

Sweden

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1. Introduction

1.1 General Features and Short History

Swedish Real Property Law goes back to the Middle Ages. The provincial statutes had codes¹ on property and so did the first national codifications (from 1350). What is described there is a static society, where conveyancing and mortgaging of land was more suppressed than encouraged. Important was to keep the property within the family (here in the sense of a clan). If land was sold, an offer of first refusal had to be made to the relatives. Ownership of farm land was in practice a share in a village, which also made trading in land difficult. Finally, the right to own land was dependent on the person; peasants could not acquire land from the nobility and crown land and church land was guarded in the same way.² Land law in the (few) cities was inspired by German City law.

The first major changes took place in the 18th century. The almost collective farm land was reallocated through the enclosure movements, starting in 1750. The feudal barriers were lifted in 1789. The family restraints lasted until the middle of the 19th century.

An ambitious attempt to create a Swedish civil code was made in the first half of the 19th century. It was based on liberal ideas and the proposal was turned down. Partial changes of the law took place anyway, but we had to wait a long time for a new code, replacing the one from 1734. A committee proposal was presented in 1909 and another in 1947, but the present Land Code was not adopted until 1970.³

The Land Code is the dominant act for real property, regulating conveyancing, user rights and mortgages. It was introduced together with the Real Property Formation Act (*fastighetsbildningslagen*) which regulates the changes in the property units.

The system for registration of transactions has its roots in an act from 1875. Changes took place in 1932, but the most remarkable reform was when Sweden in 1973 as the first country in the world began to computerize the register.

Swedish law has always been centralized and there are today no regional differences in the legislation.⁴ Provinces or municipalities cannot not legislate, unless city plans are seen as a form of legislation.

The right to own property is guarded in the constitution,⁵ but only as a regulation of eminent domain. The section is cited here, as it is the only constitutional foundation for the owner's rights. It expresses the need for a legal cause as well as the right to just compensation.

¹ "Code" is used here to describe an important act such as the Land Code. There is no general civil code of the French or German type in Sweden. The Swedish word for our form of code is "*balk*", literary translated as beam and it has been used since medieval times.

² See for instance *Hafström, Den svenska fastighetsrättens historia*, 1969.

³ The work is described in *Westerlind, Kommentar till Jordabalken 1—5 kap.*, 1971.

⁴ Property formation was for long time – into the 1990's – different in the province of Dalarna than in the other parts of the country, but all legislation is now uniform.

⁵ *Regeringsformen*, the Instrument of Government, ch. 2 sec. 18. It reads:

The property of every citizen shall be so guaranteed that none may be compelled by expropriation or other such disposition to surrender property to the public institutions or to a private subject, or tolerate restriction by the public institutions of the use of land or buildings, other than where necessary to satisfy pressing public interests.

A person who is compelled to surrender property by expropriation or other such disposition shall be guaranteed compensation for his loss. Such compensation shall also be guaranteed to a person whose use of land or buildings is restricted by the public institutions in such a manner that ongoing land use in the affected part of the property is substantially impaired, or injury results which is significant in relation to the value of that part of the property. Compensation shall be determined according to principles laid down in law.

There shall be access for all to the natural environment in accordance with the right of public access, notwithstanding the above provisions.

Legal positivism is strong in Sweden and constitutional or notions of natural law has had very little influence on land legislation. The same can be said for Human Rights. To my knowledge, there is only one rule that has been created with the outcome in a case from the European Court of Human Rights.⁶

1.2 Property and Estates

1.2.1. Estate versus Property

The basic idea behind real property in Sweden is that an estate is a two-dimensional property unit. These units can only be created (subdivision) or changed (reallotment) through a property formation procedure, executed by a governmental or municipal surveyor. Unofficial parcelling or changes of boundaries is void.

Leases are not estates in Swedish law, with the exception of building leases that are mentioned in section 1.5 below. A freehold may be encumbered by leases or other ground rights, but this is in no way regarded as a pyramid of estates.

Feudal rights to land do not exist any more. The last remainder was the *fideikommiss*, aimed to hold land and chattels together when land was inherited, but this is vanished. The church still has some special rights to land.

1.2.2. Superficies solo cedit

The rules on fixtures are set in chapter 2 of the Land Code. Facilities “constructed in or above ground for permanent use” are fixtures. Buildings are the most important fixtures and there are building fixtures and industrial fixtures.

An important exception is that objects that were put at the property by somebody else than the property owner – such as a leaseholder or a tenant – are not regarded as fixtures. This also applies for tenant-ownerships and there are no “fixtures to leases”. A new dishwasher is not automatically included if the tenant-owner sells his apartment.

Buildings that were erected by a leaseholder are not fixtures. Their legal position is

⁶ This rule is that expropriation has to be fulfilled within a year after permission from the Government. Before this change, a property owner could be made to wait for compensation for many years without possibilities to sell the expropriated property.

somehow strange. The building can neither be pledged as security in accordance with rules for chattels nor by mortgaging. It has to be sold to the creditor together with an option to recover the building as soon as the credit has been paid.

In 1981 there were 137,000 dwellings of this kind,⁷ in percent about 5 % of all buildings in Sweden. Most of them, 115,000, were built for recreational purposes. Many are simple cottages in “leisure gardens” (*Kleingärten*).

1.3 Interests in Land

1.3.1. Numerus clausus

The principle of numerus clausus is important in Swedish law. Ownership is of course the primary interest, but a clear definition of this is not made in the Land Code. User rights and mortgages are better explained.

It is hard to say whether anything like the Common Law license exists in Sweden and how to view agreements that are on the fringe of the Land Code. It has been discussed if the renting of a night in a hotel is a tenancy and if camping is a lease.

Another way to judge this is to ask if there are interests in land that cannot be registered at all. Rights to burial, public road rights and tenant-ownerships are not to be found in the public register, but they are clearly of importance to the property owner.

1.3.2. System of Interests in Land and Numerus Clausus

Apart from ownership, Swedish law recognizes leaseholds, tenures, building leases, easements and rights to electrical power. There are also user rights for fishing, hunting and mining. Mortgages are of course also acknowledged.

Pre-emption rights cannot be agreed between private parties, but there are a few legal rights of this kind (see section 1.3.5 below).

1.3.3. Servitudes (usus)

Easement in appurtenance is the only form of servitude, recognized by Swedish law. The prerequisites come close to the classical Roman conditions.⁸ Easements must be of importance to the dominant property (*utilitas fundo*) and this importance has to be enduring (*perpetua causa*). The third one, (*vicinitas*), is not strictly observed. In a leading case, *NJA 1978 s 57*, the Supreme Court accepted that a small lot with an elevator was used as the dominant estate for all tunnel easements for Stockholm’s underground. The servient unit must not be burdened in an unnecessary way and this leads in practice to a balanced view, where the value of the easement for the dominant property shall exceed the losses for the servient property. Finally, the easement right shall be granted for use “in a certain respect”; exclusive land rights are judged as tenancies. The use of a trotting oval (for harness race training) was in *NJA 1996 s 776*

⁷⁷ *SOU 1984:22, Panträtt i registrerad nyttjanderätt*, p 95.

⁸ *Hillert, Servitut*, 3d ed. 1991 p. 29 ff.

not judged as an easement, because the owner of the “servient” property had no access to the land inside the oval.

Contractual easements are regulated in chapter 14 in the Land Code. Easement contracts are only valid in written form. Registration is common, but not necessary. Payment may be a condition; one time compensations when the contract is closed are probably more common than periodical payments.

As mentioned above, easements must be enduring, but they cease to apply in certain cases. Amalgamation of the dominant and the servient properties is of course such a case. Contract breaches – where the reasons may be excessive use of the servient estate or failure to fulfil payments – can be grounds for repudiation of the easement. If the parties agree, the easement can be dissolved.

Changes or cancellation can be called upon from just one of the parties (normally the owner of the servient property). When the reason is changed conditions rather than breaches of contract, changes in or cancellation of the easement can only be decided by a land surveyor⁹ (working for the government or a municipality).

The land surveyor can also, as a part of a reallocation procedure, create easements. These are often called “official easements”. The basic features of the contractual easement apply also in this case. One difference is that an easement can be forced upon an unwilling owner of property. Of great practical importance is that official easements cannot be dissolved by the parties themselves. Dissolution must be decided by a land surveyor and he can only approve such an application if both properties are “suitably designed” even after the change. This makes official easements more stable than contractual, an important factor when creditors value the importance of easements for a dominant estate.

Easements are quite common, but they are important also in another sense. Certain legal rights have been established with the easement as a pattern. Public road rights are regulated in a special statute.¹⁰ This is also the case with some utilities, such as telephone and power lines and water and sewerage mains.¹¹

Profits are not treated as a special right in Swedish law. Easements may contain elements of rights to profit, but this is rare and not at all possible with forest and grazing rights.¹² The economically important right of felling timber can only be constructed as a grant of use with a maximum period of five years.¹³

1.3.4. Mortgages and Rent Charges

The Swedish mortgage has a lot in common with the German Grundschuld. Mortgages are created by an application from the title-holder to the Land Registry. The owner freely chooses the amount of the mortgage, but a stamp tax of 2 % for new mortgages has a restraining effect.

The registration of the mortgage (*inteckning*) is reflected in the mortgage deed

⁹ The Real Property Formation Act ch. 7 sec. 4 and 5. The English translations in this report often come from “Swedish Land and Cadastral Legislation”, 1998 (edited by *Mattsson & Österberg*).

¹⁰ *Väglagen* (, the Public Road Act.

¹¹ *Ledningsrättslagen (1973:1144)*, the Utility Easements Act.

¹² The Land Code ch. 14 sec. 4.

¹³ The Land Code ch. 7 sec. 5 para. 2.

(*pantbrev*) which is used for the actual granting of a lien. This grant can only be made of the property owner – all owners if there is more than one – and it must tie the mortgage deed to a specific obligation.¹⁴ The mortgage deed itself expresses no claims and it is therefore clear that Swedish mortgages are non-accessory.

Competition between mortgages is decided in accordance with the registration date. A mortgage deed can be used again after full payment of the credit and it is therefore fully possible with a better priority for younger liens than for older.

There are a few types of liens that have a better priority than the mortgages, but they are limited to property formation costs and joint facility fees (not older than one year). These liens are of no practical importance. Competition between mortgages and user rights is described below in section 1.3.6.

1.3.5. Rights in Rem to Acquire Real Property

Options to sell or buy real property are not valid in Swedish law. The reason is a well-established general principle that real property shall not be encumbered more than necessary. There are, however, certain exceptions.

Prevention of selling can be stipulated in deed of gift has effect towards a third party if it is registered. Such provisions cannot not be made in sales contracts.

Legal pre-emption rights are to be found in certain situations. Municipalities have such a right with some exceptions, such as to domestic properties smaller than 3,000 sq.m.. This right means that the municipality can acquire the property on the same conditions as the original buyer had. Another example is that tenants can form and register a co-operative association that is entitled to an offer to purchase if the landlord wants to sell his property.

1.3.6. Other Interests in Land

Certain land leases – agricultural, residential ground leases and commercial ground leases – are in important aspects to be viewed as rights in rem. Contracts for those leases have to be made in written form.

Bona fide acquisitions of leases are possible. If a property is sold and the former owner grants a user right – a lease or an easement – the user right will prevail if the leaseholder was in good faith and registered his right before the new owner.

Registered leases compete with the mortgages in an executionary sale. An older lease is protected against mortgage that was registered after the lease.

Assignments of leases are, however, dependent on permission from the property owner and the Swedish lease is not as strong and independent as the Common Law lease. There is also a time limit; 50 years in the countryside and 25 years in developed areas.

¹⁴ See section 7.1.1 below.

1.4 Apartment Ownership (Condominiums)

Apartment ownership is generally achieved through shares in co-operatives (*bostadsrätt*). More than 20 % of the Swedes live in such tenant-ownership flats. A special tenant-ownership act, *bostadsrättslagen*, regulates the relations in the association and the obligations of the owner and the association. Mortgaging and defects are treated in accordance with rules for chattels. Tenant-ownerships are not seen as real property. The principles were laid out in an act from 1930 that has been replaced in 1971 and 1991.¹⁵

The association has title to the property and the tenant-owners are members of the association. The tenant-ownerships can be freely sold at market prices that at present are very high (a three-room flat in central Stockholm cost about €500,000). A buyer must apply for membership to the association. If the buyer is not admitted, he can have his case tried by the regional rent tribunal.

The living in a tenant-ownership is regulated in the act with rules that are similar to the ones who apply for tenancies. In theory, the associations may add rules in their bylaws and other regulations, but such rules have to be of special importance to the association if they are to be approved by the courts. Changes of the bylaws can only be made after a decision at an association meeting and would require a qualified majority.

A change from an apartment to a restaurant would be in clear conflict with the act that states that the apartments shall be used for residential purposes.¹⁶ Prohibition of pets is not legally valid in most associations, but if the purpose is to have a house for allergic tenant-owners, pets could be forbidden.

There is no public register for tenant-ownerships. The associations register new members. Mortgaging of tenant-ownerships is possible but the system is not same as for property. The creditor shall inform the association of the mortgage and the association is obliged to make a note of this in a special register. The problem is that the mortgage is valid as soon as the association has been informed and if it is not annotated, the mortgage will be hidden for other creditors and for new owners.

The tenant-ownership association is an economical association. If the house is destroyed and not rebuilt, the association will be liquidated and the assets distributed among the owners in accordance with their shares.

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

The building lease (*tomträtt*, often translated as site leasehold) is regulated in chapter 13 and 21 in the Land Code. It has been devised in order to create a right that is as stable as a freehold. The period is indefinite and the lease can be mortgaged.

The lease can only be originally granted on publicly owned land (JB 13:2 para. 1). Usually municipalities are the grantors. Nothing prevents the municipality or the State from selling the property to a private buyer (this has in fact happened) and it is therefore possible to have building leases in private land.

¹⁵ The most important books on tenant-ownership are *Julius & Uggla*, *Bostadsrättslagen*, 2 ed. 1998 and *Victorin*, *Bostadsrätt och kooperativ hyresrätt*, 2003.

¹⁶ Tenant-ownerships can be created for commercial reasons; it is the change that is impossible.

The leaseholder pays an annual ground rent and this is the basic idea behind the building lease. The ground rent is based on the value of the land and changed every ten years.

The position of the leaseholder is similar to an owner of a freehold. Conveyancing and mortgaging is done under the same rules. Buildings are regarded as fixture to the building lease and not to the underlying property. To achieve this, the building lease contract has been made as stable as possible. Failure to pay ground rent does therefore not lead to repudiation of the lease. Instead, the property owner gets a lien for the unpaid rents. There are not any other ground for cancellation. If the municipality needs the estate, it has to acquire it by eminent domain.

1.6 The Public Law Context of Real Property Transactions

Control of subdivision and building permits function as restrictions on property transactions, but the cases of a direct control are not so many. The rights to acquire properties for agricultural use and tenancy properties are limited by special acts.

Permission to acquire agricultural properties is needed when the property is located in sparsely-populated areas, in areas where a many reallotments take place and when the buyer is a legal entity.¹⁷

A buyer of a property with tenancies has to report his acquisition to the municipality within four months.¹⁸ The municipality may either approve or force the buyer to seek permission at the Regional Rent Tribunal. The buyer then has to show that he is able to manage the property and that he has acquired it for durable, non-speculative reasons. The act is aimed at preventing “rent sharks” from buying property with dwelling units.

Public subsidies used to be an important factor for the property sector, but a part of the recovery from the crisis in the early 1990’s was the abolishment of such support. What remains are some small incentives when new houses are built, mainly bank interest subsidies and they are small in the present low-interest economy. Expenditures of this kind were about 140 million Euros in 2002.¹⁹ Direct support to families and pensioners play a much bigger role. Financial help to acquire existing houses has never been obtainable.

1.7 Brief Summary on "Real Property Law in Action"

The first years of the new millenium have seen dramatic changes in the real property market. Low interest rates (going down now to under 2.8 %) have fuelled the prices. The strange thing is that investors in new buildings still are hesitant. Many more dwellings were created in the early 1990’s, when interest rates came close to 10 % than today.

The regional differences in prices are very big. A standard house in an attractive city such as Lund may cost more than €300,000. A similar house in the countryside 100

¹⁷ *Jordförvärvslagen (1979:230)*, Land Acquisition Act, sec. 3.

¹⁸ *Lagen (1975:1132) om förvärv av hyresfastighet m.m.*, Acquisition of Rental Properties Act.

¹⁹ *Bostads- och byggnadsstatistisk årsbok 2003*, Yearbook of Housing and Building Statistics, tab 6.2.1.

kilometres north of Lund can be acquired for less than €100,000. This means that the building of new houses is uneconomical in the thinly-populated areas.

According to the European Mortgage Federation, the Swedish mortgage market in 2001 amounted to 50 % of the GDP.²⁰ It was less than Denmark (70 %) but more than Italy (10 %). The quota is probably higher today.

Notaries are not compulsory in the continental fashion. Conveyancing is almost always handled by real estate agents. They are authorized, and a two year long academic education is necessary to enter the profession. Mortgages are handled by the banks. The ordinary credits are given by non-legal clerks. This means that we have neither notaries nor solicitors, a condition that reflects a simple and efficient legal system.

Cases concerning real property are quite frequent in Swedish courts. The most common disputes are those which deal with defects in sold houses. The seller is (unless the contract says otherwise) responsible for all defects that the buyer – a non-professional *bonus pater* – could not discover. When mould or damp appears after the sale, litigation is the solution for many cases.

Executionary sales after enforcement are frequent, at least when times are bad, but they are generally handled by the enforcement agency alone, with no interference from the courts.

Access to courts is mainly a matter of insurance. The normal home insurance covers litigation costs (there is a maximum). Disputes concerning tenancies and tenant-ownerships are often tried by Regional Rent tribunals that are cheaper and faster than the regular courts.

²⁰ Lambert, Real Estate Transactions and the Secured Credit Market in Europe, Ppt-presentation in Lund 27 Feb. 2003.

2. Land Registration

2.1 Organisation

1.1.1. Statutory basis

- What is the statutory basis for land registration?

Registration is described in the second part of the Land Code (ch. 19—24). What is described here is primarily the different possible registrations and the prerequisites.

There are three supporting statutes: the Real Property Register Act – *lagen om fastighetsregister (2000:224)* – deals with privacy and information accessibility. The Real Property Register Ordinance – *förordningen om fastighetsregister (2000:308)* gives technical instructions on how to handle the computerized registers. The Land Register Ordinance – *inskrivningsförordningen (2000:309)* – fills out the Land Code regulations on land registration with certain details.

- Is there a different system in a part of your country?

No.

1.1.2. Relevant institutions

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

There are still dualities in the Swedish system. Land registration (titles, mortgages etc.) is handled by land registries (*inskrivningsmyndigheter*), while the cadaster is managed by cadastral authorities (*lantmäterimyndigheter*). The central, common computer system is run by the National Land Survey. The register is seen as one, called *fastighetsregistret*. It contains different parts and land register information is to be found in one of them, *fastighetsregistrets inskrivningsdel*.

1.1.3. Land register

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

There are seven land registries in Sweden, organised as parts of certain district courts (*tingsrätter*). There used to be a registry at every court, but they have been centralised. In charge of a Land Registry is a registrar (*inskrivningsdomare*), who is a judge of the court where the registry is situated. The registrar shall supervise the registry and handle difficult applications, but the main load is carried out by non-legal staff.

1.1.4. Is all real property registered?

All real property is registered in Sweden. This is reflected in the very beginning of the Land Code, where it is stated: “Real property is land. This is divided into real estate units.” When a new estate is created through property formation, the exact time for the commencement is when the formation is registered.

2.2 Contents of Registration

1.2.1. Which data are registered?

Information for a certain estate is public. The information comes from three general sources:

Information from the Land Registry shows title holders, last purchase and purchase sum, mortgages (but not mortgagees), leases, easements and other contractual encumbrances. Certain notices, for instance about bankruptcy or enforcement are also entered by the Land Registry.

The cadastral information shows decisions on property formation and planning as well as geographical information such as size and position co-ordinates.

The taxation value for the ground and the building is also shown.

1.2.2. Sample of Registration

- Please include (if possible as an annex to the answers to this questionnaire) a **sample copy** of a registration (rsp. an abstract of title) and explain how to read it! (*not made in the draft version*).

2.3 Registration Procedure

1.3.1. Application for Registration

Please describe the application procedure:

An application to the Land Registry must be done in written form and be signed by the owner(s), here defined as the one who is registered for title in the Land Register.

- Is there any form required for the application for registration?

The application has to be signed and point out the estate that is affected. When the registration is based on a contract – such as a sale or a lease agreement – the original document must be included.

- Is it usually a lawyer or a notary who applies for the registration on behalf of the parties?

Registration for mortgages is normally applied for by the owner's bank. The application is signed by the owner, but the mortgage deed is sent directly from the Registry to the bank.

1.3.2. Duties of the Registrar

- What does the registrar control?

The registrar (or rather one of the clerks at the Registry) matches the information in the application with the contents of the Land Register. The computer can also give warnings if, for example, the applicant is bankrupt. Marital status is checked via a computer link to the National Census Register.

The registrar looks for signatures on documents where this is necessary, but the signatures are not checked against samples. This means that anyone can apply for and get a registered title to an estate.

- How are the applicants informed about the registration?

In some cases – such as title registration – a proof is sent to the owner, together with the bill for the registration fee and stamp duty.

2.4 Access to information

- Is the registration done on paper or electronically?

The register is electronic. The district of Uppsala län was computerized in 1973 as the

World's first electronic system and the country was then gradually reformed. Since 1995 all property registers are electronic.

- How can you get access to land registration information? Is it in the public domain or is the access restricted?

Anyone can get it from a Land Registry or a cadastral authority by telephone or a personal visit. Direct internet access is only open for specified users and reasons. Another limitation is that

- In particular: Can you get access to the register :
 - if you have a *ius in rem* in the real property,

Since the Register is public: yes.

- if you are negotiating with the owner about the purchase of the property - or if you want to find out who owns a property in order to make him an offer for purchasing or renting the property,

Since the Register is public: yes.

- if you have an enforceable title against a debtor and are inquiring about the existence of real property to be seized in an execution procedure,

As long as the inquiry is for certain estates, the answer is yes, but it is not possible to use the person as the search criteria.

- if a bank wants to check whether an applicant for a loan owns real property,

If the debtor gives the bank information about his ownership of real estate, the bank can (from its own computer) control that the declaration is correct. The bank cannot check on person in the Land Register. However, banks use special credit information and it contains, among many other data, information about titles to real estate.

- if the press wants to inquire on how much real property a politician owns.

Not if the search uses a name as criteria, only for estates.

- Can you search for information by address, by registration number of land and/or by holders of rights on it?

All searches must be done for property units (using register numbers or addresses). Names of persons are not allowed as search criteria.

2.5 Substantive Effects of the Registration

- What are the substantive effects of the registration?
 - Is the registration necessary for the creation or the transfer of the right (constitutive effect) or for its opposability against third parties - or is it merely declarative?

Registration is declarative (with a possible exception for mortgages, see ch. 7).²¹

- Does the registration confer a presumption or proof for the existence of the right? (if this is different for different rights and interests, please give the

²¹ This rule is expressed in JB 19:40 para.1: "The question of whether an acquisition on which title is based is invalid or cannot be asserted ... may be adjudicated, regardless of the title registration."

information for each interest.

- Is the reliance in good faith on the registered rights protected?

Yes, when someone acts in good faith and relying on register information, he is protected. It will either secure a bona fide acquisition or entitle the person to compensation for losses from the state.²²

- Is it necessary to search for additional information apart from the content of the registration to get a full picture?

The Land Register is complete about typical private law information, such as ownership and mortgages and other encumbrances. Leases and easements are, however, only mentioned in the computerized register. The content of these agreements have not been scanned or typed into the Land Register, but copies are available at the Registry.

A lot of cadastre information is also available, but there are certain exceptions. City plans are mentioned, but to get the content one has to go to the municipality. Certain encumbrances for roads are not even mentioned in the register.

- How are parties that have relied on the information from the register (abstract of title) protected if this information proves to have been wrong?

The Torts Act has a general rule on governmental liability for errors and this applies here. There are also special rules on technical errors in the Land Code.²³

2.6 Rank and Priority Notice

1.6.1. Rank

- How is the rank of registrations determined?

Rank of registrations is based on time priority, but the rules are scattered around in Swedish legislation.

Competition between mortgages is described in ch. 17 sec. 6 para. 1 of the Land Code: “A mortgage confers priority in relation to another mortgage, in the chronological order in which they were applied for.” Competition between registered user rights and mortgages is also settled in this section.

The rank of enforcement decisions is also founded on when the decision was registered. Rank between mortgages and enforcements is described in sec. 9 in the Liens Act – *förmånsrättslagen (1970:979)*. Registration also decides the rank between enforcements and user rights, a rule to be found in ch. 4 sec. 30 in the Enforcement Code – *utsökningsbalken (1981:774)*.

- Please quote the applicable article verbatim (and translate it into English)!

JB 17:6: “A mortgage confers priority in relation to another mortgage, in the chronological order in which the mortgages are applied for. Mortgages applied for on the same title registration day²⁴ confer equal title.

In relation to a right of user, an easement or a right of electrical power, a mortgage

²² JB 18:1—18:4.

²³ JB 19:37.

²⁴ All applications to the Registry are handled on registration days. They end at noon (on workdays), meaning that the registration day of Tuesday 21 September started at noon the day before and ended at 12 AM the 21 September.

confers priority if it is applied for before title registration of the right is applied for. Title registration of a right of user, easement or right to electrical power confers priority over a mortgage applied for on the same title registration day.”

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

See above, the time of registration will decide the rank.

1.6.2. Priority Notice

- Is there any possibility to secure a future registration (or at least its rank)?

There is nothing like the *anotación preventiva* or the *Vormerkung* in Swedish law. In some cases, an incomplete application that will result in a conditional title or mortgage may serve the same purpose.²⁵ Rank is in such cases based on the first application, not on the date that the condition was met and a full title or mortgage could be created.

3 Sale of Real Estate among Private Persons (consumers)

3.1. Procedure in general

1.2.3. Main steps of a real estate sale

- When real estate is to be sold in the open market, it is common – though not compulsory – for the seller to use a real estate agent. After bidding and negotiations, the seller will approve of a buyer.
- The agent – notaries of the continental type do not operate in Sweden – will draft a sales contract, where the price as well as the date for final payment, change of possession and the signing of the sales deed is stipulated. It is common that the buyer at this moment pays 10 % of the price as a down payment.
- The sale is later concluded at the day set out in the contract. After full payment, the seller will give the buyer the keys and the parties will sign the sales deed. The banks of parties are normally also involved and the mortgages are moved to the buyer’s bank.
- The buyer registers his title by sending the title deed and an application to the Land Registry.

1.2.4. Time frame

- How long do these steps normally take in your country?

It is hard to say how long time the agent’s marketing takes. Desirable objects, such as houses in expansive areas, are probably sold (= the contract is signed) in less than one

²⁵ A buyer may, for instance, apply for a conditional title as soon as the sales contract has been signed. In that moment, full payment is still lacking. When the sales deed, where the seller certifies that he has been fully paid, is presented to the registry, the conditional title will be upgraded to a full title. For this buyer it would also have been possible to apply for conditional mortgages that later would have transformed into ordinary mortgages.

month, while houses in rural areas sell slower. The normal assignment period for a real estate agent is three months, which is the maximum period for a so-called exclusive assignment.²⁶

Nothing prevents the parties from concluding the whole deal when the contract is written. It is, however, customary to wait a while for the conclusion. This period is on average about three months long. This habit has practical reasons; the seller needs time to get a new place to live, the buyer may have a cancellation period before he can leave his old house and he may need time to arrange the credits from the bank.

The conclusion day has several moments that in the perfect case takes place simultaneously: final payment to the seller, the seller's payment to his bank, credit arrangements and mortgages between the buyer and his bank, the signing of the sales deed and the change of possession.

Application for the buyer's title is normally sent to the Land Registry on the conclusion day. The average handling time at the registries is about one week.

3.1 Real Estate Sales Contract

1.2.1. Form

- Is there any form required by law – either for the sales contract or for the transfer of ownership (e.g. writing, deed, notarial act or any other authentic instrument)? Must it be done in an oral hearing with both parties present?

There are no notaries in the Continental European fashion in Sweden. Anyone can draft a contract. The contract has to be in writing. It shall (1) identify the property, (2) the sales price must be mentioned and (3) a clear statement that expresses the seller's intention to sell has to be made. (4) Both parties must sign the contract.²⁷ If the seller's spouse is not signing as a co-owner, a written assent is also needed. The seller's signature is normally confirmed by two witnesses (also signing). The title registration will be delayed with six months if such witnesses are lacking.

- What are the consequences if the contract does not meet the formal requirements?

A contract that does not meet the formal requirements 1—4 above is void. There are no doctrines such as part performance or equity to change this. Even if a title is registered for the buyer, the contract is still void, if the registration is based on an imperfect contract

Since 1992 there is a partial exception for the required statement of the price.²⁸ The old rule said that a false price in the contract made it void (provided of course that this could be proven). The present rule says that the written contract price is binding for the parties, even when they in reality have agreed upon and transferred another sum. This is milder by an equity rule that says that the contract price shall not apply if this would be unreasonable.

²⁶ Sec. 11 para. 2 in the Real Estate Agents Act – *fastighetsmäklarlagen* – (1995:400).

²⁷ As a consequence, a contract cannot be concluded before both parties have signed the document. More surprising is a Supreme Court ruling stating that, when the contract is mailed between the parties, the exact moment of conclusion is when the first signer is informed that the other party has signed and not when the second signature is made.

²⁸ JB 4:1 para. 2.

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

The parties are free to draft the contract themselves and forms can be bought in any bookstore. However, in most cases it is drafted by the real estate agent. Most agents read the whole contract loud to the parties before it is signed.

The agent is chosen and paid by the seller, but he must take care of the interests of both parties.²⁹ He is responsible for the legal validity of the contract as well as for legal searches and presentation of register information. The agent's liability for physical defects is a more complicated question, which will be briefly discussed in section 3.5.1.

1.2.3. Preliminary contract

- Is there a preliminary contract?

As mentioned in section 3.2.1, a valid contract must contain a statement from the seller that the property is conveyed to the buyer. Preliminary contracts or options are therefore not valid.

An exception from these rigid rules is the possibility to make down payments before the contract is signed. If a buyer (or a seller) makes such a payment and later withdraws, the down payment will compensate the other party. Down payments of this kind are rare, while down payments in connection with the contract (serving as security for claims if the buyer does not fulfil) are normal.

1.2.4. Typical Real Estate Sales Contract

- Is there any standard form for a sales contract? Or is there any other form used quite often or published e.g. in a commonly used manual?

There is no standard form, but real estate agents use (computer) forms that are created by their organizations or companies. Contracts and deeds tend to be quite similar.

- If possible include a **copy** of one or two typical sales contract forms (preferably as annexes to this questionnaire)!

Examples of a sales contract and a sales deed are included as an annex.

3.3 Transfer of Ownership and Payment

3.3.1. Requirements for Transfer of Ownership

What are the requirements for the transfer of ownership?

As already mentioned, ownership can be completely transferred through a single sales contract, but in the normal procedure it is the sales deed – released after full payment from the buyer – that fulfills the agreement. In spite of this, the contract is seen as the instrument of transfer, but at that stage the sale is conditional. If the buyer does not pay, the seller may rescind, provided the rights of rescission, or a coming sales deed, are mentioned in the contract.

Title registration does not have any consecutive effects.

3.3.2. Payment due

- How do you manage to make the payment and the transfer of ownership happen at the same time – or at least to minimize risks for both seller and buyer?

²⁹ The Real Estate Agents' Act sec. ##.

Assuming that there are bank credits involved, this would be a normal routine, designed to minimize the risks:

The parties (and the agent) will meet at the office of the buyer's bank. The buyer's bank will pay the money to the seller's bank, who will use what is needed to pay the seller's debt and put the surplus on a bank account. The buyer's bank will at the same time inform the seller's bank that the buyer has mortgaged the property (and this is enough to give the buyer's bank mortgage security). As soon as the seller's bank announces that it has been paid, the parties will sign the sales deed, making the transfer unconditional. This means that the sales deed performs as a receipt for full payment. The seller will give the buyer the keys to the property.

- When is the payment due under a typical contractual agreement?

The parties decide the day for full payment. A very common length of the period is three months.

- Is the payment effectuated via an escrow account or directly among the parties?

Down payments are usually paid to an escrow account held by the real estate agent. Full payment is normally done directly from the bank of the buyer to the seller's bank.

- Is an insurance for risks inherent to the payment and the transfer of the property possible, usual or even obligatory?

During the interval between the contract and the deed, the seller retains possession to the property and he carries all risks. A very common contract clause is that the seller must keep the premises fully insured, but there is no such rule in the Land Code. Surety for the buyer's payment is theoretically possible, but unheard of in dealings between private persons. The seller's right to rescind if payment is not made in time makes the estate itself to function as collateral.

3.3.3. Ways of the seller to enforce the payment

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

It is important to remember that full payment must be stated as a condition in the agreement. This is automatically achieved when the normal method of contract and deed is used. If a forthcoming deed is mentioned in the contract, it is to be interpreted as a condition that the fulfilment of the agreement is dependent on the issuing of a deed. In such a case, the seller rescinds and he is entitled to damages.

In accordance with general rules on sales, the seller may sell the property immediately to somebody else. If the new sale is a loss for him, compared to the first one, the difference can be claimed from the buyer. Down payments will set the limits for such damages – meaning that the seller will just collect the down payment to cover his losses – unless it is clearly stated in the contract that no limitation of the damage sum is intended. If the losses are smaller than the down payment, the difference should be paid to the buyer.

If just a contract is used or if the deed is released even though full payment has not been made, a provision that the fulfilment depends on payment is necessary if the seller shall be able to retain the property. If a final sales contract or a sales deed is signed with the buyer still in debt, the seller will only have a personal claim against the buyer, but the property must be handed over. The ways to collect such a claim do not differ from other cases of unsecured demands.

3.3.4. Transfer of possession to the buyer

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

The buyer is entitled to compensation if the seller is late in handing over the property and in more serious cases, the buyer may rescind.³⁰ The Land Code has no rules on the buyer's right to enforce possession after the sale, but a buyer who has fulfilled all his obligations in the sales contract can get help from the Enforcement Authority.

Possession is however not enough. A buyer needs the signed sales deed to get full title. The Land Code gives the buyer a right to rescind in case the seller evades this.³¹ It is assumed that a court by means of contingent fines can force the seller to sign,³² but there is no way to substitute to seller's signature with a court decision.

3.4 Seller's Title

3.4.1. Title Search: Ascertaining the seller's title

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

It is not possible ever to be absolutely sure about the seller's title. If someone, for example, gets a title registration by presenting a false sales deed to the Registry, this defect can not be repaired by good faith acquisitions, only by a twenty years long prescription period. In such a case (it is theoretical) a seller can have a title without being the rightful owner.

This means that a buyer in good faith can be dispossessed of the property. If someone, who has relied on the register, should suffer an economic loss, the State guarantees compensation (see 3.4.3 below). A condition for that is that the seller had full title to the property. It is therefore wise to check for the seller's title in the Land Register. Such a search is part of a real estate agent's professional conduct.

3.4.2. Title Search: Absence of Encumbrances

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

Leases will be mentioned below in 3.4.4. It is customary to make guarantees concerning encumbrances in the sales contracts, but even without such a guarantee, the seller is obliged to transfer the property free of encumbrances (or free of other encumbrances than the ones mentioned in the contract).³³ If the buyer later should discover, for example, an easement, it is seen as a defect in the Land Code.

Mortgages are by nature visible in the Land Register. Easements are usually registered, but fully valid without a registration. If the estate is encumbered by an unregistered easement, a bona fide acquisition will extinguish the easement. A principle of constructive notice applies here; if the buyer was or ought to be aware of the easement, it will prevail.

3.4.3. Title Insurance or Liability

³⁰ JB 4:13.

³¹ JB 4:14.

³² Westerlind p. 366.

³³ JB 4:16 and 4:17.

- Why is title insurance not necessary in your system?

Registration is efficient in Sweden and the information is available to anyone. Real estate agents have the duty to make a search and to inform buyers on registrations that could be of importance.

Bona fide acquisitions based on register information are possible. In order to raise the credibility of the Land Register, the State also gives guarantees. If an estate is bought from somebody who was not the right owner but registered for a title, the rightful owner will lose the estate, but he will be compensated with money from the State.³⁴ This guarantee is not intended to cover errors made by the registrars.³⁵

3.4.4. Leases

- How does the buyer make sure that there are no leases on the sold property?

Most leases can be registered in the Land Register, but it is not very common to do it.³⁶ The sales contracts usually contain a statement about leases, but not always. Even with such a statement, a seller may forget to mention the lease.

- What are the consequences for the buyer if such contracts exist?

Unexpected leases can be seen as true triangular dramas. The seller is obliged towards the leaseholder to protect the lease and he will be liable for damages if the lease is extinguished by a good faith acquisition. The seller is also obliged to give the buyer information on existing leases (see below). Finally, a buyer in good faith can contest the lease. For a buyer who is surprised by a lease, the choice will be to accept the lease or sue the seller or to take on the leaseholder. In the only Supreme Court case that has been tried the present good faith rules were introduced in 1972, the buyer sued the leaseholder and won.

- How may problems related to leases be dealt with in the drafting of the contract?

It is common that sellers in the contract guarantee that there are no leases (or other encumbrances). Also when there is no such clause, the seller is obliged to mention and explain existing leases, even if they are visible in the Land Register.

3.3 Defects and Warranties

3.4.1. Legal rules

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

- concerning a defect of title,

If the estate can be repossessed, due to defects of the title, the seller shall return the purchase money.³⁷ If the buyer was acting in good faith, the seller will also be liable for damages.

³⁴ JB 18:4 para. 1. In para. 2 of this section, compensation for buyers in good faith that has to return the property to the rightful owner is described. How such a situation arises is mentioned in 4.2.2.

³⁵ Losses due to technical errors are covered in JB 19:37. There is a general rule on liability for errors made by governmental authorities in the Torts Act.

³⁶ Provisos in the contracts that forbid registration of ground leases and tenancies are valid (JB 7:10 para. 1) and respected by the registrars (JB 23:2 p. 8).

³⁷ JB 4:21.

This responsibility for the seller may be excluded in the contract, but is viewed to be so fundamental that the exclusion must be in writing, as a part of the contract.³⁸

- concerning defects affecting the quality of the property,

The questions in section 4.4.1 highlight this, but the principles will be explained here.

Swedish law acknowledges contractual defects (deviations from what has been agreed upon) as well as abstract defects (deviations from a standard that could be expected).³⁹ Fundamentally, the seller is responsible for all defects, meaning that the principle of *caveat emptor* does not apply in Sweden. This responsibility is balanced by exclusion of defects that were possible to discover with a careful examination of the estate.⁴⁰ In short, this means that the seller is only responsible for “hidden defects”.

No other rule in the Land Code has caused so many Supreme Court cases and discussions. It is especially the range of the prescribed examination that causes problems. The model buyer seems to be a well informed and careful private person. As soon as he finds defects, they are of course no longer hidden, but this goes also for the mere indications of defects (such as stains that are a result of damp or mould). When such signs occur, a more thorough investigation (by a professional) shall be made.

In practice, most buyers use a professional building inspector who writes a report. This does not automatically make the seller responsible for everything that the inspector has not found; the seller is only liable for defects that cannot be found through a careful examination. If the inspector misses detectable defects, he is responsible towards the buyer (but is likely to claim that indications were mentioned in the report).

- concerning restrictions by zoning law, environmental law and other administrative regulations, which have not been considered in the contract?

The seller is responsible for the free disposition of the property.⁴¹ The problem is to define this. Environmental laws are, for instance, too general to be covered by this rule. It is only when the interference of possession is clearly addressed towards the estate that this legal warranty applies; examples of this are special building prohibitions. City plans are normally made for a confined neighbourhood, but it seems as if they often are too general to be a part of the seller’s responsibility. Plans that are made for just one block, have on the other hand been found to be so limited that the rule applies.⁴²

The chronological question is also important here. The defect must have appeared at the contract date. If a decision at that time is in its preparation stage, but still awaiting a formal decision, it is not likely to be seen as a defect for which the seller is liable.⁴³

³⁸ JB 4:3 p. 2.

³⁹ JB 4:19 para. 1: „If the property unit does not conform to what follows from the agreement or if it otherwise deviates from what the purchaser could have justifiably anticipated at the time of the purchase [...] the right of the buyer to make a deduction from the purchase price or to cancel the purchase shall apply.“

⁴⁰ JB 4:19 para. 2: „A deviation which the buyer ought to have discovered in the course of such examination of the property unit as was occasioned by the state of the property unit, the normal state of comparable properties and the circumstances attending the purchase may not be adduced as defects.“

⁴¹ JB 4:18.

⁴² NJA 1982 p. 36, where only three estate were touched by the decision to change a city plan.

⁴³ NJA 1994 p. 85. The authorities had begun a dialogue concerning changes in the garbage collection, but at the day of the contract it was not inevitable that the changes (which later actually took place) would be introduced.

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

- What kind of contractual clauses on warranties are typically agreed upon in a real estate sale among private persons?

The Land Code is based on the responsibility of the seller and the need for warranties is therefore rather limited. It is common to include a warranty concerning freedom of encumbrances, but its legal importance is small since there is such a warranty in the Land Code anyway.

- Is it possible to exclude the remedies of the buyer? Does it make a difference if the seller or the buyer acts in the course of his trade, business or profession?

Exclusion is possible and often made, but the phrasing in the contract is important. If the exclusion is too general – the typical example is to deliver the estate in “existing condition”⁴⁴ – is not approved by the courts. Exclusion of the buyer’s *remedies* is on the other hand accepted.⁴⁵ Even with such an exclusion, the buyer can still make claims against the seller for defects that were known the seller. Special exclusions, for instance for the state of the heating system or for the condition of the basement appear.

In a consumer relation – when the seller is professional and the buyer a private person – the legal remedies cannot be excluded.⁴⁶

- To what degree do courts exercise control over the fairness of such clauses?

The court control is exercised in cases. If the buyer has brought the seller to trial, claiming defects in the estate and the seller refers to an exclusion clause, this will naturally be tried first by the court.

3.4.3. Liability of the Buyer for Debts of the Seller

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

- real estate taxes

Real estate tax for small houses is 1 % of the taxation value (which is supposed to be 75 % of the market value, but in reality it is about 50 %). It is collected as a personal tax, together with income taxes. There is no particular connection (lien) to the property. The buyer is in no way liable for unpaid taxes of the seller.

- other taxes, e.g. related to buildings on the property or the business of the seller conducted on the property

There are no such tax liens.

- charges for garbage collection, water and gas delivery,

The seller pays this kind of charges until the buyer takes possession of the house. Usually the seller notifies the utilities companies of the change, but other solutions can be arranged in the sales contracts. The charges are strictly personal and there are no liens to the property for the delivering companies.

- charges for the administration of condominium apartments

⁴⁴ Prop. 1970:20 B p. 212 and NJA 1983 p. 808. The expression in Swedish is „*befintligt skick*“, a clause that is possible in sales of mobile property.

⁴⁵ This acceptance was given by the Supreme Court in NJA 1975 p. 545.

⁴⁶ JB 4:19 d para. 1. „A tradesman [...] may not adduce against the consumer a condition of purchase which, by comparison with the provisions of Sections 11—19 c, is prejudicial to the consumer“.

The buyer of a co-op is not personally responsible for the seller's unpaid charges, but the association has a lien in the apartment for those demands. Thus, the apartment can be sold by enforcement to get the seller's debts paid and the buyer must pay in order to avoid this. Contracts contain a guarantee that there are no debts of this kind, but the prudent buyer (or agent) will check with the association.

How are these problems treated in typical contractual clauses?

There is an example in the included sales contract.

3.6 Administrative Permits and Restrictions

3.6.1. Standard Requirements

In a typical conveyance of a residential estate:

- Which permits are required?

There are no permits required for the acquisition of residential property. There was an act that made permission necessary for foreigners,⁴⁷ but it has been abolished.

One special case has however to be mentioned. When a part of land is sold, the cadastral authority must carry out property formation (subdivision).⁴⁸ If an application for subdivision is not made within six months from the contract date or if the surveyor turns down the application, the contract is void.

- Does the draftsman (notary) check the building permit, zoning ordinances and/or environmental issues (e.g. in France asbestos contamination)?

The real estate agent has to inform the buyer of matters that can be found in the Land Registry.⁴⁹ He shall also give the buyer a description of the taxation value and area of estate as well as the age, size and construction of the house.⁵⁰ Building permits, zoning ordinances and environmental issues are, however, not directly mentioned in the Act. The basic conclusion is that the agent is not obliged to check for this kind of information. If he should be aware of such matters that are of any importance to the buyer, he has to give information.

These principles are to some extent modified in practice. The Real Estate Agents Board (fastighetsmäklarnämnden) supervises the activities of the agents. The board has declared that agents always shall present a survey map⁵¹ and that they shall inform buyers when the municipality has a pre-emption right.⁵²

- Are there any statutory pre-emption rights for public authorities?

The Pre-emption Act (1967:868) gives municipalities a right to exercise a right of pre-emption. There are some important exceptions, such as sales to spouses and children and – excluding most conveyances of residential property from pre-emption – for all units with a range less than 3,000 sq.m. that have a single-family house. Pre-emption is

⁴⁷ Real Property (Foreign Acquisitions) Act – *lagen om utländska förvärv av fast egendom m.m.* – (1982:618)

⁴⁸ JB 4:7. The Cadastral Authority is either governmental or municipal. It is managed by land surveyors.

⁴⁹ The Real Estate Agents Act sec. 17.

⁵⁰ The Real Estate Agents Act sec. 18.

⁵¹ Declaration from the Board 20-1299-96.

⁵² Declaration from the Board 4-886-97.

possible within three months after the municipality was notified of a sales contract. If the pre-emption is contested, the Government will decide in the matter. When the pre-emption right is exercised, the municipality acquires the property on the same terms that applied in the contract between the old parties. Pre-emption rights are exercised as an average in Sweden in 50 cases per year.

3.6.2. Requirements for certain types of real estate sales only

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

Permits to acquire agricultural land and land for forestry is still needed in some cases, but the rules are remarkably liberal, compared to what they used to be.⁵³ A landlord's acquisition of multi-family houses is still controlled.⁵⁴ If the municipality does not approve of such a conveyance, the buyer must try to get a permit from the Tenancy Tribunal. Permission will be denied if the buyer cannot prove that his intentions behind the acquisition are serious and not speculative.

3.6.3. Control of administrative permits and restrictions

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

It is a defect, for which the seller is responsible, if the buyer – due to administrative restrictions – does not get the disposition of the property that he had cause to expect.⁵⁵

3.7 Transfer Costs

3.7.1. Contract and Registration

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

- registration in the land register.

The drafting of the contract is usually done by a real estate agent and included in the services that are paid by his commission. If the parties just want professional help with the drafting, this can be done by an attorney, an agent or in a bank. The cost is not dependent of the purchase som and would in both cases be 500 Euros or less.

- title insurance (if usual in your country),

Title insurance does not exist in Sweden. In section 3.4.3 above, the governmental guarantees are briefly described.

- drafting and executing the contract (e.g. the fees of an attorneys or notary),

Title registration in the land register costs (apart from the Stamp Duty) about 80 Euros (875 SEK), regardless of the value of the property.

3.7.2. Transfer Taxes

- How high are taxes on the transfer of real property? On what is the tax based (on the real value, on the purchase price etc.)?

⁵³ The Land Acquisition Act — *jordförvärvslagen*. — (1979:320).

⁵⁴ Acquisition of Real Properties Act — *lagen om förvärv av hyresfastighet m.m.* — (1975:1132).

⁵⁵ JB 4:18.

Transfer tax (stamp duty) is 1.5 % of the purchase price when the buyer is a private person and 3 % for companies. The taxation value will be the base if it is higher than the price. If the price is less than 85 % of the tax value, the transfer is treated as a gift and no stamp duty is charged.

Profits for the seller are taxed as capital gains. The tax will be 20 % of the net profit when residential property is sold, but this tax can be postponed if the seller acquires a new house or co-operative apartment.

- Is the due payment of the taxes a requirement for the registration of the transfer of a property?

No. This goes for the land tax as well as for the stamp duty and the capital gains tax.

- Does the notary/lawyer collaborate in the collection of the tax?

No. The Land Registry (on behalf of the tax authorities) collects the Stamp Duty. The buyer normally pays it when the title is registered. If the buyer is unable to pay, the seller will be charged.

3.7.3. Real Estate Agents

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

When the seller wants a market price (not selling to friends or relatives) the commonly use an agent, probably in more than 95 % of all sales.

Agents are suggested (by their own organisations) to take 5 % of the purchase value (+ 1.25 % VAT) as commission, but their market is fiercely competitive. Most agents will charge about 3 % plus VAT. For property with a low value or a long marketing period, for instance cottages in forests, the fee will be higher.

The agent is almost always paid by the seller.

3.8 Buyer's Mortgage

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

The method is to do all the important transactions at the same time. The conveyance is usually concluded at a meeting at the buyer's bank. This bank sends the purchase money to the seller's bank and the mortgages are transferred to the buyer's bank. When the seller's bank notifies the seller about the payment, the parties sign the sales deed, which concludes the transfer.

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

4.1 The Conclusion of the Contract

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

If the statements from the parties just express that they *will* (or want to or plan to) sell and buy the property, the contract is not valid. The seller must clearly state that he sells (or transfers or conveys – synonyms are allowed) the property. This requirement should not, however, be too strictly interpreted. In *NJA 1984 s 482* the expression used was that the sellers were “willing to sell”, but the contract was called a sales contract, it mentioned a price and it was signed by the parties as “seller” and “buyer”. Under those circumstances, the Supreme Court accepted the contract as valid.

The purchase price must be mentioned in the contract. Normally this will be the agreed sum, but as long as it is expressed in a way that makes it possible for others, such as registrars, to calculate the sum, it meets the legal requirements.

4.2 Seller’s title

4.2.1. Consequences of an invalid Sales Contract

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

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

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

In all these cases C is not in good faith concerning B’s title flaws and distinctions between the flaws are therefore not necessary. Even if C is registered as title holder, A can repossess the property at any time. If C is registered and stays in possession for 20 years without being sued by A, he will acquire the property by prescription.⁵⁶

4.2.2. The Seller is not the owner

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

⁵⁶ JB 16:1.

- How is B protected? May he retain the property?

B has acted in good faith and A had a registered title to the property. The basic solution for such a case is that B has acquired the property for good.⁵⁷ In certain cases, however, good faith acquisitions are not possible.⁵⁸ They refer to how A got his title and cover situations such as when A's acquisition was based on a forgery or on a transaction with someone who lacked authority or legal ability. If this is the case, B has the right to recover the payment from A together with damage compensation. If A cannot pay, B may be compensated by the State. The described case with the lately discovered will does not seem to fall into this category and B may probably retain the property.

- How is the buyer protected if, already during the transaction, it turns out that the seller is not the owner?

The decisive moment is the signing of the sales contract. If B had reasons to doubt A's ownership before this date, he will not be protected. If the lack of ownership is discovered after the signing, B is protected.

4.2.3. Execution against the Seller

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

- Are there risks for the buyer (e.g. to lose his payment)?

Without a title, the burden of proof is put upon the buyer.⁵⁹ This burden is, however, easy to carry when the buyer can present the sales contract, signed by the parties and by two witnesses. The estate will be sold to the benefit of the seller's creditors only if the Enforcement Authority suspects that the contract is forged. In this situation it is likely that no final payment has been made. A formal enforcement can be decided, but the seller's creditors will only be able to sell the claim against the buyer, not the estate.⁶⁰ Thus, the buyer is not affected by the enforcement as soon as a proper sales contract has been signed.

4.3 Payment

4.2.1. Delay in payment

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

- May the seller rescind the contract?

The seller's right to rescind must be stated in the contract, either as a clear clause, or – and this is the normal method – as a consequence of the mentioning of a sales deed.⁶¹ The seller's right to interest in case of delays is also stated as well as his rights to cancel the purchase in typical cases of anticipated difficulties to pay (such as bankruptcy or unsuccessful enforcement).⁶²

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

⁵⁷ JB 18:1.

⁵⁸ JB 18:3.

⁵⁹ The Enforcement Code ch. 4 sec. 24.

⁶⁰ The Enforcement Code ch. 4 sec. 25.

⁶¹ JB 4:25.

⁶² JB 4:26.

The seller is entitled to compensation for the damage he has suffered.⁶³ Down payments set – unless something else is clearly stated in the contract – a maximum for this kind of liability.

4.4 Defects and Warranties

4.4.1. Misrepresentation

- Half a year after the buyer has moved in, a water pipe breaks and floods parts of the house. The water pipe was put in when the house was built some decades ago.

The first question is if the broken pipe is outside the range of conditions that a buyer should expect and so is probably the case here. If the house was old and in a general bad shape – reflected in a low price – the answer could be the opposite, but in normal cases this is a defect.⁶⁴

Next comes the question of time. The seller is only responsible for defects that have occurred before the buyer takes possession. The buyer must therefore show that the pipe was defect already when the seller possessed the property (*in nuce*), even if the manifestation came later.

The last factor is how detectable the defect in the pipe was at the time of the signing of the contract. If the buyer had been told (or should understand) that the pipe was some decades old, special care should have been taken. If such a thorough investigation would unveil the defect, the seller will not be responsible.

In a typical case, however, I think that a Swedish seller would be responsible for the defect and obliged to compensate the buyer for the difference between the standard that the buyer was entitled to expect and the actual standard. This will only cover the pipe, not the flooding that followed (because the flooding happened after the transfer). This responsibility is not dependent on the seller's knowledge or behaviour. If the buyer wants compensation for the flooding, he has to prove that the seller was negligent or that a warranty or promise had been given about the standard of the pipes.

- In spring, the basement is flooded. Neighbours tell the buyer that the seller complained to them that the flooding happened every other year in spring.

If the flooding is caused by the construction of the house or other features of the property, it is a defect in the eyes of the Land Code, regardless of what the seller knew. His knowledge is of importance for the consequences, since it increases the possibilities for the buyer to get damage compensation.

- An extension of the house has been built without the necessary permit of the building authority. Now, the authority asks the buyer to tear down the extension. The seller claims that he did not know that the permit was missing, since the extension had been built years ago by the previous owner.

First it shall be noted that lack of building permission is cured by prescription after ten years.⁶⁵ If the extension was younger, an order to tear it down is possible. The situation is a defect on the property, but (strangely) the buyer can only make claims against the

⁶³ JB 4:25 para. 2.

⁶⁴ JB 4:19 para. 1.

⁶⁵ Ch. 10 sec. 27 in the Plan and Building Act – *plan- och bygglagen* – (1987:10).

seller if he was in good faith.⁶⁶ If he had reasons to suspect that a building permit was lacking, he cannot do anything against the seller.

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

Clauses of this kind are not accepted in Swedish law. A general exclusion can however be made from the consequences of a defect, liberating the seller from all obligations. Such exclusions do not apply if the seller has deceived the buyer; if the seller was aware of the defect (the regular flooding) and did not tell the buyer, he will be responsible even if a exclusion had been made in the contract.

4.4.2. Destruction of the house

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

- May the buyer rescind the contract or does he have to pay the purchase price?

The buyer may rescind, regardless of whether the seller was to blame or not.⁶⁷

- May the seller rescind the contract? Is he liable for damages? Is there a voluntary or mandatory insurance for these cases?

The seller cannot cancel the contract in such a situation and may have to pay compensation to the buyer. The seller is liable for damages (such as hotel costs for the buyer) if the fire was a result of the seller's neglect or causation.

Insurance is voluntary. Almost all sale contracts stipulate that the seller shall keep the house insured until the buyer takes possession. Insurance is a condition in credit contracts and the insurance companies usually tell the banks if the insurance is not paid.

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

5.1 Statutory Basis

5.1.1. National Law

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

The rules on construction are treated separately from the conveyancing of the land and there is no collected agreement. Sale of land follows the normal rules in the Land Code. The contract can be made dependent on conditions such as the obligation for the buyer to order a construction contract.⁶⁸ The maximum for such terms is two years.

Some years ago, a committee suggested a special act for sales of single family houses,

⁶⁶ Ch. 10 sec. 25 in the Plan and Building Act.

⁶⁷ JB 4:11.

⁶⁸ JB 4:4.

where land law and contract law was to be combined.⁶⁹ It was not well received and it never led to a government proposal.

The main legislative source for construction of single family houses on behalf of private persons is the Consumer Services Act – *konsumenttjänstlagen* (1985:716). The act was recently changed and what is said here refers to the rules that will be amended 1.1 2005, namely sec. 51—61 that deal directly with the construction of single-family houses.

Of some importance is also the Construction Defect Insurance Act – *lagen om byggfelsförsäkring m.m.* (1993:320) – that is mainly aimed at protecting the consumer from losses due to the insolvency or other economical inabilities of the contractor.

The Consumer Sale of Goods Act – *konsumentköplagen* (1990:932) – will apply if the house is sold as a construction kit and bought by the consumer from someone else than the contractor.⁷⁰

5.1.2. Influences of EU law

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

In the committee report⁷¹ and the government proposal⁷² that thoroughly describe the changes in the acts mentioned above, very little is said about EU law.⁷³ The ambition to guard the consumer's interest is seen as to be in line with general trends in European law, but there are no references to particular directives or other sources.

5.2 Procedure in general

5.2.1. Single houses

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

- Is the contract governed by any special regulation?

Swedish law treats the construction agreement as two separate contracts. The Land Code governs the sale of of the undeveloped land and the subsequent construction is seen as a consumer service. This is a quite frequently used method. The builder gets a better capital flow and lesser risks when he can make an early deal and the buyer reduces the stamp duty, which is calculated on the untouched land.⁷⁴

⁶⁹ SOU 1986:38, *Förvärv av nya småhus*.

⁷⁰ See SOU 2000:110 p. 76—81.

⁷¹ SOU, *Konsumentskyddet i dag vid småhusavtal*.

⁷² Prop. 2003/04:45.

⁷³ Sections 5.2.1 and 5.5 in prop. 2003/04:45 mention required written form in certain statutes that stem from EU directives. Apart from that, nothing is said in the proposal about EU Law. The committee report SOU 2000:110 went in to some more length in the sections 2.3—2.5. The first sentence there is revealing in its lack of modesty: “Questions on consumer protection do not have the same tradition and importance within the EU co-operation as in our country”.

⁷⁴ There are variants of this theme. Contractors may wait and sell the estate after the completion of the house (in which case the land code will apply). More difficult to place is when the estate is sold while the house is still under construction. Grauers (p. 250—251) supposes that construction law will apply for the house and not the Land Code.

Standard contracts have always been unusually important in the construction business. Construction work on single-family houses is covered by *ABS 95, Allmänna bestämmelser för småhusentreprenader där enskild konsument är beställare* (General conditions for single-family houses construction work ordered by a consumer). *ABS 95* has been written after negotiations between *Konsumentverket* (the Consumer Agency) and the building business. Rules in *ABS 95* that are of disadvantage for the consumer compared with the statutory regulation cannot be set aside.⁷⁵ As a consequence of the adding of rules mentioned above to the Consumer Services Act, a new standard contract, *ABS 05*, is to be expected, but it has not yet been released.

When does the buyer have to pay the purchase price (e.g. after termination of the building or according to the state of the building)?

The statutory regulations permit payment after the termination as well as payment in steps. Important is that the consumer only has to pay for work already done.⁷⁶

- Are there statutory warranties for material defects?

The new regulations include substantial changes in *lagen om byggfelsförsäkring m.m.* (the Building Defects Insurance Act). A mandatory insurance covers costs defects in the construction of a building as well as in material used. It also covers the repair costs. The insurance company is responsible during ten years after its approval of the building.

A insurance for completion protection will also be compulsory. the main purpose is to guarantee the completion of a family house when the constructor has gone bankrupt or for other reasons cannot fulfill his commitment.

The municipal building committees are obliged to control that the insurances described have been taken. This is to be done in the building permission procedure.

5.2.2. Condominiums

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

Condominiums do not exist in Sweden. The closest things are co-operative apartments. The parties will in that case be the builder and the association. The association is often founded by the builder and handed over to the members first when the apartments have been sold. In such a case, there will be no particular consumer protection in the sales or building contracts, but the foundation of co-operative associations is directed by rules on economic plans that are meant to protect the members.⁷⁷

5.2.3. Renovation

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

Also here, it is hard to give an answer for Sweden. If we get condominiums, the solution

⁷⁵ *Konsumenttjänstlagen* 3 §.

⁷⁶ *Konsumenttjänstlagen* 52 §.

⁷⁷ See *Bostadsrättslagen* (the Cooperative Housing Act) Ch. 3. The plan must be registered at the Patent Office and approved by two authorised reviewers, who must certify the plan is reliable.

would probably follow what has been said above: the sale of the apartments would follow the rules for sales in the Land Code and the renovation would be judged by the Consumer Services Act. More uncertain is how the common areas of the house shall be handled legally; would consumer protection rules also apply when the other party is an house owners' association?

5.3 Conclusion of the Contract

What is described here is the construction contract, separated from the land sale.

- Is there any **formal requirement** for the conclusion of the contract?

Written form is not necessary, but the contractor needs to put the agreement into writing; there is a burden of proof-rule in favour of what the consumer claims to have been agreed upon (se 5.5.1 below).

- Is there any preliminary contract?

Preliminary contracts are not frequent. Down payments are not possible and it is not easy to tie a consumer to a future agreement.

- Is there any mandatory **waiting period** before the contract can be concluded?

No.

- Has the buyer a **right to withdraw from the contract** (in particular, if the buyer acts as a consumer)?

If the buyer withdraws from the contract without a reason, he has to pay the contractor for all services already performed. He will also be liable for losses due to that the contractor has skipped other works or in other ways adjusted himself to the work.⁷⁸

5.4 Payment

5.4.1. Payment date

- When is the payment due under usual contractual arrangements?

The time for payment is regulated in the contract. Most common is to use a payment plan, that has to be a part of the contract.⁷⁹ The plan divides the construction into smaller parts and part payment is due once a particular part, for instance the plumbing, is finished.

- Is the payment made directly by the buyer to the builder or is deposited on an escrow account?

Payment is normally made to the constructor.

- Is it usual or possible to make the contract directly enforceable without the intervention of a court? (E.g. may the buyer submit to immediate enforceability in the sales contract?)

Direct enforceability is not possible for this kind of obligations.

5.4.2. Securities

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

⁷⁸ *Konsumenttjänstlagen* 42 §.

⁷⁹ *ABS 95* Ch. 6 § 1.

The mandatory insurance concerning construction defects and lack of completion was described in sec. 5.2.1 above. The standard contract *ABS 95* states (Ch. 5 § 15) that the constructor shall have a comprehensive insurance, valid during the construction and two years more. If such an insurance is not taken by the constructor, the ordering customer can take it at the cost of the constructor.

5.4.3. Acquisition of Ownership

- How is it ensured that the buyer only has to pay if it is certain that he will become the new owner?

The ownership of the land is ensured once the purchase deed has been signed by the parties and the seller has been fully paid. The construction passes over to the land owner in accordance as fixtures. Once the materials have been fitted in, they are part of the property.

- How is it ensured that the buyer is granted ownership free of existing liens (in particular free of a mortgage which has been granted by a bank to the construction company to finance the building)?

If there was a mortgage on behalf of the construction company at the time of the sale, the mortgage instrument will be released by the company's bank (the provision is of course that the secured debt is paid) and either given to the buyer's bank as collateral or given directly to the buyer. The buyer can check the Land Register for mortgages.

5.4.4. Building

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

As mentioned in sec. 5.4.1 above, a payment usually follows a plan, which is specified on the construction contract. The instalments are usually paid in accordance with the progress of the construction.

5.4.5. Financing of the Buyer

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

In most cases, the buyer will be given a building credit from the bank, connected to the construction contract in such a way that the bank will release money to the constructor, as soon as a certain part is reported as finished. The credit will thus expand during the construction, but it is from the start secured by mortgage that cover the credit limit. Once this arrangement starts – and it will not do that before the buyer has become owner of the land – all mortgages for the company will disappear.

It is not common for the buyer to give the constructor collateral.⁸⁰ In commercial construction contracts, there has however been a rising anxiety about the orderer's

⁸⁰ *Liman, Entreprenad- och konsulträtt* p. 116.

ability to pay and there is now a possibility to add a standard reservation to *AB 95*.⁸¹

5.5 Builder's Duties - Protection of Buyer

5.5.1. Description of the Building

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

An ordinary contract will include a technical description and architectural drawings. These descriptions are also necessary in the application for a building permit. The original plans seem to create less legal problems than later changes and added works.

Written form is not compulsory for construction work contracts, but it is of course always used. The contractor is in practice forced to secure that all agreements are out in writing by a burden of proof rule in 51 § KtjL. There it is stated that "valid is what the consumer claims to have been agreed about (1) the range of the work, (2) the price or the foundations for the price, (3) the date for payment, and (4) the date for the finishing of the work, unless something else is verified by a written agreement or by other circumstances".

5.5.2. Late Termination of the Building

- Does the contract usually provide for an exact delay for the termination of the building?

The construction period is regulated in the contract (Ch. 4 in *ABS 95*). The relevant date is when the construction is ready for the final inspection. The parties may agree on adjustments of this date.

- Which claims does the buyer have in the event that the delay is not respected?

There are a number of valid reasons for the constructor's delay: certain force majeure occurrences (including unusual weather conditions), negligence from a side constructor or from the orderer. Most important is perhaps that any circumstance that was not caused by the constructor will give him the right to prolong the construction time, provided that the customer is notified without delay.

The customer is entitled to compensation for damages, if the constructor is delayed, unless the contract instead prescribes a penalty.

5.5.3. Material Defects

- Which claims does the buyer have if there are material defects of the building? What is the limitation period for these claims?

After the completion, the constructor guarantees the quality for a period of two years (*ABS Ch. 4 § 4*). When the guarantee period has expired, the constructor is responsible for defects that stem from his negligence during another eight years (*ABS Ch. 5 § 7*).

- Does the buyer have any claims against third parties other than the builder (e.g. against the companies commissioned by the builder or against a guarantor)?

The general principle is that the constructor shall be responsible towards the buyer for

⁸¹ See *Liman* p. 29 f. It is called "Reservation 3/96" and it said to be rarely used. The reservation obliges the orderer to put up sufficient security and it does not apply when municipalities or government is ordering. It is unlikely to find such a clause in consumer contracts.

subcontractors. If the buyer is entitled to make claims directly against a guarantor depends on how the guarantee was made.

5.6 Builder's Insolvency

5.6.1. Unfinished Building

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

Instead of an apartment, this answer presupposes that the object was a single-family house. Builders must have a completion insurance,⁸² and this is controlled by the municipalities when building permissions are handled.⁸³

5.6.2. Repayment

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

The buyer does not have any privileges in the constructor's bankruptcy. The trustee is free to renegotiate the construction contract or prolong the existing one. It would be unwise of the trustee to prolong a contract when there are many material defects in the construction; a prolongation makes the bankruptcy estate responsible for errors that were made before the bankruptcy. The buyer's best protection are the insurances mentioned under 5.2.1 above.

6. Private International Law

6.1 Contract Law

6.1.1. Conflict of Law Rule

- Does your legal system allow the choice of the applicable law also for contracts on real property?

No.

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

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

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

⁸² *Lagen om byggförsäkring* 12—21 §§.

⁸³ *Planning and Building Act – plan- och bygglagen* – ch. 9 sec. 9 and 12.

6.1.2. Formal Requirements

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

6.2 Real Property Law

6.2.1. Conflict of Law Rule

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

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

Yes, the rule of *lex rei sitae* applies in Sweden. What is quoted here are ch. 10 sec. 10—12 from the Code of Judicial Procedure:

”*Section 10* Disputes concerning title to immovable property, the use and enjoyment of immovable property, a servitude or other special right in the property, or possession of the property shall be entertained by the court for the place where the property is situated. This rule also applies to disputes concerning the liability of an owner or possessor of the property to perform any obligation required of him in this capacity or, when a right to the use of, or other special right in, land has been granted, to disputes concerning the consideration for the granted rights, the maintenance of buildings, or similar matters. However, this section does not apply to disputes concerning leases. For the purpose of applying this section, disputes relating to temporary grants of the use of ground, or a building, or part of a building to park vehicles shall not be considered disputes concerning leases.

When the land is located in more than one court district, or when a dispute involves two or more units of land located in different court districts, proceedings for the dispute shall be entertained by the court of the district where the main part is located.

Section 11 The following may also be instituted in the courts indicated in Section 10:

1. disputes concerning the purchase price for immovable property or similar claims arising out of the transfer of ownership of the property;
2. actions against the owner of immovable property for personal satisfaction of a debt in respect of which the property is mortgage, provided that payment is simultaneously sought against the property;
3. disputes concerning damage to, or other intrusion upon, immovable property;
4. claims for compensation for work done on immovable property; and
5. claims for compensation for breach of a covenant of title.

Section 12 For the purpose of applying the rules of this chapter, immovable property includes buildings situated on the land of another, mines, and mine buildings and installations.“

6.2.2. Formal Requirements

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

A sales or loan contract may very well be written in another country (Swedish law does not demand notaries or any other professionals in these situations). As long as the document fulfills the formal demands concerning the content, it will be accepted.

6.3 Restrictions for Foreigners to acquire Land

6.3.1. Restrictions limited to Foreigners

- Are there any restrictions for foreigners to acquire real property?

No, not any more.

6.3.2. Other Restrictions

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

No.

6.4 Practical Case: Transfer of Real Estate among Foreigners

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

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

7. Encumbrances/Mortgages (and Land Charges)

7.1 Types of mortgages/land charges

7.1.1. Types of mortgages

- Which types of mortgages (or land charges) exist in your legal system?

There is only one type of mortgage in Sweden. It resembles the German *Grundschild*.

The owner who wishes to mortgage his estate has to apply for a mortgage registration (for a decided sum) which will result in a mortgage deed (JB 6:1). There are four requirements to make actual pledge valid (JB 6:2 par. 1):

1. The pledge must be made by the *owner of the property*. If there are more than one owner, all of the owners must take part. If one is missing, the pledge is not valid.

There are no formal requirements; the pledge can even be oral. This is of course a rare case, but it means that other circumstances than the written pledge can be brought in if there later should be a dispute about the pledge.

2. The mortgage deed shall be surrendered as security for a *claim*. The mere possession of a mortgage deed in someone else's property does not constitute any rights. The claim is in most cases a promissory note, but other shapes, such as guarantees, are possible.
3. The claim and the mortgage must be connected by the *pledge*. They shall be identified in the pledge. If the claim changes (novation) or the mortgage deed is changed, a new pledge is necessary. Oral claims are possible, but as rare as oral pledges. In consumer credits, written form is prescribed,⁸⁴ but the consequence of negligence is here just that the agreement shall be interpreted in favour of the debtor; the agreement is not void.
4. The mortgage deed must be *handed over* to the creditor (*traditio*). The requirement for possession of the deed reflects connects the mortgaging of real property to the principles for pledging of non-movables. Possession can be replaced by registration of a computerized mortgage.
 - Please indicate also the respective statutory bases!

The pledge is treated in chapter 6 in the Land Code, together with one case of bona fide acquisition and certain rules concerning jointly mortgaged estates. The application for registration of a mortgage is dealt with in chapter 22 in the Land Code. There is a special act for computerized mortgage deeds. Executionary sales are mainly described in chapter 12 of the Enforcement Act. Computerized mortgages are described in the Mortgage Deeds Register Act.

7.1.2. Legal nature

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

The Swedish mortgage is a *ius in rem*. It is strongly protected against third parties; not even a bona fide buyer can extinguish an existing mortgage. It is also clearly intended to be a lien. The mortgagee has a right to be paid through an executionary sale and there is no way to agree upon the debtor's direct surrender to the creditor in case of default on the loan.⁸⁵

7.2 Setting up a mortgage

7.2.1. Example

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

The four requirements for a valid pledge were mentioned in sec. 7.1.1, but the order of events is in practice different from what the Land Code states.

The common procedure when a new mortgage has to be created is this: After

⁸⁴ Sec. 9 in the Consumer Credits Act.

⁸⁵ *Lex commissoria* is expressed in sec. 38 of the Contract Law, meaning that all agreements – concerning movables as well as real estate – that says that ownership of the collateral will be transferred to the creditor in case of default are void.

negotiations, the owner will sign the promissory note and the pledge (which sometimes is a part of the text in the promissory note, sometimes a separate document). He will also sign an application for a new mortgage, where there is a direction to the Land Registry that the deed shall be sent to the creditor and that it immediately serves as collateral. After approval, the Land Registry will either send the deed (as a document) to the creditor or (more common) register the creditor as possessor in the Mortgage Deeds Register.

When an already existing mortgage is used, the creditor gets the deed from the owner or collects it from the former creditor. In the case of computerized deeds, the new creditor requires the registration from the former creditor, who will release it by means of a computerized transaction. The former creditor will in all cases release the deed only after his claim has been settled by full payment.

7.2.2. Legal requirements for the loan contract affecting the mortgage

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

The only regulations on information are to be found in the Consumer Credits Act – *konsumentkreditlagen* – (1992:830). There is a general demand that the bank acts in accordance with a “good creditor’s conduct”.⁸⁶ The bank must give detailed, written information on the interest rate.⁸⁷ The bank shall also investigate the debtor’s ability to manage the loan.

7.2.3 Formal requirements

- Is there any formal requirement for the setting up of a mortgage?

Registration of a new mortgage deed can only be made after a written and signed application from the owner (JB ch. 22). The actual pledge – the agreement between the creditor and the debtor – can be done orally. Also the debt that is covered by the mortgage may be oral. In reality, all credit agreements are put in writing,⁸⁸ but the informality makes it possible for either of the parties to claim that parts of the agreement were implied or agreed upon orally. Notaries or witnesses are not necessary.

If the owner is married, consent to the application for a new mortgage from the other spouse is normally needed. Such a consent is not required for the pledge, meaning that mortgaging can be done by the owner alone, as long as he is using already existing mortgages.

7.2.4 Registration

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

As already described, registration creates the instrument for mortgaging. The important

⁸⁶ Sec. 5 in the Consumer Credits Act.

⁸⁷ Sec. 6 in the Consumer Credits Act.

⁸⁸ Consumer credits must be put in writing according to sec. 9 para. 1 in the Consumer Credits Act. Even in this case, however, oral agreements are valid, but clauses that are to the consumer’s disadvantage are void.

information in the land register is the date of mortgage registration and the amount of the mortgage. The registration is put under the property or properties in which the mortgage was approved.

The pledge (the agreement between the debtor and the creditor) is not registered in any public registers. As a consequence, it is impossible to tell from the land register how much the property owner has pledged. The mortgage registrations will only reveal the maximum amount.

7.2.5. Time and Costs

- How long does the registration of a mortgage normally take?

The time frame varies between the land registries. A random check in June 2004, showed that the fastest land registry decided upon all applications in just one day. The slowest needed 12 workdays.⁸⁹

- What can be done to speed up the process? (e.g. In Germany, the notary can give an opinion to the effect that the registration of the mortgage in the foreseen ranking position is secured. This opinion is usually accepted by banks. In other countries, lawyers' opinions about the validity of the mortgage are used.)

There is no actual need to speed up the process. An opinion, stating that the mortgage application will be approved, from an attorney (or any expert) is possible, but such practices must be very rare.

- Is it possible to use priority notices or similar devices? How effective are they to secure the mortgage and its rank? (see 2.6)

Priority notices of the German kind do not exist in Sweden. One thing should be mentioned, though. When the owner only has a conditional title to the estate (due to an incomplete transfer or a lack of permission), he can apply for a conditional mortgage deed.⁹⁰ The value of such a deed is of course only of value for the creditor if the condition is fulfilled, but the rank of the mortgage is based on the original application.

- Is it possible to speed up the process with the use of the internet?

No, Internet applications have been discussed,⁹¹ but they have not been accomplished yet.

- What are the costs for establishing a typical security for (a) 100.000.- and (b) 300.000.- Euros?

The cost is dependent on whether existing mortgages are used or if new ones have to be created. In the former case, there are no visible costs. In order to be competitive, the banks do not charge their customers for the creation of the credit. They are of course reimbursed by the interest rates. This is an advantage for the debtors, since the interest rates are tax deductible.

If a new mortgage has to be created, the main cost is a stamp tax on 2 % of the amount, together with a expedition fee of 375 SEK (€ 40) for each mortgage. Some banks would also charge about € 50 for the work with the mortgage application. That means that the cost in case (a) would be € 2,040 to the Registry and € 50 to the bank and in case (b) €

⁸⁹ Jensen, Panträtt i fast egendom, sec. 5.1.4.

⁹⁰ JB 22:4.

⁹¹ See the Agency report Ds 1997:84.

6,040 to the Registry and € 50 to the bank.

The stamp tax is paid only once, and existing mortgages are thus an advantage when the house is to be sold. It is hard to say to what extent this is appreciated by buyers, but if a house such as the one in example (b) is sold, a buyer should notice a saving on € 6,000 if the mortgages are already in place.

- are these fees fixed by law?

The fee is regulated by the government – not the Parliament – in an annex to the Ordinance about fees at the Courts (*förordningen (1987:452) om avgifter vid de allmänna domstolarna*).

- taxes (who collects the taxes?)

There is a stamp tax on new mortgages. As mentioned, it is 2 % of the amount of the mortgage. The Land Registry, on behalf of the general tax authority, collects the tax.

7.3 Causality and Accessoriness

7.3.1. Invalid loan contract

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

The mortgage deed is still valid, but of no value to the mortgagee, who is obliged to return the mortgage deed to the owner. This follows from the basic requirement that pledges are only valid when they are made to secure a claim.

7.3.2. Right of withdrawal

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

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

It is hard to find a statutory right of withdrawal in Swedish law. The answer is therefore somewhat hypothetical.

If the debtor uses his right to rescind, the main principle to follow would mean that the parties *zug um zug* shall return what they have received. If the debtor does not repay the borrowed money, the creditor cannot be obliged to return the mortgage deed. The debt has certainly changed – from the agreement to a duty to return the money – but, as I see it, the old pledge will cover this. The mortgage is a collateral that secures the creditor's right to get back the borrowed money.

If it is established that no duty to repay follows the withdrawal, there will no longer exist any claim and the mortgage deed must be returned to the owner.

7.3.3. Changing the secured debt

- The debtor has repaid the loan for which the mortgage was granted. Now, he applies for another loan. Can the old mortgage be used to secure also the new loan (and if so, under which conditions)? Or is it necessary to set up a new mortgage?

The old mortgage deed can be used for a new loan, with its rank and maximum amount unchanged.

- Let us assume that 30% of the mortgage loan have been repaid. Now, the mortgagee wants to take up another loan for his business, amounting to 25% of the old loan, but with a much higher annual amortisation and a different interest rate. Can the “free” part of the old mortgage be used to secure this loan? What has to be done for this?

There are two ways to use the “free” part of the mortgage. It can be pledged to a new creditor as a sort of secondary mortgage.⁹² This makes the secondary mortgagee entitled (at an executionary sale) to the difference between the amount of the mortgage deed and the secured claim of the first mortgagee. To make a secondary mortgage valid (as a *ius in rem*), the first mortgagee has to be noticed in writing, but he cannot object to the second mortgage.⁹³ If the loan from the first mortgagee is fully paid, the mortgage deed shall be sent directly to the secondary mortgagee (who now has become the first mortgagee).

The other way is to split the mortgage deed,⁹⁴ which is done through an application from the owner to the Land Registry. If the old amount for example were 100,000 and the claim of the mortgagee only 70,000, it would be possible to divide the deed into one for 70,000 and one for 30,000 (normally with lower rank). A split like this has to be approved by the mortgagee. If the mortgagee refuses, he does not have to give any particular motives for this.

- Let us assume that the debtor has agreed on a loan secured by a mortgage. However, the house to be financed is not yet build, but its completion has been agreed upon as a condition for the disbursal of the loan. Therefore, the debtors wants to take up an interim loan from another bank. Can the mortgage be used to secure this interim loan until it is replaced by the final mortgage? How can this happen?

The most practical would be if the mortgage is handed over to the interim creditor. The claim of the original “creditor” (if that is the proper term, considering that no loan has been forwarded) is doubtful – it is just a promise to lend money. If the original bank insists on keeping the mortgage deed, this could be done in violation of good banking conduct.

If the original creditor keeps the mortgage deed, a secondary mortgage, as described above, would be the solution. The interim creditor will get a pledge from the debtor and the original creditor will be notified. The difficult part of this arrangement is how to regard the case where the original bank disburses the loan to the debtor directly, while the debt to the interim creditor remains. Who has best priority within the mortgage in such a case? According to the principles laid out by the Supreme Court in *NJA 1982 s 336*, the original bank would probably win on the grounds that the interim bank was aware of the first pledge.

- The bank and the mortgagor have agreed on a mortgage loan for a five year term

⁹² The procedure is regulated in the Act on Pledging of Movables in a Third Party’s Possession – *lagen om pantsättning av lös egendom som innehaves av tredje man* – (1936:88).

⁹³ The first mortgagee can insist on a clause in the credit agreement that forbids (= makes the whole loan fall) if a secondary mortgage is taken, but it is doubtful if this would hold against a consumer.

⁹⁴ JB 22:8.

at a fixed interest rate. Now, this period is over, and both sides want to agree on a new loan for another five years, but at a different interest rate. Can the old mortgage secure the new loan?

Yes. The interesting question is whether the new loan will be covered by the mortgage without a new pledge. If the new loan – even with new conditions – is seen as a direct succession to the old one, a new pledge is probably not needed.⁹⁵ If the changes create a new relationship – “novation” – a new pledge is compulsory. Where the line is drawn between “successors” and “novations” is unclear.

- What if in the last example the mortgagee wants the new loan from another bank? Could the old mortgage be used for the new loan? If yes, what steps need to be taken? Is the consent of the old bank necessary?

Changes of banks are common and the possibility to do it is important for the competition in the credit market. The new bank will pay the loan from the old bank and demand the mortgage deed (or the computer registration). The new bank secures its position immediately by notifying the old bank about the pledge, thus creating a sort of secondary mortgage that prevails until the deed has been sent over.

- What if the new loan is not designed to finance a property but a car or the mortgagee’s company and is subject to different conditions, e.g. a higher interest rate and a higher amortisation?

Mortgages can be collateral in any loan agreement and there is no demand for a connection to credits concerning the estate.

- The mortgagee runs a business and is in permanent need for credit. He agrees with his bank on a maximum credit line, which is used for different loans. Can this credit line be secured by a mortgage? Are there special forms of mortgages for it?

Yes. This kind of arrangement is well known to most small businessmen in Sweden. The mortgage deed is the same as always.

7.3.4 Independent/abstract promise of payment

- In your legal system, is there anything like an independent/abstract promise of payment (*garantie personnelle autonome/cédule abstraite*)? If so, can it be secured by a mortgage?

As said earlier, the mere possession of a mortgage deed does not entitle the holder to payment. If the promise – and this does not seem to be the case here – can be regarded as a claim, the mortgage will act as collateral, otherwise not.

7.3.5 Mortgage for the land owner himself

- Can a mortgage be set up also for the land owner (*Eigentümergrundschuld*)? without a loan contract? Could he set up the mortgage “on stock” when negotiating with several banks? How is the pre-existing mortgage assigned to a later loan?

Mortgages for the owner are possible (JB 6:9), either whole mortgages or as equities when the full mortgage amount is higher than the debt. The owner may apply for mortgages without referring to a particular obligation. Existing mortgages are assigned

⁹⁵ To be sure, banks normally see to it that a new pledge is made.

to loans in the way that was described in sec. 7.2.1 above.

The owner's equity means that he can get better priority than some of the creditors. If, for example, the oldest mortgage amounts to 100,000, but the total debt only to 80,000, the owner is entitled to the remaining 20,000, even if there should be a younger mortgage that is not fully paid with the proceedings from the executionary sale. To prevent this, creditors with younger mortgages as a routine get a secondary mortgage in the mortgages with better priority.

There is a committee proposal to abolish owner mortgages and instead rank mortgagees right next to each other.⁹⁶ The reason for this suggestion is that secondary mortgages put a great burden upon the banks. Without owner's mortgages, these routines would not be necessary.

- May the owner reserve priority to himself for a future mortgage?

No such application is possible to make to the Land Registry.

7.4 Enforcement and other rights of the bank

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

- Please describe the main steps of the enforcement procedure!

1. The foreclosure procedure cannot start until the debtor has failed to pay instalments or interest on the agreed date. When this happens, the whole credit accelerates automatically. In many cases – perhaps the majority – the bank and the debtor settles the matter without an executionary sale.⁹⁷ Normal, voluntary sales give better prices which is in the interest of both parties.

2. If the creditor cannot find any other way he will – see below – apply for a payment order. When a mortgagee applies and states his security, the payment order will act as a decision on foreclosure on the real property.

3. With the payment order, the creditor asks the Enforcement Authority for an executionary sale.

4. The Enforcement Authority sells the property. Most common is an auction, but a sale directly to a buyer is possible, provided that the price is at least as good as what an auction would bring.

5. Four weeks later, the proceedings are distributed among the creditors.

- Is a court decision necessary to render the mortgage enforceable?

An executionary title is needed;⁹⁸ since credit contracts are not directly enforceable. The application for this title can be made at the courts, but this is an unusual method when it comes to mortgage credits. In most cases, the creditor will apply to the Enforcement Authority for a payment order.⁹⁹ The debtor is given a short period to reply. If he admits

⁹⁶ *SOU 2001:38, Utländsk valuta – Ägarhypotek.*

⁹⁷ This is true even after a decision on foreclosure. In 1999 and 2000 about 15,000 such decisions were made, but they only lead to about 1,500 sales, according to *SOU 2001:38* p. 123.

⁹⁸ See the Enforcement Act ch. 3.

⁹⁹ The creditor will usually mention the mortgage in her application, because this means that the verdict on payment order will automatically include a decision on foreclosure, sec. 12 in the Payment Order and Enforcement Assistance Act – *lagen om betalningsföreläggande och handräckning* – (###).

the debt or does not reply at all, the payment order is decided and the foreclosure procedure will carry on. If the debtor denies the claim, the creditor must bring the case to a regular court. If the creditor wins there, the judgement will work as a title in the same way as the payment order.

- How long does the enforcement procedure regularly take before the bank receives the proceeds of the mortgage? Can the debtor slow down the procedure, especially if the mortgage is on his residential home? Can the bank act in receivership in the meantime (*Zwangsverwaltung*)?

There is a recommendation that the time between foreclosure decision and sale shall not take more than four months.¹⁰⁰ Most sales are arranged within this limit. The distribution after the sale will normally take place for weeks after the sale. All in all, most creditors will have their money within half a year.

- Can the bank sell the real estate without foreclosure, i.e. without a court decision and a compulsory auction? Can the owner grant the bank the right to purchase or the power to sell the property by means of a normal real estate sales contract (in the event that the loan is not repaid)?

If the creditor and the debtor agree upon it at the time of the debtor's failure to pay, a private sale is possible and the bank can buy the property. Agreements of this kind that cannot be made in the original credit contract.

- Are there any instruments for public administration or courts to stop or suspend foreclosure for social or economic reasons?

Social circumstances are not a reason to prevent a foreclosure on real estate. The only consideration towards the debtor that can be made is the possibility for the Enforcement Authority to let him stay in the house up to three months after the foreclosure sale, but the sale itself is not postponed.¹⁰¹

- What happens in the event that insolvency procedures over the debtor's estate are initiated? Will the foreclosure procedure be stopped? How are the mortgagee's rights protected in an insolvency procedure?

If the foreclosure procedure has started, it shall normally proceed irrespectively of the bankruptcy.¹⁰² If there should be special reasons to take care of a particular creditor's rights, the foreclosure procedure can be postponed.

Executionary sale is the common way to sell real property, also in bankruptcies.¹⁰³ The biggest problem is perhaps the one that arises when the trustee wants to keep the property (in order to be able to sell it undivided) and the mortgage creditors wish it to be sold. As long as the plans of the trustee seem reasonable, he can prevent a sale this way. The mortgagees are not credited for a simulated rent during this period.¹⁰⁴

7.5 Overriding interests and priority

7.5.1. Distribution of proceeds

¹⁰⁰ Ch. 12 sec. 11 in the Enforcement Act.

¹⁰¹ Ch. 12 sec. 36 in the Enforcement Act. This right to stay must be mentioned in the sales conditions.

¹⁰² The Bankruptcy Act ch. 3 sec. 8.

¹⁰³ The Bankruptcy Act ch. 8 sec. 6.

¹⁰⁴ See the Supreme Court case *NJA 1993 s 120*.

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

The basic rule (JB 17:6) is that distribution of the proceeds is made in accordance with the age of the mortgage. It is the date of registration that decides this (not the time of pledge). Each mortgagee is --as long as there is anything left -- entitled to the coverage of his claim up to the amount of the mortgage. If the claim is bigger (JB 6:3), two additions shall be made in order to cover the claim: one is a flat supplement of 15 % of the mortgage amount, the other one is about 6 %, running from the foreclosure to the distribution of proceeds.

If the trustee sells the property without using the executionary sale, he shall simulate the same priority order.

7.5.2. Overriding interests

- Are there any fiscal or other charges -- imposed by statute in favour of privileged creditors such as the state or local authorities -- that take preference over the mortgage without being registered?

Certain costs in connection with real property formation are protected by a legal lien that has better rank than mortgages. The costs are rare and the premier rank can only cover claims that are younger than one year. They are not regarded to be important.

The cost of the foreclosure procedure are in practice put before mortgages. The same goes for bankruptcy costs that the trustee directly connects to the property, such as maintenance during the bankruptcy or betterments. Costs of this kind are usually small.

Tax liens and mechanic's liens are not be found in Sweden, neither are liens in real property for utilities and salaries.

- Can you indicate a percentage of how much of the value of the real estate these charges usually amount to?

7.6 Scope of the mortgage

7.6.1. Buildings

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

Houses are fixtures to the estate (land) as long as they have been built (or later acquired) by the estate owner. Houses erected by leaseholders are not fixtures and therefore not available for the mortgagees.

There is no separate mortgage for non-fixtures. Formally, they are seen as chattels,¹⁰⁵ but they cannot be pledged in the way movables are used as collateral.

7.6.2. Machinery

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

¹⁰⁵ The Swedish definition of chattels in chapter 2 of the Land Code is negative: everything is chattels that is not real property.

Machinery, installed by the owner, in for industrial purposes in industrial estates (in essence factories) are fixtures, provided that they have been fully paid for.¹⁰⁶ Cars, raw material and other more typical movables cannot be fixtures.

7.6.3. Insurance

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

The insurance company shall – when the damage is greater than 10 % of the value of the house – pay to the county administration, which later will distribute the money among the mortgagees.¹⁰⁷ This does not apply if the owner and the insurance company agree otherwise.

7.7.4. Right to redeem

- May the mortgagor redeem the mortgage at any time at will or only under certain conditions?

Consumers have always the right to repay the full credit and redeem the mortgage.¹⁰⁸ If this is done in advance with a fixed-time credit, the creditor is entitled to a compensation which is the difference between the actual interest rate of the loan compared to the present government bond rate plus 1 %.

- Is it possible to restrict the mortgagor's statutory right of redemption?

The right of the consumer cannot be excluded.

7.7.5. Redemption after foreclosure

- May the mortgagor redeem the mortgage even after foreclosure?

Foreclosure (enforcement) is a series of acts, ending with the executionary sale. Until this moment, the mortgagor can stop further proceedings by paying the (full) credit. The enforcement authority shall stop the foreclosure process when this happens,¹⁰⁹ When all debts have been paid, the creditor shall return the mortgage deeds to the debtor.

7.8 Security granted by a third party

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

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

There are no special limitations; collateral from a third party is treated exactly as if it had been given by the debtor.

7.9 Plurality of mortgages

- If the owner has already set up (and registered) a mortgage and then wants to set

¹⁰⁶ JB 2:3.

¹⁰⁷ The Act on the Right for Creditors to Payment from Insurance Amount Founded on Fire Insurance Agreements – 1927 års lag om rätt för borgenär till betalning ur ersättning på grund av brandförsäkringsavtal.

¹⁰⁸ Sec. 24 in the Consumer Credit Act – konsumentkreditlagen – (###)

¹⁰⁹ The Enforcement Code ch. 3 sec. 21.

up a second mortgage for another bank, can he do so without the consent of the first bank? Would the holder of the second mortgage have a direct claim against the owner? What would happen if he wanted to execute the mortgage? Could he do so without the consent of the holder of the first mortgage? What would be the consequences for the first mortgage? Would it become due – or would the property be foreclosed – auctioned with the first mortgage on it?

A second registered mortgage is fully viable in the Swedish system. Some creditors try to avoid this situation by offering bonuses (insurance or lower interest rate) to so called full customers, debtors who put all their loans in the same bank. The holder of the second mortgage has a claim and collateral on basically the same terms as the one with the first priority.

Foreclosure will be decided on the application of the second mortgagee and this does not require any consent from the first mortgagee. Protection for the first mortgagee is given at the sale; without his approval the property cannot be sold at a price that does not cover his secured claim.¹¹⁰ If the claim is covered, the buyer can take over responsibility for the (capital amount) of the credit.¹¹¹ Twenty years ago, when the market supply of credits was limited, this was an important rule. The ratio behind it was that buyers would be prepared to pay more if they could take over the loans.

- What happens to the second ranking mortgage, if the loan of the first mortgage has been repaid completely or partially? Does the second mortgage get a better position or even the first rank? (Or does the owner get the right on the position for the refunded parts of the first mortgage, and the second mortgage remains at its position?)

A repaid mortgage becomes an owner's mortgage (see sec. 7.3.5 above) and the position of the holder of the second mortgage is not affected, unless – but this is as already said quite common – this holder has a secondary lien in the first mortgage. In such as case, he becomes first mortgagee.

- Can mortgages be of equal ranking? How can this be effected? (Only by applying for registration on the same day or even in the same minute or by a later change of the ranking?)

Equal ranking is possible. If the mortgages are registered on the same registration day, they will rank equally unless a priority order has been asked for (JB 22:6). Equal ranking cannot be created by later alterations.

- Can the ranks of mortgages be exchanged or altered by agreement of the parties involved? Please describe the necessary steps.

The rank can be changed by deferment (JB 22:9). The owner of the property applies to the Land Registry for a degradation of one or several mortgages. The consent of the mortgagee is needed, since the mortgage deeds must be presented to the Registrar.

7.10 Several properties

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

¹¹⁰ The Enforcement Code ch. 12 sec. 32.

¹¹¹ The Enforcement Code ch. 12 sec. 34.

Jointly mortgaged properties complicate the Swedish mortgage system. Such mortgages are fairly frequent; about 10 % of all mortgaged properties are jointly mortgaged with another property unit.¹¹² The most common cases are forest and agriculture properties, where it is seen to be an advantage to offer a commercial unit as one object for credit.

Property units can be jointly mortgaged, but only if they have the same owner or owners. Joint mortgages are not possible if there already exists separate mortgages in one of the properties. The most frequent case of joint mortgages is when a mortgaged property is subdivided or split. The mortgage will then jointly cover both properties (and they may have different owners).

Extension of a mortgage to another property unit is possible (JB 22:7) , but the owner conditions have to be uniform.

When jointly mortgaged properties are executionary sold, they will in most cases be offered as a package.¹¹³ In some cases this is not possible. They will then be offered twice, first separately and then together and the best final offer will apply.

7.11 Transfer of the mortgage

7.11.1. Transfer of the mortgage in general

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

- Can bank 1 transfer the mortgage without transferring also the secured claim (i.e. the claim arising out of the loan contract)? If not, are there any other options for bank 1 to use the mortgage as collateral for its debt with bank 2?

From the requisite in JB 6:2 that it is the owner that shall pledge the property follows that bank 1 cannot use the mortgage independently. This has been clarified in the legislative history¹¹⁴ as well as in later committee reports.¹¹⁵ The claim, secured by the mortgage, can of course be transferred or put up as security.

- Does the transfer have to be registered? (Is the registration necessary for the transfer to be valid or to be opposable against third parties? This question applies particularly in the insolvency of the transferring bank (bank 1).) What other ways exist to make the transfer insolvency-proof?

Most claims have the form of promissory notes and the general rule for the buyer or pledgee is to take possession in order to get protection against the sellers or pledgers creditors. There is, however, an old rule in the Instrument of Debt Act (sec. 22) where protection is given already by the agreement when promissory notes or stocks are acquired from a bank. Registration of the transfer is neither possible nor necessary. If computerized mortgage deeds are used, the registration of mortgagee may be changes to bank 2.

- May the debtor or the land owner object to the transfer of the mortgage? Does the debtor or the land owner have to be informed about the transfer?

¹¹² See statistics in *Jensen, Panträtt i fast egendom* p. 138.

¹¹³ The Enforcement Code ch. 12 sec. 51.

¹¹⁴ Government proposal 1970:20 B p. 305.

¹¹⁵ SOU 1982:57 p. 119 ff.

The debtor cannot object to a transfer. Information is not necessary when promissory notes are transferred. If the claim is personal, the debtor must be notified if the acquiring party shall get protection against the creditors of the transferring party.

- What are the approximate costs for the transfer of a mortgage – and the time required?

There are no visible costs when a claim and a mortgage is transferred between banks on their initiative. If the transfer of just the mortgage is made by the debtor, he will most certainly not pay any costs other than the ones that are charged for a premature redemption of the credit.

- Let us assume that bank 1 does not have a valid claim (as in question 7.3.1). If it transfers the mortgage to bank 2, can the latter still acquire the mortgage in good faith?

Certain defects in a claim can be healed if the claim is acquired by someone in good faith.¹¹⁶ A natural solution would then be, if the original pledge was error-free, to give the new creditor a claim and a mortgage. It seems, however, that the case is solved in another way.¹¹⁷ The claim was invalid when the pledge was made to bank 1. That is a defect according to the Land Code, where a claim always is required and there are no good faith rules in the Land Code that can repair it. The strange solution is that bank 2 has a valid claim, but no collateral.

- Let us assume that there is a valid claim, but the setting up of the mortgage is invalid. Can bank 2 still acquire the mortgage in good faith?

If the pledge is invalid because of general contractual errors, such as fraud¹¹⁸ or usury, this cannot be repaired by bank 2's good faith.¹¹⁹ There are no such good faith rules in the Land Code. Bank 2 will have a valid claim but the mortgage is the owner's.

- If bank 1 has transferred the mortgage to bank 2, but bank 1 is still registered, how can bank 2 enforce the mortgage? (Or does bank 1 have to enforce the mortgage?)

The best answer here is given when computerized mortgages are used. If bank 2 has the claim, it should also be registered as mortgagee. The delay is not harmful to bank 2; bank 1 is seen as possessing the mortgage on behalf of bank 2. Since bank 1 no longer has any claim, there would be nothing to take for the creditors (of bank 1).

- If bank 1 has transferred the mortgage to bank 2, but bank 1 is still registered, whose consent is necessary for any changes in the registration (the consent of bank 1 or of bank 2)?

To change the computerized registration from bank 1 to bank 2 actions from both banks are needed. Bank 2 must make a demand for the registration and bank 1 has to approve this.

7.11.2. Transfer to more than one creditor

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

¹¹⁶ The Instrument of Debt Act (*skuldebrevslagen*) sec. 10 and 15. See also Jensen p. 92 ff.

¹¹⁷ Government proposal 1970:20 B p. 305 and SOU 1982:57 p. 82 f.

¹¹⁸ Meaning that the owner fraudulently was made to make a pledge.

¹¹⁹ Government proposal 1970:20 B p. 304 and *Westerlind, Kommentar till Jordabalken 6 kap.* p. 243 f.

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

No, a split-up such as this is not possible.

7.11.3. Administration of the mortgage by a trustee or fiduciary

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

Nothing prevents the creditor from putting a mortgage deed, held as collateral, in the care of somebody else. As long as the mortgage deed is identifiable (which should not be a problem), there are no risks that the fiduciary's creditors

7.12 Can use it. Conflict of Laws Issues

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

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

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

Lex rei sitae applies here for the mortgage (it can only be created by the Swedish land Registry) and the pledge. Any country's law may govern the loan contract – the claim. Bills and checks are regulated by the law in the country where they were signed,¹²⁰ but there is no such rule for promissory notes. The parties can probably pick any country's law.

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

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

See 7.12.1.

7.12.3. Bank loan taken in a third EU-country

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

See 7.12.1.

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

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

Until 2004, Swedish law only accepted mortgages in Swedish Kronor. The Trummer case led to a change and Sweden now accepts mortgages in any major currency (that are

¹²⁰ The Bill Act (*växellagen*) sec. 80 and the Check Act (*checklagen*) sec. 59.

noted by the Stockholm stock exchange). Whether the old limitation was a disadvantage or not can certainly be discussed; mortgage registration in Sweden is not limited to the actual credit as the case is in Austria.

Cross border transactions are probably not hindered by any particular rules. Direct access to computerized information from the Land Registry is only given to subscribers and foreign banks do not belong to that category (they are not formally excluded, but it is uneconomical to subscribe if you just ask for information a few times every year). That gives Swedish banks an advantage, but it will be evened out if the cross-border system devised in the Eulis project becomes reality.