

**REAL PROPERTY LAW
PROJECT**

FRANCE

Stéphane Glock

1. Real property Law – Introduction

1.1 General Features and Short History

The foundations of French law are in Roman law, according to which property can only be transferred when there is both agreement and the fulfilment of formalities, called “traditio”. This dual requirement remained in both civil-law and common-law countries. Gradually, the formal requirements necessary to assign title gave way to the principle of “solo consensus” transfer.

Roman law was truly abandoned after the French Revolution. The French Civil Code of 1804 lays down the new law in the provisions of article 1138: *«L’obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier propriétaire... »*. (“*The obligation to deliver property is completed by the sole consent of the contracting parties. It renders the creditor owner...*”). However, the Civil Code did not provide for an exhaustive system of land registration and had to be completed by another legal provision, namely the Act of 23th March 1855, inspired by banking security requirements. The registration system set up was a personal registration system, i.e. searches were made on the name of the parties.

The decree of 4th January 1955 improved and transformed this system and from then on formed the basis of the land registration system. It implemented four main reforms: (i) The field of application of land registration was extended to numerous deeds; (ii) Registration procedures, which had until then been personal, were supplemented with a real property registration system, i.e. with searches no longer limited to individual property owners, but extended to the property itself; (iii) The mortgage registrar, or “conservateur des hypothèques”, in charge of land registration became responsible for checking the formal validity of deeds; (iv) The text set out a system of sanctions in the absence of registration.

Real property law in France is thus governed by a declaratory system, as are Belgium, Luxembourg, Portugal and Italy: the transfer of property results exclusively from the consent of the parties. The exchange of consent completes the sale and registration only occurs to render this transfer of property enforceable in relation to third parties.

However, the land registration system does not apply to all of France. Real property located in the east of France is subject to a different system. In the three departments of Alsace and Moselle there is a strong influence from the systems adopted in, inter alia, Germany, Austria, Switzerland and the Netherlands. The consent of the parties is still required, but in these countries the sale is only completed by registration of the transfer on a land register. The regime in Alsace-Moselle does not go this far; the

registration process involves thorough checking, which removes any defects from the deed and enables registration to be relied on as a basis for showing the true property title. The sale is completed on the exchange of consent, as in general French law, and land registration simply generates enforceability with regard to third parties. However, the effect of registration is further reaching in local law: third parties are thereby made aware of property rights and not just a deed of ownership.

Notwithstanding these differences, the foundation of the rules applicable in real property law, that is the right to individual property and the resulting effect with regard to third parties, is affirmed in the French declaration of human and citizens' rights (Déclaration de l'Homme et du Citoyen), whose text has not been modified since 1789. Articles 2 and 17 state: *«Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété et la sûreté et la résistance à l'oppression »* et *« La propriété étant un Droit inviolable et sacré, nul ne peut en être privé... »*. (“The aim of all political associations is the preservation of human, natural and imprescriptible rights. These rights are freedom, property, safety and resistance to oppression...” and “As the right to property is an inviolable and sacred right, no one can be deprived of it ...”)

1.2 Property and Estates

1.2.1. Estate versus Property

The Civil Code initially provided that the right to property is the right by which a thing is subjected absolutely and exclusively to the action and will of a person. The consequence of this idea is that property in goods can only be exercised individually or in the context of joint ownership. Historical and economic developments have not enabled this principle to be maintained in its pure form. Our legal system has had to integrate a process whereby relationships in a group of individuals owning different plots in the same estate are managed. The legislators have intervened several times, promulgating the reference provision of 10th July 1965 to organise a collective means of holding property.

The status of co-ownership (“copropriété”) is applicable to built-up land in which property is divided between several people in plots, each comprising a private part and a share of the common parts. The latter are therefore the subject to joint-ownership rights held by all of the co-owners. The rules of co-ownership determine which parts are common, which are private and how they are managed. The co-owners together form a co-owners' association (“syndicat de copropriété”). French law provides for the division of co-ownership expenses as well as the stating the various voting majorities that apply depending on the nature of decisions that the co-owners are required to take in their management of the building.

Another alternative to undivided property and the co-ownership system, albeit of a different nature, consists in using a company law mechanism. In France it is possible to create a type of property-development company (“société civile immobilière”) which has a legal status separate from its partners. This system is provided for by articles 1832 onwards in the Civil Code. The estate thus belongs to a third person, a legal entity, to which all the property rights are attributed, in the same way as they can be exercised by a physical person. The legal situation and the exercise of the property rights are the same as those applicable to an individual estate owner. The relationships between the partners, as owners of company shares rather than shares in the property of the estate, are governed by French company law rather than property law.

1.2.2. Superficies solo cedit

With the method of land ownership defined (by one natural or legal person, or by several people in “forced indivision” under the co-ownership system), article 552 of the Civil Code introduces the principle of “accession”, by which «*La propriété du sol emporte la propriété du dessus et du dessous*». (“*Property in the earth means property in that which is below and above.*”) Practice then invented the idea of disassociating property from that which is underneath and above by creating building leases (“droit de superficie”). This idea has been recognised by jurisprudence, notably in a decision of the French Cour de Cassation (appeal court) of 5 November 1866 (S.1866.441). Thus, a building lease provides a right to property which is real, perpetual, can be subjected to charges, acquired by contract, prescription or expropriation and with effect on existing or future constructions or plantations, located on ground known as subsoil, belonging to a third party.

1.3 Interests in Land

1.3.1. Numerus clausus

The law limits the interests that can be held in land.

1.3.2. System of Interests in Land and Numerus Clausus

The main interests are real property, which is a perpetual right, e.g. the building lease mentioned above, and emphyteusis which is a right limited in time. It is also worth mentioning accessory interests, namely easements, bare property rights and usufruct resulting from the division of property, or the right to use or inhabit land, as well as securities.

1.3.3. Servitudes (usus)

Amongst these categories of land interests, the Civil Code provides for the easement (“servitude”) which, according to article 637 is” «...*une charge imposée sur un heritage pour l’usage et l’utilité d’un heritage appartenant à un autre propriétaire*» (“... *a charge imposed on an estate (it means real property) for the use of an estate belonging to another estate holder*”). This legal mechanism is required by both agricultural and built-up land. They facilitate the use of land and buildings by offering a means of increasing a property’s economic utility by making it available to several users. These benefits apply to the dominant tenement and are offset by restrictions on the servient tenement. The easement is always granted for the benefit of an estate and never for the benefit of a person.

Usufruct, or “usufruit” is a further interest in land, either enjoyed as a life interest (“viager”), or limited in time. It confers on the holder the use and enjoyment of real or personal property belonging to another person, on the condition that he maintains the substance of the property, as provided for by article 578 of the Civil Code. The initial property holder is thus reduced to holding bare property. The main feature of this device is its temporary nature. Throughout this period, the usufructuary enjoys the use and profit of the property; the bare-property holder, who can be prevented from using the property by agreement, holds a sort of virtual or future right to recover absolute ownership.

Finally there are land charges. These are to be distinguished from personal charges, which consist in increasing the number of debtors and which does not form part of this study. A land charge may either be a right to hold property, or an interest in another’s property. There are several possible classifications, depending on the source of the charge, i.e. contractual, statutory or legal charges, or the method of constitution, i.e. whether it has been registered or not, whether there is loss of property right or not. It should be noted that a charge always gives rise to a debt in French law.

A detail worth noting is the existence of a specific land charge in the local law of Alsace Moselle: the land service (“*prestation foncière*”). This does not exist in general French law. It is a registration that can be attached to an estate as a guarantee for the regular provision of services, which can consist of a positive obligation, such as upkeep and maintenance, or an obligation to pay an annuity.

1.3.3. Mortgages and Rent Charges

1.3.4. Rights in Rem to Acquire Real property

1.3.5. Other Interests in Land

1.4 Apartment Ownership (Blocks of Apartments or Condominiums)

The rules of co-ownership govern the conditions under which apartments can be held. The founding text, dating from 10 July 1965, is an uncodified statute, which has been revised several times. This statute was the culmination of a slow process, timidly set in motion by the writers of the French Civil Code. In 1804, only one article was dedicated to the system of blocks of apartments divided by floors, expressed legally as the superimposition of individual properties. The inadequacy of this idea led to developments in the doctrine and in jurisprudence, which favoured the concept of forced indivisibility. The rules of co-ownership then arose through practice. All of these conditions were then given their first statutory, but non-binding status in the Act of 28 June 1938, which repealed article 664 of the Civil Code, referred to above. The development of property construction and the need to create binding status gave rise to the current provisions.

The status of co-ownership shall apply, in compliance with article 1 of the statute, to *«tout immeuble bâti...dont la propriété est répartie entre plusieurs personnes, par lots comprenant chacun une partie privative et une quote-part de parties communes»* (“*all built-upon land... in which property is divided between several people, in plots each comprising a private part and a share in the common parts.*”) Each co-owner is the individual owner of his own plot and joint owner of the common parts, i.e. the land and the elements making up the building. This property which is simultaneously individual and collective cannot be divided. The remainder of the estate is governed by traditional real property rules.

The rights and obligations of the co-owners, and in particular the relationship between co-owners, are defined in the co-ownership agreement. It has the force of a contract, but many of its provisions are dictated by statute, some of them being mandatory. This agreement does not have to be registered for the initial owners of the building; it must be registered to have effect with regard to their assignees, i.e. subsequent owners. There are four compulsory sections relating to the planned use of the private and shared parts, the management of the shared parts, the division of shared charges between the different plots and, finally, the method for calculating the shares in the shared parts and the division of charges.

Various examples may be taken to illustrate the operation of co-ownership. They show that a majority vote is seldomly required, which is very reminiscent of the rules of co-ownership. Thus, the unanimous agreement of the co-owners is required on a change in the planned use of a plot in the estate, or the modification of the division of the charges. Likewise, unanimity is required for the modification of the conditions of enjoyment of a plot (NB. under French law it is not possible to ban pets). This organisation of co-ownership does not imply that the system of collective property reduces property rights over the private plot. The co-owner is free to mortgage his

plot without consulting the co-owners' association, and the effects of the mortgage are identical to those on a property held individually, including in the event that it is destroyed.

1.5 Building Lease

If, traditionally, a real property right evokes a perpetual property right, in French law there are some forms of property right that are limited in time. They use terms that are not generally linked to rights in rem, the lease or "bail" for example, but they are in fact interests in land. The French agricultural code provides for different types of emphyteusis; this is a very long-term lease which is generally used for land that the lessee undertakes to cultivate in return for the payment of an annuity, with the option of mortgaging the land. The French building code ("Code de la construction et de l'habitation") provides for the building lease, a variant used in estates in towns: the lessee undertakes to build on the lessor's land, to maintain the buildings and to release them to the lessor at the end of the lease. A modest rent is paid for the completed buildings. In the same area, mention is sometimes made of a type of land license, the "concession immobilière", defined in law as a contract under which a land owner grants enjoyment of an estate to the licensee for a period of at least twenty years in return for an annuity; the licensee cannot, however, mortgage the land.

Emphyteusis and building leases are true property rights, with unlimited effect except in respect of perpetuity. More specifically, these rights last for a minimum of 18 years and a maximum of 99 years. At the end of the lease, the lessor becomes the owner of the entirety of the estate again, without any indemnity being payable to the lessee.

1.6 The Public Law Context of Real property Transactions

Property law transactions are primarily governed in the spirit of contract law, allowing considerable contractual freedom. Few provisions of the Civil Code concern public law. For example, non-professional parties may be exonerated from the guarantee against hidden defects.

However, over the past three decades contractual freedom has undergone various attacks in favour of provisions inspired by consumer protection. These provisions are imposed on the parties, sometimes by way of a mandatory system, as with sales of future property (buildings planned to be built), but more generally through additions to the system of real property sales. They vary from the compulsory condition precedent dependent on obtaining funds for a property purchase, through the guarantee of the property's floor area, to the seller's obligation of disclosure (termites, asbestos and lead). This current tendency seems to be the one favoured by the legislature.

The intervention of the legislature is not limited to regulating the contract of sale. As French national economic health is measured on the performance of the property market, property tax law has undergone various reforms. The system of registration charges has been simplified and tax applicable to the sale of estates of over 5 years has been reduced. VAT is no longer chargeable on purchases of land for building by natural persons. These measures are aimed at encouraging the acquisition of a main residence, together with a policy of interventionism in finance options. Incentives to acquire new buildings for rental with quite comfortable tax reductions.

1.7 Brief Summary of “Real property Law in Action”

In conclusion, real property law is today accompanying a growing property market. There was a boom in the property market about 10 years ago, but it was limited to two or three extremely speculative locations (Paris, the Riviera, etc.). Today, the publication of notaries' indexes reflects a steadily-increasing average price per sq. m. in all urban centres. This can be explained in particular by the lack of building land on offer and the increase in demand since interest rates have never been so low. Some would also add an increase in the cost of building, backed up by the constant increase in the indexes. All of these signals do, nevertheless, need to be treated carefully so that the market does not become overly speculative and a property bubble does not form.

The French notary (“notaire”) is the specialist in real property law in France. He is a public official who has a monopoly over conveyancing. Property transfers must be witnessed by a notarized deed. If they are not, sales of future buildings are invalid and the sale of other estates is not enforceable with regard to third parties. In Alsace-Moselle bilateral contracts concerning real property rights lapse if they are not notarized within six months. In this region, the notary even has the monopoly on the sale of property by auction, whereas in general French law such sales take place in court. The notarial profession is strictly controlled by statute owing to the delegation of public authority and the role that the notary plays in society. The profession is also monitored closely by its peers and if necessary by the judicial authorities. The other participants are bankers, whose role is limited to financing issues; and estate agents, whose profession is also strictly regulated by statute. It is also worth mentioning both Treasury officers in old France and land registry judges in Alsace-Moselle.

Property law is not an area of law with a huge amount of jurisprudence. Notarial practices, which are well established and involve very good training on statutory and legal developments, constitute one of the best barriers to this type of deviation. The French notarial profession, with its monopoly in this area, is the guarantor of the greatest possible legal security. This cannot be said for satellite sectors like construction law or town planning law where litigation is increasing.

2. Land Registration

2.1 Organisation

2.1.1. Statutory basis

- *What is the statutory basis for land registration?*

Under general French law, land registration is organised by the decree of 4 January 1955. The title of the decree states that it “reforms land registration”. This detailed text is completed by a legal enactment of 14 October 1955. Together these texts contain over one hundred and fifty articles. Various provisions have since improved these bases through successive amendments.

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

This system is not exclusive since the region of Alsace-Moselle has another system known as the “livre foncier”, a land register. This system was introduced by German law in the statutes of 22 June 1891 and 17 April 1899. Once these regions became French again, it was decided to adapt the laws of the two countries through the Act of 1st June 1924, introducing French civil legislation into Alsace-Moselle. It retains the institution of the land register. The text has just been revised to create a computerised land register.

However, registration on the land registry does not indicate assignment of property, it only offers a simple presumption of ownership.

The explanation below will consequently be subdivided to allow a comparative examination of the two systems which coexist in France.

2.1.2. Relevant institutions

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

The system in France administers land registration via “mortgage registries” (“conservations des hypothèques”). The device used here is the “land charges register” (“fichier immobilier”). This is not a land register in the sense that registration does not occur on the records that compose it. Registration occurs through entry on separate registers of real property (“registres”).

Alsace-Moselle, on the other hand, has a system of land offices (“bureaux fonciers”). The device used by the land offices is the land register (“livre foncier”), a group of

records recording property rights, in general all real property rights and some personal rights.

Land registration at the Mortgage Registry is not part of the judicial system, but of the administrative system. It is part of the Ministry of Finance. The main actor is the mortgage registrar. There is one mortgage register per geographical district. Each office is run by a registrar. He is a civil servant in the Ministry of Finance and receives a salary for this, but is also paid as a result of the deeds that he registers: this is the registrar's salary. For example, 0.1% of the price mentioned in a deed of sale or 0.05% of the total credit guaranteed by a mortgage. Nomination to the duties of registrar is often in the form of an end-of-career reward in the civil service. The registrar receives a request to register a deed, but is not bound either to examine the legal substance or the value of the title deed. His role is to check that the required legal form has been followed. This is the idea of this type of land registration: it has no probative value with regard to the rights registered; it is a simple system of registration to give effect with regard to third parties.

2.1.3. Land register/registre foncier/Grundbuch

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

The land charges register is compiled and held by the mortgage registrar and there is one land charge register per commune. It must be compiled consistently with the cadastral register. There are two types of record: firstly personal records drawn up in the name of the holder of the registered right with an indication of all estates belonging to the same person in the commune and an indication of the deeds relating to those estates, and secondly the property records drawn up per estate with its cadastral registration reference and the deeds relating to it.

The land registration system in Alsace-Moselle is structured by the legal authorities. It is organised under the supervision of the Ministry of Justice. The key actors here are the land registry judges, magistrates sitting in the district court, with the help of their clerks. In general, the role of the land registry judge is delegated to deserving clerks. The land registrar judge has more extensive powers of verification, concerning not just the form but also the substance: this is the principle of legality. Moreover, in contrast to general French law, where the entire deed containing the land interest must be registered, under local law only the interests themselves are registered. The effects of the registration can therefore be accrued.

The land register consists of folders ("feuilles") and each folder contains all the estates belonging to one landowner. It has a title, the owner's name and three sections. Section one provides the cadastral register's reference for the estate, section two lists any charges and restrictions on the right of transfer, and section three concerns mortgages. The latest legal amendment introduced a fourth section for

information, but the exact content has not yet been specified.

2.1.4. Is all real property registered?

Whether considering the mortgage register or the land register offices, land registration is effective, indeed exhaustive. It concerns over 95% of real property, with the notable exception of estates forming part of the public domain, which are inalienable and imprescriptible. Indeed there is an obligation for agreement with the cadastral registry services. The implementation of both systems has, moreover, always been linked with the updating of the cadastral services. Procedures have been introduced for those rare occasions when estate belonging to private individuals has not previously been included in the registers.

2.2 Contents of Registration

2.2.1 What data is registered?

The decree relating to the Mortgage Registry makes a distinction between those deeds which *must* be registered and those which *may* be registered.

The deeds that must be registered are defined with regard to their subject matter and their nature. They are deeds which concern a real property right, that may or may not be mortgaged, i.e. ownership, bare-property rights, an usufruct, a use, an occupation right, an easement, an emphyteusis, building leases and long-term lease interests. The types of deed that must be registered are inter vivos deeds, constitutive or on transfer, and for valuable consideration, with the exception of the gift of rights in rem that can be mortgaged. In addition to these categories there are certain deeds giving rise to a personal right to recovery of a debt. In this way, when a contract has given rise to a personal right relating to a property, this right can be imposed on successive buyers of the estate. This includes leases for more than 12 years, contracts for land licences.

Optional registration is available for deeds that have not yet been duly certified, which may be either a petition to obtain the certification of a deed executed under private seal, or the report noting the refusal or the will of the contracting party to sign the deed.


In Alsace-Moselle, it is easier to state the information that must be registered with the land office as article 38 of the 1924 statute provides an exhaustive list of the rights that must be registered:

- real property, however it is acquired;
- building leases, emphyteusis and all other rights in rem conferred by a lease, usufructs established by a person's will, uses, occupancy rights, easements established voluntarily, pledging of income from real property (...);
- privileges and mortgages;

- the right of a tenant and of a farmer under a lease for more than 12 years;
- advance payment or transfer of a sum equivalent to at least three unexpired years of rent or farm rent;
- restrictions to the right to transfer property included in a deed of alienation or resulting from any other instrument (etc.);
- all rights to dissolve a bilateral contract;
- the right to revoke a gift;
- the right to restitution in kind of a gift (etc.);
- rights resulting from instruments and decisions establishing or pronouncing the dissolution, revocation, cancellation or avoidance of a contract or of a provision on death;
- all easements whose registration is dictated by statute under penalty of being unenforceable.

In terms of organisation, in old France there is a property record for each urban estate or fraction if the estate if it is held in co-ownership. Firstly it gives the identity of the estate through the section and number on the cadastral survey and, where necessary, the name and number of the road. The record is divided into three tables, the first indicating the nature of the estate, the second to be filled in if the estate is divided and the third to contain registration formalities concerning the estate.

2.2.2 Sample of Registration

FIDUCIAL INFORMATIQUE ^ gr. 2002/0022 Du 31.05.2002 FORMULAIRE OBLIGATOIRE (Code civil - art. 39 du décret du 14/10/1955)		N° 3233  Liberté • Égalité • Fraternité REPUBLIQUE FRANÇAISE		N° de la demande : <u>F5672</u> Déposée le <u>16.12.2003</u> Références :	
DEMANDE DE RENSEIGNEMENTS SOMMAIRES URGENTS <input type="checkbox"/> hors formalité <input checked="" type="checkbox"/> sur formalité				Référence dossier : EG/DP	
Opération juridique <u>PRÊT BHW</u> formalité du Vol. : <u>20030 n° 405</u>					
COÛT DEMANDE PRINCIPALE = 12,00 € NOMBRE DE FEUILLE(S) COMPLÉMENTAIRE(S) : nombre de personne(s) supplémentaire(s) : x 5,00 € = € nombre d'immeuble(s) supplémentaire(s) : x 2,00 € = € Frais de renvoi = 2,00 € Règlement joint <input checked="" type="checkbox"/> Compte d'usager <input type="checkbox"/> TOTAL = 14,00 €			IDENTIFICATION ET SIGNATURE DU DEMANDEUR M SCP GRIENEISEN KRANTZ GRESSER GLOCK 9 Rue de la Gare B.P. 6 CODE POSTAL 67610 LA WANTZENAU À le <u>11/12/2003</u> Signature :		
QUITTANCE :			Bureau de dépôt : <u>EPINAL</u>		
NATURE DES RENSEIGNEMENTS DEMANDÉS (pour les bureaux non dotés d'un fichier immobilier informatisé) Le Conservateur des hypothèques est requis de délivrer un extrait des formalités sur les personnes et/ou les immeubles désignés ci-dessous : <input checked="" type="checkbox"/> Inscriptions subsistantes Documents publiés <input checked="" type="checkbox"/> Non acquisitifs <input checked="" type="checkbox"/> Dernière formalité inscrite ou publiée (demande portant uniquement sur des immeubles) <input checked="" type="checkbox"/> Saisies en cours <input checked="" type="checkbox"/> Acquisitifs <i>Les formalités simultanément requises, les actes et jugements énoncés par leurs références de publication dans les documents déposés avec la demande sur formalité sont exclus (bureaux non informatisés).</i>					
PÉRIODE DE CERTIFICATION					
POINT DE DÉPART - Formalités intervenues depuis le 01/01/1956 (ou date de rénovation du cadastre pour les demandes portant uniquement sur des immeubles). - Depuis le		TERME - jusqu'à la date de dépôt de la présente demande (hors formalité) - ou de la formalité énoncée (sur formalité) - ou jusqu'au DATE FICHER inclusivement			
DÉSIGNATION DES PERSONNES (Toute erreur ou imprécision dégage la responsabilité du conservateur - art.9 du décret du 04/01/1955 modifié)					
N°	Personnes physiques Personnes morales	NOM DÉNOMINATION ET N° SIREN	PRÉNOMS FORME JURIDIQUE, SIÈGE (et pour les associations ou syndicats, la date et le lieu de déclaration ou du dépôt des statuts)	DATE ET LIEU DE NAISSANCE	
1		<u>DUPONT</u>	<u>Georges</u>	<u>01-02-22 à PARIS</u>	
2		<u>HUGUES</u>	<u>Maïe</u>	<u>03-10-48 à LILLE</u>	
3					
DÉSIGNATION DES IMMEUBLES (Toute erreur dans la désignation des immeubles dégage la responsabilité du conservateur - art.8-1 et 9 du décret précité)					
N°	COMMUNE (éventuellement arrondissement, rue et numéro)	RÉFÉRENCES CADASTRALES	N° VOLUME	N° LOT de copropriété	
1	<u>VITTEL (Vosges)</u>	<u>Section C N° 333</u>			
2					
3					
4					
5					
DEMANDE IRRÉGULIÈRE. Le dépôt de la présente demande est refusé pour le (ou les) motif(s) suivant(s) :					
<input type="checkbox"/> Insuffisance de la désignation des personnes et/ou des immeubles <input type="checkbox"/> Défaut de paiement <input type="checkbox"/> Demande non signée ou non datée		<input type="checkbox"/> Défaut d'indication de la nature du renseignement demandé <input type="checkbox"/> Demande irrégulière en la forme <input type="checkbox"/> Autres		À, le <i>Le Conservateur,</i>	
CERTIFICAT DU CONSERVATEUR					
Dans le cadre de la présente demande, le Conservateur certifie qu'il n'existe dans sa documentation :				État certifié à la date du Le <i>Le Conservateur,</i>	
<input type="checkbox"/> aucune formalité. <input type="checkbox"/> que les formalités indiquées dans l'état ci-joint. <input type="checkbox"/> que les seules formalités figurant sur les faces de copies de fiches ci-jointes.					
Les dispositions des articles, 34, 35 et 36 de la loi n°78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés s'appliquent : elles garantissent pour les données vous concernant, auprès de la conservation des hypothèques, un droit d'accès et un droit de rectification.					



Liberté • Egalité • Fraternité
REPUBLIQUE FRANÇAISE

**Demande de renseignements
n° 2003F5632, déposée par Maître GRESSER EDMOND**

Conservation des hypothèques
EPINAL

CERTIFICAT DU CONSERVATEUR

Dans le cadre de la présente le conservateur certifie :

- pour la période de publication antérieure à FIDJI : du 01/01/1956 au 02/02/2003
 qu'il n'existe aucune formalité au fichier immobilier,
 qu'il n'existe au fichier immobilier que les seules formalités figurant sur les **A** faces de copies de fiches ci-jointes,
- pour la période de publication sous FIDJI : du 03/02/2003 au 22/04/2003 (date de mise à jour fichier)
 qu'il n'existe aucune formalité indiquée dans l'état réponse ci-joint,
- pour la période du dépôt : du 23/04/2003 au 16/12/2003 (date de dépôt de la demande)
 qu'il n'existe qu'1 formalité indiquée au registre des dépôts concernant les immeubles requis.

La réponse est limitée aux formalités dans lesquelles l'identité de l'immeuble interrogé a été certifiée.

A BASTIA, le 13/01/2004 *et 18/05/2004.*

Le conservateur des hypothèques,

J.-C. REY

Les dispositions des articles 34, 35 et 36 de la loi N°78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés s'appliquent : elles garantissent pour les données vous concernant, après de la conservation des hypothèques, un droit d'accès et un droit de rectification.

**MINISTÈRE DE L'ÉCONOMIE
DES FINANCES ET DE L'INDUSTRIE**

Date et Numéro de dépôt	Nature et Rédacteur de l'acte	Date de l'acte	Créanciers/Vendeurs/Donateurs Débiteurs/Acquéreurs/Donataires	Numéro d'archivage Provisoire
16/12/2003 D11326	HYPOTHEQUE CONVENTIONNELLE <i>NOT M^E FRAN C Notaire à Paris</i>	09/12/2003	SA "BHW BAUSPARKASSE AKTIEGENESELLSCHAFT <i>DUPONT Georgette</i>	V0.1888

Le présent certificat des formalités acceptées au dépôt et ce instance d'enregistrement au fichier immobilier sur les immeubles individuellement désignés dans la demande de renseignements est délivré en application de l'article 2203-1 du code civil.

I - DESIGNATION DE L'IMMEUBLE

Parcelle de terre
27 a 40 ca
Eg sous R 900 (ex 340 à 344)

III - FORMALITES CONCERNANT L'IMMEUBLE DESIGNÉ ET CONTRE (ou les lots le composant)

A - MUTATIONS SEVITIENS ACTIVES

Immeuble isolé ou lots

Dates, numéros et nature des formalités	Observations
1) 23 juin 1937. Vol 2055 n° 36. N° M I E L 1 du 13 1937 Vente par la Société Civile de Soudre (316) à DUPONT née le 4.2.22 et son époux née le 2.3.25 Prix: 50000 F	Fr

B - CHARGES, PRIVILEGES ET HYPOTHEQUES

Immeuble isolé ou lots

Dates, numéros et nature des formalités	Observations
1) Du 29.3.1938 vol 510 n° 3 N° M I E L 1 n° 1117 10.2.1938 / Hypothèque conditionnelle sur l'édif. construit sur les Etablissements de la CREDIT FONCIER DE FRANCE / DE Soudre T P E VITTEL Bâté DUPONT née le 4.2.22 et son époux DUPOND née le 3.25.25 / Intérêt 4 % Florlet 10% / Pd. 112-400 / Arec. 25.450 / Exigible le 31.1.1938 / Pagé jusqu'au 31.1.2000 / 2) Du 17 janvier 1947 vol 89 V 118. FORMALITE en ATTENTE relatif 162	
3) 17.01.1948 - Vol. 97 n° 118 Régistré consensuel Re. du 25 11 1948 - de FRANCE not. am. - Paris au profit de la SIE venant Bourgoignonne Albinus Rodoff Bourgoignonne de den. 1948 Ren. Dienasi	
05 = Succession de Soudre y M. GRAND not. am. Génese DUPONT née le 4.2.22 Exig. 304 304 / - not. 8.0590 / Pd. = 560 000 / - Arec. 112 000 / Eg. jusqu'au 30-04-2016 /	

Modèle B

II - LOTISSEMENT (Designation des lots ou appartements)						
Numéros	Bâtiment	Escalier	Etage	Nombre de pièces principales ou nature du lot	Millèmes	Renseignements complémentaires
1						
2						
3						
4						
5						
6						
7						

In Alsace-Moselle, as indicated above, the folder has a title and three sections. The title carries the owner's name. A folder is opened for each owner. Section I, entitled "Propriété", or "Property", contains the description of the estates. It specifies the union or division of an estate and the existence of or the cancellation of an easement. It also indicates the references to the appendices to the land register, i.e. the titles enabling the rights to be registered. Section II shows the charges and restrictions on the right to transfer, such as building leases, emphyteusis, usufruct, land easements and restrictions on the right to transfer. Section III includes mortgages and privileges and their renewal or their exclusion from renewal.

TRIBUNAL D'INSTANCE DE STRASBOURG 4

COPIE

FEUILLET N° 42830

du Livre Foncier de KOENIGSHOFFEN

ouvert au nom de :

Van Lage II

TOUTE INSCRIPTION SOULIGNEE OU RAYEE EN BIAIS N'EST PLUS VALABLE

N° 3419/04 du registre des commandes du bureau foncier

Maître *Spilmeisen*
Répertoire N°

34 568

136

DUPONT Georges et son épouse
Charlotte DURAND en communauté de biens.

Feuille 12890

Section I. Propriété										Sect. II. Charges et restrictions		
N° global	CADASTRE		LIEUDIT	CONTENANCE		NATURE DE CULTURE	Valeur d'usage		INSCRIPTIONS	OBSERVATIONS	N° global	INSCRIPTIONS
	Sec.	N°		m	ca		F	C				
1	2	3	4	5	6	7	8	9	10	11	12	
1	KY	86 25	Propriété sur: Rue Louis N° 135 39 11 - maisons N° 91 Au deuxième étage à droite un appartement Règlement du 29 octobre 1985 Esquisse N° 219	0,8006	sol			5250			1	123 - 2 janvier 1988. Une fois profi de Georges Roges maison n° 135 39 relativité à Strasbourg une rang que l'un fait (Ann. 86) (Ann. 87)
2			idem Au sous-sol une cave	lot 114	1,16,000			5250			2	123 - 2 janvier 1988. Une fois profi de Georges Roges maison son épouse Jeanne Marie Hélène née Bloch le 22.10.1919. Esquisse maison à Strasbourg une rang que l'un fait (Ann. 86) (Ann. 87)
3			idem Au premier sous-sol un garage	lot 224	7,10,000			5250	2 janvier 1988. Pour N° 123 Partage de société et dona- tion (Ann. 86) (Ann. 87)		3	Dépêche du 29 février 2004 inscriptions N° 123 2 aut (Ann. 106104)
Dépôt du 24 février 2006. Vente (Ann. 106104)												

2

au droit de disposer		Section III : Privilèges, Hypothèques, Séparation des Patrimoines			
OBSERVATIONS	N° d'ordre	IMMEUBLE GREVÉ	INSCRIPTIONS	SOMME	OBSERVATIONS
13	14	15	16	17	18
Radié pour N° 3.	1.	— 1, 2, 3 —	Dépot du 24 février 2004. Hypothèque conventionnelle pour somme de 37.600 euros, montant global de deux prêts, des intérêts courus, et des frais et accessoires évalués à 15.510 euros, au profit du Crédit Agricole Alsace-Vosges à Strasbourg, conformément à l'acte du 17 février 2004. L'hypothèque conserve son effet jusqu'au 28 février 2026. (Ann. 1047104) 4	93.120 -	
Radié pour N° 3.			<p>POUR PHOTOCOPIE CERTIFIÉE CONFORME COMPRENANT 2 PAGES STRASBOURG le 05 MAI 2004 A / HEURES MINUTES LE GREFFIER DU TRIBUNAL D'INSTANCE - BUREAU DU LIVRE FONCIER</p>		



2.3 Registration Procedure

2.3.1 Application for Registration

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

In France, duly certified documents are required by law before land registration. Non-compliance entails invalidity or unenforceability of the title with regard to third parties. This operation is known as “publication”. This process is completed in three stages: “dépôt” (deposit), “formalité” (formality) and “centralisation” of the documents registered.

The certified official document must be deposited. This is the notarised deed, administrative act or judicial decision witnessing the legal operation that requires registration. Both a certified copy of the original official document and an extract of it for the cadastral services are required. To register a mortgage or a privilege, a brief summary of the official document (known as a “bordereau”) is filed rather than a copy of the official document. The format of these documents is defined in detail by the French administrative authorities. In general, deposit must take place within three months, with the exception of transfers on death which have a six-month period. There is no time limit for mortgages and privileges. A fine under civil law is payable if the deadline is missed, but it is advisable to complete the process as quickly as possible to ensure enforceability against third parties. The mortgage registrar includes the submission of the documents to the filing registry in the submissions record. Entry in the filing register achieves “publication” or registration.

The registrar keeps one of the copies of the documents submitted, to be bound with the other to form the “register des publications” or publications register. This is the formal part of the process. He returns a copy of this document with the date of filing and its volume and number in the filing system to the applicant, to provide him with proof that the formalities have been complied with.

The last operation is the annotation in the land charge register on both the real property and personal records.

In Alsace-Moselle, the registration procedure is currently undergoing an upheaval owing to the computerisation of the land register. Entry on the land register is the result of an application filed by the author of the official document, or by one of the party’s lawyers in the event of a court decision. To date there are no particular formalities required for the application, but there are some disclosures which are compulsory. It must be transmitted to the land registry judge with all the relevant papers, in particular a certified copy of the official document. The judge includes this in the filing register and then examines the substance of the application. He may interview the applicant on some additional points and in this case issues an interim order of rejection or registration. He then transcribes the rights into the land register.

To achieve the computerisation of the land register, a huge and highly innovative task with consequences expected for the whole of France, statute has proposed a revision of the process, with the introduction of a standardised registration application and a new set of procedures. The application will be based on a template inspired by the system used in France, use of which will be mandatory. The current question being debated is whether this application will be on paper or electronic or both. The application will contain the surnames and first names of the applicant and of other people concerned with the registration, the cadastral description of the estate, the vendor's title to the property, the reference of the previous property holder's title and any other information which third parties may require, together with a list of the enclosed documents. When it reaches the land office, the application will be time stamped to establish its rank. This operation is known as "dépôt", or filing. At this stage an electronic file will be created, partly to facilitate court processes and partly to enable the file to be monitored from outside. The judge will then study and check the information transmitted. After filing comes the judgement: an interim order if there is not sufficient information, rejection if there is a problem with the form or substance, or a registration order.

Two observations can be made about this. Firstly, although the processes will remain the same, computerisation will lead to greater standardisation and thereby revolutionise the registration system. The second relates to the major development expected in relations between the land offices and the cadastral registry. The fundamental principle is that no transfers can occur on the cadastral register unless the new property owner has been registered on the land register. Furthermore, estates registered on the land registry must be identified on the cadastral register. To date, the land registry provides the cadastral registry with a monthly list of sales and the cadastral registry executes all the changes.

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

2.3.2 Duties of the Registrar

-
- *What does the registrar control?*

In France filing is examined by the mortgage registrar. He is not a land registry judge. He does not perform any checks on the value of title or of the rights that he registers. The decree of 4 January 1955 does, however, make him responsible for ensuring that the proper legal form has been used. In the event of clear non-compliance with formalities, such as information provision, the registrar must refuse the application. Where non-compliance is of a less clear nature, or where an inconsistency with previous documents occurs, the registrar must refuse to formalise the application. In this latter scenario, rank is retained.

The land registry judge has a completely different role, upholding the principle of legality. The 1924 statute lays down five criteria whose compliance with which must be confirmed:

- the form of the official documents, as provided for under both local law and French general law;
- the parties' capacities;
- the parties' representatives (the form of mandates and the scope of powers);
- compliance with the principle of relative registration (rights of previous property owner already registered);
- the admissibility of the right for registration: in local law it is the rights and not the official documents that are registered, the list of rights that can be registered is laid down by statute.

Jurisprudence does not consider these five criteria to be exhaustive of the judge's power. He can check the substance and form without limit. Nevertheless, he cannot encroach upon the notary's prerogatives by investigating his investigations and statements.

- *How are the applicants informed about registration?*

Whichever system of land registration used, the notary is the one who receives the decision made by the mortgage registrar or land registry judge. Even if the law provides for notification of the title holder, for the sake of simplicity, in practice notification is to the notary. Indeed, it is the notary's responsibility to register the official document. It is also the notary who will make any appeal required against an unwarranted decision of the person in charge of registration.

2.4 Access to information

-
- *Is registration done on paper or electronically?*

In France the implementation of land registration is partly electronic, using an information system known as "FIDJI"; a computerised file of legal documentation on interests in land. However, it is only partly electronic as not all registries are computerised and existing data is not being entered into the system. Furthermore, users do not have access to the file by computer but via a written request.

In Alsace-Moselle registration is still entirely paper-based. However, an Act was passed on 4th March 2002 to implement the computerisation of the land register. Ten years earlier the principle of computerisation had already been adopted and the financial resources to achieve it created. The project aims at the computerisation of existing data, the registration process and the consultation process, which will lead to an entirely electronic land registration system. The statutes have been passed, the

financial and human resources are in place and the legal enactments are being drafted: the target for completion being 2007.

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

The purpose of land registration is to inform third parties and therefore it is perfectly acceptable that such third parties have access to the documents.

In Old France, direct consultation of land registration files is not possible. They can only be consulted via forms provided by the administrative authorities. Article 2196 of the Civil Code obliges the mortgage registrar to provide a copy or an extract of registered documents to any person who requests them. Information may be searched for under the identity of the land owner or the description of the property. In theory, access is therefore extremely wide. However, in practice it is limited by the technical nature of the request, which must comply with specific conditions as to its form and substance, and by the period of several weeks required to obtain the information.

In Alsace-Moselle, the old legal provisions provided for direct consultation of the land register by any person with a legitimate interest. It was for the personnel of the land offices to decide whether there was a legitimate interest or not. Written consultation is open to everyone, without any consideration of interest, but involves a longer wait. As in old France, there is therefore no limit to consultation.

The new technical resources created by the 2002 statute on computerisation will overturn this approach, particularly through the possibility of distance consultation. The statute drafters have analysed the scope of legitimate interest in the electronic world, having particular regard to the statute of 6th March 1978 on computers and freedom. Opinion varies greatly in this area. The majority seem to be leaning towards a solution whereby there are different levels of electronic consultation. Notaries and lawyers would have the widest access from their offices, other professionals such as bankers could access more limited information with special authorisation, and the public would not have any distance-consultation rights, but would have to go through the court, with immediate access being limited to basic information, that is the names of people and description of property. The issue has not yet been decided.

2.5 Substantive Effects of the Registration

- *What are the substantive effects of registration?*

Land registration does not create rights in either the mortgage registry system or the land offices system. Its role is to resolve conflicts between different assignees of one person, these assignees claiming rights to or over the same estate, by giving preference to the one who registered his interest first. It is the sanctions applicable in

the absence of registration which are important. A deed subject to compulsory registration which has not been registered cannot be enforced with regard to third parties. However, to rely on this unenforceability, there must be a concurrent interest in the estate which is subject to registration and which has already been registered. In principle, lack of registration means no enforcement in relation to third parties.

However, it is important to distinguish the mortgage registry system from the land registration system. In fact, entry on the land register confers wider legal effects: the presumption of reliability or of inexistence. Article 41 of the 1924 Act provides: *«L'inscription emporte présomption de l'existence de ce droit; la radiation d'un droit emporte présomption de son inexistence.»* (“Entry carries the presumption of the existence of this right; cancellation of a right carries presumption of its inexistence”). This presumption exists because the rights entered on the register are checked by the land registry judge. But this presumption may be attacked by those who suffer damage linked to entry or cancellation.

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

2.6 Rank and Priority Notice

2.6.1. Rank (rang/Rang)

- *How is the rank of registrations determined?*

Under general law, rank is acquired by the filing of the registration summary (“bordereau”) with the mortgage registry (“conservation des hypothèques”). There is no distinction made between filing, which determines the order of entry, and rank. These two events are merged to give one unique date, the date of deposit. The founding law is article 2200 of the Civil Code which provides that entries are made day by day, in numerical order *«à la date de la remise et dans l'ordre des remises.»* (“On the date of submission and in the order of submissions”).

One specific type of entry should be distinguished: property privileges (“*privège immobilier*”), a type of real property charge with nearly the same effect as a mortgage. In contrast to the registration of a mortgage, registration of a privilege does not attribute rank. The seller or moneylender’s privilege takes its rank from the date of sale. However, this is only the case if the registration is made within two months of the sale, after which period the privilege is reduced to a mortgage.

In Alsace-Moselle, numerous controversies have surrounded the notion of rank. Initially, legal provisions provided that most interests obtained their rank at the moment of entry on the register as opposed to the moment of deposit. Numerous problems in interpretation coming from doctrine and jurisprudence fuelled legal uncertainty, particular in the event of a delay in the flow of registrations. The legislature intervened twice to redraft statutory provisions to avoid these difficulties,

and yet another regulation was subsequently required and implemented. Today, article 1 of the statute of 4th March 2002 modifies article 45 of the 1924 Act and provides that *«la date et le rang de l'inscription sont déterminés par la mention du dépôt de la requête portée au registre des dépôts.»* (“The date and rank of registration are determined by the reference to the filing of the request included on the filing register.”)

The solutions in the two systems have thus been harmonized.

In the example provided, mortgage B is ranked first, C second and A third.

2.6.2. Priority Notice

- *Is there any possibility of securing a future registration (or at least its rank)?*

There is the possibility of advance registration of official documents which have not yet been duly certified. A 1959 decree enables provisional registration which must later be followed by definitive registration, which gives a rank while the conditions required for the certified document are being fulfilled. Use of this early entry is justified when the conditions required for definitive registration have not yet been fulfilled and there is a need to preserve a right for which registration is required. This is the case when the holder of a right only has a deed made under private seal and is having difficulty obtaining certification. This avoids anyone gaining higher rank. This advance registration attributes rank, provided that definitive registration occurs within three years.

In Alsace-Moselle, the 1924 statute provides for early registration. The aim of this measure is exactly the same as in France in general. However, in contrast to the general system, the conditions are more restrictive as it must be shown that the right cannot be registered yet and proven that the right is one that is capable of being registered.

- *Is the effect of this priority notice limited to a certain period of time?*

There is no legal limit to the duration of the effect of early registration.

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

3.1 Procedure in General

3.1.1. Main steps in the sale of real property

The procedure for the sale of real property consists of the following stages:

The seller compiles a file of information on the real property. Depending on the age of the property and its location, this includes information on the presence of asbestos, xylophageous (wood-boring) insects and lead. It is worth noting that the legislature is looking to extend this “technical” file, to include gas installations, for example. For housing subject to the system of co-ownership, the seller must also produce measurements of the property sold. This file is understood to have the sole purpose of informing buyers and does not make the sellers liable. If these documents are not provided, a seller’s guarantee is created and cannot be avoided by contract. The rules are a little different for the measurements: an absence of measurement makes the sale invalid and an error of over 5% in the measurement results in a reduction in price. These requirements of measurements were inspired by consumer law, whilst the notion of technical diagnostics was traditionally used for commercial property. The buyer, informed of the property’s qualities and defects is less likely to bring legal action in the event of a defect in the object sold. This observation should be considered against the background of the exemption from using the guarantee for hidden defects.

The seller looks for a buyer, either directly (the press still prevails, but searches on the internet are growing), or through the intermediary of an estate agent. This profession is closely regulated by the law, which requires diplomas or professional experience as well as a bank guarantee. In order to negotiate the sale, the estate agent must be able to produce the mandate he has been given by his client.

Once the property has been found and agreement reached on the price, a preliminary contract must be signed. The type of contract can vary. For buildings under construction, a reservation contract or “*contrat de réservation*” must be signed. For existing properties, a preliminary contract known as a “*compromis*” or “*promesse de vente*” (promise of sale) is signed. The preliminary contract commits both the seller and the buyer to the transaction and the stated price, subject to a number of conditions precedent, or “*conditions suspensives*” and a seven-day cooling-off period. When the contract is signed, the purchaser pays a deposit, usually between 5% and 10% of the purchase price. This preliminary contract sets out the exact conditions of sale.

After the seven-day cooling-off period, the deposit is only refundable should one of the conditions not be fulfilled for a reason beyond the buyer’s control. One important condition concerns the inability of the purchaser to arrange a mortgage. The purchaser has a minimum of one month from the date of signing the preliminary contract to obtain a loan. If the loan application is declined, on production of

evidence from the bank the purchaser will be released from his obligation to buy and the deposit will be returned to him.

The preliminary contract is filed with the notary and the notary then performs the formalities detailed below. These are required in the drafting of the deed of sale. The contract of sale is signed before the notary and witnesses, the price is then paid and the transfer of the property executed.

The notary performs the formalities after the contract has been signed: these include payment of the registration fee and capital gains tax, as well as the requirements of land registration.

3.1.2. Time frame

The time required to find a buyer depends on the state of the property market. It generally takes about two months to complete formalities between the preliminary contract and the deed of sale.

3.2 Real property Sales Contract

3.2.1 Form

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

Conditions as to form only exist for the contract of sale. In general French law, there is a distinction between a traditional sale and a sale of newly built properties. Both types of sale must be duly certified, i.e. either through a notarised deed or an administrative authority deed if the state is a party to the contract, or else through a judgement in the event of problems obtaining the signature of one of the parties to the deed.

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

The sanction applicable differs between the two types of sale. The sale of new build property must be duly certified at the risk the contract's invalidity. The legislature considered that the buyer needed specific protection that only a notary can guarantee because of the specific risks involved in the transaction (in particular the guarantee that the property will be finished, as part of the price is paid on the transfer of property). For traditional sales, a lack of due certification simply results in unenforceability in relation to third parties. Registration of the land requires a duly

certified deed, as provided in the 1955 decree, but the sale is validly concluded between the parties by a deed under private seal. In theory, it does not even need to be in writing, but this would lead to problems of evidence. In fact the Civil Code provides, in article 1583, that a sale occurs as soon as there is an agreement on the subject and the price. There are no legal provisions obliging the transfer of property to be registered. The restriction, however, is a practical one, since the lack of enforceability in relation to third parties can have grave consequences for the new landowner, who is subject to the seller's creditors' right to pursue the debt and without any guarantee that the property purchased is has not been transferred to a third party.

Finally, a development in the Alsace-Moselle rules for traditional sales of real property should be noted. Article 42 of the 1924 statute provides that the sale of real property must be witnessed by a notarised document within six months of the agreement of the parties under private seal. Otherwise, the agreement of the parties lapses. This is not a condition as to the substance, but as to the form, designed to prevent secret transactions and forces the registration of real property sales. It is a measure to ensure legal security as amongst the parties.

3.2.2 Who normally drafts the contract for the sale of real property?

With a notarised deed, the contract of sale is drawn up by the notary. A public entity can act as a notary to draw up the documents to which it is party. One notary drafts the deed, but may be assisted by another notary who is the advisor to one of the parties to the contract. The terms used here are "participation" or "assistance" ("concoeurs"). It should be remembered that although he may be advisor to one of the parties, the notary is the lawyer for the contract and not the notary for the parties. The drafting notary is in general the buyer's notary, unless he does not practise in the area of property law. In these circumstances, the seller's notary, if practising in the area of the property, will draft the deed. The seller's notary prepares the formalities required for the drafting of the deed of sale.

3.2.3 Preliminary contract

-
- *Is there a preliminary contract?*
-

A transaction will not be invalid because there is no preliminary contract. In the event of purchase by a private individual, the buyer must be allowed a seven-day withdrawal period. If there is no preliminary contract, this seven-day period must be provided for after subsequent to sending the contract of sale. In practice, if there is a bank loan involved, the banker generally requires a preliminary contract. This contract is very important in legal terms as it determines precisely the obligations and rights of the parties for the definitive deed of sale. These conditions can only be modified by joint agreement of the parties.

- *What legal effects does it have?*

3.2.4 Typical Real property Sales Contract

- *Is there a standard form for sales contracts? Or is there any other form used reasonably frequently or published, for example, in a commonly used manual?*

No standard form is required to achieve sale; this is completed as soon as there is an agreement as to the subject matter and the price. However, the statute of 6th April 1998 did introduce a standardised format for sales, for land registration purposes. The first section of the deed of sale is standardised. This is the only part recorded in the land charge register and contains only those elements essential for the registration of the rights, without which the application would be refused. If this form is not respected, the sale remains valid, but cannot be registered. There is no similar obligation in Alsace-Moselle.

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 transfer of real property is primarily the consequence of a contract for sale. Doctrine attributes five characteristics to the contract of sale: (i) It is a consensual contract, formed by the agreement of the parties, as to the subject and the price; (ii) The sale is a bilateral contract as it gives rise to reciprocal obligations for both parties; (iii) It is a contract for valid consideration, free of any donative intent; (iv) It is a commutative contract, i.e. the reciprocal obligations of the contracting parties are equivalent; and finally, (v) It is a contract for the transfer of property.

Article 1583 concisely lists three elements that are required for the conclusion of a contract of sale. The sale is accomplished «*dès qu'on est convenu de la chose et du prix*» (“*as soon as there is agreement on the subject matter and the consideration*”). As land registration is not a condition of the sale, article 1583 requires, thirdly, that there be consent. The transfer of property is completed by the sale itself.

This orthodox rule has been altered by practice, which has introduced a division between the binding power of the contract and the transfer of the property. The development of preliminary formalities and formalities of the administrative authorities, the practical requirements of financing, and the importance of land

registration justify the development of preliminary contracts of sale, necessary in practice but not actually transferring property.

3.3.2. Payment due

- *How do you ensure that the payment and transfer of ownership occur at the same time – or at least minimize the risks for both buyer and seller?*

In order for a sale to be concluded, there must be the specification of consideration, although the actual payment need not occur. Mostly, payment is made in cash. It is the notary's responsibility to ensure that the seller receives the payment. Thus the buyer does not normally pay the consideration directly to the seller, but to the notary, who uses it to pay off any creditors holding a privilege or mortgage, before giving the remainder to the seller.

In practice, when the notarised deed of sale is signed, or before it is concluded, the buyer gives the notary the consideration for the sale. In order to guarantee that the notary is paid, the profession's authorities require the use of bank cheques or bank transfers: this eliminates the risk of non-payment. When the sale is concluded, the notary performs the tasks required for land registration and transfers the remaining consideration to the seller.

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

Different arrangements as to payment may be used, but it is always the notary's responsibility to ensure that the consideration moves from the buyer to the seller. The practice in Alsace-Moselle is worth noting. Owing to the specificities of land registration and in particular the use of the request for registration immediately after the sale, bankers have developed a method which uses mortgages. A mortgage can only validly be formed once the buyer becomes the owner, having signed the deed of sale. The banker only produces the money after the conclusion of the sale has been guaranteed. It has therefore become customary to defer payment of the consideration for two weeks. The notary receives a guarantee by way of an irrevocable order for payment signed by the buyer. As in France in general, the seller also benefits from the seller's privilege, a sort of seller's mortgage, and from a cancellation action allowing the sale to be avoided in the event that the consideration is not paid.

- *Is the payment effected via an escrow account or directly between the parties?*
-
- *Is insurance, for risks inherent in the payment and transfer of the property, possible, usual or even obligatory?*

3.3.3. Means of the seller to enforce payment

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

In any case, the notarised deed that witnesses the sale has executory power, which enables the seller to be enforce payment. Thus in old France, the notarised deed is an enforceable right, i.e. it constitutes title to a debt which does not require a judgement to be recovered. There is the additional requirement in Alsace-Moselle of including a clause expressly stating the possibility of compulsory execution and its consequences for the buyer. This measure is inspired by the Germanic notion of consumer rights. This variation in form does not lead to any difference in substance.

3.3.4. Transfer of possession to the buyer

- *How, on the other hand, may the buyer ensure that he secures possession on paying the purchase price?*

Corresponding to the buyer's obligation to pay, the seller has an obligation to deliver: i.e. to transfer the enjoyment in the property sold. This right arises as soon as the property is transferred. Entry into enjoyment can take place by direct and effective entry into possession or by the receipt of property rents. Entry into enjoyment may also be deferred. In order to guarantee that the seller transfers possession, an indemnity is held by the notary.

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, notary or agent) have to ascertain before he can be sure that the seller has a valid title?*

The seller is not only obliged to deliver the property sold, but also to guarantee his title to it: this is the eviction guarantee, or the "garantie d'éviction". Article 1599 of the Civil Code renders invalid the sale of property to which the seller does not have title. The notary, before concluding the contract of sale, must ensure that the seller has good title. In mainland France checking information as to the seller's title in the land registration system is an important step, though not a sufficient one. The notary must be convinced that the property title is in order, which involves not only consulting the seller's property title deeds, but also tracing the chain of previous owners for the last thirty years. In Alsace Moselle, the principle is strictly the same, but it is simpler in application. The land registry checks the substance of contracts for the sale of real property and consequently the seller whose rights are registered in the

land register is presumed to be the true owner of the property sold. The checks are therefore less extensive.

3.4.2. Title Search: Absence of Encumbrances

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

The eviction guarantee guarantees the buyer that the seller is indeed the owner of the property sold. Furthermore, it guarantees the buyer against problems concerning third-party rights. Firstly, the deed of sale includes a list of the rights in rem which are enforceable by third parties despite the occurrence of the sale, such as, for example, an easement. Secondly, it refers to the rights in rem that will be withdrawn, for example a mortgage. This is one of the practical uses of the preliminary contract. In the period between this and the contract of sale, the notary must determine which rights in rem exist and, where relevant, the extent of the debt with which they are concerned. The notary consults the creditors, i.e. the holders of these registered rights, to see whether the sale price is sufficient to pay them off. If it is not, he can request that they waive their right, given that the debt cannot be honoured. Without an agreement, the law provides for a purging procedure to ensure the buyer's right to the property. This procedure differs somewhat in Alsace-Moselle, but the principle is the same. If the creditor believes that the sale price is too low, he can request a sale by auction at a higher price, with the risk that if no potential buyers appear, he will have to pay this higher price himself.

This guarantee is absolute, i.e. the buyer is not affected by any loans obtained by the seller unless they are accompanied by an interest in rem by way of security, e.g. mortgages or privileges. Only these latter guarantees are carried forward with the property. This is why the notary must perform all necessary steps to ensure that these real securities are released ahead of the sale. For loans which are not associated with a mortgage or privilege, the notary is not even responsible for ensuring their reimbursement or non-reimbursement by the seller. It is a risk that the lender accepts to run. In conclusion, the buyer is bound by the seller's debts if they are accompanied by a real security and the sale price is insufficient to satisfy repayment of the debt

3.4.3. Title Insurance or Liability

- *Why did your system develop title insurance (or why is title insurance not necessary in your system)? In which cases is it used?*

The role and responsibilities of the notary in the operation of this system are sufficient to provide an absolute guarantee to the buyer. It has therefore not been

necessary to set up a system of insurance to cover any risks affecting the seller's property title.

3.4.4. Leases

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

3.5 Defects and Warranties

3.5.1. Legal rules

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

In the event of problems subsequent to the sale, the buyer has several options open to him. The notary may be sued for failure to fulfil his obligations of ensuring the legal quality of the sale. The courts are very strict in their judgements; a tendency which is sometimes analysed as being the consequence of comprehensive notarial insurance, which enables damages to be covered financially. If the transaction was commenced by an estate agent, and the agent failed in his obligation to check information due to the buyer, his liability may also be invoked. Finally, if the problems encountered result from bad execution of the contract by the seller, his liability may also be invoked. Traditionally, the notary will be held responsible for a problem with the seller's title and the omission of administrative information, as he gives a guarantee to the seller, who remains the main responsible party. Defects in the property sold are less the concern of the notary, but rather of the estate agent acting as guarantor for the seller.

Protection of the buyer results from two main obligations imposed on the seller by article 1603 of the Civil Code: «*celle de délivrer et celle de garantir la chose qu'il vend*» (“*the obligation to deliver and the obligation to guarantee the property that he sells*”). Questions relating to delivery have already been addressed under the transfer of property and entry into possession. The seller must also guarantee peaceful enjoyment of the property, the eviction guarantee, and useful enjoyment, the hidden defects guarantee.

The Civil Code does not provide a positive guarantee as to the quality of the property, but rather a guarantee against hidden defects which may affect its normal usage. An action to enforce this right must be brought within a short time period. Statute provides for two possible sanctions: reimbursement of the buyer and restitution of the property, or a reduction in price of the sale. However, in practice, the contract nearly always excludes the seller from this liability. This exclusion is possible as long as the seller is not a professional in the property world, in which case the clause is invalid.

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

- *What kinds of contractual clauses on warranties are typically agreed upon in a real property sale among private persons?*

In more recent legal provisions there has been a tendency towards greater protection for the buyer. Traditionally, it was the buyer's responsibility to inform him or herself, the seller being free from obligation: *caveat emptor*. He who bound himself lightly was not looked upon favourably when asking a judge to extract him from the consequences of his promise. Since then legal provisions have extended the obligations of the seller to inform the buyer, initially by imposing obligations on professional vendors. Statute has subsequently imposed an obligation upon non-professional vendors to provide information with regard to the size of the housing sold, the presence of asbestos, xylophageous insects and lead, or information about the environment. Despite this trend towards the provision of more extensive information for buyers, they still have to satisfy themselves as to general information about the property.

The other guarantee laid down in the provisions is the eviction guarantee. Through the seller's guarantee, the buyer is assured that he will not lose his rights over the property purchased, either for a reason prior to the sale, or even for a reason after the sale if it results from a personal act of the seller. This rule cannot be excluded by contract and has already been described under the subject of property guarantees.

- *Is it possible to exclude the remedies of the buyer? Does it make a difference if the seller or the buyer acts in the course of his trade, business or profession?*
- *To what degree do courts exercise control over the fairness of such clauses?*

3.5.3 Liability of the Buyer for Debts of the Seller

- *Is the buyer liable for any arrears of the seller, in particular with regard to real property taxes, other taxes, e.g. related to buildings on the property or the business of the seller conducted on the property, charges for garbage*

collection, water and gas, charges for the administration of condominium apartments?

- *For tax purposes, the owner on the 1st January of the year of the sale is the only person liable to pay tax. The sale contract generally arranges for a prorata payment of the land tax, but this is not enforceable against the tax authorities. A co-owners' association cannot force the buyer to repay the debts of the seller. For these purposes, statute has introduced a property privilege to retain any charges owed from the sale price. Finally, there is no joint liability between the seller and the buyer to guarantee payment for water, electricity or gas: the contracts are quite separate and the contract of sale has no influence on these issues.*

3.6 Administrative Permits and Restrictions

3.6.1. Standard Requirements

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

From an administrative point of view, the notarised deed must provide the buyer with various pieces of information.

3.6.2. Requirements for certain types of real property sales only

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

In the case of a built-up property, the buyer must be made aware by the notary of the applicable land usage rules, i.e. zonage, public utility easements, works involved in town and country planning. For a plot of land to be built-upon information must be more complete, to enable the buyer to ensure that the planned operation is possible under the applicable planning rules. The notary must ensure that construction work has been performed after a building permit has been legally obtained, and that the construction conforms to the initial project.

3.6.3. Control of administrative permits and restrictions

- *Is the check for administrative permits and restrictions the buyer's own responsibility, or is it carried out by the notary or another lawyer?*

All of these issues are explored by enquiring at the town hall and it is the notary's responsibility to do so as he is to draft the deed of sale.

In addition to this information aspect, the urban right of pre-emption must be mentioned. The local authorities have the power to buy the property subject to the proposed sale under certain conditions, such as the achievement of a purpose for the good of the community. They pay, at least in principle, the same amount of consideration as that stipulated in the contract between the private parties.

3.7 Transfer Costs

3.7.1. Contract and Registration

- *Please indicate the approximate costs for the sale of real property in your country (in general and for a property of (a) 100.000 and (b) 300.000 Euros). Please specify the costs for drafting and executing the contract (e.g. attorney or notary fees), title insurance (if common in your country) and registration in the land register.*

The costs connected with drafting the deed of sale consist of the notary's fee, the mortgage registrar's salary and tax. They are borne entirely by the buyer, as provided for by law. For the sale of a property with a value of 100,000 Euros, the purchase expenses will amount to around 7000 Euros in total and in the case of a property worth 300,000 Euros, around 19,000 Euros. The notary's fee is provided for by statute, according to a tapered scale. The higher the sale price, the lower the rate. The minimum fee is 0.825% (not including tax) of the price. Payment for the formalities performed is added to this without reference to the value of the property. The rate is compulsory and it is illegal to offer a reduction in costs, whatever the circumstances, except to offer an entirely free service. It is also illegal to increase the costs. For land registration purposes, the salary of the mortgage register must be added. This is calculated as 0.1% of the sale price. This cost does not exist in Alsace-Moselle. These costs must be paid when the notarised deed of sale is signed.

3.7.2. Transfer Taxes

- *How high are taxes on the transfer of real property? What is the tax based on (e.g. on the real value, on the purchase price, etc.)?*

A tax is also due when the buyer buys real property. This is a registration tax at the rate of 4.89% of the market value of the property. The tax authorities assume that the price stipulated in the deed is the market value for these purposes. If the tax authorities believe that this amount is an underestimate they will perform a rectification of the tax assessment.

By way of exception, this tax is not payable on sales of newly constructed property, i.e. the first sale in the five years following the completion of construction. In this case VAT is payable. There is also a tax exclusion on purchase by a professional for the purpose of resale. A tax limited to 0.615% the value of the property is collected in these circumstances.

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

This tax is a general tax paid into the authorities' funds as opposed to being allocated by way of registration fees, for example.

The seller may also have to pay capital gains tax. Sales of properties held for less than fifteen years generate a tax payable at the rate of 26.3%, calculated on the difference between the purchase price and the sale price, after various corrections have been taken into consideration. No tax is due on the sale of a family home.

- *Is the notary/lawyer involved in the collection of these taxes?*

The notary acts as the tax collector for both the buyer and the seller. He is even jointly liable for its payment to the tax authority.

3.7.3. Real property Agents

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

If an estate agent is party to the transaction, which is the case 25-50% of the time, the the fees for his services will also have to be paid.

- *Who usually pays the agent – the seller or the buyer?*

These fees are sometimes paid by the buyer, sometimes by the seller. It depends on the provisions in the mandate, whose contents, including the amount of payment due, is left to the parties to decide, without any statutory restrictions.

- *How much is the agent's fee?*

These fees are generally 5% of the transaction price.

3.8 Buyer's Mortgage

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

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

4.1 The Conclusion of the Contract

The preliminary contract concluded between the parties is as good as a sale (except in Alsace-Moselle); having all the effects of a sale except for enforceability with regard to third parties. If there is agreement as to the purpose of sale, the property concerned and the price, the potential buyer and the potential seller are bound, on the request of one or the other, to sign the notarised deed of sale for the property at the agreed price. The conditions of the sale are strictly determined by the terms in the preliminary contract. If this contract is silent as to certain conditions, those provided for by the law will apply. Given this, it is often advisable to seek the advice of a notary before signing any engagement to sell or buy so as to understand fully the consequences of the engagement and the conditions of sale. The rule applicable to real property in Alsace-Moselle limits the validity of these preliminary contracts under private seal to six months.

4.2 Seller's title

4.2.1. Consequences of an invalid sales contract

- *A has sold real property to B. Now, B wishes to sell it to C. However, before entering into the contract, C discovers that the sales contract concluded between A and B was invalid,*

a) because it lacked the required form;

b) because A did not possess legal capacity;

c) because an administrative permit required for the contract was never applied for.

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

If the sale concluded between A and B is found to be invalid, whether owing to private law, such as where the seller does not have the capacity to sell, or for reasons of public law, such as where an administrative formality has not been observed, it is impossible to witness a subsequent sale by B. He is not the legal owner and cannot transfer the property of another. The issue is different if the sale between A and B has not been concluded by a notarised deed, except if the property is located in Alsace-Moselle. In this latter case, the sale between A and B is legally valid, B is therefore the owner of the property and can transfer the property. But this subsequent sale is only possible on the condition that the previous sale between A and B has been registered and for this it needs to be evidenced in a signed notarised deed.

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 on the land register. Only afterwards, it turns out that A was not the true owner. B has however relied in good faith on A's title. (This may happen, for e.g., when the seller was believed to have inherited the property from his uncle under a will, but another will is subsequently found in which the uncle leaves his entire assets to a charity. To make the case more interesting, let us suppose further that the seller has become insolvent and cannot repay the money.)*
- *How is B protected?*
- *May he retain the property?*
- *How is the buyer protected if, during the transaction, it transpires that the seller is not the true owner?*

In the situation where A is not the true owner of the property sold to B, and this information is discovered before the notarised deed is drafted, the sale cannot be continued. Title to the property is one of the conditions for forming the contract of sale and without it the sale cannot be signed. B can at best invoke A's liability, but only insofar as he has suffered damage. If the notarised deed has been concluded, the deed of sale is invalid and B is A's creditor, to the extent that A is solvent. The Civil Code provides for an exception when A acted in good faith. This is the acquisition of the right to property by prescription. Article 2219 defines prescription as : *«un moyen d'acquérir ou de se libérer par un certain temps et sous les conditions déterminées par la loi»* (“a means of acquiring or releasing over a certain amount of time and under the conditions determined by law”). It is the result of possession for a period of, in principle, thirty years. This possession consists of two elements, namely, a material element, “corpus” and an intentional element “animus”. Animus means effective control of the property through acts of holding, usage and enjoyment; it can also involve using or maintaining the property. Possession must be continuous, peaceful and unequivocal. Prescription applies so long as it has been accomplished legally; good faith is not required. When the period of thirty years has expired, property is acquired by effect of law.

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. of losing his payment)?*

If a creditor exercises his rights before the sale is registered, the sale is not enforceable against him. Consequently, he can still enter a mortgage or seize the

property sold. These entries will be enforceable against the buyer. As the notary must not transfer the consideration to the seller before being certain of the entry for land registration, he has funds at his disposal to pay off the creditors. If these funds are not sufficient, the buyer risks losing the title in the property, but the notary will return to him the consideration paid for the sale. If the notary does not respect this rule, he is liable to the buyer for it is presumed that he will check the state of the land registration just before the sale and register the deed or the rights immediately after signature of the notarised deed.

- *How may the buyer protect himself (e.g. through the drafting of the sales contract)?*

4.3 Payment

4.3.1. Delayed payment

- *The buyer pays late. What are the seller's remedies?*
- *May the seller rescind the contract?*

In the event of a delay in payment, the contractual provisions must be examined. Owing to its status as a notarised document it has executory power, i.e. it offers the possibility of enforcing the obligations resulting from the contract, such as the payment of the consideration, without the need for a court judgement to confirm the debt. The contract generally provides for the payment of damages for delay and the possibility of registering a seller's privilege, a type of seller's mortgage. The seller's privilege is immediately registered after the sale. As a consequence, in the event of a resale with the absence of payment of consideration for the previous sale, the initial property owner is guaranteed recovery of the consideration from the second sale. The deed may also include a provision stipulating the possibility of cancellation of the sale where the consideration is not forthcoming.

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

If none of these conditions have been included in the deed, the seller may bring a claim for damages and interest or to cancel the sale, but these measures are left to the judge's discretion.

4.4 Defects and Warranties

4.4.1. Misrepresentation

The seller sells a property without any guarantee as to conspicuous defects, and without a guarantee as to unknown hidden defects. He is not liable for the deficiency of certain installations. He is, therefore, only liable for hidden defects of which he has knowledge and yet to which he has not alerted the buyer. He cannot be reproached for knowledge of conspicuous defects as the buyer has a duty to inform himself.

If the seller has undertaken unauthorised building works, the buyer has the right to claim damages and the notary is also liable.

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?*

Risk lies with the property owner. If the property is destroyed before the sale, delivery is impossible and the sale cannot be concluded. On the other hand, destruction after the sale is signed has no effect on the relationship between the parties: the buyer must assume this loss. The strictness of this rule is attenuated by the cover provided by insurance policies for this type of risk.

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

To avoid any periods where the insurance does not cover the risk, the law provides that the seller's insurance policy is valid for a month subsequent to the sale, as long as it was in force when the deed of sale was signed. In these circumstances, the seller would be liable.

5. Sale of a house or apartment by a building company

5.1 Statutory Basis

5.1.1. National Law

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

The sale of new (future) property was initially governed by ordinary sales law as article 1130 of the Civil Code stipulated that future property could be the subject of a contract. However, ordinary sales law was not very suitable for such operations because it did not offer the buyer a sufficient guarantee against the dangers involved in construction and the loss of the funds that he advanced to finance the construction. To remedy this, the legislature set up a specific system for the sale of future real property in 1967 and some of its more general provisions have been inserted into the Civil Code (articles 1601 onwards). The rest has been inserted into the building and housing code, the “Code de la construction et de l’habitation” (articles L261 onwards), and is concerned with housing. Article 1601-1 of the Civil Code defines the field of application of the sale of future real property as: «*[vente] par laquelle le vendeur s’oblige à édifier un immeuble dans un délai déterminé par le contrat*» (“*[sale] by which the seller undertakes to build a property within a period determined by the contract*”). Although most of the provisions laid down by this system are non-mandatory, by way of exception they give mandatory force in the protected sector, i.e. for housing when the buyer has to make payments before the building work is completed.

Together these highly innovative legal provisions form one of the first steps in consumer law. After thirty years of application, the system established in jurisprudence and doctrine has been influenced very little by the ordinary law.

5.1.2 Influences of EU law

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

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 smaller plots. On these plots, it plans to build town houses. The builder sells the smaller plots, 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.*
- *Are such contracts 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 progress of construction)?*
- *Are there statutory warranties for material defects?*

The legal provisions for the sale of future real property are mandatory when there is a transfer of property, the property is for domestic use and part of the payment of consideration is made before completion. If the payment of the consideration is delayed in its entirety to the moment of completion of the property, the ordinary system of laws for the sale of property applies. However, since the seller is a professional, he cannot be excluded from the guarantee against hidden defects. If a payment is made before work is completed, the rules for a contract for sale of future property are applied. This system governs the moment of the conclusion of the sale, the form of the contract and the clauses that must be included in the contract. It also provides for the methods of payment of the consideration at different stages in the building works, the guarantees for finishing the building and also the obligation for a guarantee against defects. Failure to comply with any one of these rules results in invalidity.

5.2.2. Condominiums

If the sale is for housing subject to the co-ownership system, the rules are identical except with regard to the methods of payment. As the influence of the price of the land is smaller in relation to the size of the building, the seller may receive a larger part of the consideration as the works progress.

5.2.3. Renovation

The issue of whether the sale of a property undergoing renovation can be likened to a sale for future property is controversial. The solution depends on how the works to be carried out on the existing property are qualified. If they can be likened to building, the sale constitutes a sale for future property. If not, it is an ordinary sale of property. Proposals for a Bill to regulate this area are being drafted.

5.3 Conclusion of the Contract

- *Are there any formal requirements for the conclusion of the contract?*

Article L261-11 of the building and housing code provides that the sale must be concluded by way of a certified deed. If this requirement is not met the contract is invalid. This is for the protection of the buyer, who is the only one who can invoke invalidity and then only until the works are finished. The certified deed is a condition for the validity of the sale in the protected sector, whereas it is not obligatory in the free sector, except in order to meet the requirements of land registration. The statute provides that the contract must specify:

- a description of the property sold;
- the price and its method of payment;
- the delivery date and the guarantee of completion;
- details as to whether or not a loan is involved;
- in an appendix, a plan with measurements and a description of the property.

- *Is there a preliminary contract?*

In practice, it is difficult to effect the notarised deed immediately. It is in the parties interest to bind themselves with a preliminary contract in the meanwhile. As in the free sector (i.e. non-domestic property) no rules are provided, article L261-15 of the building and housing code provides for a specific, obligatory preliminary contract. In return for a deposit, the seller undertakes to reserve a dwelling unit for the buyer. Any other promise for purchase or sale is invalid. The preliminary contract can be concluded even before the seller owns the building land, has obtained planning permission, or obtained his loan. The statute lays down the minimum contents, i.e. information about the property (net floor area and number of rooms), building quality and deadlines for completion of work, the location of the property and its price. It must also mention the date on which the notarised deed of sale can be signed and contain the text of several of the articles from the Building and Housing Code. The contract puts an obligation on the seller to reserve a dwelling unit and on the buyer to pay a deposit of no more than 5% of the price, which remains frozen, without committing the buyer.

- *Is there a mandatory waiting period before the contract may be concluded?*

Article L271-11 of the Building and Housing Code offers all non-professional buyers a seven-day get-out clause, which runs from the day subsequent to the letter notifying him of the deed. This seven-day period is offered once only: either after the conclusion of the preliminary contract, or else before signing the notarised deed. Of course, if the buyer exercises his right to withdraw from the transaction he recovers all of the moneys that he has advanced. It is not possible to waiver this seven-day period.

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

At the end of this seven-day period and until the notarised deed of sale is signed, the buyer can still withdraw from the project under certain circumstances. These are when either the characteristics of the project differ notably from those foreseen in the preliminary contract, in which case the deposit is recovered, or the buyer simply does not wish to continue, in which case the seller keeps the deposit (which is not more than 5% of the property sale price), but has no other indemnity.

5.4 Payment

5.4.1. Payment date

- *When is the payment due under usual contractual arrangements?*

Article 1601-3 of the Civil Code lays down the principle according to which the buyer must pay in instalments in line with the progress of work. The preliminary contract stipulates the payment of a deposit which cannot exceed 5% of the sale price if the notarised deed is concluded within the year, and 2% if the deed is produced within two years. This deposit cannot, however, be considered as a stage in the payment of the consideration since it is held either in the account of the notary in charge of drafting the deed, or in a bank account to which the seller does not have access. It will at the very most be imputed to the consideration if the notarised sale is concluded after the preliminary contract. Article R261-14 of the Building and Housing Code fixes a ceiling for payments that can be made for each step in the building work:

- 35% on completion of the foundations;
- 70% when the building is watertight, or "hors d'eau" (as soon as it is covered, even if the doors and windows are not yet in place);
- 95% on completion of the building;
- 100% when the keys are handed over. This remaining 5% of the price may be held on deposit if there are any disputes.

This scale of payments is modified for the sale of a house (20%-45%-85%).

Any conflicting clauses are deemed unwritten and the contract can be cancelled. The parties are free to provide for intermediary stages. It should also be noted that the price may be revised, but the method for revising the price is strictly controlled.

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

The payment of monies may be made directly to the seller, except for the deposit which he cannot receive. There are several qualifications applying to this rule. Part of the price can only be paid if all of the conditions required by law are satisfied, particularly with regard to the guarantee of completion. Moreover, this type of construction is generally financed by a loan and the bank consequently requires that the consideration for the sale be paid directly to an account which it controls. The notary will also, as part of his role, ask for the payment of his share of the price owed to him when the contract is signed.

- *Is it usual or possible to make the contract directly enforceable without the intervention of a court?*

The deed for sale of future property is a notarised deed. It therefore has executory force. Forced execution of the deed therefore does not require court intervention.

5.4.2. Securities

- *Is there any protection available to the buyer, in the form of guarantees or insurance?*

Although the distribution of payments depends on the progress of the building works, the buyer must be protected against the risk that the building is not completed and that the seller does not reimburse any payments made. Article L261-11 of the Building and Housing Code requires that the deed of sale include for the protection of the buyer “the guarantee of completion of the building works or of the reimbursement of payments made in the event of dissolution of the contract on incompleteness”. The guarantee can also be given by a bank or by way of an insurance policy. In this case it is “extrinsic”. It may also result from the conditions of the transaction itself, in which case it is “intrinsic”.

An extrinsic guarantee can take two forms. The first consists in a guarantee to reimburse. Legally this is a contract of guarantee, under whose terms the guarantor undertakes to reimburse the buyer for payments made to the seller in the event of dissolution of the sale due to incompleteness. The second consists in a guarantee of completion. In law this is a contract of guarantee under whose terms the guarantor undertakes to pay the buyer the sum of money required to complete the building.

An intrinsic guarantee results where circumstances are such that the completion of the building seems probable enough to authorise sales. This is met if the building has a roof and no mortgage. It is also satisfied if the foundations are finished and financing has been found for 75% of the sale price, via the developer’s own funds, confirmed credit and the sum of sales already concluded with conditions precedent.

In the sale of houses, the guarantee for completion of the building works results from reaching the end of the schedule of payments. The payments made by the buyer are always below the value of works already carried out.

Whichever the guarantee used, the notarised sale of the future property can only become definitive when an extrinsic or intrinsic guarantee has been set up. The notary drafting the deed is responsible for including it.

Given the protection afforded to the buyer through the obligations in the deed, the spread of payment instalments and the guarantee of completion, there appears to be no need for the transfer to be insured. Nevertheless, the legislature has imposed the use of the form of contract of either a future sale, or sale of the future state of completion. The former is the contract by which the seller undertakes to deliver the property on completion, the buyer undertaking to take delivery and pay its price on delivery. The transfer occurs as of right by the acceptance of completion, which produces retroactive effects on the day of sale. Such a system brings the buyer an additional guarantee, but is so far-removed from the traditional mechanisms in French law that it is practically never used. The contract which is systematically used is the sale in the future state of completion. This is the contract by which the seller immediately transfers his rights in the earth as well as the property of existing constructions to the buyer. Future works become the property of the buyer as they are performed. This is a transposition of the traditional system of sales, combined with the same basic system including the eviction guarantee. The notary must ensure the consideration is paid in priority to the registered creditor. But, as the banker is involved in setting up the guarantee for completion, whether extrinsic or intrinsic: the monies must in any case pass through his account.

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 in order to finance the building project)?*

5.4.4. Building

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

5.4.5. Financing of the Buyer

- *How can the buyer finance his purchase? (e.g. Can he set up a mortgage on his future property? From what moment on? How is his mortgage related to a prior mortgage granted to the construction company? Do the banks have special duties of care when granting loans secured by a mortgage to 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)?*

The seller has an obligation to include a description of the property in the contract of sale, to guarantee the buyer that the property built complies with the property sold on paper. This obligation already exists at the stage of the conclusion of the preliminary contract. This description must include the floor area, a list of rooms and the location of the property. A plan of the property with measurements is attached to the contract for sale in an appendix. All of the plans for the building can be consulted at the offices of the notary charged with the drafting of the contract. The quality of the building work is noted in a technical report. The contents of this report are specified in regulations also attached in an appendix to the notarised deed. Together these elements suffice to define the property precisely and there are very few actions brought for this type of failure to comply.

5.5.2. Late Termination of the Building

- *Does the contract usually provide for a specified period of acceptable delay in the termination of the building?*

Another of the characteristics of this type of sale is the vendor's obligation to build the property within the precise time period determined by the contract. The period may be extended in the event of force majeure or bad weather, or by any action of the buyer which causes delay. Compliance with the deadline remains an essential element of the contract for sale of future property, and its omission leads to the invalidity of the contract.

- *What claims does the buyer have in the event that this delay period is not respected?*

If the deadline is exceeded, the contract can provide for automatic compensation of the buyer. The sellers are less and less in favour of this as it is not a legal requirement. If the contract is silent on this matter, the ordinary law applies. The buyer must apply to the courts and the judge can decide to dissolve the contract, stipulate a new deadline for the seller or order payment of damages with interest to the buyer.

5.5.3. Material Defects

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

The seller must guarantee defects and bad works. This guarantee covers both conspicuous defects and hidden defects in contrast with the general law which provides protection only against the latter. This is owing to the fact that on the sale of future property the buyer is unable to detect any defects that may affect the property given that it is yet to be constructed. According to article 1642-1 of the Civil Code the guarantee against defects revealed by a superficial inspection, without requiring any particular technical skills, binds the seller for one month after entry into possession and the buyer then has one year in which to bring any legal action.

The system of guarantee against hidden defects also differs from that of traditional property sales. The rules are mandatory in nature, as provided by article 1646-1 of the Civil Code, and apply to all sales of future property, whether in the protected sector or not. The vendor is liable for any construction defect, irrespective of fault, for ten years as regards damage affecting the building works and for two years as regards the working order of certain equipment in the building. The seller must have an insurance policy to cover damages. Thus, in the case of loss, the buyer is paid damages by the insurer who is liable to successive owners for a period of two or ten years depending on the nature of the damage. These guarantees start running on acceptance of the work. The buyer can bring an action directly against the companies that have worked on the construction of the building within the same time period. The insurance policy is an essential element in the protection offered to the buyer. It is the notary's responsibility to ensure the effectiveness of the contract, whose premiums must have been paid before any sale of the future property can be concluded. The mandatory insurance cover ensures that the buyer does not have to start legal proceedings in order to prove the constructor's liability, will not need to wait too long for expert opinions and will benefit from the property being repaired with a relatively short period of time.

- *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)?*

5.6 Builder's Insolvency

5.6.1. Unfinished Building

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

The seller's insolvency rarely causes problems. The extrinsic guarantees provide for an external deposit which should cover the costs involved in completion. Of course in these circumstances, the time period announced to the seller for the completion of the property has little chance of being complied with. However, in practice most of the property projects are finished. If the guarantee in place is an intrinsic guarantee for completion, the buyers are in a different position. The system is nevertheless such that as the price has not been paid in its entirety the buyers can amass the remaining sums due to finish the works without too much difficulty if they so wish. In addition, in compliance with the ordinary law of bankruptcy, the buyers retain the possibility of calling in their debts. The success of this approach, however, depends on the existence of assets on the part of the seller.

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 numerous material defects in the 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?*

If the seller becomes insolvent after dissolution of the contract, problems are more likely to arise. There is no specific protection of the buyer in such circumstances. At most the buyer should be made aware of the risks connected to termination of the contract and encouraged to find another means of satisfying his rights. It is extremely rare for a judge to order the dissolution of such a contract.

6. Private International Law

6.1 Contract Law

6.1.1. Conflict of Laws Rule

- *Does your legal system allow for the choice of applicable law in contracts concerning real property?*

The Rome Convention of 19th June 1980 applicable to contractual obligations applies to contracts for the sale of real property. In compliance with article 4, paragraph 3, when the subject matter of the contract is a right in immovable property, it is presumed that the contract is most closely connected with the country where the immovable property is situated. The sale of real property situated in France is subject to the principles of French law. However, the parties are free to subject the contract to another national law with which a connection exists. This is derived from the principle of freedom of choice.

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

If the parties have not expressed any particular jurisdiction, the applicable law is the law of the country where the property is situated (“*lex rei sitae*”). It should be noted that the choice of the parties may sometimes come into conflict with public order provisions applicable owing to the location of the property, exchange regulations or rules as to consumer protection. In the same way, the rules of capacity and power depend on the nationality of the parties to the deed.

- *If the *lex rei sitae* governs real property rights, can the parties nevertheless choose a different *lex contractus* in relation 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*”)*

6.1.2. Formal Requirements

- *If, in your legal system, formal requirements on the obligation to transfer real property exist: Is the obligation still 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 is concluded? Is this so even when the law of the place where the contract is concluded allows the contract to be in writing without*

any other formal requirements?

Article 9 of the Rome convention determines which law is applicable to the contract.

6.2 Real property Law

6.2.1. Conflict of Laws Rule

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

The form of a contract whose subject matter is immovable property in France is governed by the mandatory rules applicable in the place where the property is situated, irrespective of the law nominated by the parties. This is also the case for the sale of future property. In the absence of mandatory rules, two laws may apply: the law of the place of drafting of the contract, or the law governing the subject matter of the contract. The contract need only satisfy one or other of these laws.

6.2.2. Formal Requirements

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

This rule must not, however, fail to comply with the fundamental principle that the formalities of land registration applicable are always those stipulated by the place where the property is situated. Land registration must therefore be carried out in France, in compliance with French law.

Consequently, in order for a deed of sale relating to real property located in France but subject to another law to be registered and enforceable with regard to third parties, the deed must be authenticated, by a notary if necessary, then filed with the original deeds. Furthermore, the notarised deed must be written in French. This process of filing a deed under private seal with the original deeds of a notary is considered equivalent to a duly certified deed, the subject matter being the clauses contained in the deed under private seal. This means that the notary is liable in the same way as if he had written the contract under private seal himself. He will of course be less inclined to accept the filing with his deeds of a document whose contents are not entirely within his control. The notary's fee is exactly the same as the fee he would have earned if he had written the certified deed of sale for the property himself.

From the point of view of tax, deeds executed abroad that transfer property located in France are subject to the taxes receivable on deeds of the same nature executed in France, i.e. payment of registration fees by the buyer and capital gains tax by the

seller. An accredited representative may collect the taxes and pay them once the sale is completed.

The land registration rules specific to Alsace-Moselle, applicable to deeds relating to property located in this region, are worth mentioning. The contract under private seal must be certified within six months of its conclusion, irrespective of the law chosen by the parties. If this is not complied with, the sale is invalid.

6.3 Restrictions on Foreigners acquiring Land

6.3.1. Restrictions limited to Foreigners

- *Are there any restrictions on foreigners acquiring real property?*

There are no limits on investment in property in France by non-residents. Property can be sold to people from foreign countries, using any means of payment, and there is no discrimination in the execution of property procedures.

6.3.2. Other Restrictions

- *Are any other permits required, particularly in the case of foreigners wishing to acquire real property (or about which foreigners complain more than nationals)?*

6.4 Practical Case: Transfer of Real property among Foreigners

7. Encumbrances/Mortgages (and Land Charges)

7.1 Types of mortgages/land charges

7.1.1. Types of mortgages

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

A secured debt consists in giving the creditor, by way of guarantee, a right stronger than that resulting from the general right or lien. The creditor has priority in the event of sale of the property which is security for the loan for his right is in relation to the property as opposed to the person who consented to the loan. This is the creditor's right to pursue the debt, "droit de suite". The creditor has a type of appurtenance. There are several ways of classifying secured debts:

They may be distinguished by their source: securities are usually created by a contract between the creditor and the debtor, or a third person acting as guarantor. Other securities are given directly by statute owing to the nature of the person or the debt: privileges and statutory lien. A third category is composed of securities granted by court order.

Securities can also be classified as general or special securities. General securities are those which are attached to all the debtor's goods including his real property. They must be provided for by statute as French law does not allow anyone to bind all of his possessions by contract, especially not future property. Special securities are attached to specific goods. These are more often securities by contract but may also be statutory or by way of court order.

Finally, a distinction can be drawn between securities subject to registration or not.

The generic term used is the mortgage, or "hypothèque". It may be contractual, statutory or court imposed. Privileges should also be mentioned. These are a type of mortgage created only by statute and which take precedence over other types of mortgage. Because of their basis in real property, these privileges resemble mortgages in effect: they confer the same prerogatives. But they can be distinguished by their rules and their classification, their rank being independent of the date of registration. This character presents disadvantages for debt security, which is why they are much less common today. This leaves the property seller's privilege, the privilege of the money lender for property purchase, the co-owner's privilege, the architect's privilege, the privilege of the separation of estate in matters of inheritance and the privilege of the first-time buyer holding a rental-property accession contract. All of these are listed under article 2103 of the Civil Code. Finally there is an important hidden privilege, that of the co-owners' association. For the sale of any

plot subject to a system of co-ownership the association must be paid in priority to all registered creditors.

The rules applicable to formation and effects are laid down by the Civil Code in articles 2114 onwards. The system of registration for these securities is organised by the decree of 4 January 1955, which concerns sales of real property.

- *What is the most common type of mortgage?*

7.1.2. Legal nature

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

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?*

It is simple to set up a mortgage. The creditor and the debtor sign a contract creating a mortgage attached to real property. The contract creating the mortgage is a formal contract which must be duly certified by a notarised deed, according to article 2127 of the Civil Code. Once the contract is signed, the security must be registered at the mortgage registry or the land registry offices.

The contract creating the mortgages is thus subjected to two series of formalities. There are conditions as to the form: the deed must be notarised. This requirement would also result from the rules guiding land registration, but mortgage contracts are only valid if concluded by way of a notarised deed. This requirement is justified by the serious nature of the commitment. Non-compliance with the rule results in complete invalidity. To be enforceable with regard to third parties, the contract must be registered at the mortgage registry.

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 creation of the mortgage? Can the mortgage be annulled*

within a certain period if the customer wishes to cancel it?

The bank is subject to many legal requirements when granting a mortgage loan to a non-professional, i.e. a consumer. The mortgagor has at least thirty days in order to search for a bank, its offer lasts four months and the consumer cannot sign the loan within the first ten days. The loan and the mortgage will usually be completed at the same time.

7.2.3 Formal requirements

- *Is there any formal requirement for the creation of a mortgage?*

Although the contract creating the mortgage is valid once signed by the creditor and the debtor, the true effect of the mortgage, i.e. its enforceability with regard to other creditors, results from its registration.

7.2.4. Registration

- *Is the registration of the security on the land register (or any other register) necessary? If so, which indications must the registration contain?*

This is a land registration procedure. The entry is made using a summary document including, in compliance with article 2148 of the Civil Code, the names of the parties, the description of the title which subject of the loan, the designation of the property against which the entry is required and the reference for the prior registration of the property title of the owner of the mortgaged property. This entry must comply with the French principle of specification of the individual nature of the property given in as security for the debt. This rule is provided for the requirements of registration by article 2132 of the Civil Code and does not affect the validity of the mortgage. Registration of the mortgage therefore requires an indication as to the reason for and the nature of the debt, details of extent of the debt and its interest and the date by which it is payable.

7.2.5. Time and Costs

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

In principle, the creditor cannot register the mortgage before the security exists. Registration of the security does not have any time limit, except for certain property privileges which must be registered in order to secure their particularly favourable rank. However, it is in the creditor's interest to register his interest as quickly as possible, firstly because the date of registration determines his rank in the order of payments, and also because certain events may render registration impossible. These

events are the sale of the property, registration of a seizure of the property or the commencement of a liquidation procedure.

- *What can be done to speed up the process?*
- *Is it possible to use priority notices or similar devices? How effective are they in securing the mortgage and its rank?*
- *Is it possible to speed up the process by using the internet?*
- *What are the costs for establishing a typical security for (a) €100,000 and (b) €300,000?*

The cost of mortgage registration includes notary fees (beyond a cut-off point as for the sale and in conformity with the statutory price of 0.55% before tax), the land registration tax (0.615%) and the mortgage registrar's salary (0.05%), all based on the value of the debt. The notary collects all of these sums. To give an example, for a mortgage of 100,000 Euros, the total costs is 1900 Euros. For a debt of 300,000 Euros, 4.500 Euros.

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?*

If there is a problem with the debt connected with the mortgage, the mortgage is also affected. It is an accessory to the debt and disappears if the obligation guaranteed is extinguished in compliance with article 2180-1 of the Civil Code: "accessorium sequitur principale". However, if the debt does not disappear entirely, including following partial payment, the mortgage remains in its entirety. Cancellation of the deed that led to the extinction of the debt will revive the mortgages retroactively.

By application of the same principle, pure and simple payment of the debt extinguishes the debt and at the same time, because of the accessory character of the security, extinguishes the mortgage. The mortgage cannot survive to guarantee another debt between the same parties.

The mortgage therefore constitutes an accessory to the debt. It is unsettled whether the cause of the debt must be indicated for the creation of the mortgage to be valid. The cause must be included for the requirements of registration to prevent the

mortgage guaranteeing multiple debts. In any case, this solution is unconceivable because it is unenforceable with regard to third parties. However, French law does allow autonomous guarantees. To secure the implementation of such autonomous guarantees, it is entirely possible to require the guarantor to create a mortgage. But this mortgage is then caused by the autonomous guarantee and is its accessory.

7.3.2. Right of withdrawal

- *Can the bank still use the mortgage to secure its right to repayment of the loan?*

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 the new loan (and if so, under which conditions)? Or is it necessary to set up a new mortgage?*

7.3.4 Independent/abstract promise of payment

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

7.3.5. Mortgage in favour of the land owner himself

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

A mortgage is created by the agreement of the parties. It is a bilateral contract, requiring the consent of two people. Consequently, one person cannot mortgage his own property for his own benefit.

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

7.4 Enforcement and other rights of the bank

- *Please describe the main steps of the enforcement procedure.*

The mortgagee is first and foremost a creditor. He has a lien over all of the debtor's property, but article 2204 of the Civil Code provides that he can only proceed to sell this property if the mortgaged property is insufficient. The mortgagee essentially has a right over the real property.

Until or unless the debt is exercised, the mortgage does not affect the fact that the owner retains his rights in the property. It gives the mortgagee priority over other creditors, as well as over the property owner. It also offers him the right to pursue the satisfaction of the debt even if the property changes owner,

If the debt is not paid and the creditor wishes to enforce the payment, he must seize possession of the property subject to the charge. However, the creation of the mortgage does not offer him any easier means of doing this. He is obliged to respect the rules as to taking possession of property and sale by auction like any other creditor, and it is impossible to stipulate otherwise in the contract.

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

The procedure consists in obtaining a possession order from the court based on the title of the debt, which is a notarised document and therefore has executory force. The order must be registered and then a court auction to sell the property must be organised. This court procedure varies depending on whether the property is located in France or in Alsace-Moselle. In the latter case, the notary intervenes as a delegate of the court to organise the sale. But this procedure is quite long, may result in numerous incidents if the debtors are of bad faith and above all may be diluted by bankruptcy law.

- *How long does the enforcement procedure usually take before the bank receives the proceeds of the mortgage? Can the debtor slow down the procedure, especially if the mortgage is on his residential home? Can the bank act in receivership in the meantime (Zwangsverwaltung)?*
- *Can the bank sell the real property without foreclosure, i.e. without a court decision and a compulsory auction? Can the owner grant the bank the right to purchase or the power to sell the property by means of a normal real property sales contract (in the event that the loan is not repaid)?*
- *Are there any instruments for public administration or courts to stop or suspend foreclosure for social or economic reasons?*
- *What happens in the event that insolvency procedures over the debtor's estate are initiated? Will the foreclosure procedure be barred? How are the mortgagee's rights protected in an insolvency procedure?*

7.5 Overriding interests and priority

7.5.1. Distribution of proceeds

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

The priority over other creditors is one of the essential elements of the mortgage. The creditor who has the benefit of the mortgage is paid off before any debtor who does not hold a mortgage. If there are several mortgagees, repayment proceeds according to their position in the rank – as determined by the date when registration was requested.

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?*

There are several exceptions to the above principle, the major one being that of the co-owners' association, which benefits from a hidden privilege which guarantees the reimbursement of unpaid co-ownership charges over a certain period. Another exception is that laid down for the payment of court expenses for possession of the property for sale. However, mortgages have priority over other securities, even tax securities, which are exempt from registration.

- *Can you indicate what percentage of the value of the real property these charges usually amount to?*

7.6 Scope of the mortgage

7.6.1. Buildings

- *If there is a mortgage on real property, does the mortgage necessarily also encompass houses built on it? Are there separate mortgages on buildings, that do not concern the land?*

To constitute a mortgage validly, its subject matter must be a real property right, as laid down in article 2118-1 of the Civil Code. In principle, property that does not belong to anybody cannot be mortgaged. The scope of the mortgage is the real property right and its fixings. As building work is firmly associated with the property, it is included in the scope of the mortgage, unless otherwise specified.

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 materials, etc.?*

All movable elements attached to the immovable property are excluded from the mortgage.

7.6.2. Insurance

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

A mortgage may be secured by way of personal property through subrogation for the payment of damages, in compliance with article L121-13 of the French insurance code. However, the mortgagee who wants to exercise his right to damages must enforce it against the insurer.

7.7 Protection of the Mortgager

7.7.1. Right to redeem

- *May the mortgagor redeem the mortgage at any time at will or only under certain conditions?*
- *The contract constituting the mortgage is an accessory contract to the loan contract, but also an independent contract. Thus even when repayments are made in advance of the provisions in the loan contract, the mortgage registration subsists for the initial duration of the loan plus an additional two years.*
- *Is it possible to restrict the mortgagor's statutory right of redemption?*

7.7.2. Redemption after foreclosure

- *May the mortgagor redeem the mortgage even after foreclosure?*

However if the debt is extinguished, the effects of the mortgage disappear too. A registration without any effect remains. The former debtor is entitled to have it removed from the register at any time.

7.8 Security Granted by a Third Party

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

Though the mortgage is usually granted by the debtor himself, it can also be granted by a third party who uses his property as guarantee for the debt of another and nominates himself as the guarantor. He is then bound "propter rem". All of the rules applicable to the guarantor as well as the rules surrounding the creation of a mortgage are applicable to provide the same level of guarantee.

7.9 Plurality of mortgages

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

the owner and are able to execute their mortgage. Generally, the priority is determined by the order in which the mortgages were created, but it is possible to create two mortgages with the same rank. This requires the consent of both creditors and is done by applying at the same time.

7.10 Several properties

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

7.11 Transfer of the mortgage

7.11.1. Transfer of the mortgage in general

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

The accessory nature of the mortgage means it is automatically transferred with any transfer of the debt with which it is associated. Transmission of the mortgage is thus the result of the contract to transfer the debt. In principle, the transfer of the debt is not subject to any specific form. After the contract, it must be notified and registered in order to be enforceable with regard to third parties.

The mortgage can also be transmitted in its own right, i.e. independently of the guaranteed debt. The mortgage is then detached from the initial debt to guarantee a new debt. This is an assignment of priority. It does not alter the rights of the contracting parties: the mortgage only guarantees the rights of the assignee to the extent of the rights of the assignor. The assignor retains his debt and only loses the mortgage that guaranteed it. This transmission must be registered in compliance with article 2149 of the Civil Code and communicated to the debtor, who cannot oppose it.

7.11.2. Transfer to more than one creditor

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

The mortgagee can also consent to several partial assignments. An order of rank is established between them in relation to the date of subrogation noted in the margin of the mortgage register in compliance with article 2149 of the Civil Code.

7.11.3. Administration of the mortgage by a trustee or fiduciary

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

7.12. Conflict of Law Issues

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

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

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

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

7.12.3. Bank loan taken in a third EU-country

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

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

- *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 law applicable to the loan contract is the law chosen by the parties. If no choice is stated in the contract, French doctrine refers to the Rome Convention of 19th June

1980 on the law applicable to contractual obligations. In accordance with the provisions of the Rome Convention, “contract shall be governed by the law chosen by the parties”. If there is no express or implicit choice by the parties, “the contract shall be governed by the law of the country with which it is most closely connected”. It is presumed that the contract is most closely connected with the country where the party supplying the service in question has his main place of business or if the service must be provided by a secondary place of business, the country where this secondary place of business is located. When the loan contract is subject to a consumer protection statute, the statute is considered to be a police regulation and is applied to the loan contract if either the creditor or the debtor is established in France.

The security is subject to the law of the jurisdiction in which the encumbered property is located. This principle is backed up by article 2128 of the Civil Code according to which “contracts formed in foreign countries cannot produce mortgages on property in France if there are no provisions contrary to this principle in political acts or treaties”. This provision is a substantive rule in public international law which denies the effectiveness of contracts made in foreign countries. The provisions of article 2103 of the Civil Code are not complied with and therefore the relevant security cannot arise.

8. Bibliography

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