:** *For the fulfilment of his obligations, the debtor is responsible with all of his present or future assets.*) This entails that if the property has been sold and it can be proved that the property has passed to another person, the creditor cannot seize it, because it no longer belongs to the debtor. If the creditor claims the credit before sale, then the sale takes place, the creditor registers the seizure at the Land Registry, and finally the buyer registers his acquisition, the buyer does not receive any protection as the claim is prior to his purchase, and he will not receive registration protection because the Registry had made the encumbrance public knowledge.

4.3 Payment

Please refer to the above statements under point 3.3.

If the delay in payment has caused loss or negative effects to the seller, the buyer should, of course, compensate him. However, no legally established sanction for such non-compliances exists (the value of losses to be compensated has to be proved), although it may have been agreed upon by both parties.

4.4 Defects and Warranties

Leaving aside the responsibility of the developer (cf., *infra*, § 5), when the sale is executed by a private individual, the following regulations are established in our laws:

Art. 1484 C.c.: *The seller is responsible for any hidden defects that the object sold*

might have, if these defects make it inappropriate as regards the use for which it was purchased, or if they diminish its use to such a degree that the buyer, having known the defects, would not have acquired it or would have paid a lower price for it; however, the seller will not be responsible for obvious defects, nor for those that are not visible, if the buyer is a expert who, because of his profession or knowledge, should have noticed them.

Art. 1485 C.c.: *The seller is responsible for any hidden defects that the object sold might have, even if he was unaware of them.*

This ruling will not be enforced where the opposite has been stipulated by the parties, and the seller is unaware of any hidden defects that the object sold might have.

Art. 1486 C.c.: *In the case of the two previous articles, the buyer can opt to dissolve the contract, and be reimbursed for the expenses paid, or to have the price reduced by a fair amount, as determined by an expert.*

If the seller knew of any hidden defects that the object sold might have and he did not show them to the buyer, the latter will have the same options, and furthermore, he will be reimbursed for any losses and negative effects should he opt for dissolution of the contract.

Art. 1487 C.c.: *If the object sold is lost because of any hidden defect known to the seller, the latter will suffer the loss and will reimburse the price and the costs of the contract, including all damages and harmful effects. If he did not know of them, he will only reimburse the price and the costs of the contract paid by the buyer.*

Art. 1488 C.c.: *If the item sold had any hidden defects at the time of sale and it was lost by chance or through the buyer's own fault, the buyer can demand from the seller the amount he paid, minus the value of the object at the time of its loss.*

If the seller worked in bad faith, he should also reimburse the buyer for damages and interest.

Art. 1490 C.c.: *The actions set forth in the above five articles will be extinguished as of six months from the transfer of the sold object.*

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

5.1 Statutory Basis

Regarding sale by property developers, there are important rules protecting the consumer:

- Above all, Law 26/1984, dated July 19th, called *General Law protecting Consumers and Users*, which regulates the rights of consumers in general and forbids all kinds of unacceptable clauses, which frequently appear in contracts for the sale of new dwellings. This Law has undergone several modifications, such as that introduced by Law 7/1998, dated April 13th, which regulated the General Contracting Conditions, and that of Law 23/2003, dated July 10th, on Guarantees for the Sale of Consumer Goods.
- The previous Law is completed by Royal Decree 515/1989, dated April 21st, on the Protection of Consumers regarding information that has to be provided for the Purchase or Lease of dwellings.
- Law 57/1968, of July 27th, on collection of the amounts paid in advance for the construction and purchase of dwellings.
- Law 38/1999, of November 5th, on Construction is very important, since it regulates, amongst others, the developer's responsibilities regarding defects in the building during the years following the completion.
- Since a significant portion of dwellings are acquired through mortgage loans, the Order of May 5th, 1994, modified by the Order dated October 27th, 1995, on Transparency of the Financial Clauses in Mortgage Loans, has become exceptionally important.

Law on consumer protection is a relatively new issue in Spanish Law, since its introduction into law only began in 1984, although it is referred to in the Constitution of 1978. In fact, the development of this area of Law has been enabled on the basis of the principles of Community Law, and, in several instances, by transcribing the rules of the European Union.

5.2 Procedure in general

There is no specific Law on contracts for sale of dwellings by developers. Roughly, this kind of conveyance will have the same formal requirements as an ordinary sale. But all the rules mentioned under section 5.1, with regard to protecting the consumer in the purchase of a dwelling, are applicable in this case and hold great importance.

Normally the purchaser pays an initial amount, which for the seller serves as guarantee that the flat will actually be purchased. A private contract is signed at this stage and is usually drawn up by the developer, although he is under an obligation to com-

ply with all the requirements and regulations on consumer protection and cannot act contrary to consumer rights. The remainder of the price is usually paid at the time of signing the notarial act. It is also frequently the case that, if the developer had previously been granted a mortgage to finance the construction, the purchaser deducts the loan from the price payable and commits himself to repay it directly to the bank.

There are important guarantees against defects in the building, which have been introduced by the Law on Construction, dated November 5th, 1999. This Law states that the developer and the experts involved in construction shall be responsible during a 10 year term for damage which may affect the building's structure; during 3 years, for physical damage due to defects in the building's elements or in the installations, which might make it uninhabitable, and during one year, for damages in the small completion facilities and components. It also declares that liability for these damages must be covered by specific insurance. At present, since we are going through a transitory period, insurance is so far only required to cover the liability for structural damages during the first 10 years; insurance for the other sorts of damage should be made compulsory at a later date. The notary has, thus, to verify that this insurance policy has been contracted before signing the notarial act authorising the declaration of new construction by the developer. In any case, without insurance it is not possible to register the construction.

The fact that the sold property forms part of a condominium association does not affect the obligations and the responsibility of the developer towards the purchaser. It merely forces the purchaser to accept the regulations of the building, if they have been registered or if they have been expressly agreed.

If the building's renovation has relevant economic value, the legal regime regarding consumer protection is the same as that governing a new building constructed by the developer.

5.3 Conclusion of the Contract

There are no differences with the general assumptions for the sale of real property, except for the provisions of the regulations on consumer protection.

5.4 Payment

Normally the developer sells the dwelling through a private contract before the building's completion. In this case, one part of the price (normally 10-15 %) is initially paid as a guarantee for the seller, who reserves the apartment for the purchaser. If the purchaser decides not to complete the purchase, he will lose the total or a fraction of that initial amount.

The rest of the price is usually paid on execution of the notarial act. Normally, as happens in all deeds, the money is paid entirely to the purchaser and is not deposited in a notary's trust account.

If the developer has financed the construction with a mortgage loan, the purchaser

may have the opportunity, if approved by the bank, to deduct the amount of the loan from the purchase price and to repay the remainder of the loan directly to the bank within the terms previously agreed with the developer, or later settled differently with the purchaser. But according to the legislation on consumer protection, the developer may not force the purchaser to accept this mortgage subrogation or to pay the subsequent cancellation costs if subrogation does not take place.

As mentioned before, all obligations resulting from a notary's deed are straightforwardly enforceable. This applies both to the obligation to pay the price, if some fraction of it was deferred, and to obligations regarding the flat's completion. This means that a judge can be requested to directly enforce the obligation established therein without any need for evidence as to the validity of the obligation, since the notary has previously verified the validity of the parties' contractual consent.

This can turn the notarial act into a very functional title in Europe: as long as notarial systems share essential characteristics (that is: that the notary not only verifies the identity of the parties, but also their capacity, the fact that the contents of the notarised deed agree with their true will, and the compliance of the deed with law), notarial acts may be regarded as equivalent in all countries (even though they might come from different countries), and this will allow their enforcement without judicial evidence on their validity, thanks to the previous verification by a civil servant.

The purchaser has the legal right to two guarantees:

- If he pays a share of the price in advance during construction (in order to purchase a dwelling), the developer, on receiving these amounts, has the legal obligation to guarantee their repayment (plus 6% annual interest) in the event that the construction does not begin or is not correctly completed in due time, through an insurance contract signed with an authorised and registered Insurance Company. Additionally, he must deposit these advanced sums in a special bank account, separated from any other kind of funds. And he may only make use of these amounts for the construction of dwellings. This is set out in the Law 57/1968, dated July 27th, although sometimes these obligations are not fulfilled due to ignorance on the part of the interested parties.
- We have already seen how the Law on Construction, dated November 5th, 1999, compels developers to take out insurance covering their responsibility for structural damages during the first 10 years; and in the years to come an extension of this obligation to insure additional less important damages is expected.

With regard to the acquisition of ownership, there are no differences with property acquisition under an ordinary contract for sale. Therefore, please refer to the details above.

The most common course of conduct is that, on the signing of a private contract, only a small amount is paid in order to reserve to oneself the purchase of the dwelling (10-15%). Often, during construction, no further amounts are demanded, although it is not unusual to agree a payment of some additional amount, and the remainder on purchase of the flat via notarial act.

There are also certain special ways to pay the price. The most common are:

- Construction in cooperatives: all the building's owners purchase the plot together and continue paying the costs of construction throughout until finally receiving their individual flats. The Cooperative Company is the owner of the building, but is dissolved at the end when the constructed flats are distributed among its associates. This system is most commonly used for the construction of Subsidized Housing. A cooperative is normally managed by professional agents paid for this purpose.
- The exchange of plots for flats: This system has been used many times in Spain over the last few years, and has often been prompted by solutions invented by Notaries. It is normally used for small constructions, in which the owner of a plot transfers his ownership to the developer in exchange for one or several dwellings, parking places, etc., which he expects to receive on completion of construction. Different kinds of securities can be used in these cases.

At present, more than 90% of the flats that are purchased by private individuals are financed by a mortgage. If the developer has taken out a mortgage in order to finance the construction, he offers the purchaser the possibility to subrogate the loan: if the bank accepts to grant the purchaser the loan, bearing in mind his payment capacity, the purchaser deducts the remaining loan amount from the sale price, and pays it directly to the Bank within the term and under the conditions initially agreed with the developer, or else on the purchaser's renegotiated terms. If the amount is not sufficient for the purchaser, he may obtain a second loan from the bank secured by a mortgage on the same dwelling.

The mortgage may be also arranged with any other bank in order to finance the acquisition.

In both cases, all transactions are typically carried out in one single act: both contracts (the conveyance, and the new mortgage contract or that of acceptance of the developer's loan by the purchaser) are signed before the same notary and at the same time. The bank pays the loan amount by cheque, which is simultaneously handed over to the seller. The transaction does not show any real security problems, thanks to the notary's verification that there are no charges encumbering the property and to the fact that a report on the sale is immediately sent to the Land Registry via fax. As soon as it can be carried out online, in real time, using the notary's electronic signature, security will be almost completely guaranteed.

5.5 Builder's Duties - Protection of Buyer

It is advisable that the developer, before commencing the sale of the flats he is building, signs the notarial act shaping the building's description and its partition into different flats and premises ("horizontal division"). This deed is registered at the Land Registry and from that moment binds any purchasers of apartments, whether by private contract or notarial act.

If the developer does not act in this way, conflicts may occur, since the private contract may contain an inaccurate description of the flat or of the rest of the building, common areas, etc., or try to modify the general shape of the building or of some of its common areas (which he cannot do by himself, unless he has retained the right to do it, and this is not abusive). In any event, disagreements may arise as to the accor-

dance of the completed building with the developer's offer.

In all these cases, as long as the private contract has not transmitted the property by itself –possession not having been transferred-, the developer may in theory, as sole owner of the plot and of the constructed building, modify the horizontal division. But if the purchaser proves that it does not comply with the agreement made in the private contract, he may receive compensation for the loss suffered. On many occasions, the courts have rendered void the modifications to the building's description made by the developer, taking into consideration the fact that although the property has yet to be transferred, the purchasers hold a *ius ad rem* that shall soon become a true *ius in rem* over the flats, and this right deserves treatment equal to that of a true proprietor.

Most commonly, the parties agree a term covering completion of construction and the handing over of the building and containing a penalty against the seller in case of delay.

But normally, in the case of delay, the seller will rely on *force majeure*, which occasionally reduces the sanction.

We have already quoted the developer's responsibilities during the terms of one, 3 and 10 years following sale regarding the different types of damage or faults of construction, as set out by the Law on Construction, nr 38/1999, dated November 5th. According to this law, liability shall attach individually to any of the persons who have taken part in the construction and who have, through their actions, caused damage (developer, architect who designed the project, architect overseeing construction, subcontractors carrying out construction). These persons may also be held liable for the actions of other agents dependent on them such that they should have watched over their actions.

5.6 Builder's Insolvency

We have seen how Law 57/1968, dated July 27th, sets out the developer's obligation and gives important guarantees to the purchaser in order to ensure the amount advanced is recovered in case the building is not completed.

Since normally the right of ownership is not transferred until the construction is completed and the notarial acts of conveyance are signed, the purchaser has no right *in rem* over the plot nor over the completed part of the work, but holds under the same conditions as the other creditors.

Even though this is the most common practice, nothing hinders the formalisation of the flats' notarial act of sale from the beginning of the building work. This would grant the purchaser a right of ownership over the flat as well as his share (according to the fixed ratio determined in the statute of the condominium) of the plot. And this right can easily be secured if the notarial act is registered. But this is seldom the case, because most developers prefer to postpone the notarial acts, thus keeping a certain flexibility to modify the projected building.

6. Private International Law

6.1 Contract Law

The law in this case differentiates between three aspects: the law applicable to obligations arising from a contract, the law applicable to the form of the contract, and that applicable to the rights over real property.

- The obligations arising from a contract regarding real estate are regulated by the law to which the parties themselves have submitted, provided it has some kind of connection to the contract. Where there is no agreement on this matter, they shall be regulated by the *lex rei sitae*. (In the case of a donation, the personal law of the donor applies).
- Possession, ownership and further rights over real property, as well as their registration, are regulated by the *lex rei sitae*.
- The form and formalities of contracts and legal acts are in principle governed by the *lex loci actum*. But there are many special rules:

Contracts drawn up according to the formalities required by the law applicable to their content shall be valid, as well as those formalized according to the personal law of the transferor or the common law of both parties (*lex personae*).

The acts and contracts regarding real estate properties shall also be valid if their formalities comply with the requirements of the law of their location (*lex rei sitae*).

But whenever the law governing the contents of these acts and contracts requires a special form or formality in order to be valid (which is in any case exceptional in Spanish law), it shall always be applied, even if they are executed abroad.

Spanish law shall be applied to the contracts, wills and further legal acts authorised abroad by Spanish diplomatic or consular civil servants (who can act as notaries in their consulates).

We have seen that Spanish law does not require any special form for property transfer. A valid contract (*titulus*) together with the transfer of possession or equivalent act (*modus*) is enough.

There is however an important rule that deserves a comment: According to the *Ley Hipotecaria*, in order for acts of transfer of ownership or encumbrances on properties to be registered, these have to be included in a notarial act. This notarial act is usually executed before a Spanish notary, but it may also be before a notary of another country of the European Union, provided that it is equivalent to the Spanish notarial act with respect to formal and essential requirements (that is: that the notary not only verifies the parties' identity, but also their capacity, that the agreement contains their true will, and that it is in compliance with the Law).

This is the case in almost all the notarial acts of European Notaries, but it is not the case of the Notaries of London, where the real property is verified but not the validity or legality of the business contained in the document. (In any case, the truth is that

most Land Registries accept conveyances or power of attorneys written up by London Notaries, even though they do not exactly fit the Spanish legal concept of a notarial act).

Progress in making the requirements and contents of notarial acts from different countries equivalent (not only with respect to the form but above all with respect to their substance) is deemed extremely important: not only should this enable the circulation of notarial acts in the European Union for property transfer, but also their registration, as well as the enforceability of obligations arising from them.

6.2 Real Property Law

Lex rei sitae applies:

Art. 10.1 of the Civil Code: The possession, ownership and further rights over real property, as well as their registration, are governed by the law of their location.

As regards the formal requirements, see above under section 6.1.

6.3 Restrictions on Foreigners acquiring Land

Restrictions on the acquisition of real property by foreigners are practically non-existent. They only remain in some areas of military interest (i.e. islands and coastal areas), where acquisition by citizens not belonging to the European Union requires authorisation by the Ministry of Defence.

On the other hand, there is a special regulation on so called “foreign investments” which applies to the persons residing outside Spain, regardless of their nationality (that is, it is applied to the Spanish nationals who have their official -tax- residence outside Spain, but not to the foreigners residing in Spain). Its sole purpose is administrative and statistical control, and it only generates a duty to declare to the Finance Ministry any investments in real estate exceeding 3,005,060.52 € or coming from tax havens.

Non resident persons are also subject to special tax regulation, which is not more onerous than the normal regulation for residents, but is intended only to prevent tax evasion: whenever property is sold in Spain, the buyer has a legal duty to retain 5% of the price and pay it directly to the tax office on behalf of the seller. This payment is just a provisional disbursement made in advance, as the seller also has a duty to make a tax declaration in the three months following sale, in which he should pay exactly the same amount as a Spanish Resident (dependent on the profits he has obtained from the investment and its later sale). The amount retained by the buyer shall, consequently, be deducted from the quantity the seller must pay, or eventually given back to him, if indeed he had nothing to pay, or less than the retained sum.

Furthermore, another special rule imposes on notaries a duty to confidentially inform the Ministry of the Interior of certain transactions that due to special circumstances (specified by the law) might be considered as suspect of money laundering.

6.4 Practical Case: Transfer of Real Estate among Foreigners

If the country where these persons reside has a notarial system analogous to the Spanish system in its formal and essential aspects, then it is in principle possible to execute the contract before a notary of that country. In addition, the notarial act must contain the Hague Convention Apostille and be translated by an official translator who is registered in Spain or a notary.

Nevertheless, the execution of the deed signed before a Spanish notary tends to be more convenient for several reasons:

- At present, only a Spanish notary can obtain the report via fax from the Land Registry on the situation of charges over the property, and only a Spanish notary can send to the Registry the report on the signature of the notarial act in order to prevent other deeds or seizures of the property from being registered.
- In order to avoid subsequent penalties, it is very important to fulfil the fiscal obligations (payment of local, regional and national taxes), as well as to observe further administrative obligations (declaration before the cadastre, registration of foreign investments) which the notary ensures are fulfilled for his clients, in most cases, being a legal duty of the notary, without any additional fees.
- In the case of urban real property or property intended for residence, information on the full situation from the point of view of urbanism can be essential in order to determine their value. This information is not provided by the Land Registry but occasionally it can be obtained by the notary, or at least, he may inform the parties before execution of the contract of the risks which the urban situation of the property might imply, as well as the way to obtain such information.

7. Encumbrances/Mortgages (and Land Charges)

7.1 Types of mortgages/land charges

In fact, in Spanish Law there is only one general type of mortgage: all mortgages are essentially equal regarding their content, scope and their status of rights *in rem* or security encumbrances.

There are differences due to the nature of the obligation secured with the mortgage:

- Normally the mortgage secures an obligation which already exists and whose features are perfectly determined: amount, term and creditor. For example, a regular loan, or the deferred price in a purchase-sale.
- A mortgage can secure a future obligation, which does not exist and which is not sure to exist. In this case, it is necessary to determine precisely the eventual nature and identity of the obligation and its maximum amount. For example, when a person provides a guarantee for another person's loan, if the creditor finally enforces the guarantee and requires payment from the guarantor, a repayment obligation arises against the person who has benefited from the guarantee?. Occasionally, this eventual future obligation is secured with a mortgage.
- A mortgage can secure an obligation which already exists, but whose amount is unknown: for example, the obligation to pay interest at a variable interest rate, or to pay a fixed amount of dollars or gold, whose exchange rate in euros is unknown. In these cases, the criterion applicable to the assessment must be clearly determined (e.g., the official exchange rate on the expiry date), and the maximum amount guaranteed as regards third parties must be fixed in euros.
- A mortgage may secure special obligations and hence have some special features depending on these effects: this is the case when it secures a rent paid by monthly or yearly instalments, or when it secures obligations attached to a bill of exchange or a bond released to the bearer or endorsable: in this case, the guarantee is established in favour of the legal holder of the bond.
- A special class of mortgage, of particular significance, is the mortgage securing a current account: In a current account contract both parties (two businessmen, or a bank and its client) agree that all future debts of a certain kind between them shall be registered on this account. In this way, none of the debts is individually paid, but go on the account's final balance. Banks often grant their customers a credit account, which enables them to get credit by debiting this account up to a maximum amount. In this case, interests are only paid for the amounts withdrawn and during the period that they are effectively owed. When the term elapses, if the account presents an outstanding balance for the customer, he shall be obliged to pay it to the bank. This payment obligation of the debit balance on the account's cancellation can be secured by a mortgage. In this case, it is essential that the account is duly identified and that the obligations which may debit the account are exactly determined (for example, all those arising from money withdrawals made by the customer debiting the account, or those stemming from the money advanced by the bank in order to carry out collections of bills or of further obligations of the customer's debtors, in case these had not

been successfully collected).

It is however not possible to agree that all eventual debts in favour of the bank debit the account indistinctly and to secure the account's final balance by the mortgage, since in this way a "floating" mortgage would be established securing undetermined obligations towards third parties.

These mortgage secured credit accounts present another important feature: normally, for the determination of the account's final balance, the payment of which is secured by the mortgage, it is agreed that a certificate issued by the creditor shall suffice.

- It is not possible to secure by a mortgage the fulfilment of non-monetary obligations (for example, the obligation to render a particular service). But the future and eventual obligation to compensate for damages incurred due to non-fulfilment of this obligation may be secured by mortgage.

In Spanish Law, a mortgage is, by its nature, a right *in rem* or a security encumbrance: it directly impinges on the real property and is effective as against third parties, although its purpose is only to guarantee the collection of the debt.

A mortgage does not grant its holder the right to acquire the object. In Spanish Law, it is strictly forbidden to establish guarantees such that in case of non-fulfilment the creditor would have the right to keep or acquire the debtor's object (the so called agreement from the *Lex Comisoria*). In all cases, the creditor can only execute a sale of the object by means of an auction ordered by the court or by a notary, and cancel the debt with the money obtained from it. If there were still some money left, it should be given to the debtor (or to other eventual creditors demanding it). And if the money obtained from sale were not enough to pay the debt, the creditor would have the right to demand that it be paid against other properties of the debtor (except for the rare cases in which the contrary is agreed: that the debtor's responsibility for the debt is limited to the mortgaged property.) In cases where the value of the debt exceeds the maximum amount secured with the mortgage (for example, because interest has accrued over a period of many years) and there are other creditors, the mortgage creditor shall only be paid up to the secured mortgage amount; in all other respects he shall be considered as an ordinary creditor.

Furthermore, due to its right *in rem* nature, a mortgage has effects as against third parties but only up to the maximum secured amount: if any other person purchases the mortgaged property and the debtor fails to pay the debt, the creditor may sell the property by court order or before a notary, and in both cases through an auction. On the establishment of the mortgage, the maximum amount secured by it must be set in euros: if more money is obtained, the rest shall be paid to the future purchaser of the property. And if the final debt is less than the maximum secured amount, the rest shall also be given to the purchaser. Furthermore, the purchaser must be summoned to appear during the legal proceedings of mortgage foreclosure and may stop the sale effected by court order or before a notary by paying the debt up to the maximum mortgage secured amount.

7.2 Setting up a mortgage

The so called “mortgage of the owner”, which is created and exists as independent from a particular obligation, does not exist in Spanish Law. A mortgage is necessarily attached, accessory, to the secured obligation: it can only exist if the obligation already exists. Once the secured debt is paid, the mortgage is automatically deemed inexistent (even if it is not cancelled at that time by the Land Registry), so the mortgage cannot be used again, to secure another debt. The reason for this is that any possible purchaser of the property should thus be able to know exactly what charges encumber it: precisely what are the secured obligations and what is the outstanding balance remaining at the time he wishes to buy it.

Therefore, the normal procedure for establishing a mortgage is the following: the bank, once it considers that it can grant the loan and has got a preliminary report on the property’s legal situation, sends the information to the notary. The notary then prepares the notarial act of mortgage loan and verifies that the property is free of charges on the same day of execution. On this day, the bank and the borrower sign, at the notary’s office, the notarial act which determines the loan’s conditions, the borrowed money is paid during the same act and the mortgage is established in the public deed. The notary sends the report on the establishment of the mortgage via fax to the Registry and thus ensures that no other right or encumbrance with precedence over the mortgage can be registered.

During the last years, a system for establishing mortgages has been developed, which presents differences in the operational sense, although legally it does not essentially differ from the normal system. The General Notaries’ Council has developed an electronic platform called *e-notario* based on the connection of all notary offices through the data centre of the Council, by using the electronic signature of all notaries and a communication channel with very high security standards. This system is used for sending information to the Notaries’ Association and the public administration (Inland Revenue, Cadastre, Town Councils, etc.) This system has also been used in collaboration with some banks in order to outsource the preparation of mortgages to notaries: when the bank approves the grant of a loan, it informs the notary via this platform and the notary effects -for the bank- the legal report on the property by analysis of the charges and an assessment of the property’s value. When the notary approves the operation, he puts it on record in the bank’s database, and the bank then automatically sets the date for execution. On this date the bank deposits the loan amount in the notary’s trust account and the notary signs the notarial act with the borrower (including therein the loan’s conditions, which the bank reports to *e-notario*, and which the customer has previously accepted) and gives him the borrowed amount. Afterwards, the bank ratifies the deed signed by the notary so as to allow for its registration. But the money has been paid in advance, once the notary has informed the bank that the mortgage does not involve hindrances or risks and that the borrower has signed before him.

From a legal point of view, there are no special requirements for establishing a mortgage: the signature of any kind of loan contract, which clearly specifies its conditions such that it can be registered, suffices.

But regulations on the protection of consumers in mortgage cases imposes on the bank important obligations, the non-fulfilment of which may determine the bank’s contractual responsibility or the non-application conditions prejudicing the customer. And the notary must check that these obligations have been fulfilled before signing the mortgage loan.

Prior to the signature of the loan and in order to compare conditions offered by different banks, these shall hand to the customer a binding offer containing all the loan's financial conditions (principal amount, term, applicable interest, fees, etc.) These binding offers must be signed by a bank representative and allow the client to decide whether or not he accepts the terms during the ten days following its submission. When the customer decides which offer he wishes to accept, he informs the bank and then the loan has to be signed. Both the offer and the loan shall clearly and separately include all the loan's financial conditions.

Mortgages are almost the only case in which a right *in rem* only exists from the moment of registration. The registration has, thus, a constitutive effect. Anyway, the exact meaning and consequences of the legal norm establishing constitutive effect of the registration of a mortgage, in a non-formalistic legal system, as is the Spanish one, are not clear, and subject to intense debate.

Therefore, the notarial act of mortgage loan is sent immediately to the Land Registry for its registration. The registration form does not have to include a transcription of all the agreements of the mortgage loan, but only those which must be opposable to third parties: the loan's amount, its term, the reasons for legal and contractual early termination by the bank, as well as the agreed and default interest rates.

Usually not more than 2 or 3 days elapse between the moment the bank sends the information to the notary and the execution of the notarial act. In urgent cases, if it is possible for the Land Registry to send information on the property to be mortgaged on the same day, it can be done in 1 or 2 days. But prior to this the bank usually needs 7 to 14 days in order to approve the loan, after it has made a legal report on the property and its assessment. If problems arise (for example, if according to the Registry there is a usufruct or a prior mortgage, which has not been cancelled, or if the dwelling, being subsidized housing, has a legal value less than that obtained by the bank's expert) the period can be longer, since these problems have to be solved first.

The system for mortgage processing through *e-notario* tries to shorten these delays, since all the verifications are made automatically and only once by the notary.

The approximate cost of the establishment of a mortgage is the following:

Tax: it is collected depending on the autonomous region, although in most cases it is 1% of the total amount secured by the mortgage (principal, interest over 3 or 5 years, default interest, costs for the bank in case of foreclosure), which is equivalent to 1.50-2.00 % of the borrowed principal. The imposition of this tax is highly open to question, since all financial transactions should be tax free in order to prevent distortions in the functioning of markets. Therefore, if a normal loan is not subject to any tax payment, there is no reason why a loan with additional guarantees must carry this important fiscal charge, and be conspicuously more costly than when it has no securities attached.

There is an exception to this: although any loans granted by banks and secured by mortgage pay this tax, when the loan is agreed between two normal persons the mortgage is not subject to this tax.

7.3 Causality and Accessoriness

As it has been said, a mortgage is legally attached to the secured loan. Therefore, if the loan is null and void, so the mortgage shall also be null and void, or rather, in-existent.

There is no real *withdrawal* right from a loan once it has been signed. But if it existed, as the loan would have been signed together with the mortgage, the recovery of the money paid would be guaranteed by the mortgage.

In principle, it is impossible to substitute the debt secured with a mortgage, such that a new debt is secured by the same mortgage. As it has been mentioned a few times, a mortgage is attached to the secured loan in such a way that it can only exist together with the debt. The speciality principle requires that the debt secured by the mortgage is very clearly defined at any time. Nevertheless, exceptions to this rule have been gradually introduced:

- The law ("*Ley 2/1994, de 30 de marzo, sobre subrogación y modificación de Prestamos Hipotecarios*") set up the first exception as it created a system through which the debtor of a mortgage loan could negotiate with another bank a loan under better conditions, and secure it with the same mortgage, cancelling at the same time the first debt. This system is based on an old rule in the Civil Code (Art. 1211), according to which, if the debtor asks for another loan in a notarial act (with several additional formalities) in order to cancel the original debt, he may substitute the first lender with the new lender, in such a way that the second creditor acquires the first credit with all guarantees and rights attached. In other words, with this legally drawn system it is possible to shift creditors and modify some of the conditions of the loan, using the same mortgage, which is therefore not modified.

In this way, the Law on Subrogation has put forward the possibility of cancelling the debt with the first bank and transferring the mortgage to a second bank without the signature or involvement of the first one, which might or might not be willing to agree and cooperate in the transfer of its mortgage right. This system is based on the intervention of the notary, who controls the process and especially checks that the full amount of the second loan is paid to the first bank and that the debt with the first bank is thus completely settled. This allows a security encumbrance that has been registered in the name of one particular creditor to be shifted to a new and different creditor, even though the first one doesn't consent to it in a notarial act, as is the general rule.

So, the same mortgage is used to secure the second loan. This system, based on verification by the notary, who defends both the debtor's and the banks' rights, has caused an enormous increase in competition between banks and has resulted in an enormous reduction of the average interest rates for mortgage loans, which at present are at Euribor plus one point.

- As it has been explained, Spanish Law allows the bank to grant its customers a credit for a particular term, in order to charge to it all the debts arising from certain specific transactions (which need to be clearly identified in the loan and mortgage notarial act), and to secure by a mortgage liquidation of that credit account, which will, obviously, include all the debts listed on the contract. That list can be as extensive as desired but must be closed and unambiguous.

Furthermore, even though this credit is granted for short terms (usually not exceeding 5 or 6 years), it is possible to negotiate –prior to its maturity- an extension of a certain number of years, and to agree that the extension be secured by the same mortgage. This contract has to be formalised in a notarial act and entered in the Registry, which carries additional expenses, even though it does not seem to be subject to tax payments (which normally involves the most important costs where mortgages are concerned). In any case, this matter, the tax exemption of the enlargement of the credit with its mortgage, is subject to discussion.

- Some banks have used this accepted idea of a fixed term credit secured by mortgage and have introduced a contract which can serve to guarantee subsequent loans agreed by the bank with its customer. Common practice is as follows: the bank, for example, grants its client a credit of 500,000 € for a term which is usually very long (20 to 30 years). At the moment of signature, the client withdraws the 500,000€ and commits himself to repaying it like a normal loan, that is, by 240 or 360 monthly instalments comprising principal and interest, pursuant to the French redemption system. As soon as these monthly instalments or the partial or total early repayment of the received amount reduce the debt to less than 500,000€, the client is again authorised to withdraw more money by debiting the credit account, up to that limit. These new withdrawals –which in fact operate as new loans granted by the bank- have to be formalized through a private contract signed with the bank (which has no special formal requirements, and does not even require a notarial act), and shall include a term of repayment (not exceeding the initially agreed 30 years after the initial withdrawal) thereby causing new monthly payments -comprising principal and interest- in order to repay the second loan. Since it has been agreed that the second loan (or third, fourth, etc.), which the customer wishes to take, are all charged to the same credit, they are all secured by the same mortgage. What is really achieved in this way is that one single mortgage is used for securing subsequent loans granted by the same bank without additional charges.

A generic pledge to pay a specific amount is possible provided that it is based on the payer's confession that he has a debt with his creditor (which, thus, needs not to be proved); once the debt has been admitted in this way, it may be secured by a mortgage.

Spanish Law however does not allow the establishment of a mortgage before the existence of the debt, in order to later negotiate a loan and secure it with the pre-established mortgage. It is forbidden in order to prevent the owner from establishing the mortgage and thus preventing the foreclosure of his properties by other ordinary creditors, even though the debt is not real. Furthermore, the system of charges and encumbrances checking by the notary at the time of creation of the mortgage and the report on the mortgage to the Land Registry by the notary at that very time is sufficiently secure, so there is no need for such a proprietor's mortgage.

7.4 Enforcement and other rights of the bank

The procedure used is nearly always that of judicial enforcement, which normally lasts for 1 or 2 years, depending on the speed of the enforcing courts and of the hindrances the debtor might put in place.

The sale must be carried out by judicial auction. Spanish Law forbids the old agreement of the *lex commissoria*; so the bank can never appropriate the property.

In order to speed up mortgage foreclosures, a foreclosure procedure before a notary was established about 10 years ago. This procedure takes no more than a few months, if there is no justified opposition by the debtor, and finishes with an auction of the property at the notary's office. Nevertheless, this procedure has been rarely used, mainly because of the unawareness of its existence, and probably as well because of the fear of possible problems that might arise, despite the fact that in all mortgage cases the possibility of auction before a notary of the mortgaged object is always agreed upon. In the first years after it was introduced, the Supreme Court twice declared that it violated the citizen's constitutional right to effective judicial protection, as the notary deprives the citizen of the property by holding the auction himself without the intervention of a court. Nevertheless, whilst these sentences were highly criticised, the Constitutional Court (which has a higher rank than the Supreme Court) later considered that there was no such problem of unconstitutionality.

In principle, if the debtor has not been declared bankrupt, the creditor sells the object via a court process, and collects his credit with the money obtained from that sale. Any money left is handed over to the owner (or to other eventual creditors demanding it). And if the money obtained from the sale does not suffice to pay the debt, the creditor may demand that it be paid with other assets of the debtor (except in the very rare cases when the contrary has been agreed: where the debtor secures the debt solely with the mortgaged property.) But if the debt exceeds the maximum mortgage secured amount (for example, because interest has accrued over too many years) and there are other creditors, the mortgage creditor shall only have preference as to the secured amount, and in all other respects he shall be considered as an ordinary creditor.

7.5 Overriding interests and priority

Taxes from the last four years arising from sales or acquisition of property through inheritance take precedence over mortgages established thereon. They can be extremely large, up to 10-15% of the property's value, but this is very rare, since for the registration of such transfers with the Land Registry, it must be proved that they have been paid; so the problem only appears when the declared value is less than the real value. In my opinion, this right of the tax administration to seize properties in order to be paid taxes that were due by someone other than the actual owner can have obvious constitutional problems, as the tax shall be effectively collected from someone different from the person who had the duty to pay it; that is, a citizen can be forced to pay taxes for something not pertaining to him.

Tax on the ownership of real property over the last two years also takes precedence over the mortgage, but is usually very low (normally less than 1 % of the property's value) and easy to check.

Other charges with precedence over the mortgage are the expenses of the condominium from the present and previous year, and those caused by the plot's urbanisation during the 7 years following its completion, if it has been effected through any of the legal procedures for joint urbanisation, although it is very rare that these expenses are

not duly paid.

7.6 Scope of the mortgage

Mortgage always extend to the plot and the buildings, and any installations and machinery existing thereon.

It does not extend to furniture which can be easily removed from the property, unless otherwise agreed.

By law, it extends to compensation for damage and destruction of the building, regardless whether they are owed to the debtor by the third party causing the damage or by the insurance company. Therefore, banks always require that insurance be taken out on the mortgaged property when they grant a mortgage loan.

And when the owner mortgages the property, then sells it and the purchaser invests in it by constructing new buildings or improving those existing, the mortgage does not extend to these improvements.

The debtor always has the right to make an early redemption of his debt, if the creditor is a bank. However, in approx. 70% of the cases the debtor is obliged to pay a fee (0.5-1% in the case of variable interest loans, and 3% for fixed), calculated on the basis of the early redemption amount.

Once mortgage foreclosure proceedings have begun, and before continuing with them, it is obligatory to offer the debtor the possibility of paying the outstanding amount, and thus avoiding its continuation. Any owner of the property other than the debtor, or anyone who owns some kind of encumbrance affecting the real estate and which should be cancelled once the mortgage has been definitively executed, must also be summoned so as to offer him the same possibility, although they may avoid execution of the mortgage just by paying the secured amount of money, in cases where the effective debt has grown much bigger.

7.8 Security granted by a third party

It is possible and frequent that the bank gives one person a loan, which is secured by a mortgage established by another person. The avoidance of foreclosure by paying the debt up to the maximum secured amount does not pose problems or important special features. The non-debtor mortgagor has the right, as above explained, analogous to that of the person purchasing the property after the mortgage had been established, to prevent the execution of the mortgage paying the debt up to the secured amount.

7.9 Plurality of mortgages

The establishment of several mortgages on the same property in favour of one single creditor or of several different creditors is possible and is frequently carried out:

- If the first mortgage has priority over the second one and the first is foreclosed, the second will be automatically cancelled. But the creditor of the second loan must be summoned to appear at the trial and is given the opportunity to pay the first debt, which would not only stop foreclosure of the mortgage with higher priority but also give him the right to take the place of the first creditor, with all his guarantees, in some sense purchasing the loan secured by the first mortgage and thereby acquiring that mortgage.
- If the mortgage foreclosed is that with lower precedence, the first mortgage will not be cancelled but will endure. Therefore, any persons taking part in the property's auction caused by the second mortgage shall deduct from the price they pretend to pay for the property the outstanding amount secured by the first mortgage, since they may have to pay it to the first creditor.
- In some cases, mortgages with the same rank are established: in this case, if any of them are foreclosed, the other(s) will endure entirely.
- It is very rare that holders of two mortgages agree to modify their priority. This can be done through a notarial act signed by both of them and by the owner of the property, provided that there are no other charges registered with a rank lying between theirs. In this case, the exchange of the mortgages' priority will imply a modification in the precedence of the said intermediate charge, which would also require the consent of the holder of that charge.

7.10 Several properties

Mortgages over more than one property are quite common. In these cases, the borrowed amount must be distributed among both of them, in such a way that their mortgage liabilities add up to the total mortgage amount. In this case, the creditor has the right to decide which mortgage he wants to foreclose.

Furthermore, if the total debt has been reduced to an amount equalling the share secured by one of the properties, the debtor shall have the right to request the cancellation of the mortgage on that property, while the other endures.

7.11 Transfer of the mortgage

The mortgage secured loan or credit may be transferred to any other person, without prior consent by the debtor. This transfer causes the simultaneous transfer of all the rights attached to the loan, including the mortgage. In order that the transfer be registered, it is necessary to formalise it in a notarial act and to pay the same tax as requested for the establishment of a mortgage. But the registration is neither necessary nor mandatory: it only assists the acquirer with the performance of his right and at the same time protects him against eventual nullity of the contract, which would establish the mortgage in favour of the previous creditor.

It is however not possible to transfer the mortgage without transferring the credit.

It is also possible to establish a mortgage simultaneously in favour of several banks, in syndicated manner. In this case, it is usually agreed that the creditors' rights are jointly but not severally exercised; that is, each of them may demand and collect only their share of the credit (which actually functions as several independent loans). In this case, there is no hindrance on the transfer of part of the credit to a third party.

The concept of transferring a mortgage to more than one creditor does not exist in Spanish Law.

7.12 Conflict of Laws Issues

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