

**Greek Report**  
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## **1. Real Property Law – Introduction**

### **1.1 General Features and Short History**

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

Origin

#### 1. Main Features

Property law as part of the Greek Civil Code descends from Byzantine and Roman law, as this has been interpreted by the so-called science of law of the Pandects. Meanwhile, it has been influenced by foreign codes, especially the German Civil Code. Finally, through the German Civil Code, some elements of ancient German law entered the Greek Civil Code, since the German Civil Code descends from Roman and ancient German law, as these were combined with the reception of Roman law in Germany (Rezeption: 15<sup>th</sup> and 16<sup>th</sup> centuries A.D.), and continued to evolve until 1900 (validity of the German Civil Code).

The prevalence of this view has had great consequences for the evolution of the science of civil law in Greece. This is due to the fact that, at that time, the texts of the Justinian legislation were also a source of the civil law, which was in force in Ger-

many. The German science of law of the pandects, which skillfully cultivated that law, was based on these texts.

### Subsequent Civil Laws

Prior to the introduction of the Greek Civil Code (i.e., until 1046), the science of law of the Pandects – as science of the law in force – had also possessed property law. At an early stage, some great and significant parts of property law got out of the prevalence of law of the Pandects and were regulated by subsequent laws, which were enacted following the pattern of other laws.

Thus, the law “on pledge” of 1836 was almost a verbal translation from the French Civil Code. The law “on mortgages” of 1836 was enacted based mainly on the model of the 1822 Bavarian Law on mortgages and the model of the French Civil Code. The law “on the distinction of estates” of 1837 was drawn up based on some provisions of the Austrian and the French Civil Codes. The Law Tζ/1856 “on the registration of ownership of real property and other rights on them”, was patterned upon the French Civil Code. Law 1339/1918 “on the recovery of lost articles” was enacted based on the German and the Swiss Civil Codes. Finally, Law 3741/1929 “on ownership per floors” was patterned upon the contemporary Belgian law of 8<sup>th</sup> July 1924.

### Civil Code

Property law of the Greek Civil Code-as it was mentioned above- was influenced by the German Civil Code, on which served as a model in the drawing up of the Greek Civil Code. However, through the German Civil Code, some elements of ancient German law also penetrated into property law of the Greek Civil Code, since property law of the German Civil Code is the result of a compromise of Roman and German Law. Thus, the contrast between ownership and possession, the clear distinction between ownership and limited property rights, the individualistic nature of ownership, the division into promissory and selling act, and the principle of the abstract character of a selling act, are of Roman origin. On the contrary, the division of property law between law of movables and immovables, the principles of publicity and specialization, and the possibility of bona fide acquisition of property from a non-owner, are of German origin.

## Other Codes

Apart from the Civil Code, other Greek Codes as well (e.g., Code of Civil Procedure, Commercial Law, Code of Private Maritime Law, etc.) contain rules regarding property rights. Thus, the Code of Civil Procedure, among other things, provides for issues related to the acquisition of property by knocking down at an auction, and the injunction measure of registration of notice of mortgage; the Commercial Law provides for the fate of a pledge and mortgage in case of bankruptcy of the owner, and the validity of legal acts on property of the bankrupt; the Code of Private Maritime Law provides for issues related to maritime liens, joint ship-ownership, transfer of ship ownership in trust, etc.

## Special Laws

Various special laws are also of great importance for property law. Firstly, property law in the Civil Code contains only a part of the provisions referring to movable or real property, while the powers of persons on them are only specified by substantive private law of property. Public property law (i.e., rules on property owned by the State or by Legal Entities governed by Public Law) and procedural property law (i.e., issued related to the registration of deeds concerning real property on Registration Books, Mortgage Books, etc., and the keeping of these books) are specified in special laws. Secondly, some institutions of substantive private law of property (e.g., horizontal ownership, vertical ownership) have not been included in the Civil Code, but are rather specified by special laws.

a) Other special laws regarding property law contain an independent and full regulation of its institutions. Such laws are, L. 3741/1929 “on ownership per floors”, Decree-Law 1024/1971 “on divided ownership on buildings erected on a uniform building site, Decree-Law 210/1973 “on the Mining Code”, Decree-Law 3899/1958 “on the preferred mortgage on ships”, L. 4112/1929 “on the setting up of mortgage on mechanical or other facilities”, Decree-Law 797/1971 “on compulsory expropriations”.

b) Other laws do not provide for independent institutions, contain, however, more or less provisions referring to issues related to property law. Such laws are, Decree of 21<sup>st</sup>/23<sup>rd</sup> September 1836 “on the enforcement of the law on mortgages”, Decree-Law of 17<sup>th</sup> July/16<sup>th</sup> August 1923 “on plans of cities, towns, and settlements of the State and building”, Decree-Law of 17<sup>th</sup> July/13<sup>th</sup> August 1923 “on special provisions for Sociétés Anonymes”, emergency law

1539/1938 “on the protection of public estates”, emergency law 2344/1940 “on seashores and coasts”, decree of 19<sup>th</sup>/23<sup>rd</sup> July 1941 “on the coding in a uniform text of the provisions of emergency laws 434/1937, 1933/1939, 2182/1940, and 5232/1940 “on the organization of Land Registries of the State”, Decree-Law 4201/1961 “on the amendment and completion of the organization of Land Registries of the State and some provisions on notaries public”, emergency law 522/1968 “on the allotment of littoral areas for exploitation and other related provisions”, Decree-Law 8/1973 “on the General Building Regulation”, L. 947/1977 “on the re-allotment of land etc.”, L. 947/1979 “on residential areas”, L. 1337/1983 “extension of urban plans, residential development and related provisions”, L. 1577/1985 “General Building Regulation”, L. 1772/1988 “amendment to the provisions of L. 1577/1985 and other related provisions”, L. 1892/1990 “on modernization and development and other provisions”.

c) Those of the above laws that are prior to the Civil Code, were maintained in force by virtue of explicit provisions of the Introductory Law (see Introductory Law of the Civil Code (41,53,54,56,66,68,70)).

In Greece, the institution of ownership and, by extension, the law of real property is primarily established and protected by the Constitution of 1975, as is currently in force following its revisions of the years 1986 and 2001. It is clear from Article 17 of the Greek Constitution that ownership is under the protection of the State, the rights arising from it, however, may not be exercised against public interest. No one is dispossessed of their property, except for public utility, which has been duly proven, as is by law enacted, following full indemnification corresponding to the value of the expropriated property during the hearing of the case on the provisional assessment of indemnification before the Court. On the other hand, Article 18 of the Greek Constitution provides for the protection of real property and establishes special cases and limitations of ownership. In detail, it is specified that special laws provide for ownership-related issues and the disposal of mines, caves, archaeological sites and treasures, mineral water springs, flowing waters, underground waters, and underground resources, in general. Issues related to ownership, exploitation and administration of lagoons and large lakes, as well as issues related to the disposal of areas resulting from their drainage, are also regulated by law. Special laws provide for issues related to requisitions for the needs of the armed forces in case of war or mobilization, or satisfaction of an urgent social need, which may put public order or health at risk. According to the procedure specified by a special law, it is allowed to re-allot rural areas for a more profitable exploitation of land, and take measures in order to avoid excessive segmentation or to facilitate the reconstruction of a small segmented rural property. The compulsory joint ownership of adjacent urban areas may be established by law, provided that the independent reconstruction of them, fully or partly, does not meet the building provisions in force or about to be put in force in that area.

It is clear from the interpretation of the above articles of the Greek Constitution that the only limitations that may be legally imposed on the right of ownership on a real estate are the ones concerning public interest, which must be clearly specified depending on the case. In any case of limitation, the owner of a real estate receives a reasonable indemnification, as assessed by courts.

In Greece, there haven't been any spectacular changes in the law of real property during the last decades. The latest changes are more associated with environmental issues, residential needs and better organization, within the framework of information society, and law of real property. Some indicative examples are: articles 17 and 18 of the Greek Constitution (revised in 2001) and the establishment of the National Cadastre Organization, which has undertaken

the registration of all real property in Greece according to Laws 2308/1995, 2508/1997, 2664/1998 and 3127/2003.

Finally, there have been changes in the law governing the selling of real property, the most significant of which were: the abolition of the right of reversion of a sale and the increase in the liability of the seller for real and legal defects on a real estate (L. 3043/2002, Official Gazette Issue A No. 192).

For further information on the law of real property, you may refer to the databases available on the websites of the Bar Association of Athens (DSA), the National Cadastre Organization and Nomos – Legal Information Database (primary and secondary legislation), jurisprudence and related articles. Access to these databases requires subscription and special charge. They are exclusively available in Greek.

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## 1.2 Property and Estates

Article 973 of the GR Civil Code numbers in a limiting manner the **rights in rem** (that is the rights that grant an immediate and against all power on the same object). These are four: on one hand there is the **ownership** and on the other hand there are the **easements**, the **pledge** and the **mortgage**, the so-called limited rights in rem. The difference between the ownership and the other rights in rem is the extent of their content.

The ownership is an immediate power, absolute (because it turns against all) and total on the object. Every perceptible action on the object, provided that it is not prohibited by law, is included in the context of ownership.

### 1.2.1. Estate versus Property

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

There is only one ownership that is intelligible upon the object, which extends to the whole object. A coexistence of more than one ownership on the same real estate is opposed to the context of ownership. On the contrary the existence of more than one right in rem on the same real estate is possible. On the same object more than one rights may be formed in favor of third parties with the same (e.g. two mortgages) or with different (e.g. mortgage and easement) and usufruct content.

However, as many as such rights are formed, the content of the ownership is not exhausted:

The general and theoretic power of the proprietor on any intelligible action on the object continues to exist.

It is possible though two or more persons (heirs, buyers) to have joint ownership on the same real estate meaning that the interest on the real estate of each of them is not restricted on a distinguished part but the whole real estate belongs to each of them in an intelligible part.(e.g ownership of 4 persons of 25% on the land, or the apartment)

The separation of usufruct from bare ownership that is encountered in the legal systems of the continental law might be considered that it resembles to the institution of the family trust, which is encountered in the English-American lawful orders.

The institution of usufruct however, operates in a different manner than this Anglo-Saxon institution because its legal frame grants to the usufructuary and to the bare owner a legal status different from the one of the trustee and the beneficiary as well as because its constitution does never result in a fundamental lawful implication that is induced by the establishment of the trust.

That is while by the establishment of the trust the material relish of the assets of the trustee property is granted to the beneficiary and the authority of the management of the said objects is assigned to the trustee, by the establishment of the usufruct these two powers are transferred to one and only person, the usufructuary. The legislation however, in Greece, mainly on taxation cases, when a trust must be realized, tends to identify the usufructuary with the beneficiary and the bare owner with the trustee and this in proportion in order to realize the will of the testator.

Thus the Tax Court of First Instance of Athens in its decision 14150/1963 (Nomiko Vima 12/1964 pg.52) reviewing the issue of whether the beneficiary of a trust that has been established by means of a testament in USA, should have been characterized as heir or usufructuary, in order to determine his tax scale, it selected the second characterization.

- What role, if any, do feudal rights play?

This question is relevant for the common law systems. Civil law systems as the Greek one have a concept of absolute ownership, based on Roman law.

### **1.2.2. Superficies solo cedit**

- Does the ownership of a piece of land generally comprise also the ownership of all buildings erected on the land?

- What are the exceptions? Are these exceptions common?

The stipulation of article 954 C.C. (1)(as constituents of the real estate are considered the objects that have been attached steadily to the ground, particularly buildings), refers to the principle of the Roman Law “superficies solo cedit” (*the objects lying above belong to the objects lying underneath*)

- Consequently the ownership of a part of land generally includes also the ownership of all the buildings that have been constructed on it.
- Exceptions to this principle establish article 1010 C.C. (building partly on an outland real estate). Under the prerequisites that are set forth by this stipulation a) construction of a building, b) by the owner, c) expansion to the neighbouring real estate, d) good faith of the person that performed the building, e) absence of a timely protest by the neighbour, the Court judges for the ownership of the land that has been built not to the owner of the land but to the one who has built the building.

Likewise an exception to this principle consists the establishment of horizontal and vertical property according to article 1002 C.C. in combination to L.3741/29 “on property per floor” and to the Legislative Decree 1024/1971 “on divided property” on buildings that are built on a uniform plot” correspondingly.

## **1.3 Interests in Land**

### **1.3.1. Numerus clausus**

- Is there a numerus clausus of interests in land? Which interests are exclusively defined by law, and which can – and to which extent - be defined by contract?

Our Law acknowledges the principle of the closed number of rights in rem. This means that a) the rights in rem are only as many as the law defines in a limiting manner and b) their content is determined bindingly by the law. The beneficiary cannot create rights in rem that are not provided for by the law. However the autonomy of the will is preserved intact also in the law of property and as far as the establishment, transfer, falsification and abolishment of the rights in rem is concerned.

This principle serves mainly the more general need of security in the transactions.

### 1.3.2. System of Interests in Land and Numerus Clausus

- Which are the different types of interests in land?

This question was answered in the question 1.2. Apart from the ownership there are the easements, the hypothec on real estate and the pledge on movable things. The so-called personal securities such as the joint obligation and the guarantee are rights of contract law.

The pre-emption right is not a right in rem. It is regulated by the law of Obligations and is not in use.

### 1.3.3. Servitudes (usus)

- Which are the different types of rights to use real property?
- There are **easements in appurtenance**, i.e. to the benefit of the owner or possessor of other, especially neighbouring land. In this sense, one may speak of a dominant tenement and a servient tenement. These are regulated by the articles 1118-1141 of the GR Civil Code. They are distinguished in negative (abstention of doing an act) and to positive ones. Some of those mentioned (there can be stipulated more which are not specifically mentioned in the law) are the easement of not obstructing the view, or the light of the neighbour building, easement of passing through etc. They are constituted by deed, judgement or usucaption.
- There are **easements in gross**, to the personal benefit of another person

They are distinguished in those which give the right to a full enjoyment (extensive right to use) of the real estate and those to partial enjoyment. In the first category belong the usufruct and the habitation and in the second the restricted personal servitudes. (limited rights to use)

### 1.3.4. Mortgages and Rent Charges

- Which are the different types of mortgages? In particular: Does your system know
- accessory mortgages, i.e. mortgages whose legal existence depends on the existence of the debt to be secured?
- non-accessory mortgages, i.e. mortgages whose legal existence do not depend on the existence of the debt to be secured?
- rent charges?

It is answered in detail in the relevant chapter

### 1.3.5. Rights in Rem to Acquire Real Property

- Which rights in rem to acquire real property exist in your legal system?
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### 1.3.6. Other Interests in Land

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

Apartly from the rights that are regulated by the Greek CC there are rights in rem that are regulated by special legislation. The most important are the rights on a mine, the right of the State on mineral water springs .

There is also regulated in the CC the possession which is considered as a sui generis right in rem. Possession which is a de facto situation is the absolute power on the real estate which is exercised by a person with the animus of an owner (974AK). It is needed for its establishment physical possession (such possession has the tenant, the depositor, the person with a loan to use). It is needed the well known corpus and animus of the Romans. If the possession is not protected by a right in rem

#### 1.4 Apartment Ownership (Condominiums)

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

In Greece the law 3741/1929 which is still valid regulates the “horizontal ownership”. After the introduction of the Greek Civil Code the articles 1002 and 1117 have set the basic principles of the “horizontal ownership”.

As a result exists the individual ownership of the apartment combined with the joint ownership of the land.

As a result the owners of the land where the block of flats is built or shall be built can set up this separate ownership only with a notarial act which must be registered or with a will in an existing apartment or in a future one.

- May the owners set up some agreements/rules governing their relations which are also applicable against a future owner (buyer) in case of transfer of ownership of an apartment? Are these rules registered in the land register? Are there statutory limitations on rules set up by the community of owners? In particular: May the apartment owners decide the following questions (by majority vote)?
- An apartment owner wants to use his apartment for a restaurant.
- The apartment owners want to change the distribution of the shared costs (e.g. from a per capita distribution to a distribution per square meter).
- The apartment owners want to forbid pets in the apartments.
- Can the apartment ownership right be freely mortgaged by its holder, or does he need the consent of the owners of the other apartments? How is the relation of mortgages or other interests on the apartment ownership right to mortgages and other interests in the land? What is the destiny of the apartment ownership right (or interests on it such as mortgages) in case the building is destroyed, e.g. by fire? Are there any substitute rights, e.g. on compensation payments from insurances or other sources?

The owners of the apartments (unanimity is needed) by a notarial act can stipulate whatever they wish in order to regulate their mutual relationships.

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

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

The right of emphyteose has been abolished in Greece. The lease is regulated in the obligation law.

### **1.6 The Public Law Context of Real Property Transactions**

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

**1.6.** Yes, there are stipulations of public order that may not in whatsoever case be violated and their non-observance results in invalidity of the contract.

Such laws indicatively are e.g. Law 1892/1990 on the prohibition without specific permit of the establishment of rights in rem on real estate in borderland areas, among which are included the mortgages.

This law is of intense public order and beside the criticism against it, it continues to be valid over a very large part of the state. In the unadulteratedly borderland areas a permit is required for every contracting party, even for a Greek citizen, for a fellow countryman or for a resident of the European Union, while in other not so strictly borderland areas, such as the area of Thessaloniki e.g. a permit is required that implicates a lot of formalities only for the citizens of third countries. The issue is broad and it has received extensive scientific process.

Another significant limitation that results in invalidity concerns mainly the plots of land and more specifically their partition.

I) Prohibition of Partition of the holdings(rural land that was given to refugees from Minor Asia in the early 20<sup>th</sup> century) (Law 431/1968, 651/1977, 1337/83

etc.)

- a) The partitions of the plots are a very sensitive area in the law of real estate because it generates many obstacles in transactions and in the ability of building.
- b) The prohibitions due to Zones of Residential Control (ZOE) that e.g. in Thessaloniki prohibit the partition of a plot smaller than ten acres, where the part that is being transferred must be 10 acres but also the remaining part must be 10 acres.

II) An invalidity is generated by L. 3250/ 1924 as it was replaced by L. 2148/1952 and amended by article 73 par.2 of the Legislative Decree 2185/1952 on the prohibition of the transfer of a plot without a permit or of the establishment of a right in rem even in case of a mortgage or a prenotation of a mortgage which results from a larger plot of an area of 250 acres.

III) Invalidity is also generated by law 2358/1997 on the obligation to pay duties in an area that is subjected to the Organization of Land Reclamation.

IV) Law 2130/94 on the real estate charge that is due to the Municipalities, which if not paid and when it is due, the contract is not valid.

V) Invalidity is also generated if the legislation on “the protection of forests” Law 998/1979 and its subsequent amendments is not observed.

VI) The Greek legislation regulates in great detail the tax exemption for the acquisition of first residence either for an unmarried or a married person.

There is tax exemption for the objective value of the residence (is costed by the taxation service) . There is no tax until value of property as follows:

For an unmarried person

Apartment until 65.000 Euros

Building Plot: until 30,000.00 Euros

For a married person:

Apartment: 100,000.00 euros. This amount is increased by twenty thousand (20,000.00) euros for each of the first two children and by thirty thousand

(30,000.00) euros for the third and each of the following children.

Building Plot: 55,000.00 euros. This amount is increased by eight thousand (8,000.00) euros for each of the first two children and by ten thousand (10,000.00) euros for the third and each of the following children.

## 1.7 Brief Summary on "Real Property Law in Action"

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

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

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

In the Greek geographical map of real estate, there is no uniformity in the distribution of the offer and demand on them. The offer and demand of real estate is determined depending on their location. In the central parts of big urban cities the demand on real estate is usually big for residencies due to the fact that there is no matching offer.

On many occasions this depends on the geographical structure of the city. In cities where the fiscal life develops around their centre there is a demand for real estate for working areas as well as for residencies.

The purchase of residencies is not a profitable investment of money, because it is subjected to the tax of large immovable property and to the income tax. However, mainly in cities where there are university schools, the investment of money on the purchase of small houses that will be inhabited by students may be characterized profitable, because their purchase and leasing value are bigger due an increased demand.

It is usually inexpedient to acquire real estate to be used for lease, because the income from leasing are subjected to taxation by a high coefficient. The investment of money on the purchase of land is profitable, particularly when it concerns an area that is going to be included in the city plan.

- The citizens at a quite great rate resort to borrowing from banks in order to proceed to the purchase of a house. This happens because in Greece there is a legislative regulation in regard with “means of acquisition” of the money a citizen affords for the purchase of a house. That is, he should justify the legitimacy of the acquisition of the money that he will afford for the purchase of real estate, a fact that is not always easy. Thus he obligatorily resorts to borrowing. This by definition also means the mortgage of the real estate that is being bought.

- The main transactor of the purchase of real estate as far as the legal part is concerned, is the notary public. The sales of real estate are according to the law always drawn up by means of a notary public instrument and under the obligation of the presentation of lawyers above a certain contractual amount.

The real estate brokers, as far as their professional jurisdiction is concerned, they do not constrainedly mediate in the selling of real estate, however they consist a professional class that helps the transactions by finding and offering real estate for a certain consideration. Their part ends at the closing of the deal of selling. The lawyers control the legal condition of the real estate and the terms of the contract. The land registrars control the legal substance of the contract as far as certain invalidities provided for by the law are concerned. The banks control the legal condition of the real estate from the point of securing the payment of the loans they grant to the buyers.

- Due to the authenticity of the notary public instrument and of the validity it lends to contracts as a public document, the cases in which the courts deal with solving disputes on real estate are not many. No specific procedure is provided for on the law of real estate, but the disputes on them are subjected to the regular procedure. In Greek law there are no vocational or obligatory mechanisms of alternative solving of the disputes. The execution of the judicial decisions and of the notary public instruments is performed according to the Rules of the Code of Civil Procedure.

- In Greece and for a number of years, a major political issue occurs in relation to the system of judicature. The judgment of many cases is so delayed that there may be a risk of limitation of actions on them. The mean time of the duration of the legal procedures cannot be defined, because this duration varies with the type of the procedure. There is an access to justice for all citizens and all the more so quite easily, a fact that is attributed to the major factor for the delay of the procedure.

The compensations of lawyers are determined by the Code of Lawyers where the minimal limits are given. Legal aid is provided for by the law for the citizens who are unable to provide the means for it. As it was mentioned before there is no specific jurisdiction for the law on real estate but the disputes that arise on them fall under the juri

sdition of the regular Courts, therefore the ability to take legal actions is adjusted by the Code of Civil Procedure, which settles the taking of legal actions in the regular procedure.

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

The law on real estate and mainly the one on the transcriptions in the Land Registry in Greece are quite safe. However not completely, because according to article 1198 of the C.C. a transfer of the ownership of the real estate or an establishment, a transfer or an abolishment of a right in rem on it, does not result without a transcription.

This means that immediately after the signing of a relevant contract that concerns the establishment, transfer or abolishment of a right in rem, its transcription must be performed without fail. The ownership is acquired by the first transcribing party, and thus we realize the speed and the necessity of the immediate transcription.

Likewise in Greek practice it is common for many contracts to be drawn up in the form of preliminary agreements, which according to article 166 of the C.c. are obligatorily subjected to the form stipulated by the law for the main contract, that is a private document or a notary public document.

The contracts that are relevant to the rights in rem are concluded by means of a notary public document, therefore the same form applies for the preliminary agreement. The legislative gap that exists in the case of the signing of a preliminary agreement, contrary to the e.g. Grundschuld of the German Law, is that the preliminary agreement does not appear in Public Books such as the ones of the Land Registry. There is therefore the risk, up to the signing of the definite contract, in case of an unreliable and insolvent seller, the preconcerted real estate to come into other hands (due to selling, confiscation, etc.)

## **2. Land Registration**

### **2.1 Organisation**

#### **2.1.1. Statutory basis**

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

The legal basis on the registration of real estate is the Civil Code and more specifically articles 1192 to 1208 of it.

The system of land registration that has been established by the Civil Code is valid throughout the state, with the exception of the islands of Rhodes and of Kos, as well as the Municipality Porto-Lagos in the island of Leros, where the institution of the Cadastre is in force.

### **2.1.2. Relevant institutions**

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

The agents that are responsible for the registration of a real estate are the Land Registries “**Ypothikofilakia**” which are discerned in unsalaried and salaried. In each district of a Court of Peace one or more Land Registries exist.

In the Land Registries take place the transfers or the registrations of mortgages or the prenotations or the confiscations of real estate in the district under the jurisdiction of the Land Registry, as well as registrations of lawsuits and whatsoever other action, registration or notation that is relevant to the real estate and is stipulated by the Law.

### **2.1.3. Land register/registre foncier/Grundbuch**

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

*Ypothikofilakio (the exact term means guardian of hypothèques)*

The Land Registries are directed by the Land Registrars, who are considered by Law as unsalaried judicial clerks. They hold a degree from the Law School. The District Attorney of the Judges in the Court of First Instance exerts supervision on the Land Registries.

### **2.1.4. Is all real property registered?**

*All the real estate must be registered in the Land Registries, with no exception.*

## **2.2 Contents of Registration**

### **2.2.1. Which data are registered?**

### **2.2.2. Sample of Registration**

The transfer is conducted on the basis of an official copy of the deed to be transferred. In particular the transfer consists of the registration of the summary of the deed to be transferred in the Book of Transfers by a chronological order of submission. The

summary of the transfer is drawn up by the Notary Public who has drawn up the relevant Contract.

**The summary of transfer** must include in the following order:

- a) the number and the year of the submitted instrument that is to be recorded, the full name and the status of the person or the authority that has performed its drawing up.
- b) The names of the parties involved and the status by which they are present.
- c) A brief description of the real estate
- d) The object of the deed that concerns the establishment, transfer or abolishment or in general the falsification of a right in rem and the cause of them. And
- e) The ownership title of the party performing the sale.

## **2.3 Registration Procedure**

### **2.3.1. Application for Registration**

Please describe the application procedure:

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

The application of transfer is a simple printed application that is accompanied by the title to be transferred and a summary of it. The application is drawn up and signed mainly by the Notary Public and in certain cases by the lawyer.

### **2.3.2. Duties of the Registrar**

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

The control made by the Land Registry must be restricted to the limits that render him the ability to conclude the deficiencies of the deed to be transferred, which however affect only the transfer, without having the right to extent to a control of the documents, that is to the essential context of the title.

The parties applying for a recording are informed, either by conducting a research in the Books of the Land Registry or by requesting for a relevant certificate.

## **2.4 Access to information**

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

- In particular: Can you get access to the register :
  - if you have a *ius in rem* in the real property,
  - if you are negotiating with the owner about the purchase of the property - or if you want to find out who owns a property in order to make him an offer for purchasing or renting the property,
  - if you have an enforceable title against a debtor and are inquiring about the existence of real property to be seized in an execution procedure,
  - if a bank wants to check whether an applicant for a loan owns real property,
  - if the press wants to inquire on how much real property a politician owns.-
  - Can you search for information by address, by registration number of land and/or by holders of rights on it?

The recordings in the Land Registry are performed in print. The access to the Books of the Land Registry is free to everyone. The facility of the knowledge of the content of the books is acknowledged to everyone and not only to those to whom the recordings in the books refer. The proof of the existence of a lawful interest for their review is not necessary. Articles 1200 and 1201 of the Civil Code are in force.

## 2.5 Substantive Effects of the Registration

- What are the substantive effects of the registration?
  - Is the registration necessary for the creation or the transfer of the right (constitutive effect) or for its opposability against third parties - or is it merely declarative?
  - Does the registration confer a presumption or proof for the existence of the right? (if this is different for different rights and interests, please give the information for each interest.
- Is the reliance in good faith on the registered rights protected?
  - Is it necessary to search for additional information apart from the content of the registration to get a full picture?
  - How are parties that have relied on the information from the register (abstract of title) protected if this information proves to have been wrong?

*The aim of the transfer is the securing of the publicity of the lawful condition of the real estate. The transfer consists a commendatory action of the real modification and *conditio iuris*.*

*However, this securing of publicity is purely a formality, without it passing to the next level that is the essential lawfulness. The inaccurate recordings in the Public Books of the Land Registries have not consolidated the third parties, even when they are acting on a good will basis. That is the third party consult the books kept by the Land Registries are not safeguarded in case the recordings are inaccurate. A defect in*

*the titles, either essential or a formality is transferred also to the right acquired by the third party, even if he is acting in good will.*

## **2.6 Rank and Priority Notice**

### **2.6.1. Rank (rang/Rang)**

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

*The rule of time precedence is valid, that is in each case the recording or registration that has been performed earlier, is preferred, even if it was performed on the previous day. This rule is not explicitly referred in the Chapter on the transfer in the Civil Code, but it results indirectly from the whole system that rules transfers and which is established by the Civil Code and in particular article 1198 in combination with the general principle that is valid for rights in rem of the time precedence (prior tempore potior iure). Without the existence of the afore rule, there would be no meaning for the existence of the specific stipulations of articles 1205 and 1206 of the Civil Code.*

*Article 1206 of the Civil Code: “Among many transfers that have been conducted on the same day in relevance with the rights on the same real estate, the one that even remotely relies on the even by the least preceding title is preferred”.*

Article 1207 of the Civil Code: “Should a transfer and a registration of a mortgage coincide on the same day and regard the same real estate, the one that has been registered earlier, even by the least, is preferred”.

### **2.6.2. Priority Notice**

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

In Greek Law there is no possibility for the securing of a future registration

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

*The selling of a real estate of a right in rem according to the Geek Law is a causative, undertaking and pre-eminently bilateral contract and it is drawn up only by means of a notary public document. –If the notary public formality is not abided by, then it is invalid.-*

#### **3.1 – 3.2.2 Procedure in general**

*A seller in search of a buyer as well as the buyer in search of a particular real estate, use at the most part a real estate broker, who receives a compensation by the seller and by the buyer, with the compensation of 2% on the agreed price.*

##### **3.1.1. Main steps of a real estate sale**

#### **3.2 Real Estate Sales Contract**

##### **3.2.1. Form**

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

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

The draftsperson might be

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

*As soon as the seller finds a buyer, he presents the ownership title to the Notary Public for the drawing up of the declaration -statement of the Transfer Tax, which is submitted prior to the drawing up of the contract, together with the Sheets of Objective Estimation of the Value of the real estate to the competent P.R.S. for the payment of the corresponding transfer tax. –An attested copy of the statement together with the duplicate receipt of the payment of the transfer tax, which is attached to the contract, are presented to the notary public who will draw up the contract.-*

*Likewise prior to the drawing up of the contract, a control of the ownership title, that is of the proprietorship of the seller and of possible burdens on the real estate, is performed by the Lawyer appointed by the buyer. –The sale contract in case the price that is stated exceeds the amount of –11,738.00 – Euros, is drawn up according to a plan of Lawyers that is submitted to the competent Bar Association for the attestation of the signature of the Lawyers and is attached to the contract. There are also some documents from different public services that need to be attached to the contract.*

*The contract is drawn up and read by the Notary public, mostly in his office and exceptionally outside his office, a fact that is explicitly mentioned in the contract, in the presence of the contracting parties or their proxies and the Lawyers and it is signed by all.-*

*There are certain cases, which are explicitly quoted by the Law, in which cases the sale contract is invalid, as are indicatively mentioned the partition of real estate inside the Zones of Residential Control (ZOE), for the non-attachment of a cadastral survey of areas that are to be registered in the Cadastre etc.*

*The sale of a real estate is completed by the transcription of the contract by the relevant documents, that is the copies of the transfer tax statements, a summary of the contract and a corresponding application to the competent Land registry or in the cases in which the institution of the Cadastre is in force, by the recording of the transfer in the cadastral books and other kept data.*

### **3.1.2. Time frame**

How long do these steps normally take in your country?

*One to two weeks are necessary for the documents that are attached to be gathered in order for a contract to be concluded. The transfer of the property counts from the day the documents are submitted for registration.*

### **3.2.3. Preliminary contract**

- Is there a preliminary contract?
- What legal effects does it have?

*In a few cases of selling a preliminary agreement contract is drawn up, which establishes bilaterally only contractual obligations.-*

### **3.7.1. Typical Real Estate Sales Contract**

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

The Notaries Code sets most of the prerequisites of the contract.

### 3.3 Transfer of Ownership and Payment

#### 3.3.1. Requirements for Transfer of Ownership

What are the requirements for the transfer of ownership?

According to the article (1033 CC) they are :

- Title of the seller (property right)
- Agreement on the transfer of property
- Agreement in the form of a notarial act
- Valid legal cause(causa)
- Registration with the land register

#### 3.3.2. Payment due

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

*–The payment of the price is performed prior or after the contract on the condition of an annulling clause in case the payment is delayed or the buyer refuses to pay off the price.*

### 3.3.3. Ways of the seller to enforce the payment

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

*–The contract is an executory title, directly enforceable.*

### 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?

In the contract there is the provision that he acquires immediately the possession and the ownership if he has paid all the price. Even when he has taken a loan and there is no condition subsequent in the contract he acquires the ownership immediately with the contract (concluded by the registration)

## 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?

### 3.4.2. Title Search: Absence of Encumbrances

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

### 3.4.3. Title Insurance or Liability

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

### 3.4.4. Leases

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

*–if the object being sold is leased, given the fact that a solemn statement is attached to the contract by the seller in which he declares that he timely declares the rents, this does not pose a problem for the transfer, it is mentioned in the sale contract and the buyer enters into the rights and obligations of the lease.*

*The existing lease on the real estate does not consist a defect of the ownership title of the seller. The real estate leases for a time period longer than nine years is valid for the buyer only if they are drawn up by means of a notary public instrument, which has to be transcribed.*

## 3.5 Defects and Warranties

### 3.4.1. Legal rules

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

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

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

- What kind of contractual clauses on warranties are typically agreed upon in a real estate sale among private persons?
- Is it possible to exclude the remedies of the buyer? Does it make a difference if the seller or the buyer acts in the course of his trade, business or profession?
- To what degree do courts exercise control over the fairness of such clauses?
- 

### **3.4.3. Liability of the Buyer for Debts of the Seller**

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

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

How are these problems treated in typical contractual clauses?

## **3.6 Administrative Permits and Restrictions**

In particular, this section covers:

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

### **3.6.1. Standard Requirements**

In a typical conveyance of a residential estate:

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

### **3.6.2. Requirements for certain types of real estate sales only**

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

### **3.6.3. Control of administrative permits and restrictions**

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

### **3.7 Transfer Costs**

#### **3.7.1. Contract and Registration**

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

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

#### **3.7.2. Transfer Taxes**

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

#### **3.7.3. Real Estate Agents**

- How often is a real estate agent involved in the sale of residential property among private persons?
- How much is the agent's fee?
- Who usually pays the agent – the seller or the buyer?

### **3.8 Buyer's Mortgage**

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

## **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?

### **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?

*The Greek Property Law establishes a causal system and also the dissociation of the sales contract from the transfer of ownership.*

*In practice the notarial act contains both the sales contract (which is a contractual obligation 369CC) and the transfer of ownership (which is a right in rem 1033 CC). If the sales contract (legal cause) is invalid from the beginning the transfer of ownership is not concluded.*

*So the answer is negative*

#### **4.2.2. The Seller is not the owner**

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

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

If only after the conclusion of the sales contract the legal cause vanished (because of the reason described above, or withdrawal of the seller or reversion of the sale or annulment by a court) then the the transfer of ownership is not reversed retroactively. The buyer is then obliged to transfer back the ownership with the provisions of undue enrichment(904 CC)

### 4.2.3. Execution against the Seller

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

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

## 4.3 Payment

### 4.2.1. Delay in payment

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

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

## 4.4 Defects and Warranties

### 4.4.1. Misrepresentation

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

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

### 4.4.2. Destruction of the house

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

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

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

### **5.1 Statutory Basis**

*The Greek legislation does not make any discretion between the sale of a house or an apartment by a construction company or by a private individual. It considers that this sale is a contract that is regulated either by the stipulations on work contracts in articles 681 up to 702 and so forth of the Civil Code, or by the stipulations on selling in article 513 and so forth of the Civil Code.*

*Namely according to article 681 of the Civil code by a work contract the contractor has the obligation to perform the work and the employer to pay the agreed compensation, while according to article 683 of the Civil Code, when a contract for the construction of a work is concerned, in case of doubt, if the material required to this end is supplied by the contractor then the stipulations on selling are implemented and if it is supplied by the employer then the stipulations on work contract are implemented.*

*Likewise and according to the stipulations of article 513 of the Civil Code a sale is the contract by which the seller is under the obligation to transfer the ownership of the sold object and to deliver the object and the buyer is under the obligation to pay the agreed price.*

#### **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?

*As far as the selling of real estate on behalf of Legal entities of Public Law is concerned, the drawing up of the contract as well as the payment of the price and the manner of sale are determined by the stipulations of the Presidential Decree 715/1979 (Government Gazette Issue 212A' /10.9.1979). According to article 59 of the afore P.D. "the sale of real estate by Legal Entities of Public Law is conducted by means of a public sale by public auction following a decision of the person who administers the collective instrument of the Legal Entity of Public Law, approved by the supervising Minister.*

*Likewise according to the stipulations of article 63 par.3 of the afore P.D. the contract of sale is drawn up by means of a notary public instrument, and from its signing and on the risk of a circumstantial destruction or deterioration of the real estate is born by the buyer.*

### 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*?

*The best interests of the buyers of residencies are protected by the general stipulations on the protection of consumers, which are by all means affected by the legislation that is valid in E. U. and are included in the specific Law 2251/1994 (Government Gazette Issue 191A'/16.11.1994).*

## 5.2 Procedure in general

### 5.2.1. Single houses

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

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

*According to article 369 of the Civil Code, contracts that have as their object the establishment, transfer, falsification or abolishment of rights in rem on real estate, are required to be drawn up in front of a notary public, that is the type of the notary public instrument is required.*

*Therefore in the case at issue in front of the notary public appear: a) the seller, that is the owner of the real estate and b) The buyer that is the legal representative of the construction company, presenting the documents that legalize their afore properties: In your example let us assume that the object for sale is a large building ground that is a large plot of land that lies within an approved city plan and can be partitioned to more partible complete and fit for building on, building grounds.*

*Then after all these preconditioned documents are presented to the notary public, and after the transfer tax has been paid and after the topographical design is presented, in which the competent engineer will state that the building ground under transfer as well as the remaining building ground are complete and fit for building on, then the sale contract is drawn up for the afore building plot, under the obligation of the selling construction company to construct, complete and deliver the residence that is going to be built in the partible building plot that is transferred, within the time limits that are agreed upon between the parties, while the construction of the residence is performed in the manner and with the materials that are agreed upon and referred to in a specific writing of the obligations of the selling company, which writing of obli-*

*gations is signed by the contracting parties together with the contract and it consists a uniform entity with this contract in which it is mentioned.*

*The Notary public reports in his contract the afore writing of obligations of the construction company, however he does not explain it to the contracting parties during the drawing up of the sale contract, because it consists an agreement between the parties referring to the technical construction of the residence.*

*Usually in this contract the term of an annulling clause of the contract is set forth, in case of non- construction or the not timely construction and delivery of the residence to the buyer and penances are determined that is penalty clauses against the default party. In every sale there is the agreement of the parties on the object that is sold and on the price the buyer is going to pay. Usually the price is paid in part as a down payment and in the remaining part as installments that are proportional to or overbalance the works that are being performed for the construction of the building.*

As far as the possible material defects are concerned, there are insurances and protection of the buyer by stipulations of the Civil Code e.g. article 534 of the Civil Code stipulates that the seller is responsible if during the time the risk is transferred to the buyer, the object that was sold did actually present defects, which discredit or considerably reduce the value or utility of it.

### **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?

In case of selling of an apartment that is going to be built in a joint ownership and not during the sale of a detached house in an independent building plot, a horizontal property is established as far as the partible areas are concerned, (apartments) of joint ownership and the terms that are required by the joined ownership are set forth e.g. that the buyer is obliged and proceeds to the Regulation of Administration of Joint property, participates in the expenses arising from the joint ownership etc. as far as the payment of the price and of the statutory guarantees are concerned however, there are no differences from the sale of a detached house in a complete building ground.

### 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?

*In this case all that is valid in the previous paragraph 5.2.2., is also valid.*

## 5.3 Conclusion of the Contract

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

*As it was afore mentioned according to article 369 of the Civil Code, Contracts the object of which is the establishment, transfer, falsification or abolishment of rights in rem on real estate, have to be drawn up in front of a Notary Public.*

*Instead of the final contract which is a real legal transaction, it is possible to draw up a preliminary contract or a promissory preliminary contract which are contractual legal transactions, however these actions also, since they concern real estate, in order to be valid they have to be conducted only by means of a notary public instrument. In case of a conclusion of a preliminary contract or of an promissory preliminary contract, in general there is no obligatory suspense period prior to the ability to conclude the final contract, unless this is so imposed by the contract or if it is agreed upon, or if this is stipulated by the law only in specific cases.*

*According to article 540 of the Civil Code, in the cases of a responsibility of the seller for an actual defect or deficiency of the agreed property, the buyer has the right to demand either the reversal of the sale or the reduction of the price.*

## 5.4 Payment

### 5.4.1. Payment date

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

*According to the usual contractual arrangements the payment is performed in instalments that are either commensurate to the fiscal capability of the buyer and irre-*

*spective of the course of the project, or they are commensurate to the progress of the building works.*

*Usually the payment is performed directly by the buyer to the constructor and it is proved by a written receipt by the seller or by a notary public deed, or provided that a Bank or other Crediting Organization intervenes, by means of evidence from them that the seller received the price.*

*Usual terms of the contracts are that in case of denial or inability of the seller to receive the agreed price, its payment in full will be proved by the deposit of the price by the buyer to the specific Deposit and Loans Fund and by means of a notice to the seller regarding this deposit for the benefit of him.*

*According to article 904 of the Code of Civil Jurisdiction the notary public documents are executory titles and therefore no intervention of the Court is required. Usually in the contracts there is a term that is set forth on the fact that the contracting parties acknowledge the contract as a title settled and executory as far as the points agreed by the contract are concerned.*

#### **5.4.2. Securities**

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

*The guarantee of the seller for the completion of the contract on his behalf is provided for by the general stipulations on guarantee in articles 847 to 870 of the Civil Code but it can also be agreed upon by the contracting parties in the contract as a guarantee for the completion of the supply or the consideration or the registration of a prenotation of mortgage or of a mortgage or of an establishment of a contractual pledge etc.*

#### **5.4.3. Acquisition of Ownership**

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

*The buyer is ensured that he will be the new owner and that he will be under the obligation to pay only when the real estate is delivered in the agreed time and with the agreed properties.*

*The securing of the buyer as far as the free of burdens and exempted from legal defects real estate that he buys is concerned, is performed by means of an investigation in the corresponding books of the competent Land Registry or Cadastre Office, that is conducted by the buyer's lawyer, who is present during the signing of the contract, and in the sale contract the seller repeats the statement that he sells and transfers the under sale object free of burdens and legal defects.*

#### **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 it was afore mentioned under the usual contractual settlements, depending on the agreement between the contracting parties and depending on the power or the will of the contracting parties to perform the selling, or purchase correspondingly of the real estate, the manner of the payment of the price is considered, which in fact depends in many ways on the credit the contracting parties have, since besides in Greece selling at their largest part are not performed through a Bank, but directly by natural or legal entities.*

#### **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?)

*The buyer may finance his purchase, either by mortgaging the real estate he purchases and which is under construction, from the moment the construction commences, financed corresponding to the progress of the building procedures, or by mortgaging some other real estate property of his.*

*Provided that the value of the real estate that is given off for the funding of the purchase is bigger than this, it is possible to record a second mortgage to secure a new funding, after of course this has been previously checked by the financing Bank.*

*In Greece also, Banks set forth specific duties during the administration of a mortgage loan to the construction companies, however of a small amount.*

*A future buyer may be rejected regarding the administration of a loan with the plot of land being bought as collateral, because for the insurance of this loan a second mortgage will be placed on the same real estate against a demand of the bank that will not be met in case of an auction on this real estate.*

### **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)?

*The description of the building that has been built or is going to be constructed, is performed in the contract on the basis of the records of the building permit that has been issued by the competent authority and service as well as on the basis of the topographical charts, the ground plans, the section plans etc. which are attached and referred to in the contract, signed by both contracting parties.*

*The description that is performed in accordance with the above is considered as adequate.*

### **5.5.2. Late Termination of the Building**

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

*In the contract an insurance deadline is set for the completion of the construction, which is usually larger than the estimated one for the completion to be realized.*

*If the deadline for the completion and delivery is not kept, then the buyer has the claim for an indemnity to be paid to him by the seller for each damage he has suffered due to the delay, while usually in the contracts a penalty clause is set forth, which forfeits against the seller in case of a default on his behalf.*

### **5.5.3. Material Defects**

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

*In case there are material defects on the building, according to the stipulations in article 540 of the Civil Code that were afore mentioned, the buyer is entitled to claim either the reversal of the selling or the reduction of the price.*

*For the real estate, the time for the limitation of actions on these claims is two years from the date of delivery of the real estate to the buyer according to the stipulations of article 554 and 555 of the Civil Code.*

*The buyer has no right to lodge claims against third parties and apart from the constructor, unless the seller has granted his relevant rights to the parties who have been used as additional parties or aids for the completion.*

*However the buyer is definitely entitled to turn independently against the possible existing guarantor, provided that this guarantee was given in writing, according to articles 847, 848, 849 and the following of the Civil Code.*

*Likewise in accordance with the stipulations of article 334 of the Civil Code the seller is responsible for the demerit of the parties he uses to complete his supply, as well as for his own demerit.*

## 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?

*In this case the contract retains its effect and the receiver has the right by permission of the mover to substitute the group of creditors for its execution.*

*If the receiver demands the execution of the contract, the group of creditors serves as a substitute regarding the rights and the obligations of the insolvent, by the contract and it undertakes the obligation to execute the terms that had been agreed upon initially.*

### 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?

*In this case the buyer is entitled to participate in the bankruptcy proceedings of the constructor –only as a bankruptcy creditor of him and to claim the due to the afore cause reimbursement of his money.*

## 6. Private International Law

### 6.1 Contract Law

#### 6.1.1. Conflict of Law Rule

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

Hellenic legal system prohibit the possibility of the choice of applicable law for contracts on real property. According to article 27 of the Hellenic civil code, the applicable law for these

contracts is the law of the country where the property is situated. (*lex rei sitae*). This rule is harmonic with the art.4par.3 of the Convention of Rome of 1980<sup>1</sup> about the law applicable to contractual obligations confirms also that all the rights in immovable property are most closely connected with the country where the immovable property is situated.

According to Hellenic law, the transfer of real property consists of contractual rights and obligations and of real property rights and obligations. This act of transfer can be realized in two different contracts but in the daily practice, it's included in one contract. The contractual rights and obligations are under the Convention of Rome of 1980; so, applicable law can be the law that the parties chose, according to the art.3 of the convention or by the law of the country with which it is most closely connected according the art.4. At the same time, the real property rights and obligations are always ruled by the article 27 of Hellenic Civil Code, which impose the *lex rei sitae* as the applicable law.

The possibility of partition of a contract (*depeçage*) is recognized for the contractual obligations by the art.3par.1 of the Convention of Rome of 1980. So, this partition can be applied in different parties of a contract or in complex contracts. The parties can choose a different *lex contractus* which will be applied in other parties of transaction (ex. for the contractual obligation of payment or for the loan contract) and not in the part of the contract which concerns the real property rights and obligations.

### 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?

In Hellenic legal system the transfer of real property is complete by the signature of notarial act **and** its registration in public books of the land register. The obligation to register real property is valid only if the form that the *lex rei sitae* provide, is respected. Even if the law of the place where the contract has been celebrated, allows the contract to be done without any other formal requirements, the transfer of real property can not be valid in Hellas. This rule is agreed with the article 9 par.6 of the Convention of Rome 1980, which declares that the appli-

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<sup>1</sup> Hellas render the Convention of Rome of 1980 in valid the 1st of April 1991.

cable law of formal requirements of a contract for the rights on real property is the law of the country where the property is situated, if that country provides the *lex rei sitae* as the applicable law on the real property law.

## **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!

The applicable law for immovable property is the *lex rei sitae*. This is ordered by the article 27 of Hellenic Civil Code: “the possession and the real property rights on movable and immovable things are under the rule of the state where they are situated.”

### **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?

The necessary condition of a registration of transfer of real property in our land register is that this transfer was realized according to Hellenic Civil Code and the Hellenic Laws about real property. So, it is not possible to register the act of transfer if that one was realized in other country

The Hellenic legislator demands that the act of transfer of real property is according to Hellenic Civil Code because he wanted to assure the security of transactions. The notary act that the Hellenic law demands for the transfer of real property, protects the two parties of the contract and guarantees the security of transactions; and the registration in land register affirms even more this security. So, it was not possible that a legislator who gives such an importance to the act of transfer of real property, to allow the registration of a transfer of real property, if it cannot be controlled the conditions of this act of transfer. Finally, the Hellenic legislator wanted to avoid any kind of violation of the national legal system on real property.

## **6.3 Restrictions for Foreigners to acquire Land**

### **6.3.1. Restrictions limited to Foreigners**

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

Due to historical and social reasons, the regions around the Hellenic borders are ruled by specific laws. In order to acquire real property in borderlands the law makes a distinction between two categories of citizens: in one hand, there are the citizens of Greece and E.U. and in the other hand there are the citizens of all the other states.

According to the article 25 of hellenic law 1892/1990, which reconciled the hellenic law to the European law, it is forbidden to everybody (even to hellenic citizens) to acquire real property in borderlands, as these borderlands are determined in the article 24 of the same law; especially, for the citizens out of E.U., the areas which are characterized as borderlands in Hellenic law are not only these of the art.24 of 1892/90 law, but also the regions of a previous presidential decree of 22/1927. Nevertheless, a comity which consists by the prefect and one representative of the ministries of National Defence, National Economy, Public Order and Agriculture can allow the citizens of the first category to acquire real property in these borderlands of the art.24 of 1892/90 law, while only a decision of the Ministry of National Defence can give a permission to the citizens of the second category to acquire real property in borderlands of the art.24 of 1892/90 law and of the 22/1927 presidential decree.

The law 1892/1990 was voted after the judgment of the Court of EU of 30 Mai 1989<sup>2</sup>. According, to this judgment the hellenic law about the acquisition and enjoyment of rights in immovable property were contrary to article 12 of the Treaty of E.U. (ex art.7) which declare the right of equal treatment between the European citizens and also contrary the articles 39 and 43 of the Treaty (ex 48 and 52) which assure the freedom of movement for workers and the right of free settlement in EU.

Finally, in Hellenic law exists a prohibition to the citizens of Albania to acquire real property in any region in Hellas, unless if the Ministry of Foreign Affairs gives the permission for this transfer. This prohibition which served certain political purposes in the decade of '60s, is nowadays still in valid.

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<sup>2</sup> C 305/1987 CEU, <http://curia.eu.int/en/content/juris/index.htm>

### **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)?

Apart of the restrictions that we have already mentioned, it doesn't exist any other restrictions for the foreigners to acquire real property. The permission of acquire real property in certain regions it is depended on the public administration; the comity of prefect and representative of the ministries of National Defence, National Economy, Public Order and Agriculture as well as the Ministry of National Defence examines each case separately and they decide according to the specific circumstances of each case.

### **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?

The best solution for the couple of another state-member of E.U. who want to transfer their real estate in Hellas, it would be that they would conclude all the necessary contracts in presence of a notary in Hellas. The other solution would be that the couple would conclude the contracts in a presence of a consul in the hellenic embassy of their country. If the contract is not according to the Hellenic Civil Code and Hellenic laws it would not be impossible to be valid the act of transfer of their real property.

## **7. Encumbrances/Mortgages (and Land Charges)**

### **7.1 Types of mortgages/land charges**

In Greece the general term is “**ipothiki**” (mortgage) and it is a right in rem and a subsequent right (since it presupposes and follows an insurable claim) to secure a future claim or a claim in proviso of the borrower with a preferential satisfaction of him regarding the real estate by the owner of the real estate, who may be a debtor or even a third party who consented for the mortgage to be recorded on his real estate.

The mortgage can be registered a) on the real estate as a whole b) on the ideal portion of it c) on the horizontal property (that is on an apartment) under the prerequisite that the deed of establishment of horizontal property will have been transferred d) on a vertical property e) on a mine and f) on the existing usufruct (of a real estate) for as long as it lasts. The mortgage has a monitorial character and follows as a burden the real estate even when it comes to the ownership of a third party.

Beside the fact that it consists a right in rem on the real estate, it does not however limit the practice of the other rights in rem, since the debtor continues to be the owner of the real estate and to exercise all his rights that appertain to the owner of the real estate, such as e.g. its selling, the protection of its proprietorship by means of lawsuits etc.

A right identical and with the same assignment with the mortgage is the ***prenotation of the mortgage*** which essentially consists a registration of the mortgage with two dilatory exceptions a) the dilatory exception of the final judgment on the claim for which the prenotation is registered by a judicial decision and b) the modification of the prenotation to a mortgage within the determined by the law deadline of 90 days.

The prenotation is widely used today by the banking system for the granting of loans mainly for fiscal and taxation reasons given that the cost of the prenotation is about the 1/3 of the cost for the registration of the mortgage. The prenotation ensures a certain claim and all the more so the one that is mentioned and described in the judicial decision, which grants the permit for the registration of the prenotation.

By means of the final judgment of the claim it turns into a mortgage and it is valid up to the time of registration of the prenotation and thus it is considered that it has been registered since then. For the turn of the prenotation into a mortgage, the claim to be ensured by the prenotation should be the same with the claim that is being judged by the final decision on the prenotated borrower.

### **7.1.1. Types of mortgages**

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

### **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 Civil Code separates the securities that are granted to the borrower to ensure his claim, into *personal* and *real*

A Personal security is according to the law the *guarantee* and the *liability in whole*.

On the contrary the real security are the *pledge* and the *mortgage*.

The real securities are more potent than the personal ones.

Because contrarily to them, they concern a certain object, that is directly subjected (in case of a pledge) or indirectly (mortgage on the power of the borrower) and due to their nature, they provide greater stability.

B The mortgage consists a *right in rem* on which science attributes the term real security, and which the Civil Code adjusts separately as an independent right in rem that concerns the real estates.

It is considered a limited right (C.C. 973). Consequently the conceptual data of the right in rem (power over an object or a right, lawful power, direct power and absolute power) also consist in the mortgage.

## **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 basic forms of securities of a bank is the personal and the real securities, which may be vested either by the customer of the bank himself (debtor) or by a third party. By means of the personal security one more party that is liable to the bank is added either as guarantor or as a co-debtor (C.C. 477).

In the Greek banking practice the real security and in particular the prenotation of a mortgage and the mortgage play the leading part due to the high degree of security they render, in view of the fact that the bank that receives a real security is preferentially satisfied in case of a bankruptcy of the debtor but also in case of a confiscation and of an auction of the burdened object.

A. The mortgage in favor of banks and societies anonymes according to the Legislative Decree 17.7/13.6.1923.

The great frequency of the establishment of mortgage in favor of banks against their claims due to whatsoever cause and mainly due to granting of credit and to a significant rate the collection of these claims by means of distraint rendered the institution of a more flexible procedure for the satisfaction of banks imperative.

The procedure was finally adjusted by the chapter on mortgage of the Legislative Decree 17.7/13.08.1923 “on specific stipulations on societies anonymes” articles 48-67, which has been kept in force with the exception of certain stipulations by virtue of articles 41 of the Intr. Law Civil Code and 52& 3 of the Intr. Law of the Code of Civil Procedure. The stipulations of the legislative decree consist an exceptional and at the same time specific law. This means that they govern only the cases that are subjected to the area of application. However, wherever they present gaps, the applicable law is the general civil and procedural law.

The deviations from the common law, which includes the legislative decree, are mainly focused on the procedure of distraint for the liquidation of the mortgaged claims. On the contrary the stipulations of the C.C. on mortgages are applied selfsame almost in their whole and on the mortgage in favor of banks and societies anonymes.

This selection of the legislator is fully harmonized with his intention to facilitate the satisfaction of the societies anonymes and in particular of the banks and not to amend the law on mortgage.

If the bank grants a loan under mortgage, the contract of the loan and the mortgage are performed either by means of a direct supply from the loan according to communal law or by means of a recognizance of a loan as follows:

The notary public instrument of a mortgaged real estate includes the terms of the loan and the provision of the mortgage without any immediate payment of the money. This mortgage is registered in the Mortgage Books and secures the loan from the registration, irrespective of the time of payment of the money (article 50 L.D. 17.7/13.08.1923).

For the granting of an amortization mortgage loan by a bank, the contract of the loan and the mortgaging is performed either by means of a direct supply of the loan or by a recognizance of the loan and always by means of a notary public instrument that includes the terms of the loan and the grant of mortgage.

The law by defining in article 50 L.D. of 17.7/13.08.1923 the notary public instrument of a mortgaged loan for the grant of a mortgage bears under consideration the most usual case of the simultaneous drawing up of the 2 legal acts. Thus connecting the contractual credit contract with the simultaneous real, the one that is to secure the provision of a mortgage, which obligatorily is drawn up by a notary public.

Following the registration the lending party is entitled to pay the money whereas a plain notary public instrument is drawn up unilaterally by the debtor for the payment of the money to this end.

If the lending bank following the conclusion of this loan, does not proceed to this payment, it is deleted following a permit issued by the one-membered Court of First Instance following the summon of the lending bank (article 51 L.D. of 17.7/13.08.1923).

Therefore in whatsoever other case that the mortgage is concluded separately, a crediting or any other preceding contract may be attached with the same validity also by means of a plain private document.

That is in the restraint in which the mortgaged lender might proceed, the executory title will be the credit contract in a private document, in combination with the notary public contract on the grant of the mortgage.

### **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 banking societies anonymes must respect the rights that the law grants to the mortgaged debtor, and which mainly aim at the protection of the land credit of the debtor and in particular in the best possible limitation of the real burden of the real estate. That is the banks will not proceed to an excess insured amount because the mortgaged debtor has the right to demand from the creditor by means of a lawsuit, the reduction of the amount in the proper extent.

Likewise when a mortgage is concluded on the basis of the general title (legal or judicial) there is a risk for the creditor to perform more than one registrations of mortgage on various real estate of the debtor, without these registrations being justified by the height of the insured demand. Because the law grants the right to the debtor to demand a limitation of the mortgage in that real estate only, the value of which is enough to ensure the claim.

### **INFORMATION OF THE DEBTORS**

The issue of the information of the debtors by the crediting institutions is particularly critical and may be confronted from a point of view “on one hand legislative and on the other hand the everyday practical approach on behalf of the crediting institutions.

According to the Code of Banking Ethics and in particular the general principles, case 3, the relevant information must at least cover:

- ...c) the rights and the obligations of the party performing the transaction

d) the prerequisites for the provision of a service and the possible risks that may be connected to it

e) the followed procedure

f) the possible implications from the backing out or non-contractual conduct of the party performing the transaction

In addition

By the deed of the Manager of the Bank of Greece number 2501/31.10.2002 information of the parties performing transactions with the crediting institutions on the terms that govern their transactions. The crediting institutions that are in operation in Greece should dully inform the parties performing transactions with them on the nature and the characteristics of the offered products and services and in general on the terms and the prerequisites that govern the banking transactions.

In addition

c) on the manner of notice under case c, they should notify the parties performing transactions prior to the conclusion of the contract of all the terms that govern the relation between them and to supply them with a complete copy following the conclusion of the contract.

Finally Law 2251/1994 on the protection of the consumer mentions that the state must mind of the interests of the consumers and their information and training on consumer issues which are valid in the private sector as well as in ventures of whatsoever nature in the public sector.

The above consist the legislative aspect of the issue that is the obligation of the crediting institutions to inform and notify the debtors. However the banking system in Greece is all-powerful to an extent that it ignores even the decisions issued by the Supreme Court of Appeal. The leading role and the compass for the actions of the banking crediting institutions are need and profit.

The need on one hand concerns the issue of the pressure on the debtors exerted mostly by contractors, engineers for the payment of the works and to this end they bind themselves to long-term loans but also to real securities, prenotations – mortgages in the context of “consensus”.

While it lies upon the professionalism of the lawyers and notary publics, to explain to debtors who are not familiar with legislative terms, what is the meaning of a

mortgage and a prenotation as well as its removal, disputes, and all these under unbearable pressure of time and situations that are anything but consistent with the virtuous morals of transactions.

In conclusion,

At a practical everyday level the release of a mortgage within a certain time limit is possible only at a theoretical form, but it means an annulment of the contract, return of the loan, a fact that has as a consequence the imposing of a fine on full payment –lately there have been efforts towards the abolishment of this- on the amount of the loan.

Those facts are repulsing of any similar thought.

### **7.2.3 Formal requirements**

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

According to article 1266 C.C. for the grant of a title in order to perform the registration of a mortgage a unilateral legal act performed *inter vivos* or *causa mortis* by the owner of the real estate, is sufficient. In the second case a public will is required, because according to C.C. 1266 the grant of mortgage is subjected to the type of notary public instrument.

Certainly the grant of a mortgage by means of a contract, which has to be invested by the same form of notary public instrument, is possible (and in practice more usual).

The unilateral statement – will, by which a mortgage is granted, is completed by the lawful drawing up of the relevant contract. This does not have to be addressed to the creditor and it cannot be revoked even if a registration of the mortgage in the appropriate Books was not performed.

The legal act (unilateral contract) for the grant of a mortgage must mention in an irrefutable manner: the person that grants the mortgage (debtor or third party), the identity of the owner of the secured claim, the real estate the ownership of which is going to be burdened with a mortgage. (C.C. 1266, principle of specificity), the se-

cured claim and in particular the identities of the creditor and the debtor (the latter only when the mortgage is granted by a third party), as well as its causative reason.

The amount of the claim does not necessarily need to be mentioned in the legal act of the conclusion of a mortgage, provided that the determination of the amount of the claim is stated at the registration of the mortgage.

Probable doubts regarding the necessary data in the context of the legal act must have been dissolved by the registration of the mortgage at the latest, because otherwise the registration is invalid and may lead to the release of the mortgage.

The person granting the mortgage must be the owner of the real estate. If he is not the owner of the mortgaged and withholds this fact or withholds limitations and burdens on his ownership, he may be obliged to immediately pay off his debt or to grant another corresponding mortgage 9 C.C. 1267 Sec. a, while an illegalization responsibility, mainly in case of fraud CC 1267 Sec. b. In case of a contractual grant of a mortgage the above responsibility of the person granting the mortgage might be accentuated, if the stipulations on the legal defects of the sold object are applied (C.C. 520, 514, 516). However the grant of a mortgage by a proxy who has only general power of attorney is possible, without the provision of a specific power of attorney being required.

The grant of a mortgage on the basis of a private title may be on a dilatory exception or deadline. In case of a grant of mortgage by a dilatory exception or deadline, the possession of the mortgage results with the completion of the condition or the deadline and not from the time of its registration.

The keeping of the form (notary public) is required for the legal act of the grant of mortgage as well as for the preliminary agreement on the grant of mortgage as well as for any amendment of the granting law act.

**The titles by law** are numbered in a limiting manner in article 1262 of the C.C. and these are held by the following natural and legal entities a) The State on real estate of its debtors for claims due to taxation b) the State, the Municipalities and the legal entities of Public Law on real estate of their trustees regarding claims resulting from the management of their property c) the parties being under parental provision or supervision regarding the real estate of their supervisors for claims resulting from the management d) every spouse for his/her claim due to an enlargement of the property of

the other spouse and against her/him. e) the heirs on the real estate of the inheritance for their claims f) the heirs of the real estate of the inheritance for the equalization of the shares and g) the mortgaged debtor for the mortgaged real estate regarding the delayed interests on the claim.

To the above titles of the Civil Code the titles that other laws impose in a limiting manner must be added a) of the receiver on real estate of the party being bankrupt and regarding the claims of the creditors b) the order of payment of a monetary demand from commercial papers c) the permit issued by the Committee of the Capital Market on the issue of a bond loan on the real estate of *societes anonymes*.

**The titles by judicial decision** are those that result from final rejective decision (that is decisions that adjudge a monetary or other provision that can be assessed in money) as well as from executory decisions of arbitrators or foreign courts.

**The titles by free will** are granted in the same manner by the debtor himself or by a third party in favor of the debtor by means of a unilateral statement in front of notary public.

#### **7.2.4. Registration**

Is the recording of the insurance in the Land Registry (or other Record) required? If so which are the data that will have to be included in this registration?

Yes, for the acquirement of a Mortgage a title that grants the right to a mortgage and registration in the Mortgage Book is required (article 1260 C.C.) The registration regarding which article 791 Code of Civil Procedure on the transfer is applied, is performed in the Mortgage Bureau (Land Registry) of the district of the Court of Peace of the real estate and substantiates the principles of publicity, specificity and priority, exists from the moment its recording becomes regular in the Book of Mortgage of the Land Registry of the district in which the real estate lies (article 1268 C.C.).

For the registration of the mortgage a written application to the Land Registrar is required (article 1303 C.C.), the title to be registered either in the original form or an official copy of it and more specifically as for the title by judicial decision or by private will an official copy of the judicial decision or of the notary public document correspondingly, is sufficient.

As for the title by law, a written certification is required, that is the debt due to delayed taxes or the property of someone as a parent or supervisor or trustee (the latter

by will) etc., should be certified in writing, two summaries the one of which is destined to be deposited to the same file to be bound in the same volume and the second is returned to the applicant following the registration with a certification attached on it regarding its realization and the summaries should contain the number, the year, the name of the Notary public, on a title by private will, the number, the year and the issuing Court in case of a title by a judicial decision, a same description of the documents on which the title by law is established.

If a mortgage or the prenotations of a mortgage are concerned, the names of the creditor and the debtor with a reference of all the particulars of their Identity Card, unless the identity card of the debtor is concluded from the title by law or by judicial decision if the recording is performed by virtue of them, a description of the real estate, the title of ownership of the debtor, the insured amount (capital, interest, expenses), the maturity time of the debt and the signature of a Notary Public if a title by free will is concerned, the signature of the attorney at law, if a title by judicial decision is concerned or the signature of the creditor for titles by law and the documents justifying the application or the registration or the relevant evidence (article 1307 C.C.) such as e.g. the copy of the power of attorney that legitimizes the applicant to register a mortgage in favor of the beneficiary of the claim etc.

#### **7.2.5. TIME AND COSTS**

The time required for the registration of a mortgage is one (1) day. Should it coincide with a large influx of mortgages and prenotations that have to be registered and the Land Registrar can not register them all in the Book of mortgages on the same day, he should draw up a report on the ones that have not been registered and to record them by the order of their presentation. The registration of these mortgages in the book is performed by the order of their presentation. The cost for the registration of the mortgage is 7.75/1000 on the amount of the insured claim.

For the conclusion of a mortgage of the amount of one hundred thousand (100.000) EUROS the costs amount to about eight thousand five hundred (8,500.00) EUROS that is the amount of one thousand three hundred (1300) EUROS in favor of the Law Fund (that is  $100,000 \times 1.30/100$ ), an amount of three thousand six hundred (3600) EUROS for a stamp in favor of the State, (that is  $100,000 \times 3.60/100$ ), for the compensation of Lawyers one thousand four hundred and fifty (1450.00) EUROS, for

the compensation of the Notary Public about one thousand two hundred and ninety (1290.00) EUROS and eight hundred and ten (810.00) EUROS for the Land Registry expenses.

For the constitution of the insurance of three hundred thousand (300,000) EUROS the costs amount to about twenty four thousand and two hundred (24,200) EUROS that is the amount of three thousand and nine hundred (3900.00) EUROS in favor of the Law Fund (that is  $300,000 \times 1.30/100$ ), an amount of ten thousand and eight hundred (10,800) EUROS for a stamp in favor of the State, (that is  $300,000 \times 3.60/100$ ), for the compensation of Lawyers three thousand four hundred and fifty (3450.00) EUROS, for the compensation of the Notary Public about three thousand and seven hundred (3,700.00) EUROS and two thousand three hundred and fifty (2350.00) EUROS for the Land Registry expenses.

The commensurate rights of the Land Registry on the amount of the mortgage is seven point seventy-five per thousand (7.75/1000) and we also estimate forty (40) EUROS for the certificates.

Are these costs determined by law?

Yes. Law 4114/1960 – Law 3050/11.09.2002 in favor of the Law Fund, Law 950/1979 Code of Lawyers, 2830/2000 Code of Notary Publics etc.

Who collects the taxes/ duties/ rights?

According to the stipulations of article 2 of Law 2157/1993, since 8.6.1993 the Specific Tax on Banking Transactions (E.Φ.T.E.) has been abolished for the loan or credit contracts.

Besides, whatsoever rights, duties, stamp cost and other expenses, are collected according to the afore mentioned.

### **7.2.3.a Conventional claims for mortgage**

The mortgage as a real securing of the claim of the borrower is applied with no discrimination on private and banking contracts and it is acquired under two provisions a) **title** that grants the right for a mortgage and b) registration of the title in the mortgage book.

The title is the legal reason, that grants the right for the registration of the mortgage and such are a) title given by law b) title given by a judicial decision and c) title given by private will.

#### **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?

Is the recording of the insurance in the Land Registry (or other Record) required? If so which are the data that will have to be included in this registration?

Yes, for the acquirement of a Mortgage a title that grants the right to a mortgage and registration in the Mortgage Book is required (article 1260 C.C.) The registration regarding which article 791 Code of Civil Procedure on the transfer is applied, is performed in the Mortgage Bureau (Land Registry) of the district of the Court of Peace of the real estate and substantiates the principles of publicity, specificity and priority, exists from the moment its recording becomes regular in the Book of Mortgage of the Land Registry of the district in which the real estate lies (article 1268 C.C.).

For the registration of the mortgage a written application to the Land Registrar is required (article 1303 C.C.), the title to be registered either in the original form or an official copy of it and more specifically as for the title by judicial decision or by private will an official copy of the judicial decision or of the notary public document correspondingly, is sufficient.

As for the title by law, a written certification is required, that is the debt due to delayed taxes or the property of someone as a parent or supervisor or trustee (the latter by will) etc., should be certified in writing, two summaries the one of which is destined to be deposited to the same file to be bound in the same volume and the second is returned to the applicant following the registration with a certification attached on it regarding its realization and the summaries should contain the number, the year, the name of the Notary public, on a title by private will, the number, the year and the issuing Court in case of a title by a judicial decision, a same description of the documents on which the title by law is established.

If a mortgage or the prenotations of a mortgage are concerned, the names of the creditor and the debtor with a reference of all the particulars of their Identity Card, unless the identity card of the debtor is concluded from the title by law or by judicial decision if the recording is performed by virtue of them, a description of the real estate, the title of ownership of the debtor, the insured amount (capital, interest, expenses), the maturity time of the debt and the signature of a Notary Public if a title by free will is concerned, the signature of the attorney at law, if a title by judicial decision is concerned or the signature of the creditor for titles by law and the documents justifying the application or the registration or the relevant evidence (article 1307 C.C.) such as e.g. the copy of the power of attorney that legitimizes the applicant to register a mortgage in favor of the beneficiary of the claim etc.

#### **7.2.5. TIME AND COSTS**

The time required for the registration of a mortgage is one (1) day. Should it coincide with a large influx of mortgages and prenotations that have to be registered and the Land Registrar can not register them all in the Book of mortgages on the same day, he should draw up a report on the ones that have not been registered and to record them by the order of their presentation. The registration of these mortgages in the book is performed by the order of their presentation. The cost for the registration of the mortgage is 7.75/1000 on the amount of the insured claim.

For the conclusion of a mortgage of the amount of one hundred thousand (100.000) EUROS the costs amount to about eight thousand five hundred (8,500.00) EUROS that is the amount of one thousand three hundred (1300) EUROS in favor of the Law Fund (that is  $100,000 \times 1.30/100$ ), an amount of three thousand six hundred (3600) EUROS for a stamp in favor of the State, (that is  $100,000 \times 3.60/100$ ), for the compensation of Lawyers one thousand four hundred and fifty (1450.00) EUROS, for the compensation of the Notary Public about one thousand two hundred and ninety (1290.00) EUROS and eight hundred and ten (810.00) EUROS for the Land Registry expenses.

For the constitution of the insurance of three hundred thousand (300,000) EUROS the costs amount to about twenty four thousand and two hundred (24,200) EUROS that is the amount of three thousand and nine hundred (3900.00) EUROS in favor of the Law Fund (that is  $300,000 \times 1.30/100$ ), an amount of ten thousand and

eight hundred (10,800) EUROS for a stamp in favor of the State, (that is 300,000 X 3.60/100), for the compensation of Lawyers three thousand four hundred and fifty (3450.00) EUROS, for the compensation of the Notary Public about three thousand and seven hundred (3,700.00) EUROS and two thousand three hundred and fifty (2350.00) EUROS for the Land Registry expenses.

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Are these costs determined by law?

Yes. Law 4114/1960 – Law 3050/11.09.2002 in favor of the Law Fund, Law 950/1979 Code of Lawyers, 2830/2000 Code of Notary Publics etc.

Who collects the taxes/ duties/ rights?

According to the stipulations of article 2 of Law 2157/1993, since 8.6.1993 the Specific Tax on Banking Transactions (E.Φ.T.E.) has been abolished for the loan or credit contracts.

Besides, whatsoever rights, duties, stamp cost and other expenses, are collected according to the afore mentioned.

#### 7.2.5. Time and Costs

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

The time required for the registration of a mortgage is one (1) day. Should it coincide with a large influx of mortgages and prenotations that have to be registered and the Land Registrar can not register them all in the Book of mortgages on the same day, he should draw up a report on the ones that have not been registered and to record them by the order of their presentation. The registration of these mortgages in the book is performed by the order of their presentation. The cost for the registration of the mortgage is 7.75/1000 on the amount of the insured claim.

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Who collects the taxes/ duties/ rights?

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Besides, whatsoever rights, duties, stamp cost and other expenses, are collected according to the afore mentioned.

## **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?

Lets us assume that the loan contract is null. How does this affect the mortgage –assuming that all the other requirements are fulfilled for the conclusion of a mortgage?

The registration of the mortgage is invalid because the loan contract is null. The mortgage is a right in rem on a foreign (as for the creditor) real estate for the ensuring of the claim of the creditor with the preferential satisfaction of him by the object. It is a right of value or exploitation. The right to a mortgage is an adjunctive right because it exists in favor of a certain valid claim and an indivisible right. Therefore according to article 1329 sec. 3 C.C., the registration of the Mortgage is invalid if it as performed on the basis of an invalid title.

The invalidity is ordered by means of a judicial decision (article 159 C.C. a law act in which the formal outline that was determined by the parties was not abided by, is in case of dispute invalid).

### **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?

Let us assume that the debtor – consumer has a statutory right to withdraw from the loan contract. The debtor exerts this right of his after the mortgage on the real estate has already been concluded. This would have been possible if the bank had not informed the debtor properly in relevance with the right for withdrawal and consequently the withdrawal date has not expired.

Beyond doubt, someone cannot overlook the legislative regulation of many credit contracts and its catalytic importance on the confrontation of various issues. This may and should be taken into account in principle. However since there definitely are gaps, these may occasionally be completed by a reference to the general principles of the unified theory on credit contracts in the context of proportional law.

The loan may be concluded for a return or without return, with interest or without interest. The bank has the ability to grant loans plain or amortization loans which are secured by means of a mortgage and the loan contract and the mortgaged insurance of it is performed either by a direct provision of the loan, according to essential law, that is with the relevant stipulations of the C.C., or by a recognizance for the grant of the loan, according to the relevant stipulations of the L.D. / 17/7-13.08.1923 “on specific stipulations on societies anonymes”.

The drawing up of the loan contract is performed by means of a private document. This document of the mortgaged loan includes the terms of the loan and the grant of the mortgage without the payment of money immediately. This mortgage ensures the loan from the day of its registration irrespective of the time of payment of the money to the borrower by the bank.

Following the registration of the mortgage, the bank pays the money. In this case a plain notary public instrument is drawn up for the withdrawal of the loan. If the bank following the conclusion of the loan does not pay the money and refuses to consent to the release of the mortgage, this is released by means of a judicial decision, according to the procedure of interim measures.

Therefore also in the case that the debtor is proven to have a legal right to withdraw from the loan contract and the mortgage continues to exist on his real estate, he has the right to demand the amortization of the mortgage by the waiver of the creditor (article 1318 sec. 2 C.C.).

The waiver from the mortgage is performed according to the article 1319 of the C.C. by a unilateral declaration in front of the notary public that this waiver also does not refute the contractual action against whomsoever is liable.

### 7.3.3. Changing the secured debt

- The debtor has repaid the loan for which the mortgage was granted. Now, he applies for another loan. Can the old mortgage be used to secure also the new loan (and if so, under which conditions)? Or is it necessary to set up a new mortgage?
- Let us assume that 30% of the mortgage loan have been repaid. Now, the mortgagee wants to take up another loan for his business, amounting to 25% of the old loan, but with a much higher annual amortisation and a different interest rate. Can the “free” part of the old mortgage be used to secure this loan? What has to be done for this?
- Let us assume that the debtor has agreed on a loan secured by a mortgage. However, the house to be financed is not yet build, but its completion has been agreed upon as a condition for the disbursal of the loan. Therefore, the debtors wants to take up an interim loan from another bank. Can the mortgage be used to secure this interim loan until it is replaced by the final mortgage? How can this happen?
- The bank and the mortgagor have agreed on a mortgage loan for a five year term at a fixed interest rate. Now, this period is over, and both sides want to agree on a new loan for another five years, but at a different interest rate. Can the old mortgage secure the new loan?
- What if in the last example the mortgagee wants the new loan from another bank? Could the old mortgage be used for the new loan? If yes, what steps need to be taken? Is the consent of the old bank necessary?
- What if the new loan is not designed to finance a property but a car or the mortgagee’s company and is subject to different conditions, e.g. a higher interest rate and a higher amortisation?
- The mortgagee runs a business and is in permanent need for credit. He agrees with his bank on a maximum credit line, which is used for different loans. Can this credit line be secured by a mortgage? Are there special forms of mortgages for it?

The mortgage as well as the prenotation is an indivisible right (article 1281 C.C.). The debtor who has paid in full the loan on which the mortgage had been concluded, granting that he has paid the loan in full, can not use the old mortgage to cover a new loan because each loan contract covers a certain amount of loan and certainly the mortgage that is registered on the real estate concerns a specific loan contract.

The only case in which the old mortgage could cover the new loan contract is that if the value of the mortgaged real estate is larger than the amount of the loan and it is concluded that the mortgaged real estate is of greater value than the amount of the

loan so as to provide the required insurance to the Bank (Banking Law By Spyros Psihomanis).

The mortgage consists as afore mentioned an adjunctive right, because it exists only in favor of a valid claim, as well as an indivisible right. The registration is always performed for a specific amount of money (mortgage limit) article 1269 sec. 1 C.C. If the title that orders the registration of the mortgage does not include a specific amount, the party demanding the registration of the mortgage should determine the approximate amount.

The debtor may demand, if it is proved a posteriori that the amount that is due is lower than the actual one, for the mortgage to be reduced to the real amount. And according to article 436 C.C. the liability is released if it is replaced by means of a contract and with the aim of abolishment, with a new liability (renewal), which includes either the same parties or another debtor or another creditor.

In case of a renewal the guarantors, the pledges or the mortgages of the previous liability are reserved in favor of the new one, only following a consent of the guarantor or the owner of the mortgaged or the object that has been mortgaged, the debtor or a third party (article 439 C.C.).

The original mortgage may not be used in another loan. A loan contract covers a mortgage on one or more real estate until the debt is secured. According to the principle of specificity article 1306 C.C., the determination of the real estates well as of the secured by mortgage claim must be clarified in regard to its kind, place and boundaries, because according to article 1269 C.C. the registration of the mortgage is always performed for a specific amount of money.

In the case at issue the already debtor who can not withdraw his money prior to the completion of his house, may address another Bank, to request for a temporary loan, for the withdrawal of which the completion of the house is not required, to register a second mortgage, if of course, the bank accepts such a case and if the value of the real estate also covers the second mortgage.

The debtor undertakes the responsibility to grant in favor of the bank security on its demands of whatsoever nature that result from the first in order mortgage for the amount that is recorded in the additional deed, on the amount the debtor purchased using this loan or on another under his ownership, under the prerequisite the afore

mentioned real estate is of adequate value and the tiles of which are according to his promise, in order.

The debtor undertakes the responsibility prior or after the withdrawal of the loan and in case of a transfer of the housing loan form another bank and at the discretion of the Bank or in cases of a modification of the housing loan to present himself as soon as he is summoned, in front of any competent court, Land Registry, Cadastre Office or whatsoever other authority or service and to take whatsoever action is necessary for the registration of the mortgage, its modification and the registration of its modification in the border of the Mortgage Book of the competent Land Registry.

According to the 373/18/05.11.87 decision of the Monetary Crediting issues of the Directorate of Fiscal Policy and Banking Procedures of the Bank of Greece, as this is valid today, the assignment – undertaking of loans or credits with an open (debit and credit) account that has been granted to enterprises of whatsoever nature, is permitted (Legal applications in Banking Practice – by Mihalis Aggelakis).

If the bank concludes that the amount of the loan was used by the debtor for a purpose other than or in violation of the terms of the loan contract, it is entitled to rescind it and to claim the immediate return of the loan that has been granted, in its total, or to deny in case of a part-payment, the payment of the remaining amount.

A credit is an agreement by which one of the two parties has the obligation to temporarily enhance the purchasing power of the other. Therefore a credit is a contract by which a creditor transfers to the other debtor a capital to be used by him for a limited amount of time and the debtor undertakes the responsibility to pay it back by the expiration of the time limit.

The credit refers only to a financial support of the other contracting party while the loan refers to other replaceable objects, that are usually determined in transactions by their number, weights and measures. The credit may be immediate such as e.g. credit with stocks as a collateral, or indirect such as e.g. grant of a letter of credit. The loan consists a credit only in case it's a monetary one. The grant of a credit has the intense character of personal trust between the creditor and the debtor.

Consequently the credit is not confiscated, is not transferred and it closes when the debtor passes away or is bankrupt. The afore mentioned debtor may open an open debit and credit account. Such an account exists between two or more parties, one of

which at least is a tradesman, and who act in opposing interests, may lead to the realization of many mutual between them provisions in a successive and alternating manner.

The contracting parties agree that the mutual credits that may result from the transactions are adjusted separately but they will enter a uniform account, in which they will lose their individuality and they will be depicted by means of credit or debit funds, to end up at the closing of the account in only one remaining balance. This relation may exist irrespective of the fact that there might arise sequential demands either in favor of one or in favor of the other of the contracting parties.

The credit contract with an open (credit and debit) account belongs to the durable contracts. The security of the claim that has been included in an open debit and credit account, whether it was granted by the contracting party or by a third party, is valid for the remaining amount and up to the amount that it ensures. (Article 164 **EMIN**).

There is a letter of credit that consists a promise on behalf of the bank for the payment of a certain amount on first demand of the person, to whom the letter is addressed (recipient). Irrespective of the defectiveness or the luck in general of the basic relation between the person in favor of whom the letter was issued (merit relation) and likewise of the relation between the and its assignor (in favor of whom the letter was issued or a third party).

The significance of the contract of theoretical recognizance or acknowledgment of debt consists of the fact that it originates an obligation irrespective of the cause of the debt (article 873 C.C.) and therefore the absence or defectiveness of the cause does not affect the validity of the contract. In the letters of guarantee there does not seem to exist a will of the contracting parties to render the liability without cause.

All the more so, on the contrary the reference of the cause in the text of the letter and the omission at the same time of setting a clause with the context of the will to establish a theoretical liability leads by interpretation and by contradistinction to C.C. 873 par.2, that is the provision of a causative legal act.

However even if the theoretical recognizance of debt, the exclusion of appeals, that consist the context of the letters of credit, will then concern the lawsuit and the appeals on unjustified collection of wealth on behalf of the bank against the recipient

of the letter, which however one way or another can not be performed by the bank, given that the stipulations of C.C., 904 are not met.

That is the collection of wealth of the recipient of the letter does not arise from the property or on detriment of the bank, but of its customer who is always implicated in a reductive manner in the payment of the amount, which the bank pays to the recipient of the letter.

From this reason also then, it appears that the theoretical recognizance of debt does not lie within the frame of the pursuance of the parties – because otherwise they would not proceed by using excessive arguments to the exclusion of appeals – however it does not also consort with the data on relations in letters of credit, where the bank by paying has a recourse against its client and only him, a lawsuit for unjustified collection of wealth against the recipient of the letter.

It can be covered by a mortgage, because according to article 1265 C.C. the right for the registration of a mortgage is granted to the debtor or by a third party in favor of the debtor, however the person who grants the mortgage is required to be the owner of the real estate.

Article 1302 C.C. stipulates that whomsoever may demand the registration of a mortgage for him, hence the registration of a mortgage may be demanded by the borrower in favor of him. Indeed, he could set the mortgage at stock during the negotiations with various banks and a pre-existing mortgage may be transferred to a posterior loan, provided that this is accepted by the bank that will grant the loan.

#### **7.2.5.**

The prenotation of the mortgage is possible when the creditor has a demand against the debtor and there is an imminent danger or emergency (article 681 sec. 1, Code of Civil Procedure), that is the risk that the debtor will sell off his real estate or to register other mortgages on it and the creditor does not have anything else (by law or by judicial decision or by private will) to register a mortgage on it in order to prevent his damage due to the debtor's disposition, he may according to article 56.1 Intr. L. Code of Civil Procedure, following a judicial decision, following an order of payment of a fiscal claim and for the amount to be paid that is determined in it, register a prenotation of a mortgage on it, to ensure his claim, provided that this is probable in whatsoever manner.

The claim may be in proviso or on notice or future, monetary or able to be valued in money. By exception if the prenotation of a mortgage is performed by virtue of the order of payment of a fiscal demand, the demand must be mature and not depend on proviso or maturation or consideration. It should be noted that the demand cannot turn against third parties but only against the person on behalf of whom the prenotation of the mortgage is requested.

The judicial decision that orders the registration of the prenotation of the mortgage according to article 706 Code of Civil Procedure, must also stipulate the ensured amount. Other than that the object of the prenotation of the mortgage is the fact that it consists the object of the mortgage.

The registration of the prenotation is performed in the same manner with the registration of the mortgage. Therefore all the data that are required for the registration of the mortgage (applications, summaries etc.) are also required for it, because according to article 1276 C.C. the prenotation of the mortgage is registered in the same manner with the mortgage (in the fourth column of the Mortgage Book) with the reference that a prenotation is conducted.

The registration of the prenotation grants according to article 1277 C.C., only the right of preference for the acquirement of a mortgage, which will be modified to a mortgage when the in proviso clause under which it lies, will be met, that is at the issue of a final decision on the demand. By deviation of all that is valid on the satisfaction of an in proviso clause, the acquirement of the mortgage does not result ipso facto when the final decision is issued on the demand but following the alteration of the prenotation to a mortgage, which has to be performed in accordance with article 56 Intr. L. Code of Civil Procedure, within ninety days from the issue of a final decision on the demand.

The person competent and responsible for the alteration of the prenotation to a mortgage is the Land Registrar, who has the right to deny the prenotation in the Mortgage Book if the afore prerequisites are absent, because without them the prenotation is invalid.

If there should prior to the alteration of the prenotation to a mortgage, proceed a distraint on the real estate by the proceeding of another creditor, the creditor who performed the prenotation does not loose his right, which results from the registration of

the prenotation as an interim measure, but the claim in favor of which the prenotation has been registered is ranked by chance (article 1007 subsec. 3 sec.1 Code of Civil Procedure), while the mortgage enjoys special privileges according to article 976 Code of Civil Procedure and therefore the prenotation of the mortgage does by no means affect the mortgage.

In our days the use of a computer and of the Internet in its widest context consist a necessary tool for every scientist, every professional, every Notary Public, every Land Registry. The computerization of the procedures and of the documents, as a technical support of the Land Registry, does by all means contribute to the acceleration of the procedures.

The use, however of the Internet, beside its contemporary significance as a tool of immediacy and speed in information, if the expedience of its use and operation in Public Services that supply personal data is not established with clarity, we consider that at least for the time being will not favor the acceleration of the procedures.

#### **7.3.4 Independent/abstract promise of payment**

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

#### **7.4 Enforcement and other rights of the bank**

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

- Please describe the main steps of the enforcement procedure!
- Is a court decision necessary to render the mortgage enforceable?
- How long does the enforcement procedure regularly take before the bank receives the proceeds of the mortgage? Can the debtor slow down the procedure, especially if the mortgage is on his residential home? Can the bank act in receivership in the meantime (*Zwangsverwaltung*)?
- Can the bank sell the real estate without foreclosure, i.e. without a court decision and a compulsory auction? Can the owner grant the bank the right to purchase or the power

to sell the property by means of a normal real estate sales contract (in the event that the loan is not repaid)?

- Are there any instruments for public administration or courts to stop or suspend foreclosure for social or economic reasons?
- What happens in the event that insolvency procedures over the debtor's estate are initiated? Will the foreclosure procedure be stopped? How are the mortgagee's rights protected in an insolvency procedure?

## **7.5 Overriding interests and priority**

### **7.5.1. Distribution of proceeds**

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

### **7.5.2. Overriding interests**

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

**Note:** Such charges might comprise of:

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

## **7.6 Scope of the mortgage**

### **7.6.1. Buildings**

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

### **7.6.2. Machinery**

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

### **7.6.3. Insurance**

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

### **7.7.4. Right to redeem**

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

### **7.7.5. Redemption after foreclosure**

- May the mortgagor redeem the mortgage even after foreclosure?

## 7.8 Security granted by a third party

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

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

## 7.9 Plurality of mortgages

- If the owner has already set up (and registered) a mortgage and then wants to set up a second mortgage for another bank, can he do so without the consent of the first bank? Would the holder of the second mortgage have a direct claim against the owner? What would happen if he wanted to execute the mortgage? Could he do so without the consent of the holder of the first mortgage? What would be the consequences for the first mortgage? Would it become due – or would the property be foreclosed – auctioned with the first mortgage on it?
- What happens to the second ranking mortgage, if the loan of the first mortgage has been repaid completely or partially? Does the second mortgage get a better position or even the first rank? (Or does the owner get the right on the position for the refunded parts of the first mortgage, and the second mortgage remains at its position?)
- Can mortgages be of equal ranking? How can this be effected? (Only by applying for registration on the same day or even in the same minute or by a later change of the ranking?)
- Can the ranks of mortgages be exchanged or altered by agreement of the parties involved? Please describe the necessary steps.

## 7.10 Several properties

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

## 7.11 Transfer of the mortgage

### 7.11.1. Transfer of the mortgage in general

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

- Can bank 1 transfer the mortgage without transferring also the secured claim (i.e. the claim arising out of the loan contract)? If not, are there any other options for bank 1 to use the mortgage as collateral for its debt with bank 2?
- Does the transfer have to be registered? (Is the registration necessary for the transfer to be valid or to be opposable against third parties? This question applies particularly in the insolvency of the transferring bank (bank 1).) What other ways exist to make the transfer insolvency-proof?
- May the debtor or the land owner object to the transfer of the mortgage? Does the debtor or the land owner have to be informed about the transfer?
- What are the approximate costs for the transfer of a mortgage – and the time required?

- Let us assume that bank 1 does not have a valid claim (as in question 7.3.1). If it transfers the mortgage to bank 2, can the latter still acquire the mortgage in good faith?
- Let us assume that there is a valid claim, but the setting up of the mortgage is invalid. Can bank 2 still acquire the mortgage in good faith?
- If bank 1 has transferred the mortgage to bank 2, but bank 1 is still registered, how can bank 2 enforce the mortgage? (Or does bank 1 have to enforce the mortgage?)
- If bank 1 has transferred the mortgage to bank 2, but bank 1 is still registered, whose consent is necessary for any changes in the registration (the consent of bank 1 or of bank 2)?

#### **7.11.2. Transfer to more than one creditor**

- Typically the bank may want to split up and syndicate the loan. Can the loan and the mortgage be split up and only a portion be transferred to bank 2? Can portions be transferred to different banks? Could those banks transfer the loans and the mortgage(s) to other banks later?

#### **7.11.3. Administration of the mortgage by a trustee or fiduciary**

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

### **7.12 Conflict of Laws Issues**

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

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

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

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

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

#### **7.12.3. Bank loan taken in a third EU-country**

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

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

**Note:** The right of a debtor to secure debt with a mortgage has been dealt with by the ECJ in the *Trummer*<sup>3</sup> case, which is a fundamental decision on the relationship of the basic freedoms and real sureties. In this case, an Austrian prohibition on registering mortgages in foreign currencies was at stake. In its decision, the ECJ first confirmed the extension of the scope of the free circulation of capital to mortgages, as these “represent the classic method of securing a

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<sup>3</sup> Case C-222/97, *Trummer and Mayer*, ECR 1999, I-1661; confirmed in case C-464/98, *Stefan*.

loan linked to a sale of real property”.<sup>4</sup> Then, the Court found a violation of the freedom right:

“The effect of national rules such as those at issue in the main proceedings is to weaken the link between the debt to be secured, payable in the currency of another Member State, and the mortgage, whose value may, as a result of subsequent currency exchange fluctuations, come to be lower than that of the debt to be secured. This can only reduce the effectiveness of such a security, and thus its attractiveness. Consequently, those rules are liable to dissuade the parties concerned from denominating a debt in the currency of another Member State, and may thus deprive them of a right which constitutes a component element of the free movement of capital and payments.”<sup>5</sup>

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

“It should be noted that a Member State is entitled to take the necessary measures to ensure that the mortgage system clearly and transparently prescribes the respective rights of mortgagees *inter se*, as well as the rights of mortgagees as a whole *vis-à-vis* other creditors. Since the mortgage system is governed by the law of the State in which the mortgaged property is located, it is the law of that State which determines the means by which the attainment of that objective is to be ensured.”<sup>6</sup>

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

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

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<sup>4</sup> ECJ, at no. 23.

<sup>5</sup> ECJ, at no. 26.

<sup>6</sup> ECJ, at no. 30.

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## **8. Bibliography**

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

### **8.1 Statutes cited**

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

### **8.2 General Literature**

### **8.3 Manuals and Formbooks**

### **8.4 Real Property Law and Land Registration**

### **8.5 Sales Contract**

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

### **8.7 Mortgages**

### **8.8 Private International Law**

**Note:**

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

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

BeurkG – *Beurkundungsgesetz* (Notarial Procedure Law) -

[http://www.bnotk.de/texte\\_berufsrecht/keurkg/keurkundungsgesetz\\_portal.htm](http://www.bnotk.de/texte_berufsrecht/keurkg/keurkundungsgesetz_portal.htm)

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

BGB – *Bürgerliches Gesetzbuch* (Civil Code) -

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

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

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

BNotO – *Bundesnotarordnung* (Federal Notary Law)

[http://www.bnotk.de/texte\\_berufsrecht/bnoto/bundesnotarordnung\\_portal.htm](http://www.bnotk.de/texte_berufsrecht/bnoto/bundesnotarordnung_portal.htm)

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

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

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

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

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

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

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

GBO - *Grundbuchordnung* (Land Register Law) -

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

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

[http://bundesrecht.juris.de/bundesrecht/gewo\\_34cdv/index.html](http://bundesrecht.juris.de/bundesrecht/gewo_34cdv/index.html)

RpflG - *Rechtspflegergesetz* (Law on Registrars) -

[http://bundesrecht.juris.de/bundesrecht/rpflg\\_1969/](http://bundesrecht.juris.de/bundesrecht/rpflg_1969/)

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

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

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

[http://bundesrecht.juris.de/bundesrecht/GESAMT\\_index.html](http://bundesrecht.juris.de/bundesrecht/GESAMT_index.html)

## **Annex: More Suggestions about how to answer to the Questionnaire**

The following suggestions taken from the Website of the Trento Project (<http://www.jus.unitn.it/dsg/common-core1/approach.html#5>) may be used loosely as guidelines. They are not to be respected strictly, but may serve for purposes of illustration.

### **General Guidelines**

- (a) As to each subtopic as a whole, the most essential literature should be indicated.
- (b) References to sources (legislation, case law, scholarly writings, etc.) should remain in proportion to the importance of that source within the legal system.
- (c) Although the main task is to provide answers about the legal system(s) one represents in the working group, remarks and information involving other systems in a comparison are welcome.
- (d) Not every question, or subquestion, is to be answered as thoroughly as indicated below. Also, it will often be possible to group together answers on level II or III for different questions (or subquestions).

### **Level I**

#### **Operative Rules**

indicate:

- 1) how the case would be solved by case law in the given legal system;
- 2) whether this is or not the solution given by the other legal formants, i.e., (according to a prima facie interpretation of legislation, primary and/or delegated; legal doctrine; custom and usage)
- 3) whether all these formants are concordant, both from an internal point of view (indicate minority doctrines, including dissenting opinions in leading cases, opposite opinions in scholarly writings, etc.), and from a diachronic point of view (whether the various solutions are recent achievements or they are identical in the past);
- 4) if appropriate in the legal system, also the level of facticity or juridicity of the solution, i.e, whether the solution is considered to be a question of fact or a question of law (see Schlesinger, Formation of Contracts, Introduction, II (5) (c) (bb), p. 56) -- this is in order not only to determine the degree to which the solution can be enforced by supreme courts against lower courts, but also the impact of judicial precedent on the matters implied by the solution.

### **Level II.**

#### **Descriptive Formants**

Indicate the reasons for which lawyers feel obliged to give the solution(s) mentioned in Level I, and where appropriate, the different reasons for the different approaches and formants -- including, for example:

- 1) consistency/inconsistency of the solution with specific and general legislative pro-

visions, with general principles (traditional as well as emerging ones), and with constitutional provisions directly affecting the subject; is the solution considered a historical accident? are there any reform proposals?

- 2) whether the solution is dependent on legal rules and/or institutions outside the private law, such as procedural institutions (including rules of evidence), administrative and constitutional (different than those at Point 1, supra) provisions;
- 3) how the solution is dogmatically explained; how do/must the lawyers reason in order to come to that solution; how do they use legal reasoning to eliminate contraindications which could lead to a different solution.

### **Level III.**

#### **Metalegal Formants**

Indicate the other elements affecting the solution(s) mentioned at Level I, such as policy considerations, economic and/or social factors, social context and values, and the structure of legal process (organization of courts, administrative structure, etc).