

Italy

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Real Property Law – Introduction

1.1 General Features and Short History

Title to property (including title to real property) is categorised under Italian law among the "property rights" (*iura in re*). Among the rights falling within that category, title is that which grants its holder the greatest range of powers and facilities. Under the traditional analysis, there are nine property rights: title, *superficie* (title to a building whose owner does not own the land upon which it is built), usufruct, use, possession, *enfiteusi* (leases obliging the tenant to make improvements, akin to a building lease), easements, pledges and mortgages¹.

The concept of title as a right over a particular "tangible item" (which does not go back to Roman law, under which there was a broader concept of *actiones in rem*) is considered a direct opposite of an "entitlement", due from another person, which are known also as "personal rights" (such as, for example, those due to a landlord). Under the traditional teaching, the specifics that characterise property rights² are the following: (a) "immediatezza", that is the power of the person with the right to satisfy its requirements and interests over the asset without the assistance of others; (b) "assolutezza", that is, the duty of all citizens not to impede the person with the right from exercising their powers over the asset, subject to their right to bring actions through the courts (the effectiveness *erga omnes* of the property right; and (c) "inerenza", that is, the power to have the right maintained and enforced against anyone with rights over the item, including where it has been assigned (*ius sequelae*)³.

The basic rules of property ownership (in particular, for real property) are contained in the Civil Code adopted in 1942⁴ and the category of rights was subsequently recognised as fundamental in the Constitution of 1948, in its article 42⁵. In accordance with the hierarchy among the sources of legislation, this ensures the greatest possible protection to property rights, albeit subject to the limits that article 42 of the Constitution provides and that have meant a significant number of difficulties in the application of the law. For a law or secondary legislation to impinge upon a right of property, it must be of the same status as the law on which the right is based. Naturally, this does not mean that a law may not impose general rules and leave the detail of the provisions to secondary legislation, but the primary source remains the law. This leads to the conclusion also that, subject to the remarks herein, that the rules governing title (including title to real property) are, by and large,

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¹ See also in this text n. 1.3. The doctrine also refers to other rights which may be characterised as "ordinary" property rights as the same are envisaged and regulated by law: such rights include the right of the purchaser in a sale where property rights are reserved to the seller (art. 1523 et seq. of the Italian Civil Code). See BIANCA, *La vendita e la permuta*, in *Trattato di diritto civile italiano*, edited by Vassalli, Turin, 1993, p. 586-587.

² It should be noted that recently the specifics characterising property rights have been revisited as it has been shown that certain of these specifics are not peculiar to property rights and not all property rights present the characteristics cited.

³ One example would be the "easement of passage" over land which continues to exist even in the event that the ownership of the land is transferred to a third party. For further discussion see COMPORTI, *Diritti reali in generale*, in *Trattato di diritto civile e commerciale*, edited by Cicu, Messineo and Mengoni, updated by Schlesinger, volume VIII, tome I, Milan, 1980.

⁴ *The Italian Civil Code* translated by Mario Beltramo, Giovanni E. Longo, John Henry Merryman, New revised and updated edition by Susanna Beltramo, 2003, Binder and, in Italian, DI MAJO, *Codice civile con la Costituzione, i Trattati U.E. e C.E. e le principali norme complementari*, Milan, 2004, as well as www.notarlex.it, where many of the provisions cited herein may be found.

⁵ Art. 42 of the Italian Constitution: 1. Property ownership is either public or private. Assets belong to the State, to entities or to private individuals. 2. Private property ownership is recognised and guaranteed by law, which regulates the purchase and the enjoyment of property as well as the limits of the same to ensure the fulfillment of its social purpose and its accessibility to all (*omissis*); see also DI MAJO, *Codice civile*, cited above and www.notarlex.it. For a traditional analysis of this article, see GALGANO-RODOTA', *Rapporti economici*, II, in *Commentario della Costituzione* edited by Branca, Bologna-Rome, 1982, p. 69 et seq.

consistent nationwide. There are obviously exceptions, that flow from Italy's regional structure⁶ but these regard not the concept of title (including real title) but typically, its limits and certain restrictions in its exercise. This will be discussed in more detail below.

Even if a study of title to real property in Italy must begin from the provisions of the Constitution and the Civil Code, as the leading authors have noted in their discussion of the development of the inter-relationship between the Civil Code and the secondary legislation⁷, there are a great number of "special" laws that regard this sector. You could say that the hard core of the rules governing title to real property⁸ lies within the Civil Code but also, and in particular, beyond it, because of the many fundamental rules that must be considered also in relation to the different assets to which title may be held (some of which come from European Community law). Partly in consequence thereof, as has been astutely remarked⁹, there is one set of rules for title to real property, one for title to personal property, another for title to agricultural land, and yet another for buildings, consumer goods and so on.

One interesting example of this can be found in recent legislation on the "construction amnesty"¹⁰ (for breaches of planning and building requirements, on payment of a fine or other sanction). In order to fight and punish (and also theoretically prevent) breaches of the planning and building regulations, and control the expansion of urban areas, a new law was passed, the third in the last twenty years¹¹. After a battle between the state and the regions, and the ruling of the Constitutional Court on the matter, it has emerged more clearly that it is the state that lays down the basic rules for the construction sector, and the criminal and procedural rules governing sales and the alienation of the assets, while the regions are entitled to establish the specific rules which determine, in an amnesty of this kind, which buildings may be left to stand and which must be demolished (and the administrative sanctions that may be imposed) in order to protect the public interest and the environment¹².

This is an example of "special legislation" that regards title to buildings, given that it is laid down in legislation outside the Civil Code, connected with the principles of the Constitution (article 42, and also article 117) and with effect for the whole country, subject to regional prerogatives. and also the "New Cultural Assets Code"¹³ and Law No. 210 of 21 July 2004¹⁴ on safeguards for purchasers under agreements for the sale of properties under construction, one of the most recent and important developments in the law of real property in Italy.

Neither the Constitution nor the Civil Code defines title to property (and in particular, real property) in objective terms. On the contrary, article 832 of the Civil Code (in Book Three, on the law of property) deals with the powers of the titleholder, but does so in subjective terms (even if

⁶ Art. 117 of the Italian Constitution, also in DI MAJO, *Codice civile*, cited above and www.notarlex.it.

⁷ IRTI, *L'età della decodificazione*, Milan, 1999.

⁸ Clearly this also extends to moveable property. In the text reference will be made essentially to real property but many general analyses also apply to moveable property.

⁹ PUGLIATTI, *La proprietà e le proprietà*, in *La proprietà nel nuovo diritto*, Milan, 1964; RODOTA', *Il terribile diritto. Studi sulla proprietà privata*, Bologna, 1981.

¹⁰ D.L. 30-9-2003 n. 269 (in G.U.R.I. n. 229/2003) and related L. 24/11/2003 n. 326 (in G.U.R.I. n. 274/2003) modified by art. 3 L. 350/2003; Constitutional Court n. 196-197-198/2004; see also D.L. 168/04, converted by law 191/2004; the above also available at www.notarlex.it.

¹¹ The above-mentioned laws are: L. 47/1985 (on the so-called "first building amnesty") and laws 724/1994 and 662/1996 ("second amnesty"). On the latter, see A.A.V.V., *Condono Edilizio, circolari, studi e riflessioni del Notariato*, Milan, 1999 (certain studies are also available on www.notarlex.it and www.notariato.it under studies and analyses); RIZZI, *Testo Unico, nuovo condono edilizio e attività negoziale*, Milan, 2004 and CASU-RAITI, *Condono edilizio e attività negoziale*, Milan 1999.

¹² See 3.7.1.

¹³ D. Lgs. N. 42/2004 (G.U.R.I. n. 45/2004), which combines and updates within a single text the regulations of the entire sector, available on www.notarlex.it where certain studies of the National Notaries' Council are available.

¹⁴ Published in "Gazzetta Ufficiale della Repubblica Italiana" n. 189 of August 13, 2004; see also www.ipzs.it.

this does not reflect its title, Content of the Right)¹⁵. Naturally, however, a definition in objective, positive terms can be easily deduced. Thus title to property is the right fully and exclusively to enjoy and dispose of an item, both in law and in fact. The article must be considered together with (a) article 810 of the Civil Code, which supplies the legal concept of "assets"; (b) article 812 c.c. (Distinction as to property), which distinguishes between the various kinds of assets, and thus supplies the concept of real property, especially the land itself and similar items; (c) article 827 c.c. (Vacant immovable property), which imposes the rule under which real property which is not held by any person is the property of the State and thus, in a certain sense, that land must always have a titleholder; and (d) article 840 c.c. (Subsoil and space above soil)¹⁶. Based on these rules and the concepts they provide, one is able to say that title to real property provides the holder with: - a right of use (*ius utendi*), which includes the right to enjoy the fruit or profit (*ius fruendi*), a right of possession (*ius possidendi*), a right of exclusion (*ius prohibendi*)¹⁷, and a right of disposition (*ius disponendi*), which includes a right of destruction (*ius abutendi*)¹⁸. As articles 812 and 840 make readily clear, the central element to real property under Italian law is the *land* itself, together with items that are naturally or have been deliberately attached thereto¹⁹, and land and property includes not only the surface of the Earth but everything above and beneath it. Title to a parcel of land thus, generally speaking, extends to powers over the air space above and the ground below, down to the centre of the earth (*usque ad sidera, usque ad inferos*)²⁰. Together with the features of *iura in re* described above, property (including real property) displays two further characteristic features: - *indefeasibility*, since title also entitles the holder not to make use of the asset (even if title can be lost through usucaption (*usucapio*)²¹; *perpetuity*, because traditionally under Italian law, "temporary" title is an impossibility (and anything that is mooted to be such is in fact a right of a

¹⁵ Civil Code Art. 832 – Substance of the right – the owner has the right of enjoyment and availability of the property on a full and exclusive basis, within the limits and in compliance with the obligations set out by law”. The doctrine has highlighted the derivation from the definition set out in the *Code Napoleon* and, naturally, in the former Italian Civil Code of 1865. For an in-depth study of property rights GAMBARO, *Il diritto di proprietà*, in *Trattato di diritto civile e commerciale*, edited by Cicu, Messineo and Mengoni, revised by Schlesinger, volume VIII, tome II, Milan, 1995.

¹⁶ Art. 810 – Assets are the things which may be the object of rights; art. 812 1. Real property includes the groundsoil, springs and waterways, trees, buildings and other constructions, even if attached to the ground temporarily, and generally everything that is naturally or artificially attached to the ground. 2. Watermills, baths and other floating constructions are deemed real property when they are firmly attached to the shore or to the underwater bed on a permanent basis for purposes of their use. 3. All other goods are moveable; for other items see www.notarlex.it.

¹⁷ According with the concept of *jus in re*: see above.

¹⁸ Medieval authors used to combine all these powers in the notion "*ius utendi et abutendi*".

¹⁹ There are, of course, exceptions especially with respect to public property, but they do not alter the system.

²⁰ See previous note and, for a recent analysis, GALGANO *Diritto Civile e Commerciale*, I, Padova, 2004, p. 329 et seq. where the evolution in the relationship between property, air space, public power and new economic interests (telecommunications) is examined, as well as the traditional studies of SANTORO PASSARELLI, *Dottrine Generali del Diritto*, Naples, 1989, p. 56 and TORRENTE-SCHLESINGER, *Manuale di Diritto Privato*, Milan, 2004. See also the recent and interesting sentence of the Supreme Court, second civil suit, n. 22032/2004 (in *GUIDA AL DIRITTO*, n. 46, Milan, 2004 and which is summarised in the article by BRESCIANI, *Sopraelevazioni, indennità pesante*, in the newspaper *Il Sole 24 ore*, Wednesday 24 november 2004, n. 325, p. 27 - www.ilssole24ore.com), which discusses the relationship between the above-mentioned article 840 of the Italian Civil Code entitled "Underground and space above the ground" and article 1127 of the Italian Civil Code "Construction above the top floor of a building" and which provides for a right of indemnity to the owners of the apartments on the lower floors. In its examination of the right to elevate constructions and of the connected concept of the "air column" over the top floor of a building, the Supreme Court (with a partially new approach in defining the right to elevate) specifies that the space over the ground "is not a thing, is not an object but a simple means in which the object of a right is found: a necessary means for the existence and the exercise of the latter". The reference in many contracts to the "air column" should be interpreted not as ownership rights in the same but rather as "regulation of the right of elevation or surface" (respectively articles 1127 and 952 of the Italian Civil Code – on the latter issue see above in the text), and therefore as "manifestation of the intent to exercise the right of elevation, or to separate the exclusive ownership rights" of the terrace "from rights of *superficie*".

²¹ See Civil Code articles 1158 et seq..

different sort), although recent studies have put forward persuasive arguments for examples of *temporary (real) property*²².

1.2 Property and Estates

1.2.1 Estate versus Property

The nature of real property, as described briefly above, makes clear that, consistent with the teachings of Roman law, it is not possible for there to be a number of titleholders holding different title, i.e. for there to be different and opposing rights over the same item, even where they arise from different sources.²³ Naturally, this does not mean that title to property is an all-or-nothing proposition. We have already mentioned the property rights beyond simple title, and they are discussed further immediately below, but fundamentally they have only one source, the law, and there is coordination between title and other property rights, also with a view to resolving any conflict and to avoid watering down the importance of title. That said, it could be considered perfectly normal, to steal a common law concept, that there be a fee owner.

At the same time, the rights of feudal origin do not these days play a substantial role in the Italian land system, although in some regions (such as Latium) and, in particular for agricultural land, they still exist (and are known as *usi civici*) and can result in a great deal of difficulty on a transfer of title because they operate outside the registration system²⁴.

1.2.2 *Superficies solo cedit*

Title to a piece of land normally includes that to all the buildings erected on and indeed under the land in question. This is clearly stated in the Civil Code (articles 934 *et seq.*) which classifies it as *accessione* (the acquisition of ownership through the incorporation of a greater into a lesser thing), one of the forms of acquisition of title²⁵, which may be summarised in the expression *quidquid inaedificatur solo cedit* and is a consequence of the rule by which title extends vertically (article 840 of the Civil Code)²⁶. This means that all that is incorporated in the ground (above or below) becomes the property of the holder of the right over the ground, even if it were made by another and without the consent of the titleholder. Naturally, there are rules in places which seek to compensate the person who performed the construction.

Accessione is a natural consequence of title to the property and its "expansion" but the law²⁷ and private act may derogate. A typical exception is an agreement which establishes a right of *superficie*, one of the other rights over the property of others that is normally temporary²⁸. Even if this is one of the instruments available to private individuals (both in transactions with other private

²² For basic notions CERVELLI, *Diritti reali*, Milan, 2001.

²³ The typical example illustrating the difference between the civilian Italian system and the common law systems is the possibility of multiple ownership (to be distinguished from joint ownership which entails shared interests in the same proprietary right) and the trust – even though a recent analysis of this institution tends to ascribe the incompatibility to the concepts of the Italian legal system: LUPOLI, *Lettera a un Notaio curioso di trusts*", in *Rivista del Notariato*, 1996, pag. 343 e ss., LUPOLI, *Lettera a un Notaio conoscitore di trusts*", in *Rivista del Notariato* 2001, p. 1159 et seq. and LUPOLI, *Trust*", Milano, 2001.

²⁴ For a traditional discussion see Messineo, *Manuale di diritto civile e commerciale*, Milan, 1954, vol. II. parte I, p. 496 et seq. For a recent study see MARINELLI, *Gli usi civici*, in *Trattato di diritto civile e commerciale*, edited by Cicu, Messineo e Mengoni, revised by Schlesinger, volume XI, tome II, Milan, 2003. For a discussion of problems related to traffic circulation COMMISSIONE STUDI DEL CONSIGLIO NAZIONALE DEL NOTARIATO, *Commerciabilità dei terreni soggetti ad uso civico*, Studio n. 877, in www.notariato.it, under "Studi e approfondimenti - Diritto pubblico e amministrativo".

²⁵ For a list see art. 932 c.c. in www.notarlex.it e SALARIS, *L'acquisto della proprietà*, in *Trattato di diritto privato* edited by Rescigno, volume 7, Turin, 1982, p. 648 et seq..

²⁶ There are different types of *accessione* but in this study it is useful to consider that of "moveable to real property".

²⁷ See art. 975, 986, 1150 c.c. (www.notarlex.it).

²⁸ See art. 952 *et seq.* c.c. (www.notarlex.it) and *infra*.

individuals and with constructors), in a great number of cases rights of *superficie* are granted in relation to public residential construction, where housing is built with State contributions. Central and local government encourage the construction of housing following the acquisition of land in the public interest and the subsequent grant of 99-year rights of *superficie* over these to the constructors. Individual apartments are then sold on to the less well-off under public schemes.

It is difficult to say just how common the use of rights of *superficie* is, but certainly for a period up to the 1990's it was the most commonly used system in public residential housing²⁹. These days the public authorities are tending to explore other policy avenues to meet the housing demands of the less well-off.

1.3 Interests in Land

1.3.1. Numerus clausus

As mentioned above, (a) title to property falls within property rights, *iura in re*; (b) this concept is normally seen as in opposition to "personal rights", "rights of claim" and obligations; and (c) there are different kinds of property right. Continuing on this basis, it can be seen that property rights are a closed set, and have been identified and classified, each with its set of legal rules. This is confirmed explicitly in article 832 of the Civil Code, which states that the limits upon the rights of titleholders shall be established by the law. Private persons may enter into new agreements (article 1322 of the Civil Code) containing new obligations, but cannot make new property rights, which are those laid down by the law. This is also a consequence of what has been termed the "absoluteness" of property rights in Italy, which serves to avoid doubts as to the existence and extent of property rights held by others over real property. In theory, the public registers (of which more later) should make it easy to know what kinds of property rights affect title and thus simplify sales and purchases of real property.

It should be mentioned, nonetheless, that the principle that property rights have a typical form and together constitute a closed set has recently been put into question by some authors, who have sought to reduce the importance of article 832 and emphasised instead article 1322 of the Civil Code³⁰; they claim that private persons may create new, "atypical" property rights.

1.3.2. System of Interest in Land and Numerus clausus

Within the class of property rights, title (*ius in re propria*) is considered apart from the others (*iura in re aliena*). This includes the rights to enjoy property and the rights to grant security over property and these days such rights are not considered parts or fractions of title but rather as limitations or restrictions thereon. Falling within the first group are rights of *superficie*, usufruct, use, habitation³¹, predial servitudes (easements)³² and emphyteusis (*enfiteusi*)³³ and their common

²⁹ See the legal notion of "rights of superficie" and related studies, TORRENTE-SCHLESINGER, *Manuale di diritto privato*, cited; SALIS, *La superficie*, in *Trattato di diritto civile italiano*, edited by Vassalli, Turin, 1958; GIACOBBE, *La superficie*, in *Trattato di diritto civile e commerciale*, edited by Cicu, Messineo e Mengoni, updated by Schlesinger, volume X, Milan, 2003.

³⁰ The most well-known instance of "atypical real right" is the "time-share" which the majority doctrine considers an example "*comunione*" and in particular of "joint ownership". On this notion, see, among many, CONFORTINI, under *Multiproprietà*, in *Enciclopedia giuridica Treccani*, Rome, 1990; for a legal summary ERMINI-LASCIALFARI-PANDOLFINI (edited by CUFFARO), *I contratti di multiproprietà*, in *Il diritto privato oggi* edited by Cendon, Milan, 2003.

³¹ For more on these rights PUGLIESE, *Usufrutto, uso, abitazione*, in *Trattato di diritto civile italiano*, fondato da Vassalli, Turin, 1972 and PALERMO, *Usufrutto*, in *Trattato di diritto privato* edited by Rescigno, volume 8, Turin, 1982, p. 99 et seq..

³² See GROSSO-DEJANA, *Le servitù prediali*, in *Trattato di diritto civile italiano*, edited by Vassalli, Turin, 1963, volume V, tomes I and II and COMPORTI, *Le servitù prediali*, in *Trattato di diritto privato* edited by Rescigno, volume 8, Turin, 1982, p. 153 et seq..

³³This right may be deemed compatible with the common law system because it creates a situation similar to the

feature is that the holder himself exercises his right over the item. Within the second group we find pledges and mortgages: these are security instruments granted in favour of creditors, and entitle the holder to proceed with the forced sale of the item if the debtor goes into breach.

1.3.3. Servitudes - usus

There simply is not space here to describe all the rights to enjoy property under Italian law.

Moreover, the Civil Code generally supplies a basic definition³⁴ of each and the rules that govern them (naturally leaving also a lot of room for private acts). Usufruct can be described by employing the Latin definition, under which it grants "ius utendi et fruendi salva rerum substantia". Article 981 of the Civil Code provides that "1. The usufructuary has the right to enjoy the use of the thing, but must respect its economic objective. 2. He may draw from the thing any use which might it may allow...."; within the limits stipulated under law, he may take up possession of the thing (Article 982, Civil Code).

Use and habitation as lesser rights, or regarding a particular subject. These rights are not in perpetuity as usufruct is. The holder of the right to use a thing "may make use of it and if he is a fructuary may gather its fruits to the extent that is necessary to satisfy the requirements of himself and his family" such requirements being determined in accordance with his social condition (Article 1021, Civil Code). The habitator may inhabit the dwelling house to which his right pertains only in accordance with his own and his family's requirements (Article 1022, Civil Code). The code goes on in Article 1023 to clarify the scope of the family, which is understood in a "broad" or "enlarged" sense.

The right of superficies has two aspects: firstly, it may be an exception to the effects of the principle of accession, but it may also be a way to create title to land different from title of what is above and beneath it (article 952 of the Civil Code). In fact Article 952(1) of the Civil Code provides that "the owner may grant the right to build and maintain a construction above (but also below – Article 955, Civil Code) to third parties which may obtain ownership in them", whilst subsection 2 states that the owner "may dispose of the property in existing buildings separately from that in the land". Enfiteusi grants its holder the same powers as the titleholder (in particular as regards the fruits, treasure, and accretions acquired through accession- Article- 959, Civil Code) subject to an obligation to pay the titleholder a fee and to improve the land (article 960 of the Civil Code)³⁵; secondary legislation imposes limits upon the amount of the fee³⁶; it may be granted for a limited period or in perpetuity. This is an uncommon form of right that emerged in the Middle Ages, in which interest was recently stirred when there were attempts to adopt it from its typical subject matter – country land – to urban construction (which were known as "enfiteusi urbane").³⁷ An easement is a burden upon a piece of land for the benefit of another, nearby, piece of land (article 1027 of the Civil Code), which characteristically establishes a relationship between the two pieces of land. There is however another important element: the Civil Code gives a general definition of the easement and lays down certain typical arrangements, but private acts that respect the general form and concept may create new, atypical easements³⁸.

existence of several different "owners" of the same land.

³⁴ See art. 952 et seq. c.c. (superficies); art. 957 et seq. c.c. (emphyteusis); art. 978 et seq. c.c. (usufruct, use, housing); art. 1027 et seq. c.c. (servitudes) (www.notarlex.it).

³⁵ The position of enfiteusi holder and owner is addressed, granting to the first "*dominio utile*" or "useful domain" and to the second "*dominio eminente*" or "eminent domain" and since the difference is minimum, for the latter there is not a true ownership right (even if subject to "*nuda propriet *" or third party property rights), but rather a "real property right to rentals".

³⁶ L. 607/1966, L. 1138/1970 and L. 270/1974.

³⁷ V. L. 1138/1970 e GERBO, *I diritti immobiliari di godimento su cosa altrui*, Milano, 2001, p. 135 et seq.; and on enfiteusi in general, PALERMO, *L'enfiteusi*, in *Trattato di diritto privato* edited by Rescigno, volume 8, Turin, 1982, p. 41 et seq..

³⁸ In line with the concept of "limited number" the servitude is an "ordinary" real property right over a thing belonging

1.3.4. Mortgages and Rent Charges

As mentioned above, rights over the property of others include pledges and mortgages as security rights, as opposed to right to enjoy property. You can say³⁹ that while these latter rights limit the owner's enjoyment, the security rights affect the owner's ability to dispose of the land, because any potential purchaser could see a legal action (and the forced sale of the asset) to satisfy the rights of the beneficiary of the pledge or mortgage. Given that the difference between a pledge and a mortgage is both in their subject matter – real property and certain rights over real property (usufruct, superficie and enfiteusi), movable property inscribed in public registers and amounts owed to the State under mortgages, movable property, universality of movables and amounts owed under pledges, and in the actual transfer of title to the secured creditor – which takes place only in a pledge – it can be said that the essential characteristic of both is their accessory nature. In particular, and with regard to our subject matter here, for mortgages to arise there must be an amount owed (although it may be a future amount, or conditional, or merely possible, see article 2852 of the Civil Code) and the mortgage and amount owed have an almost symbiotic relationship. In this regard Italian law resembles the French system.

1.3.5. Rights in Rem to Acquire Real Property

If one leaves aside usucaption as a means of acquiring original title through possession as defined in the Civil Code (in articles 1140 et seq.), and acknowledging that usucaption does not constitute a property right over an asset⁴⁰ there are no property rights that confer title to real property.

1.3.6. Other Interests in Land

As mentioned above⁴¹, and subject always to the *numerus clausus* principle, in addition to the typical rights traditionally considered, the leading authors have at times considered also certain other interests from both the Civil Code and particular legislation.

However, there is no single view on these matters: there are also further mooted examples of 'typical' property rights: the right of enjoyment over assets conferred into a property fund (article 168 of the Civil Code) or the right of a secured creditor under an *antichresis* agreement pursuant to article 1960 of the Civil Code (under which a debtor acquires a right to the fruits of a piece of land, such that they are applied in satisfaction of the debt).

To this should be added the arrangement of the property right, subject to the discussion above of the *usi civici*⁴², while although they impose restrictions on title *obbligazioni propter rem* are not considered property rights⁴³.

1.4 Apartment Ownership (Condominiums)

to a third party presenting characteristics that are well summarised by the following expressions: *servitus in faciendo consistere nequit - nemini res sua servit - praedia vicina esse debent*; in respect of these principles, private autonomy may design many different examples.

³⁹ TORRENTE-SCHLESINGER, *Manuale di diritto privato*, cited, p 448.

⁴⁰ Under the Italian Civil Code it is in fact a "de facto right" over a thing which is separate and distinct from the existence of a right over the thing itself. On the right of possession, see SACCO-CATERINA, *Il possesso*, in *Trattato di diritto civile e commerciale*, edited by Cicu, Messineo and Mengoni, updated by Schlesinger, volume VII, Milano, 2000; DE MARTINO, *Possesso, denuzia di nuova opera e di danno temuto*, in *Commentario del codice civile* edited by Scialoja and Branca, updated by Galgano, Bologna-Rome, 1984.

⁴¹ See note 1.

⁴² For bibliographical references see note 24 above.

⁴³ For further discussion see TORRENTE-SCHLESINGER, *Manuale di diritto privato*, cited, p. 302; BIGLIAZZI GERI, *Oneri reali e obbligazioni propter rem*, in *Trattato di diritto civile e commerciale*, edited by Cicu, Messineo and Mengoni, updated by Schlesinger, volume XI, tome III, Milan, 1984.

Articles 1117 et seq. of the Civil Code, in the section “On Shared Ownership in Buildings”, deal with the particular and complex situation where there is joint ownership⁴⁴ (under the terms of the Civil Code) within a building where the apartments belong to different persons⁴⁵.

Under those provisions, in addition to sole title to the apartment (or even to a separate property, such as a cellar or a garage⁴⁶), each owner also has joint ownership of certain part of the building which by law are considered common (for example the piece of land over which rises the staircase), in which the owners’ interests are in proportion with the individual property units and the whole building. Naturally, this is the case where the title or the law does not provide otherwise (article 1117, 1st paragraph, Civil Code).

The Italian Civil Code of 1865 had laid down the rules in this area⁴⁷ in just three articles (562, 563 and 564), and these were replaced by a more complete treatment in Royal Decree No. 54 of 15 January 1934, which was converted into Law No. 8 of 10 January 1935, and then, for the most part, transmitted into the current Civil Code. Many problems have emerged out of this arrangement and there are a number of projects for its reform under discussion. One only has to consider the variety of opinions as to the ability for the condominium to be recognised as a legal entity (and thus the separate legal personality of individual apartment buildings⁴⁸) or the doubt that divides the leading authors as to the applicability of these provisions or those regarding joint property in general to ‘supercondominiums’, where several buildings have parts common to all (such as access roads, electricity boxes, swimming pools, or the like), given that the concept was invented to deal with essentially vertically arrangements⁴⁹.

In any event, compared with simple joint ownership, condominium ownership (which presupposes separate ownership of the individual apartments on the various floors) is characterised by⁵⁰:

(A) the normal or general indivisibility of the common parts of the building, in accordance with the provisions of article 1119 of the Civil Code) (especially in relation to article 1112 of the Civil Code, on joint ownership);

(B) by a greater emphasis on the collective interest over the individual interest of the apartment owners, reflected for example in the powers granted to the majority of the apartment owners (see inter alia article 1120 of the Civil Code, or, generally, the rules on the division of expenses);

⁴⁴ The notion of "comunione" or “co-ownership” in general, or rather the co-ownership of a real property right held by more than one person is regulated by articles 1110 et seq. of the Italian Civil Code. On the notions discussed, see BRANCA, *Comunione, condominio negli edifici*, in *Commentario del codice civile* edited by Scialoja and Branca, updated by Galgano, Bologna-Rome, 1982; FRAGALI, *La comunione*, in *Trattato di diritto civile e commerciale*, edited by Cicu, Messineo and Mengoni, updated by Schlesinger, volume XIII, tome I, Milan, 1973.

⁴⁵ Two persons are sufficient, as stated above, provided the law and/or terms of title do not specify otherwise (for example for purposes of the establishment of an ordinary “comunione” or state of joint ownership or the application of a right of superficie). For a discussion of the relationships and the differences between the case of a condominium building and that where conflicting rights of superficie subsist, see Supreme Court, 12th December 1974, n. 4231, in *Rivista del Notariato*, 1976, p. 514 et seq..

⁴⁶ Not however to a room within a single apartment, for example, for reasons related to the above-mentioned regulatory framework governing building ownership.

⁴⁷ And their usefulness was evident when, following the end of the first world war, it was necessary to apply a special law for purposes of extending such rules to new constructions where ownership was divided by floor in the formerly Austrian provinces, as Austrian civil law did not recognize their existence: see MARINA-GIACOBBE, *Condominio negli edifici*, in *Enciclopedia del Diritto*, volume VIII, Milan, 1961.

⁴⁸ At present, also in light of tax laws and regulations.

⁴⁹ Articles 61 and 62 of implementing provisions of the civil code would give rise to the conclusion that the rules relating to joint ownership would apply to the "supercondominiums". See, for example, BIGLIAZZI GERI-BRECCIA-BUSNELLI-NATOLI, *Diritto civile, 2, Diritti Reali*, Turin, 1988, p. 340 et seq. and Supreme Court, 7th July 2000 n. 9096, in *Notariato*, Milan, 2002, p. 11 et seq. which confirms the applicability of the rules regarding building condominiums to the case in question.

⁵⁰ See BIGLIAZZI GERI-BRECCIA-BUSNELLI-NATOLI, *Diritto civile, 2, Diritti Reali*, cited.

(C) by the restriction on the use of the building as for the enjoyment and use by the apartment owners collectively; and

(D) by the organisation for the functioning and management of all the common elements.

On this last point in particular it is worth pointing out that the Civil Code provides in fact: (a) for an assembly of apartment owners (with powers to pass resolutions); and (b) for an administrator for the building (with executive and representational powers – article 1131 of the Civil Code)⁵¹; (c) that where there are more than ten apartment owners, there must be a set of rules governing the building, including the use of the common parts and the division of the expenses that are binding upon the apartment owners (even where they did not take part in its approval) and which are adopted by majority vote (article 1138 of the Civil Code).

It is worthwhile remarking a little on these rules. They bind not only the apartment owners but also their successors and assignees and thus a purchaser⁵², without there being any requirement that they be recorded on the public registers⁵³. There used in fact to be provision for the registration of the rules with the professional association of building owners (articles 1138, 3rd paragraph, 1129 and 71 of the enacting provisions under the Civil Code) but since this no longer exists it is widely thought that pending any amendment thereto there is no longer any obligation to make the rules publicly available. The practice, moreover, has seen the increasing spread of condominium contractual agreements⁵⁴. These agreements, unlike normal regulations, are not based on a resolution passed by majority vote but on an agreement between all the apartment owners (such that it is equivalent to an unanimous resolution), except where there is an acceptance by all the apartment owners in their deeds of purchase of an agreement prepared by the constructor and lodged prior to the beginning of the sales with a notary. Secondly, while, as mentioned above, the rules governing a condominium typically bind also successors and assignees, a contractual agreement binds only those who enter into it (under the rule provided by article 1372 of the Civil Code, which states that contracts are effective only among the parties). In theory, it would have to be specifically accepted by third-party purchasers. To avoid this, in practice, also as a result of the content of the regulations (which we will be discussing very shortly), they are referred to and accepted in the deeds of sale of the apartments and also registered on the official property registers so that they made by enforceable under article 2644 of the Civil Code).⁵⁵ Under the principle governing documents capable of registration and the effects of their registration under Italian law (articles 2643, 2644, 2645 and 2645-bis of the Civil Code) this should only occur where the regulations contain agreements and clauses that fall among those for which publication is admitted. In fact, a third key difference with classic regulations is that contractual regulations often contain prohibitions or burdens (albeit reciprocal) as to use, which directly affect the exclusive property (as well as the common parts), capable of classification as easements and as such registrable pursuant to part 4 of article 2643 of the Civil Code. The last peculiarity, which flows from the above, is that contractual regulations may be amended only with the agreement of all the parties and not by the majority⁵⁶.

⁵¹ Regarding the scope of such powers of shareholders and directors (both with respect to reciprocal relationships and to unilateral positions) the doctrine is divided: consider the well-known case of the mortgage over “condominium items” and the procedures for cancellation of the same, with respect to which legal scholars are in debate as to whether a majority resolution of the condominium owners is sufficient or rather unanimous consent is required. The debate applies likewise to the sale of common areas. Clearly no problems exist with respect to the mortgage or sale of a single apartment (including common areas).

⁵² The purchaser is obliged to pay, jointly with the seller, not only the charges pro quota beginning from the day of purchase, but also the charges of the current and previous year (article 63, 2 co, disp. att. c.c.).

⁵³ See above at n. 2.

⁵⁴ A reference to this notion is found in article 1138, 4th comma, of the Italian Civil Code, where “purchase deeds” and “agreements” between condominium owners are discussed.

⁵⁵ About these notions, see above at n. 2.

⁵⁶ Consider that the framework is complicated by the fact that in reality there exist “mixed regulations” which include

In the light of these characteristics, condominium rules may (and normally do) provide specific rules as to the usage and use to which individual apartments may be put by their owner. Typical cases include express prohibitions on the keeping of pets or the use of the apartment as anything other than a residence or similar restrictions of use (for example, clauses allowing non-residential use but forbidding use as a medical or veterinary clinic). Clearly, then, the owner of an apartment must verify where there are condominium rules, their content and their enforceability, should they wish, for example, to use the apartment as a restaurant. This alone does not suffice, however. One also needs to consider national and regional rules governing changes of use (with or without works) from residential premises to office, or as commercial premises (and vice versa), and submit, if necessary, applications for authorisation from municipal authorities (and update the use and plans of the apartment at the Catasto).

There are also express rules governing two particular circumstances:

(a) the division of the expenses and the maintenance of specific common parts (articles 1123 et seq. of the Civil Code), which, generally follow the rule that unless it is agreed otherwise, all contribute in proportion with the value of their individual properties (such that calculation tables are normally prepared);

(b) the destruction of the building, in whole or in part, which is dealt with by article 1128 of the Civil Code, which lays down rules (based again on the majority principle) determining what should happen to the land and the remains of the building, and the application of any insurance monies.

There are no limits by contrast upon individual owners who wish to enter into a mortgage loan (or otherwise mortgage) their apartments and any appurtenances, except for the need to obtain consent from the holders of any lesser property rights (for example, rights of usufruct) where the owner intends to mortgage the whole of the property and not just the naked title - article 2814 c.c. - (always assuming that these are property rights capable of being mortgaged pursuant to article 2810 of the Civil Code; for example, the right of occupation cannot be mortgaged).

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

Aside from the rights of superficies discussed above (under articles 952 et seq. of the Civil Code) there are no other building rights expressly governed by law.

1.6 The Public Law Context of Real Property Transactions

In principle, sales and purchases of apartments made between private parties (and the connected grant of loans) are not subject to particular legislative restrictions imposed for reasons of public interest. Of course, there are some exceptions. Subject to what is said below on building and planning regulations (and the provisions of article 1470 of the Civil Code, on prohibitions on certain purchases, for example of assets where they have been involved in the sale), one thinks also of assets of cultural and historic interest (Legislative Decree No. 42/2004), which based on the nature of the agreement, provide for obligations that notice be given to the relevant authorities or impose pre-emption rights in favour of the State or other public bodies, or where land has been affected by fire and obligations are imposed that this be specifically mentioned in the agreements and that there be restrictions on the use of the property (Law No. 428 of 1993, converting Law Decree No. 332 of 30 August 1993, as amended).

provisions typical of regulations under art. 1138 c.c. and ordinary contractual provisions (for example reciprocal servitudes) and depending on the nature of the single provisions of the above regulations a majority (and not unanimous) resolution is sufficient for the amendment of the same and such clauses may or may not be opposable by third parties, even if registered. For a summary, see BIGLIAZZI GERI-BRECCIA-BUSNELLI-NATOLI, *Diritto civile*, 2, *Diritti Reali*, cited, p. 336 et seq..

Different rules apply to the public residential construction sector, in its various guises of "subsidised", "assisted" and "approved" housing construction (aspects of some of which may be combined, to a limited degree). In this area, there are multiple restrictions imposed in the public interest; in the past, especially restrictions were imposed on sales (prohibiting sales for then years or more) alongside pre-emption rights stipulated in favour of public bodies such as the municipalities. These restrictions are closely linked to privileges regarding pricing and taxation terms (and other forms of subsidy and support).

In such cases, moreover, the ends are justified by the hefty public financial contribution made (including non-recoverable contributions to interest on loans for construction and purchase) which seek to assure constitutional entitlements to an abode, and to avoid speculation⁵⁷.

1.7 Brief Summary on "Real Property Law in Action"

The real property market (and also that for listed property funds) has in recent years been experiencing a period of consistent growth following the sharp falls in the market for shares generally and especially those of technology companies; the difficulties within European economies, especially the Italian economy, compounded by the events of September 11, 2001 in New York and March 11, 2004 in Madrid. For Italian retail investors (and for larger investors, too) bricks and mortar represent one of the few areas perceived as not being susceptible to future losses. This, together with the difficulty, particular in Italy's historic towns, in finding high-quality property and land available for construction, has resulted in vast rises in the price per square metre of properties, and a substantial fall, on the other hand, in the number of leased properties and the rents they attract. Naturally (and limiting our remarks simply to residential properties), the percentage increases (for sales) and falls (for leases) are affected by a large number of different local factors. In cities such as Rome, Milan and Turin (and generally in those centres that attract greater numbers of migrants, from inside and outside Italy), prices have generally increased faster than elsewhere. But the phenomenon is common to the whole of Italy.

One impetus to sales has been the reduced interest rates available for the provision of finance connected with property purchases and new contractual arrangements that have taken root in market practices and made the payment of mortgage instalments almost equivalent to the payment of rent. As a result, as the statistics show, loans secured by a mortgage are very common upon the purchase of residential property.

In this important part of the economy, which can readily become a political hot potato since very often a house purchase will be the greatest investment the average citizen makes, the rules laid down by the legislation are not always adequate to cover every situation. The leading actors in the market are notaries, banks, public offices and estate agents, and they are subject to the general rules governing their professions and businesses, but these do not always offer their customers the fullest protection. As a result, there are a number of agreements and collaborative arrangements among the various players (such as that between the National Council of Notaries and the Italian Banking Association, as to a standard form of mortgage agreement⁵⁸) and codes of practice for the businesses involved, although these are not always enough to ensure proper behaviour by all parties. Naturally, all are potentially liable, both under the general law and the provisions governing the

⁵⁷On this issue, which is particularly complex, see CASU-VIGNERI, *L'edilizia residenziale pubblica nell'attività notarile*, Rome, 1993 and, for updates, DE STEFANO, *Non c'è pace per l'edilizia residenziale pubblica*, in *Federnotizie, Organo della Federazione Italiana delle Associazioni Sindacali Notarili*, 1999, available on www.federnotizie.org and DE STEFANO *La superficie si trasforma in proprietà: le istruzioni del Consorzio Intercomunale Milanese*, in *Federnotizie, Organo della Federazione Italiana delle Associazioni Sindacali Notarili*, 2000., available on www.federnotizie.org.

⁵⁸ See also articles 1469 *bis* et seq. implementing an EU directive (directive 13/1993/CE) regarding agreements with consumers.

particular category, through the courts (for example, notaries are subject to controls every two years, through the state notarial archives, and fines may be imposed).

Nonetheless disputes regarding property sales are not especially common, in particular when compared to common-law jurisdictions. In fact, they are far from the most common area of litigation in the property sector.

Alternative dispute resolution is a rarity in the property sector, whether in the form of arbitration or reconciliation procedures (and this is unlike what happens in the corporate sector, especially after the recent reforms brought in by Legislative Decrees Nos. 5 and 6 of 2003). Such procedures could be very usefully applied, as putting property disputes through the ordinary court procedures has a number of shortcomings and limitations. The ordinary civil justice process in Italy is in the process of reform as a result of the excessive time that actions take to reach a conclusion, meaning disputes are frequently not resolved in a useful period. This is not a problem of fiscal costs, or of a lack of awareness of or coherence in the legislation and the jurisprudence, but results from bureaucracy in the operation of the civil justice system, even at first instance, which serves to discourage appeals to the higher courts, including the Court of Cassation.

2. Land Registration

2.1 Organisation

2.1.1. Statutory basis

Registration⁵⁹ represents the primary instrument provided by the legislation for deeds and agreements, to be made public and thus for the legal status of real property to be made available to third parties⁶⁰. This is done through official public registries known as *Registri Immobiliari* (Land Registries). The making public of documents may have a number of different aims (and the notion is used also outside rights to real property: for example, in the publication of corporate and court documents). You can distinguish between: (1) the making public of news, which serves only to make a fact more widely-known and the omission of which does not affect the validity, effectiveness between the parties or enforceability against third parties of the document but may result in a fine⁶¹; (2) a declaratory publication, which also does not affect the validity or effectiveness as among the parties but its enforceability against third parties; this is the normal function of registration, as will be discussed in 2.5 below; and (3) a constituent publication, where publication is a constituent part, required for the dealing to be perfected, without which it may neither be enforced against third parties nor produce its full effect among the parties: this is the case with mortgages of property, which arise out of the combination of the underlying arrangement and their registration on the property registers (article 2808 of the Civil Code).

Even if one can speak generically of registration, technically speaking (and as we have just hinted) publicity for real property matters is achieved through registrations, inscriptions and

⁵⁹ Clearly, reference will be made to the system concerning real property although the concept of registration also includes disclosure on registered moveable assets (such as ships, aircraft, automobiles and motor vehicles). On registration in general see PUGLIATTI, *La trascrizione, La pubblicità in generale*, in *Trattato di diritto civile e commerciale*, edited by Cicu, Messineo and Mengoni, updates by Schlesinger, volume XIV, tome I, Milan, 1957; PUGLIATTI (edited by GIACOBBE-LA TORRE), *La trascrizione, L'organizzazione e l'attuazione della pubblicità immobiliare*, in *Trattato di diritto civile e commerciale*, edited by Cicu, Messineo e Mengoni, continued by Schlesinger, volume XIV, tome II, Milan, and 1989; GAZZONI, *La trascrizione immobiliare*, in *Il codice civile - commentario*, Milan 1998, tome I; GAZZONI, *La trascrizione immobiliare*, in *Il codice civile - commentario*, Milan 1993, tome II. For a more concise but effective discussion, see TORRENTE-SCHLESINGER, *Manuale di diritto privato*, cited, p. 1038 et seq..

⁶⁰ If one purchases an apartment he would want to know whether the person selling the property is in fact the owner and, therefore, whether a purchase deed exists and, if so, its content (for example a deed of sale): the registration system allows for this verification.

⁶¹ This is the case of the registration of a declaration of acceptance of inheritance with the benefit of inventory under art. 484 of the Italian Civil Code, at least according to the traditional doctrine.

annotations, depending on the kind of document being publicised and/or the kind of effect, in accordance with a system laid down by the law and essentially contained in the Civil Code. Inscription regards mortgages (and is a constituent part thereof, as mentioned) and privileges⁶²; transcription (generally referred to as registration herein) regards deeds and documents; annotation, which is not defined in law, is a formal measure that parties take voluntarily or by court order, amending or cancelling the effects of a primary formal requirement (the classic case being the fulfilment of a condition which is noted in the margin of the registration of a sale – article 2668 of the Civil Code, and the consent to the cancellation of a mortgage which is similarly noted in the margin to the entry).

The rules governing registration in the broader sense are contained in the Civil Code and in Law No. 52 of 1985, and, unlike some other systems, such as those in Germany and Austria, it is based on personal data rather than property information. It is based in public registers, being the Land Registers held by the Land Registrar Conservatories, which these days are combined with the general land offices (Catasto) in area agencies known as Agenzie del Territorio, with sections in the name of individual persons. In other words the Conservatories do not keep a list or a map of real property and a record for each of these of its legal history⁶³; rather, from the registers you can discover whether a certain person bought or sold or disposed in some other way over the real property, and from whom and to whom. Thus if you consult the property registers, you cannot check whether an asset belongs to a certain person⁶⁴ by starting from information regarding the asset, but whether that person holds title to a certain property by using their personal details. Consequently it was because of this structure that the legislation seeks to ensure the continuity of the registrations (article 2650 of the Civil Code).⁶⁵), providing rules that would publicise acts

⁶² Privileges constitute a legitimate cause for pre-emption, and therefore are instruments provided by law for purposes of guaranteeing certain credits: for example those of the State for the payment of taxes and therefore in the event of breach (to remain on point with respect to the example given) the State may satisfy its tax claim with recourse to the object of a privilege and, therefore, also real estate. Usually a privilege, which is not limited to real estate, does not require public disclosure in order to come into existence – title is given by the law itself – nor in order to be exercised but in certain instances its registration in “special” registries is required. See TORRENTE-SCHLESINGER, *Manuale di diritto privato*, cited; ETTORRE-SILVESTRI, *La pubblicità immobiliare e testo unico delle imposte ipotecarie e catastali*, Milan, 1996, including an in-depth analysis of the legislative evolution regarding the structure, qualifications, powers and functions of the offices that handle real estate registration. For a traditional discussion see CICCARELLO, under *Privilegio (diritto privato)*, in *Enciclopedia del diritto*, volume XXV, Milan, 1986, p. 723 et seq.; TUCCI, *I privilegi*, in *Trattato di diritto privato* edited by Rescigno, volume 19, Turin, 1985, p. 449 et seq..

⁶³ A map or inventory is available at the offices of the *Catasto* (real estate registry) and includes both land and buildings (in fact the law requires the registration in the *catasto* of all new constructions). However, as is noted below, catastral data are referenced in deeds and in public disclosure documents and although the Conservatory and the *Catasto* are part of the same structure, the role of the *Catasto* is essentially fiscal in nature, which leads to the conclusion that, at least prior to the computerisation of the Conservatories, in the event of discrepancy between the physical description of the property and the catastral data, as a rule the former would prevail. Thus it should be noted that the information on file with the *Catasto* does not refer to the ownership of a real property right but rather may be regarded as a reference point for purposes of a more in-depth verification with the Land Registries (*Registri Immobiliari*).

⁶⁴ It should, however, be noted that with the computer automatization of the Offices and the registration procedures – see n. 2.2 above – the disclosure form which contains information regarding both the persons and the real estate in question (in the latter case, catastral data), allows at present for a verification starting from the real estate asset itself. However, a) this does not mean that the general framework of the system has changed and b) for purposes of the fulfillment by the notary of his professional duties with respect to the preliminary verifications regarding the absence of mortgages on the real estate it has been affirmed that such verification must be carried out on a subjective basis given the framework of the registries and that it is not guaranteed that other types of verification would result in an outcome of certainty.

The computer automatization of the Conservatories and, in general, of the real estate transfer sector discussed above (in particular under 2.4) has moreover created several legal problems where the rigidity of the computer program could give rise to an interruption of the publication of perfectly legitimate and enforceable real estate transfer agreements: for a fascinating example on this point, see MARZOCCHI, *Il caso Grosseto e prime riflessioni sulla tavola rotonda di Grosseto*, in *Rivista del Notariato*, 1998, p. 795 et seq..

⁶⁵ Art. 2650 of the Italian Civil Code: 1. In the event that, under the above provisions, a deed is subject to registration

involving the persons (for example, requiring the transcription also of transfers caused by death, article 2648) and making clear that only where each link in the chain of transfers has been publicised does transcription produce its effects (of benefit to third parties) pursuant to article 2650 of the Civil Code. Nonetheless, this structure based on individual identities, together with the non-compulsory nature of certain transcriptions, and certain shortcomings⁶⁶ in the system itself, has certain limits which perhaps would not be present in a property-based register.

The above brief description applies nationwide with the exception only of those areas that were formerly Austrian provinces in the northeast of Italy (and annexed to Italy after the First World War) where the “tabular system” of Austrian derivation remains current. This system is property-based and the publication is of a constituent nature, thus it is necessary for the agreement to be effective between the parties. This contrasts with the system of the Italian property registers which, as we will see in 2.5 below, is typically declaratory.

2.1.2. Relevant institutions

We have mentioned that transactions of real property are publicised through their transcription onto public registers, the Land Registers. These are held by public offices formerly known as Land Register Conservatories, then Territory Offices, and are now grouped with the Catasto under the direction of the Territory Agencies⁶⁷.

Without delving into the detail, these are public offices that come under the aegis of what was the Ministry of Finance and is now the Ministry of the Economy (although when control of the Catasto passed to the Municipalities, it was stated that the Ministry of Justice had the powers to supervise the chief officer) and consequently a limb of public administration.

The law (the legislation and the secondary implementing provisions) lays down that the offices will be distributed across the country, although not necessary in line with Italy's division into regions, provinces and municipalities.⁶⁸ Articles 2663 and 2827 of the Civil Code provide that transcriptions and inscriptions are to be made at the office appropriate to the building's geographical location. Any performed in any other office shall be treated as if never made and ineffective.

The chief officer, the Registrar of the Property Registers, is a public official who organises the office and is ranked above his colleagues.

He must keep a "General Registry", updated daily, which carries the order in which applications for the transcription, inscription and annotation of titles were submitted (article 2678 of the Civil Code) and the Special Registers, one for the transcriptions, one for the inscriptions and one for the annotations (article 2679 of the Civil Code)⁶⁹. Articles 2674 and 2674-bis of the Civil Code, and article 113-bis of its implementing provisions, set out the circumstances in which the Registrar is compelled to refuse registration, and those in which – for reason of doubts as to whether the entry is capable of transcription or inscription – they may be admitted "with reservations"; and the form which any such refusal should take. These were provisions introduced by Law No. 52/1985, which overcame many of the previous problems (under the old article 2678 of the Civil Code) as to the

requirements to be fulfilled by the purchaser such registrations shall not be valid unless registered prior to purchase. 2. When the deed prior to purchase has been registered, each subsequent registration shall be valid in accordance with its respective ranking in chronological order, save as provided under art. 2644. 3 (*omissis*).

⁶⁶ Moreover this mechanism applies only to purchases of derivative title, while those of original title (for example adverse possession or *accessione*) fall outside this scope. This, on the one hand, would appear evident and correct while, on the other, it could interrupt the subjective continuity and give rise to problems.

⁶⁷ Indeed, put simply, there exist Agencies of the Territory which are responsible for both the offices and the services of the Conservatories of the Real Estate Registries, as well as the offices and services of the *Catasto*.

⁶⁸ Reference to the offices (within the Agencies of the Territory) which carry the registration services of the Real Estate Registries. There exist offices which cover an entire Province and its Municipalities (such as Messina or Syracuse in Sicily) and offices which cover certain Municipalities but not all of a Province (Susa in Piedmont).

⁶⁹ In addition to other registries provided by law (special registries).

Registrar's powers and responsibilities, which should in any event be exercised on the basis of an extrinsic analysis of the agreement or other basis for which publication is sought.

Generally speaking, if the basis for the right is one for which the law provides for publication (articles 2643 *et seq.* of the Civil Code - including as to its form pursuant to articles 2657 and 2658 of the Civil Code), and the note of the transcription (article 2659 of the Civil Code - or of the inscription, or the application for the annotation) meets the requirements of the law, the Registrar proceeds with publication in the registers, with the effects that will be described momentarily. In the system for the publication of information regarding real property, the Notary's role is indispensable, since the vast majority of registrations are based on public acts (*atti pubblici*) or certified private acts (*scritture private autenticate*) (article 2657 of the Civil Code) such that an obligation is imposed which the notary is required to discharge (article 2671 of the Civil Code and Legislative Decree No. 347/1990, Consolidated Law of Mortgage and Registration Fees, article 6, paragraphs 1 and 2).

2.1.3. Land register/registre foncier/Grundbuch

As mentioned, the office that keeps the property registers and makes them publicly available is a public office. It follows that its workings are similar to those of other public administrative offices and consequently it has its place in the hierarchy and employees are appointed through competitions. The unification of the *Catasto*, connected offices and the Conservatories into a single Territory Office (for each province) has resulted in movements of employees between the various offices, based on their needs.

2.1.4. Is all real property registered?

We have discussed the subjective structure of the Italian property registers. As a result of that structure, it is not possible to be certain what proportion of real property has been registered⁷⁰. If a new building is put up on land, until the landowner sells the building (or it passes to his heirs on death, if an individual), the new asset will appear on the *Catasto* but there will be no record of it at the Property Register⁷¹. A search under the landowner's name will show only the land and we can conclude that he is the owner by establishing that *accessione* is operating, and thus that he may sell or mortgage the property.

To answer the question posed, then, you could say that the law requires all real property to be recorded on the *Catasto* (for tax purposes) but that there is no obligation to prepare a registration of newly-built property for the Property Registers.

2.2 Contents of Registration

2.2.1. Which data are registered?

The legislation deals not only with governing the procedure for transcriptions, and, as has been seen, what must be produced to the relevant offices, but also the information that must be included for the publication to be achieved, and for there to be consistency. For the transcription, for example, of the sale of a piece of land the original agreement for sale must be delivered to the relevant Conservatory together with two originals⁷² of the transcription entry, which must meet the requirements of article 2659 of the Civil Code. Under Law No. 52/85, and its subsequent

⁷⁰ The issue is different with respect to the *catasto* since the census of real property (land and buildings) carried out for tax purposes, is generally global even though the data is not always up to date and/or easily available when such data dates back too long. Many laws have, over the course of the years, attempted to recover for the catastral inventory property which in the past has evaded its scope.

⁷¹ Recall the notion of *accessione* at 1.2 above.

⁷² One of the two original copies, together with the title to be publicized, is kept in the real estate registry, and the other is delivered back to the applicant.

amendments and implementing secondary legislation⁷³ (and as we shall see later on) there is now a fixed scheme for the transcription entry, divided into four parts, A, B, C and D. Each of these contains summary information regarding the document conferring title (in the example of an agreement for sale). Thus,

Part A sets out the details of the document (be it deed, agreement, or court order) that is to be registered, i.e. the document that forms the basis of the registration (such as the data and any distinguishing numbering, its form, and compliance with any conditions; where these are notarised documents or private acts certified by a notary, the notary's details);

Part B contains the details of the property, on the *Catasto*;

Part C contains the details of the persons involved (name, surname, date and place of birth, nature of ownership where married, tax reference code), the property rights being dealt with and the quotas of them hold by various persons [for editor: Check]; and

Part D, other information, such as additional details for the other Parts, such as the physical description of the property or further details of the persons involved (for example, the town of their birth if they were born outside Italy) ⁷⁴.

Once the documents have been accepted, Part A will also show the date and number of the registration, and details of payments made for the service to the State.

2.2.2. Sample of Registration

At the end of this chapter is an example of a printout from a registry computer of a "registration note", on which the various Parts comprising the form can be clearly seen⁷⁵.

If one conducts a search (known as a *visura ipotecaria*) to discover whether a person is the titleholder to a particular property, if the result is positive the registration note will be returned and from this you may trace the basis for the title and examine it, should you wish to know the terms of the agreement under which the asset was acquired⁷⁶.

2.3 Registration Procedure

2.3.1. Application for Registration

As we have just seen, the law lays down procedure for the registration and publicisation of real property generally, both in terms of what must be submitted and the completion in detail of the accompanying application.

In principle, anyone presenting title and a registration note in two originals can, upon payment of the fee, sign off on the note (article 17 of Law No. 52/1985) and request the publication of the property transaction, naturally during office hours (article 2677 of the Civil Code). The person taking receipt will collect the documents and record them in the General Registry for their subsequent allocation to the various particular registries (article 2679 of the Civil Code) and issue a receipt with the admission number (article 2678, 3rd paragraph, of the Civil Code).

Notaries are the most frequent users of the service, given that the documents that give title for application to the registry are almost always, as discussed (article 2657 of the Civil Code) made

⁷³ In particular the interministerial decree of 10th March 1995 and the circular 128/T of 2nd May 1995 are fundamental for the operational procedures for registration, inscription and annotation and are available on www.agenziaterritorio.it.

⁷⁴ Under continuous discussion is the effectiveness of the public disclosure of the data referred to under this system both because in the first operational phase this data was not in fact memorised by the computer and because at the time, for purposes of tax savings, certain data was registered (such as new servitudes created under the deed of sale) which in reality should have been registered individually and separately.

⁷⁵ For further examples on the methods of filing and on the related printable form see SANTARCANGELO, *La compravendita*, Milan, 2000.

⁷⁶ For the sake of simplicity, reference is always made to the computerized system even though, especially with respect to the oldest deeds, even if an electronic investigation has begun, it is still necessary to consult with the hard copy indices where we may find anagrafical data and, from this, the single registrations referred to above which set out the title and the notes of transcription, inscription or annotation.

under public acts (*atti pubblici*) or certified private acts (*scritture private autenticate*⁷⁷) and as mentioned earlier there is also the obligation under both the Civil Code and special legislation⁷⁸ (including notarial laws) for notaries to perform these duties for agreements they receive or certify.

Where the applicant is not a notary (or another public official acting under a duty), the application (in practice, the registration note) must include his details, including his residence, and these shall remain on the General Register, including for fees purposes since this person is liable for payment of the fee for the service⁷⁹. An example would be a lawyer seeking to register a distraint over real property.

2.3.2. Duties of the Registrar

The checks made by the offices of the applications it received are as to their face. The nature of the title is checked, to establish whether it may be admitted for registration (article 2644 and 2645 of the Civil Code) and that the documentation is complete as discussed earlier.

As mentioned above, to lend certainty, the legal rules provide and govern circumstances in which the Registrar may refuse to proceed, and a distinction has been drawn based on the relevant provisions (article 2674 of the Civil Code) between an "optional refusal" (for example, where parts of the underlying document are written unintelligibly) and a "compulsory refusal" (for example, where a simple, uncertified private act is submitted), and also an interim category of "refusal for doubt" (article 2674 bis c.c.) where registration is made subject to reservations and the matter referred to the courts. This latter case occurs where, outside of the circumstances under article 2674 of the Civil Code, the Registrar has doubts over whether a document may be registered (for example, it is unclear whether it is a registrable document).

Having conducted its checks and acquired the documentation, the office issues a receipt with the date and application number, the importance of which is clear from the effects of the publication discussed below and the importance of the order of registrations.

2.4 Access to information

The current forms of registrations are undergoing wide-reaching changes as they exploit the advantages brought by computer technology. Until a few years ago, with the first round of computerisation⁸⁰, the registration of deeds and documents took place by submission to the office of the original or a hard copy of the basis of title (for example the sale agreement) and a floppy disk containing the registration note. The office took this in and issued the receipt and later a printout based on the contents of the floppy disk of one of the two originals of the note with the details of the registration (and the fee was paid to the office itself). More recently⁸¹, there has been further development, with the advent of the Computerised Single Form⁸² (Adempimento Unico) and the spread of electronic signatures among Notaries⁸³.

⁷⁷ Such concepts are defined in articles 2699 and 2703 c.c..

⁷⁸ Art. 2671 c.c., art. 6 commas. 1 and 2 D.Lgs. 340/1997 cited.

⁷⁹ D. Lgs. 346/1990, art. 11, cited..

⁸⁰ Traditionally, the title and note of registration (drafted freely and individually provided the required data was included) was presented in the form of 2 original hard copies; later the note, still in hard copy, was filled out on the pre-printed form.

⁸¹ D.Lgs. 18-12-1997, n. 463, D.Lgs. 18-1-2000, n. 9, D.P.R. 18th August, 2000, n. 308 and related implementino norms including the interdirectorial decree of 13th December 2000 setting out the approval of the single computer form - Mui – and the technical procedures necessary for data transmission; documentation also available on www.agenziaentrate.it, www.agenziaterritorio.it.

⁸² See note above.

⁸³ On this point, see A.A.V.V., *Firme elettroniche - Questioni ed esperienze di diritto privato*, Milan, 2003 and www.notarlex.it. Its peculiarity, for purposes of this discussion, is that the smart card setting out the above-mentioned signature certifies not only the identity of the Notary, but also his capacity as public officer: it unites the signature with the notarial seal.

In particular, taking as an example, the classic sale of a piece of land⁸⁴ based on an agreement received by a notary, once the agreement is made the Notary will complete this form. This file is more complex in its contents⁸⁵: firstly, it sets out all the information in the various Parts of the registration note; secondly a text file is attached containing an electronic version of the underlying document; thirdly, in light of the unification of the Catasto and the land registries under the Territory Agencies, all the information to be passed to the Catasto's data base is added, including any updates; and finally, a series of pieces of information necessary for the registration to take place with the revenue service and the payment of taxes and duties, including any set-offs, all on a single, electronic form.

Before this system came in, the registration, the recording and the updating⁸⁶ at the Catasto took place separately and on different terms. With the single form, a notary prepares the file, signs it electronically and sends it via internet to a central processor which directs it to the relevant offices, including the revenue service (and the amounts due are taken from the Notary's bank account). Nonetheless, for the Catasto and the Revenue Service the process ends with the despatch of the electronic form (at most, you may be required to provide hard copies of the documentation in relation to queries or as supplementary information) but for registration the public official must take a copy of the underlying document and the receipt from the despatch to the relevant office for the registration. Registration does not therefore take place electronically, although the office does receive the form. The reason for this is not technical, but the nature of registration. As we shall see, the order of submission is essential to the outcome of disputes between persons and the enforceability of certain documents (such as those for a distraint). Since not all those using the Conservatories have access to, or can be obliged to use, computerised systems (for example, the courts, and lawyers seeking to register distraint), the only way to keep the system running smoothly⁸⁷ is to continue to require the submission of the documentation in hard copy.

Generally speaking, property registers are accessed and consulted electronically. Paying a fee and settling an agreement gives passworded access to the data directly from the office.

Since these are public registers whose purpose is publication to encourage the alienation of property, the registers and their contents are freely accessible⁸⁸.

- In particular, from the registers it is possible, broadly speaking, for anyone to learn whether:
 - someone has a property right over the real property of others;
 - someone with whom negotiations are ongoing for the purchase of a property is the titleholder to that holder, or (subject to the limits indicated above, and with the advantages that computerised access brings) whether a particular asset belongs to a particular person to whom an offer for its purchase or lease may be made;
 - a debtor has assets against which you may enforce your rights; and

⁸⁴ However, the system, which is operational and is already obligatory regardless of the object of the sale, is in the process of being extended to include all real estate deeds and operational including, for example, donations and mortgage loans. To identify a case which will become subject to obligatory registration in the system, see interdiretorial decree 18th April 2003 in G.U. of 23rd April 2004 n. 94, 9th June 2004 in G.U. 11th June 2004 n. 135 and PISCHECOLA, *Obbligatorietà e facoltatività del modello unico informatico*, in *Immobili & proprietà*, Milan, p. 609 et seq.."

⁸⁵ The software needed for its preparation is provided free of charge by the Ministry of the Treasury, through the Agencies of the Territori or the Tax Revenue Agencies (the tax offices). The format provided is that of "xml" file.

⁸⁶ This was in fact already feasible on an optional basis directly through the above-mentioned mechanism of registration using floppy disk.

⁸⁷ Until such time as they will also operate, like the Notary, telematically.

⁸⁸ Provided however that verifications are currently in course for purposes of ascertaining the compatibility and coordination of this system with the so-called "Privacy Code", D.lgs. 196/2003, with regard to the free access to such data and with regard to the possibility that private persons may copy and save such data.

a potential borrower to whom you are considering providing finance has real property.

Further, for example, journalists wishing to discover what real property is held by a particular politician may search the registry.

Searches, given the personal and 'subjective' structure of the Property Registers may be conducted by name, surname, and place and date of birth. Computer technology (whatever their legal effect⁸⁹) means it is possible these days to search also by tax reference code and by the catastral data for a particular property.

It should not be forgotten, however, that the registries are arranged in such a fashion that were you to seek to discover all the property a particular individual holds, you would have to refer to all the separate offices nationwide.

2.5 Substantive Effects of the Registration

The principal, typical function of registration is to resolve any disputes between two claimants to a single asset; thus it has a declaratory nature, and is an example of declaratory publication.⁹⁰ The mechanism chosen is to make the unregistered or later-registered document unenforceable as between two claimants, with the earliest-registered document having precedence (article 2644 of the Civil Code).

To understand this rule properly, it is necessary to take a step back. Unlike the position under Roman law, under the current Italian system there is a "consensual principle" (article 1376 of the Civil Code). Completion of an agreement is sufficient, as a rule, for title and other property rights to change hands. If Alfonso sells title to his apartment to Bernardo at a price of Euro 100, and the agreement is made in writing (article 1350 of the Civil Code, about which more below), then Bernardo acquires title to the apartment. In an ideal world of honest individuals this would suffice. Regrettably, experience teaches that this is not always the case. Consider the circumstance in which Alfonso sells his home first to Bernardo and then to Claudio. Under the above rule, it may easily be concluded that Bernardo acquires title to the property, as the first in time. Claudio cannot acquire from Alfonso because they have entered into a contract for the sale of an item of which he is not the owner. Clearly this would distinctly hinder the free circulation of the assets. How can you be certain that Alfonso is the owner of the asset? You could examine the document underlying his purchase and those of his predecessors (back in time far enough at least for there to have been usucaption, being continuous possession for twenty years - normally-, under article 1158 of the Civil Code); and this can be done by consulting the Property Registers, but this may not suffice since there may be an indeterminate period between the sale and its registration. Such a risk might discourage a purchaser. Thus the legislation intervenes, with a rule that exploits registration: a conflict between a number of purchasers of the same asset is resolved in favour of he who registers first, even if the document underlying his title is of a later date. In the example, Claudio may prevail over Bernardo and Bernardo cannot enforce his title (albeit first in time) if it has not been registered or registered after Claudio's who didn't do that. To use an image suggested by the leading authors, you can say that article 1376 of the Civil Code should be read "through the spectacles" of article 2644 c.c.. The area continues to be one of some debate, as to the exact relationship between the two rules and it is certainly not easy to coordinate them in theoretical terms⁹¹ and moreover their operation, in the

⁸⁹ See note 64 above.

⁹⁰ It has been noted that the declaratory publication has various purposes and that there are different types of declaratory publication (i.e. registration, inscription and annotation) limiting the analysis, as we have in the text, to registration alone, clearly the discussion would apply to registration as well. Examples of registration for purposes of declaratory publication – according to the traditional view – include the registration of the declaration of acceptance of inheritance with benefit of inventory pursuant to art. 484 of the Italian Civil Code, while an example of registration for publication which is "*costitutiva*" (in the context of a complex proceeding) would be accelerated adverse possession (art. 1159 c.c.).

⁹¹ In the example given, C pursuant to article 1376 c.c., purchases "*a non domino*" and yet, by registering pursuant to art. 2644 c.c., he prevails over B. For an overview of attempts at coordination, see the recent CERVELLI, *Diritti reali*,

manner described above, requires that the principle of "continuity of registrations" must be respected (article 2650) and thus that the previous registrations, which are required by the law, must not have been omitted (so that all the links in the chain must be present).

- The rules do not leave the victim of this system unprotected, however. He in fact may claim damages against the seller (Alfonso in our example) who has already sold to another. Moreover, the jurisprudence has in fact recognised that the first purchaser may have an obligation to compensate the second for damages, where he ends up victorious in the battle to claim title. In principle, such persons were always considered free of obligations since they had done nothing but use the tools the Italian system provides. Nonetheless, some of the jurisprudence suggests that where they have acted in bad faith, because they were aware of the first sale and the fact it had not been registered (perhaps by agreement with the seller) and exploited the rule, harming the original purchaser thereby, they are liable to pay damages⁹².
- In light of this, it can be said that:
- registration is not necessary to the creation or transfer of title or the other property rights, as the making of the agreement in the form required by law suffices (articles 1376 and 1350 of the Civil Code); registration generally serves to resolve disputes between several purchasers or other holders of rights which (under Italian law) has a declaratory effect.
- registration and the property registers are the pre-eminent tools for checking whether a particular person holds a property right over a particular property, and the limits thereon. These registers confer a kind of presumption, as to the existence of that right for that person, even if this is not absolute, as it depends entirely on their updating and the risk of there being subsequent dealings that have not been registered or that are not capable of registration (such as the grant of a usufruct, or the death of a usufructuary, which extinguishes the right but cannot be registered; and the connection between the data held on the property register and the register of births, marriages and deaths (*stato civile*) - on which full title is these days based).
- Good faith as a rule does not offer relief from the effects of registration; the prevalence of the person who registered first does not depend on their good or bad faith (which at best can result in an obligation to pay damages). The real property registration system does offer relief for good faith in other circumstances: for example, in relation to *usucapione abbreviata* (abbreviated usucaption), under article 1159 of the Civil Code.

A review of the property registers is generally speaking sufficient to have an idea of the property rights affecting the title and other restrictions that are registered (such as those arising out of planning settlements with the municipalities); nonetheless it is important also to consult the other registers, such as that of births, marriages and deaths (*stato civile*), the Catasto and the planning departments to check up on, for example, the form of ownership by married owners and thus their rights to dispose of the property, and the real nature and use of the asset.

Redress for incorrect information on the property registers may be sought in the form of damages from the person responsible.

The procedure and the rules described above, finally, operate not only where a number of persons have purchased title from the same person but also where there is a conflict between a person who has acquired title and one who has acquired a lesser right.

2.6.1. Rank (rang/Rang)

cited and, for an in-depth analysis L. FERRI-ZANELLI, *Della trascrizione*, in *Commentario del codice civile* edited by Scialoja e Branca, updated by Galgano, Bologna-Roma, 1995, p. 18 and p. 181 et seq..

⁹² On these issues see FERRANTE, *La responsabilità per doppia alienazione ovvero "del precedente che non c'è"*, note with the Court of Ivrea 16th May 2003, in *Giurisprudenza italiana*, 2004, p. 780 et seq.; FERRANTE, *La tutela risarcitoria contro la doppia alienazione immobiliare*, in *Contratto e impresa*, Padua 1999, p. 1115 et seq..

Article 2678, 3rd para., of the Civil Code⁹³ states that applications must be recorded in the General Register immediately, and the number given (which will later be followed by a registration number for the Particular Registers) determines priority and thus the order of registration and the ranking for mortgages. Using this system and ranking, conflicting claims are resolved.

- Let us follow through an example.

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

In this example, since in the Italian system a mortgage (as a property right that accompanies an entitlement as security) arises with the registration of the underlying document on the public registers, the mortgages would rank in the order of their registration: thus, first B, then C, then A, and it would be in this order that they would be satisfied from the net proceeds of any sale under the enforcement procedure.

2.6.2. Priority Notice

In principle it is not possible to ensure a future registration or order, in the sense of booking it ahead. Two remarks should be made, however.

Firstly, a recent amendment to the Civil Code⁹⁴ has made registrable an agreement for sale (which was formerly excluded from the list of registrable documents pursuant to articles 2643 and 2645 of the Civil Code). Article 2645-bis of the Civil Code allows such a registration to take place (in fact, makes it compulsory where the agreement is made in the form of public act or a certified private act). This registration⁹⁵ acts as a booking, as can be seen from the provision's second paragraph. If A and B make an agreement for sale and have it registered, they effectively book the registration of the subsequent transfer, in the sense that the effects of the registration prevail over transcriptions and inscriptions made against the prospective seller after the agreement for sale's registration. So if A agrees to sell B title to his flat by an agreement dated 10 January 2004, and this is registered the following day, the subsequent final transfer of, say, 10 June 2004 and registered again the following day, shall be enforceable against a usufruct granted and registered between 12 January and 10 June 2004; and the purchase will be of full title. The law provides that this booking effect is not for an indefinite period, in that the law provides that it should cease one year from the agreed date for the final transfer, and always three years from the registration of the agreement for sale, if the deed remains unexecuted.

Secondly, since it is now acknowledged that sales may be registered not only of current, certain assets, but also of future assets, this could be seen in a similar light, with similar effects. In fact, since in such circumstances⁹⁶ the transfer takes place upon a document or action subsequent to the final transfer, namely upon the creation of the future asset, clearly the purchaser will prevail over

⁹³ See 2.3.2 Art. 2678 c.c. General Registry - 1. The registrar is required to keep a general registry of order in which, on a daily basis, it shall register, in accordance with the order of presentation, each title submitted to it for registration, inscription or annotation. 2. This registry must indicate the number of order, the day of the request and the related submission number, the person carrying out the submission and the persons on behalf of whom such submission is carried out, the titles presented under the note, the object of the request and whether the same is carried out for registration, inscription or annotation, and the persons with respect to whom the registration, the inscription or the annotation must be carried out. 3. Once the title and note have been accepted, the registrar must issue a receipt setting out the presentation number.

⁹⁴ Art. 3, comma 1, Decreto Legge 31/12/1996 n. 669, converted by law 28/2/1997 n. 30. On this point the relevant literature is extensive; see, inter alia, G. GABRIELLI, *La pubblicità immobiliare del contratto preliminare*, in *Rivista di diritto civile*, 1997, I, p. 529 et seq.; DI MAJO, *La "normalizzazione" del preliminare*, in *Corriere giuridico*, 1997, p. 131 et seq.; for a broader approach LUMINOSO-PALERMO, *La trascrizione del contratto preliminare. Regole e dogmi*, Padova, 1998, and GAZZONI, *La trascrizione immobiliare*, I, in *Il codice civile - commentario*, cited, p. 693 et seq..

⁹⁵ Art. 2645 bis of the Italian Civil Code.

⁹⁶ This applies to sales deemed obligatory sales such as the sale of generic things or things belonging to a third party.

anyone who has purchased and registered rights after the registration of the sale of the future asset⁹⁷ even if prior to the asset's creation, and thus prior also to the purchaser's acquisition of title to the property.

There has been discussion of the "reservation by registration" (although not in the manner possible under, for example, German law) in relation to this provision and the effects of article 2650 of the Civil Code. The ineffectiveness of registrations (and inscriptions) in the absence of continuity under article 2650 of the Civil Code is only temporary. As far as this provision is concerned, registrations become completely effective in accordance with their order of priority once the missing deed has been established, completing the continuous chain of registrations. To this extent, they have had some point, in that they have at least effectively reserved the property.

3. Sale of Real Estate Among Private Persons (Consumers)

3.1 Procedure in general

3.1.1. Main steps of a real estate sale

Herein we will attempt to summarise the steps leading up to the making of a final transfer of real property between private individuals (consumers); in particular, we will consider the situation in which the sellers are a married couple selling their residence and the purchaser another private individual.

Although not compulsory, negotiations normally take place through the mediation of an estate agent appointed by one or other of the parties. Once the counterparty has been found, the parties frequently will enter into an agreement for sale. This must be made in writing or be void (articles 1350 and 1351 of the Civil Code). As mentioned above, for the agreement to be registered and the parties to have the benefit of that registration, it must be executed as a public act or notary-certified private act. In practice, this is rarely done, and the agreement rarely registered, for a number of reasons. There is a widespread false belief that the notary's involvement at this stage is unnecessary and merely increases costs. Other reasons include the tax effects of an agreement for sale prepared by a notary, which will be registered with the tax authorities and on the property register, since the notary is obliged to do so; and the tendency for the agreement for sale to state a higher price than the transfer, the latter being the "taxable value" obtained by applying certain calculations to the property's registered rate of return at the *Catasto*. This second part arises on the one hand from the complex system for the taxation of property deeds, under Legislative Decree No. 131/1986 which, in truth, has ended up encouraging tax evasion⁹⁸; and on the other by a general lack of awareness of the risks (including tax risks, and risks connected with insolvency) that arise.

The purpose of the agreement for sale is to establish the reciprocal obligations for the future transfer and to allow the checks as to mortgages, planning, taxes and the *catasto*, and the ownership arrangements of the parties⁹⁹, to take place, as well as providing a basis on which the lender providing the balance of the funds may proceed. Part-payment is made under the agreement for

⁹⁷ Which has not yet produced effects amounting to a transfer.

⁹⁸ For many years a reform of the system has been proposed for purposes of revealing the real purchase prices such that taxes are imposed not on the "price" but rather on the "tax value" which would replace the current system which requires a tax declaration with respect to the price cited in the deed, and precludes the tax authorities from verifying the actual price paid provided that the deed sets out the declared tax value. Provided however that a sanction would be imposed for "obfuscation of price" if the tax authorities, through other means, were to "discover" this evasion. On this point, see articles 52 and 72 del D.p.r. 131/1986 "Testo unico dell'imposta di registro". On the incongruencies in the relationship between these provisions see, for example, Cassazione, 28th October 2000, n. 14250 in *Notaziaro telematico dell'Associazione Notarile Campana*, available on www.assonotaicampania.it; on this point and on the reform proposals see, among others, MUGGIA, *Prezzo e valore: riflessioni vecchie e nuove*, in *Federnotizie - Organo della Federazione Italiana delle Associazioni Sindacali Notarili*, 2, 2003, available on www.federnotizie.org.

⁹⁹ To remain in the context of the example given in this paragraph, if the asset regime applicable to a married couple selling property is that of default (or provided by law) and, therefore, of joint ownership of assets (unless the transaction regards the sale of personal property pursuant to art. 179 c.c.) both spouses must participate in the sale.

sale, usually 20 per cent. of the total amount (and that payment also stands as a deposit, at risk if the transaction does not complete, article 1385 of the Civil Code), and the amount may rise if the prospective purchaser is to take possession of the property immediately.

After the various checks have been made, and if necessary the loan for the mortgage settled, the transfer is executed. While for the document not to be void it need be no more than a simple private act (article 1350 of the Civil Code), almost always it is made before a notary (who will have run searches as to title and the limits upon the title, as this, by now, has become almost a professional obligation). The deed will be executed as a public act or a certified private act, suitable therefore for registration. The notary reads the agreement to the parties¹⁰⁰ and together with the notary they execute the agreement, and the price is paid in accordance with the requirements of the money-laundering legislation¹⁰¹ and the keys handed over (*traditio ficta*) which gives the purchaser possession to the property. The notary will then have the deed registered at the Property Register, the *Catasto*, and the Revenue Service, which, as we have seen, can be done in one fell swoop with the single computerised form.

There are a couple of further steps where the purchaser needs mortgage financing to pay the purchase price in whole or in part.

3.1.2. Time frame

The above procedure normally requires at least two weeks for the checks to be run at the Property Registers and the other offices, depending on the complexity of the matter and the documents being checked.

3.2 Real Estate Sales Contract

3.2.1. Form

The Civil Code provides that agreements regarding real property (and those regarding real property more generally) must be made in writing (article 1350, and for agreements for sale, article 1351, of the Civil Code).

If this form is used, under the consensual principle discussed above (article 1376 of the Civil Code) the deed effects the transfer of title. If A enters into a private act with B for the sale of the particular asset at a particular price (certain other conditions, required by the law are described later) this results in a transfer of title to the asset; for that transfer to be enforceable against third parties, the minimum requirements for registration must be met i.e., the transfer must be under a certified private act, or a private act confirmed by the courts, or by a public act.

Where the agreement is not made in writing, it is void (article 1418 of the Civil Code).

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

As we have said, for a transfer of real property to be made validly, written agreement between the parties is required, without further intervention. In practice lawyers and/or estate agents are frequently called upon (the choice depending on the value of the property and the position of the parties) and, to meet the requirements of registration, a notary. There are basic forms for both the preliminary act for sale and the transfer.

3.2.3. Preliminary contract

¹⁰⁰ If the deed is in public form it is because such form is required by law, if it is in the form of private authenticated deed such reading would be required under “The professional ethics principles of Italian notaries” (*I principi deontologici dei notai italiani*), approved by the National Council of Notaries (*Consiglio Nazionale del Notariato*) in the session held on 24th February 1994 by resolution n. 1188.

¹⁰¹ In summary, under Law No. 197/1991 (as amended), above the amount of Euro 12,500 payment may not be made in cash but must be by non-transferable bank cheques, money orders or by bank transfer instead, and in general with the participation of approved intermediaries. These regulations implement EU directives.

The Code, while not defining this agreement, provides for its use in sales and lays down rules for its form (article 1350), its use in the courts (article 2932 of the Civil Code) and its registration (articles 2645-bis., 2775-bis e 2825-bis of the Civil Code)

The typical effect of the preliminary act for sale is to impose obligations: it compels the parties to enter into the final transfer.

3.2.4 Typical Real Estate Sales Contract

- The Italian system, while requiring an agreement in writing and that the agreement states or appends certain information regarding the property¹⁰² does not lay down standard provisions. What is required is agreement in writing as to the sale of the asset for a price. Naturally, there are standard forms and template documents which however tend to be technical and not always easy for the layman to understand, as they have to be adapted to the particular case. Two of the most widely-used are: Petrelli, *Formulario Notarile Commentato*, in three volumes, 2001-2003, Milan; and Lovato-Avanzini, *Formulari giuridici - Formulario degli atti notarili*, 2004, Turin. More recently, albeit in a briefer fashion, Zanelli-Palmieri, *Guida operativa per i Notai*, Torino, 2004. These are not official publications either of the National Council of Notaries, or other bodies of the legal professions.

Attached hereto is a public act transferring title to a flat.

3.3 Transfer of Ownership and Payment

3.3.1. Requirements for Transfer of Ownership

The Civil Code, like the Napoleonic Code, lends great importance to "cause" in relation to contracts. Pursuant to articles 1321, 1325 (1376) and 1418 of the Civil Code, it is not merely the agreement between the parties, the subject matter and, particularly here, the form that may be required for an agreement not to be void in its transfer of title, but also the "cause" or the fundamental underlying reason for the transfer¹⁰³. The payment of a price is not necessary to a transfer; it may be an obligation upon the purchaser (article 1498 of the Civil Code) and may be in instalments or in may event follow the execution of the agreement and the transfer of title. Nor is tax registration or registration on the Property Register necessary for the transfer to be effective.

3.3.2. Payment due

The parties may determine the terms and timing for the payment of the purchase price as they see fit. Normally it is paid at the time the sale takes place, directly between the parties.

The notary may be appointed to hold the purchase monies pending the successful outcome of the registration.

It is not compulsory or even usual for insurance to be taken out against risks relating to payment and the transfer of the property.

3.3.3. Ways for the seller to enforce payment

The best means a seller has of obtaining payment of the purchase price is where the sale has been my public act: under article 472 of the Civil Procedural Code, this provides grounds for enforcing financial obligations contained therein.

3.3.4. Transfer of possession to the buyer

The seller is obliged to deliver the item to the purchaser (article 1476 of the Civil Code); leaving aside practical solutions (such as the simultaneous exchange of monies and keys), a breach is best

¹⁰² Reference is made to the requirements under laws 47/1985, 724/1994, 662/1996 and today (also) D.p.r. 380/2000 referred to in the text below.

¹⁰³ Scholarly discussions regarding the effective "cause" are still in course. Reference must be made, for an initial analysis, to Torrente-Schesinger, cited, p. 202 et seq..

addressed through the courts, which may oblige the seller to effect delivery and take steps to allow the taking up of possession and availability of the thing.

3.4 Seller's Title

3.4.1. Title Search: Ascertaining the seller's title

As mentioned earlier, the notary handling the sale has checks made at the Land Registry to establish the existence of the right that the seller claims and previous title-owners, going backward in time to examine a prior period of sufficient length for acquisition by usucaption, which normally requires twenty years of uninterrupted possession of the asset)¹⁰⁴. Clearly if the person who conferred title upon the seller acquired title ten years earlier, and he in turn acquired title thirty years earlier, the checks will go back to cover that title.

3.4.2. Title Search: Absence of Encumbrances

Through such an examination of the land register, the seller is in principle in a position to be aware of other rights over the asset, account of which will be taken in determining the price and the scope of the title being acquired. Generally, these are mentioned in the sale agreement even if this is not essential, since for the purposes of enforceability what is important is their registration. There are restrictions upon title that although not registered remain enforceable upon a sale: this is the case with certain fiscal liens, which may create practical problems as they can be difficult to identify. To protect purchasers against these, and against registrations made after the date of the contract, which as we have mentioned effects a transfer (pursuant to article 1376 of the Civil Code) on the date of registration, the practice has adopted a number of techniques. The most common is to deposit part of the purchase price with the notary, who then delivers it to the seller often when the registration has been successfully completed (or the full period in which the fiscal lien may be raised has expired)¹⁰⁵. Registration's central role and its function within the property law system has meant that the number of encumbrances enforceable against a purchaser that are not shown on the land registries tends to be reduced to a bare minimum.

This goes to explain the ruling by the Constitutional Court, that article 155¹⁰⁶, on the personal separation of spouses, of the Civil Code was constitutionally unlawful, in that part which governs the allocation of the matrimonial home. This "does not provide for the registration of the court order making the allocation [...] for the purposes of its enforceability against third parties".¹⁰⁷ Although the right to the matrimonial home is generally considered a personal, rather than a property, right, the jurisprudence (including in the light of, for example, the registrability of leases for terms of more than nine years, as discussed in 3.4.4, below) has found it essential that it be registered in accordance with the above principles.

In any event the best protection for a purchaser is speedy work by the notary in meeting the obligation to register the final transfer. In this regard, as mentioned in 2.3.1 above, there are statutory provisions that oblige the notary to do so "as quickly as possible", or otherwise to suffer

¹⁰⁴ The consolidated doctrine and jurisprudence affirm that the Notary is obliged (both from a professional and an ethical point of view) to carry out the verifications referred to (but also *catastal* verifications): on this point see Supreme Court, 15th June 1999, n. 5946, in *Rivista del Notariato*, 2000, p. 136 et seq. and Supreme Court 13th March 2002, n. 8470 in *Federnotizie - Organo della Federazione Italiana delle Associazioni Sindacali Notarili*, 6, 2002, available on www.federnotizie.org.

¹⁰⁵ On the fiscal lien on real estate for indirect taxes see PURI, *Considerazioni critiche sul privilegio speciale immobiliare*, in *Studi e Materiali*, 1, Milano, 2002, p. 222 et seq.; PURI, *Decadenza prima casa di abitazione e privilegio speciale immobiliare per i tributi indiretti*, in *Studi e Materiali*, 2, Milano, 2002, p. 612 et seq..

¹⁰⁶ 155, 4th comma: "The right to live in the family home belongs preferably, and whenever possible, to the spouse who is granted custody of the children."

¹⁰⁷ Constitutional Court, 27th July 1989, n. 454, compatible, even with certain difficulties of coordination, with the analogous provision of Art. 6 of law n. 898/1970 – as amended by law n. 74/1987 – on the subject of divorce.

the risk of damages (article 2671 of the Civil Code). This is not so where the notary has acted promptly. The courts will assess whether in the particular case the notary properly discharged his duties (by acting promptly) and thus whether the time that passed between the date of the deed and its registration may result in the notary's liability¹⁰⁸.

3.4.3. Title Insurance or Liability

Title insurance is not necessary in the Italian system since the registration system is considered effective enough and provides for sufficient liability of the notary who researches the seller's title.

The exceptions are unusual cases where title is difficult to establish, or for large property portfolios, where a voluntary insurance is obtained especially.

3.4.4. Leases

Checks that the property is free from any encumbrance under any lease agreement are conducted on two levels. On one level, with the checks at the land registry as mentioned above, in that lease agreements with a term of more than nine years must, under article 2643, part 8, of the Civil Code) be registered¹⁰⁹; and for leases of shorter terms, the solution is the purely practical measure of making due enquiries of the seller¹¹⁰ (even during negotiations the seller gives a warranty as there being no such current agreements, and then that there is no-one with rights as a tenant, in the agreement for sale, and then in the deed for sale) and by inspecting the premises for a first-hand confirmation that it is free from such burdens.

Without going into detail on the complexities of leases¹¹¹, the Italian system is based on the rule that may be summarised as *emptio non tollit locatum*, articulated in articles 1599 and¹¹² 1600 of the

¹⁰⁸ There exist many judicial decisions on this issue. In general, on the latest point discussed in the text, see Supreme Court, 12th May 1990 n. 4111, in *Nuova Giurisprudenza civile e commerciale*, 1991, I p. 777 et seq., Supreme Court 25th May 1981 n. 3433, in *Rivista del Notariato*, XXXV, p. 693 et seq. and Supreme Court, 28th August 2000 n. 11207, in *Guida al diritto in Il Sole 24 ore*, n. 37, 2000, p. 22 et seq. which specifies that the late registration is "not per se the cause of concrete, actual and economically relevant damage to the owner". As for the question of how many days render the registration "timely or not" the case law varies considerably: from decisions that hold as insufficient a term of 3 days such as the Appeals Court of Cagliari, 4th June 1999 in *Rivista del Notariato*, 2000, p. 1437 et seq. to more realistic positions such as the Appeals Court of Roma, 1st October 1984 in *Giustizia civile*, 1985, I, p. 1782 et seq. (which held as sufficient fourteen days).

¹⁰⁹ As an exception to the rule providing that only matters (more properly, real rights) are subject to publication requirements, the civil code, considering that the temporal constraint of a lease agreement of such term produces similar effects (although the right of the lessee remains, as stated above, a "personal" right of enjoyment) – even if not identical – to those, for example of usufruct, requires its registration.

¹¹⁰ Note that in reality the applicable regulatory framework (on this see the following note) is complex and may reasonably give rise to the conclusion that, even apart from the example provided under art. 1350 c.c. (in written form *ad substantiam* for lease agreements having a term greater than 9 years) with regard to residential leases, a written contract would always be required (to facilitate the imposition of tax dues) including for agreements of shorter term.

¹¹¹ On this point, reference is made to the study, in the context of the project for which this text has been drafted, of BRECCIA-BARGELLI, *Tenancy Law Report - Italy*, available on <http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw> under the item "projects" and , for a technical analysis from a notarial standpoint (with reference also to the case of the lease) but not yet updated with respect to recent provisions of law, CAPOZZI, *Dei singoli contratti*, Milan, 1988, I, p. 299 et seq. (and the new edition: CILLO-D'AMATO-TAVANI, *Dei singoli contratti, Manuale e applicazioni pratiche delle lezioni di Guido Capozzi*, Milan, 2004, I). In this regard, note that a) the Italian system of leases is quite complex in that with respect to the nature and/or purpose of the asset (land or building, for agricultural use or otherwise, for residential, office or commercial use) the civil code provisions are intertwined with "special" or specific legislation; b) with respect to the lease of apartments (and in particular for residential use) the specific legislation is in continuous evolution due to the difficulty in arriving at a balance between the needs of owners/lessors to earn a "profitable" rental and the ready availability of the asset with that of tenants/lessees to pay a reasonable rent with an adequate (minimum) term of agreements which satisfies their right to a residence. In this context, one should mention, in addition to the "historical" law 392/1978 the so-called "fair rent" law - (which in the sector of residential leases imposed a system of rentals determined outside of market conditions) and laws 359/1992 and 431/1998 – aimed at replacing the fair rent law for its "failure" to meet its intended purposes – the very recent regulations aimed at protecting "evicted" tenants (in compliance with the law) from

Civil Code) and confirmed by specific legislation¹¹³ (and of course by general principles). In consequence (and all the more so where the agreement has in fact been registered) or where the purchaser has in any event assumed an obligation on such terms towards the seller, the purchaser is required to respect the tenant's rights. It is good practice to take account in the agreement for sale of any lease of the property and the characteristics thereof (such as the type of agreement in light of the legislation in this area, its term, the rent, the treatment of expenses, and any registration) and avoid thereby that silence may lead to misunderstanding between the parties as to the property's freedom from third-party rights, or the extent of such rights where they are present, and the disputes that may follow.

This is a particularly delicate area, since on the one hand it is not always possible to trace such agreements from the public registers, and on the other the legislation provides a series of pre-emptive rights on purchase (on the same terms) to tenants, normally endowed with the right of redemption (OK)¹¹⁴. If the seller fails to meet its obligations under such pre-emption rights, the tenant may exercise and enforce them against the third-party purchaser as well, and force the surrender of the property, acquiring title (against payment of the purchase price) in a manner against which there is little defence. Examples of pre-emption rights established by law occur in relation to agricultural lands, in favour of the person who works the land or the owner of the adjacent plot (Laws Nos. 590/1965, 817/1971, including as subsequently amended) occupied by residential constructions (Law No. 431/1998, article 3, para. 1) or used for different purposes (Law No. 392/1978, article 38 et seq.)¹¹⁵

Consequently where the owner does not permit the exercise of the pre-emption right, such as where, for example, there is a sale of an apartment for use as leased offices, the tenant may enforce its right and obtain title against the third-party purchaser. Hence the importance of enquiries in this regard during negotiations, and the inclusion of suitable warranties in the agreement.

3.5 Defects and Warranties

landlords, where such tenants are without a place of residence and, therefore, faced with extreme financial difficulty, which introduces new (special) forms of agreements, see the law decree of 13th September 2004 n. 240, converted by law 269/2004 and art. 1 l. 311/2004 in G.U. 31 dicembre 2004 n. 306, S.O..

¹¹² Art. 1599: "1. A lease agreement can be enforced against a third party who has acquired the leased or hired asset, provided that the contract has a certain date which precedes the alienation of the asset. 2. The provisions of the preceding paragraph do not apply to leases of moveable goods not registered in public registries, if the third party has acquired possession of the moveable asset in good faith. 3. Non-registered leases of real assets are enforceable against a third party who has acquired the leased property only with respect to a period not exceeding nine years from the commencement of the lease. 4. In all cases, the purchaser is bound to abide by the lease if he has assumed that duty with respect to the seller." This article, as mentioned above in the context of the assignment of the family home in the event of divorce (above 3.4.2) is also the subject of debate as to the procedures and limits of enforceability of the judicial sentence of assignment. Recently, after a contrast in the case law, the civil United Sections of the Supreme Court, with sentence n. 11096 of 26th July 2002 have affirmed that "Pursuant to Art. 6, comma 6 of law n. 898 of 1st December 1970 (in the text replaced by law n. 74 of 6th March 1987), which applies also to the case of personal separation, the judicial sentence of assignment of the family home to the spouse to whom the custody of the children is granted, having by definition a certain date, is enforceable, even if not registered, against a subsequent third party purchaser for nine years from the date of assignment, or – but only in the case that the title has been registered – for a period exceeding nine years". The cited law (art. 6 comma 6, last sentence, L. 898/1970) is the following: "The assignment, if registered, can be enforced against a third party purchaser under the terms of article 1599 c.c.)."

¹¹³ See CIAN-TRABUCCHI, *Commentario breve al codice civile*, in *Breviaria Iuris* edited by Cian and Trabucchi, Padova, 2004 edited by Cian, *sub 1599, VI*, for the relationships and the coordination of art. 1599 c.c. with the special legislation, and in particular with law n. 392/1978, as well as BRECCIA-BARGELLI, *Tenancy Law Report - Italy*, cited, p. 3 and 4 and *Set 6* and CAPOZZI, *Dei singoli contratti*, cited, p. 338 et seq..

¹¹⁴ As a rule, "legal" preemption, that is pre-emption dictated by law, is characterised as a "real" pre-emption as it grants to the holder of the right a right of surrender discussed in the text.

¹¹⁵ On legal pre-emptions (including that among co-heirs as per art. 732 c.c. in the event of sale of a quota of the inheritance) see TRIOLA, *La prelazione legale*, Milan, 2003.

3.5.1. Legal rules

In addition to the normal protection afforded by the rules of contract (article 1418 *et seq.*, on invalidity, termination or rescission) a purchaser also has a number of specific legal remedies available for use against the various parties involved in the transfer of real property: the seller, the notary and the estate agent.

Against the first of these, there are the actions arising out of the warranties that the seller must by law provide to the purchaser, unless the parties agree otherwise: as to defects in title, in the property and the matters consequential thereto (loss of the property, failure of the right acquired, defects or failure of the warranties¹¹⁶), articles 1483 *et seq.* of the Civil Code, which permit the purchaser to obtain termination for the agreement, the return (in whole or in part) of the purchase monies and to make a claim for damages.

These are, in particular, the warranties (a) against eviction (that is, protecting the private purchaser from the loss in whole or in part of its right); (b) against defects in the assets (under article 1490 of the Civil Code, the seller "is bound to warrant that the thing sold is free of defects which render it unfit for the use for which it was intended or which appreciably diminish its value"); and (c) against the absence of characteristics promised (article 1497 of the Civil Code)¹¹⁷.

Although it relates to construction, article 1669 is considered also to benefit the purchaser, and provides for the seller's responsibility if the property is ruined in the following ten years¹¹⁸.

Possible actions against the notary are those which seek to compensate damage resulting from a failure properly to discharge his rules under the professional terms of conduct between the notary and the client purchaser (pursuant to articles 2229 *et seq.*). This includes a failure to make full preliminary investigations as to the seller's title, and/or the presence of prejudicial registrations at the Land Registries¹¹⁹, or, as discussed above, liability for tardiness in discharging registration obligations¹²⁰.

¹¹⁶ Consider cases of sale *a non domino*, or of a thing which is totally or partially belonging to a third party, other than cases where this is the result of an agreement among the parties – in which case article 1478 c.c. would apply – or defects of the object of the sale such as the lack of compliance with urban planning regulations (see also n. 3.6 above) or relating to qualities promised (luxury fittings, autonomous heating or electronic or technological equipment, intended use eligibility or eligibility for construction which turn out to be lacking).

¹¹⁷ From the warranty against defects (and from that for the lack of promised qualities) one may distinguish the case of the so-called *aliud pro alio* ("one thing instead of another") sale, a case to which the regulations at hand would not apply (and in particular, therefore, the short statute of limitations and expiration for the notification of the same – art. 1495 c.c. – but rather the ordinary 10-year statute of limitations provided under art. 2946 c.c.). The (theoretical) difference is clear: the "defective" thing is nonetheless the object of the agreement and not another thing altogether; in practice the distinction is more problematic. A classic case in the past was that of the agricultural land "sold" as eligible for development; more recently the case of the apartment lacking an inhabitation certificate has arisen: Supreme Court, 11th February 1998, n. 1391, in *Rivista del Notariato*, 1998, p. 1008 *et seq.*

¹¹⁸ On this point see CAPOZZI, *Dei singoli contratti*, I, cited, p. 58 (but also new edition: CILLO-D'AMATO-TAVANI, *Dei singoli contratti, Manuale e applicazioni pratiche delle lezioni di Guido Capozzi*, I, cited) and DE LUCA-COGLIANDRO-D'AURIA-RONZA, *Dei singoli contratti - Manuale e applicazioni pratiche delle lezioni di Guido Capozzi*, II, Milano, 2002, p. 21 *et seq.*: the right under art. 1669 c.c. may be exercised, according to such interpretation, by the purchaser "both against the seller who directly built the real estate, and against any builder in general, and the specific identification of the legal relationship relating to the construction of the property would not be relevant".

¹¹⁹ On this issue, in fact, the case law has become settled and consolidated in its affirmation that the "ipocatastral verifications", or controls with the Conservatoria R.R.I.I. and the Catastral offices fall within the scope of responsibility of the Notary, save for "mutual express waiver" by the parties. On this point, see for example Supreme Court, 13th June 2002, n. 8470, in *Notariato*, Milano, 2003, p. 24 *et seq.*

¹²⁰ But also with respect to the late (or even absent) fulfilment of the tax obligations which, as stated in the text, are imposed on the Notary both by the notarial law n. 89/1913 (art. 72, for example) and specifically by provisions of tax law (reference is made to the contents, for example, of D.p.r. 131/1986 – Uniform Code on the registration tax). For an

Actions against the estate agent, under which the agent may be compelled to compensate damage suffered, would arise by a failure to discharge obligations arising under the agency agreement (articles 1754 *et seq.*) and, in elementary terms, for having failed to keep proper impartiality or for having supplied incorrect information to the purchaser (and also, *mutatis mutandis*, to the seller).

3.5.2 Typical contractual clauses: the scope of *caveat emptor*

As mentioned above, there are specific warranties that benefit the purchaser, arising by law or that may be the subject of specific agreements between the parties to broaden their scope¹²¹ or indeed to exclude them (article 1487 of the Civil Code, which also imposes limits including in particular that the seller is in any case barred from invoking exclusions for which he is responsible – with any contractual term providing for the contrary being void) such that the sale becomes one at the buyer's risk (article 1488, second paragraph¹²²), with the buyer in such circumstances assuming all risks regarding the property, in particular against eviction but also any actions brought by third parties claiming rights over the property.

The resulting agreement is so different and so much more risky that some consider it a different agreement entirely, which is not even subject to rescission for breach (art. 1448 c.c.). This is even so when a true owner acts against the purchaser claiming and obtaining the property. Whilst the purchaser by law has the benefit of the warranty against eviction and can enforce its rights against the seller in court, this is not the case in sales where the purchaser bears the risk (obtaining thereby a favourable price)¹²³.

The application of the same warranty has also been claimed in relation to the agreement for sale, even if strictly speaking this should not be possible, as that agreement does not actually execute the transfer.

Where agreements are entered into between constructors and consumer purchasers, the latter may have the benefit of the rules under articles 1469-*bis et seq.* as to abusive clauses, which while not specific to sales of property¹²⁴, currently represent one of the principal protections to house buyers.

In a normal sale of residential premises, the agreements reflect the underlying legislation and confer these warranties upon the purchaser, reproducing the provisions of law. To enforce them, a purchaser must apply to the courts within the rather limited periods required, and usually by providing suitable notice to the seller.

3.5.3 Liability of the Buyer for Debts of the Seller

analysis of the role of the Notary – in his role as collector on behalf of the State and person responsible for taxes in that he is directly obligated (recourse against the principal debtor being however possible) with respect to acts related to his ministry - see NASTRI-NASTRI, *Manuale applicativo delle imposte indirette*, in *Teoria e pratica del diritto*, Milan, 1996, p. 462 *et seq.*; with respect to the tax obligations of the Notary see also SANTARCANGELO, *Elementi di diritto tributario*, Rome, 1996 and LANZILLOTTI-MAGURNO, *Il Notaio e le imposte indirette*, Rome, 2004.

¹²¹ For example, by providing in the event of eviction that the seller reimburse an amount exceeding the purchase price, without prejudice to other reimbursements, or that the seller fulfil this warranty even in the event of simple loss of possession and not of the right to the property.

¹²² Art. 1488, 2nd comma "The seller is exempt even from this obligation" (see comma 1) "when the sale was agreed to be at the risk and peril of the buyer."

¹²³ For examples of all of these warranty clauses and the derogation from the same, see SANTARCANGELO, *La compravendita*, cited, p. 300 *et seq.*. For a more general analysis on warranties, see BIANCA, *La vendita*, cited and CAPOZZI, *Dei singoli contratti*, p. 56 *et seq.*

¹²⁴ These also apply on a widespread basis to mortgage loans as discussed under paragraph 7 below.

The purchaser assumes the same legal position as the seller, being its successor "in the particular". Legislation governs, generally speaking, the extent to which he may be responsible for debts that encumber the property that has been sold.

Firstly, debts due in relation to the condominium are dealt with by article 62 of the provisions implementing the Civil Code. This article provides that the purchaser of the property is jointly liable with (but ranks below) the seller in relation to condominium expenses for the year in which the agreement is entered into, and also the year prior thereto. There are frequently specific provisions as to such debts, partly because of the difficulties in interpreting the concept of expenses¹²⁵, and partly to exclude (in the relationship between the seller and purchaser) such liability or to diminish the risk. Typically, these provisions stipulate that a part of the price is set aside or, where their amount is not yet known, used directly to pay them¹²⁶.

As to charges that the seller is obliged to pay for the property (for example, ICI, the Italian council tax on immovables, or refuse collection charges) these are typically debts which if left unsettled are not payable by the purchaser. In the most serious cases, the authorities making the charges may enforce them against the assets of the person who is obliged to make payment. Then, such debts may appear on the property registers in accordance with the rules discussed earlier as to publicisation, which entails risks for the purchaser. The same may be true for the debts arising from utility services, such as the telephone, electricity and gas. The seller usually gives specific warranties also in relation to these matters, as to payments being up to date and the absence of such debts (and thus of any pending enforcement procedures over the property). Otherwise, in a similar manner to that discussed above, provisions may be included that such debts be paid out of the proceeds from the sale. In more complex circumstances provision may also be made for the compulsory sale of the property, with the creditors taking part in the agreement for sale (or in side agreements) with a view to satisfying their claims, alongside the sale and/or waiving the right to resort to legal action or the undertaking to do so in the competent legal forum.

3.6 Administrative Permits and Restrictions

3.6.1. Standard Requirements

In principle, there is no general need to obtain any administrative permit or authorisation for the sale of real property, including in particular apartments.

As ever, the general rule is proved by the exceptions (some of which we have already hinted towards).

Firstly, in the public residential housing sector there are a large number of (not always easily reconcilable) circumstances in which the state or certain public authorities (in particular, the municipalities) have a right of pre-emption, or there is a restriction on sales, or a requirement for authorisation. In bare summary, and applying the distinctions used in the sector:

- "approved housing", characterised by the construction being conducted in the private sector, which benefits from certain advantages against its discharge of a number of obligations assumed under an agreement made with a local public authority (usually the municipality). Normally, the municipalities make compulsory purchases of the relevant land and assign it, either with a transfer of title or the grant of rights of *superficie* (usually for 99 years) to the private builder, who agrees to build on certain terms, and to assign (or lease) to persons who meet certain requirements. For a long

¹²⁵ Whether or not the purchaser would bear the costs of (and to what extent, and whether such quota would fall within the limits of the regulation under discussion and, therefore, with or without recourse) for example extraordinary expenses for works commenced after the sale but decided prior to the sale. For a sentence on point, see Court of Bologna, 12th March 1994, in *Notariato*, Ipsoa, 1995, p. 134 et seq..

¹²⁶ To this end it is common to obtain from the director of the condominium a written declaration of the liabilities of the condominium. At the moment of sale, such document may not be definitive and complete as there may be expenses in progress which have not yet been quantified and divided among the condominium quotaholders.

time, under Laws Nos. 865/1971 and 10/1977, the properties built thereby could not be alienated for ten years from the grant by the municipality of a certificate confirming its suitability for habitation, and thereafter only at a price established by the *catasto* and to persons meeting certain requirements; and after twenty years, they could be sold only subject to prior payment to the municipality of the difference between the market value and the newly assessed purchaser price. By Law No. 179/1992, these restrictions were abolished;

- "Assisted housing", where the private builder obtains special terms of credit (assisted mortgages) and contributions to purchase the land and build upon it. Under the current legislation (now article 20, of Law 179/92 as amended by article 4 of Law No. 85/1994), the person to whom the property is transferred or assigned by the builder may freely transfer the property five years after the purchaser, while authorisation from the local regional authority will be required where there are serious, intervening or documented reasons for the sale prior to the expiry of that period;

- "Subsidised housing", which is true public housing, since (a) construction is by public bodies (previously IACP, the institutions for public housing, which were arranged by province, and now mostly ATER)

and (b) because they are funded entirely from the public purse. The first assignee must meet certain requirements laid down in law, and regional authorisation is required; further sales are forbidden for a certain number of years and there is a pre-emption right in favour of the IACP, although this may be extinguished by payment of a fee, the amount of which is established by law¹²⁷.

Although the aim is different (that of reducing public debt), some of these points are valid also in relation to the rules governing the state programme for property sales. By a series of laws (the latest of which – subsequently amended - was Law No. 410/2001, converting Law Decree No. 351/2001) a sale of assets held by state social security institutions¹²⁸ have been sold, under a securitisation of publicly-owned real property. The state incorporated a special purpose vehicle, SCIP, and specific legislation transferred title in property of these institutions to the vehicle. The company then partly sold to individuals (mostly tenants) who met the legal requirements at subsidised prices, and partly auctioned the properties off. The purchasers, by reason of the subsidised price, may not sell the properties for five years from their purchase date (any attempt to do so earlier being void, under article 3, paragraph 14, of Law Decree 351/01 converted into Law 410/2001). This restriction regards only the most recent part of the properties that were sold, in that the previous legislation imposed a ten-year prohibition on alienation, which could be lifted only where the family group grew or there was a change of residence of more than 50 km); should one of the circumstances allowing the ban to be lifted be fulfilled, the property became (and remains, for a purchaser buying under the old rules) freely transferable.

A second circumstance requiring public authorisation is where property of historical or cultural importance is concerned, where authorisation is required for a sale and there are pre-emptive rights in favour of the state and some public bodies (and this is just part of a complex system, which draws distinctions between assets that belong to public bodies and not-for-profit organisations, and those that belong to private individuals or companies)¹²⁹.

¹²⁷ This is perhaps the most complex area of Erp, where in order to identify prohibitions, the need for authorizations and pre-emption rights it is necessary to verify when the deeds of assignment were executed. A summary is provided in GAMMALDI, *Rivendita di alloggi di edilizia residenziale pubblica*, in *Notiziario telematico dell'associazione notarile campana*, March, 2002, in www.assonotaicampania.it.

¹²⁸ Such as INPS (*Istituto nazionale di previdenza sociale*) or Inpdap (*Istituto nazionale di previdenza e assistenza dei dipendenti pubblici*).

¹²⁹ On these, reference is made to www.notariato.it, under Studies and analyses – historical and artistic assets (*Studi e approfondimenti - Beni storici e artistici*), where the research on point carried out by the national Council of notaries is available and, in particular, to the Code of cultural assets (*Codice dei beni culturali*) - D.lgs. 42/2004.

A third circumstance regards special restrictions on parking areas, again in an effort to protect the public interest and/or assistance provided during construction. Again, this is a very complex area¹³⁰, and without exploring the fine detail, there are a number of different categories of parking areas, such as for example "Tognoli" areas, built pursuant to Law No. 122/1989 (subsequently amended) which have special rules of their own. They are inextricably linked to a principal asset (the apartment in question) under a special deed of encumbrance in favour of the municipalities that authorised their construction and cannot be sold separately, any attempt to do so being legally void. Another kind of parking area is the 'ponte' area, and these have produced much case law. Built pursuant to Law 765/1967, they must be used by occupants of the building of which they are part, even if they may be sold separately to persons outside the building.¹³¹

Fourthly, in a quite different setting, the regulations governing construction, planning and construction amnesties should not be overlooked. These include Laws Nos. 47/1985, 724/1994, 662/1996, Presidential Decree 380/2001 and Law Decree No. 269 of 30 September 2003, converted into Law No. 326/2003, as amended¹³². These have the effect that transfers of buildings or parts thereof shall be void if details of the building permit (which has had a number of names over the years) are not provided, or you can show that the buildings' construction began prior to 1 September 1967 (when it became necessary to obtain a building permit from the relevant municipality). Where buildings have been put up in breach of the legal requirements (in the absence of building permits, or in breach of the permit granted), an application may have been made under a building amnesty (that is, an application post hoc, subject to certain limits and with payment of a fine), in which case details of the application should be provided; or a certificate of lawfulness may have been obtained.

Finally, we should mention the legislation on the prevention of forest fires (Law No. 353/2000, in Italy's Official Gazette No. 280 of 30 December 2000) which in its article 10 (Prohibitions, prescriptions and sanctions), provides: - that the land affected by fire may not have a user other than that prior to the fire, for at least fifteen years; - that any sale agreement made during that period must make express reference to that restriction on user, or otherwise be void; and - for ten years no buildings of any kind may be built upon the land (except where building permits had already been issued prior to the fire). The legislation seeks to prevent the wilful destruction of forests and pastures with a view to building on the land later.

3.6.2. Requirements for certain types of real estate sales only

The legislation referred to above provides that on any transfer of land of any kind, a certificate of approved use, as issued by the local municipality, be attached to the transfer, stating the user (be it agricultural, for construction, public green areas, or similar) of the property and a certificate from the transferor that there have been no changes to the municipality's planning documentation since the certificate was issued¹³³.

¹³⁰ For a recent summary, see MAGLIULO, *La disciplina dei parcheggi dopo il nuovo T.U. dell'edilizia*, in Notariato, Milan, 2004, p. 528 et seq., as well as, once again, in www.notariato.it, studies and analyses – urban planning and building amnesty – parking places (*studi e approfondimenti - diritto urbanistico e condono edilizio – parcheggi*).

¹³¹ See the preceding note.

¹³² See notes 10 and 11 above and, in particular, with respect to the formulas to use for purposes of notarial deeds RIZZI, *Testo unico, condono edilizio e attività negoziale*, cited p. 254 et seq..

¹³³ Certain instances are excluded such as gifts between spouses or the absence of issuance by Municipalities within a certain period of time: see articles 18 of law 47/1985 and (at present) 30 of d.p.r. 380/2001 on www.notarlex.it. On this point also refer to note 11 above.

Also worthy of mention is the restriction that may be imposed that a property should be used only as a hotel, which is temporary (albeit frequently extended), governed by complex rules¹³⁴ at a state and regional level, and by building, planning and financial restrictions (since very often in the past such restrictions were connected with loans). Where these are present, authorisations are required both for any transfer and for changes of use (and the latter will not always be possible).

3.6.3. Control of administrative permits and restrictions

In principle, these are permits, certifications and checks that fall to the parties, and the seller in particular. Nonetheless it is common practice for the notary generally speaking to conduct these investigations, whether by reasons of a specific appointment, or because of the risks that the notarial acts may otherwise be void, for which in some circumstances the notary may be liable, including in terms of disciplinary measures.

3.7 Transfer Costs

3.7.1. Contract and Registration

SALE OF A FLAT MADE BETWEEN PRIVATE INDIVIDUALS WITH OR WITHOUT SPECIAL CONCESSIONS
FOR A PRICE OF:

EUR 100,000

drafting and executing the contract (e.g. the notary's fees): 1960

title insurance: not usual

registration in the land register and Catasto: 70

EUR 300,000

drafting and executing the contract (e.g. the notary's fees): 2500

title insurance (if usual in your country); not usual

registration in the land register Catasto: 70

The costs of the notarial expenses includes preliminary checks and post-completion; if the sale is connected with a mortgage loan they may be reduced: - registration includes the updates to the records at the Catasto.

3.7.2. Transfer Taxes

Example: sale made between private individuals, subject to property registration tax, mortgage registration and catastral fees:

Taxes and Fees for:

- Property Registration 3% (principal residence) 7% (other transactions)
- Mortgage Registration € 168 (principal residence) 2% (other transactions)
- Land Register Fee € 168 (principal residence) 1% (other transactions)
- Stamp Duty € 230 (principal residence) € 230 (other transactions)
- Mortgage Tax 35 in all cases
- Land Register Tax 35 in all cases

¹³⁴ For an analysis, even if not recent, TONDO, *Multiproprietà e funzione alberghiera*, in *Rivista del Notariato*, Milan, 1984, p. 809 et seq. and Constitutional Court, sentence n. 4, 22nd-28th January 1981, in *Giurisprudenza costituzionale*, 1981, I, p. 25 et seq..

The percentages are applied to the price stated on the deed. Provided the price is at least the catastral value, no further investigation is made as to the actual price.¹³⁵

Prior to the introduction of the single computerised form, it was not necessary to register the document if the transfer was by public act. These days all these matters are dealt with together.

The notary is obliged to make payment of the fees connected with the sale ("in place of taxes"); once the agreement is made, these must be paid whether or not the parties have put him in funds, within 30 days.

3.7.3. Real Estate Agents

Estate agents are greatly involved in the sales of apartments in the large urban centres, and much less so in the smaller towns.

In the former, they are involved in 75-95 per cent. of transactions; in the latter, 25-50 per cent.

These figures are based on personal experience and some published data from the agents themselves.

How much is the agent's fee? 3%

Who usually pays the agent – the seller or the buyer? Both

(See Article 1755, Civil Code)

3.8 Buyer's mortgage

The purchase of residential premises, and of real property generally, by a private individual is normally tied to a bank loan, and the normal instrument is a mortgage agreement¹³⁶. In such circumstances it is necessary to reconcile conflicting interests: that of the seller, who would like to be paid immediately, and that of the buyer, who would like to obtain the transfer of title and the monies from the bank; and that of the bank, to make the loan at the same time as it obtains the mortgage over the property in question as security before any entries are made that might make the mortgage ineffective.

There are a number of solutions that are applied in practice and each carries some risk for at least one of the parties.

The mortgage agreement may be entered into prior to the sale, with the participation in the agreement, as "third-party mortgagor"¹³⁷ of the prospective seller, who does not assume any personal obligation (but suffers a mortgaged property); the mortgage is registered¹³⁸, the transaction awaits confirmation from the notary confirming the due registration of the mortgage and the absence of any intervening prejudicial public notices, the sums are provided to the prospective purchaser and generally, at the time that payment is made, the sale is entered into, and the property transferred and the purchase price paid.

In this case, it is the seller who runs the greatest risk, as his property is mortgaged to secure the debt of another. But the purchaser also runs some risk, assuming obligations towards the bank despite not having acquired title.

¹³⁵ See above.

¹³⁶ See above at n. 7 and reference is also made to D.Lgs. 385/1993 – Uniform Banking Code (*Testo unico delle leggi in materia bancaria e creditizia*), art. 38 et seq, available on www.bancaditalia.it.

¹³⁷ Art. 2808, 2nd comma, c.c. "A mortgage can be imposed on the property of the debtor or of a third party and is established by means of an inscription in the real estate registries".

¹³⁸ Where the person granting the mortgage is an entity which could theoretically become bankrupt, pursuant to the regulations cited above, it is necessary to wait ten days in order to render the mortgage of the bank valid and enforceable in the event of bankruptcy (the so-called consolidation of the mortgage), and a certificate of the competent authority must be submitted to the bank stating that bankruptcy proceedings have not been brought against the grantor of the mortgage as of the date falling ten days after the inscription.

Another solution is to enter into the sale and then immediately the mortgage agreement (thus the mortgage is given by the purchaser, who has acquired title) and the bank provides bridge financing, but at least until the mortgage is registered, also demands differently calculated (and usually higher) interest rates from the purchaser.

In this case, it is the bank that assumes the greatest risk, although it will have made investigations as to the prospective purchaser's reliability and financial standing. It has to provide funds although it has not yet in truth secured the mortgage.

In other cases, since the notarised public act gives enforceable title, the sale is entered into with the immediate transfer of title, but the price is not paid and it is agreed that only when the bank has properly obtained its security (with the mortgage's registration¹³⁹) and provided the funds, will the seller be paid. For that reason, provision is included¹⁴⁰ that: (a) obliging the purchaser to enter into an irrevocable mandate to the bank to pay the sums obtained under the loan to the seller, and once payment is made, the notary will be asked to receive a receipt under which the seller declares it has received the price and not to have any further claim against the buyer.

The person assuming the greatest risk is the seller (who no longer holds title) but it must be said that he can enforce his claim, and has a legal mortgage (that is inscribed ex officio - article 2817 and 2834 c.c.) where there is no waiver thereof, as typically happens where the sale is made at the time the price is paid.

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

4.1. The conclusion of the Contract

In the Italian legal system, the sale¹⁴¹ is an agreement that necessarily effects transfer. "Transfer of title to an item or the transfer of some other entitlement against payment of a price", as article 1470 of the Civil Code recites, is the basic form of a contract. It follows therefrom that it is not the sale, but the preliminary act, the agreement for sale, that which purely results in obligations being imposed. The distinction between the agreement for sale and the final transfer depends on the parties' wishes. Aside from the terminology used, if the parties wish to transfer title to an item against payment of a price, that agreement will be the final transfer, and as such will effect the transfer itself¹⁴². If they intend simply to assume obligations to enter into a final transfer in the future, then that is an agreement for sale, the effect of which is merely to impose obligations¹⁴³.

¹³⁹ In addition to the 10-day waiting period as mentioned in the previous note.

¹⁴⁰ This is not always the case in consideration of the fiscal dues in relation to the deed amounting to 0.5% of the amount in question. At times, for purposes of avoiding a public deed of release, which is useful for good faith towards the public and for providing for a date certain at law, it is possible to use either a simple private deed (with the risks related to the authenticity of the signatures and their potential disavowal or rather a clause within the deed of sale specifying that "the bank documentation certifying that the bank transfer has been effected in favor of the seller for the purchase price and that this constitutes a receipt as between the parties". The purpose of the receipt, in the event that a purchase price is not paid, is related to the need to demonstrate the absence of pending debts in the context of a subsequent sale of the property. For an interesting analysis of the problems at hand and of the contractual mechanisms discussed above, see LABRIOLA, *Compravendita e mutuo: modalità di quietanza del prezzo*, in *Notariato*, Milano, 2000, p. 172 et seq..

¹⁴¹ On the sale, in addition to the references already cited, see RUBINO, *La compravendita*, in *Trattato di diritto civile e commerciale*, edited by Cicu, Messineo e Mengoni, updated by Schlesinger, volume XXIII, Milan, 1962 and, more recently, LUMINOSO, *La compravendita*, Turin, 2004.

¹⁴² The fact that the sales agreement essentially effects a transfer, does not mean that the real effect must (or may)

Many factors make the distinction between the preliminary agreement for sale and the final transfer agreement rather complex under Italian law, some of which we have already mentioned: the two agreements must have the same basic form, because as discussed earlier, "a preliminary contract is void if it is not made in the same form as the law prescribes for the final agreement" (article 1351 of the Civil Code). This is the principle of "formal symmetry", which requires that there be a formal continuity between the preparatory agreement and the agreement under which the transfer is actually made. There must be continuity in the basic form required by law for the final deed; this means that (for example, the minimum requirement for a sale of property being a "simple" private act, if the final act is lawfully completed in any written form – whether that be a public act, a certified private act or a simple private act – the preliminary act will be valid, provided it satisfies any one of these forms of written act. In practice, agreements for the sale of real property are made in the form of a simple private act, without the notary participating, and the final agreement in the form of a notarised public act. If for the final agreement no particular form is required (in other words, if there is no minimum requirement that it be in writing, and it may be oral) then it may be made orally, in accordance with the general principles as to freedom of form under article 1325, part 4, of the Civil Code¹⁴⁴ (this is true for example for transfers of personal property or for the creation of rights over real property of a personal nature, such as leases for nine years or less, pursuant to article 1350, part 8, of the Civil Code);

- the transfer is an effect of the simple agreement, that is to say, of the "lawfully expressed agreement between the parties" (as article 1376 of the Civil Code), there being no requirement, in contrast to some other jurisdictions such as Germany, that there be a further formal transfer or a formal public declaration. In other words, a sale that is made in the form required by law – thus, if a sale of a property right, made in writing – is in itself capable of transferring the right, in accordance with the consensual principle imported from French law (article 1138 of the Napoleonic Code). It follows that simple agreement, sufficient as it is to enter into the agreement for sale which does not effect a transfer, will suffice for the final agreement, which is capable of effecting that transfer;

- a further similarity is the content of the agreements, since the agreement for sale, like the transfer must identify with sufficient certainty, or by the provision of sufficiently certain criteria for its identification, the subject of the agreement, that is to say, what the parties are obliging themselves to perform by entering into the agreement (article 1346 of the Civil Code); in particular the performance of the transfer by the seller must be of an object identified or identifiable with certainty from the agreement. This requirement as to the property's identifiability links the agreement for sale and the transfer agreement, in the absence of which either would be void (article 1418, paragraph 2, of the Civil Code).

What distinguishes the two agreements, then, is not the form, where one follows the other; nor necessarily the manner in which the agreement is entered into, which in both cases requires simple consent, expressed in the form required by law (and thus in writing, for transfers of real property).

necessarily be immediate. On the contrary, there exist several cases where the sale, although adequately concluded, does not give rise to immediate devolutionary effects (consider, for example, inter alia, the sale subject to conditions precedent or regarding a future object). This does, however, not detract from the intrinsic *traslativo* nature, as the real effect, although postponed for a period following the moment of execution of the agreement, remains indefectible and is the pure result of the agreement itself. The conclusion would be different with respect to the preliminary act, where the parties exclude at the outset the *traslativo* effect of the agreement which is not structurally adequate for transfer, whether contemporaneously with the deed of transfer or subsequently.

¹⁴³ The conclusion remains unaltered when the preliminary act, in accordance with widespread current practice, is prearranged to produce so-called anticipated effects which would otherwise be solely the result of the final agreement (for example partial or full payment of the purchase price in advance, delivery in advance of the asset for sale, etc.). On the preliminary act, see GABRIELLI, *Il contratto preliminare*, Milan, 1979, DE MATTEIS, *La contrattazione preliminare ad effetti anticipati*, Padova, 1991.

¹⁴⁴ This principle has, however, been the target of critical review by IRTI, *Del falso principio di libertà delle forme. Strutture forti e strutture deboli*, in *La forma degli atti nel diritto privato. Studi in onore di M. Giorgianni*, Milan, 1988.

Nor does the subject of the agreement provide the key, as these must in principle match and in any event be identifiable with certainty in both agreements. Thus, as we have said, the distinguishing and functional feature of the two agreements comprises the wishes of the parties, destined to produce mere obligations in the preliminary agreement for sale, and to make a final transfer in the transfer agreement.

4.2. Seller's Title

4.2.1. Consequences of an invalid Sales Contract

The Italian system focuses on causality¹⁴⁵. This means that, at least in principle, any invalidity of the underlying title prejudices subsequent purchasers. A subsequent purchase is derived entirely from the previous title, since the titleholder acquires its title if and to the extent it has been previously acquired by his predecessor in title (and so on, down the chain of title)¹⁴⁶. This is particularly clear in circumstances where the earlier title may be invalid: here, the repercussions on subsequent transfers must be examined. Nonetheless, the remarks on this point cannot be dealt with in one fell swoop, but different forms of invalidity must be distinguished.

- if the underlying title is void¹⁴⁷ pursuant to articles 1418 *et seq.* of the Civil Code (for example, an agreement for the sale of real property made orally, void pursuant to the combined provisions of articles 1325 part 4, 1351 and 1418 of the Civil Code, or an agreement for the sale of real property which fails to make mention of compulsory planning provisions, void pursuant to Law No. 47/1985, Law No. 662/1996 and Presidential Decree No. 380/2001) any person who intends subsequently to alienate rights has never effectively obtained those rights, and cannot effectively dispose of them to a third party; the contract, which would otherwise effect a transfer, is in fact fundamentally and irremediably without effect, since the new agreement cannot attribute any right to the prospective purchaser (the sub-purchaser of property may, if protected by the registration of his purchase, at most enforce the rule of "corrective publicity" contemplated by article 2652, part 6, of the Civil Code);

- if instead the underlying title is simply voidable pursuant to articles 1425 *et seq.* of the Civil Code (for example, a contract of sale in which one or both parties are found to lack capacity, by reason of law or nature, is voidable pursuant to article 1425 of the Civil Code, or has been entered into by fraud, and is thus voidable pursuant to article 1439 of the Civil Code), this is provisionally capable of producing effects, since it confers upon the successor a provisional lawful transfer, but this may

¹⁴⁵ This principle of causality refers to the necessity of a link between the derivative titles that are sequential over time. The concept of "causality" is discussed in comparison to "abstractness" to highlight the fact that the Italian system, unlike the German system, requires as essential element of a contract (and, for those who recognise the category, of the "*negozio giuridico*" or "legal transaction") the "*causa*" or "cause" (art. 1325 c.c.: "The requisites of the contract are: 1) agreement of the parties; 2) *causa*; 3) object; 4) form, when prescribed by law under penalty of nullity."). On this basis, "abstract" transactions, or those for which the "cause" does not constitute an essential characteristic, would represent the exception to the common rule (one example of the abstract transaction, according to certain legal scholars, would be the bill of exchange). In addition to this type of "abstractness" referred to as "substantive", there also exists "process" abstractness, the classic examples of which are "promise of payment and acknowledgment of debt" (art. 1988 c.c.: "promise of payment and acknowledgment of debt exonerate the person in whose favor it is made from the burden of proving the underlying obligation. Such obligation is presumed subject to contrary evidence."). This intends to highlight the fact that while the relevance of the cause remains intact, in a context of judicial proceedings its existence is presumed subject to evidence to the contrary". With respect to the definition of cause, however, the scholarly doctrine remains divided at present (under discussion are the socio-economic purposes of the contract, the basis for the allocation of assets and the "*tipico*" or "ordinary" purpose of the same). On these notions, see: GIORGIANNI, under *Causa (diritto privato)*, in *Enciclopedia del diritto*, volume 6°, Milan 1960, p. 547 *et seq.*; SCALISI, under *Negozio astratto*, in *Enciclopedia del diritto*, volume 28°, Milan 1978, p. 52 *et seq.*; GALGANO, *Il negozio giuridico*, in *Trattato di diritto civile e commerciale*, edited by Cicu, Messineo e Mengoni, updated by Schlesinger, volume III, tome I, Milan, 2002.

¹⁴⁶ *Nemo plus iuris ad alium transferre potest quam ipse habet.*

¹⁴⁷ *Quod nullum est nullum effectum producit.*

be eliminated retrospectively, if it is voided pursuant to article 1441 of the Civil Code; moreover, also in this latter case, where an application for avoidance is submitted in good time by the interested party for reasons other than legal incapacity, the law protects sub-purchasers who have acquired in good faith for consideration, pursuant to article 1445 of the Civil Code; this means that if the voidability does not depend on the legal incapacity of one or both parties to the first agreement, the new purchaser, who is not aware of the grounds for voidability, is not prejudiced thereby (and in any event, there always remains the protection afforded to real property transactions by the rule of "corrective publicity" pursuant to article 2652, part 6, of the Civil Code).

In both sets of circumstances, the law reflects a distinctive flavour of the Italian system, which is based on contracts capable of producing real effects. Since under mentioned article 1376 of the Civil Code, the transfer is effected only by the agreement, made in the forms prescribed by law, any faults in that agreement, such as avoidance or voidability, have an impact: it ceases to have effect, and so does any subsequent agreement, even where that agreement is perfectly valid. Subject, then, to the above remarks, it must be concluded that in accordance with the principle of causality (as described above) which governs the sale of assets in the Italian system, defects in the contracts that provide the underlying title condition to a varying degree the effectiveness of the transfer of the agreement that derives therefrom, and subject further to some limitations that serve to safeguard the sub-purchaser, may certainly prejudice a purchase.

4.2.2. The Seller is not the owner

Without prejudice to what was said above on warranties against eviction, we can look further into circumstances in which after the agreement has been entered into and the registration made, it is discovered that the seller was not in fact the owner. If there is a defect in the lawful acquisition of title by the seller, who then enters into a sale agreement without actually holding title to the right sold, that agreement, even if validly made, cannot immediately produce its characteristic effect of making a transfer to the purchaser. Nevertheless, the sale of other assets is valid, whether or not the purchaser was aware of the other nature of the asset sold¹⁴⁸ (and moreover, independent of the literal tenor of the agreement)¹⁴⁹. The agreement, rather than actually transferring the right, imposes an obligation upon the seller to procure the acquisition by the purchaser, in accordance with the provisions of article 1478, first paragraph, and more generally by article 1476, part 2, of the Civil Code¹⁵⁰. In particular, under article 1478, 2nd paragraph, the buyer becomes the owner of the asset at the moment the seller acquires ownership from the former owner.

If in the above sense, the seller does not identify the subjective status of the buyer, he is nonetheless bound to discharge his obligation to make a transfer, under articles 1478, 1st paragraph,

¹⁴⁸ Art. 1479, 1st comma: "The purchaser may request the termination of the agreement if, at the time of execution, the latter was unaware that the seller was not the owner of the thing being sold, and if in the meantime the seller did not procure that title to the same be transferred to the purchaser."

¹⁴⁹ The solution set out by the civil code currently in force, which recognises that validity of the sale of an asset belonging to a third party, was already contemplated by the commercial code of 1882 regarding commercial sale, while it did not appear in the civil code of 1865 which held as null and void the sale in a civil context of an asset belonging to a third party. Nonetheless, such nullity could be imposed only by the purchaser, since it constituted a "relative nullity", a notion which at the time was irregular (a reference may be found in the current civil code in the introductory text of art. 1421 c.c.), while today it is on the contrary incorporated throughout the civil code (consider, for example, consumer protection against vexatious clauses, and the provisions of art. 1469-*quinquies*, 3rd comma, c.c. which according to certain legal scholars constitutes a case of nullity and not of mere unenforceability or, in a separate context, the cases of nullity of marriage). It remains clear that the validity of the sale of an asset belonging to a third party, as implemented by the laws in force, poses the problem of compliance with the principle of consent to the transfer (1376 c.c.) which would lead to the transfer of the right by virtue of the mere agreement as legitimately expressed. The solution is found in the provisions of art. 1476 n. 2 c.c. (see text above).

¹⁵⁰ Art. 1478: 1. If at the time of the contract the thing sold was not owned by the seller, he is obliged to cause the buyer to acquire ownership of it. 2. The buyer becomes the owner of such thing at the moment the seller acquires ownership from the former owner. Art. 1476: The principal obligations of the seller are: *omissis* 2) to cause the buyer to acquire ownership or other rights in the thing, if such acquisition is not an immediate consequence of the contract.

and 1476, part 2, of the Civil Code, the knowledge or ignorance of the other nature of the asset sold to the purchaser reflects upon the legal protection available to the purchaser. Thus:

- if the purchaser at the time it enters into the agreement is unaware that the asset belonged to another (and is thus said to have acted in good faith), he may immediately demand the termination of the agreement, unless in the meantime the seller has not had him acquire title to the asset sold; he may always make use of his protection against eviction, if this should occur (article 1483 of the Civil Code);

- otherwise (where there is said to have been bad faith), the purchaser may not request termination immediately, but only after a suitable period, so that the seller may in the meantime discharge its obligation to make transfer; and he may in any event invoke the protection under article 1483 of the Civil Code, if there has been intervening eviction, notwithstanding his awareness of the seller's lack of title (or bad faith); the protection against eviction in fact arises regardless of any enquiries as to the subjective knowledge of the purchaser¹⁵¹, ¹⁵².

In relation to real property, once more registration rules come to the rescue, subject to certain limits. Without prejudice to the aforementioned remedies for the benefit of a purchaser of items that belong to others under articles 1478 and 1479 of the Civil Code¹⁵³, in order to marry the requirements of the courts and the principles of alienation of real property we have discussed, registration is once more applied (and, as we have seen, allows one to ascertain with a high degree of reliability the provenance of the right being transferred, even at an early stage). Obviously, it is not completely reliable, in the sense that – for example, registration does not rectify a defect as to invalidity – voidance or voidability – in the underlying title registered by the prospective seller, with all the consequences we discussed above for the new purchaser¹⁵⁴, ¹⁵⁵. The reference here is to the institution of usucapion (adverse possession) (articles 1158 *et seq.* of the Civil Code)¹⁵⁶, that is

¹⁵¹ As for the sale of a thing which belongs partially to a third party, the provisions of art. 1480 c.c. apply (and with respect to protection from eviction, the provisions of art. 1484 c.c. would apply).

¹⁵² However, with respect to movable property, these rules applying to the sale of a thing belonging to a third party must be reconciled with the important rule of circulation set out under art. 1153 c.c. (the so-called "possession is tantamount to title" rule). The regulations recognise the rights sold to the purchaser, even where the seller does not have title to the thing sold, where a) there exists a contract (oral agreement since a moveable good is being sold) in an abstract sense (in other words theoretically adequate for purposes of transferring a right), b) the thing has been materially delivered to the purchaser and c) the purchaser acted in good faith at the time of delivery. It is therefore necessary that the purchaser was innocently unaware that he was causing the detriment to a third party pursuant to article 1147, 1st and 2nd commas c.c. at the time he takes possession of the thing (while it does not raise the possibility of subsequent bad faith, as per art. 1147, 3rd comma, c.c.).

This does not mean that the protection of the purchaser of a thing belonging to a third party is deemed "absorbed" by the circulatory rule referred to above, since where the prerequisites are satisfied the purchaser becomes the owner of the property notwithstanding the lack of absolute certainty of the assignor and, therefore, he would not require the contractual protection provided by arts. 1478 and 1479 c.c. The protection of the purchaser is therefore that of the owner and the purpose of this principle is to encourage the circulation of assets and to preclude that a purchaser refrain from purchasing a moveable asset due to the risk of losing such asset.

¹⁵³ And the rule of art. 1153, referred to above, does not apply for the obvious reasons a) that the circulation of moveable goods is simplified due to their generally lower value (although not always the case) and social importance with respect to real estate and b) that there does not exist a registration system, unlike the case of real property as discussed above, due to impossibility of a similar system (and prejudice due to the risk of confusion in light of the greater need for speed and efficiency in transfers of moveable assets).

¹⁵⁴ Furthermore, the fulfillment of the formalities by the purchaser (consider the case where a sale is perfected not by public deed but by authenticated private deed) is treated by the applicable law as a simple duty aimed at allowing for the full enforceability of the purchase *erga omnes* and not as his obligation upon which the sale itself is conditioned. It may be inferred that absence of publication of a transfer does not imply the lack of title, as the assignor may well be the holder of title which at the time has not yet been publicized (which occurs, clearly, in the phase subsequent to the actual sale and prior to its subsequent registration).

¹⁵⁵ Cfr. the observations above, para. 4.2.1.

¹⁵⁶ Also with respect to movable property in cases where the rule "possession is tantamount to title" (under art 1153 c.c.) would not apply.

to say, the acquisition of original title by a person who has possession¹⁵⁷ of a certain kind, for a certain period, of the property. This is another instrument that Italian legislation offers to acquire a property to which the person does not have title. In principle, usucaption occurs "by virtue of continuous possession for twenty years" (as article 1158 of the Civil Code recites). Necessarily, such possession must not have been obtained violently, or clandestinely (article 1163 of the Civil Code). Clearly, if usucaption in principle protects possession per se, allowing a person who has obtained possession not by violent or clandestine means to obtain ownership of the property he possesses with the passage of a certain period of time, will often safeguard also a successor in title who enters into an agreement effecting transfer which is subsequently discovered to be inadequate for him to acquire title. Often the person seeking title through usucaption will be doing so precisely because he obtained de facto rights over the asset through a sale or an agreement intended to effect transfer, with someone who did not have title to give. In this sense, usucaption can clearly be considered an instrument that protects the assignee that failed to obtain proper title.

With regard to real property¹⁵⁸, thanks to the provisions of article 1159 of the Civil Code, it is possible to shorten the period of time required for usucaption, to ten years. For this to occur, the purchaser without title must have been in good faith at the time the agreement for the purchase was entered into, that is to say, that he was unaware that he was harming the other right, that the contract was at least in theory capable of transferring title, that it has been duly registered and that ten years have in fact passed since that registration. This means that if Alfonso buys title to Acrobianco from Bernardo, unaware that Bernardo does not in fact hold title to Acrobianco, which instead is held by Claudio, and the sale from A to B is duly registered, A acquires title to Acrobianco ten years, not twenty, after that registration. Clearly, land registration plays an important role in this mechanism, by itself putting the lawful owner on notice of the agreement. A lawful owner may in that ten years take measures to safeguard the asset and especially to interrupt the accruing usucaption¹⁵⁹.

Further rules are laid down for the special usucaption of rural smallholdings (article 1159-bis of the Civil Code), for the usucaption of personal property (article 1160 of the Civil Code) and the usucaption of publicly-registered personal property (article 1162 of the Civil Code)¹⁶⁰.

4.2.3. Execution against the Seller

We have mentioned a number of times that a contract of sale is a contract that effects a transfer (article 1376 of the Civil Code) since the purchaser of the real property right acquires title independently of his compliance with the duty to publicise, by effect simply of the consent to the transfer, lawfully expressed. Even before that publication requirement has been fulfilled, he may enforce the purchase not only against his contractual counterparty, but also against all third parties who cannot show that they have formally submitted a competing interest.

¹⁵⁷ See note 40, above, on the notion of possession under the provisions of the Italian Civil Code.

¹⁵⁸ Where possession regards moveable property, the applicable term for adverse possession would be only 10 years, rather than 20, in the event that the property has been acquired in good faith, meaning that the holder was unaware that his actions prejudiced the rights of a third party at the time he took possession of the property (see also art. 1161, which implicitly refers to the notion of initial good faith provided under art. 1147, 1st and 3rd commas, c.c.) and provided that the "possession is tantamount to title" rule under art. 1153 c.c. (discussed above) does not apply. Adverse possession will be invoked only in cases where art. 1153 c.c. (an instrument which otherwise provides much stronger protection of the rights of a holder *a non domino*) does not apply due to absence of necessary conditions.

¹⁵⁹ According to one scholarly theory, it would be necessary for the title to be for valuable consideration in addition to being abstractly susceptible to transfer as discussed in the text, which would therefore preclude the case in question from being interpreted as a donation agreement. This theory, although interesting and supported by an intuitive rationale, would appear to impose on this case in point a requirement that otherwise would not apply and therefore should be disregarded. For a brief discussion of donation and adverse possession see FERRANTE, *Donazione di cosa altrui: una sentenza eccentrica della Cassazione*, in *Rivista trimestrale di diritto e procedura civile*, Milan, 2000, p.281 et seq..

¹⁶⁰ For a summary of adverse possession, see TORRENTE-SCHLESINGER, *Manuale di diritto privato*, cited, p. 383 et seq..

Nonetheless, as we have said, until registration has been made, in order to protect third parties and to ensure the transparency of the property system generally, the law provides that an agreement conferring title, while effective between the parties, and enforceable generally against third parties, may not be enforced against a third party who has a competing interest protected by earlier registration. In other words, where there is a conflict between a purchaser and a third party, it is not he who first obtained title and right, but he who first publicised his right through registration who will prevail.

If therefore a conflict emerges between Alfonso, purchaser from Bernardo of real property rights over Acrobianco, and Claudio, who as B's creditor claims distraint of Acrobianco pending a court order giving possession, Alfonso will prevail over Claudio if he registered his right first, and vice versa. If A comes off worse, because C has registered his distraint of the property, A will have the benefit of the rules governing warranties against eviction, should this occur and his right be expropriated by Claudio (in accordance with articles 1483 and 1484 of the Civil Code). Even before eviction, a purchaser who has registered his title late may be protected under the rules of article 1482 of the Civil Code. Naturally, on this basis there are risks to the purchaser, that he may also lose his money if his seller no longer has it.

4.3. Payment

4.3.1. Delay in payment

Where the purchaser fails to discharge his obligation to pay the purchase monies, an obligation governed by articles 1498 and 1499 of the Civil Code, the seller may in principle apply any of the remedies available to a creditor owed a sum of money. These are circumstances covered by contract law, the principles of which are set out in article 1218 of the Civil Code. Since the sale is an agreement with corresponding performance by the parties, the seller may demand termination for breach pursuant to articles 1453 *et seq.* of the Civil Code (and compensation for damages). The payment to him of a pre-determined amount as a penalty, in accordance with article 1382 of the Civil Code, depends rather on the existence of an agreement to that effect in the contract, because only the parties' will may lead to an early payment of compensation should the obligation as to payment of the price not be discharged. Otherwise payment of such a liquidated amount will occur on the basis of article 1223 of the Civil Code (and this will quantify the compensation as greater than the price, taking account of the effects of the default and the need to pay default interest).

Always with a view to protecting the seller, the creditor with regard to the price, it should be emphasised that:

- Pursuant to article 2817, part 1, of the Civil Code¹⁶¹, the transferor – here, the seller – has a legal mortgage over the property transferred (or more properly, over the property up to the value of the right assigned) "for the discharge of the obligations arising under the alienation" and thus for the payment of the price, where this has not been immediately paid in full upon completion of the agreement. In practice the seller usually – but not always – waives his legal mortgage, even where the price is not paid in full upon completion of the agreement; obviously the legal mortgage should be registered with the land registers for the purchase price stated in the agreement;
- Pursuant to article 417, 2nd paragraph, part 3, of the Civil Procedural Code, if the agreement for the sale of the real property has been made in public notarised form, as usually happens, this gives title for enforcement of the pecuniary obligations thereunder; this means that if the obligation as to payment of the purchase price is not discharged promptly by the purchaser, the seller may enforce, without first obtaining a judgment of cognizance, and is thereby able to obtain satisfaction more

¹⁶¹ And as mentioned under n. 3.8 above.

rapidly. Here also the effectiveness of the enforceability of the public act as to sale is limited to the amount of the price stated therein.

Within the rules regarding sales of chattels, the code envisages sales with reservation of title (articles 1523 *et seq.* of the Civil Code). Where the sale takes place with payment of the purchase price by the buyer in instalments, reservation of title by the seller allows the latter to retain title to the asset being sold until such time as the price has been paid in full, while the purchaser assumes the risks immediately (since he normally has the asset available to him from the moment the agreement is entered into). Although such arrangement are envisaged in relation to chattels, there is little doubt that reservation of title by a seller is possible also in relation to sales of real property. It is a means of protecting the seller, to whom is owed the purchase monies, until they have been paid in full as agreed¹⁶².

4.4. Defects and Warranties

4.4.1. Misrepresentation

Among the seller's obligations, as we have seen, article 1476, part 3, of the Civil Code includes a warranty against defects in the item being sold. The seller must warrant to the purchaser against defects that would render the item "unsuitable for the use for which it is destined or that reduce its value in an appreciable way" (article 1490, paragraph 1, of the Civil Code). Nonetheless, no such warranty is necessary if at the time the agreement is entered into the purchaser was made aware of the defects or these were easily identifiable, unless – in the latter case – the seller has certified that the item is free of defects (article 1491 of the Civil Code). The warranty is automatically a legal effect of the agreement, for which no specific provision is required, except that the parties are free to exclude or limit it. The limitation or exclusion of the warranty nonetheless has no effect where the seller has "in bad faith remained silent to the purchaser as to the thing's defects" (article 1490, paragraph 2, of the Civil Code).

We have already briefly discussed the remedies provided for defects or an absence of promised characteristics. Where there is a defect, the law gives the buyer of the defective item the traditional construction actions, namely a redhibitory action (an action for annulment of the sale) or for a reduction in the price, in accordance with the provisions of article 1492 of the Civil Code, and always actions for damages pursuant to article 1494 of the Civil Code. The periods in which such claims may be brought are rather short (article 1495 of the Civil Code). If instead the purchaser wishes to assert the absence of some quality – and very often the distinction between this and a defect is far from immediately apparent – the remedy is that of ordinary termination for breach, but the same periods and restrictions apply as article 1495 of the Civil Code gives for the construction actions (article 1497 of the Civil Code). Here too the success of the action will not depend on any finding that the seller was responsible for the defect. Obviously the seller may associate the termination action under article 1497 with a claim for damages under article 1494 of the Civil Code. It should be added - what has been said above¹⁶³ with regard to the application of article 1669 of the Civil Code in relation to construction - that this provision is an instrument which the purchaser may, subject to certain limits, use against persons other than the seller. Article 1669 of the Civil Code

¹⁶² One method of protection which is similar to that illustrated consists in the interpretation of the payment of the price (which is one of the obligations of the buyer) as an event constituting a condition precedent or condition subsequent, both unilateral and potestative, in favor of the seller (the so-called "condition of fulfillment" or of "breach"). On this notion, see PETRELLI, *La condizione "elemento essenziale" del negozio giuridico*, Milan, 2000, p. 431 *et seq.* and, for a decision that does not allow for the transformation of the obligation to pay the price into a legal condition but in an impossible or illegal condition as referred to in art. 1354 c.c.: Supreme Court, 24th June 2003, n. 7007 in *Rivista del Notariato*, Milan, 1994, p. 1112 *et seq.* where bibliographical references to the favorable theory are provided.

¹⁶³ N. 3.5.1.

provides for extracontractual protection and for a sale provides a means for a purchaser of a real property that is intended to last and has structural defects. This instrument may be actioned directly against the builder, whether or not he was party to the sale or not. Hence the extracontractual nature of the legal action, if the claimant is an assignee of the builder's client (as e.g. a subsequent purchaser of the real property). To that end, under these rules, the defect must emerge within ten years of the building's construction and the builder must receive notice thereof within one year of its discovery. Then the action must be brought within one year of the complaint.

On the basis of the above, if the warranties have not been limited or excluded (and the purchaser has not exceeded the periods for their enforcement, or these have been waived, or the provisions of article 1491 of the Civil Code¹⁶⁴ apply) the purchaser may be afforded some protections in cases such as these:

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.

Further, in the light of what was said above¹⁶⁵ on the relevance of regulations on construction and planning, the following situation may also be addressed:

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.

It should be remembered, as we have mentioned, that notarised agreements must give details of the authorisations under which building took place, and this may reduce the risk of such a situation arising¹⁶⁶. Secondly, any divergences between what was authorised and what was built do not render the transfer void, if the difference is considered minor, which is to say, not a total absence of authorisation or a total divergence from its provisions¹⁶⁷. This does not mean that there are not administrative sanctions (payment of a fine, and/or municipally-issued demolition orders), or even criminal sanctions, under the relevant rules. This is why such risks should be addressed by contract (since the contract's validity may be all very well, but the purchaser may find himself on the receiving end of changes to the asset, as a result of demolition; sanctions, including criminal sanctions, where he fails to show that he was not responsible for the offence). It follows that the seller should be liable, and obliged to compensate any damages the innocent purchaser suffers (and in the most extreme cases, the agreement may be terminated in accordance with general principles, for example an *aliud pro alio* sale and a claim by the seller against his predecessor in title).

¹⁶⁴ Which in any case would hold the seller responsible where he has declared that the thing being sold is without defects.

¹⁶⁵ N. 3.6.

¹⁶⁶ Since such an obligation to declare such information (theoretically) should encourage the seller to assume the responsibility of verifying compliance with building codes and regulations, and to take appropriate measures as the case may be, and to disclose all such information to the purchaser.

¹⁶⁷ In this respect, see the Ministry of Public Works, circular letter n. 2241 17-6-1995 (chapter 9, para. 9.1) declaring that "it is necessary in particular to reiterate that the eventual nullity of deeds of transfer is limited solely to real estate built in the absence of permits or in complete non-compliance with respect to the same.....while" (as stated in the text) "less serious violations are not subject to any limitation with respect to saleability and remain subject to administrative or criminal sanctions". On this point, see also CASU-RAITI, *Condono edilizio e attività negoziale*, cited, p. 43 et seq. where reference is made to provisions of law which confirm this affirmation, as well as other bibliographical sources. Clearly, it is not always simple to evaluate the seriousness of a violation: the creation of a bathroom through the reduction of a room would certainly be considered "less serious" while the construction of a house having an internal distribution and footprint which are radically different or with an extra autonomous floor would constitute a grey area in that it is difficult to evaluate the degree of seriousness of the violation. On this point the case law is extensive.

4.4.2. Destruction of the house

Italian law in large part accepts the fundamental principle *res perit domino*¹⁶⁸. This means in general that all the economic, legal and tangible matters that adversely affect the item impact directly upon its owner. The same principle stands in relation to sales, and it is adapted to the peculiarities of the underlying contractual dealing. Since transfer of title is effected generally with the simple consent of the parties, lawfully expressed, and thus in writing, where real property rights are concerned – clearly compliance with the *res perit domino* principle requires that the exact moment of the transfer of title be identified, since it is upon this that title to the right depends, and thus also its submission to the adverse consequences of the damaging event or act.

This naturally reflects upon the risk of the consideration, and even upon the validity of the contract of sale itself. Indeed, if the item is damaged prior to the agreement being entered into under the law, the contract may be void as impossible (article 1346, which requires that the subject of a contract must be possible, and article 1418, 2nd paragraph, of the Civil Code, which makes clear that otherwise the contract is void as lacking an essential element). In such circumstances pre-contractual responsibilities may emerge, where these are contemplated under article 1338 of the Civil Code (but in principle the purchaser should not have to pay any price).

If, on the other hand, the item is damaged after the agreement has been entered into, in the manner required by law, the provisions of article 1465, 1st paragraph, of the Civil Code, under which if the sale regards a particular item, "the perishment of the item for a reason for which the transferor is not responsible does not release the purchaser from its obligation to give its counter-performance, even if the item has not yet been delivered." A seller who has transferred title to the purchaser by entering into the agreement and has not occasioned the event that has resulted in the perishment cannot, in fact, be deemed to have committed a breach.

Things seem rather less clear when the seller has already expressed its consent to the transfer to the purchaser by entering into the agreement, but has not yet delivered the item, since the perishment occurs precisely while delivery has been unduly delayed. In this case, the seller finds itself unable to make delivery, because the item sold has perished, but perishment has occurred when title has already been transferred to the purchaser based on the principle of consent. In this case, he would in theory lose his entitlement to the purchase price, even if he was not responsible for the perishment, in accordance with general rules as to the risks in performance in synallagmatic agreements (that impose mutual obligations).

Since nonetheless in the specific case delivery regarded an item title to which had already been transferred to the purchaser - who is entitled to delivery on two counts, as party to the contract and as owner - the law admits the pre-eminence of *res perit domino* over the rule as to risk in performance, and entitles the seller to the price. This result is however subject to the condition that the event is not obviously the seller's responsibility, or in any event has not occurred during the seller's *mora debendi* - in which case the seller would have to bear the burden of impossibility for which he was not responsible and thus lose his entitlement to the other party's performance, unless he can show that "the object of the performance would in any event have perished in the creditor's sphere" (article 1221, 1st paragraph, of the Civil Code).

Clearly the strict application of the *res perit domino* principle may have uncertain and even contradictory results, since it will often be entirely by chance that the item perishes before or after the agreement is entered into.

¹⁶⁸ One exception (which is justified by the rationale of the institute) would be the above-mentioned sale with reservation of property rights by the seller.

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

5.1 Statutory basis

5.1.1. National law

Until August 2004 (excepting some minor legislation, such as that on the registration of agreements for the sale of real property) in Italy, unlike some other countries such as France, Germany and Spain, there was no specific legislation, for the protection of purchasers of properties that are awaiting, or under, construction by businesses. Rules in this area were conspicuous for this absence. The frequent failure of businesses in this area, with the financial damage to prospective purchasers, had resulted in a number of proposals which had never materialised into legislation. With Law No. 210 of 2 August 2004, within 28 February 2005, the government was charged with introducing regulations protecting purchasers' property rights where premises are awaiting construction (so-called "purchases on paper") by businesses. This law will, in addition to giving definitions such as "purchaser", "constructor", "emergency situation", lay down basic principles which the government will have to follow, such as: (a) having purchasers obtain a guarantee; (b) supplement the current rules to increase the protection to purchasers, by further limiting the bringing of revocation actions against them and for their payment of compensation for damages it suffers; (c) creating a "solidarity fund" to recover the sums the purchaser pays that are not recoverable from the insolvent constructor; (d) rules disciplining the contract of preliminary acts over properties to be built, especially with regard to the description of the works and materials to be used; and (e) coordinating the rules on mortgages with the purchaser's interest in the cancellation of adverse formalities prior to the final agreement.

5.1.2. Influences of EU law

The law has been inspired by French legislation but reflects the influence also of EU law in a number of aspects. This is true both in relation to the rules providing a specific definitions article (article 2) and in its reference to concepts such as "professional operator", which recalls the rules governing "illegal clauses" in consumer contracts and exclude from its application agreements between private individuals¹⁶⁹.

5.2 Procedure in general

5.2.1. Single houses

There are no specific rules in Italy currently with regard to businesses building individual houses on land that they own and selling them while they are under construction. The rules we have discussed above, on sales and preliminary acts for sale of real property¹⁷⁰ and the general provisions of articles 1469-bis et seq. of the Civil Code on consumer contracts and illegal clauses would apply, even if not specific to this field.

¹⁶⁹ For an initial comment on the proposed law, see RIZZI, *Poste le "fondamenta" per la tutela dei diritti patrimoniali degli acquirenti di immobili da costruire*, in *Notariato*, Milan, 2004, p. 673 et seq..

¹⁷⁰ For the latter, in particular, the provisions regarding the possibility of registration and protection in the event of bankruptcy of the seller. These are rules which, it should be noted, are not specific to the cases addressed in this paragraph.

5.2.2. Condominiums

Plainly matters do not change where one or more blocks of apartments are being built and sold on as parts of a condominium.

5.2.3. Renovation

The same considerations apply where a single building is completely restructured, creating a number of apartments which the business then sells while the works are being performed.

5.3 Conclusion of the Contract

For the conclusion of a real property agreement in the above cases, the formal rules we have already discussed will apply: a written document is required both for the preliminary act and for the final agreement. In practice, depending on the parties' needs and the time for the completion of the works, and any freedoms the prospective purchaser may have over the apartment while it is under construction, there will either be an agreement for the sale of a future item (with the transfer of title taking place when the item comes into existence, article 1472 of the Civil Code) or a preliminary act.

There are obviously no legal requirements as to the time for works to be completed or as to the content of the agreements, other than the general provision, which apply for every preliminary act for sale that is to be registered, under article 2645-*bis*, 4th paragraph, of the Civil Code¹⁷¹, nor specific rights of termination for the prospective purchaser.

5.4 Payment

5.4.1. Payment date

In the circumstances under consideration, the practice generally provides for a minimum deposit of 20 per cent. at the time the agreement is entered into, payable directly to the seller-constructor, with the associated risks to the purchaser, who must apply to court if there is a breach.

5.4.2. Securities

Subject to the normal treatment of the deposit, as a confirmatory or penalty deposit (under articles 1382 and 1385 of the Civil Code) it is rare, in the absence of legal obligations, that the constructor provides security or assurances.

5.4.3. Acquisition of Ownership

The instruments that allow the purchaser to make a full purchase, free of limits that restrict his title, are on the one hand, the use of a sale of a future item, for which title is automatically acquired when the item comes into existence (and you can make provision in the contract for when the item will be deemed to exist, or make reference to article 2645-*bis*, which regards preliminary acts¹⁷²), and on the other, the notary's involvement, in his conduct of the preliminary checks.

5.4.4. Building

¹⁷¹Art. 2645 *bis*, 4th comma: 2: "Preliminary contracts having as object portions of buildings to be built or under construction must indicate, in order to be registered, the surface available with reference to the portion of the building and the share of the right belonging to the potential purchaser with respect to the whole building under construction expressed in thousandths."

¹⁷² This regulation is considered by some to apply to all cases where the object of a contract is a future asset, while others would limit its applicability to the preliminary real estate agreement.

Practice covers all possible variations as to the manner of payment of the price. These range from the simple deposit with the balance payable on execution of the final agreement, or within a certain number of days of the item coming into existence, to forms of payment in accordance with a works schedule, with the balance payable at the end of the works (or execution of the final agreement).

5.4.5. Financing of the Buyer

The purchaser has a number of means of financing the purchase. The first is to apportion¹⁷³ part of the agreed loan for the construction (with the application of the rules provided by the Consolidated Banking Law, on measures that protect the new mortgagor - article 38 et seq. of Legislative Decree 385/1993, the Consolidated Banking Law, in its provision on property mortgage loans). Generally this solution allows a reduction in the fiscal and notarial costs of the purchase, but is limited by the need to accept a loan with characteristics, as to the interest rate or its duration, that the purchaser would not choose. A second solution is that of entering, at the time of the sale, a loan which is made immediately available by the bank (as we have already seen) and a charge over the same asset (which has just been acquired) or some other of the purchaser's assets. A third solution is to enter into a loan with the assistance of the constructor, as third party mortgagor (article 2808, 2nd paragraph, of the Civil Code¹⁷⁴), if the purchaser does not have other property and is unable to otherwise pay the deposit, in part or in whole. The parties will determine which of these solutions will be applied. It should be noted that the banking legislation requires the business to release the property from other mortgages and allow the purchaser to obtain a mortgage that is divided into parts.

The purchaser's mortgage may be over the asset that is to be purchased if it is existing (in the case of the single house to be built on the constructor's land, immediately; in the case of an apartment within a condominium, as soon as it is identifiable as a separate item, even if it has not been completed). There is specific provisions for loans to purchasers in the articles regarding the registration of preliminary acts: these are in article 2775-bis, 2nd paragraph of the Civil Code, which provides that a claim for failure to perform the registered preliminary act shall be secured by a special property lien (1st paragraph) which nonetheless is not enforceable against the loans provided to the prospective purchaser for the purchase of the property and the creditors secured by the mortgage pursuant to article 2825-bis, of the Civil Code, as mostly will be the case¹⁷⁵.

The banks limit themselves to the enquiries and requests for documentation that are normally made for circumstances in which the persons involved might become insolvent, for example, enquiries as to their inclusion in any insolvency procedures.

5.5 Builder's Duties - Protection of Buyer

¹⁷³ The "*accollo*" (assumption of third party debt obligations) is regulated by arts. 1273 et seq. c.c.. On the nature of such cumulative agreements (usually by an express clause within a mortgage loan agreement) see the recent decision by the Supreme Court, 24th May 2004, n. 998 which applied art. 1268 2nd comma to the *accollo*, holding that the original debtor/mortgagor would become the second ranking obligor as the Bank must first take recourse against the person who assumed the debt through an *accollo*

¹⁷⁴ Art. 2808 2nd comma: "A mortgage can be imposed on the property of the debtor or of a third person (omissis)".

¹⁷⁵ With respect to the coordination of these two regulations, the doctrine presents a divergence of opinions: for brief notions and contractual clauses, see - in addition to para. 2.6.2, CACCAVALE-RUOTOLO, *Trascrizione del preliminare e ipoteca a garanzia del mutuo concesso al promissario acquirente per l'acquisto dell'immobile*, in *Studi e materiali*, 6.2, Milan, 2001, p. 1166 et seq., A.A.V.V., *Contratto preliminare di vendita*, in *Federnotizie, Organo della Federazione Italiana delle Associazioni Sindacali Notarili*, 1997, p. 58 et seq., available on www.federnotizie.org, as well as MASCHERONI, *L'effetto di prenotazione della trascrizione del contratto preliminare*, in *Federnotizie, Organo della Federazione Italiana delle Associazioni Sindacali Notarili*, 1997, p. 236 et seq. and p. 292 et seq., available on www.federnotizie.org.

5.5.1. Description of the Building

In the description of the assets, in the circumstances under discussion, either the asset is described as it will be when completed (where an agreement for the sale of a future item, or a preliminary act, is entered into) or as it is at the time (where the uncompleted asset is sold¹⁷⁶).

5.5.2. Late Termination of the Building

Usually there are provisions for penalties to protect the purchaser as to the timing of delivery, that apply where the constructor is at fault in failing to deliver the completed works on time, but there are no specific remedies for the recovery of the relevant sums where they are disputed, other than through the courts.

5.5.3. Material Defects

As for every sale of real property, the remedies discussed above regarding sales and construction will apply in relation to material defects, and as mentioned, this means action may be taken against both the seller-constructor and any sub-contractors.

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.

In such circumstances, the purchaser has no choices but to enforce his claim in the insolvency procedure (except, as mentioned above, in relation to the rules specific to preliminary acts, where his claim has privileged protection, as well as a claim for damages).

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.

In such circumstances the purchaser must once again enforce his claims through the insolvency procedure.

6. Private International Law

6.1 Contract Law

6.1.1. Conflict of Law Rule

The recent reforms of private international law under the Italian system, by Law No. 218 of 31 May 1995¹⁷⁷, governs property rights in its Part VIII, articles 51 *et seq.* The new rules reintroduce solutions already available under the now-abolished article 22 [disp. prel.] of the Civil Code and its

¹⁷⁶ And in this case we refer, for example, to "apartments currently under construction in an unfinished state, without fittings, floors, and internal fixtures".

¹⁷⁷ On the reform of international private law, see POCAR, *Il nuovo diritto internazionale privato*, Milan, 2002 and A.A.V.V., *La condizione di reciprocità. La riforma del sistema italiano di diritto internazionale privato*, Milan, 2001, A.A.V.V., *La riforma del diritto internazionale privato*, edited by the Lombard regional notarial Committee, Milan, 1996, BALLARINO, *Manuale breve di diritto internazionale privato*, Padua, 2002.

interpretation by leading authors and the courts. The new set of rules on real property rights converts those rules into express provisions of law. This at least leaves matters clearer.

In principle – and subject to the remarks made below – among the connection criteria contemplated therein, *professio juris* is not included. With regard to real property rights, determining the applicable law, in accordance with the internal rules on conflicts of law, is not affected by any recognition of the private autonomy. Nonetheless, this statement must be reconciled with general rules of private international law.

Article 51, 1st paragraph, of Law No. 218/1995 confirms the traditional analysis of *lex rei sitae*. "Possession, ownership and other real rights in movable and immovable property are governed by the law of the State where the property is situated." The second paragraph applies the same analysis to the "acquisition and loss" of the rights described in the first paragraph, adding: "except in matters of succession and in cases where the attribution of a real right is dependent upon a family relation or a contract".

This last provision is currently interpreted to mean that where the transfer is an effect of an agreement, as on a sale of real property, the applicable law to the transfer arising thereby (the acquisition and loss, as article 51, 2nd paragraph, says) is the law of the place, and may not be the same as the law of the contract, which shall govern the purely contractual aspects of the matter. Thus private international law, capable of separating the title from the manner of its acquisition, unlike some other systems (such as that in Germany) does not require that the agreement effecting transfer necessarily be regulated wholly and solely by the *lex rei sitae*. The agreement (and for example the warranties given thereunder) shall be governed by its own governing law, pursuant to article 57 (contractual obligations) of Law No. 218/1995¹⁷⁸, while the *lex rei sitae* will find application with regard only to the matters that immediately regard aspects of the transfer and the reconstruction of the concept of the transferred right. Obviously, it remains common that the two laws are one and the same, but this is a purely statistical phenomenon.

Since article 57, of Law No. 218/1995 refers to the Rome Convention of 1980 on the law applicable to contractual obligations, and this contemplates as the principal connection the *professio juris* of the parties – in our case, the seller and the purchaser – one may conclude that the rules of private international law in making this reference gives limited but significant room for the choice of the applicable law. That space will be restricted to the *lex contractus* of the document under which title is acquired, since *lex rei sitae* must always govern the transfer itself. Hence the *lex rei sitae* does not necessarily cover every aspect (contract, title and manner of acquisition) surrounding the transfer, at least based on the reconstruction made herein of the provisions in question¹⁷⁹. By way of example, a sale made in Germany regarding a real property in Italy, (a) the notion of property would be governed by Italian law (article 51, 1st paragraph, of Law No. 218/1995) including the distinction between real property and chattels and the concept of a future item; (b) the real effects of the agreement would be governed by Italian law (*lex rei sitae*)¹⁸⁰; and (c) the obligations imposed by the contract would be governed by the *lex tituli*, pursuant to article 57 of the aforementioned law which refers to the Rome Convention, could be (in this example) German law, as the law chosen by the parties (article 3, 1st paragraph of the Rome Convention) or the law of the State with which it is most closely connected" (article 4, 1st paragraph of the Rome Convention)

¹⁷⁸ Which refers to the Treaty of Rome of 19 June 1980 ratified in Italy through Law n. 975 of 18th December 1984 (and which entered into force on 1st April 1991) discussed above and the original scope of which is "extended in all cases" by the article at hand: Art. 57 "Contractual obligations are in all cases governed by the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, made effective by Law No. 975 of 18 December 1984, without prejudice to other international conventions, insofar as applicable."

¹⁷⁹ On this point, for a summary of the various positions see PETRELLI, *Formulario Notarile Commentato*, 3rd volume, tome I, Milan 2003, p. 562 et seq. and therein the extensive bibliography on the issue as well as many practical examples on other pages.

¹⁸⁰ *Contra* SEATZU, *Sui criteri di collegamento previsti nella nuova disciplina internazionalprivatistica dei diritti reali*, in *Rivista del Notariato*, 1996, p. 864 et seq. in light of of the (purported) possibility of derogation from the principle of consent under art. 1376 c.c..

subject to the presumption (that there is a connection with the place in which the property is found) under article 4, 3rd paragraph¹⁸¹.

But what if the contract governed by e.g. German law would not be valid – could the title still pass according to Italian law?

The publicising (and thus the registration) will be governed by the *lex rei sitae* pursuant to article 55, of Law 218/1995, and without prejudice to what is said under paragraph 6.2.2.¹⁸².

6.1.2. Formal Requirements¹⁸³

Under the Italian system, the contract that transfers title to real property must be in writing or be void, pursuant to the combined provisions of articles 1325, part 4, and article 1350, part 1, of the Civil Code. The same form is required for any preliminary act for the sale of real property, pursuant to article 1351 of the Civil Code. On the other hand, no express provision has been made as to the form for contracts that effect transfers of real property within Part VIII of Law No. 218/1995 (articles 51 *et seq.*)¹⁸⁴. In fact, as we have seen, this legislation imposes connection criteria to be used in determining what law applies with regard to real property rights, including their acquisition and loss, but not for contracts effecting transfers per se, and even less with regard to formal requirements, as shown in article 51, 2nd paragraph, 2nd proposition, of Law No. 218/1995. Contract lies outside the scope of articles 51 *et seq.* of Law No. 218/1995, even where the contract arranges or effects a transfer of real property and thus regards real property rights. It should be added that the Italian law reforms have deliberately omitted laying down any single prescription as to the form of documents, as the previous article 26 preliminary provisions of the Civil Code did¹⁸⁵, while it has introduced single formal rules, based on *favor validitatis*, wherever it deemed such provisions unavoidable (such as, for example, for marriage, in its article 28, for testamentary provisions, in article 48, for gifts in article 56, 3rd paragraph¹⁸⁶, for powers of attorney in article 60, 2nd paragraph). In real property, then, reference must be made to the provisions of article 57 of Law No. 218/1995, and thereby to article 9, Formal Requirements, of the Rome Convention of 1980 on the law applicable to contractual obligations, which in its six paragraph deals with such matters.

¹⁸¹ Art. 4, para. 3: "Notwithstanding the provisions of paragraph 2 of this Article, to the extent the subject matter of the contract is a right to immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated."

¹⁸² On this point see RE, *I diritti reali nella riforma del diritto internazionale privato*, in *Rivista del Notariato*, 1996, p. 702 *et seq.*, as well as LICINI, *Diritti reali*, in A.A.V.V., *La condizione di reciprocità. La riforma del sistema italiano di diritto internazionale privato*, cited, p. 265 *et seq.*, in particular p. 286-288 and LICINI-PASQUALIS, *Contratti ad effetti reali: gli atti negoziali aventi ad oggetto diritti reali*, in A.A.V.V., *La Convenzione di Roma sulla legge applicabile alle obbligazioni contrattuali*, edited by Ballarino, Milano, 1994, p. 239 *et seq.*

¹⁸³ The issue of the concept of "form", which also involves the relationship between private international law and the Rome Convention, is one of the most subtle and complex in this context (as well as in legal theory in general: see for example: Cassazione 12 July 2004 n. 12821, BALLARINO, *Disciplina della forma*, in A.A.V.V., *La Convenzione di Roma sulla legge applicabile alle obbligazioni contrattuali*, Milano, 1983, p. 163 *et seq.* e BALLARINO, *Forma degli atti giuridici nel diritto internazinale privato*, in *Digesto delle discipline privatistiche - sezione civile*, VIII, Torino, p. 416 *et seq.* An important analysis focusing on the perspective of private international law and its relationship with the various provisions of the Civil Code and the Solicitors Act which is thus of direct relevance to section six of the present study is: PAQUALIS, *Il problema della circolazione in Italia degli atti notarili provenienti dall'estero*, in XXIII Congresso Internazionale del Notariato Latino, Atene 30 September – 5 October 2001, Milano, 2002, pag. 469 *et seq.*, as well as BAREL – PASQUALIS, *L'efficacia degli atti stranieri*, in *La condizione di reciprocità. La riforma del sistema italiano di diritto internazionale privato*, *op cit*, pag. 479 *et seq.*

¹⁸⁴ With the exception of the provisions on donation set out under art. 56 of l. 218/95 above.

¹⁸⁵ Art. 26 preliminary provisions c.c. (abrogated): "The form of inter vivos deeds and wills is regulated by the law of the place where such deed is executed or by that which regulates the object of the deed, or rather by the national law of the person executing the deed or by that of the contracting parties if one and the same."

¹⁸⁶ Art. 56, 3° co.:" A gift is valid, as form, if it is so regarded by the law which regulates the substance thereof or by the law of the State in which the act is performed."

Therein it is provided that "...a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract." There remains a question as to whether for Italian law, article 1350 of the Civil Code (requiring an agreement in writing for real property sales in particular, which are otherwise void) are a formal requirement that applies independent of the place in which the agreement is entered into and the law that governs its substantive provisions. The problem is perhaps not of great importance in practice: on the one hand, it arises only for those jurisdictions that admit verbal contracts that transfer of real property rights (and a contract of sale in particular), and, on the other, as has been mentioned a number of times, for publication in the land registries, the agreement must take the form of at least a private certified agreement (including where the documents are made abroad, pursuant to article 55 of Law No. 218/1995 and article 2657 of the Civil Code). In any event, the problem, at least theoretically, exists. Some have observed¹⁸⁷ that the rule under the Rome convention as to the transfer of title "seems to have been made to order for German law, where the provision that recognises the principle of locus is excluded for dealings that create property rights over items" and where, for real property, "a formal procedure, the *Auflassung*, is required, in which a public official is involved to the point that he must identify the real wishes of the parties. This procedure cannot be escaped, as No. 6 provides." But such a formal procedure as the *Auflassung* is not always required. The rules laying down requirements as to form (and substance) in the private international law system must be read with those that by their very distinction from the rules of any particular legal system create a principle of *favor validitatis* any time that the form used in that of the law of the place in which the document was entered into (or that governs its substance¹⁸⁸). In other words, one may with good reason maintain that once the required written form is respected, the foreign document may be considered valid title for the transfer of ownership in an Italian immovable asset; on the contrary, an agreement for the sale of real property entered into abroad or made in accordance with *lex loci* or *lex substantie*) that is made verbally should not be considered so valid¹⁸⁹. One further remark: We have seen above in 3.6 that

¹⁸⁷ BALLARINO, *Forma degli atti e diritto internazionale privato*, cited, the traditional Italian framework of private international law remaining in force.

¹⁸⁸ Consider, once again, Law 218/1995 and the cited provisions on the form of power-of-attorney and wills.

¹⁸⁹ Indeed, one source supporting a differing conclusion, that the transfer of an Italian real asset concluded in oral form, outside of Italy, in compliance with the hypothetical law of the place where the oral contract is perfected would be valid, is art. 56, 3rd comma, l. 218/1995 cited above with respect to the form of donation. If we consider that in Italy a donation (whether of moveable or real property) is concluded by public notarial deed with witnesses subject to the penalty of nullity (art. 782 c.c., save for donations of moveable assets of modest value - art. 783 c.c.), the rule of international private law which would lead to the conclusion that an informal donation (i.e. not following the above formalities), or even that an "oral" agreement is valid, leading to a conclusion in contrast to that discussed in the text. It is true, however, that the rules of international private law do not serve to identify whether a system of law governing a certain sector has imposed a mandatory (directly applicable) provision but rather they presume this result, in the sense that private international law is not the source giving rise to such conclusion. The logic in practice is different: one refers to the system of law (excluding the d.i.p.) and one verifies whether a certain rule is, for example, an imperative rule of law, after which one would consult the relationships of d.i.p. and in general the international relationships, one then would evaluate whether or not such internal rule would apply notwithstanding the rules of deferral or international Treaties. In other words, the rule of Law 218/1995 (in particular art. 56 3rd comma), should not have any relevance as a d.i.p. rule, for purposes of evaluating whether the written form in the context of transfers of real property, is an imperative rule of form which applies regardless of the place of conclusion of the contract and of the law that governs its substantive content as per art. 9, para. 6 of the Treaty of Rome. The issue is related to that regarding the problematic coordination between arts. 56 and 57 of the Law 218/1995, since on the one hand a specific rule on donations would apply, and on the other hand reference must be made to the Treaty of Rome ("in any case") and the latter would apply to donations as well according to the prevailing view. To avoid an abrogative reading of the scope of art. 56 see FERRI JR, *Donazioni*, in A.A.V.V., *La condizione di reciprocità. La riforma del sistema italiano di diritto internazionale privato*, cited, pag. 291 et seq.. In particular, for the purposes referred to above, the author points out that art. 56, 1st comma, and the deferral to the national law of the donor – in derogation from the ordinary operation of the rules of d.i.p. – would constitute only a criterion of connection but, more importantly, "basic element for the identification of the

documents that transfer real property must carry details of the building permit or otherwise be void. Although these are said to be "formal voidances", the term refers not to the "external form" but to the "internal form" and thus to the content, and it is the content that must comply, not the form. The point here is that the sale agreement for an Italian property that is made abroad must comply with these requirements (or their purpose could easily fail¹⁹⁰). Nonetheless, where the document fails to mention these documents, the foreign document may not be considered complete, and must be supplemented by the information (in particular, to obtain registration at the Land Registries). This is best done upon the document's lodging with a notary or a notarial archive¹⁹¹.

6.2 Real Property Law

6.2.1. Conflict of Law Rule

As discussed above, the Italian system of private international law accepts the criteria of connection with the *lex rei sitae*¹⁹².

6.2.2. Formal Requirements

Subject to what we have said above, as to form in private international law, there is no obstacle in the Italian system but only the requirement that there be a preventive "filter" that a transfer of real property made abroad should accord with the rule under article 55 of Law 218/1995 (and consequently under article 2657, 1st paragraph, of the Civil Code, the title document must be a public document or a private act the signatures to which have been certified or approved by a court). This is unlike some other European states, such as Germany or the Netherlands. Nonetheless, to gain access to the Land Registries¹⁹³ (and generally, subject to any international double taxation agreements, to avoid that the real property documents be taxed) the real property sale agreement in the above form must be lodged with a notary (or in a notarial archive) pursuant to article 106, part 4, of the Notarial Law (Law No. 89/1913)¹⁹⁴. The notary in preparing the minutes for the lodging of the foreign document will ensure that the foreign document has been legalised or apostilled (except where this is not necessary, because of specific international conventions), that the accompanying Italian translation is suitable (in person, if he has sufficient knowledge of the language in question,

criterion of connection"; the national law of the donor would serve the purpose of not only identifying the applicable law but also and in particular, that of proceeding with its qualification; this constitutes therefore a purpose which is not "typical" of the rules of d.i.p.. For a practical application of the above analysis see FERRI, *Donazioni*, cited, p. 313, note 55.

¹⁹⁰ Moreover, this is in line with Articles 3, 4 and 7 of the Treaty of Rome.

¹⁹¹ For further thoughts (extended to include also the abrogated L. 165/1990) see TONDO, *Deposito presso notaio di atti esteri relativi ad immobili in Italia*, in A.A.V.V., *La Convenzione di Roma sulla legge applicabile alle obbligazioni contrattuali*, edited by Ballarino, Milan, 1994, p. 281 et seq., in particular, p. 292 et seq., which also includes references to the subject of the filing discussed above.

¹⁹² Cfr. the observations mentioned above in para. 6.1.1.

¹⁹³ As is generally the case with all foreign deeds which one wishes to "use" in Italia by virtue of the rules indicated in the text.

¹⁹⁴ Regarding the obligation of provisional registration (only touched upon in the text), the exceptions to this requirement, the concept of "making use of in Italy", and the extent of the solicitor's obligations (or the Keeper of the Solicitors' Archive), on the concept of foreign deed, including the relevant principles regulating its legal recognition in Italy, see in addition to note 183: GRASSO, *Il deposito di atti esteri*, in *Vita Notarile*, Palermo, 2002, pag. 1689 e ss. e LEO, *Deposito di atto estero privo di certificato di destinazione urbanistica*, studio della Commissione Studi civilistici del Consiglio nazionale del notariato (forthcoming in *Studi e materiali*); see also LIOTTA, *Prova teorico-pratica riguardante un atto di ultima volontà*, in *Studium iuris*, Padova, 1, 2004, p. 67 et seq, PICCOLI-VELLETTI-RUOTOLO, *La circolazione degli atti notarili nello spazio giuridico europeo*, in *Rivista del Notariato*, Milano, 1996, p. 1377 et seq, PICCOLI, *Deposito degli atti esteri: un passo avanti e mezzo indietro*, in *Notariato*, Milano, 1997, p. 292 et seq, CALO', *Discorso sulla legalizzazione*, in *Notariato*, Milano, 2002, p. 417 et seq.

or through an official translator), and will examine the document's lawfulness in light of the "international ordre public" and the necessary requirements¹⁹⁵, which might otherwise be too easily overlooked through the use of a foreign document. Here we are thinking, in particular, of compliance with planning and building consents, and the references that if missed may result in the agreement being deemed void. Where these are absent in the foreign document, as this section 6 has discussed, the notary will have to have it supplemented by statements in the minutes of the document's lodging and only then may it be registered.

6.3 Restrictions Upon Foreigner's Acquisition of Land

6.3.1. Restrictions limited to Foreigners

The Italian legislation has been moving towards greater freedom for foreign nationals in dealing in land. The original rule, set out in article 16 of the preliminary provisions to the Civil Code¹⁹⁶, to take account of the subsequent adoption of the Constitution, has been gradually watered down and superseded, so that now a "condition of reciprocity" is the residual yardstick used in every area to decide upon the treatment of foreign nationals.¹⁹⁷ Confirmation of the presence of that "condition of reciprocity" is not required¹⁹⁸ for property purchases (and in truth other areas also) by individuals who hold a work permit, be that a *carta di soggiorno* or a *permesso di soggiorno* issued for reasons of employment, self-employment and their family members under Law No. 40 of 6 March 1998, which formed part of the Consolidated Law on Immigration and Foreign Nationals, issued by Legislative Decree No. 286 of 25 July 1998 and its enacting provision, in Presidential Decree No. 394 of 31 August 1999. Such individuals have the same rights as any Italian citizen, without there being any need for a condition of reciprocity to be established.

Also exempted from established a condition of reciprocity are:

(1) citizens of the member states of the European Union, by application of articles 43, 49 and 56 of the Treaty establishing the European Community, in accordance with the consolidated jurisprudence of the European Court of Justice;

¹⁹⁵ This notion is more restrictive than the so-called internal "public order" rule which, for example, is cited in art. 1418 c.c., imposing the nullity of contract due to contrast with the internal public order and citing those rules of fundamental importance to our legal system and, therefore, of "necessary application" to use an expression which is adopted by the law reforming international private law (L. 218/1995). Under this law, the provisions of articles 16 (public order) and 17 (rules of necessary application) set out that foreign law may not be applied in Italia where its effects are contrary to our public order and that in any case the Italian rules of necessary application prevail (the case of urban planning laws are a classic case on this point). On this subject, see the traditional rules of international private law still in force that remain valid even today, APPELLO TRENTO, 24th April 1982, in *Rivista di diritto internazionale*, 1983, p. 459 et seq. and, for a reconciliation of the contrasting concepts of public order, see Supreme Court 15th March 1985 n. 2215, in *Rivista del Notariato*, Milan, 1986, p. 149 et seq.. It has been noted that these observations have not been superseded by the reform of international private law: on this point see IEVA, *Manuale di tecnica testamentaria*, Padua, 1996, p. 12-13.

¹⁹⁶ Art. 16 - Treatment of aliens - 1. Aliens enjoy the civil rights attributed to citizens on condition of reciprocity and subject to the provisions contained in special statutes. 2. This provision also applies to alien entities.

¹⁹⁷ On the condition of reciprocity, see: CALO', *Il principio di reciprocità*, Milano, 1994, BARALIS, *La condizione di reciprocità*, in A.A.V.V., *La condizione di reciprocità. La riforma del sistema italiano di diritto internazionale privato*, cited, p. 3 et seq., anche per il raccordo con le norme di cui infra nel testo, MENGOZZI, *Il notaio e la condizione di reciprocità*, in *Rivista del Notariato*, Milan, 1994, p. 1213 et seq. in particular on the issue of whether or not it is necessary that reciprocity be controlled with respect to laws and regulations (legislative or diplomatic reciprocity) or with respect to de facto reciprocity, taking into account actual practice; for a summary and specific examples, see PETRELLI, *Formulario notarile commentato*, Milano, 2003, volume III, tome I, p. 738 et seq..

¹⁹⁸ The text is derived in full from the internet site of the Ministry of Justice (www.giustizia.it, item *La politica estera-Italia nel mondo- Servizi della rete consolare- Lo straniero e la condizione di reciprocità - scheda informativa*). There, it is specified that, with respect to residual cases where the condition of reciprocity subsists, a list of single States is provided showing, with respect to purchases of real estate, in which no information is provided on mortgage loans since, where not otherwise indicated, they would not require further verification of the condition of reciprocity as such deeds are linked to the purchase transaction. [to be checked by the editor]

(2) citizens of the states belonging to the European Economic Area (Iceland, Liechtenstein and Norway), in accordance with articles 31, 33, and 34 of the Agreement creating the European Economic Area;

(3) stateless persons, in accordance with article 7 of the Convention relating to the Status of Stateless Persons, adopted in New York on 28 September 1954, and made enforceable by Law No. 306 of 1 February 1962, provided they have been properly resident within Italy for at least three years;

(4) refugees, by the application of article 7, 2nd paragraph of the Convention Relating to the Status of Refugees, adopted in Geneva on 28 July 1951, ratified and made enforceable by Law No. 722 of 24 July 1954, provided they have been properly resident within Italy for at least three years.

If on the other hand, the foreign national in question does not have permission to stay in Italy as described above, or is a body corporate from a foreign jurisdiction (for example, an association, foundation or company):

(a) where it is a citizen of a state which has an agreement with Italy on civil matters, there will be no checks as to the condition of reciprocity for matters governed thereby, since the agreement will be directly applicable in that it will have been received into the relevant legislation of the two countries. In this regard, the Consular Service, through the website of the Ministry of Justice, publishes information regarding the international conventions to which Italy is party, in an archive;

(b) where it is a citizen of a state which does not have an agreement with Italy on civil matters, the Diplomatic Disputes and Treaties Service will provide an opinion on civil matters to public offices and notaries. As the Council of State has ruled, the Service will not provide certificates or declarations to private persons.

With regard to real property purchases and the incorporation and membership of companies, in particular, the Service periodically sends information bulletins to the following bodies, relevant to such documents:

- A. The Ministry for Internal Affairs
- B. The Ministry of Justice
- C. The Ministry of Finance
- D. The Ministry for Industry
- E. The National Council of Notaries
- F. Unioncamere, the association of Chambers of Commerce.

6.3.2. Other Restrictions

There are no other restrictions or peculiarities on the purchase of real property within Italy by foreign nationals¹⁹⁹, since article 1 of Law No. 340 of 24 November 2000 abolished all the previous legislation requiring authorisation for the purchase of real property by foreign nationals in "border areas"²⁰⁰. In effect, because Law No. 340/2000, which removed all such restrictions, and Law No. 242 of 29 December 2000 (which was the later of the two laws to be passed, and to enter into force, and removed the restriction only with regard to European Union citizens), are difficult to reconcile,

¹⁹⁹ Since the provisions of art. 7 of D.Lgs. 286/98, which provide that whoever assigns title to or the right of enjoyment of real property located in Italy to a foreign citizen must give written notice thereof within 48 hours to the local public security authorities, are not deemed a restriction. This regulation, which does not impose a sanction, does not prohibit the purchase, nor may it invalidate a purchase subsequent to its conclusion and, furthermore, a similar provision exists with respect to Italian citizens under art. 12 of d.l. 21-3-1978 n. 59 converted by law 191/78. Recently the Minister of Internal Affairs with Note n. 557/ST/208.018.1.S.23(11) of 18th November 2004 of the "Department of public security – Office of general administration" has addressed the coordination of the two instances of notification to the public security authorities which have similar but not identical scopes of application (the first is aimed specifically at the surveillance of foreign citizens while the second was adopted for anti-terrorism purposes).

²⁰⁰ For a summary of the legal framework prior to its abolishment, see: CALO', *Il principio di reciprocità*, citato, p. 186 et seq., LIGUORI, *Zone di confine (Trasferimento di immobili in)* in *Dizionario Enciclopedico del Notariato*, edited by Falzone-Alibrandi, Rome, in V updated volumes through 2002, volume IV, Rome, p. 855 et seq..

doubts have arisen as to whether the restriction continues to exist with regard to those from outside the European Union. Nonetheless, as leading authors have remarked²⁰¹, the only logical interpretation of the rules leads one to conclude that all restrictions should be considered to have been abolished²⁰².

6.4. Practical Case: Transfer of Real Estate Among Foreigners

The considerations made above as to private international law highlight that there are no theoretical obstacles to several foreign nationals holding a property in Italy, nor to their transferring it to other foreign nationals by an agreement made outside Italy. Nonetheless, for tax reasons, to avoid the duplication of expenses²⁰³, and to avoid risk in an area where the law is continually developing (as, for example, we have seen with the construction amnesty), it is most probably advisable to consult an Italian notary directly. Indeed, the European code of conduct for notaries makes specific provision for collaboration in the interest of the parties between notaries, where there are international transactions, since here the risks of multiplying costs and a lack of awareness of local requirements is greatest.

²⁰¹ BARONE-CALO', *Trasferimento di immobile in zona di confine*, in *Studi e materiali*, Milan 2002, p.619 et seq..

²⁰² On this point, while changing the express purpose (also for reasons connected to the well-known events of New York), the Chief of the diplomatic litigation department of the Ministry of Foreign Affairs has expressed his views through a note addressed to the National Council of Notaries, n. 691/223 of 14th January 2002.

²⁰³ Recall the discussion regarding the filing in advance of a foreign deed with a Notary or Notarial Archive, save for the case of a deed (or private authenticated deed) of an Austrian Notary.

7. Encumbrances/Mortgages (and Land Charges)

7.1 Types of mortgages/land charges

7.1.1. Types of mortgages

Under the Italian legal system immovable credit guarantees can essentially be sub-divided into two categories: special land charges and (immovable) mortgages. Whilst both land institutes are widespread and heavily used in business practice, their legal forms and economic significance differ markedly. The common thread running between the two real property guarantees is the privileged ranking that both attribute in an eventual compulsory sale of the immovable property.²⁰⁴ In fact where the debtor is in breach of his obligations, the holder of the guarantee has preferential rights in the distribution of the proceeds in relation to the various other creditors, including unsecured creditors and holders of weaker guarantees.

The starting point for such an affirmation is the obvious point that if the debtor fails to perform as obliged, the creditor may, by way of appropriate court proceedings (in particular distraint), initiate proceedings for the compulsory sale of the debtor's goods and satisfy his debt from the proceeds. Generally speaking, and according to Article 2740 (1) of the Civil Code, "the debtor answers for the fulfilment of the obligation with all his present and future property",²⁰⁵ which as a rule means that all creditors have equal rights (provided that they respect the relevant time limits for lodging claims before the courts) to satisfy their debts from the proceeds of the compulsory sale in accordance with the maxim *par condicio creditorum* (Article 2741(1)). This rule naturally has its exceptions and the law provides that some creditors be preferred over others (so-called unsecured creditors or *chirografari*), having been accorded a legitimate right to priority treatment. According to Article 2741 (cited above) the stated principle of parity of treatment does not apply in the presence of charges, pledges or mortgages²⁰⁶ which constitute, as has been noted, legitimate grounds for priority ranking.²⁰⁷

²⁰⁴ In the Italian system the substantive aspects of such procedures are regulated under the Civil Code (Articles 2910 et seq) whilst the procedural aspects are covered by the Code of Civil Procedure (Articles 483 et seq). For a summary, see *inter alia*, GAZZONI, *Manuale di diritto privato*, op cit. pag. 635 et seq.

²⁰⁵ This rule is naturally subject to exceptions, but only in those cases foreseen by the law, with the second sub-section of the same Article stipulating that "limitations to this responsibility are only valid where expressly permitted under the law"; this means that certain types of property may not constitute the object of a pledge (and thus of a compulsory sale), such restrictions either being absolute, such as for wedding rings or the bed (Article 514, Code of Civil Procedure), or relative, as is the case for patrimonial funds constituted to meet the requirements of the family, which may not be subject to compulsory sale in relation to credit not intended to meet such requirements (Article 170 Civil Code). A legal institution which is particularly difficult to reconcile with Article 2740 of the Civil Code (and others) is the trust; in the already prodigious literature on the subject, in addition to that cited in note 23, see: GAZZONI, *In Italia tutto è permesso, anche quel che è vietato (lettera aperta a Maurizio Lupoi sul trust e su altre bagattelle)*, in *Rivista del Notariato*, Milano 2001, pag. 1247 et seq. and A.A.V.V. "Introduzione ai trust e profili applicativi tra dottrina, prassi e giurisprudenza", Stefano Buttà (ed), Milano, 2002.

²⁰⁶ And in order to distinguish the secured creditors which have title over such charges from unsecured creditors (i.e. those with no legitimate right of priority) the former are variously referred to as: charged, pledged or mortgaged.

²⁰⁷ Complex is the relationship between the articles cited (2740, 2741 and the related 2744 of the Civil Code) and the prohibition on so-called foreclosure agreements, which provides that "any agreement which purports to transfer to the creditor property in the object mortgaged or pledged in the event of failure to pay within the stipulated time limits is void. Such agreements are void also when concluded subsequent to the mortgage or pledge". The legal profession has made various attempts to circumvent this prohibition and has moreover opposed court rulings which has, nonetheless, over the course of the years swayed from more liberal positions to more restrictive readings in line with currents within the literature: see *inter alia* Cassazione Unified Civil Section, 3 April 1989, n. 1611, in *Rivista del Notariato*, Milano, 1989, pag. 890 et seq. (including also extensive bibliographical references), Cassazione, 28 September 1994, n. 7890, in *Rivista del Notariato*, Milano, 1995, pag. 1321 et seq, for a summary see CILLO, D'AMATO, TAVANI, *Dei singoli contratti, manuale e applicazioni pratiche delle lezioni di Guido Capozzi*, volume I, Milano, 2005, pag. 149 et seq. This issue is linked with the now permissible operation of the

Charges may be *general*, i.e. covering all property of the debtor, or *special*, i.e. linked to particular moveable or immoveable property.²⁰⁸ The order of preference between the various secured creditors does not depend upon the date of the credit but rather, just as for the charge itself, on the law. Naturally for the purposes of this study, of particular interest is the special immoveable charge governed by Articles 2745 – 2750 (“General Provisions”), and more specifically by Articles 2770 – 2776 (“On immoveable privileges”) and finally, as regards the ranking order of the different securities, by Articles 2777 – 2783-bis of the Civil Code (“On the ranking of securities”). This, as has been said, constitutes legitimate grounds for priority ranking provided for by the law on the protection of the various creditor positions that are closely linked to immoveable property – and therefore by extension to the housing trade. Considering the general category of charges, which under current law occupies first place in the ranking of securities, enjoying preference over all others including mortgages, the immoveable charge is characterised primarily by the fact of its constituting a real right, but also on account of its “specificity.” This right is vested in the creditor by virtue of the particular nature of his credit, attaching neither to all nor even to part of the immoveables belonging to the debtor, but rather to the specific immoveable or immoveables to which the credit is linked. This means that, whilst moveable securities may be both special or general (and thus in the latter case attaching to all moveable property of the debtor), immoveable securities are always special and hence fall on the immoveable property to which the secured credit is attached.

A third characteristic of land charges, and which this time is held in common with all other securities, is, as has been noted, their exclusively legal origin. This means that charges (in this case immoveable) may be created and may have effect only where provided for by the law. Accordingly the creation of charges in general and land charges in particular is strictly limited by the law, which excludes the possibility of the conventional creation of atypical securities which have not been specifically created and regulated *ex lege*. Private initiative may very well play a role in the formulation of the credit relationship to which the charge accedes *ex lege*, but it cannot itself create securities not provided for by law and thus modify the *par condicio creditorum* (Article 2741 Civil Code) by creating a secured credit with superior rights over all the others.

A further characteristic of the special land charge, also shared with other types of security provided for by law (usually), is the absence of publicity. This certainly amounts to a systematic anomaly, since on the strength of the special land charge a burden of sequestrability is created on the property along with a priority in the recovery of the secured debt, even though this state of affairs cannot be formally ascertained through consultation of property registers. The existence of the security depends in fact on the existence and particular nature of the guaranteed credit attaching to it. Since however this credit is clearly not subject to any legal publicity, and at most simply *de facto* publicity, the bond created by the security (which, as has been noted, is an extremely strong bond and which has the potential to effect changes in property rights through compulsory sale) does not correspond to any registration or transcription of any sort. This explains the practical problems stemming from the requirements of legal coherence, which are encountered in property transactions and are due to the special land charge provided for under Article 2272 of the Civil Code (“Credits for indirect taxes”) and the last sub-section of Article 56 of presidential decree 131/1986 on registration taxes which refers to the former article. On the one hand in fact, the latter law provides for a security for registration fees, stipulating its lapse five years after the date of registration; on the other hand, as far as the Civil Code is concerned, Article 2772(4) applies, which provides that the security may not be invoked in such a way as to prejudice any rights which third parties might previously have acquired in the immoveable property. In the determination of the relevant date for

lease back.

²⁰⁸ According to the academic literature a floating charge is not a genuine subjective right but rather, as noted in the text, is essentially a particular quality of a given credit and does not infer a so-called *ius sequelae*. See also below in the text.

the acquisition of such rights, it is generally accepted that (notwithstanding provision of Article 56 regulating their extinction) the security is created at the moment of the conclusion of the deed and not of its financial registration, with the resulting detriment for the third party buyer who remains liable to the tax authorities for possible enforcement of the debt. Under this interpretation, the new owner's relationship with the tax authorities is analogous to that of the purchaser of mortgaged property, except that it does not have the publicity which, as will be shown below, is required for this latter real right (i.e. securities), and he remains deprived of any of his own powers to defend himself against the State, since he is not personally liable for the unpaid tax which is cause of the proceedings.²⁰⁹

The other instrument of immovable security known to the Italian legal system is, as mentioned above, the mortgage. The Code refers to "mortgages" in the plural, clearly alluding to the variety of sources from which the right can be constituted. The core regulation of this instrument is contained in Articles 2808 – 2899 of the Civil Code, but other important land credit regulations and related mortgage guarantees are contained in Article 38 et seq of Legislative Decree 385 of 1 September 1993 (so-called "Unified text on credit and banking laws", abbreviated in shorthand to "Unified Banking Text or UBT") since it is most common in practice that the registration of a mortgage as guarantee for a loan is subject to these rules, in particular for the acquisition of family apartments.

Further clarifications regarding mortgages will be set out in the following paragraphs, whilst the issue of land charges will only be discussed at most in passing.

7.1.2. Legal nature

It was stated at the outset of this paper that mortgages (like pledges) a) belong to the category of *iura in rem*, thus enjoying absolute status understood as an inherence in the property, and thus enforceability *erga omnes*; the mortgage "follows" the property in its transactions, without such transfers being detrimental to the mortgage creditor; b) constitute, under traditional classification schemes, real rights "of security" which, as opposed to real rights "of enjoyment" limiting the owner's power to enjoy the thing, limit the owner's power to dispose it. The mortgagee (or secured) creditor may resort to the judicial sale of the property (*ius distrahendi*) and recover his debt from the proceeds (in preference to others). Given the nature of the real right, including its absolute character, the exercise of this power remains possible even where the property in the heritage has been transferred to others (*ius sequelae* [right of tracing]).²¹⁰

A fuller appreciation of the nature of the mortgage can be derived from the factors which distinguish it from the pledge, and in addition from further clarifications in relation to securities.²¹¹

According to traditional thinking, the basic difference between mortgages and general securities is inclusion in the category of real rights, since the latter are not real in nature, and correspondingly mortgages, as will be shown below, must always refer to specific property. The difference from special charges is located on a different level, since the academic literature recognises that these too are real rights in nature. It is therefore important to consider the source of the rights. Special charges

²⁰⁹ On this issue and related practical problems (which often lead either to a delay in the sale until the State's claim has lapsed or to express provision in the contract of sale requiring the deposit of a guarantee for part of the price with the notary and which the seller may redeem only following the extinction of the charge) see also PURI, *Considerazioni critiche sul privilegio speciale immobiliare per i tributi indiretti*, in A.A.V.V., *Studi e materiali*, Milano, 2002, pag. 222 et seq, and LOMONACO, *Privilegio speciale immobiliare per i tributi indiretti e sua estinzione* in A.A.V.V., *Studi e materiali*, Milano, 2003, pag. 176 et seq.

²¹⁰ Article 2808(1) Civil Code: "The mortgage entitles the creditor to sequester, even in respect of third party successors any property burdened in guarantee of his credit and to have priority the satisfaction of his debt from the proceeds of the sequestration."

²¹¹ The arguments which follow and others on the same subject are drawn, inter alia, from TORRENTE-SCHLESINGER, *Manuale di diritto privato*, op cit.. For an additional specific study, see RAVAZZONI, *Le ipoteche*, in *Trattato di diritto privato* edited by Rescigno, Torino, 1985, p. 3 et seq (though in need of modification in the light of subsequent legislative developments).

are created by law, and the credit comes into existence “already” privileged. In the case of mortgages however a constituent deed is necessary. This means that some leeway is left for private initiative (though it is not the sole source of mortgages), whilst there is no scope for private parties to create charges, the prohibition on conventional creation being absolute. This distinction also has its corollary: the special charge only burdens the property of the debtor whereas the mortgage may also burden the property of a third party that has allowed it to be created (third party mortgagor) (Article 2808 (2), Civil Code).

Of interest are also the differences between mortgages and real rights of guarantee on the one hand, and pledges on the other. The first distinctive element is the object of the right: pledges attach to moveable property whereas mortgages (broadly speaking) to tradable immovables (including accessories), real immovable rights of usufruct, right of *superficie*, emphyteusis (*enfiteusi*), the landowner’s rights to the proceeds of leases, as well as to the bare ownership of immovable property burdened by usufruct; as far as movables are concerned, only the registered movables and State income may be mortgaged (Article 2820, Civil Code).²¹² The second distinctive element is the dispossession of the object, namely its transfer to the creditor, which is characteristic of pledges but not of mortgages. Due to the impracticability of a system of publicity for moveable property permitting third parties to ascertain the business of a particular piece of property, including whether it has been subject to pledge, the law has satisfied this requirement with the dispossession of the holder.

A further characteristic of the mortgage in the Italian system is its accessory nature. Mortgages, as do pledges, necessarily presuppose a specific credit (whether future, possible or contingent), and their fate is linked to that of the credit. The mortgage relationship is accessory to the principal creditor-debtor one and, tied to the status of the latter, lapses with its resolution.

Finally, in accordance with Article 2809 of the Civil Code, the mortgage is characterised by its special and indivisible nature.

As will be argued in the next paragraph, since not only the deed but also registration in the land register is necessary for the creation of a mortgage, it is important to specify here the registration must involve property “expressly indicated and for a determinate sum of money.”²¹³ Indivisibility implies that the mortgage “subsist in full above all bonded properties, above each one of them and above every part of each” (Article 2809 (2), Civil Code): if several properties have been mortgaged in respect of the same credit, the creditor is entitled to do diligence on any one of them; if the mortgaged property is split either by division or sale, it may be sequestrated either in its entirety or in part since the mortgagee cannot suffer any detriment. So long as the credit still subsists the mortgage guarantees it, although there are specific rules for limiting the mortgage in the eventuality of a partial redemption of the debt (Article 2872 et seq Civil Code).

7.2 Setting up a mortgage

²¹² Once again only such property as is expressly identified by the law (including special laws) may be subject to mortgage. For a summary of the issues related to the object of the mortgage, see BIGLIAZZI GERI, BRECCIA, BUSNELLI, NATOLI, *Diritto civile*, 3, cit., pag. 252 et seq; for a more complex analysis BOERO, *Le ipoteche*, in *Giurisprudenza sistematica di diritto civile e commerciale*, fondata da Bigiavi, Torino, 1984, p. 189 et seq. which includes interesting insights in particular into the disputed possibility of a single owner mortgaging an abstract share in a piece of property and the so-called “causal usufruct”, under which the owner mortgages the usufruct.

²¹³ However a line of thinking in the literature argues that this specificity relates to registration only and not to the deed for registration; whilst the registration, i.e. the effective guarantee, may only concern the property specifically identified, the registrable instrument may also be general, that is cover all of the debtor’s property, as in the case for judicial mortgages. As far as the sum of money is concerned, and in the light of the mortgage’s accessory nature, the law requires that in addition to clarity as to the extent of the credit, an indication of the amount of the registered debt be given, since this constitutes the limit of the mortgagee’s preferential rights and is also information pertaining to the value of the property necessary for any third parties which might wish to register other rights in security as guarantee for their own credit. On this issue, see further: BIGLIAZZI GERI, BRECCIA, BUSNELLI, NATOLI, *Diritto civile*, 3, op cit., pag. 258.

7.2.1. Example

In the same way as for special immoveable charges, mortgages can be constituted primarily by the law, which are accordingly termed ‘legal mortgages’ (Article 2817, Civil Code). Mortgages can also be created by court orders (or in any case by judicial rulings) thus guaranteeing the execution of performance for which the creditor has already obtained a court order for specific performance (Articles 2818-2820 Civil Code). Another predominant means for constituting mortgage rights is through private agreements – which not by chance are termed “conventional” mortgages – which may either be constituted through contract or unilateral declaration (Articles 2821-2826, Civil Code). In both cases however – namely contract or promise – the mere demonstration of a constitutive wish, whether bilateral or unilateral, is not in itself sufficient to create the legal right, with its subsequent rights to priority in ranking, as the formality of registration is an absolute requirement for this. In other words the mere reaching of agreement or unilateral granting of the deed entitles the beneficiary to the status of creditor (which is therefore relative), that is the right to proceed to registration in the appropriate public register, only at which point does a real mortgage right come into being. This is one of the numerous exceptions to the principle that *nuda pacta* are sufficient to create or transfer real rights over immovables (which as we have seen regulates for example the sale of immoveable property), in the sense that the real effect – here the constitution of the real mortgage right – is not an automatic consequence of the expression of consent, but rather requires an “extra-” or “post-” contractual element, namely an external attributive act the rationale of which is founded on the constitutive consent already expressed. But even when the source of the right is not consensual, but rather statutory or judicial, the principle of constitutive publicity still applies, as this principle is the cornerstone underpinning the regulation of this entire field. This serves to reinforce both legal certainty and publicity of mortgage guarantees, because once mortgages have been constituted they cannot fail to appear in the relevant public registers, and if accordingly they are not included, this means that they do not exist as such, with the only right being that (of the creditor) to registration.

It follows from this that when a bank wants to receive a guarantee for its own credit, given for example as a mortgage, that mortgage must not only consist of the unilateral deed of (or contract with) the mortgagor (who may either be the debtor himself or a third party) granting the mortgage, but also the subsequent registration in the land registers of the place in which the property is located (Article 2827, Civil Code). And, it goes without saying of course, that access to such registers in the case of voluntary mortgages is as a rule only possible through the mediation of a notary, as will be shown below.

The steps to be followed are generally quite straightforward. The client asks the bank for a loan in the form of a mortgage and the bank, after ascertaining the client’s economic and financial status, consents on condition of a mortgage guarantee.²¹⁴ The next step involves an evaluation of the property by a qualified surveyor in order to establish the relationship between the amount loaned and the mortgage guarantee and the first contact with the notary. He then carries out checks on the mortgageability of the property and its freedom from other registrations or so-called burdens which might hinder the satisfaction of the bank’s interests.²¹⁵ The results of these inquiries are set out in a “preliminary notary’s report” on the legal status of the property (and where appropriate on the mortgagor), all of which is obviously drawn from public sources, including information from the Land Register relating to the property to be mortgaged, and is a kind of technical permit for the operation. In a second stage the notary concludes the loan deed for the establishment of a

²¹⁴ Which may either be exclusive or also accompanied by personal guarantees, such as a personal bonds (*fideiussio*).

²¹⁵ For example a previous mortgage taken out on a debt which still exists for a sum which would take up the entire value of the property as established by the expert surveyor or alternatively where it transpires from the preliminary inquiries – i.e. checks which notaries carry out on public registers – that the property to be mortgaged is (already) subject to compulsory sale proceedings.

mortgage,²¹⁶ then lodging this with the Land Register through the production of a copy of the deed, together with the note of mortgage registration²¹⁷ in accordance with the requirements in particular of Article 2839 of the Civil Code. Finally, the notary hands over to the bank an executed copy of the contract²¹⁸ and a “definitive notary’s report” (an update of the preliminary report) which normally attests to a) the fact of registration of the mortgage along with its degree, and b) the absence (or not) of other registrations or burdens detrimental to the bank’s mortgage.²¹⁹

7.2.2. Legal requirements for the loan contract affecting the mortgage

In conformity with a (predominantly) Community line of thinking, now endorsed by the Italian legislature, there are a range of rules addressing the issue of “transparency in banking operations and services” and which, alongside the “unfair” terms cited elsewhere, aim to protect the consumer starting from the phase of contractual negotiations for the mortgage loan, as well as implying particular terms and references into the contract itself. Without delving too much into these complex regulations, it is sufficient here to note that this area has recently been subject (applying the provisions of legislative decree 385/1993 – unified banking and credit text) to further regulation by the decision taken on 4 March 2003 (G.U.R.I., 27 March 2003 n. 72) by the Interministerial Committee for Credit and Savings and entitled “Regulations for transparency in the contractual terms of banking and financial operations and services”. An addendum dated 25 July 2003 has also been produced by the Bank of Italy on “Oversight Instructions for Banks”, as set out in title X (published in G.U.R.I. 19 August 2003 n.191 S.O.) which is dedicated to the same subject. In summary, these regulations entitle the client (future mortgagor) to the recognition of important (theoretical) rights already at the pre-contractual stage, including in particular:

²¹⁶ Although strictly speaking the intervention of a notary is only necessary for the registration of the mortgage, in practice the parties stipulate in a unified notarial act both the loan and the act of concession of the mortgage on the property since public acts creating pecuniary obligations constitute, under Article 474 of the Civil Procedure Code, enforceable contracts (This provision is about to be changed in order to allow for private acts to become executive titles). In recent years, in part due to the entry into the market of foreign operators, both instances of acts of granting of mortgages, which take for granted the existence of a loan, as well as the so-called “unilateral mortgages” (i.e. acts of “acceptance of the mortgage offer and the granting of mortgage” by the debtor) have become more frequent. As a rule these procedures are followed by banks which, also for reasons of business management, do not have the appropriate facilities in the place where the contract is concluded. On such contractual arrangements and the problems related to the release of executed copies: CACCAVALE, *Gli atti unilaterali di mutuo nel credito bancario, attività ricognitiva e procedimento di formazione del contratto*, in *Pratica del diritto civile* edited by Iudica, Milano, 2002, A.A.V.V., *Studi in tema di mutui ipotecari*, Milano, 2001, which also offers solutions to a range of practical problems in this area.

²¹⁷ According to procedures similar to those already discussed governing the publicity and sale of immoveables, for which the *Computerised Singl Form* or Uniform Electronic Format (“Modello Unico informatico”) is used.

²¹⁸ Drawn up in conformity with the requirements of Article 475 of the Civil Code and which constitutes a valid deed for the purposes of any subsequent court action

²¹⁹ Sometimes such documentation includes the so-called insolvency certificate, i.e. attestations of the competent authorities that, up until ten days after the registration of the mortgage, the mortgagee was not subject to insolvency proceedings *latu sensu*; Article 39 of the legislative decree 385/1993 – unified banking and credit text – provides that for credit secured on land (as defined by Article 38) the mortgage shall be incontestable (i.e. not revocable in favour of creditors in bankruptcy) against the bank by the liquidators (only) if the mortgagor becomes insolvent more than ten days after the registration of the mortgage (the so-called consolidation of the mortgage). Any mortgage, which survives the ten day period following registration without any bankruptcy procedures being (or having been) instigated against the mortgagor, is not only created with the simple act of registration but is also protected against revocation by liquidators. In particular, under Article 38 of this decree, both mid- and long-term mortgage guarantees of first degree on the property count as land loans (under certain conditions fixed by the Bank of Italy also loans with second degree mortgages are classed as land mortgages). There are various consequences other than those described above which stem from the qualification of a mortgage as such.

- the right to receive (on request) a complete copy of the mortgage contract (a right which may obviously be waived by the client), and it should be stressed that the acceptance of this document does not oblige either party to conclude the contract;
- the right to receive a “summary document” outlining the most important contractual and financial conditions;
- the right to a concise outline of the costs (that is the effective interest rate of the financial operation), to be included both in the contract and in the summary document.²²⁰

The law does not however provide for minimum time limits between the receipt of this documentation and the conclusion of the contract nor, generally speaking, the possibility of a cooling-off period during which the mortgagor may rescind the contract (although it should be said that it is hard to imagine having an interest in doing so, since he would then be obliged to return the borrowed sum in its entirety).

7.2.3 Formal requirements

The contract or unilateral declaration constitute the deed for registration and, therefore, the birth of the mortgage; nevertheless the concession of a mortgage cannot be undertaken in a will (Article 2821(2)) which is therefore excluded from the unilateral acts capable of creating a mortgage. The reason for this prohibition is the need to uphold the principle of *par condicio creditorum*.²²¹ According to Article 2821(1) of the Civil Code, the concession of a mortgage must occur either through public act or authenticated private writing, on pain of nullity, which includes the necessary indications for the registration, and in particular those relating to the immovable property required under Article 2821 of the Civil Code.²²²

The concession may relate both to one’s own property and to that of third parties; in the latter case, Article 2822(1) provides that the act of concession will become effective, in the sense that registration may be validly undertaken, only once the thing has been acquired by the grantor.

A similar rule applies to mortgages over future property, since registration can only be carried out once the property has come into existence (Article 2823, Civil Code).

7.2.4 Registration

²²⁰ This is a (derived and secondary) law which has given rise to a number of problems in business practice on account of its lack of clarity. For a summary: A.A.V.V., *La trasparenza bancaria*, in *Federnotizie*, *Organo della Federazione Italiana delle Associazioni Sindacali Notarili*, 2004, available at www.federnotizie.org.

²²¹ Whilst it is beyond doubt that a will is not a suitable deed for registration, there is some debate over whether a provision through which a testator purports to oblige an heir or successor to implement a mortgage in favour of a creditor is valid. Some commentators claim that the actual deed establishing the mortgage (the deed for registration) is an act between living parties (carrying out the requirements contained in the will) and accordingly that the mortgagor here would not be the testator; others by contrast contest the validity of this argument on the grounds that it is ultimately still the wishes of the testator which constitute the grounds for the mortgage. On this issue, see: IEVA, *Manuale di tecnica testamentaria*, Padova, 1996, pag. 15.

²²² And in any case “in the deed establishing the mortgage the property must be described specifically including indications as to its nature, the municipality in which it is to be found as well as the information necessary for the Land Register; for buildings still under construction it is necessary to indicate” (if not yet registered) “the information necessary for the Land Register pertaining to the ground on which they are built.”

As has been noted, the creation of a mortgage requires both the deed of concession and registration in the competent Land Registers (a procedure which today under the Computerised Single Form or Uniform Electronic Format occurs simultaneously with fiscal registration of the deed in the competent Tax Offices).

The date of registration determines the ranking order between different mortgages on the same property (Article 2852, Civil Code).

Just as is the case for ‘transcriptions’ of sales (though laying aside differences in the effects of both operations) this operation requires the production of the constitutive deed, together with a note of registration (in duplicate original), signed by the applicant²²³ and containing, *inter alia*, as required under Article 2839 of the Civil Code:

- the debtor’s full particulars, and where appropriate those of the third party mortgagor (n. 1);
- the domicile chosen by the creditor within the jurisdiction of the court of competence for the Land Register²²⁴ (n. 2);
- the relevant particulars of the deed, such as the date and the notary’s particulars (n. 3);
- the amount for which the inscription is taken (n. 4);
- the interest and instalments related to the credit (n. 5);
- the time at which the claim can be collected (n. 6);
- the nature and location of the property (n. 7).

If the mortgage is linked to the release of bills, i.e. where the creditor-lender draws bills of exchange in order to facilitate the circulation of its credit, it is necessary to present these documents to allow the Land Register to note on each one of them the existence of the mortgage as well as the particular details of its registration.²²⁵

It is also important to note that the requirement of publicity applies to a range of other modifications, such as changes in the creditor’s chosen domicile (Article 2842, Civil Code) or the transfer or burdening of the mortgage through actions involving the credit such as assignation or sub-entry (Article 2856) of the credit,²²⁶ or also if the validity of the registration ends after twenty years (Article 2847, Civil Code). In the light of the constitutive nature of publicity, it follows that on the expiry of this term all real mortgage rights cease to exist (referred to as “peremption”). Technically speaking, this is not a lapse or prescription, but rather the running to term of the foreseen limit of the mortgage. Accordingly it is possible to “renew” the mortgage before its expiry with a view to maintaining the guarantee under the terms of Article 2850 of the Civil Code.²²⁷ This means that it is possible to preserve the old mortgage

²²³ As has already been noted in respect of the transcription carried out using electronic procedures, when the note of registration reaches the office via internet together with a paper copy, once it has registered the mortgage (both in the general register (i.e. of transcriptions, annotations and registrations) and also in the specific register), provides the applicant with a copy of the original of the note containing details of the registration carried out. Here too the note is constituted by Sections A, B, C and D which contain the particulars as described above in the text.

²²⁴ The bank may derogate from this provision regulating land credit, covered by Article 38 et seq of decree 385/93, specifying as domicile its own headquarters.

²²⁵ On “mortgage bills” see PAVONE-LA ROSA, *La cambiale*, in *Trattato di diritto civile e commerciale*, Cicu, Messineo & Mengoni (eds), continued by Schlesinger, volume XXXIX, part I, Milano, 1982, pag. 446 et seq. For a more updated version, albeit from an academic viewpoint, see CAMPOBASSO, *Diritto commerciale*, 3, *Contratt - titoli di credito – Procedure concorsuali*, Torino, 1992, pag 260 et seq, and GAZZONI, *Manuale di diritto privato*, cit. pag. 736 et seq.

²²⁶ For an exhaustive list see Article 2843, Civil Code.

²²⁷ In particular it is necessary to provide a new note of registration in duplicate, corresponding to the original, accompanied by a declaration requesting renewal of the original registration.

and its ranking. Correspondingly, if twenty years pass without any renewal, the mortgage expires, but not (automatically) the deed for its registration, and the creditor may accordingly carry out a new registration (Article 2848), which will be allocated a new ranking.

7.2.5 Time and Costs

Once the deed of mortgage concession has been drawn up and signed, the Italian system allows for its registration within the space of a few hours. And if this was true prior to the introduction of the Uniform Computer Model, it is now today only more so, since this system is now the only one in use.²²⁸ Once the deed has been prepared, along with a copy and the note of registration, they are transmitted electronically to the Land Register in order to allow for the payment of the relevant taxes, following which the parties take an acknowledgement of the transmission and a copy of the deed to the competent Register in order to complete the registration.

Slightly more time (but within reason) is needed for the notary to carry out mortgage and registry checks in drawing up the “preliminary notary’s report”, its transmission to the bank, for the bank to consider the concession of the mortgage and send a draft contract to the notary and then to finalise the contract (or the deed establishing the mortgage), all of which takes about fifteen days. Once the mortgage has been legally registered the proceedings are more or less finished, since the registration is constitutive of a legal right;²²⁹ the final practicalities entail the notary’s production of the “definitive notary’s report” (together with an executed and a certified copy of the deed) within the time limits provided for in the deed²³⁰ which, if the disbursement – i.e. immediate delivery – of the sums to the borrower has already taken place, constitutes the last passage of the procedure.

There is no way of “booking” the mortgage registration which, as has been noted, takes place on completion of registration at the Land Register and is treated (as was noted in the discussion of the registration of sales²³¹) in the same way as other real estate transactions which are subject to the requirement of publicity.

Of particular importance, once again, is the comparison of the total costs of a mortgage loan for €100,000 and one for €300,000. It is however necessary to make a few preliminary observations. First of all the total costs in these examples are calculated partly in relation to the size of the loan and partly in relationship to the amount registered for the mortgage. Secondly, as far as the notary’s share is concerned, the fees may differ according to whether or not the mortgage is linked with the (relatively) simultaneous purchase of a house for which a loan is required. This is because, if this link does exist, since the notary must carry out checks to

²²⁸ Other than emergency procedures where the electronic connections are interrupted for a period of time determined by the law.

²²⁹ Except in the event, noted above, of a consolidation of the mortgage which must not however lose sight of the fact that the mortgage already exists, amounting simply to a problem of (additional) protection of the creditor bank against the possible risk of a subsequent bankruptcy, under which the liquidators might attempt to revoke the deed establishing the mortgage, thereby rendering it incontestable by creditors in bankruptcy.

²³⁰ And the client, if he has not already done so, will also hand over any other documents stipulated in favour of the bank that are required under the contract, such as property insurance against the risk of fire or other eventualities.

²³¹ See further on this point, paragraph 2.6.

ascertain the availability of the property for sale which are essentially identical to those carried out prior to the registration of the mortgage, the fees due for the mortgage element will obviously be lower. These fees are then (by law) halved for property loans under Articles 38 and 39 of decree 385/93. Third, the tax burden on the mortgage (excluding the notary's fees) varies according to whether it may benefit from tax deductions under the presidential decree 601/73, Articles 15 et seq.²³²

Bearing in mind that the most common eventuality is a secured loan (i.e. mortgage) for the purchase of the first house, this will be taken as a basis for our examples,²³³ and the lawyer's fees will be given for both with and without simultaneity with sale.

Loan of €100,000

Mortgage of €200,000 subject to the beneficial tax regime under presidential decree 601/1973

Notary's fees²³⁴

- simultaneous land mortgage and sale: €1,385²³⁵

²³² In particular, where mid- or long-term investment (defined by law as longer than eighteen months) is provided, for the sake of argument, by banks or other entities regarded as equivalent, the law provides for exemptions from registration tax, stamp duty, mortgage and registration levies as well as the tax on government concessions, replacing them with a "substitute" tax which is deducted directly by the bank on payment by the debtor. This tax is – as a rule – equal to 0,25% of the amount loaned (except where the loan relates to a property for which the direct tax requirements for tax deductions on the so-called "first house" have not been fulfilled, in which case the level is fixed at 2%). This is a recent legal development, and is complicated by the law 191 of 30 July 2004 (in G.U.R.I. n. 178, S.O. n. 136/L of 31 July 2004) converting decree 168 of 12 July 2004 making "Important modifications for the containment of public spending" also subsequently modified by decree 220 of 3 August 2004 (published in G.U.R.I., 20 August 2004 n. 195) converted into law 257 of 19 October 2004 (in G.U.R.I. n. 246, 19 October 2004): see, for example, the ABI circular (Associazione Bancaria Italiana: Italian Banking Association) n. TR/004104 of 12 August 2004 and FRIEDMANN-LOMONACO, *Considerazioni in ordine alla nuova aliquota prevista per i finanziamenti a medio/lungo termine*, in *Studi e materiali*, cit, 2004, pag. 970 et seq.

²³³ On a strictly fiscal level a) for non-land mortgages of a duration longer than eighteen months the tax burden is lighter, though the other expenses indicated remain the same, and notary's fees will be roughly 1.950 euros; b) for land mortgages of a duration longer than eighteen months for the acquisition of what is defined for the purposes of the registration levy as the second house, the notary's fees will remain unchanged but the substitute tax will be higher (2%). As the reader will appreciate, these combinations diverge significantly from one another in relation both to the level of tax and the notary's fees, also having to take account of VAT regulations (where the mortgage is granted by a company which cannot benefit from the tax deductions discussed above the deed will be subject to VAT - though an exemption may apply - and will pay the registration fee at the minimum fixed rate of 168 euro). Generally speaking a mortgage which does not benefit from the tax deductions under presidential decree 601/1973 mentioned above is subject to: - registration fees of 0,50% of the amount guaranteed (in addition to 3% of the mortgaged sum), - mortgage levy of 2% of the credit guaranteed, including interest and ancillary services, - mortgage tax now fixed at 35 euros.

²³⁴ Also in this case, as for sale, the figure given is an average because the uniform national tariff approved by the ministerial decree of 27 November 2001 in G.U.R.I. n. 292, 17 December 2001, general series), sets out criteria for the calculation of fees which are then modified as appropriate by the relevant District Association of Notaries. For an example, see the internet site of the College of Notaries for the joint districts of Como and Lecco at <http://www.notaicomolecco.it/>, in the section "Per il cittadino".

²³⁵ Bearing in mind that in addition to this sum consideration should also be given to the preliminary inquiry fees, normally fixed at between 100 and 200 euros and which, in the example under discussion of simultaneous mortgage and sale is added in an identical fashion either to the one of the other sum.

- no simultaneous land mortgage and sale: €1,500²³⁶
- expenses (mortgage and filing taxes): €20.90 and €35
- substitute tax under Article 15 presidential decree 601/73: 0,25% of the amount loaned.

Loan of €300,000

Mortgage of €600,000 subject to the beneficial tax regime under presidential decree 601/1973

Notary's fees

- simultaneous land mortgage and sale: €2,000
- no simultaneous land mortgage and sale: €2,300
- expenses (mortgage and filing taxes): €30.60 and €35
- substitute tax under Article 15 presidential decree 601/73: 0,25% of amount loaned.

NB:

- The notary's fees in both examples do not include VAT.
- All sums are collected from the client and paid by the notary, with the exception of the substitute tax which is retained (and then paid according to specific procedures) by the lender bank.

7.3 Causality and Accessoriness

7.3.1 Invalid loan contract

The foregoing pages have examined one of the particular characteristics of the mortgage in the Italian legal system, namely its accessory status in relation to the guaranteed credit. A corollary of this relationship of dependence of the former on the latter is the fate of the mortgage where the loan contract is invalid and, therefore, the credit relationship is void. In such cases the mortgage will be also be void with the related implications, for the general principles in the area, for the judge's power to act *ex officio* and the application of the maxim *quod nullum est nullum effectum producit*. The credit may be nonexistent because it never existed or has already been extinguished and, in both cases, the mortgage cannot be created. A similar conclusion may be reached in the case of a voidable mortgage contract and its relationship with the credit: since the mortgage follows the fortunes of the credit and the judge's ruling on the voidability of the contract has legal consequences also for the mortgage, so too will the mortgage which was created alongside the credit, be avoided *ab initio* by the judge's ruling to annul.²³⁷

²³⁶ See previous note.

²³⁷ See further BOERO, *Le ipoteche*, op cit., pag. 56 et seq.

7.3.2. Right of withdrawal

Where credit is secured on land (and under the rules of U.T.B.), the borrower is considered to have the right *ex lege*, even in the absence of express contractual provision, to pay back in advance the borrowed capital either in whole or in part, with *ad hoc* provision for the payment of compensation for the early liquidation. These compensation clauses must be all-inclusive, stipulating that no further sums may be demanded from the borrower.²³⁸

In all cases of withdrawal by the borrower (but generally also in case of resolution of the contract in favour of the bank) and the consequent activation of the requirement of restitution, the bank may call in – and legally enforce – its credit interests. This is not however tantamount to the creation of a new mortgage, rather simply being the exercise of a mortgagee's prerogatives.

7.3.3. Changing the secured debt

The accessory nature of the mortgage has been illustrated at various junctures above, being a principle which, alongside that of indivisibility, is a particular characteristic of the mortgage.²³⁹ It is however necessary to add a few clarifications regarding the mortgage's dependence on the guaranteed credit²⁴⁰ in order to throw light on a series of potential practical problems.

The literature is unanimous in affirming the non-existence under Italian law of the so-called "owner's mortgage", which is a possibility under the German system (*Grundschuld*). It is not therefore conceivable that, were the mortgagee to renounce his rights in the credit, that the mortgage would continue to exist in favour of the owner of the mortgaged thing, who, in the event of sequestration due to other mortgages burdening the property would accordingly participate as a ranked creditor in the division of the proceeds. Whilst it may be true that the extinction of the credit has implications for the mortgage which, according to Article 2873(3) of the Civil Code, cannot exist independently,²⁴¹ there can however be exceptional cases where

²³⁸ The applicable law is in the first instance Article 40(1) of decree 385/1993 and subsequently its implementation contained in a ruling of the Inter-Ministerial Committee for Credit and Savings; this provision requires, inter alia, that contracts illustrate the criterion for calculation using examples. On this issue see FAUSTI, *Questioni in tema di scioglimento unilaterale del contratto di mutuo bancario*, in *Studi in tema di mutui ipotecari*, Milano, 2001, pag. 237 et seq.

²³⁹ Reasons of space prevent a more thorough investigation of the two principles, though it should be noted, for example, that derogations from them are possible (or instances defined as such in the literature): it is common ground that the requirement for indivisibility may be derogated from and, therefore, renounced by the creditor in whose interest it exists. As regards land credit, Articles 38 et seq of the cited decree 385/93 enact the right – this time of the debtor – to the splitting of the mortgage based on the special nature of this type of loan and its economic function. On the general issue of the splitting of mortgages, see BOERO, *Le ipoteche*, cit. pag. 182 et seq.

²⁴⁰ See Article 2808(1), Civil Code.

²⁴¹ It is however clear that the opposite does not automatically apply, i.e. that the extinction of the mortgage have an effect on the credit. The law in this area is not however fully consistent, with some accordingly speaking not of the accessory nature but of the "functional connection", and sometimes the fate of the mortgage determines that of the credit, as under Article 1186 or Article 2843 of the Civil Code, or, within

the mortgage does not fulfil its standard role as a credit guarantee but rather as a right offered to a third party buyer (and thus potentially to the owner) who may then rank as a creditor in case of sequestration.²⁴² This type of case would fall under Article 1203(2) of the Civil Code.²⁴³

In any case even in this eventuality it may be noted that the accessory nature of the mortgage is the starting point for any inquiry into the possibility of transferring the mortgage independently of the guaranteed credit (since it is natural for it to circulate together with the latter).

Although it is definitely not possible to cede only the mortgage – without the guaranteed credit – to a person who is not the holder of any credit connected with it, commentators have considered the issue of whether it is possible to transfer the mortgage from one credit to another. This would in other words be premised on understanding ‘accessory’ as a connection with credit in general, but not as the inseparability from the credit that was originally guaranteed (hence requiring an exclusive connection to it).

The negative answer and, by extension, the necessity that the accessory bond always be with the original credit has been determined on the basis of: a) Article 2843 of the Civil Code which covers the deferral of the mortgage’s ranking and not its independent assignability; b) the *travaux préparatoires* which indicate that this outcome was originally intended and c) the (presumed) requirement of protection of the debtor, of the owner or of third parties (that is the other creditors). Whilst however mortgage assignments with real effects to unsecured creditors are not permitted, the following are possible: a) binding assignation, requiring the mortgagee to pay to the assignee the sum determined at the time of the compulsory sale; b) assignation with the consent of the owner of the thing. Finally, the extension of an already existing mortgage to another credit between the same parties which has been subsequently granted (even following the extinction of the first) is precluded: in every case it is necessary to create a new mortgage registered in its own right and with its own ranking.²⁴⁴

In the following examples therefore a new mortgage will be necessary, interpreting the principle of subordination in a very broad sense.

The debtor has repaid the loan for which the mortgage was granted. Now, he applies for another loan. It is necessary to set new up mortgage.

Let us assume that 30% of the mortgage loan has been repaid. Now, the mortgagee wants to take out another loan for his business, amounting to 25% of the old loan, but much with higher annual amortisation and a different interest rate.

He cannot use the “free” part of the old mortgage to secure this loan.

Let us assume that the debtor has agreed on a loan secured by a mortgage. However, the house to be financed is not yet built, but its completion has been agreed upon as a condition for

the area of specific contracts, Article 1864 of the Civil Code on simple life annuities and Article 1877 on onerous life annuities.

²⁴² See also BOERO, *Le ipoteche*, op cit., pag. 51.

²⁴³ Article 1203(2) of the Civil Code: “Legal Substitution – Substitution occurs *ex lege* in the following cases: ... (2) in favour of the purchaser of immovable property who, prior to payment of the sale price, pays one or more creditors in favour of which the property is mortgaged”.

²⁴⁴ On this, see RUBINO, *L’ipoteca immobiliare e mobiliare*, in *Trattato di diritto civile e commerciale*, edited by Cicu, Messineo and Mengoni, continued by Schlesinger, volume XIX, Milano, 1956, pag. 29 et seq.

the disbursement of the loan. Therefore, the debtor wants to take out a bridging loan from another bank. Can the mortgage be used to secure this bridging loan until it has been replaced by the final mortgage.

An entirely new mortgage will be necessary also in this case.

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?

In this case it will be necessary to conclude a new loan with a related new mortgage. However, if the term of the old mortgage has not yet elapsed and the first loan has not yet been repaid, the parties could agree to amend the conditions of the loan. This type of modification is permissible and must be entered as an “annotation” into the Land Register.²⁴⁵

A new mortgage is equally necessary if, as in the last example, the mortgagee wants the new loan from another bank or if the new loan is not designed to finance a property but the acquisition of a car or the mortgagee's company and is subject to different conditions, e.g. to higher interest rates and a higher amortisation.

All of the above does not however prevent the existence of instruments that can allow for a similar practical effect. An example is the “trade in mortgage rankings” between various registered creditors, which is permissible under the law and is subject to the requirement of publicity by registration in the Land Register. This instrument allows the new mortgagee (or the new mortgage) to take on the same ranking (or even swap rankings) and, at an economic level, at least satisfy the interests that could (perhaps better) be realised through a real right assignment or the independent use of an old mortgage.

Finally where the debtor does not need a fixed lump sum up-front, but rather a line of credit, Italian law recognises a specific contractual form, namely the opening of credit regulated by Article 1842 et seq of the Civil Code, which in a manner analogous to a loan may be backed up by a mortgage subject to the same rules discussed above.²⁴⁶

7.3.4 Independent/abstract promise of payment

The Italian Civil Code regulates promises to pay and the recognition of debts (in Article 1988 in the section on “unilateral promises”) according to the rule that promises relieve the person in favour of whom they are made “of the burden of establishing the existence of the fundamental relationship. In the absence of evidence to the contrary, the relationship shall be presumed to exist”. Although the nature of this legal institution is in dispute, the literature being divided over whether to include it amongst the sources of obligations, it is often claimed that a mortgage may

²⁴⁵ Just as is the case for other modifications to the mortgage, for example the consent of the creditor (whether satisfied or not) to the cancellation of the mortgage expressed in a public deed or in an attested contract, which must be annotated in the margin of the original registration.

²⁴⁶ For some general observations on this type of contract, see CAMPOBASSO, *Diritto commerciale*, 3, *Contratt - titoli di credito – Procedure concorsuali*, op cit., pag. 112 et seq.

in general be constituted even through unilateral promise.²⁴⁷ There is therefore no doubt, given the current state of the law, as to the link noted above between mortgages and credit titles, or more precisely the possibility of granting a mortgage in guarantee of credit constituted in a paper certificate.

However, mortgages similar to the German law notion of the *Grundschuld* are not permitted, as are neither those not tied to credit which have been granted by the owner in the context of negotiations with the bank for the setting up of a line of credit to which they may be subsequently linked, nor finally, the possibility of “booking” the ranking of future mortgages.

7.4 Enforcement and other rights of the bank

It may be useful, at this point, to summarise the procedures providing for where the debtor fails to pay the debt and the bank wants to satisfy its interests by activating the mortgage guarantee. It is necessary to respect the provisions regulating the *sequestration* following which the creditor will claim his share of the proceeds of the sale by auction of the mortgaged property.²⁴⁸

The procedure is divided in three stages:

- *distrainment* carried out by the creditor (through court action) preventing the debtor from disposing of the pledged property, so that the creditor’s freedom of action may not be limited by any acts carried out in violation of this prohibition. For the present purposes, as far as immovable property is concerned, the attachment must be ‘transcribed’ and, in compliance with the publicity rules for immovable property, any priority between acts carried out before or after the arrestment are resolved according to the ranking of the transcriptions or annotations (Articles 2914 and 2915, Civil Code);
- *sale by auction*, ordered by a judge who may also delegate a notary or other expert to carry out the operation.²⁴⁹ This is a procedure “against” the debtor which in some cases also provides for the creditor’s assignation of the property to himself (for instance in the case of a failed auction);
- *division of the proceeds amongst the creditors* determined in accordance with the ranking of the creditors, including, as noted above, the ranking between securities and mortgages, as well as between different mortgages.

²⁴⁷ “The prevailing opinion in the literature does not accept this possibility: the promise to pay a sum of money or the recognition of a debt are not in themselves sufficient to found an obligation, since they refer to the payment of the promised sum, or the performance of the acknowledged debt; on this view they constitute an element of proof for the addressee relating to the existence of an obligation, the source of which however is elsewhere (in a pre-existing contract or delictual act)”. This gives rise to what the traditional Italian literature calls “procedural abstraction”, as distinct from “substantive abstraction”, specifying that the figures in discussion are not examples of transactions “without cause” and are not accordingly substantially abstract. Their effect is procedural, in that they reverse the burden of proof. For a summary, see GALGANO, *Diritto civile e commerciale, Le obbligazioni e i contratti*, volume II, Padova, 2004, pag. 274 et seq.

²⁴⁸ On the distinction between this remedy and *specific performance (esecuzione forzata in forma specifica)*, GAZZONI, *Manuale di diritto privato*, cit., pag. 634 et seq, which also addresses many of the themes discussed in the present text.

²⁴⁹ Article 591 *bis* of the Code of Civil Procedure: on the delegation to notaries of compulsory sale proceedings for immoveables, see MANNA, *La delega ai notai delle operazioni di incanto immobiliare: legge 3 agosto 1998 n. 302*, Milano, 1999, in *Quaderni del Notariato* series edited by Rescigno, Galgano & Ieva.

Enforcement proceedings may also be initiated by a non-mortgagee, including therefore unsecured creditors. In any case the requirement for a court order is absolute, which means not only that the creditor's freedom to act is limited by the principle of "prohibition on foreclosure agreements", contained in Article 2744 of the Civil Code, but also that compulsory sales may not be undertaken for a single creditor (whether mortgagee or not). Everything happens under the supervision of a judge, even where implementation is delegated to a notary and, except where practical requirements dictate otherwise, there is no express legal provision for slowing down the procedure in the interests of the debtor. This procedure today takes on average between 12 and 18 months, though prior to the reform (giving competence also to notaries and introducing some procedural simplifications) it could take up to 8 years. Nonetheless, disinterest by the plaintiff creditor or defendant debtor, who are possibly involved in extra-judicial negotiations, may always lengthen the timescale. Moreover, the benefit of the notary's intervention is also dependent on fact that the arrestment generally²⁵⁰ presupposes notification of the directly (without court order) executable deed (the notary's deed for pecuniary obligations contained in it – Article 474(3), Code of Civil Procedure) and a demand for payment. In fact under Article 474(1) of the Code of Civil Procedure compulsory sales can only take place on the basis of a directly executable deed, and in relation to a determinate, liquid and due credit. Article 479 by contrast provides that, in the absence of legal provisions to the contrary, compulsory sales must be preceded by the notification of such deeds,²⁵¹ and finally Article 492(2) stipulates that the law may require bailiffs implementing arrestment orders to be in possession of these deeds.

There are some differences when, as for the cases covered in this study, court proceedings are instigated by a mortgagee. Article 2911(1) of the Civil Code provides that he may not arrest other immovable property belonging to the debtor where he has not already done so for the latter's mortgaged property. This is not the case where he has several guarantees for the same credit, in which case he can freely choose what guarantee to use as enforcement and may even use them cumulatively. The mortgage creditor is included in the list of people which must be advised of any sequestration (Article 498 Code of Civil Procedure²⁵²). Sequestration moreover has the effect of extinguishing the mortgage, as provided for under Article 2878(7) of the Civil Code: "The mortgage is extinguished by an order of the court which transfers the sequestered right to the claimant and orders the cancellation of the mortgages", allowing the new owner to acquire the property free from any burdens. Moreover, special provisions, as mentioned above, apply to court actions relating to land credit, as provided for under Article 41 of presidential decree 385/93 regulating this issue and also the Article 39(4) rule on so-called "mortgage consolidation", discussed above.²⁵³

It is also important to consider the impact of possible bankruptcy proceedings against the debtor. Whereas each creditor may take the initiative in individual court action to which the others, in any case, may associate themselves (Article 499 Code of Civil Procedure), under collective or insolvency proceedings, such as bankruptcy, a third party pursues the interests of

²⁵⁰ This is not necessary in sequestration proceedings relating to land credit (Article 41(1), legislative decree 385/93).

²⁵¹ According to Article 480, Code of Civil Procedure, a demand for payment is defined as the document containing the intimation to perform the obligation resulting from the enforceable contract within a given deadline.

²⁵² Which also provides for the consequences of violations of this right.

²⁵³ "Mortgages in guarantee of (*land*) credit are not subject to insolvency discharge where they were registered ten days prior to publication of the declaration of insolvency. Article 67 of the law on bankruptcy does not apply to payments made by the debtor in relation to land credits."

all creditors, liquidating all property belonging to the debtor in proceedings regulated by Article 51 of Royal Decree 267 of 16 March 1942 (bankruptcy law); unless otherwise provided by law, from the time of declaration of insolvency no court proceedings may be either instigated or continued in relation to property covered by the bankruptcy.²⁵⁴ This is without prejudice to the rights of the individual creditors to have their claims satisfied under this bankruptcy procedure according to their ranking.²⁵⁵

7.5 Overriding interest and priority

7.5.1 Distribution of proceeds

The proceeds of the compulsory sale are to be divided between the various plaintiff or associated creditors whose debts, as indicated above, are satisfied according to their respective rankings²⁵⁶ (including, after mortgage creditors, any unsecured creditors) but nonetheless subject to the interests of any creditors holding charges, in the cases examined above, granting priority rights over mortgage holders in accordance with Article 2748(2) of the Civil Code which provides that: “Creditors which hold charges over immovable property are preferred to mortgage creditors in the absence of any contrary legal provision”. The satisfaction of mortgage creditors is also subject to the rules governing insolvency proceedings, for instance, under Article 110 of the bankruptcy law. This provision stipulates that the gross proceeds of the liquidation of the asset, prior to the satisfaction of any creditors including mortgagees, be used to pay off fiscal debts and costs of the procedure. These rules apply irrespective of whether the mortgage was granted over the debtor’s property or over that of a third party.

7.5.2 Overriding interests

As indicated above, both in individual court proceedings and in insolvency proceedings there are rules for determining the order of ranking, in particular for sums owed to the State or Social Security payments, and these preferential rights apply even in respect of mortgage creditors.

7.6 Scope of the mortgage

7.6.1 Buildings

The Italian law of mortgages also applies the maxim *accessorium sequitur principale* which requires therefore that the mortgage extend to the improvements, constructions and other accessions to the property according to Article 2811 of the Civil Code except where otherwise provided for by the law.²⁵⁷

²⁵⁴ See the above cited Article 41 of decree 385/1993 on land credit.

²⁵⁵ For example see Articles 53 and 54 of the law on bankruptcy.

²⁵⁶ With the exception of so-called “privileged” mortgages, which take precedence even over mortgages registered previously, as is the case under Article 2650(3), Civil Code, on legal mortgages of the transferor or joint owner – covered **respectively** by Articles 2817 and 2814(2) of the Civil Code.

²⁵⁷ Article 2810(1), Civil Code, also provides that immovable property together with its additions is mortgageable. On problems of coherence between the two provisions, see BOERO, *Le ipoteche*, cit.

It is clear however that the parties may derogate from this provision, and exclude the extension of a mortgage on land to buildings constructed on that land, just as (as in the classic case of apartments in common ownership (*condominium*)) it is possible to mortgage the land separately from any buildings constructed on it.

7.6.2 Machinery

In accordance with the rule examined immediately above, even a motor car (and registered movables in general²⁵⁸) or a piece of machinery may (for the former) be the object of a mortgage or (for the latter) fall within the ambit of an extended mortgage. Case law in this area has in particular clarified that conventional mortgages on immovable property and additions to it may only be extended to machines that have been organically integrated into the immovable property in such a way as to constitute a single complex entity.²⁵⁹

7.6.3 Insurance

In practice at the time when the mortgage is granted the debtor hands over to the bank an appropriate insurance policy covering the destruction of the building along with an undertaking in favour of the bank to transfer to it any insurance payments made in the event of damage or destruction.

7.7 Right to redeem

As has been noted above in relation to land credit – in practice the most common type of mortgage – the debtor has the right to pay back the contracted debt in advance.²⁶⁰ This exists in tandem with the debtor's right to have the loan subdivided into instalments and the consequent splitting of the mortgage as provided for by Article 40(6) of decree 385/193,²⁶¹ as well as subsection 5 of the same Article, concerning the debtor's right following restitution of one fifth share of the debt to a proportionate reduction in the registered mortgage, as well as a partial liberation of the property where its value is sufficient to maintain the loan's characteristic as a land loan falling under Article 38 of the same decree.

pag. 243 et seq.

²⁵⁸ See Article 815, Civil Code.

²⁵⁹ Cassazione 10 March 1984 n. 1584; the court considered here the legalistic notion of immovable property for the purposes of Article 812, Civil Code, and the definition of complex or composite things (as opposed to simple things) as developed in the literature: for an example see, TORRENTE-SCHLESINGER, *Manuale di diritto privato*, op cit, pag. 128 et seq.

²⁶⁰ This is to be contrasted with the bank's right to invoke as grounds for resolution a delay in payment subject to the conditions set out in Article 40(2) of the decree, which is often subject to contractual modification. On the conventional modification of the legal rules on land credit and on its consequences (either modification or invalidity of the contracts), see GIACOBBE-BACCHI, *La derogabilità delle norme sul credito fondiario*, in *Rivista del Notariato*, Milano, 1996, pag. 811 et seq.

²⁶¹ A mechanism used by builders once the building has been completed to sell on the single apartments and assign shares in the loan, and the corresponding shares of the mortgage, to the purchasers.

Generally speaking the Civil Code regulates cases in which an imbalance may develop between the value of the bonded property and the guaranteed credit after registration, in such cases allowing a “reduction” of the mortgage or reducing the registered sum or even restricting to part of the property the scope of the mortgage, in accordance with the strict limits imposed by Article 2872 of the Civil Code. The source of such reductions may be either legal or consensual.²⁶²

An unrelated point which is however worthy of note at this juncture concerns the possibility of the mortgage’s extinction on one of the grounds set out in Article 2878 of the Civil Code (for example the passing of twenty years from the date of registration in the absence of the creditor’s consent to the cancellation) which are “annotated” in the margins of the registration. The formality of cancellation is a prerequisite for the mortgage’s extinction, though it is clear that, for example, if the debt has been repaid and the creditor’s consent to cancellation has been obtained, the mortgage will not longer be actionable, even if it is still registered.²⁶³

It is therefore important to repeat that in principle the debtor’s right to pay back the sum and thus attain the cancellation of the mortgage cannot be limited.²⁶⁴ In addition to the rules on land credit discussed above it is however necessary to bear in mind the requirements of Articles 1184, 1185 and 1186 of the Civil Code, which regulate the fulfilment of the obligation and make provision for cases where performance is not forthcoming. Without entering into the details of these provisions, if the limit is fixed in the interest of the debtor: a) the debtor may first request early payment of his debt, and b) the creditor may enjoy particular rights should the debtor wish to pay back the sum in advance.²⁶⁵

Contractual practice, finally, tends to limit the debtor’s right to the extinction of the debt (and of the real guarantee), also regulating, through contractual derogations from or modifications to Article 1193 of the Civil Code, the destination of the sums paid to the creditor (and, therefore, the way in which they are used to pay back capital, interest, ancillary payments or expenses).

7.7.1 Redemption after foreclosure

At any point in these proceedings the debtor, whilst he may not be able to “purchase” the property subject to compulsory sale by participating in the auction, can extinguish the debt,

²⁶² For a summary see BIGLIAZZI GERI-BRECCIA-BUSNELLI-NATOLI, *Diritto civile – obbligazioni e contratti*, op cit., pag. 279-280.

²⁶³ See again BIGLIAZZI GERI-BRECCIA-BUSNELLI-NATOLI, *Diritto civile – obbligazioni e contratti*, cit., pag. 281 et seq as well as CHIZZINI, *Clausola limitativa del potere di cancellazione dell’ipoteca*, in A.A.V.V., *Studi in tema di mutui ipotecari*, op cit., pag. 151 et seq.

²⁶⁴ As observed in the study cited in the preceding footnote, bearing also in mind the express provision of Article 1200 of the Civil Code, clauses restricting the debtor’s ability to ask and obtain from the creditor, once the debt has been paid back, consent to the cancellation of the mortgage are to be considered “abusive”, according to the definitions of Community law and national rules on their implementation. Such clauses, where included in a land loan, will be held to be invalid.

²⁶⁵ See further FAUSTI, *Questioni in tema di scioglimento unilaterale del contratto di mutuo bancario*, in *Studi in tema di mutui ipotecari*, op cit, in particular, the observations relating to obligations.

thereby blocking the sale, and obtain the cancellation of the mortgage. This normally occurs through express agreements with the creditors.

7.8 Security granted by third party

As already said mortgages can be granted not only to debtors but also to third parties and this aspect is not subject to particular restrictions. By contrast these types of mortgage are subject to specific regulations – unlike the treatment of mortgages granted by debtors or third party purchasers or mortgaged goods – so long as the third party does not suffer any detrimental effects due to the behaviour of the debtor or the creditor.²⁶⁶

7.9 Plurality of mortgages

The substantial autonomy between the different mortgages and the priority of ranking based on the degree (order) of registration allow us to draw the following conclusions:

- a debtor who has already mortgaged the property guaranteeing a loan granted by another creditor may register the second as a mortgage on the same property²⁶⁷ without having to ask any consent or authorisation; correspondingly, the second mortgage creditor can, in the event of a failure to honour the debt, act executively in order to satisfy his own interests, thereby “activating” the mortgage guarantee (whilst not however losing sight of the rights of the other secured creditors to be informed and to participate in the distribution of the proceeds or in any case not to suffer detriment²⁶⁸);
- where the creditor who is holder of a first degree mortgage has been satisfied, the creditor holder of a second degree mortgage will automatically take first place in the ranking order, bearing in mind also the absence from Italian law of an institution similar to the *Grundschild*; this effectively occurs prior to annotation of the cancellation of the mortgage, though formally speaking only happens upon actual annotation;
- there is no obstacle to two mortgages of the same degree existing side-by-side, an eventuality which occurs when “several people simultaneously present the note to obtain registration in respect of the same person or of the same immovable properties” with the registrations thereby being attributed the same number and both being mentioned in the receipt sent to the applicants by the Keeper (Article 2853, Civil Code), irrespective of whether the parties have made any agreement to this effect; the same result can be achieved through specific agreements between the parties, so-called “ranking trades”, which the mortgage creditors may even use to swap rankings between themselves and which are expressly mentioned in the above cited Article 2843 of the Civil Code, which provides for annotation in the event of “deferral of ranking”. Although this last provision only covers deferral, the literature is unanimous in accepting any type of trade in rankings, provided that neither other mortgages or real rights of enjoyment included in the Land Register nor the sums registered be thereby

²⁶⁶ See BIGLIAZZI GERI-BRECCIA-BUSNELLI-NATOLI, *Diritto civile – obbligazioni e contratti*, cit., pag. 271 et seq on the position of third party purchasers of mortgaged property as well as of third party mortgagors.

²⁶⁷ Without prejudice to the clarifications previously made on the characteristics of Land Credit and the fact that it is only possible to speak of a “Mortgaged Land Loan” within the limits provided for by the law, even in the presence of a second degree mortgage, under the terms of Articles 38 et seq and decree 385/1993.

²⁶⁸ See the preceding paragraphs 7.4 and 7.5.

prejudiced.²⁶⁹ The terminology used to describe such trading varies, referring to the barter, inversion, postponement or equalisation of rankings, depending on the type of exchange taking place. In any case, the agreements: a) are annotated and are therefore subject to the formal requirement of registration already examined; b) may not prejudice those who are not party to them and whose rights have already been publicised; c) are generally gratuitous, though the provision of a consideration is nonetheless not precluded; d) according to the prevailing opinion in the literature, and in harmony with the rules on publicity examined above, where concluded between buyers of the same degree, the one who is first to annotate will be preferred.²⁷⁰ Finally, e) notwithstanding the change in ranking,²⁷¹ where two (even non-contiguous) grades are exchanged, each of the mortgages conserves its original characteristics, which means that if one of the two had already been extinguished at the moment of the exchange, the trade in ranking is void and the existing mortgage continues to hold its own previous ranking.

It is possible for the original loan and the connected mortgage to be split, that is divided up into shares, each of which is guaranteed by a correspondent mortgage which is also part of the original mortgage. This is particularly useful where buildings have been constructed on land: the mortgage on the land extends, in line with the rules discussed above, to the building and accordingly to the individual apartments. When selling individual dwellings, the builder may (in line with the observations made above) exclude particular apartments from the mortgage bond and sell them unburdened, or alternatively divide the loan and the mortgage so that each dwelling will be burdened by a share of the loan and the corresponding mortgage, which is also part of the original one. The rules governing the publicity of mortgages clearly require that the act of splitting be subject to an annotation in the margin of the original mortgage. This right of the debtor under the law of land credit²⁷² can however be applied to mortgages in general.

7.10 Several properties

The registration of a mortgage over several properties is perfectly compatible with the rules analysed at the start of this section dedicated to mortgages. This means that the mortgage covers several mortgagable properties, such as for example a piece of land and an apartment belonging to the debtor. Moreover, subject to the restrictions set out above, regarding the extension of the mortgage to accessions and additions, the scope of the registered mortgage may accordingly expand.

²⁶⁹ Accordingly if the exchange takes place between non-contiguously ranked creditors, the change will not prejudice the rights of intermediate creditors, and is valid unless and until a higher ranked credit intervenes.

²⁷⁰ On this see RUBINO, *L'ipoteca immobiliare e mobiliare*, op cit. pag. 390 et seq and GORLA, *Del pegno – Delle ipoteche*, in *Commentario del codice civile*, edited by Scialoja and Branca, continued by Galgano, Bologna-Roma, 1973, pag. 538.

²⁷¹ In the sense that the previously lower-ranked credit now enjoys preferential ranking, *qua* mortgage holder, over mortgage creditors which were previously ranked higher.

²⁷² MORANO-CHIAIA, *Problemi critici dell'accollo di credito fondiario e riflessi nel bilancio di esercizio dell'impresa costruttrice*, in *Rivista del Notariato*, Milano, 2005, pag. 1 et seq.

The mortgage creditor enjoys, subject to Article 2911 of the Civil Code, full freedom in deciding upon which property to enforce his debt, and so accordingly where he holds mortgages over a range of properties he may choose in respect of which to bring arrestment proceedings.

7.11 Transfer of the mortgage

7.11.1 Transfer of the mortgage in general

The accessory nature of the mortgage with respect to a particular credit which has allowed us to formulate answers to the practical issues discussed in 7.3.3. is also the basis for the solution in the following case.

Bank 1 has granted a loan to one of its customers guaranteed by a mortgage and it now intends to refinance the loan through Bank 2; under Italian law it is not possible to use the existing mortgage by “transferring it” or, in any case, to use it as guarantee for a new loan. Different considerations apply to the possibility of constituting a new mortgage and through ranking trades (including an equalisation of the ranking) reaching a similar result.

The costs of the operation are affected by the differences noted between operations in the Land Credit sector, as well as by incentivised loans due to their mid- or long-term nature, and those which fall outwith the scope of application of such provisions, even though the costs of the latter are as a rule not prohibitive. As far as the timescale is concerned, the notary’s intervention is relatively brief, while the time taken for preparatory work by the bank or carrying out the formality of annotation by the relevant Land Registry tends to be longer.

7.11.2 Transfer to more than one creditor

Article 58 of the Unified Banking Text (decree 385/1993) regulates the transfer to banks of undertakings, in whole or part, and of legal relationships. This mechanism can also be used to transfer credits (en masse) guaranteed by mortgages, and is an exception from the rules examined above on publicity of immoveables.

The law in fact provides for the declaration of such acts in the Official Journal of the Italian Republic and also through registration in the Register of Companies,²⁷³ the charges and securities preserving their validity and ranking in favour of the assignee without any formal requirement of annotation.

In addition to setting out rules on the transfer of the credit, regulated by Articles 1260 et seq of the Civil Code – and which are, in the context of the present study, subject to the rule according to which any accessories (charges, but also mortgages) are transferred along with the credit on assignation – the norm of the T.U.B. quoted is a useful instrument for the Banks in allowing them to pass their credit on to others, either in whole or in part.²⁷⁴

²⁷³ The Bank of Italy has modificatory powers in this area, provided for under the same law.

²⁷⁴ It is important to bear in mind that the assignation envisaged under Article 1260 et seq relates to single credits and is subject to the normal rules on the publicity of mortgages, whilst that covered by Article 58 of the UBT covers “block” assignations. For problems related to the cancellation of mortgages in the case of block assignations, see SETTI, *Un annotamento particolare*, in *Federnotizie, Organo della*

7.11.3 Administration of the mortgage by trustee or fiduciary

It is also possible for the mortgage creditor to nominate a trustee to administrate the loan and the mortgage, even though this right is limited and subject to existing limitations on the so-called “Internal Trust”.²⁷⁵ Whilst this phenomenon is probably more similar to the conferral of a mandate on a third party, this is not the appropriate place to discuss this matter further. This is not however the case where the *trustee* is the holder of the mortgage alone, which on account of the requirement of accessoriness would not appear to be a plausible possibility.

This issue must nonetheless be studied further in the light of the various practical problems it entails.

7.12 Conflict of Law Issues

It is assumed that the property to be mortgaged is located in Italy whilst the debtor (that it is also the owner of the property) resides in another Member State of the European Union.

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

The rules examined under the preceding section 6 may also be applied in this area, since Article 51 of law 218/1995 on private international law clearly includes mortgages in its reference to “ownership and other real rights”. This means that this area of the law is subject to the application of the *lex rei sitae* in order to establish which property may be mortgaged, whether mortgages may be divisible or not, the effects and duration of registration, whether several mortgages may be registered in respect of the same property as well as how to determine the ranking of creditors. The deed is by contrast (that is the fact or concrete transaction upon which the mortgage is founded) regulated in its own right and therefore subject, for transactional or conventional mortgages, to the law of contract and, as already indicated, to the Rome Convention on the law applicable to contractual obligations, under Article 57 of law 218/195.²⁷⁶

In the light of this it is clear which law is applicable where the debtor grants a mortgage in the same country as that in which the property to be mortgaged is situated, though the Rome Convention still allows, within limits, that the law applicable to the contract be different from that applicable to the real right.

7.12.2 Bank loan taken out in the debtor’s country of residence

Federazione Italiana delle Associazioni Sindacali Notarili, Novembrer 2004, available www.federnotizie.org.

²⁷⁵ See the articles of Lupoi and Gazzoni cited above.

²⁷⁶ On this see BALLARINO, ;*Manuale breve di diritto internazionale privato*, op cit., pag. 212.

The same considerations outlined in the previous paragraph, as well of course as those of section 6.4, are also applicable to the practical possibility of the loan being managed by a notary in the place in which the mortgage is registered.

7.12.3 Bank loan taken out in a third EU-country

Once again this issue is determined by the application of Article 51 of law 218/1995 and the Rome Convention on the law applicable to contractual obligations, cited above.

7.12.4 National restrictions on the right of a debtor to secure a debt with a mortgage assessed under EU law

According to the applicable provisions of Community law, as well as those regulating the treatment of (non-EC) foreigners, there are not in general any particular detrimental restrictions for foreigners. It should in addition be noted, as stated above, that in the cases in which the “condition of reciprocity” still applies, it is clear that the existence of this condition in relation to the transfer of immoveables implies (in the absence of any provision to the contrary) automatically the possibility of creating a mortgaged loan.

It goes without saying that national and Community rules on the movement of capital and the fight against money laundering of money from illicit sources will apply.

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Atto tipo di vendita

N. del Repertorio N. della Raccolta

VENDITA

REPUBBLICA ITALIANA

L'anno duemilaquattro il giorno ventidue del mese di giugno in Torino, nel mio studio in via Bligny n. 15.

Avanti a me **GIOVANNI LIOTTA**, **Notaio** in Torino, iscritto al Collegio Notarile dei Distretti Riuniti di Torino e Pinerolo,

SONO PRESENTI

i coniugi

- **PRIMO**, nato a Roma il giorno 1 gennaio 1900, pensionato,

codice fiscale

e

- **SECONDO**, nata a Roma il giorno 1 gennaio 1900, casalinga,

codice fiscale

entrambi residenti in Roma, via Montebianco n. 42,

- **TERZO**, nata a Roma il giorno 1 gennaio 1900, residente in Torino, via Amerigo Vespucci n. 39, studente,

codice fiscale

Io Notaio sono certo dell'identità personale dei comparenti i quali d'accordo tra loro e con il mio consenso, rinunziano all'assistenza dei testimoni al presente atto col quale convengono:

Art. 1 - I coniugi **PRIMO e SECONDO**, in ragione di un mezzo (1/2) indiviso ciascuno e, comunque, unitamente per l'intero, con ogni garanzia di legge, vendono e trasferiscono a **TERZO** che accetta la proprietà dei seguenti beni immobili facenti parte del fabbricato di civile abitazione sito in Comune di MILANO, in corso Re Umberto n. 88:

a) al piano terreno (prima elevazione fuori terra), un locale composto da un vano - ingresso e soprastante soppalco collegato da scala interna, destinato a ufficio, distinto con la lettera "B" nella pianta del relativo piano della planimetria allegata all'atto di divisione a rogito del Notaio Romolo Romani, già di Torino, in data, di cui infra, nell'insieme confinante con corso Re Umberto, androne carraio, vano scala ed alloggio "C";

b) al piano seminterrato (collegato da scala interna) bagno e un ampio locale magazzino - esposizione distinto con i n.ri 10 (dieci) e 11 (undici) nella pianta del relativo piano della succitata planimetria, confinante con sottosuolo di corso Re Umberto, cantina n. 9, cantina n. 8, corridoio comune e condominio di via Amerigo Vespucci n. 15.

Nel Catasto Fabbricati del Comune di, **Foglio particella**

sub 5001, corso Re Umberto n. 88, piani S1-T, zona censuaria 1, categoria A/10, classe 1, vani 3, rendita euro 1.673,32 - derivante dall'originario sub 2 dei medesimi foglio e particella, giusta denuncia di variazione per frazionamento e cambio di destinazione d'uso n. L02666.1/1997 del 4 aprile 1997 - in ditta aggiornata.

Art. 2 - La vendita è consentita ed accettata con ogni accessione, accessorio, dipendenza, pertinenza, servitù attiva e passiva, nello stato di fatto e di diritto in cui quanto venduto si trova, così come in possesso della parte venditrice, con tutti i diritti relativi sulle parti comuni del fabbricato per legge, per progetto, per destinazione e per regolamento di condominio nonché risultanti dall'atto a rogito del Notaio Romolo Romani, già di Torino, in data 10 , repertorio n. , registrato a il al n. 6504 e trascritto presso la Conservatoria dei R.R.I.I. di Milano 1 il ai numeri 27764/22613 (atto che la parte acquirente dichiara di ben conoscere e accettare obbligandosi a farlo conoscere e accettare ai propri aventi causa e inquilini in particolare anche per tutti i diritti, obblighi e titoli ivi indicati e /o richiamati).

A quanto venduto (secondo quanto indicato in un allegato dell'atto a rogito del Notaio di cui infra per l'originario sub 2) spettano ventidue virgola cinquanta millesimi (22,50/1000) quale quota di proprietà delle parti comuni e di concorso alle spese generali.

La parte venditrice dichiara che quanto venduto le è pervenuto per averlo acquistato dai signori Tizio, nato a Torino il e Caia, nata a Torino il

con atto a rogito del Notaio Romolo Romani di Roma in data 26 marzo 1980, repertorio n. 34298,

raccolta n. 6610, registrato a Roma il 14 aprile 1980 al n. 18756, trascritto presso la Conservatoria dei Registri Immobiliari di Torino 1 in data aprile ai n.ri.

Art. 3 - Dichiarano le parti che il prezzo della vendita è stato tra loro convenuto a corpo, in complessivi euro **100.000,00 (centomila virgola zerozero)** che la parte venditrice dichiara di avere ricevuto dalla parte acquirente alla quale rilascia ampia e legale quietanza.

Art. 4 - La parte venditrice dichiara e garantisce che quanto venduto è di sua proprietà, nella sua piena disponibilità, franco e libero da pesi, oneri, imposte e tasse arretrate, iscrizioni, trascrizioni e formalità comunque pregiudizievoli e così lo trasferisce alla parte acquirente, immettendola nel possesso di quanto venduto surrogandola in ogni azione, diritto o ragione ad essa spettante in dipendenza della citata provenienza.

Art. 5 - La parte venditrice dichiara di **rinunziare ad ogni eventuale ipoteca legale.**

Art. 6 - Ai sensi della legge 19.5.1975 n. 151 e dell'art. 2659 C.C. le parti dichiarano:

- **i venditori** di essere coniugi in separazione dei beni;

- **l'acquirente** di essere nubile.

Art. 7 - La parte venditrice, da me Notaio previamente ammonita, ai sensi del D.P.R. 445/2000 sulle responsabilità penali in caso di dichiarazioni mendaci, sotto la propria responsabilità dichiara, ai sensi della vigente normativa in materia di edilizia e urbanistica che i lavori di costruzione dell'edificio in cui ricade quanto venduto risultano iniziati in data anteriore all'1 settembre 1967 e che successivamente sono state eseguite opere per le quali è stata rilasciata dal Comune di Torino Concessione Edilizia n. , protocollo n. in data 15 maggio 1981, seguita da licenza di abitabilità ed occupazione n. 47, protocollo 19... - n. 2 in data 21 giugno 19...; in data 9 ottobre 19... è, inoltre stata rilasciata autorizzazione per variante di scala di collegamento interno a seguito di domanda presentata in data 31 maggio 19... e protocollata al n.

Le spese del presente, relative e consequenziali, sono a carico della parte acquirente.

Richiesto, io Notaio ricevo quest'atto da me letto ai comparenti che l'approvano.

Quest'atto è scritto in parte a macchina da persona di mia fiducia e in parte completato a mano da me Notaio su cinque pagine di due fogli fin qui.

In originale firmato:

PRIMO

SECONDO

TERZO

Giovanni Liotta Notaio