

Real Property Law and Procedure in the European Union

National Report

Finland

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1. Real Property Law – Introduction¹

1.1 General Features and Short History

Finland's territory is divided into real-estate units – including water areas – that can be directly owned, and other units that cannot: public roads, and land or water belonging to two or more estates as common areas². All these units are entered in the Cadastre³. In contrast, the title and mortgages register – Land Register⁴ – deals with real estate that may be exchanged or mortgaged.⁵ Today the Cadastre and the Land Register form one computerised Land Information System. The competence to enter information into the system is divided in two: the National Land Survey and its District Survey Offices maintain the Cadastre, while the district courts record ownership and other rights in the Land Register (see 2.1 below).

The Cadastre developed from a register of houses of villages, which was set up for taxation purposes in 1524 while Finland was part of Sweden. After the peasant's name dropped from the register in the early eighteenth century, proper cadastral registers were established regionally in the next century, with comprehensive coverage reached only after 1895. Likewise, the Land Register has its roots in the 'middle ages,' when land sales had to be certified in court – sometimes in the presence of no less than twelve witnesses.⁶ With the spread of literacy, however, this certification, and the legal confirmation of possession (*lainhuudatus*, hereafter 'title confirmation') that preceded certification and enabled families to use their pre-emption right, became in practice post-contractual. On this basis, the 1734 Land Code (*maakaari*) – one of eleven codes in the 1734 Codification – required that transfers of real estate should be made in writing and in the presence of two witnesses, followed up by three successive title confirmations in court. As the importance of the families' pre-emption right decreased, three confirmations became excessive, but it took until 1930 before a new Act on title registration abolished the pre-emption right and moved on to one title confirmation (*lainhuuto*; hereafter not literally translated in post-1930 contexts as 'title registration,' although the old legal term is still used in Finnish).

While real-estate liens were registered already in the fifteenth century in e.g. Stockholm, raising a mortgage on a real estate became the prerequisite of a lien only later, presumably in the seventeenth century. From the same era there are also some court records on an early form of mortgage, where the debtor sold the property to the creditor conditional on the right to buy it back. If the debtor defaulted, the property remained the creditor's, who applied for confirmations in court just like after a sale. The 1734 Land Code recognised both this early form of mortgage and the 'hypothec' – mortgaging without transferring the property to the

¹ The author is grateful to Jukka Mähönen and Jarmo Tuomisto for considerable assistance in the completion of this Introduction.

² The governance and use of common areas is regulated in *yhteisälaki* (758/1989). Common areas are called 'common property units' in the unofficial translation of the Real Estate Formation Act (554/1995) (at: <http://www.finlex.fi/fi/laki/kaannokset/1995/en19950554.pdf>). 'A common area is to be kept strictly separate from a jointly owned real-estate,' according to Vesa Majamaa and Markku Markkula, *Kiinteistönmuodostamislaki*, Edita 2001, 106 note 131. See also 1.2 below.

³ *Kiinteistörekisteri*.

⁴ *Lainhuuto- ja kiinnitysrekisteri* or *kiinteistökirja*.

⁵ For further details on how real estate can move into and out of the sphere of exchange, see, e.g., Marjut Jokela, Leena Kartio, and Ilmari Ojanen, *Maakaari*, 3rd edition, Talentum 2004, 262.

⁶ General outlines of this history are given in Simo Zitting and Martti Rautiala, *Esineoikeuden oppikirja*, 5th edition, Suomen lakimiesliiton kustannus 1982, 100–6, 142–3 and 162–9.

creditor – but as the hypothec had a better rank, the early form of mortgage fell out of use (though remaining in legislation until 1930). Next, a Decree on mortgaging of immovable property was passed in 1868, while Finland was an autonomous Grand Duchy of Russia. While the Decree assumed that the creditor applied for the hypothec to be written on the original debt-instrument, practice in banks and courts became – once again – entirely different. The original debt-instrument was separated from a second, abstract debt-instrument, in which the debtor promised to pay upon request. This abstract debt-instrument was mortgaged by the debtor and handed over to the creditor. If needed, the debtor (and also the creditor on no stricter conditions than those of the original pledge⁷) could use the abstract instrument as surety over again.⁸ In a 1997 textbook, the twentieth-century situation is looked back as follows: ‘It is in a way astonishing how financing and insurance can have operated on the basis of old-fashioned and already misleading statutory provisions. However, the phenomenon is quite familiar in the field of private law, where key legislation has long been very old and inadequate.’⁹

Among the legislation in force in the twentieth century, the 1734 Code laid down formal requirements for transfers and mortgaging, a time-priority rule for double transfers, and initially also rules on title confirmation and leases of land and apartments, but it included no provisions on defects or other breaches of contract. In addition to the 1868 Decree on mortgaging, a Decree on illegitimate clauses in real-estate sales had been passed in 1864; the latter was interpreted by the Supreme Court as prohibiting clauses that provide for cancellation in the event that a condition is not fulfilled¹⁰. The first separate Land Lease Act was passed in 1905 and, after Finland had gained its independence in 1917, a separate Tenancy Act was passed for the first time in 1926. The already-mentioned 1930 Act on title registration was intended to be temporary, paving the way for a modern register, the entries of which would be presumed correct¹¹ and show all rights pertaining to a real estate¹². However, it was not until 1983 that committee work began that in fact led to the revision of the Land Register along these lines.¹³ The same committee also began preparing a new Land Code (hereafter ‘Code’ or ‘Code of Real Estate’ as it is translated in the unofficial English version by the Ministry of Justice),¹⁴ the creation of which was sped up¹⁵ by the contemporaneous preparation of a new Sale of Goods Act¹⁶ and the Housing Transactions Act (for the latter, see **Part 5** below). The new Code was passed in the spring of 1995 with no political friction in Parliament.¹⁷ The

⁷ The Code of Sales (3/1734) 10:6. For today’s situation, see **Part 7** below.

⁸ The abstract debt instrument had to be renewed every ten years. Initially, the reason for this requirement was that information on mortgages was not registered on a real-estate-specific basis, and so a search of real-estate liens involved going through the indices of court records. The renewal requirement limited this search to ten years. However, the renewal requirement persisted for decades after real-estate-specific records had been established, on the rather weak ground that the requirement prevented the accumulation of ‘dead’ mortgages in the register.

⁹ Jokela et al., note 5 above, 404.

¹⁰ For example Supreme Court 1965-II-37 and 1995:199. On cancellation and suspension (retention of title) clauses, see **3.2.3**, **3.3** and **4.2.1c** below.

¹¹ The so-called ‘positive public credibility.’ See **2.5** below.

¹² The so-called ‘negative public credibility.’ See **2.5** below.

¹³ Act on a unified data-based register of title and other rights to property was passed in 1987. Its procedural provisions were transferred to the second main Part of the 1997 Code.

¹⁴ *Maakaari* (540/1995) (unofficial translation at <http://www.finlex.fi/fi/laki/kaannokset/1995/en19950540.pdf>). Today, an Act of Parliament tends to be named a ‘Code’ accordingly, if it corresponds to any of the codes in the 1734 Codification.

¹⁵ Leena Kartio, *Esineoikeuden perusteet*, Kauppakaari 2001, 23.

¹⁶ (355/1987) (unofficial translation at: <http://www.finlex.fi/fi/laki/kaannokset/1987/en19870355.pdf>).

¹⁷ Jokela et al., note 5 above, 4.

Code comprises four main Parts on ‘Acquisition of Real Estate,’ ‘Registration Procedure,’¹⁸ ‘Registration of Titles and Special Rights,’ and ‘Real Estate Liens.’¹⁹ It entered into force on January 1, 1997.²⁰

Having served various purposes since its creation in the 1930s, a special notary-type institution is today mainly helping to keep real-estate registers and statistics up to date. During the recession of the thirties, contractors tried to evade creditors by backdating real-estate sales, and Parliament therefore replaced one witness in the formal requirements of the Land Code with a so-called ‘public certifier of deal’ (*julkinen kaupanvahvistaja*, hereafter translated as ‘notary’). Today, real estate agents and bank personnel act as notaries on authorisation by the district court, as do, by virtue of their position, public officials such as notaries public, high-ranking police officers, and land surveyors.²¹ After the Supreme Court in the thirties declared null and void transactions where the seller had been present earlier than the buyer – with the same²² or without the²³ second witness – all signatories must according to the 1997 Code be present at the same time (themselves or represented by agents).²⁴ In addition to checking formal requirements and the parties’ capacity and signing the document, the notary informs the District Survey Office (which, in turn, informs the district court, the regional tax authority and the local register office) and the municipality within a week of sale. In this way, the municipality receives information to decide whether it will use its pre-emption right (see 1.6 below). The notary acts subject to the grounds of incapacity of a witness, but her civil and criminal liability is that of a public official. The requirement of a second witness was dropped as unnecessary in the 1997 Code.

The only geographically specific rules concern the Åland Islands. Based on the right of domicile in Åland,²⁵ aliens and businesses with a non-domicile majority need the regional government’s permit to acquire or lease real estate²⁶. In Lapland, the areas of the Sami people (Finland’s only indigenous people) are mostly owned by the state, based on various justifications, such as that the nature of their source of livelihood could not give them ownership in

¹⁸ Cf. note 13 above.

¹⁹ Contrary to Sweden’s 1972 Land Code, which was partly used as a model, the Finnish Code does not cover land leases. Although a separate Part on land leases was recommended, it was left out of the Government proposal.

²⁰ Together with a new Real Estate Formation Act (note 2 above) and a transfer tax (*varainsiirtoverolaki* 931/1996) that replaced a stamp duty on title (see at the end of 1.6 below).

²¹ The full list of notaries has seventeen positions (nine of which are in the police). The most important item on the list is ‘any person that the district court has, on request, ordered to act as a notary.’ *Kaupanvahvistajasetus* (958/1996) 1. See also 6.2.2 below.

²² Supreme Court 1939-I-35.

²³ Supreme Court 1936-I-61 and 1945-II-251.

²⁴ Code 2:1 (1).

²⁵ Act on the Autonomy of Åland (1144/1991) Chapter 2. (Unofficial translation at: <http://www.finlex.fi/fi/laki/kaannokset/1991/en19911144.pdf>.) As the introduction to this translation explains: ‘The war of 1808-09 resulted in Sweden being forced to relinquish Finland and the Åland Islands to Russia, whereby the Swedish-speaking Åland became part of the Grand Duchy of Finland. When Finland gained its independence, the Ålanders began to hope for reunion with Sweden. Consequently the Parliament of Finland adopted an Autonomy Act for Åland in 1920. At first the Ålanders refused to accept it, and the question of Åland’s status was referred to the League of Nations. In June 1921 the Council of the League of Nations reached a decision that Finland should receive sovereignty over the Åland Islands. Finland undertook to guarantee the population of Åland its Swedish language, culture and local customs. The Council of the League of Nations also prescribed that an international agreement should be made confirming the demilitarization of the Åland Islands from 1856 and expanding it to include neutralization. The Autonomy Act was supplemented in conformity with the decisions of the Council of the League of Nations, and the Ålanders started applying the Act. The first election to the Åland Parliament was held in 1922.’ Id.

²⁶ Act on the Acquisition of Immovable Property in Åland (3/1975).

land^{27,28} Notably, however, in a 1981 case the Swedish Supreme Court stated that, although landownership could as a rule be established only by adapting land to farming, ownership in a free land could in the seventeenth century be acquired also without construction or farming, by exercising in a certain area reindeer-herding, fishing or hunting sufficiently intensively, constantly and without interference.²⁹ In Finland, late-eighties research highlighted court records from the seventeenth century, showing that Sami families had specific areas that were taken into account in assessing taxes to a village.³⁰ Landownership was, however, relegated to wait for further studies, while cultural autonomy was addressed in a 1995 Act on the Sami Parliament³¹. As President Tarja Halonen remarked in 2000, '[during the previous two hundred years] the position and rights of the Sami people as users of land and water in the areas owned by them had continuously been weakened, because they had not been taken adequately into account in legislation.'³²

1.2 Property and Estates

Several persons may own the same real estate only as joint ownership. However, multiple estates, regardless of how they are owned, may have common areas, such as waters or common forest³³. For example, the water area of an estate shall be re-formed as a common area in a cadastral partitioning, unless there are special reasons for dividing the area.³⁴ Similarly to easements below (see 1.3), common areas are established on the basis of a contract or the executors' decision. The areas do not receive title, but they show up in the title register under their own separate number.³⁵

Anything that is included in a real estate follows it without a separate agreement (see 7.6.1 below) – not only the soil, but also any building erected on the land, if the landowner owns the building. Any other person, who has erected a building on the land, remains its owner, until the building is transferred to the landowner. While landownership does not in itself create a presumption of ownership of the building, a claimant party has the burden of showing her right, if the landowner has possession of the land and the building. At present, isolated ownership comprises roughly five percent of buildings, most of them on leased municipal land.³⁶

²⁷ And that a 1683 regulation on forests had stated that the (Swedish) Crown was the owner of all land that did not belong to houses, villages or parishes; and that the legal basis for the major cadastral procedure carried out in Lapland in the 1920s did not mention the possible land ownership of the Sami people.

²⁸ This and the following information in the text are based on *Saamelaistoimikunnan mietintö*, Ministry of Justice 2001, 4–17.

²⁹ Supreme Court case 1/1981 referred to in *id.*, 5.

³⁰ Against this, it could be stated that the nature of the taxation was personal or trade taxation and, therefore, may not alone settle the issue of landownership. *Id.*, 6. The court records also include cases where punishment and damages were claimed against injurers, but these cases are said to be inconclusive as regards landownership, because the cases were not only about trespass, but also about other acts such as setting traps, fishing or settling down in areas belonging to a village. *Id.*

³¹ (974/1995) (unofficial translation at: <http://www.finlex.fi/fi/laki/kaannokset/1995/en19950974.pdf>).

³² Ministry of Justice, note 28 above, 22.

³³ *Yhteismetsälaki* (latest 109/2003) is a special Act on the governance and use of common forest. (Unofficial translation at: <http://www.finlex.fi/fi/laki/kaannokset/2003/en20030109.pdf>)

³⁴ Real Estate Formation Act 135.

³⁵ However, if a common area or a parcel of it is sold, the buyer must register title, and the area will be re-formed as a real estate. Real Estate Formation Act 20 (3).

³⁶ Jarmo Tuomisto, personal communication.

1.3 Interests in Land

Rights of Use

In the 1997 Code, Section 1 of Chapter 14 enumerates ‘Registrable Special Rights’:

The following special rights, based on a contract or another legal transfer, over the real estate of another may be registered:

- (1) a lease or other usufruct;³⁷
- (2) a right to a pension off the real estate;³⁸
- (3) a right to take timber; and
- (4) a right to extract land or mineral resources or another comparable right of extraction.³⁹

This list is in part an outcome of legislative history, which began from the 1734 Code that sustained presumptively in force limited rights in transfers of title (but it was provided that a sale broke a lease) and which continued with the 1868 Decree on mortgaging⁴⁰ mentioned in 1.1 above and a separate Decree from 1901 on the registration of a fixed-term right to cut timber. At the end of this history – as the last 1982 edition of a classic property-law textbook laconically put it – ‘as development has taken place, it has become *the rule that rights of use must be registered* in order to be protected against a third party.’⁴¹ Additionally, the above list bears the mark of academic research: ‘Caselius’ study on Contract-Based Rights of Extraction (1934) has provided the ground for classifying rights of extraction as a separate subjective-right group, even though his theory on these rights has had to give way.’⁴²

Only those rights may be registered that are of the above-defined type. For example, a right that restricts the landowner’s use of a real estate may not be registered.⁴³ However, the significance of *numerus clausus* is lessened by the fact that the registrable rights are loosely defined.

When title is transferred, the above special rights remain in force according to the same rule that applies to double transfers: time priority governs, but the special right is not binding on a new owner who did not know, and should not have known, about the right at the time of transfer.⁴⁴ Traditionally, the burden of proof lies on the party who claims that the other party knew or should have known of the right.

Easements (‘easements in appurtenance’) between a servient estate and one or more domi-

³⁷ The lease can be for a fixed or an unspecified period, and also a sublease may be registered. ‘Other usufruct’ covers rights of use lacking a consideration. Jokela et al., note 5 above, 340–2.

³⁸ For example, a non-transferable right to reside in an apartment. Jokela et al., note 5 above, 343.

³⁹ Code 14:1 (1).

⁴⁰ The 1868 Decree described contents of interests that could be registered, rather than cataloguing types of right. In addition to a mortgage, it mentioned the right to levy ‘a definite tax’ and the right ‘to use within a specified period the real estate or something belonging to it.’ However, already in the early twentieth century, the only known limited right of the former kind was a pension off the real estate.

⁴¹ Zitting and Rautiala, note 6 above, 147.

⁴² Kartio, note 15 above, 13.

⁴³ Jokela et al., note 5 above, 343.

⁴⁴ Code 14:7 (1) and 13:3 (1 and 3). In addition, the Tenancy Act provides that a residential lease is binding on the new owner if the tenant has taken possession of the apartment. Act on Residential Leases (481/1995) 38. (Unofficial translation at: <http://www.finlex.fi/fi/laki/kaannokset/1995/en19950481.pdf>)

nant estates may only be established in a cadastral procedure. They can be either permanent or (exceptionally) for a fixed term;⁴⁵ they are entered in the Cadastre and continue to exist in transfers of title. This means that they normally fulfil all conditions of ‘special rights’ *not* registrable under the above-indented Chapter 14, Section 1, which continues: ‘A special right shall not be registered if it is permanent, if it is for the benefit of a given real estate or area or if it has been established by an official real estate formation measure or otherwise by a decision of the authorities.’⁴⁶ The Real Estate Formation Act lists exhaustively the (currently nine) types of easements that may be set up.⁴⁷ The executors establish these easements based on the parties’ contract – which up to that point is binding only *inter partes* – or on their own decision. The owner of the servient estate has the right to receive compensation from the party to whose benefit the easement is established; as an exception, compensation shall be ordered for special reasons⁴⁸ only, when a necessary access-road is established from the dominant estate to a public road⁴⁹.

Mortgage

Under the Code, the titleholder must first apply for one or more ‘mortgage instruments,’ which are issued by the district court. These instruments have any chosen fixed sums representing the object real-estate’s value. When agreeing with the titleholder on a mortgage and obtaining a mortgage instrument, the bank attains a lien to the amount and rank shown in the instrument. If the debtor defaults, the lien has to be enforced in court (see 7.4 below). The new mortgage instrument is similar to the pre-1997 abstract debt-instrument in that both are technical means of establishing a lien which, in order to be binding on third parties, presupposes transfer of possession to the creditor. However, the difference between the two is that the abstract debt-instrument could in principle stand for a debt, whereas the mortgage instrument can only be used to create the third-party effect, and the standard regulation of debt-instrument transfers applied to the former, but does not apply to the latter.

By far the most common type of mortgage is an accessory mortgage, which means that the lien expires at the moment that the debt is paid. The mortgagee may not separately transfer the mortgage instrument, thereby setting up a lien for the transferee, because the titleholder is the only person who may set up a lien under the Code. Nevertheless, it would be legally possible to create a non-accessory mortgage, by removing the debtor’s personal liability and limiting the liability to the value of the real-estate. This is rare, however, as there is usually no reason to agree on the limitation.⁵⁰ The non-accessory mortgage would naturally be transferable, but markets for independent collateral have not emerged. By contrast, debts and accessory mortgages have been transferred, bundled, and split up – e.g. by the off-budget governmental agency Housing Fund of Finland (ARA) – but the size of these markets is not known.⁵¹

⁴⁵ Real Estate Formation Act 154.

⁴⁶ Code 14:1 (2).

⁴⁷ Real Estate Formation Act 154.

⁴⁸ For example, if the road is drawn in a significantly different way than the parties agreed upon. Government Proposal 227/1994.

⁴⁹ or the road of a private-road maintenance association. Real Estate Formation Act 162.

⁵⁰ Also prescription of the personal debt may create a non-accessory mortgage, but these situations are of course rare.

⁵¹ Substantial help from Jarmo Tuomisto acknowledged in the writing of the preceding two paragraphs.

Mortgage objects include, first, a real estate, its share, and a parcel.⁵² Second, while buildings cannot be mortgaged separately, the right-holder may mortgage the lease that confers her possession of a building. The condition for mortgaging special rights is registration: The holder of a right of use has the *duty to register* the right,

if the usufruct is transferable to a third party without hearing the titleholder and if there are buildings or other constructions belonging to the usufructuary on the real estate or it has been agreed that they may be built.⁵³

These conditions are at the same time requisites for mortgaging, according to Chapter 19, Section 1 on ‘Object of Mortgage over Usufruct’:

A lease and another fixed-term usufruct on the land of another person may be mortgaged, if the right can be transferred to a third party without hearing the titleholder and if the area contains a building or facility belonging to the usufructuary or if it is agreed that one may be built. It shall be a prerequisite for the mortgage that the usufruct is entered into the title and mortgage register. Also a share of the usufruct may be mortgaged.⁵⁴

Finally, the Code introduced the possibility to delineate through registration, which machine or facility is not, or is, part of the real estate.⁵⁵ In this way, the titleholder may redefine her property and, in particular, the scope of a mortgage vis-à-vis the scope of a floating charge⁵⁶. All holders of lien and – in the case of inclusion within the real estate – floating charge need to give their consent to the registration.⁵⁷ However, neither buildings nor *parts* of the machine or facility can be redefined by this means.⁵⁸

1.4 Building Lease

What follows are three scenarios – in a descending order of likelihood – concerning the owning or leasing of a building on another person’s land.

1. A building may be owned by a person who holds a lease to the land. A land lease may be for a fixed (normally 30–100 year) term or (rarely) for an unspecified period; as a rule it must be in writing⁵⁹. It may be entered into the Land Register if it is in writing and not permanent.⁶⁰ In this first scenario, a lessee who owns the building has the above-mentioned duty to register her right if, as is typical, the lease is transferable to a third party without hearing the titleholder⁶¹. Once registered, the lease and a building erected on the leased land are pro-

⁵² Code 15:1 (1).

⁵³ Code 14:2 (1) first sentence.

⁵⁴ Code 19:1 (1).

⁵⁵ Code 14:5.

⁵⁶ *Yrityskiinnityslaki* (634/1984).

⁵⁷ Code 14:10.

⁵⁸ Kartio, note 15 above, 102.

⁵⁹ For details, see *maanvuokralaki* (258/1966) 3.

⁶⁰ Code 14:1 (2).

⁶¹ Code 14:2 quoted in 1.3 above.

tected against a new titleholder and may be mortgaged according to Chapter 19, Section 1, quoted close to the end of 1.3 above.

2. A residential or a business-premises lease may be coupled with a land lease. The encompassing lease (or sublease) may be entered into the Land Register, if it is in writing and not permanent.⁶² If registered, this encompassing lease is protected against third parties, and it may also be mortgaged, combining the value of the leased building and the land lease.

3. As the least likely scenario, a building may be erected on another person's land without any registration. In a 1985 case,⁶³ a couple had owned two plots of land together, and one spouse had built a house that reached from the second plot over to the first. The first plot was sold, and in a later transfer the contracting parties used a clause whereby they did not approve of the unlawfully built house on the land. As the owner of the building could not show any legal ground for maintaining the house on the property, the new landowner could order the building to be removed. The landowner was granted restitution based on unjust enrichment (the award was half of what she claimed as reasonable rent, after her legal-costs award is added to the total).

1.5 Apartment Ownership

Housing Company

Homeownership is organised in a peculiar way. Finns typically live in houses owned by companies that they own themselves. Nearly all multi-storey residential buildings and many row or semi-detached houses are company-owned, most often through a special limited-liability company called the 'housing company' (*asunto-osakeyhtiö*).⁶⁴

Typically, a housing company neither makes nor has the purpose of making profit. Instead, it maintains apartments for the shareholders' use, and sets aside any extra income for future repairs.⁶⁵ Nonetheless, the company is set up like an ordinary limited-liability company, and it is entered in the Trade Register⁶⁶. A limited-liability company shall be registered as a housing company when two requisites are met: First, the company owns one or more buildings where over half of the total floor area is specified as residential apartments in the shareholders' possession.⁶⁷ Second, the shares confer the right to the possession of a specific apartment⁶⁸. However, even if the second requisite is met, but the apartments are not specified as residential ones for the shareholders' possession, the Housing Companies Act still applies, unless the articles of association exclude it (in part or as a whole).⁶⁹ While the company

⁶² Code 14:1 (2).

⁶³ Supreme Court 1985 II 140.

⁶⁴ In 1992, the first Act from 1926 was repealed by the current Housing Companies Act (809/1991) (unofficial translation at: <http://www.finlex.fi/fi/laki/kaannokset/1991/en19910809.pdf>).

⁶⁵ Matti Kasso, *Asunto- ja kiinteistökauppa*, Kauppakaari 2001, 94 and 97.

⁶⁶ *Kaupparekisteri*, operated by the National Board of Patents and Registration.

⁶⁷ Housing Companies Act 1, first requisite.

⁶⁸ or other part of the company's property. Housing Companies Act 1, second requisite.

⁶⁹ The opposite presumption applies to a company registered before January 1, 1992, to which the Act applies only if the articles of association so provide. However, the normal Limited-Liability Companies Act applies without qualification to a 'real-estate company,' which is founded for the purpose of owning real estate, but where the shares are not connected to any specific apartment.

can be called a ‘mutual real-estate company’⁷⁰ whenever the second requisite is met, the use of this term tends to be limited to companies to which the Housing Companies Act does not apply.

While the articles of association may provide limitations on transferability, the shares are otherwise freely negotiable and can be pledged as movable property. One block of shares confers the right to the possession of one apartment. Shares in the same block of shares may not be separately transferred or pledged, except when an apartment is being divided up or part of it is combined with some other apartment.⁷¹ All shares confer presumptively equal rights,⁷² but in e.g. large apartments the number of shares may be higher than in small ones.

The management of the company consists of a board and, usually, a ‘superintendent’ (*isännöitsijä*), who is not unlike a managing director. Often, the latter task is handled by specialised real-estate companies. Shareholders, who may be natural or legal persons or groups of these, decide the company affairs in the shareholders’ meeting.⁷³ The number of regular shareholders’ meetings annually is typically one. An extraordinary shareholders’ meeting can be convened by the board, auditors⁷⁴, the shareholders’ meeting or a ten-percent⁷⁵ shareholder minority. Decisions are taken in the meeting by a simple majority, but changing the articles of association requires two thirds of the vote and shares at the meeting. Three particular situations:

- *Changing the grounds of maintenance charge* in the articles of association requires not only the aforesaid qualified majority, but also those shareholders’ consent whose payments would rise. Exceptionally, the decision may be taken by the standard qualified majority, if the grounds are changed into actual and reliably measurable consumption of a commodity⁷⁶ (such as water consumption after installing a meter).
- *Changing the purpose of use of an apartment from (say) a residential dwelling to a restaurant* in the articles of association requires, first of all, not only the above-mentioned standard qualified majority, but also the consent of those shareholders who are affected⁷⁷ (say, by noise). Second, the change may affect the amount of maintenance charge, as this fee is usually 1.2 to 2 times larger for business premises than for residential apartments. This means that changing residential premises into business premises would normally reduce the other shareholders’ charge; but, conversely, changing business premises into residential ones would typically increase all the other shareholders’ charge, and the latter change would require each shareholder’s consent.⁷⁸ Third, a permit from the municipal building authority is normally required. Finally, if the apartment is used for an ‘essentially different purpose’ from what it was intended for or otherwise against the articles of association, the housing company may take possession of the apartment for at maximum three years⁷⁹ (and lease it⁸⁰).

⁷⁰ *Keskinäinen kiinteistöosakeyhtiö*.

⁷¹ Housing Companies Act 10 (2).

⁷² Housing Companies Act 9 (‘unless otherwise provided by this Act and the articles of association’).

⁷³ See Housing Companies Act 23 to 49 on ‘Shareholders’ meeting.’

⁷⁴ See Housing Companies Act 63 to 68 on ‘Audit.’ At least one auditor is required per housing company.

⁷⁵ or less according to articles of association.

⁷⁶ Housing Companies Act 42.

⁷⁷ Housing Companies Act 41.

⁷⁸ Kasso, note 65 above, 117.

⁷⁹ Housing Companies Act 81. The shareholder’s meeting can make this decision after the board has handed out a written warning. Housing Companies Act 82.

⁸⁰ See Housing Companies Act 85 (‘Leasing an apartment taken into the company’s possession’).

- *Forbidding pets in apartments or the company's facilities* may not be regulated by general rules. However, the company may take possession of an apartment, if a person living in the apartment 'violates rules necessary to maintain order in the company's facilities,'⁸¹ while the board may try to define what is necessary for maintaining order in the company's facilities.

Housing companies illustrate 'neighbourhood democracy,' where shareholders decide the company affairs basically in the same way as in ordinary business companies. While a legal entity has been inserted between an owner-occupant and a dwelling – allegedly simplifying the possession and exercise of rights compared to joint ownership – the dwelling is commonly perceived to be owner-occupied.⁸²

Agreement of Joint Possession

An alternative ownership arrangement for mainly semi-detached houses is an 'agreement of joint possession.'⁸³ Parties agreeing on joint ownership to an estate and a house (or to either one separately) may define, e.g., the parts of the estate and building that each owns. The agreement can be registered under the Code⁸⁴ to protect it against future owners and mortgagees. On the mortgaging of a share of a real estate, see 7.1 below.

Two parties may prefer this arrangement to setting up a housing company. The benefits include the possibility to use as security the real estate rather than shares, the fact that a housing company can be costly to operate, and that a fifty-fifty deadlock may cripple the use of property in a housing company. On the other hand, the housing company has the advantage of a 'standard contract' called the Housing Companies Act and the articles of association drafted in accordance with it. In the absence of these, distributing the costs of water, wastewater, heating and possible repairs may create additional transaction costs.

1.6 The Public Law Context of Real Property Transactions

Disappearing Restrictions on Transferability

Limitations on foreigners' landownership had been introduced in an Act in 1939. Most of

⁸¹ Housing Companies Act 81 (1) (5).

⁸² As to the question what will happen to the apartment ownership right (or interests on it such as mortgages) if the building is destroyed, e.g. by fire, the Housing Companies Act provides under 'Miscellaneous provisions' in Section 87 (1) that: If all the buildings of the company are destroyed so severely that getting them repaired would be equivalent to completely reconstructing them, no decision on collecting a maintenance charge for such construction may be made without the consent of every shareholder. The company is entitled to redeem the shares of a shareholder who fails to give her consent, if the other shareholders are unanimous about this redemption. The redemption price is the value of the shares taking into account the decrease in company assets arising from the destruction concerned, the compensation obtained by the company from the insurance or other compensation, and other factors. According to 87 (2), if only some of the company's buildings or apartments are destroyed and the company does not build new apartments to replace those destroyed, the holder of shares connected to a destroyed apartment is entitled to have her shares redeemed by the company on a similarly calculated price.

⁸³ Code 14:3.

⁸⁴ Id.

these were repealed as of January 1, 1993, in anticipation to Finland's accession to the European Economic Area. After that, the sale of free-time estates to persons domiciled abroad was made subject to permission, but this restriction persisted only for a five-year transition period after Finland joined the European Union on January 1, 1995.

Since the Housing Production Act of 1966, the Government has subsidised the construction of owner-occupied housing, albeit after 1994 to an ever decreasing extent under a new Act on State-Subsidised Housing Loans⁸⁵. The subsidies have imposed a ten-year limit on transferability, and any apartment still subject to such a condition may be transferred only if the loan is paid off or reassigned to the buyer. Today Government policy has moved to interest subsidies to banks who grant housing loans.

Municipal Pre-Emption Right

The municipal pre-emption right was introduced in the late seventies, with exceptions covering sales to spouses and children and a limit to sales of more than five thousand square metres⁸⁶ – compare 3.6.1 in the Swedish report. Initially, it was required that more than half of the object land should be zoned or that zoning should be under way, but this qualification was removed in 1990, because it unnecessarily prevented municipalities from acquiring un-zoned land before planning increases its value⁸⁷.

When exercising the right, the municipality replaces the buyer on the conditions agreed upon by the parties – so the seller still decides the timing and the price, but not to whom to sell. Within three months from the time of transfer, the municipality must decide whether to exercise its right. During this time⁸⁸, the buyer's title will be pending in the district court; the buyer cannot mortgage the land, because the mortgage may not be approved before approving the transfer of title. On request, the municipality may supply an anticipatory notice, where it commits to avoid exercising the right⁸⁹.

The frequency of pre-emption was described in 2001 as follows: 'Overall, municipalities use this right rather little, mainly to purchase larger wholes of real estate or for other special reasons, such as when the municipality already owns land in the vicinity of the sold property.'⁹⁰

Taxation

The municipal real-estate tax was introduced in 1992, replacing, among other things, the taxation of imputed housing income. The tax rate must be between 0.50 and 1.00 percent of tax-

⁸⁵ (1189/1993) (unofficial translation at: <http://www.finlex.fi/fi/laki/kaannokset/1993/en19931189.pdf>).

⁸⁶ *Etuostolaki* (608/1977). Exceptionally, the four central municipalities of the Helsinki region – Espoo, Helsinki, Kauniainen, and Vantaa – can use the right irrespective of the limitation on purpose and in sales of more than three thousand square metres. 1 (4) (990/1992) and 5 (4) (1063/1988). In any case, the purpose of acquisition must be communal development or (since 1989 also) recreation and protection. 1 (3) (289/1989).

⁸⁷ Government proposal 104/1989, cited in the case Supreme Administrative Court 2004:91. In this case, half of the land in question was under the approach zone of an airport in a non-binding plan. The purpose of communal development was considered to be fulfilled, as there had been long-term commitment to the project.

⁸⁸ or until a court decides that the municipality does not have the right. *Etuostolaki* 19 (1) (545/1995).

⁸⁹ for two years in a transfer described in the notice. *Etuostolaki* 8.

⁹⁰ Kasso, note 65 above, 172–3.

able value, but only between 0.22 and 0.50 percent for those buildings that are used as a main permanent home.

The state transfer tax must be paid by the buyer of a real estate (or a special right that must be registered). The rate is 4 percent of taxable value, while a lower rate of 1.6 percent applies to shares, including those of a housing or real-estate company. The purchase of a first home by 18–39 year-old person is tax-exempt.⁹¹

Similarly to the stamp duty that preceded it, the transfer tax is also used to induce buyers to register title as soon as possible. The tax rate increases by twenty percent every six months from the last day of the title-registration period (six months from the transfer) and can at maximum rise as high as double the original tax.⁹² This sanction can of course have effect only within the scope of the tax: indeed, it was estimated in 2001 that one half of titles were applied within two weeks after a sale, whereas long time lags were more common in acquisitions by inheritance or will, where neither the transfer tax nor the sanction applies.⁹³

1.7 Brief Summary on ‘Real Property Law in Action’

Property Ownership

Last year’s report on Tenancy Law in Finland⁹⁴ summarised the relative popularity of ownership and tenancy in its **1.7**.

Housing Shares as Collateral

In general, almost any shareholder who has taken out a housing loan has the shares pledged as security. Likewise, housing-company shares are frequently used as collateral for business loans. However, there are no public statistics currently available.

Valuation

An independent valuator often values land and business-related estates and apartments, when their sale is planned or the property is used as collateral. A self-regulatory body founded in 1995 defined ‘good valuation practice,’ providing e.g. that the price of valuation should not be tied to the value of the object (a practice that was fairly common in the eighties⁹⁵). Since 2004, the Central Chamber of Commerce supervises valuers and continues to organise annual authorisation examinations begun by the self-regulatory body.

⁹¹ *Varainsiirtoverolaki* (931/1996) 11. Sections 12 to 14 include other exemptions, such as pre-emption by a municipality and the purchase of land from the state for agricultural or forestry purposes conditional on state or EU financing.

⁹² See **2.1.4** below.

⁹³ Jokela et al., note 5 above, 260, referring to a study by the National Land Survey.

⁹⁴ At <http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/tenancyLaw.shtml>.

⁹⁵ Kasso, note 65 above, 562.

The emergence of ‘mildew houses’ in the nineties brought about several new home-inspection professions onto the market. Today a self-regulatory body defines requisites for inspectors, and common rules have been agreed upon among associations in the fields of construction, insurance and real estate. A home inspection is most likely commissioned when a detached house is sold. The inspector’s report does not remove the seller’s liability, but the buyer may become aware of defects. For the Code provisions on defects in quality, see **3.5** and **4.4** below.

Real Estate Agents

A real estate agent is used in about two thirds of consumer sales.⁹⁶ The central market position of the agent led to special consumer-protection legislation in the late eighties,⁹⁷ and since 2001–2 two separate Acts regulate the profession⁹⁸ on the one hand, and the agent’s contractual relations and liability⁹⁹ on the other. Most estate agents are not lawyers, though some are. The profession is now divided into ‘LKV’ for real-estate and ‘LVV’ for solely rental-apartment agents. The Central Chamber of Commerce organises examinations for certifying both kinds of agent on a semiannual basis, and the regional government maintains a compulsory register and supervises the profession¹⁰⁰. For the agent’s liability towards non-business buyers and sellers, see **3.1.1** and **3.4.1** below. In disputes concerning defects in a real estate, the agent is said to be often sued alongside the seller.¹⁰¹

Title Registration

The acquisition of a valid title has three necessary steps. First, the ‘notary’ (see **1.1** above) verifies the formalities under the Code and signs the document. Second, the buyer pays the *transfer tax* to the tax authority. Third, the buyer *registers title* in the district court, annexing the tax receipt and the original deed to the application.¹⁰² In the World Bank study cited in Table 1 below, the three steps involved keep Finland from the top position. As to time (the right-hand side of Table 1), one day is the norm in title registration; see also **2.3**, **2.6** and **3.1.2** below.

⁹⁶ **3.1** below.

⁹⁷ *Laki kuluttajansuojasta kiinteistönvälityksessä* (686/1988).

⁹⁸ *Laki kiinteistönvälitysliikkeistä ja vuokrahuoneiston välitysliikkeistä* (1075/2000).

⁹⁹ *Laki kiinteistöjen ja vuokrahuoneistojen välityksestä* (1074/2000).

¹⁰⁰ *Laki kiinteistönvälitysliikkeistä ja vuokrahuoneiston välitysliikkeistä* 7 and 16.

¹⁰¹ Jokela et al., note 5 above, 189.

¹⁰² See **2.3** below.

Table 1. Who has the most efficient property registration – and who the least?

Source: ‘Registering Property’ in *Doing Business in 2005*, World Bank 2004, 35.

Alternative Dispute Resolution

Starting from 1995, the Consumer Complaints Board has had jurisdiction to give settlement recommendations in disputes between private persons regarding any sale of housing – real estate or shares – and in disputes about the release of the securities explained in 5.4.2 below.¹⁰³ Today these housing transactions account for most of the workload of the Board (202 cases in 2002). The sole jurisdiction to give legally enforceable decisions resides in the general courts.

Note on Sources

The 1997 Code more or less codified previous case law and property-law scholarship into a Parliamentary Act. The post-Code case law has largely been concerned with transitional issues, and so new important developments are yet to emerge. At the same time as the Code entered into force, however, the first edition of the book *Maakaari*¹⁰⁴ (‘land code’) was published. This work has so far been updated in two more editions, including answers to questions of interpretation that have arisen. The book is widely used, also by judges,¹⁰⁵ and the authors Leena Kartio (University of Turku), Marjut Jokela (Ministry of Justice) and Ilmari Ojanen (Supreme Administrative Court) were key figures in the modernisation of the Code, not to mention being leading authorities in the field. For these reasons, many parts of the report dealing with the Code – such as those on defects in a real estate – rely not so much on cases as on the book in question.

¹⁰³ *Laki kuluttajavalituslautakunnasta* (42/1978) 1 (1) (3 and 4).

¹⁰⁴ Note 5 above.

¹⁰⁵ Although it is not according to the national tradition to cite scholar’s works in judgments.

2. Land Registration

2.1 Organisation

2.1.1. Statutory basis

The statutory basis for land registration is found in the Code of Real Estate of 1996 (the Code).¹⁰⁶

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

No.

2.1.2. Relevant institutions

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

The District court of *forum sitae* is the registration authority and enters information regarding titleholders of land in the title register (*lainhuutorekisteri*). Information on mortgages and leases (special rights) on real property is entered into the land register in the mortgage register (*kiinnitysrekisteri*). After registration of title to a new plot of land, a technical survey of the land is done by the District Survey Office (*maanmittaustoimisto*). Information regarding borders, re-formation of real property (*kiinteistönmuodostus*) and certain permanent rights of others pertaining to the property (*kiinteistörasite*) is entered into the cadastre.

2.1.3. Land register/registre foncier/Grundbuch

How is the register structured?

Since 1987 information about plots of and interests in land are entered into the computer-based Land Information System (kiinteistötietojärjestelmä).¹⁰⁷ At the same time the procedural rules regarding land registration were also modernized.¹⁰⁸ The Land Information System is divided into two parts, the cadastre (kiinteistörekisteri) and land register (lainhuuto- ja kiinnitysrekisteri), which in turn consists of the title register (lainhuuto) and mortgage register (kiinnitys). The cadastre consists of information about the physical and legal formation of the plot of land. Information about property and other rights to the land are entered into the land register.¹⁰⁹ As the information in the cadastre serves as a basis for decisions pertaining to the land register, daily electronic updates are sent from the National Land Survey of Finland (maanmittauslaitos) to the land register.¹¹⁰ A notary¹¹¹ (kaupanvahvistaja) conveys information¹¹² about a sale (piece of land, name of parties and date and price of sale) to the relevant District Survey Office, which enters the information in the land register.

What (legal) training have the people working at the register authority?

The registrations are generally handled by people with no legal training (80%). Courts always have young lawyers training on the bench (notaari) that handle some of the registration

¹⁰⁶ Maakaari: Code of Real Estate (hereafter the Code) (1995/549) Chapters 5-9.

¹⁰⁷ KirjRekL: Act on the title and mortgage register (353/1987).

¹⁰⁸ Jokela et al., p. 233.

¹⁰⁹ Jokela et al., p. 240.

¹¹⁰ KiintJärjL: Act on Access to Information in the Land Information System (2002/453). Jokela et al., p. 240.

¹¹¹ A direct translation would read "the official witness of conveyance". In practice, notaries are either notary publics, certain other civil servants or court-appointed. The court-appointed notaries usually work at banks. All notaries act under official duty when witnessing a transfer.

¹¹² Article 7:5 of the Code: Acquisition information, (*saantotieto*).

work-load and assist the other staff in cases involving legal issues. Some (larger) courts have positions for lawyers that have completed their training and have additional experience of work on the bench (*kärjäviskaali*). Similarly, they usually share the registration work-load (the two together 18%). All courts have appointed one judge as head of real estate issues (*kiinteistötuomari*) (2%).

The *kiinteistötuomari* is responsible for the accuracy and reliability of all information entered into the land register by the registrar. The *kiinteistötuomari* is also responsible for the entry of information about court decisions regarding annulment of purchase, expropriation, seizure, recovery proceedings, insolvency or bankruptcy. Such information is *ex officio* entered into the land register by the court of *forum sitae*, immediately upon receipt of a request by the relevant authority.¹¹³

2.1.4. Is all real property registered?

The transferee is under obligation to register the change of title within 6 months from the date of the transfer. The obligation applies to all transfers, regardless of the object of sale or the parties involved.¹¹⁴ A buyer that fails to register in time, runs the risk of not being protected against third parties in good faith that have valid claims to the property or part thereof. A buyer¹¹⁵ that applies for registration of title after said time-period has lapsed, is penalized by added tax by the rate of 20 % for every 6 months. The maximum penalty tax is 100 % of the original tax.¹¹⁶ Consequently, almost all land is registered. Government land that is not in the stream of commerce does not have to be registered, however, the government can request an entry of ownership to those pieces of land. If pieces or parcels of unregistered property are transferred, title to it will have to be registered.¹¹⁷

2.2 Contents of Registration

2.2.1. Which data are registered?

Information regarding the holder of a legal right is entered under the registration number of the relevant piece of property. The registration number consists of xxx-xxx-xx-x, where the first series indicates the city/municipality, the second series indicates the village and the third and at times a fourth or fifth specifies the property. Every application receives an application number, consisting of the date filed and the application number in turn at the relevant registration authority (e.g. 1.1.2005/1). An application can pertain to the whole piece of property or part thereof, therefore the object of the entry is specified next to each application number. An application pertaining to only part of the real estate ends with e.g. -M601 after the registration number. Below, the name and social security number of the owner(s) is entered. The numbers immediately preceding the name of the owner indicates, whether she owns the specified property in full or together with someone else (e.g. 1/1, 1/2, 1/3 etc.). Further below, the form and date of transfer are entered and the price paid, if appropriate. Last the name and social security number of the transferee are entered. A line separates one application from the other. The status of a pending application carries the heading “application for transfer of title pending” (*lainhuutohakemus vireillä*). A priority notice based on information from the notary is always the last entry and contains the same information, but instead of the application number, there

¹¹³ Articles 5:1.3 and 7:1.2 of the Code. Jokela et al., p. 236.

¹¹⁴ Articles 11.1 and 10:1.2 of the Code.

¹¹⁵ Inherited property is not taxed.

¹¹⁶ The statutory tax amounts to 4 % of the contracting price. VarSiirVL: Act on Tax on Transfer of Assets (1996/931): 6 § and 8 §.

¹¹⁷ Article 11:4 of the Code.

is a series of numbers.

2.2.2. Sample of Registration

Please find the attached sample forms.

2.3 Registration Procedure

2.3.1. Application for Registration

Is there any form required for the application for registration?

Yes. A written and signed application for registration that specifies the property, the request of the applicant as well as the name, social security number and contact information of the applicant meets the formal requirements.¹¹⁸ The applicant needs to submit proof of ownership, including written consent from certain holder's of statutory rights¹¹⁹, as well as proof of payment of tax. A foreign party will have to submit a copy of some form of identification, e.g. passport. Although there is no required paper form for the application, a standardized application form is available on-line and at all courts.¹²⁰

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

No. Banks handle most applications for registration of title, when the buyer also applies for registration of a mortgage with a lien raised to the bank.¹²¹ In other cases, the application is usually filed by the buyer/s themselves. The application receives an application number and information about the pending application is immediately entered into the land register and assigned to an official at the court.

2.3.2. Duties of the Registrar

What does the registrar control?

The registrar controls that the contract meets the formal requirements and that the tax has been paid. If the necessary documents are not presented with the application the applicant is exhorted to supplement the application, several times if necessary.¹²² On its own initiative the registrar obtains necessary information that is of relevance to the case and available from registers accessible to the registrar.¹²³ If the applicant fails to heed an exhortation (which is rare) the application will as a last resort be dismissed.¹²⁴

How are the applicants informed about the registration?

The content of the decision is indicated by the register and a certificate on the register-entry (*lainhuutotodistus*) is sent to the applicant. If there appears to be an obstacle to the approval of the application the registrar can summon the applicant to a hearing, and as a last resort exhort the applicant to have the matter resolved in a separate trial on pain of having the application dismissed.¹²⁵ The application can, if otherwise clear, be left in abeyance¹²⁶ for a set time,

¹¹⁸ Article 6:1 of the Code.

¹¹⁹ See below 2.5 and 4.2.

¹²⁰ www.oikeus.fi, a sample form and extract from the land and mortgage registers are attached.

¹²¹ In fact the bank consulted (Nordea) for the purposes of this study conditions the grant of the loan on the bank handling the registration.

¹²² Article 6:5 of the Code.

¹²³ Article 6:4 of the Code.

¹²⁴ Article 6:5,3 of the Code.

¹²⁵ Article 6:6 of the Code.

¹²⁶ See below 4.2.c.

of which note is made in the title register (*lainhuutohakemus jätetty lepäämään 1.1.2006 asti*) until the barrier to registration is removed.¹²⁷ A registration decision shall be taken without delay, unless there is a barrier to approval.

2.4 Access to information

Is the registration done on paper or electronically?

Electronically.

How can you get access to land registration information? Is it in the public domain or is the access restricted? Can you search for information by address, by registration number of land and/or by holders of rights on it?

*The Act on Access to Information in the Land Information System (453/2002) entered into force on Jan. 1, 2003.¹²⁸ The act is part of a greater technical reform of the land information system, which will be completed by June 1, 2005.¹²⁹ Official registers on holders of user licenses as well as a surveillance register¹³⁰ (*lokirekisteri*) are also developed as part of the reform. Particularly, the reform intends to protect personal information (e.g. social security number, address) that originates from non-public registers.¹³¹*

*The land information system is public and anyone has the right to receive information from it without compensation.¹³² District Survey Offices (*maanmittaustoimisto*) are obligated under law to provide this service. They can search the register by registration number or the name or location of the property. As mentioned above, the registration number consists of xxx-xxx-xx-x, where the first series indicates the city/municipality, the second series indicates the village/area and the third and at times a fourth specifies the property. Thus, even if the customer does not know the complete registration number, the 1st and 2nd are standardized and the 3rd and 4th can be substituted with the name of the property. A search can also be made by postal address of a particular piece of property.*

Only under special circumstances can the register be searched by social security number in order to locate a piece of property. However, the owner can request an extract on her real property by giving the clerk her social security number. Likewise, the register can be searched by social security number to locate any real property of a deceased person for estate inventory purposes.¹³³ All civil servants are under duty to supervise that personal information is not released without legal right. Provided that no such information is visible on the screen it can be shown to a private person, who can make notes. However, private persons are not authorized to use or search the register themselves.¹³⁴

The National Land Survey of Finland can on application, under specific statutory conditions,

¹²⁷ Article 6:8 of the Code.

¹²⁸ KiintjärjL: Act on Access to information in the Land Information System 453/2002.

¹²⁹ For more information in English visit www.maanmittauslaitos.fi.

¹³⁰ Loki = the God of mischief and destruction in Norse mythology.

¹³¹ Väestötietol (Act on the Population Register) 507/1993.

¹³² KiintjärjL:(453/2002) 6§: *Maanmittauslaitoksen on järjestettävä jokaiselle mahdollisuus saada maanmittaustoimistossa maksutta luettavakseen kiinteistötietojärjestelmässä olevat tiedot ja tehdä niistä muistiinpanoja. Maksua vastaan tietoa luovutetaan otteina, todistuksina tai muina tulosteina taikka teknisen käyttöyhteyden avulla.* Act on the Land Information system and providing Information Service 6 §: The National Land Survey is obliged to arrange an opportunity for anyone to read and make notes on information in the Land Information System without cost. Extracts, certificates and other printouts or a technical user-interface is available against compensation. (translation K. Weckström)

¹³³ Estate inventory deed (*perukirja*). KiintjärjL: 6 § 5.

¹³⁴ The reform seeks to find technical ways of protecting non-public information so as to make this service available to private persons.

issue an electronic user's license (tekninen käyttöyhteys).¹³⁵ Banks and real estate agents can, and in practice do, apply for access to the land information system, where they can access the title and mortgage register. Print-outs are not official though and an official extract is purchased from the District court a few days prior to the sale.

Anyone can purchase an official extract (*lainhuutotodistus*) from the land register on a certain piece of property from any District Court (10 euros). All mortgages and special rights pertaining to a certain piece of land will be visible on an extract from the mortgage register (*rasitustodistus*), which are also referred to before the closing of any sale (20 euros). The registrars office does a search on the property and provides an official extract of the title-page regarding the relevant piece of property. An extract from the cadastre is available at District Survey Offices (8,40 euros).

2.5 Substantive Effects of the Registration

What are the substantive effects of the registration? Is the reliance in good faith on the registered rights protected? How are parties that have relied on the information from the register (abstract of title) protected if this information proves to have been wrong?

An entry¹³⁶ in the title and mortgage register, is deemed to be public knowledge from the first weekday after the date of entry and therefore no protection is given to a party in good faith after that^{137,138}. The register enjoys both positive and negative public credibility. Consequently, if there are no entries to the contrary in the title and mortgage register at the date of conveyance the buyer can trust the information (negative public credibility=*negatiivinen julkinen luottavuus*).¹³⁹ If, however, the buyer has reason to doubt the accuracy of the information it triggers a duty to investigate, since it is also required that the buyer did not know, nor should have known of another transfer or earlier non-registered lien or right, to receive good faith protection (*vilpittömän mielen suoja*). When this is the case the buyer is said to be in qualified good faith (*perustellussa vilpittömässä mielessä*).

The buyer can also trust the accuracy of the information in the land register, i.e. the register enjoys positive public credibility (*positiivinen julkinen luotettavuus*).¹⁴⁰ The keeper of the register is liable for the accuracy of the information in the register and if someone suffers damage due to erroneous information they have the right to claim compensation from the

¹³⁵ KiintJärjL: 6 § 3: Maanmittauslaitos saa teknisen käyttöyhteyden avulla luovutta 4 §:ssä tarkoitettun viranomaisen puolesta tietoja Kiinteistötietojärjestelmästä tuomioistuimelle, kunnalle, kiinteistönmuodostamistehtäviä hoitavalle viranomaiselle, kaupanvahvistajalle, ulosottoviranomaiselle ja veroviranomaiselle sekä lisäksi hakemuksen perusteella myöntää luvan tietojen saamiseen teknisen käyttöyhteyden avulla sille, joka tarvitsee tietoja yhdyskuntasuunnittelua, kiinteistönvälitystä, luoton myöntämistä ja valvontaa taikka muuta näihin verrattavaa kiinteistöihin liittyvää tarkoitusta varten. Käyttölupaan voidaan ottaa tietojen hakuperustetta, muuta järjestelmän käyttöä ja sen valvontaa koskevia ehtoja. Article 6 section 3: The National Land Survey can, in lieu of the authority specified in article 4, release information from the Land Information System to a court, municipality, a property formation authority, population register authority, an ex officio or court-appointed notary, execution authority and upon application issue a license to access information via an electronic user-connection to a party, who needs the information for community planning, real property sales, to issue or supervise a loan or for another comparable purpose that relates to real property. Terms may be included in the license agreement regarding available searches, other uses of the system and the supervision of such use. (translation by K. Weckström)

¹³⁶ Both ownership information and entries made by the registration authority ex officio.

¹³⁷ With the exception of article 17:10 of the Code, regarding raising liens after the transfer of real estate. See next paragraph below.

¹³⁸ Article 7:3 of the Code.

¹³⁹ Jokela et al., p. 490.

¹⁴⁰ Jokela et al., p. 490.

relevant authority.¹⁴¹ However, if the information in a priority notice is erroneous there are no grounds for a claim against the registration authority.¹⁴²

In the case of double transfer, the later transfer can take precedence, if the transferee applies for registration first and did not know, nor should have known of the previous transfer at the time of acquisition. Naturally, the precedence lapses, if the application is rejected or the applicant otherwise loses the claimed right to the property.¹⁴³ The same rule applies to the registration of special rights and mortgages.¹⁴⁴ An application for registration of a special right takes precedence over a lien, based on a new mortgage, applied on the same day.¹⁴⁵ However, the legal effects of an exsisting mortgage stem from the date of the original application and is valid against a new owner, even if the lien has been created after the transfer, if the creditor did not know, nor should have known of the transfer.¹⁴⁶ The creditor cannot, however rely on good faith, if information on the transfer of title has been available in the title and mortgage register a month prior to the raising of the lien.¹⁴⁷

The statutory exception for creditors can easily lead to a misconception of the legal situation in practice. A creditor is also required to act diligently and carefully consider whether or not to accept a lien and issue a loan. The higher the professional skill of the creditor the higher the demand for diligence. A creditor cannot rely on good faith, if a lien is raised without checking the land register *at all* for ownership information.¹⁴⁸ The good faith of the creditor at the time of transfer of possession of the mortgage instrument (*traditio*) is of relevance, when determining whether the creditor receives protection against a new owner under 17:10,2 of the Code.¹⁴⁹

A sale, where the consent of a spouse or partner is required becomes final, if title is registered to the buyer regardless of whether the appropriate consent was given, if the buyer was acting in good faith.¹⁵⁰

2.6 Rank and Priority Notice

2.6.1. Rank (rang/Rang)

How is the rank of registrations determined?

Each application for mortgage receives its rank according to filing date and individual entry.¹⁵¹ Information regarding the application and its rank is entered in the mortgage register. Information on land charges are also entered in the mortgage register and acquire their rank according to filing date.

All mortgages and land charges pertaining to a certain piece of land will be visible on an extract from the mortgage register, which are generally referred to before the closing of any sale.

¹⁴¹ Article 7:4 of the Code.

¹⁴² Article 7:5 of the Code.

¹⁴³ Article 13:3 of the Code.

¹⁴⁴ Article 14:8 of the Code.

¹⁴⁵ Article 14:8(1) of the Code.

¹⁴⁶ Article 17:10 of the Code.

¹⁴⁷ Article 17:10,2 of the Code. The legally significant moment is when possession of the mortgage instrument is transferred.

¹⁴⁸ Jokela et. al., p.494.

¹⁴⁹ Jokela et. al., p, 495.

¹⁵⁰ See below 3.3 and 4.2.

¹⁵¹ Articles 13:3, 14:7, 14:8 and 16:8 of the Code. E.g. Section 14:8 - Precedence: The legal effects of the registration of a special right begin on the day when the registration application has become pending. A registration earlier applied for shall take precedence in relation to a registration or mortgage later applied for. A special right shall take precedence to a lien, based on a mortgage, applied for on the same day.

The registration of a mortgage (*kiinnitys*) and issue of a mortgage instrument (*panttikirja*) can usually be done in a day, if the application is complete, i.e. meets formal requirements. A creditor can, with the consent of the owner, apply to be entered in the mortgage register (*halti-jamerkintä*) as the holder of the mortgage instrument.¹⁵² In practice, most banks generally file the mortgage application for their client, and even if the owner files the application herself, the standard application form also offers the option of including an application for entry.¹⁵³ However, when the application is submitted with an application for transfer of title, the mortgage application cannot be approved until the transfer has been approved. In either instance the application receives its rank according to filing date and a pending application is visible in the register from the day after the filing at the latest.¹⁵⁴ Priority notices are not possible and the application has to be filed in writing to be delivered by mail or in person to the court. There is no obstacle against filing the application electronically per se. However, since banks generally handle both applications for title transfer and mortgage, and the original deed and possible other supporting documents will have to be submitted with the application anyway, this option is hardly ever used.¹⁵⁵

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

Only the owner can raise mortgages on real property, and the transfer of the mortgage instruments are decisive. Creditors receive the rank that the individual mortgage instrument has that has been handed over to them.

2.6.2. Priority Notice

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

Priority notices equivalent to the German “Vormerkung” are not possible. However, a buyer cannot receive good faith protection regarding a transfer that has been concluded after the day a notary-entry has been entered in the land register. The ex officio or court-appointed notary has her own access code (to check the contents) to the land register. Under article 7 of the decree on notaries,¹⁵⁶ the notary is under duty to report a sale within 7 days to the relevant District Survey Office and city or municipality in which the land is situated. Notice containing the names and social security numbers of the parties, the object, date and price of sale, can be sent by mail, or if specifically agreed upon electronically. The District Survey Office enters the information into the land information system and sends notice to the tax authority and if necessary to the city administrative authority (*maistraatti*).¹⁵⁷ The information is entered in the land register under the registration number of the real property. If the object of sale is a parcel of land that does not have a registration number, the information is entered under the registration number of the seller’s estate (source estate=*emokiinteistö*), and serves as notice for the particular piece of land sold.¹⁵⁸ Once entered, the information serves as ‘priority notice’ against any subsequent successors, who henceforth cannot rely on good faith.

The buyer can, however, file an application for registration of transfer of title at the District

¹⁵² In order to assure the receipt of notice of an executive auction.

¹⁵³ Article 16:9 of the Code.

¹⁵⁴ Article 16:8 of the Code.

¹⁵⁵ Jokela et. al., p. 249.

¹⁵⁶ KaupVahvA: Decree on Notaries (1996/958)

¹⁵⁷ KaupVahvA: 13 §.

¹⁵⁸ KirjRekA: Decree on the title and mortgage register (1996/960) 2 §.

Court of forum sitae,¹⁵⁹ immediately after the sale has been certified. If the application is filed at the wrong court, the court will ex officio transfer the application to the appropriate registration authority.¹⁶⁰ The competent registration authority enters information about the pending application immediately, or by the end of the day of arrival of the application at the latest.¹⁶¹ When entered into the register, the application receives the benefit of priority notice against third parties. However, the application receives its rank the day it arrives at the competent District court. If, another application concerning the same property is filed the same day, the application with the earlier date of transfer receives priority.¹⁶²

¹⁵⁹ Article 5:2 of the Code.

¹⁶⁰ Article 6:2 of the Code.

¹⁶¹ Article 6:3,3 of the Code and KirjRekA: 15 §.

¹⁶² Articles 13:3,1 and 6:3 of the Code.

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

3.1 Procedure in general

3.1.1. Main steps of a real estate sale

Almost always, when the seller is a consumer, she uses the services of a real estate agency in order to find a buyer. An educated guess would be that a real estate agent is used in two thirds of consumer sales involving residences.¹⁶³ When a buyer has been found and approved by the seller, the licensed real estate agent assists the parties in drafting the contract. The real estate agent is responsible for informing both parties about their duties to each other and restrictions laid down by the law. The agent is not allowed to withhold information from one or both of the parties, including bad credit or defects in the object.¹⁶⁴

Having drawn up the contract, the parties are required to sign it in the presence of a public or court-appointed notary. The parties have to be physically present or represented per procura-tion (*valtakirjalla*). The notary checks that the document is drafted according to the statutory form requirements, and the identification of the parties present. The notary also checks the seller's right to convey the property in the land register.¹⁶⁵ She then verifies the document and the signatures of the parties and conveys information about the sale to the District Survey Of-fice.

After the conclusion of contract the buyer can apply for transfer of title (acquire rank) in the land register and is mandated by law to do so within 6 months from the date of the sale.¹⁶⁶ In addition to the signed application form, the buyer must attach the original deed as well as the receipt of paid transfer tax to the application.¹⁶⁷ If the application is not signed or properly filled out (rare) the registrar will demand completion before the application is admitted.¹⁶⁸ The application will be admitted, even if the necessary documents are not submitted with the application. The registrar shall exhort the applicant to supplement the application with docu-ments necessary for the approval of the application.

Preliminary contracts are rare in consumer sales.¹⁶⁹

3.1.2. Time frame

How long do these steps normally take in your country?

It is not possible to estimate the time it takes to find a buyer or seller, however, once an object has been found and the parties have agreed on the price the formalities generally do not take much time. In normal cases where a real estate agent is involved, drawing up the contract and concluding the contract can be done in less than a month. Buyers that finance their purchase with a bank loan have usually concluded negotiations with the bank prior to this stage. Once

¹⁶³ Both when the object of transfer is residential real estate and residential apartments.

¹⁶⁴ The real estate agent can be held liable to one or both of the parties, if she has neglected to perform her du-ties.

¹⁶⁵ The notary cannot be held liable for any defects in the seller's title.

¹⁶⁶ See section 2.1. on tax.

¹⁶⁷ Article 12:1 of the Code.

¹⁶⁸ Article 5:1 of the Code: The written application for registration shall indicate; the registrable object; the re-quest; the name and domicile of the applicant a personal identity number or trade register number; and con-tact information of the applicant or representative. The application shall be signed by the applicant or its rep-resentative.

¹⁶⁹ See 3.2.3 below.

approved the payment of the loan only requires the signatures of the parties and the money is released immediately. The coordination of events (e.g. simultaneous presence of all parties at the notary's office) is the only thing that requires time.

3.2 Real Estate Sales Contract

3.2.1. Form

Is there any form required by law – either for the sales contract or for the transfer of ownership? Must it be done in an oral hearing with both parties present?

The contract of sale must be made in writing, and it shall indicate the intent to convey; as well as specify the real estate conveyed, the seller and buyer, and the price or other consideration paid for the property. As mentioned above the contract has to be signed in the presence of a notary.

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

According to 2:1,3 of the Code, the sale is not binding inter or ultra partes, unless it is concluded according to the formal requirements. However, if the application for registration is approved even though the formal requirements have not been met, the sale is final.¹⁷⁰

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

A real estate agent. Due to specific formal requirements laid down in article 2:1 of the Code, and the similarity of other issues involved in the sale of private homes, most real estate agencies use their own standard contract as a basis. The use of a real estate agent is not mandatory, but in practice only parties that know each other prepare their own document of transfer. Transfers between relatives (i.e. sales, exchanges and gifts) are sometimes prepared by the parties themselves to save money. Contracts between businesses usually involve more complex arrangements and therefore the parties consult legal counsel during negotiations.

3.2.3. Preliminary contract

Is there a preliminary contract?

Yes. Preliminary contracts are mostly used concerning larger projects, such as sales of undeveloped land at the conclusion of preliminary negotiations. They are hardly ever used in consumer sales, since the possibility of otherwise concluding the sale (i.e. transfer possession/payment) and condition the transfer of title on a desired event (e.g. building permit), is preferred. In the latter instance the registrar will leave the application in abeyance and ex officio decide the case, when the condition has lapsed. A preliminary contract requires two trips to the notary's office and consequently payment of the notary fee twice.¹⁷¹

What legal effects does it have?

A preliminary contract (*esisopimus*) is binding upon the parties, provided that the formal requirements in article 2:1 of the Code are met. The notary will send a priority notice to the land register, but no transfer of title occurs and the pre-buyer cannot claim the property in relation to a third party. If the pre-seller sells the property to someone else, the pre-buyer can file suit and claim compensatory damages.¹⁷²

¹⁷⁰ Article 13:1 of the Code.

¹⁷¹ See 4.2.1c below.

¹⁷² Jokela et al., p.55-59.

3.2.4 Typical Real Estate Sales Contract

Please find the attached sample.

3.3 Transfer of Ownership and Payment

3.3.1. Requirements for Transfer of Ownership

What are the requirements for the transfer of ownership?

The parties are free to agree when transfer of ownership takes place. The transfer of title is presumed from the contract, unless the parties have otherwise indicated therein.¹⁷³

If the seller is married and the object of sale includes the residence of the spouses, registration is conditional on the spouse's written consent, even if the seller is the sole owner of the property in question. The registrar checks the marital status of the seller and the permanent address of the spouse, and exhorts the applicant to supplement the application if necessary.

3.3.2. Payment due

When is payment due?

In practice, the date of the transfer of title is explicitly mentioned in contracts prepared by a real estate agent. Usually, the ownership is transferred at the date of sale in exchange for full payment, irrespective of whether possession is transferred at the same time. Another fairly common solution is to condition the transfer of title on payment in full, which is to happen at a set date. In these situations the seller has usually received a down payment at the time of signature and conditions for transfer of title are specifically agreed upon in the contract. In these cases, provisions on sanctions for the delay or lack of payment are also expressly taken into the contract. If the parties have agreed that the transfer of title is conditional or will take place at a certain date in the future, the application will be left in abeyance until the buyer demonstrates that the condition has been met and the transfer of title has taken place.¹⁷⁴

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

Directly among the parties.

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

No, to all of the above.

3.3.3. Ways of the seller to enforce the payment

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

The main obligation of the seller is to transfer the object of sale and any documentation necessary for transfer of ownership on time. The main obligation of the buyer is to pay the purchase price on time. If either party fails to fulfill their obligations under the contract, the other has a right to withhold her own performance, and in specific circumstances, remedies.¹⁷⁵

If specific time and place for payment has not been included in the contract, payment is due upon request by the seller.¹⁷⁶ The first remedy available to the seller in cases of non-payment is, to demand payment with interest on arrears and compensatory damages. Only in specific circumstances, i.e. 1) when such a condition has been taken into the sale's contract; 2) the

¹⁷³ Article 2:1 of the Code; the fact that the parties have signed a contract is indicative of an „intent to convey“.

¹⁷⁴ See below 4.2.c.

¹⁷⁵ Articles 2:30, 2:27 and 2:28 of the Code.

¹⁷⁶ Jokela et al., p. 97.

breach is essential and 3) the buyer refuses to pay, can the seller demand cancellation of the sale.¹⁷⁷ Cancellation is also possible, if the condition was taken into the contract and the buyer after the conclusion of the sale, is declared bankrupt, indigent or it is otherwise evident that she will not pay (*ostajan ennakkoviivästys*).¹⁷⁸

The seller cannot enforce payment through execution, unless he is in possession of a mortgage instrument given as security for payment. This option is hardly ever used, since the seller can condition transfer of title (and possession) on payment in full.

3.3.4. Transfer of possession to the buyer

How may the buyer be sure to get possession when he pays the purchase price?

Sometimes the parties have agreed that the seller retains possession of the real estate for a certain period after the conclusion of the sale and in these instances a provision on the delay on the part of the seller is usually included in the contract. However, if no agreement has been made article 2:13 of the Code governs, under which the emblements of the real estate (*kiinteistön tuotto*) belong to the seller until the conclusion of the sale. During this time the buyer cannot take actions that nullify the seller's right.¹⁷⁹ The seller's right does not, in any case, include taking timber, extracting land resources (in excess of domestic use) or create special rights to the real estate sold. In the case of criminal damage or wrongful use, the buyer has the right to price reduction or if the abuse is essential to cancel the sale and receive compensatory damages.¹⁸⁰ The seller loses the right to the emblements, if transfer of possession is delayed.¹⁸¹

If the seller has retained ownership to the real estate, but has transferred possession to the buyer; the buyer cannot raise liens or create special rights in the real estate without the seller's consent. The buyer is also restrained in its use of the real estate, where the use would amount to taking timber, extracting land resources or otherwise actions that would lead to a decrease in the value of the real estate. The seller, however, does not have a right to use or legally dispose of the property.¹⁸²

3.4 Seller's Title

3.4.1. Title Search: Ascertaining the seller's title

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

The buyer has to obtain extracts from the land register; both the title and mortgage register.¹⁸³

If a real estate agent is involved, the agent is under statutory duty to inform the parties of circumstances relevant to the sale.¹⁸⁴ If a party suffers damage due to incorrect information in

¹⁷⁷ Article 2:28 of the Code. See below case 4.2.c. See also Jokela et. al., p. 104.

¹⁷⁸ Article 2:29 of the Code.

¹⁷⁹ Article 2:13.2 of the Code.

¹⁸⁰ Article 2:23 of the Code. Whether or not a special right created under these circumstances is binding upon the buyer is resolved under the rules in chapters 3 and 13 of the Code.

¹⁸¹ Jokela et. al., p.107.

¹⁸² Jokela et. al., p. 110.

¹⁸³ See 2.5 for substantive effects of registration.

¹⁸⁴ KiintVälL: Act on Brokerage of Real Estate and Rental Apartments (2000/1074); full translation not available. 8 §-Toimeksiantajalle annettavat tiedot;(1) Välitysliikkeen on annettava toimeksiantajalle kaikki ne tiedot, joiden välitysliike tietää tai sen pitäisi tietää vaikuttavan kaupasta tai vuokrasopimuksesta taikka muusta käyttöoikeussopimuksesta päättämiseen. Section 8.1- Informing the client; the agency has a duty to inform the client of all known facts or facts that should have been known to the agency that could influence the conclusion of the contract of sale or lease or other usufruct. (translation K. Weckström)

the land register, the government is under some circumstances liable to cover the damage.¹⁸⁵

In addition it is usually specifically mentioned in the contract that the seller assures that she has not sold or mortgaged the property between the time of issue of the extract and the date of the sale and that no other mortgages or land charges exist.¹⁸⁶ In practice, the date of the extract the buyer has consulted is mentioned in the contract and extracts are usually purchased only a couple of days prior to the sale itself.

3.4.2. Title Search: Absence of Encumbrances

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

The buyer has to obtain extracts from the land register; both the title and mortgage register.¹⁸⁷

If mortgages exist, possession of the mortgage instruments are usually transferred at the time of the sale. The transfer of possession of the mortgage instruments is of legal significance, since whoever possesses the instruments is presumed to be the rightful holder of the instrument. If the seller cannot produce the mortgage instruments the buyer can condition the sale upon the mortgages being lifted. A buyer, who purchases the property regardless, cannot rely on good faith against a third party in possession of the mortgage instrument, but can claim compensation from the seller.¹⁸⁸

3.4.3. Title Insurance or Liability

N/A¹⁸⁹

3.4.4. Leases

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

A registration or lack thereof¹⁹⁰ only protects a buyer acting in good faith. Third party possession of the property known to the buyer, e.g. visible or present at inspection of the property before the sale, is protected under the Land Lease Act (*maanvuokralaki*)¹⁹¹ and the Act on Residential Leases (*huoneenvuokralaki*)¹⁹² An unregistered lease (known to the buyer) or a registered lease that is valid until further notice, can be terminated by giving notice.¹⁹³ A lease for a set time that is known to the buyer, is binding for that time.

9 §-Tiedonantovelvollisuus toimeksiantajan vastapuolelle; (1) Välitysliikkeen on välityskohdetta tarjotessaan annettava toimeksiantajan vastapuolelle kaikki ne tiedot, joiden välitysliike tietää tai sen pitäisi tietää vaikuttavan kaupasta tai vuokrasopimuksesta taikka muusta käyttöoikeussopimuksesta päättämiseen. Section 9.1- Informing the adverse party; the agency, when offering the object for sale, has a duty to inform the adverse party of all known facts or facts that should have been known to the agency that could influence the conclusion of the contract of sale or lease or other usufruct. (translation K. Weckström).

¹⁸⁵ See above section 2.5.

¹⁸⁶ This is of relevance in a later dispute, when determining whether the seller has fulfilled his or her duty to inform and/or there is a defect under article 2:17-19 of the Code.

¹⁸⁷ See 2.5 for substantive effects of registration.

¹⁸⁸ Article 2:19 of the Code.

¹⁸⁹ In theory government liability for the accuracy of information in the land information system could be regarded as one form of ‘insurance’. The transfer tax could then be seen as an “insurance fee”.

¹⁹⁰ See above section 2.5.

¹⁹¹ MVL: Land Lease Act (258/1966).

¹⁹² AHVL: Act on Residential Leases (1995/481). English translation available at www.finlex.fi.

¹⁹³ Supreme court decision (KKO 1985 II 140) holding that a new owner could give notice and end a lease even though the building was present at the time of sale, since the new owner had never accepted the lease and had immediately ordered the building removed.

3.5 Defects and Warranties

3.4.1. Legal rules

The obligations of the parties are determined by their contract and with a few exceptions the general principle of freedom of contract (*sopimusvapaus*) governs.¹⁹⁴ Under article 2:11 of the Code certain conditions of contract are automatically null and void (*pätemättömien ehtojen kielto*). Such are conditions that 1) give someone a preemption right to the property; 2) limit the buyer's right to legally dispose of the property; 3) limit the seller's statutory responsibility for defects; or 4) are otherwise unfair, inappropriate or illegal.¹⁹⁵ In addition, certain mandatory rules govern consumer sales (*kuluttajakauppa*) in order to protect consumers, when the opposing party is a merchant.¹⁹⁶

What are the buyer's legal rights against the seller, intermediaries (estate agents) and/ or notaries, concerning a defect of title, concerning defects affecting the quality of the property, concerning restrictions by zoning law, environmental law and other administrative regulations, which have not been considered in the contract?

Sales for other than residential purposes and sales between consumers fall outside the scope of applicability of the above mentioned rules, however, the statutory duty of real estate agents to provide information protects parties that rely on their services.¹⁹⁷ The licensed agent is under duty to provide certain documents regarding the sale (including extracts from the land register) and is furthermore under duty to research and inform both parties about facts that could influence the sale.¹⁹⁸ The real estate agent/agency is liable for any damage to either party due to dereliction of duty.¹⁹⁹ Liability on the part of the agent, however, does not remove the seller's liability under the Code, and if the seller has willfully withheld or provided false information, the agent has action for recourse.²⁰⁰

A defect in quality (*laatuvirhe*) exists in the property, if 1) the characteristics of the object are

¹⁹⁴ Article 2:9 of the Code.

¹⁹⁵ Article 2:11 of the Code-Invalid Clauses (1) Unless otherwise provided, the following clauses shall not be binding in a sale of real estate: 1) a clause under which the seller or a third party has the right to redeem the real estate at will or under which the seller or a third party has the right of refusal before the real estate is conveyed to a new titleholder; 2) a clause which restricts the right of the buyer to reconvey the real estate, to raise a lien over it, to agree on a lease or on other special right to it or to otherwise dispose of it in a comparable manner; 3) a clause which restricts the liability of the seller or a previous titleholder in cases of contesting of title; and 4) a clause which restricts the personal freedom of the buyer or is otherwise improper or illegal. (2) Without prejudice to paragraph (1) 2) above, a clause under which the buyer cannot without the consent of the seller reconvey undeveloped real estate or sell it below a set price shall be allowed. Such a clause shall not be binding unless it is taken into the deed of sale. The provision in section (2)2) applies to the time of validity of the clause. (3) Section 36 of the Contracts Act applies to the adjustment of an unreasonable clause.

¹⁹⁶ Article 2:10 of the Code-Acquisition of Residential Real Estate from Merchants: If the buyer has acquired real estate to serve as residence or leisure residence for himself or his family, from a merchant who develops or sells real estate professionally: 1) a clause derogating from the provisions in sections 17-34 to the detriment of the buyer shall not be binding; 2) the seller cannot invoke the time limit provided for a notice in section 25(2); 3) the seller shall be liable to compensate for repair costs, other necessary costs and the costs of measures that have become unnecessary due to a breach of contract, even if the matter concerns a hidden defect referred to in section 17(1), or if the seller can prove that his conduct has been careful; 4) the buyer's liability for compensation may be adjusted, if late payment is a result of insolvency arising from illness, unemployment or other special circumstance which is not primarily the fault of the buyer.

¹⁹⁷ KiintVäL: (2000/1074).

¹⁹⁸ KiintVäL: Sections 8-11.

¹⁹⁹ KiintVäL: Section 14. Typically cases where the agent has been held responsible involve failure to inform or do sufficient research or instances where the agent has provided false information.

²⁰⁰ Jokela et al., p. 184-189.

not as agreed; 2) the seller has provided false or misleading information; 3) the seller has withheld information; 4) the seller has not corrected the buyer's misconception; or 5) due to a hidden defect the object is significantly lower in quality than could have been expected.²⁰¹ Whether or not a defect in quality exists, is determined in view of the property as it was when sold in relation to what the buyers could reasonably have expected to obtain for the price in question. As clarified below²⁰² the burden is on the seller to prove that she has fulfilled her duty to inform the buyer. However, the buyer cannot invoke a defect of which she must have known at the conclusion of the sale.²⁰³

The sale has a defect in possession (*vallintavirhe*)²⁰⁴, if 1) the seller has provided false or misleading information about a current plan, building prohibition or transfer restriction; 2) the seller has provided false or misleading information about a permit or an official decision relating to use of adjoining real estate; 3) the seller withheld such information; or 4) the seller failed to correct the buyer's misconception; 5) a necessary permit for a building on, or an activity carried out on the real estate has not been obtained; 6) a share or parcel cannot be formed into new real estate or be used as a building site due to administrative restrictions.²⁰⁵

A defect in title (*oikeudellinen virhe*) exists, when 1) the buyer may lose title in favor of a third party; 2) the seller has provided false or misleading information about the titleholder, a lien, a lease or special right or the ownership of a building, facility or other object; 3) the seller has withheld such information; or 4) the buyer cannot register title due to defective or

²⁰¹ Article 2:17 of the Code- Defect in Quality (1) Real estate shall have a defect in quality if: 1) the characteristics of the real estate are not as agreed; 2) the seller has prior to the conclusion of the sale provided the buyer with false or misleading information on the area of the real estate, the condition or structure of the buildings, or other characteristic of the real estate pertinent to its quality and there is a reason to believe that the information has had an effect on the sale; 3) the seller has prior to the conclusion of the sale failed to provide the buyer with information on a characteristic referred to in subparagraph 2, which typically has an effect on the use or value of similar real estate and of which the seller knew or should have known, and there is reason to believe that the failure has had an effect on the sale; 4) the seller has prior to the conclusion of the sale noticed but failed to rectify the buyer's misconception of a characteristic having an effect on the intended use of the real estate; or 5) due to a hidden defect, the real estate is of significantly lower quality than what can justifiably be expected in view of the price and the other circumstances. (2) In case of a defect in quality the buyer shall have the right to a price reduction or, in case of an essential defect, to cancel the sale. Furthermore, in case of a defect referred to in paragraph 1.1-4 the buyer shall have the right to due compensation.

²⁰² In 3.4.2 and 4.4.1.

²⁰³ Article 2:22.2 of the Code.

²⁰⁴ The English translation available at www.finlex.fi uses the word „possession“ as a translation to *vallinta*. It should be noted that the translation is inexact as the statute refers to a defect in the owner's ability to dispose over, administer or dominate the property in question.

²⁰⁵ Article 2:18 of the Code- Defect in Possession: (1) Real estate shall have a defect in possession if: 1) the seller has prior to the conclusion of the sale provided the buyer with false or misleading information on a current plan, building prohibition, conveyance restriction or other official decision restricting the use or possession of the real estate and there is reason to believe that the information has had an effect on the sale; 2) the seller has prior to the conclusion of the sale provided the buyer with false or misleading information on an official permit or decision relating to the use of adjoining real estate and there is reason to believe that the information has had an effect on the sale; 3) the seller has prior to the conclusion of the sale failed to provide the buyer with information on a decision, or a permit or decision in his knowledge, referred to in subparagraph 1 and 2, respectively, which typically has an effect on the use or value of similar real estate, and there is reason to believe that the failure has had an effect on the sale; 4) the seller has prior to the conclusion of the sale failed to rectify the buyer's misconception of a decision referred to in subparagraphs 1 and 2 or a comparable circumstance, which prevent the buyer from using or possessing the real estate as intended; 5) the necessary permit for a building on the real estate or for the activity carried out on the real estate has not been obtained; or 6) a share or parcel of the real estate cannot due to the restrictions in chapter 4 of the Real Estate Formation Act (554/1995) be formed into a new real estate or, when a share or parcel has been acquired for building purposes, into a new real estate to be used as a building site. (2) In case of a defect in possession the buyer shall have the right to a price reduction or, in case of an essential defect, to cancel the sale. Furthermore, the buyer shall have the right to due compensation.

incomplete title documents.²⁰⁶

If there is a defect in the sale, the buyer can bring suit in District Court against the seller or his predecessor. The buyer has the right to due compensation and price reduction, or in the case of an essential defect, to cancel the sale. However, in the case of a hidden defect the buyer only has a right to price reduction or to cancel the sale.²⁰⁷ The buyer cannot cancel the sale, if she cannot return the real estate to the seller.²⁰⁸

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

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

Since the scope of the seller's statutory duty to inform the buyer is so broad in Finland the principle of *caveat emptor* does not apply. The parties can, however, agree on who is liable for specific flaws in the real estate under 2:9.2 of the Code. The Supreme Court has, however, in a recent decision set a high standard for these clauses.²⁰⁹ A trader cannot escape liability for unspecified defects under a contractual clause.²¹⁰

Two general principles govern the relationship between the parties. The seller, on the one hand, has a broad duty to inform the buyer (*myyjän tiedoantovelvollisuus*), for which she is liable and carries the burden of proof in a subsequent trial.²¹¹ On the other hand, the buyer has a duty to investigate (*ostajan selonottovelvollisuus*), which includes inspecting the object of sale prior to the sale as well as reacting to anything 'suspicious' by demanding further inspection by a professional.²¹² In addition, in order to trigger a remedy, a defect has to be essential (*vaikutuksellinen, merkityksellinen*), in the sense that it would have affected the sale, had it been known to the parties.²¹³

It is therefore, in the agent's, and the parties' interest to include specific provisions in the contract on what information has been shared between the parties, which later serves as a basis for their obligations to each other. All real estate agencies have standard contracts that define

²⁰⁶ Article 2:19 of the Code- Defect in Title (1) Real estate shall have a defect in title if: 1) the buyer may lose title to the real estate in favour of the rightful titleholder or the sale may be voided upon the request of a third party; 2) the seller has prior to the conclusion of the sale provided the buyer with false and misleading information of the registered titleholder, a lien over, lease on or other special right to the real estate in favour of a third party, or the ownership of a building, facility, or other object customarily affixed to the real estate, and there is reason to believe that the information has had an effect on the sale; 3) the seller has prior to the conclusion of the sale failed to provide the buyer with information referred to in subparagraph 2 and there is reason to believe that the failure has had an effect on the sale; or 4) the buyer cannot have his title registered due to the title documents of the seller being defective or incomplete, or due to another irregularity in the acquisition of the seller. (2) The buyer may invoke a defect in title also if a third party claims that he has a right referred to in paragraph (1) and there are likely grounds for the validity of the claim. (3) In case of a defect in title the buyer shall have the right to a price reduction or, in case of an essential defect, to cancel the sale. Furthermore, the buyer shall have the right to due compensation.

²⁰⁷ The seller is liable for hidden defects regardless of negligence. Therefore, it has been considered reasonable to limit the buyer's right to compensation for damages.

²⁰⁸ Article 2:34 of the Code.

²⁰⁹ KKO 2004:78.

²¹⁰ Article 2:9.2 of the Code, KKO 2004:78, paragraph 7.

²¹¹ Article 2:17-19 of the Code.

²¹² Article 2:22.1 of the Code.

²¹³ Jokela et al., p. 123-124.

the state of the object at the time of negotiations and sale as clearly as possible.²¹⁴ If the contract does not include provisions to the contrary, the liability for the real estate and costs pertaining to it, are presumed to have been transferred at the date of contract.²¹⁵ When the object of conveyance includes a building that is not new, an independent inspector's brief on the condition of the building is almost always attached, even when a real estate agent is not involved. Such a brief includes photographs, a description of the building and materials and building-methods used, age and condition of elements of the house, machines and appliances and specific mention and assessment of signs of decay, rot, mildew or moisture damage.

3.4.3. Liability of the Buyer for Debts of the Seller

Is the buyer liable for arrears of the seller? How are these problems treated in typical contractual clauses?

If the contract does not include provisions to the contrary, the liability for the real estate and costs pertaining to it, are presumed to have been transferred at the date of contract. Nonetheless, contracts prepared by real estate agents include specific provisions on the transfer of all costs pertaining to the property.

Please find attached sample.

3.6 Administrative Permits and Restrictions

3.6.1. Standard Requirements

Which permits are required?

No administrative permits are required for the conclusion of an ordinary sale, but on the one hand, the parties can condition the sale on issue of a permit²¹⁶, or on the other hand, the existence of permits is in practice checked prior to the sale to determine the value of the object of sale and to avoid future liability.

If the seller is under legal guardianship the relevant Administrative City Authority will have to consent to the sale. For further details see 4.2.1b below.

When selling unbuilt land, a city or municipality usually conditions the sale on a building-requirement. The buyer agrees to start construction within two years of the transfer, and to include the condition in any transfer of the property within the same time. When the buyer applies for transfer of title, the registrar ex officio enters information in the registrar about the restriction of the owner's right to legally dispose of the property.²¹⁷ However, the transfer of title is approved, instead of left in abeyance. The entry includes information about, who the holder of the right is. If the buyer's have not commenced construction within the agreed time period the municipality has the right to cancel the sale.

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

²¹⁴ In addition to meeting the formal requirements the contracts usually include provisions on documents that have been referred to, a mention of inspections of the property by the buyer, specific mention on date of transfer of title, possession, liability for risk, insurance policy, liability for taxes and other costs and inclusion of sale of movable property or lack thereof.

²¹⁵ Article 2:15 of the Code (public debts and tax) and 2:16 (risk of damage). No liability is automatically transferred for costs pertaining to other property than that conveyed. As a result of activity on the property however, the seller might be liable for environmental hazards.

²¹⁶ Such a condition is only valid, if included in the contract. In case of such an agreement the parties usually also include remedies in case of breach of contract.

²¹⁷ Article 11:5 of the Code.

The real estate agent usually checks building permits, zoning ordinances as well as extracts from the cadastre and land register relating to the property. The search is extended depending on the the real estate in question.

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

The municipality in which the real estate is situated has a statutory pre-emption right in the sale of property more than 5000 square meters.²¹⁸ The right lapses, if the municipality does not inform the registrar of its intention to exercise its pre-emption right within three months of the transfer. In the meanwhile the application is left in abeyance. The buyer can apply to have decided earlier, whether or not the municipality will exercise its right regarding a specific transfer, at the relevant municipal authority. A decision not to exercise the pre-emption right will enable the buyer to have the transfer of title registered without delay.

3.6.2. Requirements for certain types of real estate sales only

Unless the parties include provisions to the contrary, no administrative permits affect the validity of the real estate contract.²¹⁹ The rules regarding a defect in possession described in 3.5. above are, however, available to the buyer, if a restriction of this nature burdens the property.

3.6.3. Control of administrative permits and restrictions

In connection with any sale the seller is under duty to provide information about the property, including governing zoning ordinances, permits and restrictions. An extract from the cadastre (8,40 euros) should always be consulted in order to know the object of sale. If the area is not zoned or built the research prior to the sale obviously has to be more thorough before it is even known whether the buyer will want to buy, not to mention what price should be paid.

3.7 Transfer Costs

3.7.1. Contract and Registration

The estimated expenses for the sale of a real estate of

- a) 100000 EUR
 - a. Drafting and executing the contract
 - i. Real estate agent: 4880 EUR (ordering party)
 - ii. Notary: 70-80 EUR (seller and buyer each pay half)
 - iii. Assessment of the condition of used building: 500-700 EUR (ordering party)
 - iv. Extracts: 50-80 EUR (ordering party)
 - b. Registration (buyer)
 - i. Tax: 4000 EUR, if not exempt.
 - ii. Title registration fee: 65 EUR.
 - iii. Mortgage fees: 40 EUR/application + 10 EUR/each additional mortgage instrument.
 - c. Bank fees (buyer)
 - i. Bank loan 100.000 EUR, interest 20 years/Eurib 12+0,60 % 32.869,16

²¹⁸ Restrictions apply. For further details see 1.6. above.

²¹⁹ See 4.2.1.c below.

EUR

- ii. Fee: 0,2 % of the amount of the loan, minimum 100 EUR
- iii. Mortgage instruments:
 - 1. If old ones exist: no fee
 - 2. If new ones are needed: the bank may require that the bank files the application for registration on behalf of the client
 - a. transfer of title: 210, 23 EUR (inc. tax); or if a company or an estate: 252,28 EUR (inc. tax)
 - b. transfer of title and application to raise a mortgage (5 included): 311,15 EUR (inc. tax); or if a company or an estate: 353,20 EUR (inc. tax).

b) 300000 EUR

- a. Drafting and executing the contract
 - i. Real estate agent: 14640 EUR (ordering party)
 - ii. Notary: 70-80 EUR (seller and buyer each pay half)
 - iii. Assessment of the condition of used building: 500-700 EUR (ordering party)
 - iv. Extracts: 50-80 EUR (ordering party)
- b. Registration (buyer)
 - i. Tax: 12000 EUR, if not exempt.
 - ii. Title registration fee: 65 EUR.
 - iii. Mortgage fees: 40 EUR/application + 10 EUR/each additional mortgage instrument.
- c. Bank fees (buyer)
 - i. Bank loan 300.000 EUR, interest 20 years/Eurib 12+0,60 % 98.608,90 EUR
 - ii. Fee: 0,2 % of the amount of the loan, minimum 100 EUR.
 - iii. Mortgage instruments:
 - 1. If old ones exist: no fee
 - 2. If new ones are needed: The bank may require that the bank files the application for registration on behalf of the client
 - a. Transfer of title: 210, 23 EUR (inc. tax); or if a company or an estate: 252,28 EUR (inc. tax)
 - b. Transfer of title and application to raise a mortgage (5 included): 311,15 EUR (inc. tax); or if a company or an estate: 353,20 EUR (inc. tax).

3.7.2. Transfer Taxes

The tax amounts to 4 % of the purchase price.

3.7.3. Real Estate Agents

Real estate agents are involved in 75-95% of the sales of residential property among private persons. The ordering party pays the agent's fee. In most cases the ordering party is the seller, however, sometimes a buyer pays the real estate agent to find a specific piece of property. It is illegal for the real estate agent to charge more than one fee. For the purposes of this report one of the leading real estate agencies in Finland was contacted. Their fee amounts to 4,88 % (incl. tax) of the purchase price (free from debt) and is only charged, if a sale is completed. The ordering party also pays an estimated 50-80 euros for extracts.

3.8 Buyer's Mortgage

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

The buyer can apply for registration of title and raise a lien as soon as the transfer of title has been registered. In practice, the bank will issue a loan, if the buyer applies for registration of the mortgage instruments in the bank's name. The registration authority will not release the mortgage instruments to the buyer, but can only release it to whoever is entered as the holder of the mortgage instrument, i.e. the bank.

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

4.1 The Conclusion of the Contract

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

The contract is not valid, unless it is signed in the presence of and verified by a notary. This formal requirement applies to both preliminary contracts and contracts. The seller might of course, due to other reasons follow through on the contract, but it is not legally enforceable against a third party, or even against a seller that has changed his mind and transferred the property to someone else.

Real estate contracts are inherently different from other contracts, since a contracting party in most instances can withdraw from the deal after its conclusion. However, according to article 2:8 of the Code, the party liable for the non-conclusion of the sale shall compensate the other party for the reasonable costs incurred for the conclusion of the sale.²²⁰

4.2 Seller's title

4.2.1. Consequences of an invalid Sales Contract

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

a) *because it lacked the required form;*

Since C knows about the possibility of invalidity of the contract between A and B before entering into the contract with B, C's acquisance will not be protected as one made in good faith. Thus, if C were to proceed without further information, she runs the risk of losing the property to A or a possible real owner X, without compensation. However, if the sale between A and B is invalid due to a formal requirement, the post-sale actions of B are relevant. If B has successfully registered the transfer of title, the sale is valid regardless of the contract lacking required form.²²¹ If the transfer has not been registered, C can only demand that B repair the formal flaw in the contract by entering into a formally valid contract with A. The invalidity of the contract between A and B, will prevent C from acquiring legal title to the property in question, since the registrar will ex officio check the compliance of the contract with formal requirements. C will need to provide a copy of the contract between A and B in order to register the transfer of title to herself. As the contract between A and B is invalid, both A and B can, if necessary bring suit in court to have it declared invalid. There is no set time limit for such a suit, provided that the transfer has not been registered.²²²

²²⁰ Article 2:8 of the Code: If the parties have agreed on a sale of real estate, but the agreement has not been concluded in accordance with section 7(2) (formal requirements for pre-contracts), the party liable for the non-conclusion of the sale shall compensate the other party for the reasonable costs incurred by advertising, visiting the real estate and the other activities necessary for the conclusion of the sale. If a down payment has been made, the part exceeding the costs referred to above shall be returned.

²²¹ Article 13:1 of the Code.

²²² Jokela et al., p. 47-49.

b) *because A did not possess legal capacity;*

Lack of legal capacity renders the contract invalid and unenforceable, and is as such an obstacle to registration of title. Again the registrar checks the legal capacity of both parties *ex officio*. Keeping the statutory timelimits regarding the consent of a spouse/partner or shareholder in mind (below), suit can be brought under article 13:2 of the Code regarding a disputed title, regardless of whether the transfer has been registered.²²³

If A is a natural person, flaws in legal capacity are mainly due to legal minority or the lack of consent from A's spouse or partner. If A is under-aged or placed under guardianship his or her legal guardian needs to enter into the contract on behalf of A to make the transfer valid. Legal incompetence is repaired, if the legal guardian consents to the sale, or if the minor reaffirms the sale after obtaining legal competence.²²⁴ Regarding the sale of the real property of a minor or person under court-appointed guardianship, a supervising guardianship authority (*maistraatti*) needs to grant permission for the sale.²²⁵ A sale without the permit is not binding on the minor, unless the guardian authority grants a permit *post facto* on application by the guardian.²²⁶

If A is married or has registered his or her partnership, a sale regarding the real property on which the residence of the spouses or partners is situated, is invalid without the consent of the other spouse²²⁷ or partner.²²⁸ However, the spouse or partner must bring suit within three months from the time when he or she acquired knowledge of the transfer, otherwise a buyer in qualified good faith²²⁹ is protected. If such an acquisition is registered without the consent of the spouse or partner the sale stands, notwithstanding the lack of legal capacity on the part of A.²³⁰

If a spouse or partner retains possession under section 3:1a of the Code of Inheritance or a will²³¹, and thus the right to remain on and administer the real property after the death of the spouse or partner that owned the real property (*vallintarajoitus*), the registrar enters this in-

²²³ Article 13:2 of the Code: The registration of title shall not preclude the consideration of a dispute over title to real estate or the validity of an acquisition in a trial or by official real estate formation procedure, as separately provided.

²²⁴ HolhTL: Guardianship Services Act (1999/442) section 26.

²²⁵ HolhTL: section 34.

²²⁶ HolhTL section 36 (2).

²²⁷ AL: Marriage Act (234/1929) section 38. A spouse shall not convey real property intended for use as the common home of the spouses, unless the other spouse consents to the same in writing. However, the consent of the other spouse shall not be necessary, if the property to be conveyed is mainly intended for some other use and if the home and the property on which it stands cannot be excluded from the conveyance without causing a considerable reduction in the value of the real property. The provisions in this paragraph on real property apply also to a building located on the land of another and to the right to lease of the land. The establishment of a leasehold over the real property or another right of use thereof shall be deemed corresponding to a conveyance. A transaction entered into by one spouse in violation of the provisions in paragraph 1 shall be declared void, if the other spouse brings an action to this effect within three months of becoming aware of the transaction. However, a conveyance of real property shall gain validity, if the title of the acquirer has been registered, and the acquirer did not know nor should have known at the material time that the conveyer was not entitled to convey the property in question. The provisions in this paragraph on the registration of title apply, in so far as appropriate, to the effect of the registration of a leasehold or of another right of use of the real property.

²²⁸ ParisuhdeL: Act on registered Partnerships (950/2001) section 8, wherein is stated that the rules regarding married couples applies to the relationship between registered partners as well.

²²⁹ The buyer did not nor should have known.

²³⁰ Jokela et al., p. 50 and 277-281.

²³¹ A specific type of will that could be translated as „testament granting a right of usufruct“(*hallintaoikeustestamentti*).

formation ex officio in the land register, when the transfer of title from the spouse to his/her heirs takes place.²³² A separate consent of the spouse/partner is no longer relevant in this case, but the right of the widow/er is binding on any successor.²³³ If A is an estate of a deceased person, the manager of the estate is not allowed to sell real property without the written consent of all co-owners.²³⁴ A suit contesting a transaction has to be brought within six months of notice, but within a year from registration of title or mortgage on the property.

If A is a business, the lack of legal capacity to enter into the contract renders the contract invalid and unenforceable against A. The Finnish Trade Register contains information about all registered businesses in Finland and its legal representatives. The register can be searched online by the name or registration number of the business.²³⁵ Limited-liability companies are obligated under statute to also provide the registrar with a copy of its byelaws (*yhtiöjärjestys*), where the internal decisionmaking procedure and the legal competence of the business' bodies and legal representatives is outlined.²³⁶ The title registrar has access to all the information registered in the trade register and the legal competence of the person acting on behalf of the business is checked ex officio. If the information registered does not match the contract, the applicant is exhorted to supplement its application with proof of legal competence on pain of refusal of the application. A contract signed by a person lacking legal competence to act for a business is valid, if the appropriate body or legal representative confirms the transfer.²³⁷

c) *because an administrative permit required for the contract has never been applied for.*

If the contracting parties have agreed on a conditional sale; i.e. either to void (*purkava ehto*) the contract on certain conditions or to delay transfer of title pending a desired process or event (*lykkäävä ehto*), the application for transfer will by court decision be left in abeyance (*jättää lepäämään*) until the condition has been met and the transfer is complete.²³⁸ If a shorter time has not been agreed upon in the contract, the condition shall be valid for five years and action shall be brought within three months from the end of the relevant period.²³⁹ When three months have passed from the end of the time-period in question and if no one has contested the sale, the registrar will approve the application ex officio. Other conditions of sale than those taken into a contract that meets all formal requirements are invalid. If A and B have conditioned the sale on the application of an administrative permit and have included this condition in the contract, the contract itself might not be invalid depending on the time passed and set forth in the contract. If, however, such a condition was not taken into the con-

²³² See also Supreme court decision KKO 1992:56 on the duration of requirement of consent in cases of divorce/death)

²³³ Article 12:5 of the Code.

²³⁴ PK: Code of inheritance (1965/40); sections 18:2 ja 19:14: Real property and a leasehold over the land of another which, together with the right to administer the land, can be transferred to a third party without the consent of the landowner shall not be transferred or mortgaged by the estate administrator unless all shareholder consent to this in a document signed by two witnesses or, if the consent cannot be obtained, the courts permits the measure on petition.

If an estate administrator has undertaken a measure referred to in paragraph 1 without the consent of the shareholders or the permission of the court, the measure shall be invalid if contested by a shareholder. An action of this effect shall be brought within six months of the date when the shareholder was notified of the measure, and at the latest within a year of the registration of title or mortgage to the property.

²³⁵ Information available at the official web-site of the Finnish Patent and Trade Registry www.prh.fi. The site and additional information is also available in english at www.ytj.fi/english

²³⁶ KaupRekL: Trade Register Act (1979/129); 3 §: OYL: Finnish Companies Act (734/1978). 9§

²³⁷ Jokela et al., p. 272-274.

²³⁸ Article 12:2 of the Code.

²³⁹ Article 2:2 of the Code.

tract, the permit is of no significance in relation to the validity of the contract.

4.2.2. The Seller is not the owner

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

The rules on contesting title and the consequences of a collision between two claims to real property can be found in Chapter 3 of the Code. The general rule is that the rightful titleholder may demand that the acquisition of the buyer shall be voided on the basis of a defect encumbering the acquisition of the seller, and that the real estate shall be returned to the rightful titleholder.²⁴⁰ However, a buyer in good faith is protected, if the title was registered in the seller's name at the time of transfer and the buyer did not know, nor should have known about the defect in the seller's title.²⁴¹ Then again, if the rightful titleholder has been coerced into the transfer or a forged instrument has been used in the latter transfer, or if the title has been registered by mistake, the rightful titleholder receives protection against a third party in good faith.²⁴² Likewise, an acquisition not by conveyance, but e.g. by inheritance, will or division of matrimonial assets, does not receive good faith-protection against the rightful owner.²⁴³ Finally, as an exception to all of the above, a person who has registered title to real estate and thereafter possessed the real estate for ten years may keep the real estate, regardless of a defect in title, if she at the time of acquisition was in qualified good faith. The possession by a predecessor in good faith counts towards the ten years of a subsequent owner.²⁴⁴ This protection of possession (*nautintasuoja*) is the only remedy available to a buyer, when the seller has not registered title to the real estate.

A buyer who has lost real estate to the rightful titleholder has the right to bring a claim against the seller and instead of the seller, against a previous titleholder within whose acquisition the defect lies.²⁴⁵ A buyer, who has acted in good faith, has the right to keep any profit pertaining from his use of the real estate and the rightful titleholder shall compensate the buyer by a reasonable amount for the necessary expenses incurred by the maintenance of the real estate. If the buyer at the time of acquisition was in qualified good faith, she has the right to compensation for those useful expenses that have added to the value of the real estate.²⁴⁶ However, if

²⁴⁰ Article 3:1,1 of the Code.

²⁴¹ Articles 3:1,2 and 13:4,1 of the Code: An acquisition of real estate based on a conveyance shall be permanent even if the conveyor was not the rightful titleholder of the real estate due to a defect in his acquisition or that of a previous titleholder, if the title of the conveyor was registered at the time of acquisition and the conveyee, at that time, did not know nor should have known that he[the conveyor] was not the rightful titleholder.

²⁴² See section 2.5. Article 13:5 of the Code:

²⁴³ Article 13:9 of the Code: (1) A person who has acquired real estate by inheritance, will, distribution of matrimonial assets or otherwise not by conveyance shall not enjoy the protection of good faith provided in sections 3 and 4 against an earlier conveyee, holder of a special right or the rightful titleholder.

²⁴⁴ Article 13:10 of the Code.

²⁴⁵ Articles 2:19 (against the seller), and 3:2 of the Code.

²⁴⁶ Articles 3:3, 1 and 3:4, 1 of the Code.

the buyer has neglected to take proper care of the real estate and the value has decreased as a result of the buyer's activity, she is liable to the rightful titleholder for the amount of the decrease in value.²⁴⁷ Furthermore, the buyer has a right to, within a reasonable time, remove, the buildings and facilities that she has built, unless they are necessary for the regular use of the property or their removal would cause significant damage to the real estate.²⁴⁸ An action shall be brought in District court within two years from the return of the real estate to the rightful titleholder.²⁴⁹ However, a claim for set-off (*kuittaus*) in proceedings initiated by the opposing party is not precluded even after said timelimit.

The seller is liable to the buyer for all defects on the seller's part (*kaupanvastuu*), which includes the return of the payment (*kauppahinnan palautus*) and compensatory damages (*vahingonkorvaus*).²⁵⁰ As already mentioned, the buyer has the right to bring suit against the seller or against the seller's predecessor within whose acquisition the defect in title is found. If the seller is held liable to the buyer for a defect in title, she has the same right to bring suit against the predecessor, within whose acquisition the defect lies.²⁵¹

The same rules apply to ownership (*omistusoikeus*) as well as registered special rights (*erityiset oikeudet*), which are considered equal in relation to each other.²⁵² The starting point in a collision is that the earlier registered right takes precedence over the later (*aikaprioriteettisääntö*).²⁵³ However, a later right can under certain circumstances be given preference, if the transferee was acting in good faith (*vilpittömän mielen suoja*).²⁵⁴

4.2.3. Execution against the Seller

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

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

Yes. The creditor's distraint on the property is valid, if she is a holder of a mortgage instrument on the property and it has been pledged as security for a loan. See above 4.2.2.

How may the buyer be protected (e.g. in drafting the sales contract)?

The buyer can only rely on qualified good faith, if an extract from the mortgage register was consulted at the time of the sale and it revealed no information about existing mortgages. If, there were existing mortgages the mortgage instruments are usually handed over at the conclusion of the sale in return for payment of the purchase price. In addition, it is customary to include a declaratory clause in the sales contract, where the seller states that there are no other encumbrances on the real property.

4.3 Payment

4.3.1 Delay in payment

If the buyer pays late, what remedies are available to the seller? May the seller rescind the contract? Does the buyer have to pay a (statutory) penalty or is he liable for damages?

²⁴⁷ Article 3:3,2 of the Code.

²⁴⁸ Article 3:4, 2 of the Code.

²⁴⁹ Article 3:5 of the Code.

²⁵⁰ Jokela et al., p. 194.

²⁵¹ Article 3:2 of the Code.

²⁵² Jokela et al., p. 192.

²⁵³ Article 3:6 of the Code.

²⁵⁴ Article 13:3 of the Code. Jokela et al., p. 192. See above 2.5.

If specific time and place for payment has not been included in the contract, payment is due upon request by the seller.²⁵⁵ The first remedy available to the seller in cases of non-payment is, to demand payment with interest on arrears and compensatory damages. Only in specific circumstances, i.e. when such a condition has been taken into the sale's contract, the breach is essential and the buyer refuses to pay, can the seller demand cancellation of the sale.²⁵⁶ Cancellation is also possible, if the condition was taken into the contract and the buyer, after the conclusion of the sale, is declared bankrupt, indigent or it is otherwise evident that she will not pay (*ostajan ennakkoviivästys*).²⁵⁷

4.4 Defects and Warranties

4.4.1. Misrepresentation

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

If the pipe burst because it was not properly installed (assuming that the seller did not know this), it could be deemed a hidden defect, for which the seller answers up to 5 years after the sale.²⁵⁸ The buyer has the right to a price reduction or, if the defect is essential, to cancel the sale. The buyer cannot claim compensatory damages. However, the standard of comparison, when evaluating construction flaws, is the normal building standard at the time of installation and the ordinary life-time of material used is also factored into the equation. Thus, the older the house, the less likely that the construction flaw itself will be deemed the only factor resulting in the damage. The older the house the less is expected of its condition. The standard of proof is fairly high and the burden²⁵⁹ is on the buyer.

However, if the buyer can show that the seller knew²⁶⁰ of a defect in the pipe the burden of proof shifts to the seller, i.e. to prove that she has not failed to inform the buyer.²⁶¹ In this case, the buyer's duty to inspect the property, and possibility to notice the defect is of relevance when determining the liability for the defect. If the seller has withheld information that would have affected the sale the seller can be held liable for the defect and the buyer has the right to a price reduction and due compensation.

In Spring the basement is flooded. Neighbours tell the buyer that the seller complained to them that the flooding happened every other spring.

The seller has a widely defined duty to inform the buyer of anything relevant to the sale and value of the property, before the conclusion of the sale. The burden of proof is on the seller to prove that she has fulfilled her duty. If the seller has withheld relevant information, the buyer can bring suit against the seller for a defect in quality and receive a price reduction, or in the case of an essential defect, have the sale cancelled.²⁶² The buyer also has the right to due compensation. Here again, however, any visible signs on the property at the time of inspec-

²⁵⁵ Jokela et al., p. 97.

²⁵⁶ Article 2:28 of the Code. See below case 4.2.c. See also Maakaari, p. 104.

²⁵⁷ Article 2:29 of the Code.

²⁵⁸ Article 2:17,5 of the Code.

²⁵⁹ To prove that there was a defect. In the case of hidden defects the seller answers, regardless of negligence on her part.

²⁶⁰ Or should have known.

²⁶¹ Article 2:17.1-4 of the Code.

²⁶² Article 2:17.3 of the Code.

tion are of relevance in determining what the buyers could expect from the property. If, e.g. the basement floor was damp at the time of inspection this might have triggered the buyer's duty to investigate the matter. So could the geographical placement of the basement in relation to the source of the flooding in areas where flooding is common. However, the neighbor will be a good witness on the buyer's side.

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.

The seller is liable to the buyer for a defect in possession²⁶³, which includes necessary permits for buildings existing on the property. The buyer has a right to a reduction of the price and damages. If the defect is essential the buyer has the right to cancel the sale. The seller can in turn bring suit against his predecessor.

4.4.2. Destruction of the house

After the parties have signed the sales contract the house burns down. What are the consequences for the contract? May the buyer rescind the contract or does he have to pay the purchase price? May the seller rescind the contract? Is he liable for damages?

The liability for risk (*vaaranvastuu*) is on the buyer after the date of contract, regardless of whether possession of the property has been transferred, unless the parties have agreed otherwise.²⁶⁴ However, standard contracts usually entail a provision regarding the date when the liability for damage to the property is transferred. When the damage was done independent of the actions of the parties, whoever bears the risk has no grounds to cancel the sale or to claim a price reduction.²⁶⁵ However, if the parties have agreed that the seller maintains possession of the property, the seller is under duty to take proper care of the estate until possession is transferred. If the property has been damaged due to neglect or negligence on the seller's part, the buyer has the right to a price reduction or, in cases of essential damage to the property, to cancel the sale.²⁶⁶

Is there a voluntary or mandatory insurance for these cases?

There are voluntary insurance policies that cover damage in case of e.g. fire. By statute, all new owners²⁶⁷ are protected under the seller's old insurance policy for fourteen days in the event that the new owner has not insured the property.²⁶⁸

²⁶³ Article 2:18,5 of the Code.

²⁶⁴ Article 2:16 of the Code.

²⁶⁵ Jokela et al., p. 117-118.

²⁶⁶ Article 2:23 of the Code.

²⁶⁷ By way of sale, gift, exchange, division of an estate, compulsory auction.

²⁶⁸ VakSopL: Insurance Contracts Act (1994/543); 63 § *Omistajan vaihtuminen; Jos vakuutus sopimuksen mukaan taikka vakuutuksenottajan suorittaman irtisanomisen johdosta päättyy vakuutetun omaisuuden siirtyessä oikeustoimen johdosta uudelle omistajalle, uudella omistajalla on kuitenkin oikeus korvaukseen vakuutustapahtumasta, joka sattuu 14 päivän kuluessa omistusoikeuden siirtymisestä, jollei hän ole itse ottanut omaisuudelle vakuutusta.* Section 63- Transfer of ownership; If the insurance policy expires due to end of term of contract or because notice is given, when the insured property is by legal act transferred to a new owner, the new owner is entitled to compensation for an event insured, that occurs within 14 days of transfer of ownership, if she has not insured the property. (translation K. Weckström)

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

5.1 Statutory Basis

5.1.1. National Law

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

When a house is sold together with land or a land lease, the 1997 Code applies to the transaction. As pointed out in **1.4** above, there are few cases where buildings are owned or sold without even a lease to the land.

On the other hand, most new-apartment sales consist of sales of housing-company shares. The first statute to regulate these transfers is the Housing Transactions Act²⁶⁹ passed in 1994; it entered into force on September 1, 1995. It was already amended in 1997 with more changes forthcoming²⁷⁰ in 2005. Like most decisions taken in Parliament, the Act and its later updating are based on Government proposals. These preparatory documents supply most of the detailed information about the regulation dealt with in this Part 5.

5.1.2. Influences of EU law

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

EU law has not yet influenced the regulation of new-apartment sales.

5.2 Procedure in general

5.2.1. Single houses

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

Is the contract governed by any special regulation?

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

Are there statutory warranties for material defects?

²⁶⁹ (843/1994) (*asuntokauppalaki*). 'Act' in Part 5 refers to the Housing Transaction Act. (Unofficial translation at: <http://www.finlex.fi/fi/laki/kaannokset/1994/en19940843.pdf>)

²⁷⁰ A committee report on reforming the Housing Transactions Act was completed in 2003 (hereafter '2003 Committee').

Formalities and payment arrangements in transactions including land were described in 3.2–3 above.

There are some differences between the provisions on defects in the Code and those in the Housing Transactions Act, beginning from the highest categorisation of defects in the Code, where material defects are distinguished from legal ones, and the latter are separated into ‘defects in possession’ and ‘defects in title’ corresponding to a distinction between authority decision and subjective rights. The subtleties were described in 3.5.1 above.

5.2.2. Apartments in a Housing Company (‘Condominiums’)

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

New apartments in a housing company are typically sold during the construction stage.²⁷¹ In one common arrangement, the construction company sets up a housing company, with which it enters into a construction contract. In fact, because the construction company administers the housing company and owns the entire capital stock, it makes the construction contract with itself. Alternatively, the housing company may be founded by another developer than the construction company, such as a municipality, a non-profit organisation or another firm. In any case, the housing company pays the construction company by e.g. taking a bank loan, and then repays the bank with payments from homebuyers, who purchase the company’s shares.²⁷² The shares are paid to the housing company as the construction of the building progresses (more on this in 5.4.1 and 5.4.4 below). Usually, the founding shareholder of the housing company retains ownership to the shares until their price is fully paid, thus maintaining authority over the company until the end of the construction stage. When the building is completed, the administration is transferred to the share buyers.

The term ‘founding shareholder’ in the description above refers to any legal or natural person who subscribes for the company’s shares before the shares are offered to consumers.²⁷³ This person and the housing company (on paper, as it were) and the lender bank co-operate in a contractual arrangement known as the ‘RS-system.’ The RS-system was created in 1972 through a bank-sector association called *rahallaitosten neuvottelukunta*, a body established in 1948, which during the following decades collectively decided on e.g. interest on deposits and banking-service fees. (The letter *R* in ‘RS-system’ comes from the name *rahallaitosten neuvottelukunta*, ‘the financial institutions’ consultation board,’ and the letter *S* comes from the word *suosittelema*, ‘recommended by.’) Some light on the origin of the RS-system is shed in the Government proposal for the Housing Transactions Act, which mentions that, in 1972, a government committee had proposed a guarantee or insurance to protect buyers against abuses during the construction stage: ‘The committee’s work did not lead to legislative ac-

²⁷¹ A general description of the practice summarised in this paragraph can be found in Government proposal 14/1994 General grounds 1.2.

²⁷² This arrangement was described in the case Supreme Administrative Court 2002:57.

²⁷³ According to the Act, a founding shareholder is defined as follows: ‘a person, corporation or foundation which subscribes to or otherwise owns a housing share during the construction stage; a party who has assigned his title to the share before the share is placed on the market for purchase by consumers shall not, however, be considered a founding shareholder, unless probable cause is shown that the assignee is acting as the assignor’s agent; nor shall a consumer who acquired the title to a share by assignment before the construction stage ended be considered a founding shareholder, unless probable cause is shown that the person in question is acting as the assignor’s agent[.]’ In Act 1:2.

tion, but once its proposal was completed the banks agreed on developing the so-called RS-system.²⁷⁴

At the core of the RS-system are the so-called ‘safekeeping documents,’ which the founding shareholder must deposit in the (what is called hereinafter) ‘deposit bank,’ prior to first offering the shares for sale²⁷⁵. Today, the required safekeeping documents are prescribed by Decree²⁷⁶ and include, among others: up-to-date information about the housing company (the articles of association, Trade-Register excerpt, evidence that minimum share capital has been paid); Land-Register and Cadastre excerpts; building permit, standard technical documents (such as façade and floor plans) and building-work description; as well as the housing company’s financing plan²⁷⁷ which shows, among other things, the purchase or leasing cost of the land, the company’s equity and debts, an estimate of building costs, mortgages raised on the real estate (or on buildings and lease) and their holders, information on loans taken out or planned to be taken out by the company (their amounts, conditions and securities), insurances, and budgetary estimate for the financial period immediately following the construction stage. By looking over the safekeeping documents and especially the financing plan, a potential homebuyer can calculate the viability of her investment, including the likely level of the company’s maintenance charge.

The second core part of the RS-system concerns securities to be put up by the founding shareholder, as explained in 5.4.2 and 5.6 below. The original documents showing that the required securities have been put up must also be included among the safekeeping documents.²⁷⁸

The safekeeping documents become part of individual agreements through references in the contracts of sale.²⁷⁹

The Housing Transactions Act codified the RS-system in its Chapter 2, adding several changes for the protection of the buyer: the security requirements were revised (see 5.4.2 and, as an entirely new item, see 5.6 below), and it was provided that the share buyer’s meeting – which must be convened when homebuyers own at least twenty-five percent of the shares – may elect not only a construction observer but also an auditor²⁸⁰. Chapter 2 is mandatory in favour of both a consumer-buyer and the housing company.²⁸¹ In particular, any agreement about loans, the company’s assets as security, or other obligations contrary to the financing plan is ineffective against the company,²⁸² as a contractual partner should have known about the contents of the plan.²⁸³ The deposit bank and the housing company must supply information to anyone who needs it to fulfil the duty to investigate.²⁸⁴

The rest of the Act regulates, among other things, defects and remedies as described in

²⁷⁴ Government proposal 14/1994 General grounds 4.1.

²⁷⁵ Act 2:4 (2). The founding shareholder may not receive any earlier reservations, which the buyer could not cancel without cost. Act 2:1 (1). The producers of new apartments typically market apartments in advance, in order to discover whether there is sufficient demand to justify the project. Any advance reservations received at this stage must be revocable without cost.

²⁷⁶ *Asuntokauppa-asetus* (854/1995) 2.

²⁷⁷ *Asuntokauppa-asetus* 3.

²⁷⁸ *Asuntokauppa-asetus* 2 (1) (8) and (2).

²⁷⁹ Government proposal 14/1994 General grounds 1.2.

²⁸⁰ Both persons are to be paid for by the housing company. For details, see Act 2:20–2.

²⁸¹ Any contract term restricting the rights of *the share buyer or the housing company* under this chapter shall be null and void. Act 2:2 (emphasis supplied).

²⁸² See Act 2:8.

²⁸³ See Act 2:10.

²⁸⁴ Act 2:5.

5.5.2–3 below. These provisions were adapted from those in the dispositive 1987 Sale of Goods Act²⁸⁵ which would otherwise apply to these transactions. However, the provisions at hand are mandatory in favour of a consumer-buyer.²⁸⁶

5.2.2. Renovation

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

When apartments are built within an existing housing company, the company must increase its share capital and amend its articles of association.²⁸⁷

Chapter 2 of the Act applies as usual, if the construction company carries out the project by acquiring all or a substantial part of the housing company's shares.²⁸⁸ By contrast, in the most typical project of constructing apartments within an existing building, an attic in an old multi-storey building has been converted into residential use.²⁸⁹ In these cases, the housing company offers the shares to be subscribed by a construction company, which builds the new apartments, and also sells them during the construction stage. Alternatively, the housing company may both develop and sell the apartments itself. In either situation, the construction company has at no point authority over the housing company during the construction stage. For the last-mentioned reason, a recent government committee that recommends extending Chapter 2 to apply to these cases as well also recommends excepting provisions on the financing plan, the share buyer's meeting and the election of an auditor and construction observer. Likewise, the committee does not propose security against the builder's insolvency (see 5.6 below) when the housing company develops and sells the apartments, on the ground that housing companies cannot cease their operations like ordinary companies do, and their bankruptcies are also exceptional²⁹⁰.

The provisions on defects in new apartments apply as normal to renovated apartments.

5.3 Conclusion of the Contract

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

A contract of sale must be made in writing, if it is concluded during the construction stage.²⁹¹ If this formality is disregarded, the contract is not binding on the buyer²⁹² (rather than being null and void)²⁹³. The aforementioned committee also recommends that the Act shall lay

²⁸⁵ (355/1987) (note 16 above).

²⁸⁶ Any contract clause derogating from the provisions of this chapter to the detriment of the consumer shall be null and void, unless otherwise provided. Act 4:2.

²⁸⁷ Kasso, note 65 above, 314.

²⁸⁸ Government proposal 14/1994 Detailed grounds Chapter 2.

²⁸⁹ The information in the rest of the paragraph in the text is mainly based on 2003 Committee, note _ above, 11–2.

²⁹⁰ Thus id., 12.

²⁹¹ Act 2:11 (1).

²⁹² Act 2:11 (1).

²⁹³ Government proposal 14/1994 Detailed grounds 2:11.

down minimum contents of the contract, including the object (information about the housing company, shares and apartment), the parties, the price (the total transaction price or, if different, the transaction price plus the part of the company's debt that burdens the shares sold) and terms of payment, securities, and selected statutory rights of the buyer.²⁹⁴ No specific form or minimum content is required of contracts concluded after the construction stage.²⁹⁵

Is there any preliminary contract?

A preliminary contract is typically used when a sale is made conditional on a suspected defect or a future decision by, say, the company board.²⁹⁶ For example, when the housing company wants to find a subscriber prior to increasing its share capital, it may enter into a preliminary contract about a future subscription.²⁹⁷ As a rule, a preliminary contract is mutually binding, but it can be made binding on one party only (so that, for instance, the seller must sell, if the buyer wants to buy after having secured financing – creating an option to buy). If the terms of the upcoming agreement are expressed in sufficient detail, the precontract obliges the parties to conclude the contract and might, in principle, be enforced in court. Normally, however, it is imprudent to force a non-cooperating party into a deal and, thus, as an alternative the non-breaching party may claim compensation for sale expenses and lost profit. Uncertainties about actual damages are usually removed by clauses that anticipate a breach: a down payment or liquidated damages.

Starting from the 1995 Act, the maximum that the buyer may lose as a down payment has been regulated at four percent of the transaction price.²⁹⁸ While the actual down payment may be larger than this, the buyer has the right to recover the excess, if the contract is not concluded²⁹⁹. A prohibition against accepting more than one down payment at a time applies to both the seller³⁰⁰ and the estate agent³⁰¹, prompting one commentator to note that, in strong demand conditions, it may be practical to refrain from using a down payment altogether³⁰².

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

No.

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

The Act has a provision on the buyer's '*breach* of contract by withdrawing from the transac-

²⁹⁴ Forthcoming Act 2:11a.

²⁹⁵ 2003 Committee, note _ above, Detailed grounds 2:11a.

²⁹⁶ The information in this paragraph is based mainly on Kasso, note 64 above, 299–305 and 340–3.

²⁹⁷ Kasso, note 65 above, 314.

²⁹⁸ *Asuntokauppa-asetus* (854/1995) 1.

²⁹⁹ For details, see Act 3:3 (2 and 3).

³⁰⁰ Act 3:5.

³⁰¹ *Laki kiinteistöjen ja vuokrahuoneistojen välityksestä* (1074/2000) 16 (1).

³⁰² Kasso, note 65 above, 305.

tion before possession.’³⁰³ However, according to the Government proposal, this is ‘[t]he buyer’s *right*,’ which ‘is not ... tied to any particular reasons, nor does the buyer have to justify the withdrawal in any way.’³⁰⁴ Under the Act, the seller’s compensation includes: costs of resale, special expenses incurred that are not likely to bring any benefit (e.g. changes made to the apartment according to the buyer’s wishes, except insofar as they may reasonably be expected to have increased selling value)³⁰⁵ and reasonable compensation for other loss (such as price differential between the old and the new agreement)^{306,307} The contract may determine the seller’s compensation schematically³⁰⁸, but the compensation must be reasonable³⁰⁹.

5.4 Payment

5.4.1. and 5.4.4. Payment date and Building

When is the payment due under usual contractual arrangements?

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

Unless otherwise agreed, the transaction price must be paid on the date of the transfer of possession.³¹⁰ In 1994, the Government proposal described that, in practice, the entire transaction price was ‘as a rule’ paid in instalments prior to the transfer.³¹¹ To protect the buyer against the constructor’s insolvency, the ensuing Act specified that advance instalments may not be so large as to be – clearly or continuously³¹² – disproportionate to the value of the seller’s performance³¹³. Further, at least ten percent of the price must not be due until possession is transferred.³¹⁴

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

While payment is in other respects made on the housing company’s account,³¹⁵ no less than

³⁰³ Act 4:32 (highlight added).

³⁰⁴ Government proposal 14/1994 Detailed grounds 4:32 (emphasis added).

³⁰⁵ Government proposal 14/1994 Detailed grounds 4:35.

³⁰⁶ Government proposal 14/1994 Detailed grounds 4:35.

³⁰⁷ Act 4:35 (1). Act 4:35 (2) includes a force majeure provision.

³⁰⁸ as a specific proportion of the transaction price or on the basis of some other standard criterion. In Act 4:35 (3).

³⁰⁹ taking into consideration normal losses and the statutory provision under discussion. See Act 4:35 (3). According to Government proposal 14/1994 Detailed grounds 4:35, this possibility reduces evidence costs and clarifies circumstances where compensation is due.

³¹⁰ Act 4:29 (1).

³¹¹ Government proposal 14/1994 Detailed grounds 4:29.

³¹² According to Government proposal 14/1994 Detailed grounds 4:29.

³¹³ Act 4:29 (2). This proportionality was deemed important from the buyers’ perspective because, if the founding shareholder has reserved title and becomes insolvent, the buyer holds a lien on the shares as security for the repayment of the advance instalments. Government proposal 14/1994 Detailed grounds 4:29.

³¹⁴ Act 4:29 (3).

³¹⁵ The founding shareholder must open a separate account for each housing company in the deposit bank. Act 2:12 (1).

two percent of the transaction price must be paid on a seller-designated escrow account, from which it may be withdrawn automatically one month after the transfer of possession, unless the buyer notifies the bank (orally or in writing)³¹⁶ and prevents releasing a certain amount as described in 5.5.3(i) below.³¹⁷ This two-percent arrangement was designed to strengthen the seller's incentive to render the apartment swiftly into conformity with the contract, for instance in cases where some finishing should be done after the transfer of possession.³¹⁸

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

5.4.2. Securities

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

Already in the pre-1995 RS-system, the founding shareholder had to put up security for the benefit of an individual share buyer, corresponding to at least ten percent of the total prices of shares sold. The Act altered the minimum security by adding a second standard, according to which the security must be at least five percent of the price of the construction contract already at the beginning of the construction stage.³¹⁹ To enable the deposit bank to control this initial amount, the construction contract was included among the safekeeping documents (thus, at least the price term of the construction contract must be in writing). After the release of the construction-stage security, the founding shareholder must put up security corresponding to two percent of the total prices of shares sold.³²⁰

The Act also laid down the rank of beneficiaries. The above securities – which can be in the form of a bank deposit, a bank guarantee or appropriate insurance³²¹ – must be used to compensate, primarily, losses to the housing company and only secondarily losses to the share buyers (in proportion to the defects found, if the share buyers do not agree otherwise).³²² This ranking was justified as follows: ‘Normally, it is in the interest of all share buyers that construction will be carried out as far as possible, if necessary by means of securities. In this way, the value of shares for all buyers will be higher than it would be if construction had to be discontinued because some buyers want to pull out from the deal and use the securities to cover their own damages claims.’³²³

Both securities are in force until released³²⁴ with the written consent of the company board

³¹⁶ Government proposal 14/1994 Detailed grounds 4:29.

³¹⁷ Act 4:29 (3).

³¹⁸ Government proposal 14/1994 Detailed grounds 4:29.

³¹⁹ Act 2:17 (2).

³²⁰ Act 2:17 (3). In the RS-system, after completing the building, the construction company had to put up security corresponding to two percent of building costs. Government proposal 14/1994 General grounds 1.2.

³²¹ Act 2:17 (1). The form of these securities was regulated in the Act, in order to make the securities easily usable by the housing company and the share buyers. Government proposal 14/1994 Detailed grounds 2:17.

³²² For details, see Act 2:17 (4).

³²³ Government proposal 14/1994 Detailed grounds 2:17.

³²⁴ Act 2:17 (2 and 3). According to the Government proposal, a clause that would terminate the security if no demands are made by a set date is not acceptable. In addition, a clause where the transfer of ownership or possession would be made conditional on the release of the security should, according to the same source, be considered an unreasonable term under the unconscionability provision of the Contracts Act. Government

and the share buyers³²⁵. If consent is withheld without grounds³²⁶, a court may, on application, permit releasing the security in whole or in part.³²⁷

5.4.3. Acquisition of Ownership

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

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

During the construction stage, share certificates³²⁸ remain in the deposit bank. Instead of transfers of possession, sales or pledges are notified to the bank. In the pre-1995 RS-system, the buyer needed to notify her purchase,³²⁹ but today, under Chapter 2, the founding shareholder must notify sales and pledges without delay.³³⁰ Further, she may neither pledge a share that has been sold, nor sell a share that she has pledged – any contrary agreement being ineffective against the buyer, unless the buyer has given her written consent that specifies the object claim³³¹. The bank will hand over the share certificates to the buyer when the buyer has fulfilled her obligations (or earlier with the seller's consent), but if the share has been pledged it is given to the (highest ranking) pledgee.³³²

If the transfer is deferred because of third-party rights, the provision on late performance should apply³³³ (see 5.5.2 below). After the transfer, actionable 'legal irregularity' (*oikeudellinen virhe*, translated as 'defect in title' under the 1997 Code) may still exist if the share is subject to third-party rights not provided for in the contract (such as a lease: the contract may not provide for third-party ownership³³⁴).³³⁵ Generally, the RS-system is said to protect the

proposal 14/1994 Detailed grounds 2:18.

³²⁵ and, in the case of the construction-stage security, the keeper of documents must be notified that the building inspector has approved the building for use. Act 2:18 (1). For further details, see Act 2:18 (1 and 2).

³²⁶ or if it cannot be obtained without undue inconvenience or delay. In Act 2:18 (3).

³²⁷ Act 2:18 (3).

³²⁸ The keeper of documents must have the share certificates printed in an approved note-printing press (Act 2:6 [1]), and so no duplicates should appear.

³²⁹ With speed, because a later sale could possibly be notified first and, thus, result in a better title for a good-faith purchaser. Government proposal 14/1994 General grounds 1.2.

³³⁰ The shareholder (or the party to whom the rights are transferred) shall similarly notify the deposit bank of any reassignment or pledge. Act 2:15 (1).

³³¹ Act 2:11 (3).

³³² Act 2:6 (2).

³³³ Government proposal 14/1994 Detailed grounds 4:28.

³³⁴ Government proposal 14/1994 Detailed grounds 4:28.

³³⁵ Act 4:28 (1) first sentence. Legal irregularity exists already when a third party gives probable grounds for her claim. Act 4:28 (1) second sentence. According to Government proposal 14/1994 Detailed grounds 4:28, the purpose of the last-mentioned provision is to prevent the buyer from getting involved in lengthy and difficult legal disputes.

The buyer's remedies in the case of legal irregularity are:

- (i) the right to cancel the transaction, if the seller does not see to it that the defect is immediately rectified, or,
- (ii) if the defect is not significant, the right to a price reduction in proportion to the defect; and
- (iii) the right to compensation for loss. If the defect existed when concluding the contract, the buyer has this right independent of the seller's negligence, if the buyer did not know and should not have known of the defect at that time; whereas if the defect arose after concluding the contract, the buyer has the right only

buyer from legal irregularity reasonably well, and there are hardly any disputes.³³⁶ In particular, a construction-stage pledge is ineffective against a non-consenting buyer, so no legal irregularity should arise on this ground.³³⁷

5.4.5. Financing of the Buyer

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

5.5 Builder's Duties - Protection of Buyer

5.5.1. Description of the Building

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

Technical specifications are included among the safekeeping documents and become part of the contracts of sale as described in **5.2.2** above.

5.5.2. Late Termination of the Building

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

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

The parties may agree on an exact or an estimated date of completion. If the contract has an explicit clause on an estimated date, then a special provision may be incorporated as well, according to which the buyer's remedies apply as if the transfer of possession should have occurred thirty days after the stipulated estimated date.³³⁸

The buyer's remedies in the case of late performance are:

unless the seller can show that the defect was not caused by her negligence (but, instead, by e.g. a company-board decision to which the seller objected).

See Act 4:28 (3 and 4). The example in brackets is from Government proposal 14/1994 Detailed grounds 4:28.

³³⁶ *Uuden asunnon kauppa: Ostajan Opas 2003* ('New-Apartment Purchase: Buyer's Guide 2003'), Confederation of Finnish Construction Industries RT, 17.

(At: http://www.rakennusteollisuus.fi/kuluttajalle/ostamassa_asuntoa/uusopas.pdf)

³³⁷ Government proposal 14/1994 Detailed grounds 4:28.

³³⁸ According to Act 4:12.

- (i) the right to withhold payment (i.e. an instalment that is due before the transfer of possession), if there is a legitimate cause to expect a delay;³³⁹
- (ii) the right to cancel the transaction before the transfer of possession, if the breach is significant³⁴⁰ (from the buyer's point of view)³⁴¹; and
- (iii) the right to compensation for loss. As a rule the seller is liable for any loss, unless she can prove that the default was caused by an unforeseeable obstacle beyond her control.³⁴² Recoverable losses include (for example) extra costs of temporary accommodation, temporary costs of moving, higher temporary costs of living such as those of commuting to work and, if moving out is delayed, compensation to the buyer of the previous apartment.³⁴³ Exceptionally, the seller is only liable on negligence grounds for two kinds of 'indirect loss': loss of income (e.g. lost working time or lost rent) and significant loss of utility from housing (e.g. significant decrease in the level of accommodation).³⁴⁴

5.5.3. Material Defects

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

An apartment is defective if (1) it is not in conformity with the contract (not excluding oral terms)³⁴⁵, it does not comply with laws and regulations³⁴⁶, it has one of what may be called 'genuine construction defects'³⁴⁷ (it may pose a hazard to health; it does not comply with good construction practice; or a material used is of substandard quality) or it does not otherwise meet the buyer's legitimate expectations.³⁴⁸ Also if (2) the seller (or her agent)³⁴⁹ misstated or withheld information material to the transaction,³⁵⁰ including information about the surroundings or services in the area,³⁵¹ or if (3) a business seller does not supply information listed in a special Decree on information to be provided in the marketing of housing^{352,353}

³³⁹ Act 4:7.

³⁴⁰ Act 4:8 (1). Anticipatory cancellation is enabled by Act 4:9 if there are 'weighty reasons to expect a default justifying cancellation.' Also, the seller may inquire whether the buyer will accept performance within a specified time despite default; if the buyer fails to respond in a reasonable time after receiving the inquiry, the buyer waives her right to cancel the transaction if the seller performs within the specified time. Act 4:10. But the buyer may only cancel if the delay exceeds sixty days, if the default is caused by an unforeseeable obstacle outside the seller's, contractor's and subcontractor's control. Act 4:8 (3).

³⁴¹ Government proposal 14/1994 Detailed grounds 4:8.

³⁴² See Act 4:11 (1).

³⁴³ Government proposal 14/1994 Detailed grounds 4:11.

³⁴⁴ The following losses shall be considered indirect: 1) any loss of income caused to the buyer by a breach of contract or any consequent action; and 2) any significant loss of utility to the apartment [*sic*] which does not cause direct financial loss, and any other comparable significant loss. Act 4:11 (3). The examples in brackets in the text are from Government proposal 14/1994 Detailed grounds 4:11.

³⁴⁵ Government proposal 14/1994 Detailed grounds 4:14.

³⁴⁶ in force at the time when the building inspector approves the building for use. Act 4:14 second point (941/1997).

³⁴⁷ I have borrowed this term from Government proposal 58/1997 General grounds 1.2.

³⁴⁸ For these defects, see the list in Act 4:14 ('General provision on defects').

³⁴⁹ Government proposal 14/1994 Detailed grounds 4:15, referring to 'general legal principles.'

³⁵⁰ Act 4:15 (1) (1).

³⁵¹ Act 4:15 (2).

³⁵² The latest Decree is from 2001 (*Valtioneuvoston asetus asuntojen markkinoinnissa annettavista tiedoista* 130/2001).

³⁵³ The preceding two numbered items are mentioned in Act 4:15 ('Information concerning the apartment'). For

Finally, if (4) the transaction is ‘financially irregular,’ for instance if the seller misstated or withheld information about financial obligations – such as the maintenance charge, or the part of the company’s debt that burdens the shares sold – or if the housing company’s financial standing at the end of the construction stage is inferior to that stipulated in the financing plan³⁵⁴.

The buyer’s remedies against the seller are:

- (i) the right to withhold payment, in reasonable proportion to the claim.³⁵⁵ The buyer may prevent releasing in whole or in part the two-percent deposit mentioned in **5.4.1 and 5.4.4** above; the withheld sum will remain on the account until the parties agree or their disagreement is resolved by court;
- (ii) the right to demand that the seller repairs or rectifies any – significant or insignificant – defect at no cost to the buyer. The seller may defeat this claim, if her costs would be unreasonably high compared to the significance of the defect to the buyer (so the significance of the defect may eventually come to be evaluated in this connection);³⁵⁶ this option (ii) is not available in the case of financial irregularity³⁵⁷;
- (iii) if rectification is out of the question or not performed, the right to a reasonable price reduction;³⁵⁸
- (iv) if rectification is out of the question or not performed, the right to cancel the transaction if the breach is significant³⁵⁹ (for example, a defect poses a hazard to health and its significance cannot be decreased by repair work)³⁶⁰. However, the conditions for cancellation are said to be rarely met³⁶¹; and
- (v) the right to compensation for loss sustained because of the defect, except for indirect loss on terms explained at the end of **5.5.2(iii)**.³⁶² As usual, the buyer has the duty to mitigate damages³⁶³ and her contributive negligence may reduce the damages amount³⁶⁴.

Within twelve to fifteen months from the building inspector’s approval, the seller must organ-

details, see the provision in question.

³⁵⁴ For details, see Act 4:27 (the so-called *taloudellinen virhe*; literal translation would be ‘economic defect’).

³⁵⁵ Act 4:21.

³⁵⁶ Act 4:22. For the seller’s right to rectify the defect, see the conditions in Act 4:23 (1).

³⁵⁷ Act 4:27 (3).

³⁵⁸ Act 4:25 (1) first point.

³⁵⁹ Under Act 4:25 (1) second point (the term ‘material’ is used instead of ‘significant’ in the translation of the Act). The seller must refund payments (with interest), while the buyer must return the shares and pay a reasonable compensation for any significant benefit received through using the apartment. Act 4:36.

³⁶⁰ Government proposal 14/1994 Detailed grounds 4:25.

³⁶¹ *Uuden asunnon kauppa: Ostajan Opas 2003*, note _ above, 19.

³⁶² Act 4:26 (1). In addition, the seller is only liable on grounds of negligence for losses that fall within the scope of producer liability: (a) personal injury caused by a defect in construction materials or other ‘components’ of the building or in an equipment that belongs to the apartment (‘fixture’); (b) damage caused by construction materials or other ‘components’ to any other property than the apartment itself; and (c) damage to property caused by an equipment (‘fixture’) that lacks a direct connection of use with the damaged property (for example, a washer has this connection with laundry in it, but not with floor; so the seller must compensate the former damage irrespective of negligence, but not the latter). For details, see Act 4:26; for the example in brackets, see Government proposal 14/1994 Detailed grounds 4:26; finally, for special limitation periods coinciding with those of producer liability, see Act 4:40.

³⁶³ Government proposal 14/1994 Detailed grounds 4:26, referring to ‘general principles of liability.’

³⁶⁴ Act 4:38 (‘Adjustment of compensation for loss’).

ise a one-year inspection, where all defects are recorded in minutes.³⁶⁵ The buyer waives her right to invoke against the seller any defect which she should have detected at the latest during the inspection.³⁶⁶ After the one-year inspection, the seller is only liable for later-discovered latent defects, which had existed at the time of the transfer of possession. Subject to waiving her rights, the buyer must notify a latent defect within a reasonable time after detecting it.³⁶⁷ (One rule of thumb sets the usual reasonable time at one month.)³⁶⁸

The seller's liability ends within three years from the moment that the buyer detected or should have detected the defect.³⁶⁹ In a case decided in 1997, the performance of a construction contract was considered to defer continuously the beginning of the limitation period under the contract of sale. In the case, a municipality-developer was liable to a housing company for damage caused by defective water pipes, and the Supreme Court majority held that the period of limitation started to run from the moment when the housing-company administration was transferred from the developer to the buyers, rather than from the date of an acceptance inspection between the constructor and the developer (as the minority would have decided).³⁷⁰ In a concurring opinion, it was also pointed out (as it were *obiter*) that, in cases like these, it would not be acceptable if the period of limitation started to run from the conclusion of the contract between the developer and the housing company, because the developer makes this contract with itself, nor could it for practical reasons start to run from the various dates on which the individual sales are concluded.³⁷¹

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

If the seller is liable, she may turn to the party responsible for causing the damage, including the estate agent, the contractor or subcontractor (in the case of construction defects) or the producer or importer (in the case of defective materials).³⁷²

5.6 Builder's Insolvency

In the 1995 Act, a new type of security was designed to protect the buyer against the constructor's insolvency. The founding shareholder was to put up security for up to ten years from the building inspector's approval, to be used for examining and rectifying any material defect secondarily to the securities mentioned in 5.4.2 above. However, the entry into force of this requirement was postponed, in order to investigate the cost of the system.³⁷³ It was discovered that the only security available would be insurance, and the insurance companies reported that the price would be around six percent of building costs – significantly above the estimated one to three percent debated in Parliament when the Act was passed. The benefits

³⁶⁵ Act 4:18 concerns one-year inspection.

³⁶⁶ Act 4:19 (1). Exceptions include a defect posing a hazard to health; see Act 4:20.

³⁶⁷ For details, see Act 4:19 (2–4). For exceptions, see Act 4:20.

³⁶⁸ *Uuden asunnon kauppa: Ostajan Opas 2003*, note _ above, 18.

³⁶⁹ *Laki velan vanhentumisesta* (728/2003) 4 and 7 (1) (1).

³⁷⁰ Supreme Court 1997:209.

³⁷¹ *Id.* (Judge Taipale, concurring).

³⁷² Kasso, note 65 above, 522 and 524.

³⁷³ The following information in the text is mainly based on Government proposal 58/1997.

were considered lower than the costs (which would probably be added to prices and perhaps decrease new construction altogether) and the conclusion was reached that costs could only be lowered by decreasing the insurance provider's risk and liability. Additionally, related considerations included that housing companies could also bear risk by taking out loans without significantly weakening the position of individual shareholders, while some stakeholders considered that, if a deductible should be introduced, it might apply only to the housing company and not to the shareholder³⁷⁴. In 1998, when the security finally entered into force, the scope of liability was narrowed down to those genuine construction defects (in 5.5.3 above) which are detected after the one-year inspection, and a deductible was introduced, distinguishing in its grounds between defects found in those parts of the building that belong to the housing company (reportedly the more common case) and those belonging to the shareholder³⁷⁵.³⁷⁶ As originally planned, the liability is also capped by Decree, currently at twenty-five percent of the cost of work³⁷⁷.³⁷⁸

5.6.1. Unfinished Building

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

5.6.2. Repayment

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

6. Private International Law

6.1 Contract Law

6.1.1. Conflict of Law Rule

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

In the absence of a choice of the applicable law by the parties: Is the lex rei sitae applica-

³⁷⁴ In communications prior to the 1998 enactment, according to Government proposal 58/1997 General grounds 3.

³⁷⁵ 2 percent of the price of work in the former case; 1.5 percent of the first transaction price in the latter. *Asuntokauppa-asetus* (854/1995) 7b (120/1998).

³⁷⁶ Act 2:19b (941/1998).

³⁷⁷ *Asuntokauppa-asetus* (854/1995) 7a (120/1998).

³⁷⁸ At present, 2003 Committee (note _ above) has proposed extending this security requirement on the ground of equal treatment of buyers to also those new apartments that are sold after the construction stage, despite strong opposition from entrepreneurs that this change will increase concentration in the construction industry because small and medium-sized firms will be unable to acquire the required insurance except on highly disadvantageous terms.

ble also to contractual obligations concerning real property (e.g. to the obligation to transfer real property or to set up a mortgage on it)?

The parties may choose the law applicable to their contract in terms of the Rome Convention itself³⁷⁹: in the absence of a choice, the *lex rei sitae* is presumed to govern.³⁸⁰

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

Yes.³⁸¹

6.1.2. Formal Requirements

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

The formal requirements of the place where the real estate is situated must be respected,³⁸² including in Finland verification by the notary³⁸³ (see 1.1 above).

6.2 Real Property Law

6.2.1. Conflict of Law Rule

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

Yes. See the Code of Judicial Procedure, Chapter 10 on ‘Jurisdiction,’ Sections 14 and 14a on immovable property – still in its original 1734 form – and mortgages, respectively, at: <http://www.finlex.fi/fi/laki/kaannokset/1734/en17340004.pdf>.

³⁷⁹ After the contents of the Rome Convention had first been approximated by a domestic Act in 1988, this legislation was repealed as of April 1, 1999, when a Decree incorporating the Rome Convention text entered into force. Decree 30/1999 (*Asetus Itävallan, Suomen ja Ruotsin liittymisestä sopimusvelvoitteisiin sovellettavaa lakia koskevaan yleissopimukseen sekä sen tulkintaa Euroopan yhteisöjen tuomioistuimessa koskevaan ensimmäiseen ja toiseen pöytäkirjaan tehdyn yleissopimuksen osittaisesta voimaansaattamisesta ja sen eräiden määräysten hyväksymisestä annetun lain osittaisesta voimaantulosta*).

³⁸⁰ Convention on the Law Applicable to Contractual Obligations (80/934/EEC) Article 3 and Article 4 (1 and 3).

³⁸¹ Hannu Tapani Klami and Eira Kuisma, *Suomen kansainvälinen yksityisoikeus*, 3rd edition, Kauppakaari 2000, 94, 95 and 97–8.

³⁸² Convention on the Law Applicable to Contractual Obligations (80/934/EEC) Article 9 (6).

³⁸³ Code 2:1.

6.2.2. Formal Requirements

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

Yes, because among notaries (1.1 above) are included³⁸⁴, in a diplomatic mission or consular post that is part of the Finnish foreign service: an attaché or a public official of higher rank or another Finnish citizen authorised thereto by the Ministry for Foreign Affairs for a special reason³⁸⁵.

6.3 Restrictions for Foreigners to acquire Land

6.3.1. Restrictions limited to Foreigners

Are there any restrictions for foreigners to acquire real property?

No. See 1.6 above.

6.3.2. Other Restrictions

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

No.

6.4 Practical Case: Transfer of Real Estate among Foreigners

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

The best option is to contact the mission: see 6.2.2 above.

³⁸⁴ *Kaupanhvistaja-asetus* (958/1996) 1 (1) (4) (1202/1999).

³⁸⁵ Consular Services Act (498/1999) 33 (1) (unofficial translation at: <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990498.pdf>).

7. Encumbrances/Mortgages (and Land Charges)

7.1 Types of mortgages/land charges

7.1.1. Types of mortgages

Which types of mortgages (or land charges) exist in your legal system? Which is the most common type of mortgage?

A real estate lien (*panttioikeus*) may be raised over real estate, a share (*määräosa*) or parcel (*määräala*) of real estate, a lease (*vuokraoikeus*) or another usufruct (*muu käyttöoikeus*) on the real estate of another.³⁸⁶ The same provisions apply to all mortgages (*kiinnitys*) regardless of the object of mortgage. Naturally, a mortgage on a lease or another usufruct to the real estate of another, will be entered in the mortgage register under the individual identification number of the land charge itself (*laitostunnus*), and is in no way connected to the real estate in question.³⁸⁷ A real estate lien is raised by creating a mortgage (*kiinnitys*) and a mortgage instrument (*panttikirja*), or in certain circumstances under public law (*lakisääteinen panttioikeus*), solely by entry (*kirjaus*) into the title and mortgage register.³⁸⁸

If several people own the real property in question, a real estate lien can either be raised on application by all owners over the whole real estate, or on application by an individual owner over a share of real estate. If the co-owners have registered an agreement on possession (*hallinnanjakosopimus*) mortgages cannot be raised on the real estate as a whole. A lien can be raised and the mortgage instrument surrendered only with the consent of all the co-owners.³⁸⁹ A court can grant permission on behalf of a non-consenting co-owner, to raise a mortgage on the real estate as a whole, if this is necessary for the maintenance and management of the property.³⁹⁰ A mortgage and lien over a share of real estate can be raised without the consent of other titleholders. However, a co-owner cannot raise a lien on her share of the real estate, using a mortgage instrument that has been issued on the whole real estate. Such an agreement is invalid.³⁹¹ The same rule, also applies to an owner raising a lien after she has sold a parcel of land, when the creditor is aware of the transfer³⁹². The mortgage will have to be altered and lifted from the parcel sold (*yhteiskiinnityksen purkaminen*).³⁹³ The owner of the parcel can raise a mortgage and lien solely on the parcel after registration of title.

A joint mortgage (*yhteiskiinnitys*) can only be created over two or more real estates, if they belong to the same owner(s) and are situated in the jurisdiction of the same registration authority. Furthermore, the objects can only be subject to mortgages of the same amount and seniority. After a joint mortgage has been registered, separate mortgages can no longer be registered in the individual estates as long as the estates belong to the same owner.³⁹⁴ However, if the owner sells, e.g. a parcel from one of the estates, the buyer can raise a lien on the

³⁸⁶ Article 15:1,1 of the Code.

³⁸⁷ See below 7.6.

³⁸⁸ State guaranteed loans for forest improvement (*metsänparannuslaina*) or for farming.

³⁸⁹ YhtOmL: The Act on Joint-Ownership 1958/180); section 4.

³⁹⁰ YhtOmL: section 5.

³⁹¹ Supreme Court decision KKO 1999:9 holding that when the contract pledge was declared invalid with regard to one spouse, the agreement regarding the share of the other spouse was also invalid. The same rule applies to joint ownership of shares in a housing company (KKO 1995:67). Jokela et al., p. 458.

³⁹² See above section 2.5.

³⁹³ Article 18:6 of the Code.

³⁹⁴ Article 15:2 of the Code.

parcel.³⁹⁵

Registrability of land charges are regulated in chapter 14 of the Code. Certain special rights (*erityiset oikeudet*) to the real property of another can be registered, if they are based on a contract or another transaction (namely a will).³⁹⁶ Such special rights are leases or other usufructs, the right to a pension off the real estate, the right to take timber or a right of extraction. A requirement for registrability is that the right is not permanent, nor established by official measure or by decision of other authorities.³⁹⁷ This because such pledges on real property (*kiinteistörasite*) are or can be entered in the cadastre by administrative decision.³⁹⁸ The holder of a lease or other usufruct on the real estate of another is obligated to register the right within 6 months from acquittance of said right, if the usufruct is transferable to a third party without hearing the titleholder and³⁹⁹ if there are buildings or other constructions belonging to the usufructuary on the estate. The latter applies in cases, where agreement on future building has been reached as well.⁴⁰⁰ If registered, such transferable leases or usufructs can be mortgaged.⁴⁰¹

All the above-mentioned special rights can be registered on application and are in that case also valid against any future titleholder.⁴⁰² Non-registrable other rights or non-registered special rights are only binding inter partes and are not in the case of transfer of title, protected against a third party in good faith. However, third party possession known to the buyer, e.g. present at inspection of the property before the sale, is protected under the Land Lease Act⁴⁰³ and the Act on Residential Leases⁴⁰⁴.

7.1.2. Legal nature

What is the legal nature of mortgages (or land charges)?

Ius in rem. If the mortgagor defaults on a loan, the mortgagee has the right to receive payment out of the value of the real estate only in executive recovery proceedings.

7.2 Setting up a mortgage

7.2.1. Example

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

The mortgage instrument can be released to the titleholder, or with the consent of the titleholder, directly to a creditor. A creditor can, with the consent of the owner, apply to be entered in the mortgage register (*haltijamerkintä*), as the holder of the mortgage instrument and in practice most banks do so, as they generally file the application for their client.⁴⁰⁵ However, when the application is submitted with an application for transfer of title, the mortgage application cannot be approved until the transfer has been approved. In either instance the application receives its rank according to filing date and a pending application is visible in the regis-

³⁹⁵ See section 7.10 below.

³⁹⁶ Article 14:1 of the Code.

³⁹⁷ Article 14:1.2 of the Code

³⁹⁸ KiintRekL: Act on the Real Property register (1985/392).

³⁹⁹ The English translation at www.finlex.fi wrongfully reads 'or'.

⁴⁰⁰ Article 14:2.1 of the Code.

⁴⁰¹ Article 19:1 of the Code.

⁴⁰² Articles 13:3, 14:7 and 14:8 of the Code.

⁴⁰³ MVL: Land Lease Act (258/1966).

⁴⁰⁴ AHVL: Act on Residential Leases (1994/843).

⁴⁰⁵ Article 16:9 of the Code. In practise the bank will demand to handle the application for mortgage on behalf of the buyer, if prior mortgages do not exist, in order to assure receipt of notice of an executive auction.

ter from the day after the filing at the latest.⁴⁰⁶ Priority notices are not possible and the application has to be filed electronically or in writing to be delivered by mail or in person to the court.

The rank of a mortgage can be altered on application by the titleholder, with the consent of lienholder(s) and holder(s) of registered special rights, whose rights are decreased by the alteration. The alteration of a joint mortgage can only take place, if the alteration affects the estates equally.⁴⁰⁷ A mortgage may under the same conditions be extended to cover other real estate belonging to the titleholder.⁴⁰⁸ Mortgages of equal seniority can be merged to one, and consequentially a mortgage can also be split into two or more mortgages. A mortgage can also be cancelled in full or in part and in cases of joint ownership, even without the consent of other titleholders.⁴⁰⁹

7.2.2. Legal requirements for the loan contract affecting the mortgage

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

The Code does not contain rules regarding form or contents of the contract of pledge (*pant-taussitoumus*), therefore the general rules of contract law apply.⁴¹⁰ A contract of pledge is an agreement of free form between two parties and can be concluded and completed in writing, verbally or even conclusively.^{411, 412} Due to the difficulty relating to proof of verbal agreements, written contracts are the norm in practice. When determining the exact date of when a binding contract has been concluded (in a later dispute) the date of transfer of possession of the mortgage instrument is decisive.⁴¹³

Regarding the contents of the contract of pledge, it needs to include the intent to pledge and specify the parties, as well as, the object of the pledge and the counter-consideration. A condition under which the pledged object is automatically lost, in the event of failure to pay, is void.⁴¹⁴ The object of the pledge and counter-consideration for which the pledge is given need to be clearly specified. Banks usually use standardized contracts of pledge and these are generally binding on the debtor, if she has been given the opportunity to familiarize herself with the conditions, before signing the contract of pledge.⁴¹⁵ In addition, the bank is under specific duty to emphasize and explain certain onerous conditions and their meaning, in order for them to be binding. On the other hand, when interpreting a binding condition, an unclear condition

⁴⁰⁶ Article 16:8 of the Code.

⁴⁰⁷ Article 18:1 of the Code.

⁴⁰⁸ Article 18:2 of the Code.

⁴⁰⁹ Article 18:3-5 of the Code.

⁴¹⁰ The contents of these rules will be explained and translated in connection with specific cases and questions. Case law and doctrine over the past century has given life to the otherwise plain rules. Due to this reason a translation is not available. OikTL: Contracts Act (228/1929) Chapter 1; and KK: Code of Sales (1734/3) Chapter 10.

⁴¹¹ E.g. through transfer of possession of the mortgage instrument.

⁴¹² Jokela et al., p. 462.

⁴¹³ Supreme Court decision KKO 1992:87. Jokela et al., p. 463. Naturally, this is only the case when a later binding contract of pledge has also been agreed upon. Possession of the mortgage instrument as such is worthless if the creditor cannot prove that it has been relinquished as security for a debt. Maakaari, p. 467.

⁴¹⁴ Jokela et al., p.464. OikTL 37§.

⁴¹⁵ Supreme court decision (KKO 1993:45).

is under settled case law interpreted to the detriment of the draftsman.⁴¹⁶ On a more general note, the bank is under duty to explain the conditions under which the pledged property can be seized for the unpaid debt. In cases where the security is given by a third party and the guarantor is a natural person the duty of the bank to explain the consequences of non-payment is a peremptory condition for the validity of the guarantee agreement (*takaussopimus*). In other situations the result of a dereliction of duty can result in the adjustment or mitigation (*sovittelu*) of an unreasonable condition.⁴¹⁷

A contract of pledge can take the form of a general pledge (*yleispanntaus*) or a specific pledge (*erityispanntaus*). In a specific contract of pledge, the lien only pertains to a specific debt or claim in the contract. A general pledge pertains not only to a specific debt, but also to future debts of the debtor to the creditor.⁴¹⁸ A third party guarantor is not liable for the future debts even if she has signed a general pledge, if this has not been specifically agreed upon and explained to the guarantor.⁴¹⁹ In practice, general pledges are mostly used. A pledge is valid until the debt has been repaid, if not otherwise agreed upon in the contract. If no agreement on the term of contract has been made it is valid until further notice (*toistaiseksi*). As long as the general pledge is valid new debt can be incurred. By giving notice of withdrawal the debtor can stop new debts from being included under the lien.⁴²⁰

The mere contract of pledge has no effect on third parties, the transfer of the mortgage instrument is decisive. However, if the debtor does not hand over the mortgage instrument the creditor is highly unlikely to issue the loan. Since third party validity is in the creditor's interest, payment of the loan is usually conditioned upon receipt of the mortgage instrument(s) equipped with holder entry.⁴²¹ If the mortgage instrument is in the possession of a third party, a notice of pledge (*panntausilmoitus, denuntaatio*) is sufficient to raise the lien, and thus, validate the contract of pledge in relation to third parties.⁴²² If the owner wants to use the "left-over security value of a mortgage instrument" for a new loan she is entitled to raise a secondary mortgage (*jälkipanntaus*) assuming that she can convince the bank to take the deal.⁴²³ The lien becomes effective when the holder receives the notice of the secondary pledge. The holder of the primary mortgage cannot refuse the secondary mortgage, nor escape the duty to inform or preserve the interests of the holder of the secondary lien.

7.2.3 Formal requirements

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

A standardized form for a mortgage application is not mandatory, but is in practice always used. The form is available on-line, at all district courts and at most banks.⁴²⁴(see appendix). A separate form is similarly available for the registration of special rights. (see appendix).

7.2.4 Registration

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

In order to have effect against third parties a lien must be raised on the property. Information

⁴¹⁶ Supreme court decision (KKO 1992:80).

⁴¹⁷ KK: 10:14.1. Jokela et al. , p. 466-467.

⁴¹⁸ Jokela et al., p. 467.

⁴¹⁹ TakL (GTPP) Act on Guaranties and Third Party Pledges (1999/361) 4 § 1.

⁴²⁰ Jokela et al., p. 469.

⁴²¹ Jokela et al., p. 481-483.

⁴²² Article 17:2.3 of the Code.

⁴²³ Jokela et al., p. 485.

⁴²⁴ www.oikeus.fi

about the specific lien-holder does not have to, but can, be entered into the registry. Legal right to the pledged property is presumed from possession of the mortgage instrument.

7.2.5. Time and Costs

How long does the registration of a mortgage normally take?

The registration of a mortgage and the issue of a mortgage instrument can usually be done in a day, if the application is complete, i.e. meets formal requirements.

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

The owner can handle the mortgage application herself for free. A registration of a mortgage costs 40 euros, but if the same application includes requests for a number of mortgages, an additional 10 euro is charged for each mortgage instrument. A request for entry as holder of the mortgage instrument is free of charge, if applied for in connection with the mortgage application. A fee of 25 euros is charged for altering a mortgage (when a new mortgage instrument is issued). There is no tax on mortgages.

Bank fees (buyer)

- a. Bank loan 100.000 EUR, interest 20 years/Eurib 12+0,60 % 32.869,16 EUR
- b. Fee: 0,2 % of the amount of the loan, minimum 100 EUR
- c. Mortgage instruments:
 1. If old ones exist: no fee
 2. If new ones are needed: the bank may require that the bank files the application for registration on behalf of the client
 - a. transfer of title: 210, 23 EUR (inc. tax); or if a company or an estate: 252,28 EUR (inc. tax)
 - b. transfer of title and application to raise a mortgage (5 included): 311,15 EUR (inc. tax); or if a company or an estate: 353,20 EUR (inc. tax).

Bank fees (buyer)

- a. Bank loan 300.000 EUR, interest 20 years/Eurib 12+0,60 % 98.608,90 EUR
- b. Fee: 0,2 % of the amount of the loan, minimum 100 EUR.
- c. Mortgage instruments:
 1. If old ones exist: no fee
 2. If new ones are needed: The bank may require that the bank files the application for registration on behalf of the client
 - a. Transfer of title: 210, 23 EUR (inc. tax); or if a company or an estate: 252,28 EUR (inc. tax)
 - b. transfer of title and application to raise a mortgage (5 included): 311,15 EUR (inc. tax); or if a company or an estate: 353,20 EUR (inc. tax).

7.3 Causality and Accessoriness

7.3.1. Invalid loan contract

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

The bank is only the holder of the mortgage instrument, while it is the property of the owner. Assuming that the loan contract is invalid, even though all other requirements have been complied with, the mortgage instrument is worthless to the holder and the lien lapses, unless of course the parties sign a new loan contract.⁴²⁵ If the contract is invalid the mortgage instrument will be returned to the owner, and if the holder has been registered the owner can apply to have the entry removed. Whoever possesses the mortgage instrument is presumed to be the rightful holder. In practice, disputed invalidity issues concerning loan contracts are resolved in a separate trial. If the loan contract is declared invalid (which hardly ever happens) removing the holder-entry is a mere formality.

The purpose of the loan is not of legal significance in issuing a mortgage and any piece of property can in that regard be used as security for any loan. However, the bank will demand to know what the money is for, in order to evaluate the risk in granting the loan and if deciding to do so, the value of the security it will demand for the loan. Not all real property are by banks accepted as security, and it is more important to the bank that the debtor values the security given than its paper value. The bank's primary focus is on getting the debtor to repay the loan and banks tend to negotiate payment plans even after non-payment. The bank has to incur costs in order to realize a security and thus, runs the risk of losing more money.

The bank can negotiate an agreement that includes a negative pledge in order to minimize their credit risk. Sanctions for breach of contract can include contractual penalty, the premature calling in of the loan and are all allowed and binding inter partes. It is clear that a negative pledge-agreement does not affect the validity of a mortgage to a third party unaware of such agreement. The question whether such an agreement should affect the rank of a mortgage of a third party, who accepts a mortgage for a new lien, regardless of knowledge of the previous negative pledge agreement, is debated.⁴²⁶ However, under current interpretation of the Code, such an agreement is only binding inter partes.⁴²⁷ The same is true for agreements aspiring to prevent that the value of the property serves as security for several contracts of pledge.⁴²⁸

The mere contract of pledge has no effect on third parties, the transfer of the mortgage instrument is decisive.⁴²⁹ Since third party validity is in the creditor's interest, payment of the loan is usually conditioned upon receipt of the mortgage instrument(s) equipped with holder entry. Regardless, however, of whether transfer of possession has occurred an enforceable lien has not been raised until a debt or other counter-claim exists, i.e. the mortgage instrument is

⁴²⁵ Article 17:6 of the Code- the mortgage instrument shall be void and the lien lapse, if the mortgage is cancelled or lifted. If the mortgage is altered the lien shall correspond to the altered mortgage.

⁴²⁶ Tammi-Salminen 2001, p.183-216. A negative pledge could be given the legal significance of a non-registrable special right under Article 3:8 of the Code; i.e. only a third party in good faith receives protection. Havansi 1996, p. 64-65. Mere knowledge is not enough, but in extra-ordinary situations, raising a lien in breach of a negative pledge agreement can affect the legitimacy of the latter agreement in favour of the former.

⁴²⁷ Jokela et al., p. 455.

⁴²⁸ Supreme court decision, KKO 1998:47, holding that both the housing company and the shareholders had the right to use their property (eventhough it in fact amounted to the same) as security for a loan. Maakaari, p. 456. A criticized Supreme Court decision on the issue (KKO 1997:146) held to the contrary and invalidated the second pledge. However, the court placed great importance on the fact that one and the same entity (amounting to the same person) was to gain from the first loan as well as the second pledge at the first creditor's expense.

⁴²⁹ Article 17:2.1 of the Code.

worthless to the creditor, albeit not to the debtor.⁴³⁰ This issue is of importance, i.e. mere possession of the mortgage instrument is not decisive, when evaluating whether a debt under a general pledge shall be regarded as old or new in relation to the debtor's estate of bankruptcy.⁴³¹

7.3.2. Right of withdrawal

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

The bank is only the holder of the mortgage instrument, while it is the property of the owner. The bank can only receive payment under a mortgage, if and to the extent they have a valid claim against the debtor.

7.3.3. Changing the secured debt

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

When the debtor has repaid the loan for which the mortgage is granted, he can use the same mortgage as security for another loan. The registrar only has to be involved, if the parties want to change the amount or object of the mortgage. The loan contract and its contents is a matter of negotiation between the bank and the debtor. The bank decides what it accepts as sufficient security for a bank loan. The debtor is free to negotiate loans with as many banks he wants, however, all banks will ask for sufficient security for any loan. Therefore, if the debtor has already agreed on a loan secured by a mortgage under the condition that a house be built on the property and wants to take up an interim loan to finance the building of the house, the mortgage instrument can be used to finance another loan, if it hasn't been handed over to the first bank.⁴³² The owner of the property is entitled to raise as many mortgages of different value and rank as he wants on a piece of property.

Only a new contract of pledge is needed as long as the creditor remains the same. Please read this section in connection with the section on secondary pledges. It should be noted that mort-

⁴³⁰ Article 17:2.2 of the Code.

⁴³¹ TakSL: The Act on Recovery to a Bankrupt's Estate (1991/758); 14 § *Vakuuden peräytyminen: Velallisen myöhemmin kuin kolme kuukautta ennen määräpäivää velastaan luovuttama pantti tai asettama muu vakuus peräytyy, jos sellaisesta vakuudesta ei ollut sovittu velan syntyessä tai jos pantin hallintaa ei ollut luovutettu tai muita vakuusoikeuden syntymisen vaatimia toimia tehty ilman aiheutonta viivytystä velan syntymisen jälkeen. Jos vakuus on asetettu velallisen läheiselle tätä aikaisemmin mutta myöhemmin kuin kaksi vuotta ennen määräpäivää, vakuus peräytyy, jollei näytetä, ettei velallinen ollut maksukyvytön eikä vakuusjärjestelyn vuoksi tullut maksukyvyttömäksi.* Section 14: Recovery of security: A security or other pledge surrendered by the debtor for a debt later than three months before the due date, is recovered, if agreement on surrendering the security has not been made in the loan contract or if transfer of possession or actions with constitutive effect with regard to raising a lien have not been taken without undue delay after the creation of the debt. If recognizance has been made to a closely related person of the debtor earlier, but later than 2 years before the due date, the security is recovered, unless it is shown that the debtor at the time was not insolvent nor became insolvent as a result of the arrangement. (translation by K. Weckström)

⁴³² See also the possibility of a secondary pledge.

gages are raised for a specific amount that is not equal to (usually much higher) the amount of the loan.

From a practical point of view there are some issues to consider. If the mortgage instrument has not yet been handed over to the 1st bank, the debtor runs the risk of losing the 2nd bank loan, if that bank cannot receive the highest ranked mortgage on the property, since that most likely was a condition under which the negotiations took place. If the 1st bank is the holder of the mortgage instrument with the highest rank, the 2nd bank decides, whether it wants to (take a higher risk) issue a loan in exchange of a mortgage with lower rank. Whether or not the 1st or 2nd bank will issue a loan depends on the amount of the loan, in relation to the value of the property, and of course the activities of the debtor. In practice banks place high value on what rank their mortgage will achieve, because that determines the bottom line of the risk their taking. After all, in the event of non-payment, the amount received for the property at an executive auction will be divided between the creditors according to rank, and most of the time all the proceeds go to those with highest rank. Therefore, the amount of the mortgage is much higher than the amount of the actual loan, since possible interest and costs incurred due to non-payment are factored into the mortgage. Again, if the debtor wants a new or larger loan the bank might demand a more valuable security, i.e. an additional mortgage or an altered mortgage for a higher value.⁴³³

If the original debt has been paid in full the mortgage instrument(s) are returned to the owner, who can use the mortgage instruments as security for a new loan at any bank. If, however, some debt remains, the bank will in practice not release (all) the mortgage instruments. Depending on the amount of the original loan in relation to the remaining payments, the first bank might agree to release one of several mortgage instruments (keeping the one(s) with the highest rank(s)), or agree to issue a new loan. If the old mortgage instrument is used for a new loan, the new bank can apply to have the holder-entry of the old bank removed and its name entered instead. Whoever possesses the mortgage instrument is presumed to be the rightful holder, nonetheless, banks usually apply for entry in the register as well, to assure receipt of notice of an executive auction.

7.3.4 Independent/abstract promise of payment

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

The owner can set up as many mortgages he likes in the property and start negotiations after that.⁴³⁴ The mortgage instrument can be used as security for any agreement. In practice, banks demand a high rank and set the terms for what they consider sufficient security. The business sense in using real property as security for “small” loans is also questionable, since the holder of a mortgage instrument, can in cases of non-payment demand payment out of the value of the real estate. In practice, the owner hardly ever sets up a mortgage without intention to use it as security, and only possess his own mortgage instruments in situations where the debt has been paid in full and there is no need for a new loan. Once a mortgage has been raised on the property the mortgage instrument can act as security in any agreement. Existing unpledged instruments are generally transferred with title at the conclusion of the sale.

⁴³³ Jokela et al., p. 464-465.

⁴³⁴ This does not mean that the owner can raise a lien on his or her own property. Supreme court decision (KKO 1997:66). Jokela et al., p. 563. Similarly, a mortgage instrument in the debtor’s possession cannot be distrained, so as to forcibly raise a lien on real property for the benefit of a creditor (Article 17:5.3 of the Code).

7.4 Enforcement and other rights of the bank

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

In the vast majority of cases the lien need never be enforced. Furthermore, in instances of non-payment the rights conferred on the bank under the lien, are in practice effective as such and forcible collection is therefore rare.⁴³⁵ Late payment of, or voluntary sale of the secured property on the free market to cover the debt is fairly common. As soon as the debt is paid the creditor's lien on the property lapses, regardless of whether she maintains possession of the mortgage instrument. However, in certain circumstances, i.e when the payment could be regarded as 'suspicious', bank custom dictates that the creditor, in light of the rules of recovery to a bankrupt's estate, is entitled to delay the return of the mortgage instrument by three months. This rule applies to both guaranties and third party pledges.⁴³⁶ It is worth mentioning though that installments paid on the loan do not effect the creditor's right to the lien and does not impose a duty on the creditor to relinquish the security or part thereof.

If the debtor defaults on payment of the loan the creditor has the right to claim payment out of the value of the property.⁴³⁷ The lien does not give the creditor the right to sell the property; this can only be done by way of distraint (*ulosotto*) or as part of insolvency proceedings (*konkurssi- ja velkajärjestely*). The real property can only be liquidated through compulsory auction in recovery proceedings and it has been criticized as both expensive and slow.⁴³⁸ To commence forcible collection proceedings the creditor needs to establish grounds for execution (*ulosottoperuste*) by obtaining a court decision.⁴³⁹

The creditor can bring an action of performance (*velkomuskanne*) against the debtor combined with an action for declaratory judgement to foreclose on pledged real property (*hypoteekki- kanne*) in the District court of forum sitae.⁴⁴⁰ Under the Execution Act section 4:22.1, such a decision immediately renders the property distrained, as well as, serves as grounds for execution.⁴⁴¹ A joint-action can be brought against the debtor and third party pledgor, as well as the pledgor alone. When the existence of the debt and pledge is undisputed, the action can be brought under the rules of summary procedure (*summaarinen menettely*), where the plaintiff only is required to specify its claim, and the basis thereof, in the suit, but is not required to

⁴³⁵ Jokela et al., p. 554.

⁴³⁶ Jokela et al., p. 557. However, the right of the creditor to delay the return of the security for longer than three months is debated. Supreme court decision (KKO 2002:114) regarding refusal to return the third party's mortgage instrument after payment by the debtor, who later filed for bankruptcy. The bankrupt estate was later resolved due to lack of assets. The bank relying on a standardized contract provision was holding out for the full recovery period of 5 years. The court held that the bank under the circumstances of the case did not have the right to delay the return.

⁴³⁷ A new Statute of Limitations came into force in the beginning of 2004 and is not available in English. VanhL (SoL) Statute of Limitations (728/2003). If the creditor does not act on the default of the debtor within three years (SoL, section 4) from when the debt became overdue (SoL section 5) the debtor does not have to pay the debt. The debt can therefore not be claimed in insolvency proceedings. The creditor can, however, enforce his or her right in the lien and demand payment out of the value of the property (SoL section 16.1, article 17:6.2 of the Code). The amount of the mortgage is therefore the maximum that the creditor can receive. This only applies to a guarantee given by the debtor. The lien lapses on a third party pledge immediately when the principal debt no longer exists. (GTPP section 15, 17 and 41).

⁴³⁸ Jokela et al., p. 602. According to a study done in the late 1980s about 80 % of the sales by compulsory auction generated a price equal to that of the market price.

⁴³⁹ Forcible recovery will take a minimum of 6 months from the final court decision (appeals delay) and can take up to 2-3 years. The debtor can further delay forcible collection by initiating insolvency proceedings.

⁴⁴⁰ OK: Code of Judicial Procedure (1734/4); section 10:14a.

⁴⁴¹ UL: Execution Act (1895/37).

provide further evidentiary support.⁴⁴² In practice, this is how actions are initiated in court, since the action can continue under normal procedure, if the defendant contests the validity of the plaintiff's claim. Furthermore, this is in the interest of both parties, since it keeps collection charges at a minimum.

When receiving a suit for performance and foreclosure the court checks the information regarding the piece of property in question in the land register. Only if the creditor has not applied for registration of a holder-entry, can the court request that the mortgage instrument or notice of secondary pledge as proof of existence of the lien be submitted.⁴⁴³ The court then summons the defendant to issue a written reply within 7-14 days of the serving of notice. If the defendant does not reply or replies, but contests the plaintiff's claim on non-legal grounds, the court can issue a judgement by default (*yksipuolinen tuomio*) upon request by the plaintiff⁴⁴⁴ (court fee 70 euros, a maximum of 220 euros in legal fees). If contested on legal grounds the suit thereafter follows ordinary procedure, which carry the following costs depending on when the matter is decided: during written proceedings (court fee 70 euros, legal fees), an oral hearing (court fee 100 euros, legal fees) and trial (court fee 130/160 euros, legal fees).

If the court finds for the plaintiff and declares the real property foreclosed, the court ex officio reports to the real property judge (*kiinteistötuomari*), who enters the information into the land register, and to the execution authority, who can initiate execution proceedings upon request by a creditor.⁴⁴⁵ The court takes care of service of a judgement by default upon the defendant, after which the appeal time starts and the decision can become final.⁴⁴⁶ When the plaintiff only has sought a declaratory judgement for performance (in cases where other property has been pledged) the decision can serve as grounds for execution, which is needed to initiate recovery proceedings.⁴⁴⁷

The application should be filed at the execution authority, where the defendant resides, unless real property is involved, in the case of which, it should be filed in the jurisdiction where the property is situated.⁴⁴⁸ If the application does not involve mortgaged real property it is within the execution officer's discretion to decide what property⁴⁴⁹ will be used to cover the defendant's debt(s). The general prohibition on execution mandates, that property cannot be liquidated, if the creditor cannot be expected to receive payment out of the proceeds (*tarpeettoman ulosmittauksen kieltö*).⁴⁵⁰ Forcible collection out of the value of real property, however, automatically involves all holder's of mortgage in the property in question. A piece of property cannot be liquidated upon request of a creditor with a lower rank, if the proceeds would not cover the debts incurred under the higher ranked mortgages.⁴⁵¹ However, if the property is sold, creditors can, according to rank, claim payment for debt that is not yet due out of the proceeds of the sale.

If recovery proceedings are initiated by receipt of notice of judgement on foreclosure, the real property will not be sold, unless a creditor demands a sale (*esittää myyntivaatimus*) within six

⁴⁴² OK 5:3. Jokela et al., p. 577.

⁴⁴³ Jokela et al., p. 577.

⁴⁴⁴ OK 5:13.

⁴⁴⁵ UL 4:22.2.

⁴⁴⁶ OK 12:14.2.

⁴⁴⁷ UL 3:5-7.

⁴⁴⁸ UL 3:1.

⁴⁴⁹ See first footnote under 7.3 for restrictions relating to mortgage instruments in the debtor's possession.

⁴⁵⁰ UL 4:15.

⁴⁵¹ Jokela et al., p. 555.

months from the judgement becoming final.⁴⁵² If a request has not been made within said time limit, the debtor/pledgor can request, at the relevant execution authority, to have the foreclosure cancelled.⁴⁵³ No separate request is needed, when the recovery proceedings are initiated on application of a creditor, however, the sale may be conditioned upon the creditor's payment of a retainer that will cover the costs of the compulsory auction. Real property can be distrained by judgement of performance only in the event that it belongs to the debtor.⁴⁵⁴ If, the creditor has received a judgement on foreclosure though, the real property can be distrained, regardless of whether the property has been sold to someone else, even in instances where the foreclosure has temporarily been cancelled.⁴⁵⁵

Similarly, the lien does not necessarily lead to liquidation of the property, rather the creditor's lien can amount to a right to receive payment according to a loan arrangement.⁴⁵⁶ When a court takes the decision to commence insolvency proceedings for the benefit of a debtor, a stay on all executive measures with regard to collateral automatically follows.⁴⁵⁷ However, the creditor can request permission to resume liquidation, if the security does not belong to the basic necessities of the debtor, or if it is evident that the debtor will not be able to cover the creditor's secured portion (*velkojan vakuusvelkaosuus*).⁴⁵⁸ If the debtor over a payment-schedule of ten years would not be able to cover the minimum aggregate for ordinary debts⁴⁵⁹

⁴⁵² UL 4:22.3.

⁴⁵³ After taking the decision to cancel foreclosure the execution authority ex officio reports to the land register, which removes the entry on foreclosure from the register.

⁴⁵⁴ UL 4:9.1: Out of the debtor's estate shall not be distrained property that is discovered to belong to someone else and enforcement shall not be executed to the detriment of someone else, who has a right to the debtor's property. (translation by K. Weckström) *Ulosottolaki 4:9§1: Velallisen pesästä älköön ulosmitattako mitään, joka havaitaan toisen omaksi, älköönkä ulosmittausta tehtäkö toisen haitaksi, jolla on oikeus velallisen tavaraan.*

⁴⁵⁵ Jokela et al., p. 582 - . Whether or not the property was owned by the debtor at the time of the distraint is a separate issue that can be contested and if successful, result in cancellation of the foreclosure. Supreme court decision (KKO 2002:84). To prevent liquidation claims should be raised in recovery proceedings. UL 3:28. UL 4:26.1. If the debtor has registered title to real property, the real property can be distrained to cover his debt, if it is not evident that it belongs to someone else. If a third party claims ownership to the real property article 10 to the appropriate extent applies. Regardless of such a claim, real property can be distrained to cover a debt for which a real property lien has been raised. Paragraph 1 also applies, when a third party claims ownership to an element or appurtenance of the debtor's real property. Measures of distraint shall not be directed to a piece or parcel of real property that has been sold prior to enforcement. When enforcing a lien on real property measures of distraint shall be directed to a piece or parcel of land that has been conveyed from it, however, such distraint shall be individually directed to the real property and pieces or parcels of real property. (translation K. Weckström) *Ulosottolaki 4:26: Jos velallisella on lainhuuto kiinteistöön, kiinteistö saadaan ulosmitata hänen velastaan, jollei se ilmeisesti kuulu jollekin toiselle. Jos sivullinen väittää omistavansa kiinteistön, on soveltuvin osin noudatettava, mitä 10 §:ssä säädetään. Kiinteistö saadaan väitteistä huolimatta ulosmitata saamisesta, jonka vakuutena on kiinteistöpanttioikeus. Mitä 1 momentissa säädetään, on noudatettava myös silloin, kun sivullinen väittää omistavansa jotakin, joka hänen omaisuutenaan ei kuulu kiinteistöön sen ainesosana tai tarpeistona. Kiinteistön ulosmittausta ei saa kohdistaa ennen ulosmittausta kiinteistöstä luovutettuun määräalaan tai määröosaan. Panttisaamisen perimiseksi saadaan kiinteistön ohella ulosmitata myös siitä luovutettu panttioikeuden kohteena oleva määräala tai määröosa, jolloin kiinteistö sekä määräala tai määröosa on ulosmitattava jokainen erikseen.*

⁴⁵⁶ VJL (ADPI): Act on Adjustment of the Debts of a Private Individual (1993/57); section 23.

⁴⁵⁷ ADPI 13.1.1.

⁴⁵⁸ ADPI section 15.

⁴⁵⁹ ADPI section 32-Debtor's owner-occupied home and the minimum aggregate for ordinary debts: Where the debtor has an owner-occupied home, he shall cover his ordinary debts to the amount corresponding to the mathematical minimum aggregate provided in paragraph (2) (minimum aggregate for ordinary debts) regardless of whether he gets to retain the home or whether it is to be liquidated. The minimum aggregate for ordinary debts consists of: (1) the possible surplus of the anticipated sale price of the owner-occupied home of the debtor, minus the liquidation costs, the debts for which the home serves as collateral and the estimated capital amount securing the living arrangements of the debtor and his family at the cheapest feasible level (portion for living arrange-

the debtor-owned home can be liquidated, unless it would only insignificantly increase the portion allocable to ordinary debts. If a reasonable alternative residence is not available, the debtor-owned home cannot be liquidated.⁴⁶⁰ Failing this, a creditor's request notwithstanding, the liquidation of the debtor-owned home may, under certain circumstances, be post-poned for a year.⁴⁶¹

A requirement for liquidation of a third party security is that the principal debt has become overdue. However, some additional requirements have to be met. The creditor has to issue notice of the debtor's default on payment to the pledgor within one month of the date of default on pain of losing the right to claim interest on arrears (*viivästyskorko*).⁴⁶² When the creditor calls in or cancels the loan due to default on payment, notice of such action will have to be sent to the pledgor as well, to have effect.⁴⁶³ Nonetheless, preclusion of the creditor's right to seek enforcement due to the debtor's insolvency proceedings, does not preclude the creditor from seeking payment out of a security pledged by a third party. In these situations, however, it is possible for the third party to commence payment on the principal debt according to the original payment schedule.⁴⁶⁴ The pledgor is also entitled to at least a one month-term, in order to make the overdue payments that are overdue due to the debtor's default. However, the pledgor only answers for the debt with the value of the pledged property and is not liable for any exceeding debt.⁴⁶⁵

7.5 Overriding interests and priority

7.5.1. Distribution of proceeds

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

All creditors have to demand payment for their claim, when summoned to do so by the execution authority, on pain of not being included in the list of creditors (*velkojainluettelo*).⁴⁶⁶ An ordinary claim without a lien raised on the property can only receive payment out of the value of the property, if the property has been distrained to cover the claim. After all claims are

ments); and (2) the aggregate payment to the creditors over a payment schedule of five years, if the living expenses of the debtor and his family are estimated according to the cheapest feasible level. 32 § :*Kun velallisella on omistusasunto, velallisen on suoritettava tavallisia velkojaan 2 momentin mukaista laskennallista kertymää vastaava määrä (tavallisten velkojen vähimmäiskertymä) riippumatta siitä, saako velallinen pitää asuntonsa vai onko se muutettava rahaksi. Tavallisten velkojen vähimmäiskertymään luetaan: 1) mahdollinen ylijäämäarvo, joka saadaan, kun velallisen omistusasunnon todennäköisestä myyntihinnasta vähennetään rahaksimuuttokustannukset, niiden velkojen määrä, joista asunto on vakuutena, sekä sellainen pääomamäärä, jonka turvin velallisen ja hänen perheensä asuminen edullisimman saatavilla olevan vaihtoehdon mukaan tulisi turvatuksi (asumissuojaosuus); sekä 2) se kertymä, jonka enintään viisi vuotta kestävä maksuohjelma tuottaisi tavallisille velkojille, jos velallisen asumiskustannukset arvioidaan sen mukaan, että hänen ja hänen perheensä asuminen järjestetään edullisimman saatavilla olevan vaihtoehdon mukaan.*

⁴⁶⁰ ADPI, section 33.

⁴⁶¹ ADPI, section 35. If it is deemed reasonable in view of the circumstances of the debtor and his family, and if the debtor is able to service the secured debt during the delay.

⁴⁶² GTPP section 4.2.

⁴⁶³ GTPP section 24.

⁴⁶⁴ GTPP section 25.

⁴⁶⁵ Jokela et al., p. 566. However, if the third party chooses to take on a larger debt in order to retain the pledged property, the relationship between the creditor/pledgor is comparable to a negotiation for a new loan. In that case additional property can be pledged in return for a payment plan. For further information on order of payment see 7.8.

⁴⁶⁶ Jokela et al., p. 595.

known, the debtor as well as a creditor, can contest any claim on the list, regardless of whether a declaratory judgement has been given regarding the validity of the claim.⁴⁶⁷ If a holder of a lien does not demand payment in time, the amount of the mortgage is set aside from the proceeds of the sale. The creditor can thereafter demand payment out of the proceeds instead, by presenting a valid demand, which can of course also be contested.⁴⁶⁸ If the creditor has not demanded payment within 2 years of the compulsory auction becoming final, the assets are divided between the rest of the creditors.⁴⁶⁹

Section 5:26⁴⁷⁰ in the Execution Act mandates that the costs and claims of creditors are covered in the following order:

- 1) Execution costs;
- 2) Maintenance costs, if the property is part of an estate of bankruptcy;
- 3) Statutory liens, with equal rank;
- 4) Liens based on a mortgage or registered special right according to rank;
- 5) Unregistered special rights, if the owner possessed the property at the time of distraint, with priority for the holder of the earliest right;
- 6) The unpaid purchase price, if a provision regarding reservation of title (*omistuksenpidätysehto*) was taken into the deed; and
- 7) Other reported claims with equal rank.⁴⁷¹

Holders of liens backed by a mortgage are also privileged in bankruptcy proceedings and receive payment out of the value of the real property first, as long as they have demanded payment pending bankruptcy proceedings.⁴⁷² Only the costs that *directly* pertain to the main-

⁴⁶⁷ UL 5:24.1. Supreme court decision (KKO 1992:137)

⁴⁶⁸ UL 6:12.

⁴⁶⁹ UL 6:18.

⁴⁷⁰ UL 5:26: In a compulsory auction of real property the debts and special rights enjoy priority in the following order: 1) execution costs; 2) claims, for which statutory liens have been raised in the real property, with equal rank; 3) claims, for which a lien based on a mortgage in real property has been raised and special rights pertaining to the property, ranked according to entry in the land register; 4) unregistered rights to a pension, lease, or other usufruct in the real property, if the holder of the right has taken the real property or part thereof into possession before the act of distraint; in the order of an earlier right gaining priority; 5) an unpaid purchase price specified in article 32 a; and 6) claims, for which the real property has been distrained, with equal rank, unless otherwise provided in the act on the order in which creditors receive payment (1578/92). If the real property is part of an estate of bankruptcy, necessary costs for maintenance and care of the property is to be redeemed to the estate after the execution costs have been covered. (translation by K. Weckström) UL 5:26.

Kiinteistön huutokaupassa saamisilla ja erityisillä oikeuksilla on etusija seuraavassa järjestyksessä: 1) täytäntöönpanokulut; 2) saamiset, joiden vakuutena on kirjattu lakisääteinen panttioikeus kiinteistöön, keskenään samalla etusijalla; 3) saamiset, joiden vakuutena on kiinnitykseen perustuva panttioikeus kiinteistöön, ja kiinteistöön kirjatut erityiset oikeudet lainhuuto- ja kiinnitysrekisterin osoittamalla keskinäisellä etusijalla; 4) kiinteistöön kohdistuvat kirjaamattomat eläke-, vuokra- tai muut käyttöoikeudet, jos oikeudenhaltija on ottanut kiinteistön tai sen osan hallintaansa ennen ulosmittausta, niin että aikaisemmin perustetulla oikeudella on etusija; 5) kauppahintasaaminen, jota tarkoitetaan 32 a §:ssä; sekä 6) saamiset, joista kiinteistö on ulosmitattu, keskenään samalla etusijalla, jollei velkojien maksunsaantioikeudesta annetussa laissa (1578/92) toisin säädetä. Jos kiinteistö kuuluu konkurssipesään, kiinteistön hoidosta ja myymisestä aiheutuneet välttämättömät kustannukset on suoritettava konkurssipesälle heti täytäntöönpanokulujen jälkeen.

⁴⁷¹ There are two exceptions to the order of payment regarding claims. First, a maintenance claim, i.e. alimony is paid before other ordinary claims. Secondly, interest incurred after the date of bankruptcy will be paid only after all other claims have been satisfied. MaksL: The Act on the Order in which Creditors Receive Payment (1992/1578) section 4 and 6.

⁴⁷² KL: Bankruptcy Act (2004/120) 12:9 (*valvontavelvollisuus*) and 12:16 (*jälkivalvonta*). However, failure to demand payment does not amount to preclusion of the lien under the mortgage (CRE 17:6.2).

tenance and care of the real property receive priority over registered liens.⁴⁷³ However, other bankruptcy claims receive priority in relation to claims in group 7.⁴⁷⁴ As mentioned above the same mortgage can act as security for a primary lien, as well as, a secondary lien. Likewise, if a third party pledgor pays the debtor's debt, the mortgage remains as security for repayment against the debtor, to the benefit of the pledgor. Therefore, either of the three, can act as mortgage holder in bankruptcy proceedings.⁴⁷⁵ In this regard, the holder of a lien is more strongly protected than a holder of a deposited security (*käteispantti*) or floating charge (*yrityskiinnitys*). However, a holder of a lien never has the right to realize the security, but must initiate recovery proceedings to receive payment. The other two above-mentioned forms of security, give the holder, under certain circumstances, the right to realize the security due to non-payment.⁴⁷⁶ However, in bankruptcy proceedings a holder of a floating charge (that has demanded payment⁴⁷⁷) only receives priority to up to half of the value of the mortgaged property in relation to other claims.⁴⁷⁸

If the lien is held invalid under the rules of recovery and payment received under a lien backed by a mortgage is recovered to the estate of bankruptcy⁴⁷⁹, the creditor loses its priority and can only demand payment as an ordinary claim.⁴⁸⁰ In addition, holders of liens can demand payment outside bankruptcy proceedings.⁴⁸¹ However, a holder of a lien based on a third party pledge is not a creditor in the bankruptcy of the pledgor, since the debtor in that case is not personally responsible for the debt. Therefore, the estate of bankruptcy can e.g. sell the property without hearing the holder of the lien.⁴⁸²

7.5.2. Overriding interests

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

Only registered statutory liens receive priority and if not, the government receives payment, for e.g. taxes, as ordinary claims. Execution costs, which normally amount to about 2000 euros, however, always receive priority.

7.6 Scope of the mortgage

7.6.1. Buildings

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

First, it is worth mentioning that the same physical property can and frequently does serve as security for different loans to different debtors.⁴⁸³ The issue at trial is therefore not whether

⁴⁷³ KL 17:7 and UL 5:26.2.

⁴⁷⁴ Jokela et al., p. 621.

⁴⁷⁵ Jokela et al., p. 622.

⁴⁷⁶ If the debtor has been declared bankrupt the creditor must issue a disquisition of his/her claim for which the property has been pledged to the estate of bankruptcy. Otherwise the estate can demand a stay on the realization of the property (KL 17:11).

⁴⁷⁷ KL 12:11.

⁴⁷⁸ MaksL section 5.

⁴⁷⁹ See above section 7.3.

⁴⁸⁰ Jokela et al., p. 635 .

⁴⁸¹ See below 7.8.

⁴⁸² Jokela et al., p. 620.

⁴⁸³ Supreme court decision (KKO 1998:47) holding that both the housing company and the shareholders had

one pledge or the other is invalid, but which is to be given preference when both rights cannot be realized. Conflicts are resolved in a separate trial under the general doctrine regarding elements and appurtenances that has over time evolved in case law.⁴⁸⁴ When it comes to buildings, however, registration of ownership is the norm today (see above 1.4.), wherefore the rules on rank and priority govern. Other appurtenances (constructions and machinery) as well as extraction rights may cause some concern, especially when they have not been contractually specified, or only have limited effect on third parties. However, article 14:5 of the Code allows for the owner, to specifically register that a certain piece of property a) belongs or b) does not belong to the real estate.

If a specific piece of property is deemed to be an element (*ainesosa*) or appertunance (*tarpeisto*) of the real estate, it legally belongs to the estate and cannot be separated from it, regardless of ownership. The opposite legal conclusion is reached, when the object is deemed to be a piece of movable property (*irtain esine*) and therefore not a part of the real estate. All that grows on real estate is considered an element of the estate, as are buildings of the same owner, wells, basements, as well as, pipes and cables. Whatever is *permanently used* for the benefit of the real estate, can be deemed an appertunance of the estate. It does not matter that the object can be easily moved or removed from the property, as long as, an initial *physical relationship* has been established. When considering the connection to certain parts of a building, it is decisive whether the building can be considered complete without the object in question. However, economic considerations, such as the effect on the value of the property, are also important, as well as, the use and/or benefit the object brings to the real estate, regardless of whether the same business continues.⁴⁸⁵

An estate of bankruptcy cannot separate and sell element(s) nor appurtenances of the real property without the consent of the lien holders, if the separation would lower the value of the real estate. However, if a third party owns, or has a registered right to, an element or appurtenance of the real property that right shall be respected, and is binding upon later lien holders.⁴⁸⁶ If an element or appurtenance has been registered as part of the real estate, a provision regarding reservation of title or lease (*omistuksenpidätys- tai vuokrausehto*) might not be deemed effective in relation to lien holders.⁴⁸⁷

7.6.2. Machinery

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

See 7.6.1. above the same rules govern.

7.6.3. Insurance

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

Under article 17:8.1 of the Code, the lien holder has priority to indemnity for damage to real estate.⁴⁸⁸ Several lienholders receive payment according to rank, regardless of whether their

the right to use their property (eventhough it in fact amounted to the same) as security for a loan.

⁴⁸⁴ Kartio, p. 96.

⁴⁸⁵ Kartio, p. 98-101.

⁴⁸⁶ Jokela et al., p. 632.

⁴⁸⁷ Supreme court decisions KKO 1988:85, 198:37, 2003:2, 2003:82. Kartio, p. 102-105.

⁴⁸⁸ Section 8 of the Code-Right to Compensation for Insurance and Redemption (1) The creditor shall have the right to receive payment from and insurance compensation before the debt has become due and payable, unless

claims are due. In practice, however, the ideminty is almost always paid to the titleholder, either because it falls under one of the exceptions in article 17:8.2 of the Code, or because the lienholders consent to it.⁴⁸⁹ The insurance company decides whether and to whom the ideminty is paid.

7.6.4 Right to redeem

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

According to article 17:7.1 of the Code, the creditor has the right to payment of existing debt, even if the claim has not become due, in the event that the value of the security has decreased.⁴⁹⁰ The decrease must endanger the receipt of payment, and therefore, if the remaining value of the property is sufficient to cover the debt, the creditor cannot demand payment.⁴⁹¹ The creditor has to react, by bringing suit within six months of gaining knowledge of the decrease in value of the security. In practice, contracts of pledge usually include a provision under which the debtor, in these circumstances, is under duty to pledge additional security for the loan within a set time, on pain of the bank calling in the loan.⁴⁹²

If the owner has engaged or is about to engage in activities (*hukkaamisvaara*) that will decrease the value of the security (e.g. removing to sell buildings and machinery that are part of the real estate), or if the owner neglects the maintenance and care of the security, the creditor may bring suit in *forum sitae* to seize (*takavarikko*) the property as a precautionary measure (*turvaamistoimi*).⁴⁹³ The debt need not have become due, only the receipt of payment is endangered.⁴⁹⁴ In the event that a seize is ordered, it will remain in effect one month after the debt has become due.⁴⁹⁵

7.6.5. Redemption after foreclosure

May the mortgagor redeem the mortgage even after foreclosure?

A creditor does not have a right to redeem the property, only to receive payment from the value of it.

A decision on distraint of real estate always covers all elements and appurtenances of the es-

the compensation by virtue of paragraph (2) is to be paid to the titleholder. If the debt backed by the lien is subject to a dispute or it is otherwise unclear as to whom the compensation should be paid, the insurer shall withhold payment. (2) The titleholder shall have the right to collect the insurance compensation for the restoration or repair of the damaged real estate. The titleholder shall have the right to collect the compensation also if the amount of the compensation is minor in proportion to the value of the real estate or if it is otherwise evident that the collection of the compensation does not decrease the security of the debt. (3) Separate provisions are enacted on the right of a lienholder to compensation for redemption and compensation set in real estate formation.

⁴⁸⁹ Jokela et al., p. 520.

⁴⁹⁰ Article 17:7 of the Code-Decrease in Value of Security; (1) If the security for the payment of a debt from a mortgaged real estate is out in jeopardy because the value of the real estate decreases to an essential degree due to a fire, natural disaster, activity of the titleholder or another comparable reason, the creditor may seek payment of the debt from the real estate even if the debt has not yet become due and payable. (2) If the creditor does not bring an action for the payment of the debt within six months of gaining knowledge of a circumstance referred to in paragraph (1), he shall not have the right to payment before the debt becomes due and payable.

⁴⁹¹ Jokela et al., p. 517.

⁴⁹² Jokela et al., p. 517-518.

⁴⁹³ OK Chapter 7.

⁴⁹⁴ Maakaari, p. 519.

⁴⁹⁵ OK 7:6.1.

tate as well. A separate decision regarding ownership of a specific element or appurtenance is only taken, when the presumption of inclusion⁴⁹⁶ has been challenged in recovery, insolvency or bankruptcy proceedings. A challenge can also be raised in a separate trial (*täytäntöönpanoriita*), on whether an appurtenance shall be deemed part of the real estate or floating charge.⁴⁹⁷ After a compulsory auction the creditor, or anyone else, cannot challenge the ownership to any part of the real estate of the new owner.⁴⁹⁸

7.7 Security granted by a third party

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

The Act on Guaranties and Third Party Pledges (GTPP)⁴⁹⁹ entails the rules governing all securities given by both debtors and third parties as a result of a contract of pledge. The act sets forth general rules and by reference in section 41, extends some of the rules governing guaranties to third party pledges as well.⁵⁰⁰ Chapter 8 specifically concerns third-party pledges.⁵⁰¹ If a private person serves as guarantor or pledgor, the rules are mandatory in favour of the guarantor or pledgor⁵⁰² Some of the rules apply solely when private persons are guarantors or pledgors and are all mandatory provisions, and therefore render an agreement to the contrary invalid.⁵⁰³ However rare a transaction in practice, private third party pledges are over-represented in case law. There are no separate rules governing the form of third party pledges, and it is worth mentioning that the GTPP governs the relationship between debtor and creditor, as well as, on the one hand, the relation between the pledger and creditor and, on the other hand, the pledger and the debtor.⁵⁰⁴

Thus, the contract of pledge can take the form of a general or special pledge. However, apart from the principal debt, additional costs such as interest or recovery costs, are not binding on a third party pledgor that has signed a general pledge, unless this has specifically been agreed upon and explained to the third party.⁵⁰⁵ If a private person guarantees a debt with a general

⁴⁹⁶ Kartio, p. 105.

⁴⁹⁷ The same rules govern when dispute arises whether an element or appurtenance is to be considered part of the sale of a real estate. Jokela et al., p. 592-593.

⁴⁹⁸ UL 5:50. Only in cases where the new owner takes upon her/himself to answer for the debt will the liens remain valid (e.g. when a whole business is sold and business is resumed). UL 5:27 and 5:46. Any special rights that have not been maintained in the recovery proceedings lapse as well. The mortgage instrument, however, need not be declared null and void, but are instead transferred to the new owner who can use them as security for his or her own debt. Maakaari, p. 604-605.

⁴⁹⁹ GTPP, 1999/361.

⁵⁰⁰ GTPP Section 41.

⁵⁰¹ GTPP Section 40-Dueness of the right under a third-party pledge: (1) A creditor shall be entitled to repayment under a third-party pledge as soon as the principal debt has become due. (2) If the debtor has given a security for the same principal debt, the creditor may collect the principal debt from a third-party pledge subject to the conditions laid down in section 23. (3) In the undertaking on the pledge, a derogation may be made to paragraph (2) unless the security is by law primarily available for the debt.

GTPP Section 42- Transfer of a pledge: If a debtor has transferred pledged property to another person, or that person has by some other means become the owner of the pledged property, and this transfer has been notified to the creditor, the provisions in section 4(2) and sections 13-14 apply, after the notification, to the new owner of the pledged property.

⁵⁰² GTPP Section 1(3).

⁵⁰³ Jokela et al., p. 470.

⁵⁰⁴ Jokela et al., p. 471.

⁵⁰⁵ GTPP section 4(1).

pledge, it is mandatory to include a specification regarding the maximum amount of the lien, as well as, a time limit for it, in the contract of pledge.⁵⁰⁶ According to GTPP section 5(2) a dereliction of duty to specify, results in the lien being restricted to the amount of the principal debt, unless the guarantor knew of the other costs incurred.⁵⁰⁷ A third party pledgor can also limit his or her liability by giving notice of withdrawal, and henceforth is only liable for the debt incurred before notice was given.⁵⁰⁸ As mentioned above the creditor is under specific duty to inform the pledgor about surprising and onerous conditions in the contract of pledge, in order for it to have effect.⁵⁰⁹ The general adjustment provision, GTPP section 7(1), does not apply to third party guarantors, since they only answer for the debt with the value of the pledged property. Adjustment is in principle possible under the general adjustment provision, however, a high threshold to adjusting guarantee liability has been maintained in case law, so as not to undermine the whole point with third party pledges.⁵¹⁰

As regards to collectability on the debt, the creditor can demand payment from either the pledgor or debtor as soon as the debt is due, unless otherwise agreed in the contract of pledge. Similarly, the fact that the creditor has initiated insolvency proceedings against the debtor, does not preclude the creditor from seeking payment from a third party.⁵¹¹ However, if the debtor has offered property as security for the debt, the property of the debtor has primary liability.⁵¹² Consequently, in cases of contracts of pledge regarding shares in a housing company, payment is primarily sought out of the value of the apartment and under mandatory law, property pledged by a third party only serves as collateral security (*täytevakuus*).⁵¹³ Likewise, if the pledger voluntarily pays off the debt, the security raised by the debtor usually remains in force to the benefit of the pledger.⁵¹⁴

7.8 Plurality of mortgages

If the owner has already set up (and registered) a mortgage and then wants to set up a second mortgage for another bank, can he do so without the consent of the first bank?

Every mortgage and entry in the mortgage register receives a rank, and more than one mortgage cannot receive the same rank. However, it is not uncommon that the owner wishes to raise several mortgages (e.g. 100.000 euro + 50.000 euro + 50.000 euro) for smaller amounts, instead of one for a large amount. This way, the bank might release mortgage instruments over time, as the debt is paid off and the owner will have mortgage instruments available for new loans. Thus, the owner can maximize the security-value of the property at all times and

⁵⁰⁶ GTPP section 5(1) and 5(3).

⁵⁰⁷ It should be noted that the dereliction does not result in invalidity.

⁵⁰⁸ GTPP section 6.

⁵⁰⁹ GTPP section 12- Duty to Inform the guarantor before the guaranty is given: (1) Before a guaranty is given, a lender must inform a private guarantor of the debts and incidental costs that the guaranty covers, the principles under which repayment can be required of the guarantor and the other circumstances that are of relevance as regards the status of the guarantor. If the information is provided in writing, it shall be provided no later than one day before the guaranty is given. (2) Before the guaranty is given, the lender shall inform a private guarantor of those other obligations of the debtor and other circumstances relating to the ability of the debtor to pay as can be deemed to be of interest to the guarantor. (3) If the lender is in breach of the duty provided in paragraph (1) or if he/she fails to inform the guarantor of a circumstance referred to in paragraph (2) that he/she knew of, or ought to have known of, and there is reason to believe that the breach has affected the guaranty, the liability of the guarantor may be adjusted.

⁵¹⁰ Jokela et al., p. 475.

⁵¹¹ ADPI section 14.

⁵¹² GTPP section 40 (1) and 40(2).

⁵¹³ GTPP section 3 (2).

⁵¹⁴ GTPP section 30.

will not have to resort to secondary pledges (that might not be as desirable to a bank).

After receipt of notice of a secondary pledge, the holder of the mortgage instrument is under specific duty to protect the interests of the holder of the secondary lien and cannot surrender the mortgage instrument to the debtor after receiving payment for his or her own debt.⁵¹⁵ In cases of non-payment the secondary lien has the rank of the mortgage, in relation to other mortgages, but can only receive payment after the amount of the primary lien and out of the amount, for which the mortgage has been raised.⁵¹⁶ Nonetheless, if the debtor has signed a general pledge to the holder of the primary lien, new debts incurred after receipt of notice of the secondary pledge, receive payment after the secondary lien. However, interest on the principal debt and accessory charges pertaining to the primary lien, are not for these purposes, considered new debt.⁵¹⁷ The secondary lien, however, is of equal status to a primary lien, when it comes to effect against the debtor and third parties (i.e. other holder's of rights in the mortgaged property). Therefore, the holder of the second lien, has equal right to enforce the lien due to unpaid.⁵¹⁸⁵¹⁹

7.9 Several properties

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

A joint mortgage (*yhteiskiinnitys*) can only be created over two or more real estates, if they belong to the same owner(s) and are situated in the jurisdiction of the same registration authority. Furthermore, the objects can only be subject to mortgages of the same amount and seniority. After a joint mortgage has been registered, separate mortgages can no longer be registered in the individual estates.⁵²⁰

However, if a piece or parcel is sold from a real estate, the mortgage remains in effect in relation to both/all pieces of property until it is lifted. In these instances, payment shall primarily be taken out of the property of the debtor. If the debtor is not the owner of any of said pieces or parcels of property, payment shall primarily be taken out of the source real estate. When several pieces or parcels are in question, she who has applied for registration of title first, shall answer last for payment of the lien, however, if no registration has been sought the properties shall answer by date of transfer; the later going first.⁵²¹

7.10 Transfer of the mortgage

7.10.1 Transfer of the mortgage in general

The debtor has set up a mortgage/land charge to the benefit of bank 1 to secure a loan

⁵¹⁵ Jokela et al., p. 486. For further duties following from the receipt of notice see the Supreme court decision (KKO 1988:13) holding that it is the responsibility of the holder of the mortgage instrument to inform the holder of the secondary mortgage about an executive auction, on pain of incurring liability for any damage to the holder of the secondary mortgage.

⁵¹⁶ Jokela et al., p. 485. Here, the word 'after' refers to, which mortgagee's debt will primarily be met, when the total debt succeed the amount of the total mortgage.

⁵¹⁷ Jokela et al., p. 486.

⁵¹⁸ Kärkkäinen, p. 255-259.

⁵¹⁹ See above 7.1 on alteration or division of mortgages as an alternative.

⁵²⁰ Article 15:2 of the Code.

⁵²¹ Article 17:9 of the Code.

granted to him. Now, bank 1 wants to refinance the loan with bank 2 How can bank 1 transfer the mortgage to bank 2?

The rank of a mortgage can be altered on application by the titleholder, with the consent of lienholder(s) and holder(s) of registered special rights, whose rights are decreased by the alteration.⁵²² The alteration of a joint mortgage can only take place, if the alteration affects the estates equally.⁵²³ A mortgage may under the same conditions be extended to cover other real estate belonging to the titleholder.⁵²⁴ Mortgages of equal seniority can be merged to one, and consequentially a mortgage can also be split into two or more mortgages. A mortgage can also be cancelled, in full or in part, and in cases of joint ownership, even without the consent of other titleholders.⁵²⁵

The creditor can transfer the debt, the lien and consequently the mortgage instrument without the consent of the titleholder.⁵²⁶ The lien remains unaltered and the debt, the lien and mortgage instrument, cannot be separated. The power to pledge per se, can never leave the owner, however, the bank can hand over the mortgage instrument and contract of pledge to a new bank, as security for a loan of its own.⁵²⁷ In relation to a third party pledger who has signed a general pledge, new debts of the original debtor, as well as, new or old debts of the new debtor or creditor, cannot be incurred after a transfer of the primary claim has taken place.⁵²⁸

7.10.2 Transfer to more than one creditor

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

Transfer is only possible, if the lien remains unaltered and the debt, the lien and mortgage instrument, are not be separated.

7.10.3 Administration of the mortgage by a trustee or fiduciary

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

Not applicable.

7.11 Conflict of Laws Issues

7.11.1 Bank loan taken by a foreign debtor in the host country

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

Finnish law governs the mortgage and the pledge. The parties are free to agree on what law is applied to the loan contract.

7.11.2 Bank loan taken in the debtor's country of residence

⁵²² As an alternative to secondary pledges.

⁵²³ Article 18:1 of the Code.

⁵²⁴ Article 18:2 of the Code.

⁵²⁵ Article 18:3-5 of the Code.

⁵²⁶ Article 17:5.2 of the Code and VJL: Promissory Notes Act (1947/622) section 9.

⁵²⁷ I.e. the form of a general pledge can be used. Jokela et al., p. 546-548.

⁵²⁸ GTPP, section 9. Jokela et al., p. 548.

See above 7.12.1.

7.11.3 Bank loan taken in a third EU-country

See above 7.12.1.

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

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

The Finnish system has been considered in compliance with the rules set forth by the ECJ, since the mortgage instrument is always set to a fixed EURO-amount. However, a similar problem may arise if the loan contract fixes the debt in foreign currency, or in relation to the value of eg. gold.

Does your national law contain restrictions or de facto disadvantages for foreign debtors which might negatively affect cross border transactions involving real property?

Restrictions on foreigners to acquire land were abolished through the reform of the Code in 1997. However, some practical concerns might arise for foreigners, since banks are unlikely to consent to applicability of other than Finnish law to the loan contract. Mortgages in real property are raised, and the amount fixed, in euros.

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