



EMF>

STUDY ON THE EFFICIENCY OF THE MORTGAGE
COLLATERAL IN THE EUROPEAN UNION



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CONTACT DETAILS

Annik Lambert
Secretary General
E-mail: alambert@hypo.org
Tel: +32.2.285 40 44

Matthias Tiemer
Head of Legal Affairs
E-mail: mtiemer@hypo.org
Tel: +32.2.285 40 40

LIST OF CONTRIBUTORS

The European Mortgage Federation would like to thank the members of the Legal Affairs Committee for their contribution towards the elaboration of this study:

CHAIRMAN

Mr Alain Gourio
Coordination Juridique Group/Affaires Européennes
BNP Paribas
E-mail: alain.gourio@bnpparibas.fr

PRESIDENT OF THE EDITORIAL COMMITTEE

Mr Alain Gourio
Coordination Juridique Group/Affaires Européennes
BNP Paribas
E-mail: alain.gourio@bnpparibas.fr

BELGIUM

Mr Jo T'Jampens
Premier Conseiller
Union Professionnelle du Crédit (Febelfin)
E-mail: jt@febelfin.be

DENMARK

Ms T. Borch-Jacobsen
Lawyer
Realkreditrådet
E-mail: tbj@realkreditraadet.dk

Mr J. Wohlsen
Vicedirector
Legal Department
Nykredit
E-mail: jw@nykredit.dk

GERMANY

Ms I. Hager
Lawyer
Verband deutscher Pfandbriefbanken
E-mail: hager@pfandbrief.de
Ms K. Edzard-Heinke
Abteilung Kapitalanlagen
Gesamtverband der deutschen Versicherungswirtschaft
E-mail: k.edzard-heinke@gdv.org

GREECE

Mr K. Panagopoulos
Hellenic Banks Association
E-mail: Pang@enternet.gr

SPAIN

Mr J. Garcia Muñoz
Secretary General
Spanish Mortgage Association
E-mail: jgarcia@ahf.es
Mr R. Sanz Company
Director, Servicios Jurídicos de Negocio Hipotecario y Contratación Singular
BBVA
E-mail: rsanz@grupobbva.com

FRANCE

Mr P. E. Fuzier
Chef de bureau
Secrétariat Général
Crédit Foncier de France
E-mail: pierre-eric.fuzier@creditfoncier.fr

HUNGARY

Mr A. Botos
Secretary General
Association of Hungarian Mortgage Banks
E-mail: botos.andras@jelzbank.hu

IRELAND

Ms E. O'Rourke
Head of Retail Banking
Irish Banking Federation
E-mail: eimer.orourke@ibf.ie
Mr C. MacCarthy
Irish Life & Permanent Plc

ITALY

Ms T. Broggiato
Legal Department
Italian Banking Association
E-mail: t.broggiato@abi.it

Mr G. Pompei
Head of Credit Department
Banca Monte dei Paschi di Siena
E-mail: Giancarlo.Pompei@banca.mps.it

THE NETHERLANDS

Mr W. Filott
Assistant General Manager
Legal and Tax Department
Rabobank Nederland
E-mail: W.H.G.A.Filott@rn.rabobank.nl

AUSTRIA

Mr C. Hiesberger
Deputy Secretary General
Federation of Austrian Mortgage Banks
E-mail: hiesberger@hypoverband.at

POLAND

Ms A. Drewicz-Tułodziecka
President
Polish Mortgage Credit Foundation
E-mail: a.tulodziecka@ehipoteka.pl

PORTUGAL

Mr J. Dias Garcia
Secretary General
Caixa Geral de Depósitos
E-mail: joao.garcia@cgd.pt

FINLAND

Mr. R. Piepponen
The Mortgage Society of Finland

SWEDEN

Mr T. Tetzell
Chief Lawyer
Swedish Bankers' Association
E-mail: tomas.tetzell@bankforeningen.se

UNITED KINGDOM

Mr A. Heywood
Deputy Head of Policy
Council of Mortgage Lenders
E-mail: andrew.heywood@cml.org.uk

RAPPOREUR

Mr M. Tiemer
Head of Legal Affairs
European Mortgage Federation
E-mail: mtiemer@hypof.org

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FOREWORD

The efficiency of mortgage collateral is at the core of mortgage lenders' activities. In this context, efficiency is measured in terms of simplicity, transparency, rapidity and costs. These conditions must be adhered to throughout the whole procedure, starting with the constitution of the mortgage collateral and following with its registration and execution.

The efficiency of mortgage collateral has become even more important with the implementation of the Capital Requirements Directive. Indeed, the mortgage guarantee is a significant risk-reducing factor, which justifies a privileged weighting of mortgage loans as opposed to non-secured loans. However, this risk-reducing effect provided by the mortgage surety largely depends both on the efficiency of the national procedures and on the cross-border enforceability of the surety.

This European cross-border dimension is of rapidly growing importance in the current context. Indeed, the achievement of a single currency for the EU, together with the continuous strengthening of the Single Market, the consolidation of the banking sector and the development of electronic means of communication could trigger mortgage lenders' expansion into other EU markets.

Therefore, the differences between Member States' legislation may be seen as a problem in terms of efficiency, as they imply some degree of insecurity in cross-border lending. Consultation of practitioners highlighted that the possible problems resulting from the differences throughout Member States were not linked to the constitution of the mortgage under different national legislations, but instead to the lack of transparency in the registration systems and to the uncertainties linked to its enforceability.

For these reasons, the European Mortgage Federation undertook to assess the extent of these differences between the Member States' legislation, and their possible impact on the mortgage sector. The study, which is the result of this survey, covers the legislation of 16 of the EU27.

The study covers all areas, which determine the efficiency of the mortgage collateral: constitution and registration, the ranking of the surety, as well as the repossession (i.e. forced sale procedure). The study covers both residential and commercial mortgage loans.

The results of this very detailed survey conducted by the European Mortgage Federation are encouraging. The study shows that very often the principles underlying the national legislations are the same or similar, with the differences arising from the actual application, i.e. timing, level of costs, competent authority, etc. This implies that cross-border lenders do not have to face totally different and unknown systems but can, on the contrary, work in a rather similar environment all over the EU. This does not however eliminate the need for lenders, planning to enter another national market, to inform themselves about the particularities of that given system.

In conclusion, all of the national systems appear to be secure on a general basis. Member States' national mortgage legislation is long-standing, surviving relatively well often for over 100 years. There is however room for improvement, especially in some of the EU10. For example, there remains a need for simplification, which in turn would positively impact the rapidity of procedures. Specific areas of legislation could also be subject to certain improvements. For instance, the transferability (remortgaging situation) of the mortgage could be improved throughout Member States. There is a need for greater transparency in the management of the national land/mortgage registers. They should be accessible on a cross-border basis in all Member States (currently in 10 out of 16). Moreover, their centralisation and the achievement of their computerisation would greatly improve cross-border accessibility (this issue is being closely examined in the framework of the EULIS project).

In general, the time taken by the registration and enforcement procedures, or parts of them, is satisfactory. However in some Member States, there is, to differing degrees, a need for the time taken to register and especially to repossess to be shortened. In the context of cross-border activities, it is also of the greatest importance that exequatur procedures (official recognition of foreign judgements) are limited to a strictly formal process; this is not yet the case in all Member States. Furthermore, there is no doubt that hidden mortgages and preferences, which involve a high degree of insecurity for the lenders, should disappear from national systems. Finally, in a limited number of cases, the lowering of the costs related to the procedure would also constitute a step in the right direction.

These conclusions are presented in detail in the Executive Summary. The study itself comprises the national reports detailing the entire procedure. Finally part four summarises the different steps of the national procedures.

2. EXECUTIVE SUMMARY

1. Constitution and Registration of the Mortgage

1.1 PERSON(S) ENTITLED TO MORTGAGE A PROPERTY:

- > **In all MemberStates:** the owner of the property. The owner is always the holder of a legal right in the mortgaged property (right in rem).

1.2 THE CONSEQUENCE OF A PROPERTY BEING MORTGAGED:

- > **In all MemberStates:** the lender is protected by taking a legal charge over the property, which gives him a privileged ranking. This privilege will be maintained until total repayment.

1.3 CHARACTERISTICS OF THE MORTGAGE:

- > **In the majority of Member States the mortgage is an accessory to the main contract (credit). "Accessoriness" means that the mortgage does not exist on its own but only in relation with the main contract/debt.**

- > However, a certain number of Member States – such as e.g. Germany, Hungary and Sweden – provide mortgage collateral instruments that are not based on accessoriness but on a system of contractual accessoriness/independent collateral. According to the system prevalent in Germany the collateral is independent by law from any main contract or debt. In practice however the so-called security agreement creates an obligatory/contractual link between the real estate collateral and the debt secured. This collateral is called *Grundschuld*. As a result of the contractual-accessoriness, once a credit guaranteed by the surety has been repaid, the surety may be re-used to guaranty other contracts without any limit. In Germany this is the main system used to guarantee real estate loans, the mortgage is rarely used in practice.

Hungarian law provides for an independent mortgage lien called *önálló zálogjog*. It is a non-accessory mortgage collateral and exists alongside two other, accessory mortgage collateral tools, namely the hypothec and the limited security lien.

- > In Poland, there are currently two different types of mortgage collateral in existence, the ordinary, accessory mortgage and the deposit mortgage, which is accessory in principle but allows for certain exceptions from the principle of accessoriness.

On the other hand, a bill on a non-accessory mortgage collateral tool called *dług gruntowy* (land debt) is under discussion. This tool is designed to provide for a flexible security on the property while at the same time securing the borrower's/mortgagor's rights.

1.4 INTERVENTION OF A NOTARY:

- > **In 11 MemberStates out of 16, the constitution and the registration of the mortgage is conducted through a notary¹** (Belgium; Germany²; Greece; Spain; France; Hungary; Italy; the Netherlands; Austria; Poland³ and Portugal). In a majority of these countries, the role of the notary is set out by law (to variable levels), which enables the notary to issue authenticated deeds/writs of execution (enforceable deeds). Very often, the notary has also a role of adviser to the contracting parties.

¹ This is also true for Luxembourg.

² The intervention of a notary is not required by law but in practice the constitution and the registration of the mortgage is conducted through a notary.

³ Art. 95 of the Polish Banking Law Act provides for a simplified procedure to create a mortgage collateral in cases of credits being granted by banks. If the requirements of said Art. 95 are met, the intervention of a notary is not necessary (cf. the National Report on Poland below).

- > Nordic countries (Denmark; Finland; Sweden) and Ireland and the United Kingdom do not have a notary system. The role of the notary is held by a solicitor or a court (judicial or administrative).

1.5 CONTRACT:

- > **The credit agreement and the mortgage agreement are always 2 different contracts. However, depending on the country, the 2 contracts are included in 1 single deed (authentic deed) or they remain 2 different deeds.**
- > **In general one deed** including the credit contract and the mortgage: Belgium; Denmark; France; Portugal; Sweden and the United Kingdom.
- > **In general two deeds**, a credit contract and a separate mortgage agreement: Germany; Hungary; Ireland; Austria; Finland and Sweden.
- > **Countries where the two situations are possible**, depending on the lender's policy: Belgium (theoretically); Greece; Spain; Italy; the Netherlands and the United Kingdom (lenders' practices will differ and separate agreements tend to be used where the loan is also regulated under the Consumer Credit legislation).

1.6 MORTGAGES FOR FUTURE DEBT:

- > **In approximately half of the MemberStates a mortgage can be granted for "existing and future debts" or "for all debts".** The condition sometimes however is that the future debt could be determined and that all debts are held by one single lender.
- > **Do allow this kind of mortgage:** Belgium; Germany; Greece (Greece allows mortgages for future debts but a mortgage can only guarantee a specific debt, existing or future); Spain (the future debt must be determined "maximum amount of credit, term, etc." in the mortgage contract); Hungary; Ireland; Italy; the Netherlands; Austria; Poland; Finland and the United Kingdom (the lender's "all monies charge" will usually cover all future mortgage related debt).
- > **Do not allow this possibility:** Denmark (in Denmark, this possibility actually exists for creditors other than mortgage banks; for mortgage banks, it is forbidden by law); France; Portugal and Sweden.

1.7 ABILITY TO TRANSFER THE SURETY TO THE NEW LENDER (RE-MORTGAGING SITUATION):

- > **MemberStates where the surety can be transferred to the new lender:** Belgium; Germany, Greece (only by assignment of the claim, whereby as a result of "accessoriness", the mortgage is transferred ipso iure to the assignee); Spain; France (possible but most generally a new mortgage is taken out); Hungary; Italy; the Netherlands (possible but nearly always a new mortgage is established); Austria; Portugal; Finland and Sweden.
 - Subject to the agreement of the involved parties: Germany and Sweden.
 - Not subject to agreement: Belgium; Greece; Spain; France and Italy.
- > **MemberStates where the surety cannot be transferred to the new lender and the borrower must take out a new mortgage:** Denmark; Ireland; Poland and the United Kingdom.
- > In Germany, under the *Grundschuld* system (real estate collateral which is contractually accessory to the main contract), there are no legal restrictions either to the transfer of the security to a

new lender or to the replacement of a former mortgage loan by a new one. The same is true in Hungary with the *önálló zálogjog* (i.e. the independent/non-accessory mortgage lien). In Poland, the bill on the *dług gruntowy* aims at establishing a mortgage collateral which would allow for a flexibility similar to the German and Hungarian systems.

1.8 DURATION OF THE MORTGAGE:

- > **Depending on the country, the mortgage (the effect of the mortgage registration) has a fixed maximum term or lasts as long as the debt exists.** The real estate collateral (*Grundschild*) continues to exist even if the debt is extinguished. It is converted by force of law into a property owner's land charge (*Eigentümergrundschild*). In countries with a maximum term the mortgage must therefore be renewed if the credit has not been repaid within the fixed duration. On the other hand, if the credit is repaid before the deadline, the mortgage must be redeemed. For information, a mortgage will only become a ranked charge over the property once the mortgage is registered.
- > Countries with **a fixed maximum duration:** Belgium (30 years); Spain (20 years); France (35 years); Italy (20 years); Portugal (10 years) and Finland (10 years).
- > Countries with **no fixed maximum duration:** Denmark; Germany, Greece; Hungary; Ireland; the Netherlands; Austria; Poland; Sweden and the United Kingdom (but the mortgages tend to be 20/25 years).

1.9 TYPE OF REGISTER:

1.9.1 Depending on the country, the mortgage will be registered either in a general land register or in a specific mortgage register.

- > The following countries use a land register: Denmark; Germany; Greece; Spain; France; Hungary; Ireland; Italy; Austria; Portugal; Sweden and the United Kingdom.
- > The following countries use a deed/mortgage register: Belgium; Greece; the Netherlands and Sweden.
- > Greece and Sweden constitute an exception. They have both types of register.

1.9.2 Depending on the country, the Register is electronic or remains traditional (paper).

However, countries with a traditional Register are generally in the process of computerising it.

- > The following countries have an electronic Register: Belgium (partially); Denmark; Germany (partially); Greece (partially); Spain (partially since 1st January 2002); Hungary; Ireland (partially); Italy; the Netherlands (partially); Austria; Poland (partially); Finland; Sweden and the United Kingdom.

1.9.3 In practice, there are as many registers as national jurisdictions. However in some countries the register is centralised at a national level. Registers generally depend on the competent court, on the Ministry of Justice or on the Ministry of Finance.

- > Countries with **centralised register:** Hungary; Ireland; the Netherlands; Austria, Poland (partially); the United Kingdom (centralised registers in England & Wales, Scotland and Northern Ireland) and Sweden.
- > **No centralised register:** Belgium; Denmark; Germany; Greece; Spain; France; Italy and Portugal.

1.10 EFFECT OF THE REGISTRATION: IT IS THE REGISTRATION THAT MAKES THE MORTGAGE COMPLETE:

- > **In all the Member States, registration grants the mortgage a certified date and a privileged rank. The deed must always identify the property which is mortgaged as well as the amount which is guaranteed.**
- > **In all Member States, the principle establishing the creditor's ranking is: 1st in time 1st in rank and priority.** In general, the registration is precise to the day but not to the hour, which implies that mortgages and preferences registered on the same day have the same rank. In Germany however, mortgages and preferences registered on the same day do not have the same rank. The rank of collateral registered on the same day is determined by receipt or arrival of the registration office (hour, minute). This is also true for Poland. In the Netherlands, Austria and Portugal, it is precise to the hour. In these countries, the mortgage and preferences take rank at the precise moment they are registered. The rank is determined by the number in the Register.
- > Greece ranks mortgages and preferences separately (two-thirds of the proceeds are reserved for mortgages and one-third for preferences).
- > In Belgium, preferences on real estate always rank before mortgages (in the relationship of the creditors with one and the same debtor).
- > In Finland, if a mortgage and a preference are registered on the same day, the preference takes precedence.
- > In the United Kingdom, it is often a condition of the mortgage that it has priority ranking. The solicitor will have a "priority" period in which to register the charge.

1.11 ACCESSIBILITY OF THE REGISTER: LIMITED TO NATIONAL CONSULTATION OR AVAILABLE ON ACROSSBORDER BASIS.

- > **Countries where the Register is accessible on a cross-border basis are generally countries where consultation of the Register is conditional on a fee being paid. In these cases, anybody making the request to see the register (using the correct procedure) and paying the fee can access the requested information.** A few countries have their Register(s) online, which means that the entire Register can be consulted: Denmark, Germany (a justified reason for use must be proven), Hungary (a safe electronic connection to the competent authority i.e. the Ministry of Agriculture and Regional Development is required); Italy (only some Registers are available online); the Netherlands (submitted to a fee); Sweden and the United Kingdom.
- > Register **accessible on a cross-border basis**: Belgium; Germany (a justified reason must be proven); Greece; Spain; France; Ireland; the Netherlands; Austria; Poland; Finland and the United Kingdom,.
- > Register **non-accessible on a cross-border basis**: Denmark; Hungary; Italy; Portugal and Sweden.
- > In Denmark, a proposal has recently been put forward in the Folketing according to which anybody can be authorized to obtain access to the land register from the external. A fee must be paid per consultation per property.
- > In Germany, there are Federal States (i.e. Bundesländer), which have completely switched over to a computerised land register, others, which have only partially converted, and some, which still have a completely traditional land register system.

1.12 AVERAGE TIME NECESSARY FOR CONSTITUTION AND REGISTRATION (FROM APPLICATION TO REGISTRATION):

Belgium	1 to 15 days
Denmark	max. 10 days; (10 days is the legal limit – the average is 2-3 days. In peak periods it can however be up to several weeks – the last time something like this happened was when interest rates fell dramatically 3-4 years ago)
Germany	7 days to 4 weeks
Greece	5 to 14 days
Spain	1 to 15 days
France	1 month
Hungary	Several weeks ⁴
Ireland	4 to 8 weeks (if there is no query raised by the registry, if a query is raised the period can extend to 12 months)
Italy	30 to 40 days
The Netherlands	1 to 15 days
Austria	4 weeks
Poland	1.5 months
Portugal	2 weeks to 2 months
Finland	a few days to a few weeks
Sweden	a few days to a few weeks
The United Kingdom	25 days

1.13 COST FOR AN AVERAGE CONTRACT:

> **Total of constitution and registration costs, including taxes** (fixed or as a percentage of the guaranteed amount):

For a € 50.000 loan:	
Belgium	€ 1,812 (805.16 (registration costs) + € 411.90 (honoraries) + € 594.94 (various costs))
Denmark	€ 1,202 (€ 942 registration costs and € 260 various costs)
Germany	€ 350
Greece	€ 3,000 (6% of the loan amount in case of a mortgage, less than 1% in case of a pre-notice)
Spain	€ 1,500
France	€ 1,478 for a mortgage, 1,110 € for a preference
Hungary	Max € 46 (5%)
Ireland	circa € 800 (includes fees payable to solicitor, which are likely to be included as part of the legal fees in respect of any underlying property transaction)
Poland	€ 100 (0,2%)
Sweden	€ 750 (1.5% of loan amount)
The United Kingdom	€ 973 including legal, valuation and registration fees

⁴ The file number assigned to an application shall be entered on the title deed/land registry extract called an index ("széljegyzék") on the day when submitted. However, there are no strict deadlines until when the mortgage right has to be entered, with the only exception that land registry offices shall register mortgages as well as restraint of alienation and encumbrance in favour of mortgage banks within eight (8) days by law. A fast track settlement of the index might be requested for a fee of approx. € 37,00 providing for an eight (8) days settlement procedure.

For a € 100.000 loan:	
Belgium	€ 2,702 (€ 1,548.84 (registration costs) + € 557.44 (€ honoraries) + € 594.94 (various costs))
Denmark	€ 2,080 (€ 1,695 registration costs and € 385 in various costs)
Germany	€ 530
Greece	€ 6,000 (6% of the loan amount in case of a mortgage, less than 1% in case of a pre-notice)
Spain	€ 1,900
France	€ 2,206 for a mortgage, € 1,469 for a preference
Hungary	Max € 46 (5%)
Ireland	circa € 1,400 (includes fees payable to solicitor, which are likely to be included as part of the legal fees in respect of any underlying property transaction)
Austria	€ 1,300
Poland	€ 150 (0,15%)
Sweden	€ 1500 (1.5% of loan amount)
The United Kingdom	€ 2,165 including legal, valuation, registration and stamp duty fees

- > In Italy, costs depend on the value of the mortgage. For example, for a formality (mortgage) valued at between € 154,937 and € 206,582, the notary's fee is about € 268; for a value between € 258,228 and € 387,342, it is about € 340.

1.14 CONSUMER PROTECTION: MANY PROTECTION MEASURES DO APPLY

- > The notary or the solicitor (and in Denmark the lender) is in charge of giving the consumer comprehensive legal information about the transaction. The lender retains responsibility for the provision of most consumer protection information about the loan (Spain; Sweden).
- > European directives apply: consumer credit, unfair terms, distance selling etc. Since September 2002, the European Code of Conduct for Home Loans is applicable.
- > National consumer protection legislation as well as national codes of conduct.
- > Often the consumer is not allowed to borrow more than a given percentage of the value of the property (Denmark, Greece, Spain, France and Sweden).
- > In most of the Member States the consumer is obliged by law or by contract to take out a number of insurances designed to protect him.
- > Methods for termination of the mortgage exist as well (Belgium).

2. Enforcement procedure on a property

Nota Bene: In some countries, parts of the territory may come under specific legislation (different from the rest of the country): France (Alsace-Lorraine); the United Kingdom (Northern Ireland and Scotland).

2.1 MEASURES TO BE TAKEN BEFORE STARTING THE ENFORCEMENT PROCEDURE

- > **In most Member States, whatever the extent of the legal obligation/self-regulation requirements, lenders adopt a range of measures aimed at helping the borrower experiencing financial difficulties.** Resorting to re-possession is generally the very last solution.
- > **In a majority of Member States, the lender has a legal obligation/self-regulation requirement to give his defaulting borrower a chance to correct his situation before starting the enforcement procedure and taking possession of the mortgaged property.** This obligation is implemented through a wide range of measures, ranging from a compulsory official summons, to a more detailed conciliatory procedure.
- > **Countries where the legal obligation is limited to a summons:** Denmark; Greece (3 days); Spain; France; Italy (10 days); the Netherlands; Portugal and Sweden. In these countries, the practice however grants the consumer a supplementary number of warnings and months before the enforcement procedure is started: Greece (6 to 9 months).
- > **Countries where the lender must follow a more detailed procedure:** Belgium; Ireland; Austria and the United Kingdom (4 to 5 months).
- > Country where the lender has an obligation on the base of a code of conduct to grant the consumer a number of months before the enforcement procedure is started: the Netherlands.
- > In Germany, the only measure to be taken before starting the enforcement procedure is the service of the title to the debtor.

2.2 WRITS OF EXECUTION

- > **Depending on the Member State, the mortgage deed is/can be executory by nature or must be given executory power by a court.** Once executory, the mortgage deed is the basis for the request for a distraint/possession order.
- > Countries where it is **executory by nature** (notary deed): Belgium; Germany⁵; Greece (in case of a mortgage); Spain; France; Italy; the Netherlands and Portugal.
- > Countries where the collateral deed must be made enforceable through a judicial decision: Denmark; Greece (in case of a prenotice); Hungary; Ireland; Austria; Poland⁶; Finland; Sweden and the United Kingdom.
- > Where it is not executory by nature, the time necessary to get the mortgage deed made enforceable (executory): Greece (in case of a prenotice: 3 to 5 years) and Sweden (one week).

⁵ A mortgage deed is only executory if the debtor has declared in the deed his consent, with respect to the claim described, to immediate execution.

⁶ According to Art. 96-98 of the Polish Banking Law Act, however, banks can issue bank execution titles based on which they may start the enforcement procedure without a court decision.

2.3 EXEQUATUR⁷

- > **In a majority of countries the exequatur procedure is a purely formal procedure, the competent body limiting its intervention to checking the form/legality of the foreign judgement. In this case, the procedure generally follows the Brussels Convention. However, in some Member States the foreign judgement may be subject to a second examination of the facts of the case.**
- > Countries where **the exequatur is a purely formal procedure**: Belgium; Denmark; Germany⁸; Greece; Spain; France; Hungary (if the mortgage deed is notarised); Italy (automatic, no procedure any more); the Netherlands; Austria; Poland and Portugal.
- > Countries where **the Court re-examines the substance of the case**: Ireland; Finland; Sweden and the United Kingdom. In Sweden, the courts do not recognise foreign judgements or writs of execution, which means that there is no possible exequatur (except for judgements and writs of execution from Nordic countries). These deeds are therefore only used as proof elements.
- > Time taken by this procedure: Belgium (1 month); Denmark (6 months); Germany (the duration varies from case to case and is decided by the court); Greece (3 to 10 months); Spain (6 to 8 months); France (6 to 8 months); Hungary (30 days); Portugal (12 to 18 months); Finland (1 year); Sweden (6 to 12 months) and the United Kingdom (6 to 12 months).

2.4 DISTRAINT/RE-POSSESSION

- > **In all Member States, except in the Netherlands, the procedure is always subject to an authorisation by the competent authority.**
- > **Distraint**: Roman law system (implies no transfer of possession to the creditor and selling conducted following a compulsory procedure): Belgium; Denmark; Germany; Spain; France; Italy; the Netherlands; Austria; Portugal and Sweden.
- > **Possession**: Common law system (implies that the lender can sell the property in his own capacity and under his responsibility, but does not have capacity to take the property by force. Accordingly, unless possession is voluntarily surrendered to the lender, it is necessary to take proceedings for a Court Order for Possession): Ireland and the United Kingdom.

2.5 PUBLICITY AND INFORMATION

2.5.1 Publicity and information of creditors:

- > **In all Member States a number of measures are taken with a view to informing registered creditors that an enforcement procedure is being run against a certain debtor.** This provides other creditors with the opportunity of joining their claim to the existing procedure and possibly of opposing the right of the plaintiff.
- > **Measures** (publicity in newspapers, hearing, summons...): Belgium (transcription of the summons and of the writ of seizure at the mortgage registry); Germany (registration in the land register of the order of the enforcement procedure); Greece (summons); France (newspapers disclosure); Italy (registration in a local register); the Netherlands (publicity); Sweden (newspapers, summons).

⁷ In this respect it should be noted that the European enforcement order for uncontested claims has entered into force on 21 January 2004 (see Regulation (EC) No 805/2004, OJ L 143 of 30.04.2004). This regulation is applicable in all EU Member States with the exception of Denmark.

⁸ According to the prevailing opinion, a forced sale based on documents of foreign notaries is not possible.

2.5.2 Publicity and information of potential buyers:

- > **In all MemberStates a number of measures are taken with a view to informing potential buyers of the property that a sale/an auction is being set.** It is in the interests of both the creditor(s) and the debtor that the auction is given as much publicity as possible. Therefore the creditor is sometimes directly responsible for publicising the sale (Denmark; Greece; France). In Sweden the administrative authority monitoring the auction is responsible. In Germany and Italy the court is responsible for the publication.
- > In other countries the notary organises the publicity: Belgium; the Netherlands (in co-operation with the mortgagor).
- > Measures (publicity in newspapers, disclosure on the property, hearing): Belgium (newspapers, disclosure on the property, publicity collectively organised on TV or on websites...), Germany (newspapers); Greece (newspaper); the Netherlands and Sweden (newspapers, disclosure).

2.6 FORCED SALE

2.6.1 Possible types of sale

- > **Depending on the country, 4 different systems of sale of the property can be applied, ranging from bilateral agreement, possession, public auction or sale regulated by law.**
- > **By agreement** between the creditor and the debtor (not regulated): Belgium (only in the specific situation where the creditor agrees to stop the enforcement procedure and, in specific cases, with the agreement of the other inscribed creditors should there be any); Spain; France and Hungary.
- > **Possession:** Ireland and the United Kingdom (the subsequent sale is usually managed by the lender through its agents being its estate agents and its solicitors.).
- > **Regulated sale:**
 - Public auction: Belgium; Germany; Greece; France; Hungary; Italy; the Netherlands; Austria; Poland and Sweden;
 - Sale stipulated by law: Belgium (if the judge dealing with seizures authorises a private sale); Spain and Italy;
 - Private sale: the Netherlands.

2.6.2 Depending on the national system, the regulated sale is managed by the notary or by the competent court. The court is generally a judicial court, however, in Sweden it is an administrative authority.

- > Countries where the **sale is managed by the notary:** Belgium; Greece; Spain and the Netherlands.
- > Countries where **it is managed by a court:** Denmark; Germany; Spain; France; Hungary (the bailiff's office); Italy (with the possibility for the Court to delegate a notary to manage the sale); Austria; Poland (under the supervision of a judge) and Portugal.
- > Countries where it is **managed by the lender** (through its agents or its solicitors): Ireland and the United Kingdom.

2.6.3 In a majority of Member States a second auction can be organised. This can happen because the result of the first one (highest bid) did not reach the reserve price (the amount set preliminary as a minimum acceptable amount for the sale of the property). The second auction is then considered valid irrespective of how much the highest bid is. A second auction can also be granted by law during a given period after the first auction. However in some countries prospective buyers may still have a few days after the second auction to make a higher offer. In Belgium the lender may buy if the auction does not succeed. In Germany the value of the property is fixed by the court. In France if no buyer volunteers, the lender is obliged to buy. In Italy only when the auction does not succeed the lender may request assignment of the property. In Austria the adjudication must at least reach half of the value of the property. In Sweden the minimum amount for the sale is fixed by the administrative authority.

- > Countries where **only 1 single auction is held**: Spain.
- > Countries where **a 2nd auction is possible**: Belgium (maximum 30 days from first auction); Denmark; Germany; Greece; Hungary; Italy; the Netherlands; Austria and Sweden (7 days from first action).
- > Countries where new candidates still have a possibility after the 1st or 2nd auction to make a higher offer: Belgium (15 days after the auction); France (10 days after the 1st auction) and Italy (10 days after the 1st auction).

2.6.4 Time necessary for the forced sale procedure (not including distribution of proceeds):

Belgium (maximum 6 months from the order of the judge dealing with seizures appointing the notary (extension of time is possible)); Germany (6 to 12 months); Greece (8 to 18 months); Spain (sale by agreement between creditor and the debtor: no time limit; sale managed by the Notary: no time limit; sale managed by a court: maximum 3 months; sale organised by law: maximum 6 months); France (8 to 18 months); Hungary (45 days plus 3 months); Italy (a survey conducted by the Italian Banking Association (ABI), in 1999 on credit recovery times, found that in Italy forced sales procedures take an average of five years in the North and seven years in the South. ABI is currently monitoring the situation by gathering data from a representative sample of banks operating nation-wide); the Netherlands (average time from the beginning to the division of the proceeds: 6 months); Sweden (2 to 4 months) and the United Kingdom (8 to 12 months).

2.7 PAYMENT OF THE PROCEEDS OF THE SALE

- > **The proceeds of the sale are paid to the person/body responsible for the sale and then generally distributed to the creditors as soon as possible after the auction.** In several countries the buyer must pay a percentage of the price at the auction and the rest of the price by a given deadline.

2.7.1 Terms of payment by the buyer

- > Percentage of the price to be paid at the sale: Denmark; Germany (amount in controversy determined by the court); the Netherlands (normally a bank guarantee is required for 10% of the price); Austria (10%) and Sweden (usually 10%).
- > Deadline allowed to the buyer after the sale to pay the total price of the property: Belgium (15 days for the costs, 2 months for the price); Denmark (4 weeks); Germany (There is no legal deadline. The buyer has to pay the price on the date fixed by the court); Spain (10 days); France (3 months); Italy (the Court establishes the deadline and the forms); Austria (2 months) and Sweden (2 weeks to 3 months).

2.7.2 Time necessary for payment of creditors

- > Time usually necessary for the proceed of the sale to be distributed to the different creditors: Belgium (3 to 4 months); Germany (2 months); Greece (several weeks to 2 years, if the notary's report is presented before court); Spain (3 months); France (7 months - system based on a provisional payment); Hungary (30 days); Ireland (4 to 6 weeks); Austria (6 to 10 months); Finland (5 to 6 weeks); Sweden (4 weeks) and the United Kingdom (4 to 6 weeks).

NB: In Italy the bidder who has won the auction and has already posted a bond in order to participate in the auction and must pay the remaining party of the price of the property within the deadline set by the Court.

2.8 TIME TAKEN TO COMPLETE THE PROCEDURE FROM THE WRIT OF EXECUTION TO THE ACTUAL DISTRIBUTION OF THE PROCEEDS OF THE SALE:

- > Usual duration: Belgium (18 months average); Denmark (6 months); Germany (12 months); Greece (3 months); Spain (7 to 9 months); France (15 to 25 months); Hungary (6 months); Ireland (11 to 14 months); Italy (5 to 7 years); the Netherlands (6 months); Austria (6 months); Portugal (18 months to 2 ½ years); Finland (2 to 3 months); Sweden (4 to 6 months) and the United Kingdom (8 to 12 months).
- > Maximum duration: Belgium (no limit); Denmark (no limit); Germany (no limit); Greece (2 years); Spain (no limit); France (4 to 7 years); Hungary (no limit); Ireland (no limit); Italy (no limit); Austria (no limit); Poland (no limit); Finland (1 year); Sweden (no limit); The United Kingdom (2 years).

2.9 RANKING

- > **In a majority of MemberStates, both the expenses made to maintain the property in good condition and the costs incurred by the auction take precedence over all other mortgages and preferences. Many countries have hidden mortgages or preferences, which result in a risk for the mortgage lender.**
- > **Existence of preferences taking precedence over the mortgage** Belgium; Denmark; Germany; Greece (only referring to one-third of the proceeds); Spain; France; Hungary; Ireland; Italy; the Netherlands; Austria; Poland; Portugal; Finland; Sweden and the United Kingdom (local land charges which are not very common);
- > **Existence of hidden mortgages and preferences** (non-registered) likely to take precedence over the registered mortgage: Belgium (taxes); Spain; France; Portugal and Sweden.
- > **Risk that a mortgage is considered void** due to the fact that it was granted during a given period before the debtor's bankruptcy (commercial credit): Belgium (6 months before bankruptcy); Germany; Spain; France (18 months); Hungary⁹; Italy (2 years); Austria (12 months before bankruptcy); Poland (6 months before the bankruptcy); Portugal and Sweden.

2.10 TOTAL COST OF THE ENFORCEMENT PROCEDURE

- > Average cost of the entire procedure to be paid by the buyer (for a debt of € 100,000 or as a percentage of the proceeds of the sale) from the first summons to the repayment of the creditor: Belgium (€ 18,700); Germany (the average cost of the enforcement procedure does not depend on the amount of the debt, but partially on the market value of the property and partially on the amount of the maximum offer. If the market value is € 25,000 and the maximum

⁹ This restriction will be abolished as of 1st January 2007.

offer is also € 25,000, the average cost is € 1050 (€ 673 court fee, € 127 other legal costs, € 250 surveyor)); Greece (16% of the sale price); Spain (€ 4,250); France (€ 7,000); Hungary (1% - € 1.000); Ireland (€ 3000 - € 5000 - Legal costs of proceedings = € 2000; legal costs of sale = 1% of sale price, auctioneers costs of sale = 2% of sale price; administrative costs = € 600); Italy (the cost of the enforcement procedure depends on the time taken by the procedure); Sweden (€ 5,000) and the United Kingdom (€ 2,588 – € 6975).

2.11 CONSUMER PROTECTION

- > **In all Member States, the consumer is protected by national (consumer protection legislation) and European legislation (implementation of European directives). Furthermore, at a procedural level, the consumer has the opportunity to appeal at each stage of the procedure.**
- > In some Member States, this protection may permit the Court to reduce the consumer's debt in accordance with indebtedness regulation, which means the creditor suffering a loss. In some cases, the judge can also decide in favour of a private sale in cases where he believes that it is in the interests of the consumer, or transfer the property to a buyer who will keep the consumer in the property as a tenant. On the other hand, in most Member States, the debtor remains liable if the proceeds of the sale of the property are insufficient to repay the mortgage in full.
- > In some countries, conciliation procedures to deal with over-indebtedness situations can lead to the freezing of claims, including claims guaranteed by a mortgage: Belgium; Greece; France and Finland.
- > Countries where the debtor remains liable for the difference between the proceeds of the sale and the amount of his debt: Belgium; Germany (the court does not have any possibility of reducing the debt. In the case of default of the private debtor, however, the insolvency decree, which took effect from 1st January 1999, introduced a procedure for over-indebted consumers. After a 7 year procedure they can be discharged of all their remaining debts including the residual debt); Greece; Spain; France; Ireland; Portugal and the United Kingdom.
- > Countries where the judge can decide in favour of a private sale instead of a public auction: Belgium; Denmark; Spain; Italy; the Netherlands and Sweden.
- > Countries where the judge can attribute the property to a buyer who will keep the consumer in the property as a tenant/where the family housing is protected: Belgium and Spain.
- > Countries where the eviction of the debtor can be impossible under certain specific circumstances: Spain and France (winter).
- > Duration of the debtor's liability: Belgium (without limit); Germany (without limit); Greece (20 years); Spain (15 years); France (without limit); the Netherlands (without limit) and the United Kingdom (12 years by law, 6 years in practice following voluntary industry agreement; 5 years in Scotland).
- > Spain: If the price obtained is less than the total amount of debt, the creditor can continue an enforcement procedure to obtain a forced sale of other goods of the debtor (real estate or other).

3. NATIONAL REPORTS

I. Questionnaire

II. Country Reports

Belgium
Denmark
Germany
Greece
Spain
France
Hungary
Ireland
Italy
The Netherlands
Austria¹⁰
Poland
Portugal
Finland¹¹
Sweden
The United Kingdom

¹⁰ Last updated in 2003.

¹¹ Last updated in 2003.

3. NATIONAL REPORTS

Questionnaire

I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL

1. Constitution

- 1.1 Who can create a Mortgage?
- 1.2 Procedure: formalities
- 1.3 Is the mortgage accessory to a loan or can it be a separate deed? Description of systems and consequences
 - 1.3.1 One contract (credit + mortgage)
 - 1.3.2 Two contracts (credit and mortgage)
 - 1.3.3 Is it possible to pledge real estate for "all present and future debt to the pledgee"?
 - 1.3.4 Reuse of the security when changing lender
- 1.4 Consumer protection rules with respect to the creation of mortgage collateral
- 1.5 Schedule: time necessary to get a mortgage registered and entrusted with official authority

2. Registration: Functioning of the Register

- 2.1 Traditional, computerised
- 2.2 Accessibility: national and cross-border
- 2.3 Body in charge of registration

3. Cost

- 3.1 Constitution (fees, notary)
- 3.2 Registration
- 3.3 Others

4. Duration of validity of the mortgage

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. Brief outline

- 1.1 Preliminary measures / actions
- 1.2 Sale: form and conditions
- 1.3 Subsequent measures
- 1.4 Distribution of the process of the sale: description and possible incidents
 - 1.4.1 Lender's right on his borrower's right to rent
 - 1.4.2 What happens if the borrower has renounced his right to his rent?
- 1.5 Consumer protection rules in the context of a foreclosure procedure

2. Writ of execution

- 2.1 Conditions to be fulfilled to render a deed (or a judicial decision) enforceable

2.2 Conditions pertaining to and procedure for enforcing a writ of execution within the national territory

2.3 Exequatur (extension of foreign judgements)

2.3.1 Description of the procedure for enforcing a foreign writ of execution in your country

2.3.2 Maximum time taken by this procedure

2.3.3 Existence of any bilateral conventions simplifying procedures

3. Carrying into effect of the mortgage deed

3.1 Who has the right to initiate the procedure for a forced sale

3.2 The stage at which this procedure becomes demurrable on third parties

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people)

4. Time taken by the forced sale procedure

4.1 Typical duration of a forced sale procedure (without incident)

4.2 Maximum possible duration of a forced sale procedure

4.3 Most frequently occurring incidents

4.4 Typical duration of the distribution procedure

5. Cost of the forced sale procedure

5.1 Cost of the procedure:

5.1.1 Fixed

5.1.2 Proportional (percentage of the adjudication value)

5.1.3 Example for an adjudication value of 100.000 euro

5.2 Who pays the costs?

III. RANKING OF MORTGAGES AND PREFERENCES

1. General points – Legal texts

2. The rank of priority between preferences and mortgages

2.1 Principle

2.2 Existence of hidden preferences and mortgages

2.3 Preferences likely to take precedence over the mortgage

2.3.1 Enumeration

2.3.2 Conditions

2.3.3 Rank

3. Effects of the borrower's / owner's bankruptcy on the rights of the mortgagee

3.1 Conditions under which the validity of the mortgage constituted during the suspect period (or risk period) may be called into question;

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to the classification of his preferential right;

3.3 List of claims which, in the event of bankruptcy, take priority over the mortgage whereas, without bankruptcy, no such priority exists;

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy.

4. Various other risks faced by the mortgagee

II. COUNTRY REPORTS

BELGIUM

I. CONSTITUTION AND REGISTRATION (*) OF A MORTGAGE COLLATERAL

(*) In Belgium, this is referred to as the "inscription" of a mortgage.

1. CONSTITUTION

1.1 Who can create a Mortgage?

In order validly to create a mortgage, it is necessary to be the owner or the holder of a real right that can be mortgaged (e.g. usufruct). In order to be able to create a mortgage, you must have the ability to alienate it. Minors must be represented by their parents, or if they are both dead, by their guardian, who must be authorised by a Justice of the Peace¹². A spouse may not, without the agreement of the other, dispose of to living persons, against payment or free of charge, the rights held on the building that serves as the main residence of the family, nor mortgage this property¹³. This provision also applies to legally recognised cohabitants.¹⁴ A co-owner may create a mortgage, but only on his undivided part. As from the day of transcription of the seizure or order to pay, a debtor may no longer alienate or mortgage the seized property, on pain of inopposability. A mortgage may be taken in order to guarantee a third party debt.

1.2 Procedure: formalities

Conventional mortgage formalities:

- > A notarial deed or private deed is required, recognised before the courts or before a notary. The "mortgage mandate" given to the mortgage lender to enable him to create a mortgage inscription must also be authentic (drawn up before a notary)¹⁵.
- > In addition, the voluntary support of the creditor and debtor is required. A power of attorney that has the effect of consenting to the mortgage must also be authentic. A power of attorney given to an agent of the creditor with a view to accepting the mortgage does not have to be drawn up before a notary and can even be verbal. A creditor can accept a mortgage by "porte-fort" promise, but, in this case, the mortgage contract only exists as from the moment when the creditor ratifies the acceptance made by "porte-fort". The ratification can be tacit.

To carry out the inscription, the creditor presents to the registrar of mortgages a certified copy of the deed that creates the mortgage and attaches two forms on stamped paper, one of which may be attached to the copy of the deed¹⁶. These forms contain:

- > the name, forenames, domicile and profession of the creditor;
- > the name, forenames, domicile and profession of the debtor;
- > specific wording in the deeds that confers, confirms or recognises the mortgage and the date of the deeds;
- > the amount of the capital and accessory(*) of the loans for which the inscription is required (and which are covered by inscription), and the term allocated for their payment;
- > specific wording concerning the nature and situation of each of the buildings on which the

¹² Law of 27.3.2001, Moniteur belge of 31.5.2001.

¹³ Art. 215 Civil Code.

¹⁴ Art. 1477 Civil Code.

¹⁵ Art. 76 of the mortgage law.

¹⁶ Art. 83 of the mortgage law.

person making the inscription intends to attach his mortgage.

(*) "Accessory" means those charges specified by the mortgage deed other than the interest, which are legally guaranteed¹⁷, for three years by inscription.

In order to take advantage of this guarantee, the form must state not only that the capital bears interest but in addition must show the rate. In the event of a variable rate either a theoretical maximum rate or the terms and conditions of the how the initial rate can vary must be shown.

1.3 Is the mortgage accessory to a loan or can it be a separate deed? Description of systems and consequences.

A mortgage that is accessory to a loan is a real right by virtue of which the creditor (mortgage lender) has the right to seize the building concerned in whatever hands it is (right to follow) and to obtain preferential payment on the price (right of preference). A mortgage is therefore an accessory right and necessarily assumes the existence of a loan, although it can be taken out in order to guarantee future loans and even conditional loans. In addition, a mortgage may be taken out by a third party to guarantee a third party debt.

1.3.1 One contract (credit + mortgage): Clearly it is always possible to create a mortgage in order to guarantee a single loan. In this case it is a loan contract. The loan only exists as a real contract after signature of the contract and the handover of the entire sum loaned. In the case of a loan for the purpose of financing the purchase of a building, the vendor will in practice receive a cheque (even if the funds may theoretically be remitted in another form). In the case of a loan for the purpose of financing the construction of a building, the mortgage company will make the capital available to the borrower as the work progresses once the loan agreement has been signed. The borrower submits either invoices, or the architect's certificate to the lender. The terms and conditions for the release of the funds are laid down in the agreement which stipulates the time (e.g. 24 months) in which all the work planned must be carried out. The agreement also lays down that all the funds must be drawn down within the same time frame (or another determined period). In the case of a loan for the purpose of financing conversion or refurbishment work a schedule for the release of the funds is also drawn up. In the last two cases, the lender requires the borrower to give notice of (e.g. eight) working days' notice before funds are drawn down.

1.3.2 Two contracts (credit + mortgage): It is also possible to create a mortgage for all existing debts contracted with the same lender. Moreover, an opening of a credit line can be granted in the form of a framework agreement guaranteed by a mortgage. Under such an agreement, advances, which are separate credit agreements (loans for property or other purposes), may be granted.

1.3.3 Is it possible to pledge real estate for "all present and future debt to the pledgee"?
A mortgage can be taken out in order to guarantee (existing and/or) future debts, provided that at the time the mortgage is created, the debts guaranteed are determined or determinable. Its ranking is fixed on the day of its inscription, without regard to the time at which the guaranteed debts are created¹⁸.

1.3.4 Reuse of the security when changing lender: Pursuant with the mortgage law, a mortgage inscription is made by and on behalf of one or more specific lenders¹⁹.

Repayment of the original credit – if the lender is changed, the original credit is usually repaid, using a credit granted by the new lender. Given the accessory nature of the mortgage, the

¹⁷ Art. 87 of the mortgage law.

¹⁸ Art. 51bis of the mortgage law (law of 13 April 1995).

¹⁹ Art. 83, 2nd sub-paragraph, 1^o, of the mortgage law. A «mortgage transfer» concerns the transfer of the guarantee to another of the debtor's properties, always in favour of the same creditor who retains his ranking.

first inscription becomes void and the new lender has to inscribe a new mortgage to secure its debt.

We must also point out that a third party, who also pays the creditor, may be substituted in the creditor's rights (including the mortgage guarantee).²⁰

Finally a distinction must be made between the various forms of assignment of credits:

- > Base rules. In transferring a claim, the title deed is passed from the transferor to the transferee. The assignment of the claim is binding on third parties other than the debtor whose debt is assigned by the signing of an assignment agreement. The assignment is only binding on the debtor from the time the debtor is notified of the assignment or the assignment is acknowledged by him.²¹ The assignment of a mortgage claim may not be binding on third parties if it is not performed by a notarial deed, a private deed, certified by a notary or a court, or by a judgment and if no mention is made in **the margin of the inscription** of the date and type of the assignee's title, stating the full name, profession and addresses of the parties.²²
- > In the event of securitisation ((of a part) of a portfolio of a company's mortgage credits)²³, article 5 of the mortgage law is not applied. At the request of third parties the assignor has to supply any information necessary to identify the assignee. An advance granted as part of the opening of a mortgage loan may be part of a securitisation operation. The assignee then also has the benefit of the mortgage, which guarantees the opening of the credit line, whatever amount is still owed in respect of the opening of the credit line. The advance assigned is paid by priority to the advances granted as part of the credit line after the transfer. The right to use the credit line is suspended up to the amount of the advance assigned remaining payable by the borrower. The assignor may demand at any time to be informed by the assignee of the amount still owed.
- > A mortgage loan may be made movable by calling it **the principal bearer mortgage or mortgage to order**. The mortgage is assigned at the same time as the principal is delivered or endorsed. Article 5 of the mortgage law is not applied.

Article 5 is not applied in the event of universal transmissions or those similar to company assets when they are merging or being split or in the case of bringing in of branches of activity.

1.4 Consumer protection rules with respect to the creation of mortgage collateral

If a mortgage is set up to guarantee future loans that may arise during an indefinite period or to guarantee loans resulting from a contract indefinite in time, the person against whom such a mortgage is inscribed or the third-party holder of the property concerned by the mortgage may at any time terminate the mortgage by sending a notice, with a term of minimum 3 months and maximum 6 months, to the creditor by registered letter with advice of receipt. The period starts as from the date of acknowledgement of receipt. As for future loans, termination has the result of guaranteeing only the loans that exist on expiration of the notice period. For contracts indefinite in time, the only loans to remain guaranteed by the mortgage are those that result from the execution of such contracts as exist on expiration of the notice period. Anyone who terminates a mortgage may require the creditor to notify him in writing of the list of loans still guaranteed at the end of the notice period²⁴. This mortgage which is jointly called "for any sums" must be distinguished from the opening of a credit line for an unspecified term which is guaranteed by a mortgage which is mentioned in point 1.3.2. In this latter case both the debtor and also the lender may terminate this by means of notice of the opening of the credit line itself.

²⁰ Art. 1249 of the Civil Code.

²¹ Art. 1689 of the Civil Code and ff.

²² Art. 5 of the mortgage law.

²³ The aims of suspension of debt by or to an investment undertaking as defined by the legislation of 4 December 1990 concerning financial business and financial markets as well as the pledging of debt by or for such undertakings. Art. 51 of the law concerning mortgage loans.

²⁴ Art. 51bis, §2, of the law concerning mortgage loans (law of 13 April 1995).

1.5 Schedule: time necessary to get a mortgage registered (*) and entrusted with official authority.

(*) In Belgium, this is referred to as the “inscription” of a mortgage.

In Belgium, the official authority is the registrar of mortgages (bureau (de conservation) des hypothèques). Between the parties, the mortgage is valid by virtue of the agreement concerning it. It becomes opposable to third parties by inscription in the registrar’s records. Between creditors, the mortgage only has ranking on the day of the inscription in the registrar’s records, in the form and manner prescribed by the law. All creditors inscribed on the same day have equal ranking and rights on a mortgage created on the same date, without distinction between inscription in the morning or in the evening, where such a difference is recorded by the registrar²⁵. The ranking of a mortgage created to guarantee future loans is fixed on the day of its inscription, without regard to the time at which the guaranteed loans are granted.

2. REGISTRATION(*): FUNCTIONING OF THE REGISTER

(*) In Belgium, this is referred to as the “inscription” of a mortgage.

There is not yet a patrimonial documentation, a kind of statutory land register as there is in other countries, including the land register, the registration and the mortgage documents. However, the Minister of Finance would like to have this kind of documentation in the long term.

2.1 Traditional, computerised: The input of documentation in the registers is still made on paper (see point 1.2 above), because the registers of entries (registers in which are recorded, by sequential number and as they are carried out, the deeds submitted for inscription) are not yet available on computer supports. However, since 1 January 2001, the registers of inscriptions are maintained on computer media²⁶. This only concerns new inscriptions. Documents lodged are processed by machine (scanning).

2.2 Accessibility: national and cross-border: National and cross-border accessibility is guaranteed. Indeed, the registrars are required to deliver to anyone who so requests copies of existing inscriptions (mortgage certificates) or certificates stating that they do not exist. However, a request for a certificate is made using a form prescribed by the Ministry of Finance, called a “Request for a mortgage certificate” (Demande de certificat hypothécaire), drawn up in one of the three national languages of the country. Consultation by electronic means for those making enquiries is not yet possible but it is envisaged in the medium term.

2.3 Body in charge of registration (In Belgium, this is referred to as the “inscription” of a mortgage): The registrar of mortgages (bureau de conservation des hypothèques). Inscriptions are made at the mortgage registry in the district in which the property subject to a mortgage is situated²⁷. A draft law provides for the replacement of the words «in the local district where the mortgaged assets are situated » by the words «in Belgium», which would be a welcome modernisation²⁸. There are 27 judicial districts, the largest of which have several mortgage registries. In total, there are 49 mortgage registries. When there are several offices in a local district, a catchment area is allocated to them. An office shall deal with these matters when a property on which a mortgage is taken is situated in its catchment area. The catchment areas are determined by the Ministry of Finance

²⁵ Art. 81 of the mortgage law.

²⁶ Royal Decree of 12 December 2000, Moniteur belge of 21 December 2000.

²⁷ Art. 82 of the mortgage law.

²⁸ Senate document (Session 1999-2000) no 2-463/1 of 8 June 2000.

3. COST

3.1 Constitution (fees, notary): There are fees for drawing up a notarial deed and for the inscription of the mortgage. These are legally fixed on the basis of the capital loaned, to which are added the accessories. These accessories contain all of the expenses and any interest due on the latter, that the creditor advances in the event of a delay or a failure to make a payment. They are expressed as a percentage of the capital, generally 10%. In this case, for a loan of 100,000 EUR, a mortgage inscription of 110,000 EUR would be recorded.

These costs, owed by the borrower and paid by him to the notary, cover:

- > The legally fixed notary's fees.
- > The registration costs, which cover the registration of the notarial deed of the mortgage loan at the Bureau of registration. This is a proportional fee of 1% of the amount of the loan covered by the mortgage guarantee. These rights are transferred by the notary to the Bureau of registration.

3.2 Registration (Mortgage Inscription): The mortgage fees (proportional) stand at 0.3% of the amount of the loan covered by the mortgage. These duties are owed by the borrower and are paid by him to the notary. They are transferred by the notary to the mortgage registration office.

3.3 Others: The registrar's fees are +- 50.00 EUR (49.58 EUR) for an inscription of +- 25,000.00 EUR (24,789.35 EUR), plus 17.35 EUR per additional +- 25,000.00 EUR or part of +- 25,000.00 EUR. Stamp duty: the registrar affixes a fiscal stamp of 4.96 EUR on the two mortgage inscription forms (see point 1.2 above), which he completes for the mortgage beneficiary (the lender).

N.B. Various notarial fees may be charged to the borrower: these cover the fees for fiscal notifications²⁹, the request for an extract from the land register, a mortgage certificate, etc. These fees, duties and costs are owed by the borrower and are paid by him to the notary. They are transferred by the notary to the relevant administrative departments

4. DURATION OF VALIDITY OF THE MORTGAGE

The inscriptions maintain the mortgage for a period of 30 years as from the date of inscription. The effect ceases if the inscription is not renewed before the expiration of this period³⁰. The inscriptions may be deleted or reduced with the consent of the interested parties with the capacity for such an action, or by virtue of a judgement of last resort or become *res judicata*, or by virtue of a judgement declared as enforceable notwithstanding opposition or appeal³¹.

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

1.1 Preliminary measures/actions

When creditors wish to proceed with the seizure of a property belonging to their debtor, they must be in possession of a writ of execution (see point 2 below). Although such a document allows them to proceed with the enforcement without having to go before a trial judge, it is necessary to precede any

²⁹ Art. 433 and ff of the law on IncomeTax. - Notaries, required to draw up an instrument to assign the mortgage on a property, are personally liable for the payment of the taxes and other charges which give rise to a mortgage registration, if they do not advise the tax officer in the area in which the owner of the property lives and in addition if this is a building, the tax officer in the area where it is situated. If the interests of the Treasury so require the tax officers notify the notary before the end of the 12th working day following the date the above notice is sent of the amount of taxes and charges giving rise to the registration of the Treasury's mortgage on the assets which are the subject of these instruments. With the agreement of the tax-payer, the banks and mortgage companies are authorised to draw up the above mentioned notification and are authorised to receive the notification. The sending of a certificate by these organisations to the notary relating to the sending of the advice and the follow-up by the tax officers substitutes the liability of these organisations for the notary's.

³⁰ Art. 90 of the mortgage law.

³¹ Art. 92 of the mortgage law.

such action or seizure carried out by virtue of a mortgage loan enforceable order for private purposes, on pain of nullity, with an attempt at reconciliation before the judge dealing with seizures, that has to be recorded in the hearing papers³². Moreover, the seizure must be preceded by an order to pay, with notice served by a court bailiff to the debtor in person, at his domicile or elected domicile, election of which is made in the deed that will be enforced. The creditor may transcribe this order to pay at the mortgage registry in order to render ab initio the procedure opposable to third parties.

The order to pay must be followed within six months by a writ of seizure, with notice served by a court bailiff. This document must contain the following references:

- > identification of the basic deed on which the seizure is based;
- > a precise indication of the property to be seized in accordance with the land register descriptions or other property title;
- > indication of the Judge dealing with seizures who will decide on the appointment of a notary.

The writ of seizure must be transcribed within two weeks in the mortgage registry of the district in which the property is located. This transcription remains valid for 3 years only, unless it is renewed on the basis of a request signed by a court bailiff or a lawyer.

Within a month of transcription of the seizure, the creditor must ask, unilaterally, the Judge dealing with seizures at the court of first instance of the place where the seizure took place to appoint a notary responsible for the sale of the property and operations regarding the ranking.

The order to pay must be followed within six months by a writ of seizure, with notice served by a court bailiff. This document must contain the following references

A copy of the order appointing the notary is sent to the latter within two weeks of the judgement, with an advice of receipt. When the order is served on the judgment debtor, a period of one month shall begin in which the judgment debtor may apply opposition to the judgment³³ by challenging the party appearing before the judge who ordered the seizure, which is being challenged. This procedure may be carried out at the same time as the formal notice mentioned below but the authority of the final decision of the order will not be confirmed before one month has elapsed. This opposition is intended to show the judge that the creditor does not have a specific liquid³⁴ and demandable³⁵ claim or any other reason which might implicate the nomination of a notary (for example non compliance with the preliminary conciliation proceedings or even the lack of impartiality on the part of the ministerial officer appointed).

The sale (first session) of the assets must take place within six months from the order. The notary first of all draws up the general articles and conditions of sale. At least one month before the sale, the creditors inscribed, those that requested transcription of an order to pay and the debtor, are summoned by a court bailiff to take note of the conditions of sale contained in the specifications drawn up by the notary. Within eight days of the last notification, the order to pay is mentioned in the margin of the transcription of the seizure at the mortgage registry.

³² Art. 59 of the law concerning mortgage loans.

³³ Art. 1034 of the Judicial Code.

³⁴ Art. 1494 of the Judicial Code.

³⁵ Art. 1186 of the Civil Code.

1.2 Forced Sale: form and conditions: The sale is organised by the appointed notary. The auction takes place in accordance with local custom, to the highest bidder and in principle in a single session. The notary may, if he deems it necessary, decide on a second session at the earliest 15 days and at the latest 30 days after the first session. The adjudication always allows for a higher bid, and any person has the right to place a bid within 15 days of the adjudication for a minimum of 1/10th of the price with a maximum of 6,197.34 EUR (250,000 BEF). This sum must be placed in the hands of the notary, after which a session will be fixed. The mortgage registrar must mention the adjudication in the margin of the transcription of the seizure.

1.3 Subsequent measures

Following the adjudication, the buyer must pay the purchase price in the manner indicated in the specifications. In most cases, it is stipulated that the payment is made to the notary appointed for the auction. The acquirer may nevertheless, notwithstanding any opposition or opposition clause, pay the purchase price, interest and other costs and fees of the appointed notary, into the hands of the notary responsible for the ranking procedure (in fact in the event of there being more than one asset in different local areas the judge may appoint several notaries who will carry out the auctions, but only one of them will be responsible for the ranking procedure) or to the "Caisse de Dépôts et Consignations"³⁶.

One month at the latest after the auction is definitive (there may be opposition up to fifteen days after the notification of the auction to the debtors), the notary must draw up his report of the ranking. It should be noted that there is no sanction attached to this period. In it he must note the mortgages and privileges cited by the various creditors. The notary must summon the inscribed creditors and the debtor to tell them within one month of the draft report, in order to allow them to express their grievances. In the event of opposition to the report, the notary must submit the dispute to the Judge dealing with seizures. In the absence of a dispute, or after the Judge has ruled definitively on the dispute, the redemption of the property is carried out at the initiative of the notary.

1.4 Distribution of the proceeds of the sale: description and possible incidents

1.4.1 Lender's right on his borrower's right to rent: Rents are frozen as from the seizure writ, to be distributed, with the price of the building, in order of mortgage ranking. A simple appeal, at the request of the prosecutor or any other creditor, in the hands of the tenants, obliges them to declare to the prosecutor the amount of the rent due now and in the future. They may only be released by a peremptory collocation order or by the payment of rents due to the Caisse des dépôts et consignations, at the latest on the first request. In the absence of protest, the payments made to the debtor are valid, and he is responsible, as judicial sequestrator, for the sums he received³⁷.

1.4.2 What happens if the borrower has renounced the right to his rent? The creditors may, in their own name, challenge the acts of the debtor as an infringement of their rights³⁸.

1.5 Consumer protection rules in the context of a procedure of seizure

a. Protection is given to the consumer by the fact that he can challenge the creditor's writ of execution before the Judge (see point 1.1 above). So the creditor will not have a writ of execution when the notarial deed (of mortgage charge) states that the conditions for a private agreement are to be applied and that this agreement is not attached to the notarial deed.

³⁶ Caisse des Dépôts et Consignations: Ministry of Finances – Administration de la Trésorerie – Service IX «Service central des dépenses fixes» – 23rd Division. Address: 71 Rue de la loi, 1040 Bruxelles. The royal decree of 18 March 1935 gave the Caisse the right to accept, to the exclusion of any other organisation, funds and payments in cash and securities, ordered by the courts, laws and regulations, and ordered it to make a distinction between the funds which are paid to it and Treasury funds. Various legal or regulatory provisions have also given the Caisse the right to keep or manage certain special funds. These operations are taken into a suspense account.

³⁷ Art. 1572 of the Judicial Code.

³⁸ Art. 1167 of the Civil Code.

- b. In the majority of cases the Judicial Code stipulates the periods that have to be respected on pain of nullity. It also stipulates the possibilities of enforcement, including those of the debtor, during the procedure of seizure. Please refer to point II.1.1 concerning attempts at reconciliation before the Judge dealing with seizures and concerning the order to pay. The order to pay informs the debtor that, failing payment, his property will be seized and any private offer to purchase the building may be transmitted to the Judge within one week of notification of the writ of seizure. The wording concerning the possibility offered to the debtor to transmit to the Judge, on pain of inadmissibility, within one week of serving notice of the procedure of seizure, any private offer to buy his property, is repeated in the seizure notification.
- c. If the value of the buildings to be seized is more than sufficient to settle the debt, the debtor may request that the effects of the transcription of the order to pay do not extend to all of his properties
- d. Where it is in the interests of the parties concerned, the Judge dealing with seizures may order a private sale. In the event of the disposal of the building serving as the main residence of the debtor, the judge may also appoint as acquirer, any person who allows the debtor to use his home. Inscribed mortgage or privileged creditors, those who transcribed an order to pay or a writ of seizure, the debtor and, where appropriate, the third-party holder of the building, must be heard or duly summoned by judicial letter. The order of the Judge must indicate the reasons for the private sale (and, where appropriate, the name of the acquirer), serve the interests of the creditors and the debtor and, where appropriate, the third-party holder³⁹. Any creditor of the seizure may also request authorisation for a private sale⁴⁰.
- e. If the value of the property sold is not enough to pay off the debt, there will still be an unsecured debt. Either the debtor is able to pay the residual debt or he is not and in this case, he may call for a collective settlement of the debt⁴¹.

2. WRIT OF EXECUTION

In the field of mortgage loans, writs of execution can have the following form:

- > Judicial decisions (judgements by a Magistrate of the Peace, Commercial Tribunals (in case of bankruptcy), Courts of First Instance (Judge dealing with seizures), as well as judgements from the Court of Appeal), that are definitive or declared expressly or legally enforceable by provision. Where appropriate these will be consent judgments between the parties⁴² or conciliation records⁴³.
- > Writs from ministerial officers (principally from notaries) invested with an executory formula.
- > This means that the mortgage creditors may carry out the procedure of seizure without procedure on the merits.

2.1. Conditions to be fulfilled to render a deed (or a judicial decision) enforceable: Please refer to point (II.2) above. In addition, in the case of a notarial deed, the latter must respect the conditions stipulated by the "loi de ventôse"⁴⁴ in order to become enforceable: the parties and the notary must sign the deed, the notary must read it in full (in principle; under certain conditions, partial reading is sufficient), the notary must comment on the deed and the deed must mention the fact that the notary read it and commented on it.

³⁹ Art. 1580bis of the Judicial Code. See also point 3.3 below.

⁴⁰ Art. 1580ter of the Judicial Code. See also point 3.3 below.

⁴¹ Art. 1675 / 2 to 19 of the Judicial Code.

⁴² Art. 1043 of the Judicial Code.

⁴³ Art. 733 of the Judicial Code.

⁴⁴ Law of 4 May 1999 amending the law of "25 ventôse an XI", containing the organisation of notaries, Moniteur belge of 1 October 1999.

2.2. Conditions pertaining to and procedure for enforcing a writ of execution within the national territory: Please refer to points II.1.1 and II.1.2 above.

2.3 Exequatur (execution of foreign judgements)

2.3.1 Description of the procedure for enforcing a foreign writ of execution in your country: Given that Regulation no. 44 / 2001 of 22 December 2000 "on jurisdiction and recognition and enforcement of judgments in civil and commercial matters" does not enter into force until 1 March 2002, we refer you to the provisions concerning the recognition and execution of judicial decisions and the documents to be produced, covered by the Brussels Conventions of 27 September 1968, San Sebastian of 26 May 1989 (the Brussels Convention of 29 November 1996 has not yet been ratified), as well as the Lugano Convention of 16 September 1988, ratified by Belgium.

2.3.2 Maximum time taken by this procedure: In the absence of any procedural incident, +/- 1 month between sending to the court the request for a declaration establishing the executive power and obtaining the exequatur decision. Several months if there are incidents (e.g. if there are appeals against the exequatur decision).

2.3.3 Existence of any bilateral conventions simplifying procedures: Convention of 23 October 1989 between the Kingdom of Belgium and the Republic of Austria on judicial cooperation and assistance, complementary to the Hague Convention of 1 March 1954 concerning civil proceedings (Belgian law of 6 June 1997 concerning consent to this Convention of 23 October 1989).

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

Please refer to points II.1 and II.2. above.

3.1. Who has the right to initiate the procedure for a forced sale: Creditors with a writ of execution. If they do not have one, they must go before the trial iure to obtain a definitive judgement on the merits. See point II.2. above.

3.2. The stage at which this procedure becomes demurrable on third parties: Creditors may transcribe the order to pay in the mortgage registry in order to render ab initio the procedure opposable on third parties.

3.3. Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset.

The creditor (of the seizure) has the benefit of several guarantees assuring him of a sale at a fair price:

- > In the case of voluntary sale, the creditor may object to the sale.
- > It may be a private sale ordered by the judge dealing with seizures when the interests of the parties so require. The creditors have an opportunity to state their case before this. The order must state the reasons why a private sale is in the creditors' interests. The judge may fix a minimum price. This has the effect of redeeming the mortgage inscriptions.⁴⁵ The reason for this is that the law provides that the sale ipso iure assigns the payment in favour of the mortgage creditors.⁴⁶
- > It may be a private sale requested by the creditor of the seizure himself and authorised by the judge. The creditors have an opportunity to state their case before this. The order must state the reasons why a private sale is in the creditors' interests. The judge may fix a minimum price. This

⁴⁵ Art. 1580a of the Judicial Code.

⁴⁶ Art. 1326 of the Judicial Code.

has the effect of redeeming the mortgage inscriptions.⁴⁷

- > During the seizure proceedings the creditor of the seizure himself may purchase the asset being sold if a sale by auction does not appear sufficient with regard to the value of the assets.

Other types of private sale can be arranged under the supervision of a judge. This is the sale of a building belonging to a bankrupt debtor or the sale of a building as part of a collective settlement procedure.

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee

Note the existence of the Treasury legal mortgage (see point I.3.3 above, note 18 below):

The notary must inform the tax collector of the planned sale of a building⁴⁸ (in this case, a public sale as part of a real estate seizure). A period of 12 working days will be allowed for the information procedure which the notary must observe. Moreover, the notary must also notify the tax authorities if the sums he holds after the sale are less than the sums due to the creditors, including the Revenue. Without prejudice to the rights of third parties (including creditor of the seizure), neither the transcription of the deed of sale to be drawn up by the notary, nor the deed of mortgage allocation that may be drawn up by him are opposable to the Revenue if the inscription of the legal mortgage took place within one week of posting the notification by the notary⁴⁹. As a result, the Revenue obtains a right to follow against the acquirer of the building.

3.5. Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people): See below points III.3 and

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a forced sale procedure (without incident): 18 months.

4.2 Maximum possible duration of a forced sale procedure:

Sometimes up to 3 years

Summary of the stages and time allowed:

- > Preliminary attempt at conciliation (provided for by art. 59 of the law concerning mortgage loans)
- > (if there is no conciliation) order to pay sent by the creditor to the debtor (assistance of a bailiff) (min. 15 days – max. 6 months)
- > writ of seizure (assistance of a bailiff) (max. 15 days)
- > transcription of writ of seizure at the mortgage registration office (max. 1 month)
- > application by the creditor for appointment of notary to deal with the sale of the building
- > order from the judge appointing the notary (max. 15 days)
- > presentation of the order to the notary
- > notary draws up specifications and official demand, sent by notary to the creditors for them to take note of the specifications and to attend the auction (assistance of a bailiff) (mention of this official demand in the margin of the transcription of the seizure) (min. 1 month) (max. 6 months from the order)

⁴⁷ Art. 1580ter of the Judicial Code.

⁴⁸ Art. 433 of the 1992 Income Tax Code.

⁴⁹ Art. 435 of the 1992 Income Tax Code.

- > (or) adjudication by the notary in the 1st session (or 2nd session fixed if necessary) (min.14 days max. 30 days); (second session) (max. 15 days)
- > higher offer by any interested party made to the notary (assistance of a bailiff) (no fixed time period)
- > sale following higher bid (time specified in specifications)
- > payment of costs by the purchaser (max. 15 days)
- > notice of the adjudication to the judgment debtor by the notary
- > transcription of the adjudication at the mortgage registration office
- > drawing up of the report of the ranking by the notary
- > the creditors are officially notified by the notary to take note of the report
- > close of the report and issue of the payment schedules to the creditors
- > payment to the creditors by the notary
- > receipts and release document drawn up by the notary and signed by the creditors
- > cancellation of mortgage inscriptions in the mortgage registration office registers

4.3 Most frequently occurring incidents:

- > dispute of the seizure
- > challenge to the specifications
- > challenge to the report of the ranking drawn up by the notary;
- > the notary delays closing the report of the ranking.

4.4 Typical duration of the distribution procedure: 3 to 4 months

5. COST OF THE FORCED SALE PROCEDURE

5.1 Cost of the procedure

5.1.1 Fixed: There are no fixed costs.

5.1.2.a Proportional (percentage of the adjudication value): The acquirer must pay to the offices of the notary a "share" [tantième] according to a scale fixed by the notaries who deal with these matters in the district (arrondissement). The scale for the district where the sale takes place will be used. The scales are fixed by taking account of the costs of announcements (see point 5.1.2.b below) which vary from one district to another. This scale varies between 14 (for the proceeds of major sales) and 37.5% of the selling price. The share only applies to auction prices and charges and covers the registration fees, the notary's fees and the legal costs for the specifications and reports on the adjudication and on the absence of higher bids, costs for inscriptions made automatically and for possible first authentic copy of the deed bearing the executory formula, as well as the applicable value added tax.

5.1.2.b Other costs

- > sale advertising costs (different from one district to another depending on custom and practice);
- > cost of the seizure procedure;
- > deed of discharge costs (= discharge costs);

- > deed of ranking costs (= discharge costs);
- > property valuation costs;
- > measurement plan costs.

5.1.3 Example for an adjudication value of 100.000 Euro: Depends on too numerous and very diverse elements, the most important being the situation of the asset and the progress of the procedure.

5.2 Who pays the costs?

Since 1995-1996, there have been two systems, depending on the district:

the acquirer pays:	the creditor pays
the share	the remaining part of the discharges costs
the advertising	
the cost of the procedure	
the discharge costs of 2% of the sale price	
the property valuation costs	
the measurement costs	

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

The law, which governs preferences and mortgages is the Mortgage Law of 16th December 1851, the text of which is to be found in the Civil Code, Book III "About the Different ways to acquire property", Title XVIII " About Prefences and Mortgages", articles 1 to 144.

Mortgage law was modified by the law of 9th February 1995 "modifying the mortgage law of 16th December 1851", which was published in the Belgian Monitor on 18th March 1995.

The law of 1995 consists of 4 sections, each one responding to an appropriate objective:

- > To regulate the rank of deeds submitted to the formal procedure on the same day.
- > To modify the regulation concerning the establishment of the double register of the lodging of deeds and contracts delivered by the notary in original.
- > To fix and complete the rules governing the designation of the parties to the contracts and buildings.
- > To entitle the King to regulate the material forms of mortgage publicity in such a way as to be able to resort to more modern and efficient working methods.

The law of 1995 grants the King the power to fix the date when each provision of the law will come into force. In accordance with the Royal Decree of 12th December 2000, which was published in the Belgian Monitor on 21st December 2000, the law of 1995 (with the exception of articles 1 and 2) entered into force on 1st January 2001.

To ensure preference over other creditors, a creditor may secure agreement from his debtor that he specifically assigns one or other of his goods to the payment of the debt. In the property field, this assignment takes place by creating a mortgage. The mortgage has the advantage of the debtor retaining possession and use of the property. It gives rise to an in rem right, which may be invoked against all and the preference recognised to the creditor is the direct and necessary effect of this right.

Certain derogations to the rule of equality of rank may be created by authority of law by granting favourable treatment to certain claims which are declared preferential. A preference can only be established by law. It is a right, which the quality of the claim gives to a creditor of being preferred to the other creditors, even mortgagees.

On the other hand, the mortgage results either from the law, an agreement or a will (legal mortgage, contractual mortgage, testamentary mortgage).

The preference is attached to the quality of the claim; the mortgage, on the other hand, is established in consideration of the person of the creditor. The mortgage as a rule is confined to immovable property. Preferences may cover movable or immovable property (art. 16 Mortgage Act of 16 December 1851).

Between preferential creditors, priority is determined by the various characteristics of the preferences (art. 13). Between the mortgage creditors, priority is determined by registration date (art. 81).

The preferential creditors who are ranked equally are paid equally (art. 14). The same applies between mortgagees registered on the same day (art. 81).

Attention should also be drawn to the fact that the rank of the mortgage for present and future debts (see above chapter I, points 1.3 and 1.4) is fixed on the day of its registration, regardless of the period during which the secured debts. For the re-use of the mortgage in the event of a change of lender (subrogation, assignment of debt, details of the securitisation, etc.) information can be found in Chapter I, point 1.3.4.

2. The rank of priority between preferences and mortgages

2.1 Principle: The preference takes priority over the mortgage (art. 12).

2.2 Existence of hidden preferences and mortgages

The only hidden mortgage is the legal mortgage provided for in article 86 of the Inheritance Tax Code. „The legal mortgage guaranteeing the recovery of the inheritance tax and death duty may be invoked against third parties, without registration, for a period of eighteen months from the date of death. It remains effective from this same date if the registration is required before the expiry of the above-mentioned period. After this period has expired, it is only ranked from the date of registration.“

This article therefore provides for a hidden mortgage for a period of eighteen months; this mortgage does not prejudice the rights of preference and mortgage previously acquired of third parties.

As far as privileges are concerned, some provisions of the law provide for derogations from the rule of the publicity of preferences by registration.

The following are exempt from any publicity and consequently hidden:

- > the preference of legal costs in civil cases;
- > the preference of the insurer;
- > the preferences under k) above.

2.3 Preferences likely to take precedence over the mortgage

2.3.1 Enumeration

The Mortgage Act of 16 December 1851 gives a limitative list, in articles 17 to 40, of the various preferences existing. Subsequent laws have made a large number of additions to it, at least as far as movable property is concerned.

The law provides for four separate groups of preferences according to their object:

- > the preferences which extend to movable and immovable property (art. 17);

- > the general preferences on movable property (art. 19);
- > the preferences on certain movable property (art. 20);
- > the preferences on immovable property (art. 27).

Legal costs, according to article 17 take precedence on movable and immovable property as regards all the creditors in whose interests they have been incurred. There are two types of preferences on immovable property:

> On the one hand there are the general preferences

- the preference of legal costs (art. 17);
- the preference of the Treasury on the goods of condemned persons for the recovery of legal costs in criminal cases (Law of 5-15/09/1807);
- the preference guaranteeing the repayment of advances made for restoration guaranteed by the State (art. 43 to 48 of the laws on the repair of war damage to private property, coordinated by Royal Decree of 30/01/1954);
- the preference guaranteeing the return to the State of certain sums and assets paid for by the occupying forces during the 1940-45 war;
- the preference of the requisitioned companies for the resupplying of the country; the preference guaranteeing the payment of the advances for restoration provided for by the law of 12/07/1976 on the repair of certain damage caused by natural disasters.

> The others are special preferences

- the preference of the seller (art. 30);
- the preference of the party to a barter transaction (art. 31);
- the preference of the donor (art. 32);
- the preference of the joint heir (art. 33);
- the preference of the contractor and the architect (art. 38);
- the preference of the insurer on the property insured (law of 11/06/1974, art. 23);
- the preference provided for regarding mines (art. 14 and 73 of the laws on mines co-ordinated by R.D. of 15/09/1919);
- the preference of the State on collieries (R.D. No 2 of 18/04/1967, art. 12);
- the preference on the property investments of undertakings engaging in the compulsory insurance of third-party liability in the field of motor vehicles (art. 20 of the Royal Decree of 5/07/1967);
- the guarantee drawn up in favour of the farmer regarding constructions, labour and works (art. 26 of the law of 4/11/1969);
- the special preferences on the goods representing reserves of certain financial institutions and insurance undertakings.

a. Conditions

Article 29 lays down the principle of the publicity of the preferences: „Between creditors, the preferences only have effect in relation to the immovable property in so far as they are made public by entry in the registers of the mortgage registrar, with the exception of the preferences of legal costs.“

The main preferences, i.e. those of the seller, the party to a barter transaction, the donor and the joint

heir, are retained by the transcription of the instrument from which they result; this transcription is equivalent to registration (art. 34).

The following are subject to the rule of publicity by registration:

- > the preference of the Treasury regarding legal costs in penal cases;
- > the preference of the contractor and the architect (art. 38);
- > general preferences c), d) and e) above;
- > the special preferences referred to under g) to j) above.

b. Rank

The preference takes priority over the mortgage.

The preference, according to article 12, is a right which the quality of the claim gives to a creditor of being preferred to the other creditors, even mortgagees.

To what extent does the rule of the priority of the preference over the ordinary mortgage apply? No difficulty arises for the preference of legal costs and for the preference of the insurer. These costs, which in any case are preferential without any publicity, were incurred in the interests of all the creditors registered in relation to the property and they must be charged first of all against the proceeds of the sale of the pledged property.

The preference of the contractor and the architect is based on a different concept. This is a matter of excluding from the registered creditors the added value given to the property by the work carried out. The claim of the contractor and the architect is the counterpart of this work and it is legitimate that, within the confines of the added value, the contractor should be given preference over all others, even the creditors registered previously with regard to the property, on the initiative of either the owner who has built or the previous owners.

The case of the special preferences of article 27 of the law. The group of the special preferences of article 27 remains, of which the preference of the seller is the prototype. Will it be said that the preference of the seller will take precedence over all the mortgages registered on the property, including those which he himself or a previous owner has granted on the property sold? No, certainly not, the seller transfers the property as encumbered under his ownership; it is not for him to deprive his creditors of rights acquired by them. His preference will only be ranked after these previous registrations.

However, the situation would be otherwise if the buyer, before having paid the price and before having had his title registered, were himself to mortgage the property. The law having wished for the claim of the seller to be preferential in relation to the other creditors of the buyer, the rule of article 12 takes effect again and the automatic registration taken to guarantee the price takes precedence over all the mortgages registered on the property on the initiative of the purchaser.

This solution is justified moreover, even apart from article 12, by the retention of the right of ownership of the seller until the day of the registration and this is the case in relation to third parties in general and the successors in title of the buyer in particular.

In reality, for the preference of article 27, priority only plays a role in the relations between creditors of the same debtor.

All the mortgages, whether legal, contractual or testamentary, must be made public through registration, with the sole exception of the hidden mortgage of the Treasury in the field of inheritance taxes. The registration, which is carried out by a copy of a registration form in the mortgage registers, has a two-fold effect:

- > it makes the mortgage have effect in relation to third parties;

> if there are several registered creditors, the date of the registrations serves to fix the order in which the creditors will be classified regarding the price of the mortgaged property.

Article 81 of the Mortgage Act stipulates that: „Between creditors, the mortgage is only ranked on the day of the entry in the registrar’s registers in the form and manner provided for by the law.

All the creditors entered on the same day have equally ranked mortgages of the same date, without distinction between the mortgage of the morning and the mortgage of the evening, when this difference is marked by the registrar.”

3. EFFECTS OF THE BORROWER’S / OWNER’S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

3.1 Conditions under which the validity of the mortgage constituted during the suspect period (or risk period) may be called into question;

Article 17(3) of the Bankruptcy Act of 8 August 1997 states that securities constituted by the future bankrupt during the suspect period to secure a previous debt may not be invoked against the general body of creditors.

> Guarantees referred to:

These are guarantees voluntarily given by the future bankrupt; the law in particular covers the contractual mortgage since it is liable to give the creditor a preferential right over a property which formed part of the common pledge of the creditors.

> The guarantee must have been created by the bankrupt, during the suspect period or during the ten days preceding it:

The date of constituting the guarantee, for the mortgage, is the day on which the notarial act is passed. Consequently, the constitution of the guarantee during the suspect period, for a previous debt, may not be invoked even if it was constituted to carry out a promise of a mortgage or a mortgage order given at the time the debt was created.

> The guarantee must have been given to secure a previous debt

A debt contracted previously refers to the obligation assumed by the future bankrupt prior to the creation of the guarantee and not before the suspect period, since it is if the creditor, having trusted the future bankrupt, has a guarantee granted after the event, which is prohibited.

The mortgage guaranteeing a concomitant or future debt arising during the suspect period is therefore valid, as the person contracting with the future bankrupt can make his consent subject to the granting of a security.

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to the classification of his preferential right;

3.3 List of claims which, in the event of bankruptcy, take priority over the mortgage whereas, without

bankruptcy, no such priority exists: None

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy.

The first two paragraphs of the new Article 100 inserted by the Bankruptcy Act of 8 August 1997 provide that: „If no proceedings have been brought for expropriation prior to the pronouncement of the judgment declaring bankruptcy, only the trustees are authorised to carry out the sale... The provisions above are not applicable to the first mortgagee registered who may, after the closure of the report checking the claims, have the mortgaged property sold, in accordance with the provisions

of Articles 1560 to 1626 of the Judicial Code. Nevertheless, if the interests of the general body of creditors so require, and on condition that it can be expected that the sale of the mortgaged property will not be detrimental to the mortgagees, the court may, on application by the trustees and after having summoned the first creditor registered by court writ, order the stay of execution for a maximum period of one year from the declaration of bankruptcy."

Henceforth, the first mortgagee registered, whose right to bring proceedings under the old system remained unaffected notwithstanding the bankruptcy, in that he could exercise it „at any time“, has had a compulsory waiting period imposed on him (closure of the report checking the claims) and a possible right of preferential sale is granted to the trustee „if the interests of the general body of creditors so require, and on condition that it can be expected that the sale of the mortgaged property will not be detrimental to the mortgagees“. On application by the trustee and after having summoned the first creditor registered, the court may order the stay of execution of the sale sought by this creditor for a maximum period of one year from the declaration of bankruptcy.

3.5. Within the framework of settlement in bankruptcy proceedings, the creditors deliberate the excusability of the bankrupt. The court decides whether or not the bankrupt is excusable. If the bankrupt is declared excusable, the creditors are no longer permitted to take proceedings against him. If the bankrupt is not declared excusable, the creditors regain the right to individually exercise their claim on his assets.

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

4.1 The Belgian law of 17 July 1997 concerning arrangements with creditors.

Arrangements with creditors may be allowed to the debtor-trader if he is temporarily unable to settle his debts or if the continuity of his enterprise is threatened by difficulties that could lead, within a short time, to cessation of payment.

If these conditions are satisfied, there is no bad faith and it is possible on the basis of a temporary assessment to totally or partially allow the enterprise to continue, the court grants a temporary respite for an observation period that may not exceed six months. This period may be extended once for a maximum of three months.

No form of seizure of the furnishings or buildings may be pursued or exercised during the observation period.

This respite is applicable to all creditors, whatever collateral they have, and to claims by the creditor-owner. The respite does not benefit either co-debtors or guarantors.

The court may, at the request of a creditor-owner, a mortgage lender, guarantor and anyone benefiting from a special privilege, who can prove that his surety or ownership is suffering from or could suffer from a significant loss of value, grant additional sureties in compensation having regard to the amount of the debt.

When the interest and costs of debts that have accrued since granting the arrangement with creditors are not paid, the creditors recover the full exercise of their rights.

No seizure may take place during the observation period. However, seizures that have already taken place before the respite retain their conservatory character, but the commercial court may, depending on the circumstances, grant a release, after having heard the debtor, the creditor and the commissioner dealing with the respite.

If there is no opposition on public order grounds and the debtor offers the necessary guarantees of management probity, the court may approve a definitive respite where more than half of the creditors agree. However, the respite granted may not exceed twenty-four months as from the court decision. The court may grant one extension of a maximum of twelve months to the respite.

4.2 The Belgian law of 5 July 1998 concerning the collective settlement of debts.

The aim of the collective settlement of debts is to re-establish the financial situation of a heavily indebted person. An amicable settlement plan is negotiated by the debt mediator with all of the creditors. If all of the parties come to an agreement, it is approved by the judge dealing with seizures. Failing an agreement, the judge may impose a judicial settlement covering a maximum period of five years. The period for repayment of credit agreements may be extended. In that case, the new period for repayment may not exceed the duration of the settlement plan fixed by the court, plus one-half of the remaining period of these credit agreements.

The decision of the judge dealing with seizures declaring admissible a request from a heavily indebted person (individual, farmer, liberal profession) gives rise to a situation of equality of rank and rights. The relative position of the creditors is therefore fixed irrevocably and the principle of equality applies. No creditor may then undertake any action that breaches the rule of equality. The execution of a mortgage mandate and the inscription of a mortgage are no longer possible. Interest is suspended with regard to the estate and all of the assets of the debtor become in principle untouchable.

The equality of ranking and rights and the collective settlement of debts affect all creditors for whom a collectible debt exists at the time of the decision. Receivables subject to a condition or a term are deemed to be "existing" debts. In such cases, no distinction is made between the unsecured creditors, senior creditors, guarantors and mortgage lenders.

Given the collective dimension of equality of ranking and rights, the seizure rights of the individual creditors are suspended. As from the decision, no conservatory attachment or distraint may be carried out. This covers all distraint measures concerning the assets of a debtor who offers payment in sums of money. This concerns not only conservatory attachment and distraint, but also includes the execution of an assignment of debts (e.g. the assignment of a salary) or the realisation of a pledge.

The effect of real sureties is suspended for the term of the judicial plan, without such a measure compromising the estate. This reservation only retains intact the common pledge of the creditors during the period of the plan. However, the causes of preference must be taken into account when distributing the proceeds of realising the assets of the debtor under the plan. The law stipulates that such realisation must be used to reconstitute the capital of the debts.

The execution rights of mortgage creditors and guarantor creditors are subject to collective settlement. However, any seizures carried out retain their conservatory nature. They may not however be realised as long as the settlement of debts continues.

What happens if a distraint measure is on the point of terminating at the time of a request for collective settlement? The suspensive effect only occurs on the date of the decision concerning the admissibility and not the date of submission of the request.

To avoid the least doubt on this subject, it was deemed preferable to stipulate, in the same way as announcement under the bankruptcy laws, that „if, prior to the order of admissibility, the day of the forced sale of furniture or buildings seized has already been fixed and announcements published, the sale takes place on behalf of the estate“.

Under a judicial settlement plan, the law stipulates a series of measures that the judge dealing with seizures may impose – separately or in combination – whilst respecting the equality of the creditors.

Such measures include:

The suspension, for the period of the judicial settlement plan, of the effect of real sureties, without such a measure compromising the estate, as well as suspension of the effects of assignment of the debt.

Revocation of the decision of admissibility of either the judicial or amicable settlement plan may be pronounced by the judge dealing with seizures.

In the case of revocation, the creditors recover their right to exercise individually their rights on the assets of the debtor in order to recover the unpaid portion of their debts.

DENMARK

I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL

1. CONSTITUTION

1.1 Who can create a Mortgage? The owner of a real property grants a mortgage to the lender against a mortgage credit.

1.2 Procedure: formalities

1.3 Is the mortgage accessory to a loan or can it be a separate deed? Description of systems and consequences: The mortgage is a necessity for the mortgage loan, and carried in the same document. This only applies to mortgage loans, however. In other credits against security there may not be a direct link between mortgage and loan.

1.3.1 One contract (credit + mortgage): Yes

1.3.2 Two contracts (credit and mortgage): No

1.3.3 Is it possible to pledge real estate for "all present and future debt to the pledgee"?
Not within the mortgage bank system.

1.3.4 Reuse of the security when changing lender: The mortgage banks use their own individual contracts – the content is more or less the same, but the document in itself cannot be transferred to a new lender.

1.4 Consumer protection rules with respect to the creation of mortgage collateral: The EU Consumer Credit Directive is implemented in Denmark in the Danish Consumer Credit Act. Contrary to most of the other Member States. Denmark has extended the Consumer Credit Act in order to apply also for mortgage loans and other credits secured by a mortgage in Denmark.

1.5 Schedule: time necessary to get a mortgage registered and entrusted with official authority: The mortgage contract can be submitted immediately to the Land Register, and depending on the general level of activity at the Land Register, the mortgage contract will be registered within 1 – 10 working days.

2. REGISTRATION: FUNCTIONING OF THE REGISTER

2.1 Traditional, computerized: all the Land Registers will be computerized by the end of 2001. The documents must still be submitted in physical form to the Land Register, but the registration itself is done electronically.

2.2 Accessibility: national and cross-border: The Danish Land Register is not yet generally accessible from outside the country. Realkreditrådet is not sure whether a user permit for the Land Register can be extended to an external user.

2.3 Body in charge of registration: The Land Register under the Circuit Courts.

3. COST

3.1 Constitution (fees, notary): There are no such fees.

3.2 Registration: There is a fixed price for turning any document over for registration in the Land Register – 1.400 DKK. For documents, i.e. mortgage loans, the registration fee is 1.5 % of the nominal amount of the loan.

3.3 Others: No.

4. DURATION OF VALIDITY OF THE MORTGAGE

Until cancelled from the Land Register by the creditor

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

1.1 Preliminary measures / actions

When the debtor is considered in default the creditor must – in order to pursue his rights – address the debtor with a written claim, stating that the capital is up for repayment after the expiry of a fixed notice (8 days). In practice, the mortgage banks do not call in the entire capital by default, but only request payment of the outstanding amount.

If the debtor does not respond to the written claim the case is turned over to a lawyer, who handles the practicalities from then on.

The next step will be to submit a request for execution of a forced sale along with a complete statement of claims against the debtor together with a copy of the mortgage deed, the reminder and denunciation letter in copy to the Bailiff's Office in the court of venue.

The Bailiff will summon creditors and debtor(s) to his office, where the execution order will be registered.

Preparations for a forced sale (enforced auction) are initiated when the creditor files an auction application with the Bailiff's Court. The application must be in writing and must contain information concerning the nature and use of the property in question, including information about whether the property is the residence of the debtor and his family.

1.2 Sale: form and conditions

The sales figures are prepared on a special form with the cooperation of the Danish General Council of the Bar and Association of Danish Real Estate Agents. The form is divided into 3 main sections:

- > Information about the property in question,
- > A calculation of each mortgage's claim, and
- > A calculation of the costs, including auction costs, which must be paid on top of the auction bid.

The applicant must check the Land Register about the property in question, including mortgages, rent charges and easements. This examination also includes contact with the debtor for further information about the property, including matters of insurance.

Also, the applicant must obtain the necessary information about claims and terms of claims as per the auction date from the rightful claimants. Such claimants may for example be public authorities (e.g. the tax authorities). Tax authorities can only pursue taxes linked to the property at the auction. Rightful claimants who are responsible for any information they give are also under an obligation to inform any interested party whether their claims must be settled at the auction or whether the claim will remain with the property, i.e. can be transferred to a purchaser at the auction.

Once the applicant receives the claim calculations and all other information, a physical inspection of the property must be performed, so that a very thorough description of the property and its condition may be included in the sales figures.

If the property in question is let, fully or partly, this should appear from the sales figures. The next item is the actual calculation of the mortgage's claim on the auction date. These claims are listed by priority under outstanding amounts, remaining debts, and their total. Information must also be

provided as to the interest on the mortgage and any mortgages that may fall due if the property is taken over by a purchaser at the auction.

The sales figures must contain information about the costs, which must be borne by the purchaser at the auction on top of the bid itself. These costs include expenses to meet applicants' fees and appearance fees to mortgages whose claims are fully or partly met by the bid.

The sales figures must contain information about the amount of security placed by the successful bidder at the Bailiff's Court to meet the auction requirements. This security is usually calculated as 1/4 of the amount claimed, to which should be added any outstanding amounts as well as other costs.

According to general rules about liability for damages, the applicant is liable for the accuracy of the information submitted (in the sales figures).

1.3 Subsequent measures

It is the Bailiff's Court which auctions the property in question. It is, however, the applicant who must advertise the auction in The Danish Official Gazette as well as in a widely read local daily paper. There is also an increasing in the number of auctions which are advertised on the Internet.

The advertisement must contain a brief description of the property as well as the main cost figures for the property. The advertisement must also contain information as to the time and place of the auction, and information about how to obtain a set of sales figures.

1.4 Distribution of the proceeds of the sale: description and possible incidents: There is no practical answer to this question.

1.4.1 Lender's right on his borrower's right to rent: One will deal separately with special conditions about the property and the rights of the earnings of property at the auction.

1.4.2 What happens if the borrower has renounced his right to his rent? See the answer under

1.5 Consumer protection rules in the context of a foreclosure procedure

The Bailiff's Court will summon the debtor, the applicant or other rightful claimants of the property to an introductory meeting, if the Bailiff considers it necessary. At this meeting, the rightful claimants of the property must document their claims, and during the meeting the matters regarding the property are explained.

If the property serves as the residence of the debtor and his family, the Bailiff will (as a rule) issue summons to an information meeting. The applicant also attends this meeting. For the meeting the Bailiff may also summon or inform the social services, which may - if the property is sold at the enforced auction - have to re-house the debtor and his family.

At the information meeting, the Bailiff can grant the debtor a period of (typically) 4 weeks to either sell the property by himself, or in some other way prevent the auction.

Such a period will only be granted, if preventing the auction is considered a realistic possibility. The applicant can demand, as a condition for withdrawing the request for auction, that all of his claims due - which are secured by mortgage on the property be paid, together with costs. wing the request for auctioning

After expiry of the 4-week period, the Bailiff can decide to employ a property expert both with a view to assessing the value of the property in question, in the case of an enforced auction, and to assess the value on the open market.

Generally, the Bailiff ought to employ an expert when the debtor, the applicant or other rightful claimants of the property request it.

The applicant has to guarantee the fee of the expert-failure to provide a guarantee will have the effect that the request for an enforced auction will lapse.

If the Bailiff considers it necessary, the Bailiff's Court can assign a counsel to the debtor. This will happen particularly when there is a realistic chance of preventing the auction through negotiations with the mortgagees or the establishment of a repayment scheme. The assignment of counsel can also take place even if the auction seems inevitable, particularly in matters where the interests of the debtor are involved (i.e. easements, rent charges, etc.).

Generally, the Bailiff's Court ought to assign a counsel, when the debtor, the applicant or other rightful claimants of the property request it. If the need for counsel is due to the personal situation of the debtor - and if the debtor meets the requirements to be granted free legal aid - the Bailiffs Court can decide that the expenses from assigning a counsel are to be fully or partly paid by the State. In other cases, the Bailiff's court can require the counsel expenses to be paid by the debtor or - if the auction is carried out - by the purchaser at the auction, in addition to the auction bid.

2. WRIT OF EXECUTION

2.1 Conditions to be fulfilled to render a deed (or a judicial decision) enforceable: The deed or court decision must be final in order to be executed.

2.2 Conditions pertaining to and procedure for enforcing a writ of execution within the national territory: The writ of execution must be final and can be filed into the Bailiff's Office in the Court of Venue.

2.3 Exequatur (extension of foreign judgments)

2.3.1 Description of the procedure for enforcing a foreign writ of execution in your country: If the debtor owns a private property in Denmark and a final writ of execution can be produced from a country whose court decisions are recognized in Denmark, the writ of execution can be filed with the Bailiff's Office in the court of venue of the property.

2.3.2 Maximum time taken by this procedure: No precise answer can be given - international documents provide sometimes some problems, but the procedure should be completed within 6 months.

2.3.3 Existence of any bilateral conventions simplifying procedures: Probably many, but Realkreditrådet is not familiar with any of those.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1 Who has the right to initiate the procedure for a forced sale? The right to initiate a forced sale procedure belongs to the creditor and others with a legal claim on a real property. This could be a pursuing creditor who has a registered claim not otherwise linked to the property.

3.2 The stage at which this procedure becomes demurrable on third parties: It is not clear what is meant with this question. If the question concerns formal complaints, these can be announced any time, but typically complaints will be stated at the auction, when the Bailiff can consider the complaint and make a decision.

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset: Any creditor is called in to be represented at the auction - if an unsatisfactory bid becomes the highest, any creditor whose claim is not covered by the bid can demand that a second auction be held, if he can produce a guarantee to cover the costs of a second auction.

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee:

Will be revealed at the auction.

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people):

No, the only problem can be caused for tenants in real estate apartments, but the Tenants Act protects their rights unless they have very special conditions. If such special conditions apply for the tenancy, they can be cancelled at the auction if they are not registered at the Land Register.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a forced sale procedure (without incident): **Currently:** less than 6 months.

4.2 Maximum possible duration of a forced sale procedure: No limit.

4.3 Most frequently occurring incidents: The most frequently occurring incident is probably that the auction is called off just before the auction day, or at the auction itself because the debtor pays the outstanding amount.

4.4 Typical duration of the distribution procedure: It is not clear what is meant with this question.

5. COST OF THE FORCED SALE PROCEDURE

No standard can be offered for the costs – it depends on the property, number of claimants, etc.

5.1 Cost of the procedure: See the answer to question 5.2

5.2 Who pays the costs? The buyer pays the positive costs while still in the auctioning room. Outstanding amounts must be paid within 4 weeks and mortgages that are called in due to the auction must be paid within 6 months.

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

The ranking of the mortgages is decided in accordance with the registration in the Land Register. The Land Register is operated and administrated by the Circuit Courts under the regulation of the Danish Registration Act.

The auction procedure takes place under the auspices of the Bailiff's Court, which are special departments under the Circuit Courts. The decisions of the Bailiff's Court can be appealed to the High Court. The auction procedures are spelled out in the Danish Administration of Justice Act.

2. THE RANK OF PRIORITY BETWEEN PREFERENCES AND MORTGAGES

2.1 Principle: First in time is first in right, unless otherwise agreed in the mortgages. A registered right suppresses an unregistered right, unless the holder is aware of the unregistered right.

2.2 Existence of hidden preferences and mortgages: If a right is hidden or not registered it will be suppressed if another holder of a right that is registered and who is not aware (in good faith) of the hidden preference or mortgage defies it.

2.3 Preferences likely to take precedence over the mortgage

Some rights have precedence by law. According to the Tenants Act, tenants in dwellings cannot be expelled from their dwellings even if their contracts are not registered in the Land Register.

Also, examples can be given when an old user's right can be given preference despite not being registered in the land register. There must have been an ongoing uninterrupted and undisputed activity for over 20 years, or "as long as can be remembered". Often occurring in rural areas, e.g. where the use of distant fields necessitates the crossing of the property of a third party.

Typically, preference is decided on the grounds of the ranking in the Land Register. This ranking is decided by succession unless otherwise regulated in the conditions of the documents with the mortgage agreement.

3. EFFECTS OF THE BORROWER'S / OWNER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

In itself, the debtor's bankruptcy may not be the cause of the amounts owing to the mortgagees being called in. The estate must pay the instalments on the mortgages in order to prevent the mortgagees from calling in their claims due to default.

3.1 Conditions under which the validity of the mortgage constituted during the suspect period (or risk period) may be called into question: The Bankruptcy Act, sections 70 and 71, states that security registered in the property less than 3 months prior to the bankruptcy date can be cancelled if the security is offered after the secured claim has been established, or not pursued without hesitation by the claimant. Even stronger restrictions exist regarding pursuing creditors in § 71.

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to the classification of his preferential right: After a bankruptcy has been proclaimed the mortgagee cannot demand that a forced auction be held. Only the estate can do this.

3.3 List of claims, which, in the event of bankruptcy, take priority over the mortgage whereas, without bankruptcy, no such priority exists: No such preference applies in the property against an undisputed mortgage.

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy: See answer 3.2.

GERMANY

I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL

In Germany, a common generic term „Real Estate Collateral“ (*Grundpfandrecht*) is used for both types of collateral that exist. The term “mortgage collateral” is used for accessory charges on property (*Hypothek*) and the term “land charge” is used for non accessory charges on property (*Grundschild*).

1. CONSTITUTION

1.1 Who can create a Mortgage? According to German legal terminology, «creating a mortgage» is to be understood as charging a piece of land with a mortgage or a land charge (§§ 873 para 1, 1113 para 1 BGB [German Civil Code]). In this sense, it is the owner of the piece of land to be charged or the holder of the heritable building right to be charged or the owner of the residential property to be charged who can «create» a mortgage.

1.2 Procedure: formalities: The mortgage comes into existence through a two-part act: (1) by agreement between the encumbrancer (see above 1.1) and the future mortgage creditor, and (2) by registration of the mortgage in the Land Register, § 873 para 1 BGB. Moreover, the debt to be secured must come into existence (§ 1163 para 1 sentence 1 BGB) and – if a mortgage certificate [*Hypothekenbrief*] has been drawn up on the mortgage – the mortgage certificate must be turned over to the mortgage creditor by the encumbrancer (§ 1117 para 1 sentence 1 BGB).

The agreement is substantively effective regardless of form. However, in order for the mortgage to be recorded in the Land Register, according to the regulations of the Grundbuchordnung [GBO - Land Register Code], notarial certification [Beglaubigung] of the declaration of agreement of the beneficiary is required (§ 29 para 1 sentence 1 GBO).

Thus, a notarial authentication [Beurkundung] of the declaration of the encumbrancer is not required for the registration of the mortgage. However, if – as generally required by the credit institutions – the encumbrancer submits to immediate execution of the property to be mortgaged, then this declaration of submission to execution requires notarial authentication in order to be effective in view of § 794 para 1 No. 5 of the Zivilprozessordnung [ZPO - Code of Civil Procedure]. However since, for practical reasons, the encumbrancer usually proceeds to such a declaration of submission together with his declaration of agreement in the same deed, the entire deed, including the declaration of agreement, must then be authenticated by a notary.

Whereas in the case of the accessory mortgage one of the requirements for the coming into being of a mortgage right is the coming into being of the debt to be secured (§ 1163 para 1 sentence 1 BGB), the non-accessory land charge arises without the existence of a debt to be secured (§ 1192 para 1 BGB).

1.3 Is the mortgage accessory to a loan or can it be a separate deed? The mortgage collateral is, without exception, accessory to the debt which it secures. However, this does not mean that the mortgage and the secured debt must be established in one and the same deed.

Despite being accessory to one another, it is perfectly possible for the secured debt and the mortgage to be established in separate deeds. However, the mortgage deed [*Hypothekenurkunde*] must describe the debt to be secured so accurately that no doubt can arise as to the identity of the debt.

Nevertheless, if a mortgage certificate is drawn up on the mortgage, then the mortgage certificate must be joined with the debt deed – if any debt deed has been drawn up on the debt to be secured, § 58 para 1 sentence 1 GBO.

It is important to point out that the German banking industry has virtually ceased using (accessory) mortgages to secure credit debts over the past 25 years, and now in practice uses almost exclusively non-accessory land charges [*Grundschilden*].

There is no legal link between the land charge and the debt secured. Its creating and its existence are independent on the debt to be secured. Guarantors and mortgagees normally agree in a separate agreement – in a so-called security agreement – which creditors are to be secured with which debts by the land charge. As far as protection of the guarantor is concerned, this function is therefore – instead of the accessory nature of the mortgage – taken over by the obligation constituted in the separate security agreement.

Even if the protection granted by the security agreement is “only” of an obligatory nature, it is not worse than the protection guaranteed by the accessory nature of the mortgage. Virtually all legal systems with accessory mortgages simulate for cases of inexistence of the debt secured by the mortgage – in the interest of the public faith of the land register – its existence without the possibility to raise objections. This applies even if there should be objections with respect to this debt or if there would be a bona-fide acquirer of the mortgage. As far as German law is concerned, reference in this regard is made to §§ 1138, 892 para 1 sentence 1 BGB. In the case of a disposal of a registered claim in contradiction to the material legal situation by the creditor with (only) book justification, the mortgage-debtor (*Hypotheken-Schuldner*) is just as unprotected as the land-charge-debtor (*Grundschuld-Schuldner*) in the case of a disposal by the holder of a land-charge contrary to the security agreement.

1.3.1 One contract (credit + mortgage): See above under 1.3. The credit contract, on the one hand, and the mortgage contract (= agreement in the sense of § 873 para 1 BGB), on the other, are always two contracts. There was no uniform practice on this even when the German banking industry was still using mortgages. Insofar as two deeds were established, in general a certified copy of the credit contract deed was joined with the mortgage contract deed; that was recommended because, in this way, no doubt could arise as to the identity of the secured debt.

If the non-accessory land charge is used, the loan agreement on the one hand and the land charge agreement on the other are always separated.

1.3.2 Two contracts (credit + mortgage): See above under 1.3.1

1.3.3 Is it possible to pledge real estate for “all present and future debt to the pledgee”?

Yes. If a mortgage collateral is selected as the pledge, such a security can at any rate – within the framework of a maximum amount to be specified – be achieved via a ‘maximum amount mortgage’ as understood in § 1190 BGB (on the admissibility, see already Reichsgericht [Supreme Court of the German Reich] in RGZ volume 75 page 245 ff., 247).

If a non-accessory land charge is selected as the pledge, there are no property-law objections, at any rate. With regard to the effectiveness of the security agreement, there could be legal objections relating to the General Standard Terms and Conditions law if the person providing the security and the personal debtor are not identical.

1.3.4 Re-use of the security when changing lender:

The answer to this question depends on whether the identity of the secured debt is preserved, or if it changes.

If only the person of the lender is exchanged, with the secured debt being transferred from the old to the new lender, then the identity of the debt is preserved. In this case, one cannot speak of „re-use” of the security. The mortgage secures the same debt as before.

But if the secured debt is exchanged – if, for example, the borrower pays off the old lender’s loan with a newly-granted loan from the new lender – then there is no longer any identity of the secured debt. However, this so-called „debt substitution” is not a problem of subrogation of creditors, it is independent of the person of the creditor.

Debt substitution is legally admissible. It presupposes the corresponding agreement between the mortgage creditor and the property owner, as well as registration of the substitution in the Land Register, § 1180 para 1 BGB.

Debt substitution is no longer possible when the debt to be substituted has been cancelled. Upon cancellation of the mortgage-secured debt, the third-party mortgage [*Fremdhypothek*] is converted by force of law into a property owner's land charge [*Eigentümergrundschild*], §§ 1163 para 1 sentence 2, 1177 para 1 sentence 1 BGB. The owner can once again make this property owner's land charge available as collateral for securing a loan – insofar as this is not blocked by a claim for cancellation in favour of a secondary creditor (§ 1179 a para 1 sentence 1 BGB).

If a land charge is used instead of a mortgage, there are no problems in substituting the debt. There is no "debt substitution" within the meaning of mortgage law; it is neither necessary to enter the substitution in the land register, nor is it even permissible in this instance. In this case it is only necessary – provided it has not already been agreed from the outset between guarantor and mortgagee – to make an amendment/addition to the security agreement. This amendment/addition must have been made between the parties to the security agreement. There is no need for any collaboration or consent to this agreement between junior creditors, nor is there any need for this amendment/addition to be entered in the land register.

This possibility has proved itself in particular for instances of changing a business relationship, where there is a pool of creditors, and in particular when there is a so-called internal consortium (or "dormant" consortium). The common feature of all these instances is that here debts are to be secured by real estate collateral ("*Grundpfandrecht*"), where the creditor is not identical with the real estate collateral creditor. These instances of a lack of identity between creditors of a debt and real estate creditors cannot be satisfactorily governed by accessory mortgages – nor even by so-called maximum amount, maximum or surety mortgages.

Even if the secured debt is extinguished, the non-accessory charge may be used again at any time to secure other debts of the same or another creditor without it being necessary to make an entry in the land register.

1.4 Consumer protection rules with respect to the creation of mortgage collateral

There are no special consumer protection rules with regard to the creation of a mortgage collateral.

This also applies to a non-accessory land charge.

This also applies to a non-accessory land charge. Insofar as a non-accessory land charge is „created“ instead of an accessory mortgage collateral, it is generally based on a so-called „security agreement“. When concluding the security agreement, if applicable the provisions on General Standard Terms and Conditions –now being included in the Civil Code– must be respected, in particular the prohibition on surprise clauses (§ 305c para. 1 BGB) and the prohibition on unduly prejudicial clauses (§ 307 para. 1 BGB).

1.5 Schedule: time necessary to get a mortgage registered and entrusted with official authority: There are no statutory or administrative regulations setting a schedule. One cannot give a generally valid answer to the question of how much time the Land Register Office responsible for the registration requires in order to complete a registration request submitted to it in a given case. The processing times differ from one Land Register Office to another, depending on the number and scope of the requests to be processed, the personnel and material equipment of the Land Register Office, and the type of processing (computerised or not).

2. REGISTRATION: FUNCTIONING OF THE REGISTRATER

2.1 Traditional, computerised: The Land Register Code authorises the governments of the individual federal Länder to establish by ordinance whether and to what extent the Land Register in the respective federal Land shall be maintained in digitalised form (§ 126 para 1 sentence 1 GBO). The individual federal Länder have made varying use of this power. The situation is not uniform from one Land to the next.

In the Federal Republic there are Länder which have completely switched over to a computerised Land Register, while others have only partially converted to a computerised Land Register, and yet others still have a completely traditional Land Register system.

2.2 Accessibility: national and cross-border: The formal principle that the Land Registers and the related land deeds should be open for public inspection is in fact limited: only those who can prove that they have a justified interest in such an inspection (§ 12 para 1 GBO) are entitled to inspect the Land Register and the land deeds.

2.3 Body in charge of registration: The local first-instance courts are functionally responsible for maintaining the Land Registers, and this includes the act of registration (§1 para 1 sentence 1 GBO); see below for exceptions (last paragraph under this number). Locally responsible is the first-instance court in whose district the property lies (§1 para 1 sentence 2 GBO); if the property lies in the district of several Land Register Offices, then the common higher court will decide which of the several first-instance courts is responsible (§1 para 2 GBO in combination with § 5 para 1 sentence 1 of the Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit – FGG, Act on Matters of Non-Contentious Jurisdiction).

The Land Governments of the individual federal Länder are authorised under certain conditions to assign by ordinance the maintenance of the Land Register to a single local court for the districts of several local first-instance courts (§ 1 para 3 GBO).

Within a Land Register Office, the Registrar is responsible for the registration, § 3 number 1 h of the Rechtspflegengesetz [Registrar's Act].

There are exceptions to the principle of the functional responsibility of the first-instance courts in Baden-Württemberg, where - unlike in the rest of German federal territory - the Land Registers are not maintained by the first-instance courts but rather by the state Land Register Offices established in every community (§ 143 para 1 GBO in combination with the Baden-Württemberg law on non-contentious jurisdiction). The body responsible for registration in Baden-Württemberg are the notaries and notarial representatives in the Land service, in the Baden legal territory moreover also the registrars assigned to the notary's offices and appointed as Land Register officials.

3. COST

3.1 Constitution (fees, notary)

The costs to be levied by the notaries (= fees + expenses) are set exclusively under the Law on Costs in Matters of Non-Contentious Jurisdiction, abbreviated „Kostenordnung (KostO = Cost Regulations), see § 140 sentence 1 KostO. In particular, fee agreements are expressly prohibited (§140 sentence 2 KostO).

The level of fees results from §32 in combination with § 141 KostO and the fee table included there. The fee level is determined by the level of the value of the property at issue – the higher the value, the higher the fee. The fee curve is degressive in relation to the rise of the value. At a value of - € 5.000, a full fee amounts - € 42 (= 0, 84 %), while for a value of € 50.000 the fee is - € 132 (= 0.26 %), and at a value of - € 500.000 it is € 807 (= 0.16 %). Thereby the nominal value of the mortgage/land charge is taken as the basis for the property value (§ 23 para 2 KostO).

Since to register the mortgage one requires only the registration authorisation of the owner in notarially certified form (§ 29 para 1 GBO, also see above under 1.2), the notary receives insofar only the so-called certification fee. The certification fee amounts to one-quarter of the full fee (§ 45 para 1 sentence 1 in combination with § 141 KostO); thus, for a mortgage of € 50.000 he receives € 33. The maximum amount of a certification fee is € 130. However, in general the credit institutions agree with their customers that the owner of the property to be encumbered with the mortgage/land charge submits due to the mortgage/land charge to summary foreclosure on the pledged real property. This submission to execution derives from practical reasons in the mortgage deed. Since the submission to execution must be notarially authenticated in order to be effective (§ 794 para 1 No. 5 of the Code of Civil Procedure), in these cases the notary receives instead of the ¼ certification fee a full authentication fee – for a mortgage of € 50.000, there would be a fee of € 132. Some expenses – in particular expenses for copies and telecommunications – are added to the notary fees.

The cost turnover of the notaries is subject to the turnover tax; thus one has to add a 16 % value-added tax to the fees and expenses.

3.2 Registration: For the registration, the court levies court costs (= fees + expenses), also calculated under the KostO mentioned in 3.1. Therefore with regard to the level of the fees one can refer to what was set forth in 3.1

For the registration of the mortgage/land charge, the court imposes a full fee – for registration of a mortgage/land charge of € 50.000 therefore € 132 (§ 62 para 1 KostO). If a mortgage certificate/land charge certificate is drawn up on the mortgage/land charge, the court levies for this additionally one-quarter of the full fee, for a certificate over € 50.000 therefore an additional € 33.

The court also charges for expenses (copying costs, telecommunications). No turnover tax is imposed.

3.3 Others: Other costs do not arise. In particular, there are, apart from the court costs, no stamp duties or other charges. However, one should point out that further notary costs arise when – as is generally the case – the establishment of the mortgage is part of a real estate transaction and the notary intervenes in the implementation of this transaction, and in particular of the financing.

4. DURATION OF VALIDITY OF THE MORTGAGE

The duration of the mortgage is unlimited, the mortgage as right in rem is therefore perpetual. The mortgage also does not become statute-barred (§ 902 para 1 sentence 1 BGB). The right to demand the transfer of mortgages and land charges (§ 196 BGB) has a limitation period of 10 years.

Also, the statutory limitation of the debt secured by the mortgage does not impair the mortgage. For the mortgage, this is expressly stated in § 216 para 1 BGB. With regard to the land charge, this already follows from the fact that it is not accessory, but it also derives from § 216 para 2 BGB. Therefore in both cases – mortgage and land charge – the owner cannot, despite statutory limitation of the secured debt, demand either cancellation of the charge on property or its reconveyance; the creditor can, despite statutory limitation of the secured debt, realise his pledge and satisfy himself from the realisation proceeds due to his secured (and statute-barred) debt.

Overdue mortgage and land charge interest however is statute-barred under §§ 223 para 3, 902 para 1 sentence 2 BGB in accordance with general regulations, meaning in 3 years (§ 195 BGB). For land charge interest, however – if it involves the interest on a land charge created to secure a debt – according to the German Federal Supreme Court, the statutory limitation period only begins to run upon the occurrence of the security event (Federal Supreme Court decision of 21.1.1993 – IX ZR 174/92 – in ZIP Zeitschrift für Wirtschaftsrecht 1993 page 257).

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

1.1 Preliminary measures/actions: Regarding the sale, there are no preliminary measures to take. A sale is done by private contract, the decision about the sale being – legally – in the hands of the property owner.

1.2 Forced sale: form and conditions: The sale of properties must be notarially authenticated, § 311 b para. 1 sentence 1 BGB. A sales contract concluded without observing this form is void, § 125 sentence 1 BGB, it becomes valid when the agreement between the parties and the registration of the mortgage have taken place.

1.3 Subsequent measures: Purchase price payment and transfer of title. Due to the separation principle, which dominates German private law, the conclusion of the sales contract in its own does not lead to a transfer of ownership from the seller to the purchaser.

The sales contract creates between the contracting parties only rights and obligations, on its own however it does not lead to legal changes. Legal changes giving rise to effective performance is rather the object of separate legal transactions independent of the underlying obligatory contract.

For transfer of the ownership of properties therefore, one requires – besides the constitutive registration of the change of ownership in the Land Register – a separate legal transaction between buyer and seller, § 873 para 1 BGB. This agreement required in accordance with § 873 para 1 BGB between buyer and seller – the actual property transfer contract – is called „land conveyance“ [Auflassung] (see legal definition § 925 para 1 sentence 1 BGB).

In principle, the land conveyance must be declared by each party in the presence of the other before a notary. It is substantively effective regardless of form, but - in view of the formal requirements to be observed in the Land Register procedure (§ 29 GBO) - it must at least be notarially certified.

1.4 Distribution of the proceeds of the sale: description and possible incidents

The purchase price is due to the seller. The buyer will pay the purchase price, if it is guaranteed that he receives the property as agreed in the purchase contract. If he bought the property free of encumbrances, he will only pay when the cancellation of the registered encumbrances has been confirmed.

The notary authenticating the purchase contract and the participating banks (bank of the seller, bank of the purchaser) are involved in this guarantee process. There are several possible ways to structure this; the credit institutions prefer the following variant:

The notary receives the purchase price (own funds of the buyer, outside funds of the buyer's bank) first as a fiduciary of the purchaser and his bank, and holds it in safe custody in an escrow account.

At the same time, he calls on the bank (or banks) of the seller to send him the land register declarations required for cancellation of its charges on property [*Grundpfandrechte*] and to provide figures on the debts still secured by the charges on property. The safekeeping of the Land Register declarations is also handled on a trust basis.

When the purchase price – own funds and outside funds – has been furnished to him in full and it is sufficient to pay off the debts still secured by the charges on property, the notary can then process the purchase contract. He will then proceed as follows:

He pays out to the banks of the seller the amounts due to the latter, thus fulfilling in a single act the obligation of the seller vis-à-vis his bank(s) and – in the amount of these payments – the purchase price payment obligation of the buyer vis-à-vis the seller. Any remaining surplus he pays out to the seller, thus also fulfilling the remaining purchase price payment obligation of the buyer vis-à-vis the seller. He

submits to the Land Register Office three registration requests: cancellation of the charges on property registered in favour of the banks of the seller, new registration of the charge on property in favour of the bank financing the purchase price, transfer entry for the property in the Land Register.

However, before the notary pays out the monies which he had held in safe custody as a fiduciary and makes the above-mentioned Land Register requests, he must verify that there are no obstacles which could block implementation of the requests.

1.4.1 Lender's right on his borrower's right to rent

The lender as such has no claims on the rent claim of his borrower, unless he had this right to rent of his borrower assigned or pledged to him as security for his claims coming from the credit relationship. Both actions – assignment for security and pledging of rent claims – are possible under German law.

However, the lender in his capacity as mortgage creditor is also liable for the rent claims due to the renting or leasing of the real property encumbered with the mortgage, § 1123 para 1 BGB.

The attached claims are – to the extent that they are due – released from the liability with the lapse of one year from the time of becoming due, insofar as attachment in favour of the mortgage creditor has not taken place first, § 1123 para 2 sentence 1 BGB. The attachment is performed by serving the decision of the court in charge of enforcement procedures ordering sequestration (not: forced sale!) on the judgement debtor, or if applicable already earlier, upon filing of the request for registration of the sequestration endorsement to the Land Register Office or upon taking possession of the real property by the sequestrator (§§ 148 para 1 sentence 1, 147 para 1, 20 para 1, 22 para 1, 151 para 1 of the Gesetz über die Zwangsversteigerung und die Zwangsverwaltung [ZVG = Act on Forced Sale and Sequestrations]).

The above remarks on § 1123 BGB similarly apply if a non-accessory land charge is used instead of an accessory land charge (§ 1192 para 1 BGB).

1.4.2 What happens if the borrower has renounced his right to his rent?

If the renunciation takes place after the attachment of the real property (compare on this the above figure 1.4.1, last paragraph), the renunciation is ineffective in relation to the mortgage creditor, §§ 146 para 1, 23 para 1 sentence 1 ZVG in combination with §§ 136, 135 para 1 sentence 1 BGB.

If the renunciation takes place before the attachment, then § 1124 BGB applies. The renunciation is first of all – as long as no attachment of the rented or leased real property takes place – also effective vis-à-vis the mortgage creditor (para 1 sentence 1). However, if attachment of the real property takes place afterwards, the renunciation in relation to the mortgage creditor becomes subsequently and retroactively ineffective, to the extent that it relates to the rent for a later period than the current month at the time of the attachment (para 2, 1st half-sentence). If the attachment takes place after the 15th day of a given month, then the ineffectiveness of the renunciation first sets in for the month after the immediately following month (para 2, 2nd half-sentence).

The above remarks similarly apply if a non-accessory land charge is used instead of an accessory land charge.

1.5 Consumer protection rules in the context of a foreclosure procedure: It is true that there are rules which serve to protect the judgement debtor in the foreclosure procedure. However, these are not specific consumer protection rules.

2. WRIT OF EXECUTION

2.1 Conditions to be fulfilled to render a deed (or a judicial decision) enforceable

Insofar as judgements are involved, the foreclosure takes place in accordance with § 704 para 1 ZPO on the basis of final judgements which are either absolute or – if they are not yet res judicata – have been declared provisionally enforceable by the trial court.

On the basis of deeds, the foreclosure takes place in accordance with § 794 para 1 figure 5 ZPO, if the deed has been drawn up by a German notary within the limits of his official powers in the prescribed form, and if the debtor in the deed has submitted himself, due to the claim to be described, to summary foreclosure.

2.2 Conditions pertaining to and procedure for enforcing a writ of execution within the national territory

In order to be able to enforce on the basis of the executory title defined in 2.1, the executory title must be provided with a so-called execution clause and before the beginning of the foreclosure (where judgements are involved, it can also be simultaneous with the beginning) served on the judgement debtor, §§ 724 para 1, 750 para 1 ZPO.

The execution clause for judicial decisions is issued by the registrar of the registry of the first-instance trial court where the trial was pending (§ 724 para 2 ZPO). The execution clause for notarial deeds is issued by the notary, who keeps the deed in safe custody (§ 797 para 2 sentence 1 ZPO).

The execution clause reads „The foregoing official copy is issued to the... (description of the parties) for the purpose of foreclosure“ (§ 724 ZPO). It is signed by the registrar of the court's registry or by the notary and the official seal is affixed.

The execution clause is not placed on the original of the judgement or the deed, but rather on an official copy; the originals remain in the safe custody of the court or of the notary.

With respect to foreclosure on the basis of notarial deeds, the service must have taken place at least two weeks prior to the start of the foreclosure, § 798 ZPO.

2.3 Exequatur (extension of foreign judgements)

2.3.1 Description of the procedure for enforcing a writ of execution within the national territory

The procedure is governed by the Code of Civil Procedure (Zivilprozessordnung - ZPO) §§ 722 and 723.

Compulsory enforcement based on a foreign writ of execution requires prior permission in the form of a special judgement by an ordinary court of law. The court responsible for this process is the court relevant to the debtor's general place of jurisdiction.

The court may not pass judgment until the foreign judgment has been legally enforced according to the law of the foreign court. The court is not permitted to carry out a factual review of the foreign judgment.

Whether provisions §§ 722, 723 ZPO (Code of Civil Procedure) also apply to enforceable documents of foreign notaries is disputed in the German literature. Prevailing opinion rejects the application of these provisions in this instance so that we must assume that – unless bilateral contracts make a different provision – an enforceability statement for such documents does not arise.

2.3.2 Maximum time taken by this procedure: The duration depends on the individual instance and the volume of business of the court responsible. It is not possible to make a generally valid statement.

2.3.3 Existence of any bilateral conventions simplifying procedures: There are a number of bilateral enforcement agreements. Known by name are agreements with Belgium, Austria, Great Britain, Greece, the Netherlands, Israel and Norway, c.f. Zöller, Code of Civil Procedure, Commentary 20th Edition, Cologne 1997, § 723 marginal note 3. The Association of German Mortgage Banks is not familiar with the content of these agreements in detail.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1 Who has the right to initiate the procedure for a forced sale? The mortgage creditor named in the deed can apply for the forced sale.

3.2 The stage at which this procedure becomes demurrable on third parties: The procedure becomes effective vis-à-vis third parties at the time when the decision by which the forced sale has been ordered, is served on the judgement debtor (§ 22 para 1 sentence 1 ZVG). If applicable, it is also effective earlier, at the time when the request for registration of the sale endorsement has been filed with the Land Register Office (§ 22 para 1 sentence 2 ZVG).

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset:

In accordance with

§ 9 ZVG, other mortgage creditors are procedure participants; therefore all legal remedies which any other participant in the procedure can put forward are also at their disposal.

The real estate value of the property to be auctioned off must be determined by decision of the court in charge of enforcement decisions (§ 74 a para 5 sentence 1 ZVG). This decision can be challenged by all participants in the procedure – i.e. also by the other mortgage creditors – by the legal remedy of immediate appeal (§ 74 a para 5 sentence 3 ZVG).

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee

Yes. These include all claims which, in accordance with § 10 para 1 figures 1, 1a, 2 and 3 ZVG, have higher rank than the claim of the mortgage creditor for satisfaction from the property. Essentially, these can be the following claims:

- > expenditures of petitioning creditors for maintenance of the property;
- > estimated costs for assessment of the appurtenances by an insolvency administrator in the case of insolvency;
- > (for agricultural and forestry properties:) wage claims from the current year and the previous year;

public property charges, specifically the overdue real property taxes, development costs, local taxes (e.g. street cleaning fees) and chimney-sweep fees to be paid for this property.

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people): No, not even the protection of the Vienna Convention on Diplomatic Relations of 18.4.1961 applies against foreclosure on a property if the property involved is a private immovable asset of the diplomat. The official building itself, however, is excluded from the forced sale.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a forced sale procedure (without incident): The usual period for a «normal» forced sale procedure is – calculated from the day of request until the conclusion of the division of the auction proceeds – depending on the workload of the individual courts responsible for enforcement procedures – between 6 and 12 months.

4.2 Maximum possible duration of a forced sale procedure: There is no legally established upper limit for the maximum duration of a forced sale procedure.

4.3 Most frequently occurring incidents

Delays generally arise due to the legal remedies filed by the judgement debtor (or also by other creditors). The most frequent legal remedies are:

Execution cross-action of the judgement debtor (§ 767 ZPO), with which in particular objections against the debt secured by the mortgage can be raised. The action is not filed with the court in charge of enforcement procedures, but rather with the trial court. By way of a temporary order, however, the trial court can suspend the foreclosure until the pronouncement of its judgement, either with or without security being provided by the judgement debtor.

Application of the judgement debtor under § 30 a ZVG for a temporary (limited to at most 6 months) suspension of the procedure. This application is frequently made, but it is rarely successful, because the judgement debtor must prove that, due to the suspension, the auction can ultimately be entirely avoided.

Immediate appeal against the determination of the market value (§ 74 a para 5 sentence 3 ZVG), by the judgement debtor, by other creditors, or also by the petitioning mortgage creditor himself.

Application for a refusal to knock down under § 74 a para 1 sentence 1 ZVG by the creditor entitled hereto (not by the judgement debtor). This application is admissible if the last and highest bid made lies below 70 % of the market value determined by the court. The application can only be made by the creditor – under certain circumstances also by the petitioning mortgage creditor himself – whose claim is not or not completely covered by the highest bid lying below 70 % of the market value. If the conditions are met, this application is made regularly: it leads to a refusal to knock down and to the setting of a new date within three to six months. The application cannot be made once again at this new or any further dates.

4.4 Typical duration of the distribution procedure: The distribution procedure is part of the forced sale procedure, not an independent procedure. The distribution takes place on a separate date, which must be set by the court after knocking down (§ 105 ZVG). Generally the distribution is concluded at the latest 6 weeks after knocking down.

5. COST OF THE FORCED SALE PROCEDURE

The costs of the forced sale procedure are levied in accordance with the Gerichtskostengesetz (GKG – Court Costs Act). They are composed of the court fees and the expenditures to be reimbursed to the court.

With respect to expenditures - besides the usual letter and copying expenditures – there arise in particular the costs for the prescribed publication of the forced sale dates in the daily newspapers and for the experts called upon by the court to establish the market value to be determined by him.

The fees are levied under § 11 para 1 GKG in accordance with a special cost schedule contained in annex 1 to the GKG. The level of the fee is based on the value of the object in dispute (§ 11 para 2 GKG) – the higher the value of the object in dispute, the higher the fee. The curve of the fees levied under the Court Costs Act is also digressive in relation to the rise of the amount in controversy. For

an amount in dispute of € 50.000, a full fee amounts to € 456 (= 0.91 %), for an amount in dispute of € 125.000 the full fee is € 956 (= 0,76 %), at a value of € 250.000 the full fee is € 1756 (= 0,70 %), and at a value of € 500.000 it is € 2956 (= 0.59 %).

The various amounts in the forced sale procedure apply as the so-called amount in dispute. For the procedure in general and for the holding of the judicial sale date the market value determined by the court serves as the basis of the amount in controversy. The amount of the highest bid (including the value of any continuing rights which are to be taken over by the highest bidder) serves as the basis for the knocking down and for the distribution of the proceeds.

5.1 Cost of the procedure:

5.1.1 Fixed: € 51 is levied for the decision on the application to order a forced sale – regardless of the level of the amount in controversy (Annex 1 to § 11 para 1 GKG, Schedule Nr 5210).

5.1.2 Proportional (percentage of the adjudication value): Under annex 1 to § 11 para 1 GKG – in addition to the fee mentioned under 5.1.1 – the following are levied cumulatively: >

- > a 0.5 fee for the procedure in general, calculated on the basis of the „market value“ amount in controversy (Schedule Nr 5212);
- > a 0.5 fee for holding at least one judicial sale date, calculated on the basis of the „market value“ amount in controversy (Schedule Nr 5215);
- > a 0.5 fee for knocking down, calculated on the basis of the „highest bid“ amount in controversy (Schedule Nr 5217);
- > a 0.5 fee for the distribution procedure, calculated on the basis of the „highest bid“ amount in controversy (Schedule Nr 5218).

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

The basis for the mortgage is to be found in the Civil Code (BGB), §§ 1113 ff. The land charge (*Grundschuld*) which, like the mortgage, is a right in rem on immovable property, but which is independent of a personal claim, is regulated with reference to the mortgage in §§ 1191 ff. BGB. The difference between the mortgage and the land charge from the legal point of view is not however of any importance for the present study.

The value of these forms of security for the creditors with charges on real property emerges in the event of enforcement. The rights with priority over a mortgage (or a land charge) are determined in accordance with § 10(1) of the Mortgage Foreclosure Act (ZVG).

2. THE RANK OF PRIORITY BETWEEN PREFERENCES AND MORTGAGES

2.1 Principle

The ranking of rights under the enforcement procedure is based on the eight so-called ranks in § 10 (1) ZVG. Rank 1 offers the best, rank 8 the worst right.

Mortgages belong to rank 4. This applies to the related interest and additional payments for the arrears of the current and past two years. Arrears dating back further are assigned to rank 8.

Within rank 4 are all rights recorded in the land register. The ranking of a mortgage is determined by the date of entry in the land register (or a different determination of rank). This priority principle applies to both charges on real property recorded in section III of the land register (mortgage and land charge) with one another and also in relation to the charges and restrictions recorded in section II of the land register (easements, usufruct, etc.).

2.2 Existence of hidden preferences and mortgages: According to the above-mentioned principles, only the rights in ranks 1 to 3 and legal costs have priority over mortgages in the enforcement procedure. They in general have no essential impact on the result of the auction. It should also be pointed out that legal mortgages in principle do not exist under German law. Only the right of lien on a claim for conveyance of title changes after the registration of the transfer of ownership by law into a so-called covering mortgage. This in turn has the rank of the entry made in the land register in favour of the buyer.

2.3 Preferences likely to take precedence over the mortgage

2.3.1 Enumeration

- > Costs of the enforcement (around 4% of the market value). These are to be paid in advance by the creditor enforcing payment and are reimbursed first from the proceeds of the sale. Other legal costs in connection with the enforcement of charges on real property are to be met in the order of the respective main claims (§ 10(2) ZVG).
- > Outlays by the creditor applying for the receivership of the property to ensure its upkeep (rank 1, § 10(1) ZVG): if the receivership lasts until the foreclosure and if it is not covered by the income from the rent or farm rent.
- > Wages of agricultural and forestry workers for the current year and the past year (rank 2, § 10(1) ZVG): only significant in the case of agricultural or forested property.
- > Public charges on the property (rank 3 of § 10(1) ZVG): but only once-only payments of the past four years (most significant example: development costs) and recurrent payments for the year of seizure and the arrears of the past two years (in particular property taxes and dike levies).

2.3.2 Conditions: The conditions relating to preferences have already been stated under 3.1

2.3.3 Rank: The preferences described are ranked as stated under 3.1.

3. EFFECTS OF THE BORROWER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

3.1 Conditions under which the validity of the mortgage constituted during the suspect period (or risk period) may be called into question

Provision is also made in §§ 129 ff. of the Insolvency Ordinance for opposition to insolvency, which can only be exercised by the trustee in bankruptcy in accordance with §§ 130 to 146 of this Ordinance.

Since in mortgage credit the creation of the mortgage precedes the disbursement of the loan or this takes place in instalments against this (so-called matching cover), in mortgage credit the requirements for effective opposition to bankruptcy do not exist in practice - unless the mortgagee at the time of entering into the mortgage knew of a suspension of payment or an application to open bankruptcy proceedings which had already occurred.

The situation would also be different if within 3 months of the suspension of payment or submission of the application to open bankruptcy proceedings a mortgage is created and the creditor, according to the loan contract, had no claim to security through this mortgage (so-called non-matching cover).

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to the classification of his preferential right

The prominent characteristic of the mortgage is that the mortgagee can claim separate settlement under the bankruptcy proceedings (§ 49 Insolvency Ordinance) This means that bankruptcy proceedings which are already in progress or opened later do not prevent the creditor from applying for or continuing the foreclosure or receivership. The trustee in bankruptcy only has the rights of the debtor, i.e. also the claim to surplus proceeds.

If the property is already overindebted through registrations, the trustee is often „released from the bankrupt's estate“, which means has the bankruptcy entry deleted from the land register. There are no special preferences in favour of the costs of the bankruptcy proceedings or similar.

3.3 List of claims which, in the event of bankruptcy, take priority over the mortgage whereas, without bankruptcy, no such priority exists: None.

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy: There is only any difference for the creditor when he has to have the enforcement deed transferred to the trustee (which usually means a delay of about two weeks). In addition, the trustee is usually a lawyer. This means that one is dealing with a critical debtor.

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

Public building charges

The legal basis for public building charges lies in the building regulations of the individual Federal Länder. These are in rem commitments governed by public law. A building charge is regularly created in favour of a neighbouring piece of land or in the interests of an agreed building over several properties if this is considered necessary in the context of a building permit procedure. Examples of this are keeping properties or parts of properties free for roads, car parking spaces, to ensure distances, heights of buildings, etc. In addition, there are many other forms of building charges.

The building charge is never recorded in the land register, but in a list of building charges open to inspection. This registration is however not a prerequisite for the effectiveness of the building charge in some Federal Länder. Furthermore, for the creation of the building charge, the agreement of the mortgagee is not generally required (exception: Saarland).

The building charge is of practical significance as a restriction on the mortgagee therefore mainly when lending on non-built-up land. Here, the mortgagee, prior to granting the loan should inspect the relevant list of building charges which is kept by the building supervisory authorities to satisfy himself about any existing building charges which, as stated above, may impair the value of the property even without a civil agreement (and registration in the land register). Building charges remain unaffected by foreclosure and bankruptcy or insolvency proceedings.

GREECE

I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL

1. CONSTITUTION OF A MORTGAGE [OR A PRENOTICE]⁵⁰

1.1 Who can create a mortgage? The title for the registration of a mortgage on an immovable shall be granted by the debtor of an obligation or by a third person in favour of the debtor of that obligation. Already at the time of the constitution of a mortgage, the grantor must be the owner of the immovable under penalty of nullity which may not be cured by a subsequent acquisition of ownership (Civil Code 1265 & 1271). [A prenotice can only be created by virtue of a court-decision or of a judicial order of payment⁵¹. (Civil Code 1274 and Code of Civil Procedure 724). If the owner of the immovable (debtor or third person) does not oppose the creation of the prenotice, he shall appear before court to express his consent⁵²].

1.2 Procedure – formalities: The title for the registration of a mortgage shall be granted by unilateral deed executed before a notary identifying the immovable on which it shall be established (Civil Code 1266). [The court-decision ordering a prenotice or the judicial order of payment constitutes the title for the registration of a prenotice]. The mortgage [or prenotice] is always linked to a specific claim for an exact amount of money (Civil Code 1269) and takes effect as from its proper registration in the mortgage records at the registry office of the district in which the immovable is situated (Civil Code 1268). The date of registration determines the rank of preference of mortgages [and prenotices], those registered on the same date enjoying the same ranking (Civil Code 1272 & 1300 - 1301).

1.3 Is the mortgage accessory to a loan? The mortgage [or prenotice] is always accessory to the secured claim (of any kind, not only to a loan); by assignment of the claim the mortgage is transferred ipso jure to the assignee (Civil Code 458 & 1312) and by extinction or prescription of the claim the mortgage shall be extinguished.

1.3.1 & 1.3.2 One or two contracts? (credit + mortgage): Although credit and mortgage may also be separate deeds, they are usually made in one and the same contract in practice

1.3.3 Is it possible to pledge real estate for "all present and future debt to the pledgee"? No, a mortgage [or a prenotice] is always linked to a specific (even future) claim.

1.3.4 Reuse of the security when changing lender: "Reuse" of the security when changing lender is only possible in the event that the lender was changed due to assignment of the secured claim (see above 1.3).

1.4 Consumer protection rules with respect to the creation of mortgage collateral: A mortgage registered on more than one immovables of the debtor may at the latter's request be limited to only those whose value provides sufficient security for the claim. Further, if the title granting a mortgage does not fix a certain amount of money and the applicant for registration (the lender) gives such

⁵⁰ While currently operating as one of the conservatory measures that may be ordered following the procedure for provisional remedies (Code of Civil Procedure 706) preliminary seizure similar to the German "Sicherungshypothek"), the Greek prenotice ("Vormerkung") constitutes furthermore an "embryonic" mortgage, since it shall retroactively be converted into a genuine mortgage upon the (secured) claim being adjudicated by a final court decision (Civil Code 1277).

In the recent past almost all loans were secured with mortgage and the respective contracts were drawn up before a notary. However intense competition has recently forced Greek Banks to reduce the cost of a loan and thus led them to change their practice totally: Banks now grant the loan without the assistance of a notary, preferring to draw up the contract in the form of a private document instead of a notarial deed and to secure the loan with a prenotice rather than with a much more expensive (see I 3.1) mortgage. On the other hand, of course, this had the negative consequence that the Banks can no longer take advantage of the provisions (favourable to them) of the legislative decree of 1923 (see details in section II), which only applies if the contract has been drawn up in the form of a notarial deed and the loan is secured with mortgage (see II 1).

⁵¹ The proceeding for "orders of payment" is a quite effective method in Greek law of obtaining a prompt enforceable instrument with regard to money claims.

⁵² In contrast to mortgage, private may not typically confer a title for a prenotice. However, procedural tactics tend to practically establish such an additional method, through the participation of the opponent and his prompt consent before court, most often in order to avoid the increased expenses of a conventional mortgage.

amount by approximation, as provided by law (Civil Code 1269), the debtor shall be entitled to require a proper reduction of the amount given by the lender. Finally, an agreement which is made before the secured debt has become due and whereby, in the event of the creditor not being satisfied in due time, the ownership of the immovable pledged shall be transferred to the creditor or the creditor shall be released from the obligation to carry out the formalities of the enforcement proceedings, will be void.

1.5 Schedule: time necessary to get a mortgage registered and entrusted with official authority: It takes from about five days to two weeks to grant a title and get the mortgage [or prenotice based on opponent's consent] registered, depending on the district where the immovable is situated.

2. REGISTRATION: FUNCTIONING OF THE REGISTRATER

A person applying for registration of a mortgage shall produce the title (see above I 1.2) and two summaries thereof, containing its main terms (Civil Code 1305). Registration consists of entering a summary of the title in the mortgage records of the registry office in the chronological order of submission (Civil Code 1194). [The registration of a prenotice shall only be entered pursuant to a court decision or a judicial order of payment in the same manner as a mortgage with the mention of "prenotice"] (Civil Code 1276).

2.1.Traditional, computerized: Some registries run computerized records, while others are traditional.

2.2 Accessibility: national and cross-border: Registers shall be public and accessible to anyone wishing to consult them, the conditions required for their proper maintenance being observed (Civil Code 1200).

3. COST

3.1 Constitution (fees, notary): About 5% of the secured amount in case of a mortgage. [In case of a prenotice: a fixed amount of about 100,000 GrDrh (300 EURO) irrespective of the secured amount].

3.2. Registration: About 0.75% of the secured amount, in both cases (mortgage or prenotice).

3.3. Others: None.

4. DURATION OF VALIDITY OF THE MORTGAGE

A mortgage shall be extinguished by the extinction or prescription of the secured claim, by the expiration of the period for which the mortgage was granted, by the merger in the same person of ownership and of the right of mortgage, and by the sale in public auction of the mortgaged immovable. A renunciation of the right of mortgage shall take place by a unilateral deed made before a notary (Civil Code 1317 & 1319). [A prenotice shall be extinguished on the same grounds as a mortgage and further: if the decision that had ordered the prenotice has been revoked by a new court decision or the prenotice has not been converted into a mortgage within 90 days as from the date of the final court decision that adjudicated the secured claim (Civil Code 1323)].

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

The forced sale procedure in Greece is governed in principle by the provisions of the „Code of Civil procedure“, (articles 904 - 1054), but if the lender is a Bank, then the forced sale procedures are governed by the provisions of the „Legislative Decree of 17.7-13.8.1923“, (hereafter „The Decree of 1923“)⁵³, provided that:

- > the claim derives from a loan,
- > the loan agreement and the mortgage have been drawn up in the form of a notarial deed, and
- > the loan has been secured with a mortgage on a property.

In any other case (for instance, if the loan is secured with prenotice)⁵⁴, the forced sale procedure is not governed by the “Decree of 1923” but by the Code of Civil Procedure.

1.1 Preliminary measures / actions

a. If repayment of the loan is due, (because the borrower has not paid a loan instalment or has violated any term of the loan agreement), then the creditor (the Bank in our case) can start the forced sale procedure.

b. To start this procedure, one needs an executory title which, in the case of the «Decree of 1923», is the notarial deed by which the loan and the mortgage have been stipulated. [If the loan is not secured with a mortgage but with a prenotice, then a final court decision adjudicating the secured claim is required].

c. In order to start the forced sale procedure, the creditor has to serve a precept⁵⁵ on the borrower (and on the owner of the mortgaged property, if not one and the same person) delivered by a bailiff.

The precept should contain the following (art. 57, par. 2 of the «Decree»)

- > summary of the terms of the notarial deed, by which the loan was stipulated (the names of the lender and the borrower, the amount of the loan, the time when the instalments are due, etc.)
- > analysis of the sums which should be paid and,
- > description of the mortgaged property on which the forced sale procedure has to be applied.

d. Once the precept has been served, as mentioned above, then the Bank can foreclose on the mortgaged property, by filing an application with the competent Mortgage Registry, in which the mortgage on the property in question is registered. Attached to this application should be a copy of the precept and a document from the bailiff certifying that the precept has been served on the borrower. The precept should be recorded in the Foreclosures’ Book, having upon its registration the effect of an “attachment”⁵⁶.

e. The legal consequence of the foreclosure on a property (the same as of an attachment thereof according to the provisions of the Code of Civil Procedure) is that any act of alienation or disposal of the involved property is considered void and produces no legal effects against the petitioning or other announced creditors.

⁵³ The provisions of the Code of Civil Procedure also apply supplementarily to the provisions of the «Decree of 1923», where and when there is no specific provision in the «Decree of 1923». The relationship between the «Code of Civil procedure» and the «Decree of 1923» is namely that between general law and special law (Juris Generali and Juris Speciali).

⁵⁴ See notice 1.

⁵⁵ A formal notice marked by the creditor on the executory instrument and served by the bailiff on the debtor, inviting the latter to voluntary performance, otherwise threatening execution.

⁵⁶ Contrary to the «Code of Civil Procedure» that in respect of the attachment provides for more and different formalities, the only formality required by the «Decree of 1923» is the one mentioned in the text above.

f. Defense of the borrower: Should the debtor deem that the enforceable instrument is invalid, that the enforcement rules have not been complied with or even that the creditor's claim has been paid or set off, he is entitled to oppose the enforcement proceedings by a remedy called "anakopi" (opposition). In addition to this, the borrower can file a separate remedy, asking for the suspension of the forced sale by the court until its decision concerning the opposition has been issued. If the court decides that there are good reasons for believing that the opposition of the borrower will be accepted, then it will suspend the forced sale.

1.2 Forced sale – form and conditions

a. After the registration of the foreclosure, the forced sale of the property should take place within one year, otherwise the foreclosure lapses. The auction takes place on Wednesdays, except in the period between the first of August and the fifteenth of September.

b. Once the foreclosure has been recorded in the mortgage registry, the creditor can give an order to a Notary (who will be the "clerk" responsible for the forced sale) to draw up the programme of the forced sale.

c. Then the programme of the forced sale should be served by a bailiff on the borrower, on the owner of the property and on other creditors. Finally, the programme should be published in a newspaper at least 15 days before the day of the forced sale.

d. The forced sale can take place at least 40 days after the foreclosure on the property, but no longer than one year after the day of the foreclosure.

e. Defence of the borrower:

- > The borrower can file a remedy requesting correction of the programme by the court, if he believes that the programme has omissions or mistakes.
- > The borrower can file a remedy requesting postponement of the forced sale for a period of up to 6 months.
- > Furthermore, in order to attract more potential buyers, the borrower can ask the Court to order additional publication of the programme or change of the place where the forced sale will take place.

1.3 Subsequent measures

1.4 Distribution of the proceeds of the sale:

a. The creditor who has started the enforcement proceedings does not have any direct or indirect right of preference over other announced creditors. In contrast to the Germanic system, which is governed by the criterion of temporal priority, Greek law follows the system of proportional distribution. Any creditor, even if his claim is not based on an executory title, can participate in the distribution of the sale proceeds through a remedy known as "announcement." If the proceeds are sufficient to satisfy all creditors, the notary who has conducted the public auction discharges their claims after the payment of the costs and expenses of the enforcement proceedings.

b. If the proceeds are insufficient to satisfy all creditors, the distribution is accomplished by the "list of ranking" drawn by the same notary and indicating the order in which the claims must be satisfied. Creditors who are subject to the same class share equally the proceeds of the sale, in proportion to the amount of their claims.

c. However one departs from proportionality in two respects: First, to the benefit of creditors enjoying a real security right (a mortgage in our case), whereby the proceeds are distributed according to the time order which ranks the real right of each creditor; and second, to the benefit of creditors enjoying general preferences (including the state and all public entities for their claims existing before the day of the public auction, as well as the social insurance institutions for their claims created within the last six months before the day of the public auction)⁵⁷.

d. In cases of collision among creditors with general preferences and creditors secured with real rights, the sale proceeds are divided into two parts: The percentage of general preferences is limited to one-third of the proceeds, so that the remaining two-thirds are reserved for the satisfaction of the claims secured with mortgage. [Claims secured with a prenotice enjoy an equally preferential treatment to those secured by mortgage, under the condition of conversation-subsequent to the auction- of the prenotice into a full mortgage.]

e. Only after satisfaction of these two "privileged" groups of creditors is the satisfaction of "ordinary" creditors allowed.

f. If the bidder is the lender (the Bank) and provided that the enforcement proceeding was governed by the Decree of 1923, then he has to deduct the debt from the price of the forced sale and the remainder of the amount, if any, should be deposited in the so-called «Fund of deposits and loans», at the disposal of other creditors. If the bidder is someone other than the lender (the Bank), then he has to hand over the money to the notary who has conducted the public auction, and the latter organizes distribution as already mentioned above.

2. WRIT OF EXECUTION

2.1 Conditions to be fulfilled to render a deed (or a judicial decision) enforceable: An enforceable instrument must carry the executory formula for enforcement proceedings to be commenced. The formula consists of an official command addressed to the bodies of enforcement in the name of the Greek people to execute the instrument. In the case of a court decision, the formula is effected by the presiding judge, while in the case of a notarial document the executory formula is entered on it by the notary who has drawn it up.

2.2 Conditions pertaining to and procedure for enforcing a writ of execution within the national territory

a. Enforcement proceedings are not allowed when the claim depends on a suspensive condition or a term. Further, the amount of the claim must be exactly defined in the enforceable instrument. Subsequent determination of such amount through another document is not allowed.

b. A precept⁵⁸ shall be marked by the creditor at the end of a certified copy of the enforceable instrument and shall be served by a bailiff on the debtor, inviting him to voluntary performance, otherwise threatening execution. A precept lapses if enforcement proceedings are not implemented within one year.

2.3 Exequatur (extension of foreign judgments)

Article 905 of the Code of Civil Procedure contains the following provisions with regard to the enforcement of foreign instruments:

"Unless otherwise provided by international conventions, enforcement proceedings based on a foreign instrument may take effect in Greece as soon as this is declared enforceable by a decision of the one-member district court of the debtor's domicile or, in its absence, of the country's capital.

The court declares the foreign instrument as enforceable on the condition that it is enforceable in accordance with the law of its origin and it is not contrary to good morals or public policy".

⁵⁷ All general preferences are listed below (III 1).

⁵⁸ See notice 6.

2.3.1 Description of the procedure for enforcing a foreign writ of execution in your country

The exequatur proceeding tends to adopt the foreign judgment as such. Therefore neither re-examination of the merits nor corrections of the foreign decision are allowed. A request for enforcement is not subject to time limitations. The defendant does not need to be summoned.

The application to obtain an exequatur must be supported by:

- > the foreign instrument accompanied by a Greek translation,
- > assertions and evidence concerning its enforceability in the country of origin,
- > in case of a default decision, evidence of the notification to the defendant.

If the defendant appears, he may only contest the exequatur's prerequisites; he may not bring objections against the claim under enforcement.

2.3.2. Maximum time taken by this procedure: Three to five months. In case of an appeal it would take twice as long.

2.3.3 Existence of any bilateral conventions to simplify procedures

a. Greece has ratified the Community Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1968. ("Brussels Convention").

b. A number of bilateral conventions govern the mutual recognition and enforcement of foreign judgments between Greece and the contracting states. Germany is the only EU Member State with which Greece has such a bilateral convention. This continues to apply only for matters outside the scope of application of the Brussels Convention.

c. International conventions prevail over the requirements of national law when these are more favourable to the request of recognition or enforcement.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1. Who has the right to initiate the procedure for a forced sale? Enforcement proceedings are subject to the principle of the party's initiative, namely that of the creditor holding the enforceable instrument. All procedural steps are to be taken, as a rule, by the creditor who started the original proceedings, and not by the bailiff or by other announced creditors. Although based on the initiative of one creditor, the enforcement proceedings lead to collective results by the remedy of «announcement» (see below 3.3).

3.2 The stage at which this procedure becomes demurable on third parties

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset: At the latest within fifteen days after the public auction, any creditor preserves the right to participate in the distribution of funds realized in the forced sale, through a remedy known as «announcement». (See also II 1.4a). Among creditors enjoying a real security right (a mortgage in our case) the proceeds are distributed according to the time order, which ranks the real security of each creditor. [Claims secured with a prenotice enjoy an equal treatment to those secured by mortgage, under the condition of its conversion into a full mortgage].

3.4 Existence of special preferences that could a posteriori affect the priority of the mortgage guarantee: In cases of collision among creditors with general preferences⁵⁹ and creditors secured with mortgage, the funds realized in the auction are divided into two parts. The percentage of general

⁵⁹ All general and special preferences are listed below (III 1).

preferences is limited to only one-third (1/3) of the funds, so that the remaining two-thirds (2/3) is reserved for satisfaction of the claims secured with mortgage. [Claims secured with a prenotice enjoy an equally preferential treatment to those secured by mortgage, under the condition of conversation-subsequent to the auction- conversion of the prenotice to a full mortgage].

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people): Forced sale of property that belongs to the state is not allowed. Exempt from forced sale are also items used personally by the debtor such as bedding, clothing, furniture, medals, souvenirs, unpublished manuscripts, correspondence etc. or instruments of professional people, farm equipment and the like, on the condition that these are personally used by the debtor to earn his living.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a forced sale procedure (without incident): About three (3) months.

4.2 Maximum possible duration of a forced sale procedure: About two years.

4.3 Most frequently occurring incidents

- a. Opposition to / suspension of enforcement. (See above II 1.1g).
- b. Remedies filed by the debtor before court requesting correction of the programme or the postponement of the forced sale. (See above II 1.2e).

5. COST OF THE FORCED SALE PROCEDURE

5.1 Cost of the procedure

5.1.1 Fixed : /

5.1.2 Proportional (percentage of the adjudication value): About three to eight percent (3% - 8%) of the claim.

5.1.3 Example for an adjudication value of 100.000 Euro

5.2 Who pays the costs? Art. 932 of the Code provides that the costs shall be prepaid by the creditor who takes the initiative to start the enforcement proceedings, but they are finally to be paid back from the funds resulting from the auction prior to their distribution.

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

Code of Civil Procedure 975 – 976.

The classes of claims enjoying “general” preference, according to Article 975, are: 1) Claims concerning the funeral expenses or the medical attendance of the debtor and his family, created within the last twelve months before the day of the public auction, 2) Claims concerning the supply of necessary foodstuffs to the debtor and his family, created within the last six months, before the day of the auction. 3) Claims concerning the performance of employed services, as well as claims of teachers, created within the last six months before the day of the auction. 4) Claims of farmers or of farmers’ cooperative societies from the sale of their products, created within the last 24 months before the day of the auction. 5) Lawyer’s claims for fees, compensations or other expenses, as long as they are created within a year before the day of the auction and are based on a final judgment. 6) Claims of public entities, with all additional fees or interests, based on any legal cause, on the condition that they have matured before the day of the public auction. 7) Claims of social insurance institutions,

created within the last six months before the day of the auction.

On the other hand, the classes of claims, enjoying "special" preference, according to Article 976, are:
1) Claims raised from the necessary expenses to preserve the assets of sale. 2) Claims enjoying a special security right, i.e. pledge or mortgage. 3) Claims concerning the production and harvesting of crops.

2. THE RANK OF PRIORITY BETWEEN PREFERENCES AND MORTGAGES

In cases of collision among creditors with general preferences and creditors secured with real rights, the sale proceeds are divided into two parts: The percentage of general preferences is limited to one-third of the proceeds, so that the remaining two-thirds are reserved for the satisfaction of the claims secured with mortgage. [Claims secured with a prenotice enjoy an equally preferential treatment to those secured by mortgage, under the condition of conversation-subsequent to the auction of the prenotice into a full mortgage]

2.1 Principle

2.2 Existence of hidden preferences and mortgages: None

2.3 Preferences likely to take precedence over the mortgage: Only the claims raised from the necessary expenses to preserve the assets of sale enjoy "special" preference (Code of Civil Procedure 976.1) that takes (full) precedence over claims secured with a real right (pledge or mortgage).

3. EFFECTS OF THE BORROWER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

None (if the creditor is a Bank and the loan is governed by the Decree of 1923)

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

SPAIN

I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL

1. CONSTITUTION

In Spanish law, a mortgage may be created voluntarily or legally.

a. The voluntary mortgage may be done through an agreement between the parties, or may be imposed by the owner of the assets for which it is being created (Article 138 of the Mortgages Act).

Thus it may be created through two different channels of negotiation: one is the agreement between the parties, which is regulated by the mortgage contract of the Civil Code (conventional mortgage), and the other is carried out by the owner's unilateral disposition, regulated in Article 141 of the Mortgages Act.

The special characteristic of the unilaterally-created mortgage is that the acceptance of the beneficiary comes after the delivery and registration. During the period after the unilateral establishment of acceptance, the party who has created it cannot cancel it without the consent of the beneficiary, unless there is a special requirement for the recipient to declare whether or not he or she accepts and this willingness to accept is not proven after a period of two months from the date of the notice.

b. The legal mortgage does not mean that the Law creates it automatically; rather, one must understand by "legal mortgage", those cases when the law accords the right to demand the creation of a mortgage, so that the mortgage is created when the right is exercised, either because the proprietor accepts, or by judicial mandate.

1.1 Who can create a mortgage?

A mortgage may be created by any natural person or legal entity who, at the time of the delivery of the deed, has full access to the property asset, or is duly authorised in accordance with the Laws (Article 138 of the Mortgages Act).

The mortgage involves the establishment of a charge that may involve the future expropriation of the mortgaged asset. The mortgagor must have full capability to work, and there must be no prohibitions on the mortgaged building.

The mortgage may be created by the debtor of the guaranteed obligation or by a third, unrelated party. In this case, the third-party mortgagor guarantees the obligation exclusively with the good(s) mortgaged. Therefore, the third-party mortgagor has no personal obligation.

With respect to the creation of the mortgage through a representative, Article 139 of the Mortgages Act, in reference to Article 1.713 of the Civil Code, requires express power of attorney.

1.2 Procedure: formalities

The mortgage must be formalised by a deed, and the registration in the Land Registry is constitutive, for which reason the mortgage is not created at the time of the delivery of the deed, but rather at the time of its inclusion in the Registry.

Consequently, the mortgage will not exist if the deed is not produced, and the mortgage will only exist from the date of registration in the Land Registry. This means that the rank – meaning the position that the mortgage will occupy with respect to the other existing rights in rem on the estate, for the purposes of their preference (if they are compatible) or their exclusion (if they are incompatible) – will be given on the date of registration of each of them.

1.3 Is the mortgage accessory to a loan or can it be a separate deed? Description of systems and consequences

Under our law, a mortgage, like any real right of guarantee, is dependent on the right to credit, so that in order for a mortgage to exist, the right to credit must exist and be valid.

The extinction of the right to credit means the extinction of the guarantee; despite the fact that the mortgage exists because of its registration, it will be essential to cancel the mortgage in the registry, since, according to Article 76 of the Mortgages Act, registrations with respect to third parties are extinguished by cancellation.

The mortgage is a guarantee dependent on credit that guarantees but is not obliged to appear on the same deed.

1.3.1 One Contract (credit + mortgage)

The most common assumption is that this same deed formalises the credit and the mortgage guarantee. This guarantee may be established on one or various estates, but always bearing in mind the "Principle of Speciality" according to which each mortgaged estate must be assigned the maximum amount of the obligation guaranteed by the responsible party, with the requirement that the sum of the responsibilities assigned to each estate, in the event that there are several, must not surpass the general limit of responsibility guaranteed by the mortgage.

It is also possible, though not common, for a single deed to formalise various credits with mortgage guarantee on one or more estates, as long as there is precise specification of the credit guaranteeing each estate and the maximum amount for which it is responsible. Orchestration in the single document facilitates the determination and identification of the credits guaranteed.

1.3.2 Two Contracts (credit + mortgage)

It is possible to create a mortgage to guarantee one or more previously formalised credits on independent contracts, even if they are not included in the Land Registry, as long as the guaranteed credits are precisely identified and the specifications found in point 1.3.1. are satisfied. If the credit and its guarantee do not figure in the same document, there may be problems in identifying the guaranteed credit.

There is a method called "Maximum Mortgage Guaranteeing Various Operations", according to which it is possible to create a mortgage on one or several estates to guarantee various previously formalised operations together, without having to determine the operation guaranteed by each estate, as long as the operations are precisely identified.

1.3.3 Is it possible to pledge real estate for "all present and future debt to the pledgee"?

This is not possible. The operations in progress that are to be guaranteed must be precisely identified without allowing formulas of universal responsibility. The possibility of mortgage in guarantee of future operations is generally not admissible, except in very concrete cases of precisely identified obligations about which there is a certain security or possibility that they will exist, and their existence is subsequently accredited in the Registry.

1.3.4 Reuse of the security when changing lender

The guarantee only exists with respect to the operation(s) guaranteed by its establishment, and cannot be re-used by the same creditor or other party to guarantee other obligations, except in the possible situations described below.

In the case in which a new mortgage is granted by another lender, he or she will replace the former lender in the mortgage without the need for consent, and the new loan is guaranteed under the same conditions, as long as the following apply:

- > The two operations (that of the former lender and that of the new lender) are loans.
- > The two lenders are Financial Entities.
- > The old loan is paid off by the new loan.
- > The substitution document will only establish new conditions on the type of ordinary and moratory interest. The rest of the conditions agreed upon in the previous loan will be applicable to the new loan.

1.4 Consumer protection rules with respect to the creation of mortgage collateral

There are two types of rules:

There are specific rules for mortgage, which include:

- > Delivery of a brochure by the credit entities to all clients upon request, containing the economic conditions that apply to the new mortgage operations. The minimum content of the brochure is determined by Law (maximum quantity with respect to the appraisal value, period, frequency of payment, form of repayment, type of interest, expenditures, etc.). This brochure is free of charge and the information inside is for informative purposes only, and is not binding for the entity, except for the commissions to be applied.
- > Once the verifications have been duly made on the estate and on the financial capability of the client requesting a mortgage, the credit entity will be responsible for making a loan offer to the potential borrower, or to notify him or her that the loan has been denied. The offer must be made in writing; it will be valid for a period of at least ten working days, and it must specify the financial conditions applicable to the loan and the anticipated causes of expiry. The content of the binding offer is determined by Law (amount, form of delivery, repayment schedule, conditions for anticipated repayment, type of ordinary interest, interest on arrears, causes for an anticipated resolution by the entity, etc.).
- > The borrower has the right to examine the draft deed, and this is included in the binding offer, in the office of the Notary for at least three working days before formalisation.
- > The Notary must advise the borrower and verify that there are no discrepancies between the conditions of the document and those of the binding offer, the nature and values of the type of reference that has been used in determining the type of interest, the conditions for anticipated repayment, and generally to oversee compliance with consumer protection standards.
- > In the case of variable interest, the new applicable type must be reported to the client beforehand, unless one of the references used is considered official, and is published in the Official State Bulletin and in the Bulletin of the Bank of Spain.

The general rules for the protection of consumer rights include:

- > The applicable commissions must be published and authorised by the Bank of Spain.
- > For each liquidation, a document must be delivered to the clients, indicating the types of interest and commissions applied, the amount of the payments, and the period liquidated.
- > The existence of a Complaints Service within the Bank of Spain, to which clients may direct complaints about the standards of discipline and good banking practices and uses. Its report is not binding on the credit entities.
- > Complete nullity of all abusive clauses and conditions, including those that have not been negotiated

and that harm the consumer by putting him or her at a significant disadvantage with respect to the rights and obligations of the parties. Those clauses that, without discussion and in all cases, are considered abusive, are determined by Law.

1.5 Schedule: time necessary to get a mortgage registered and entrusted with official authority

There is no time period for registering a mortgage in the Land Registry, although notaries have the obligation to report the delivery of these documents to the registry:

- > On the day that the deed is delivered, the Notary has the obligation to send to the Land Registry, by fax or any other method, competent communication of having authorised the deed. This communication will permit the extension of a presentation entry that will expire if an authentic copy of the corresponding deed is not presented to the Registry within ten consecutive working days.
- > Once the deed has been presented within the cited period, the Registry will again make a presentation entry, this time for a period of 60 working days, with the possibility for extension; the rank of priority obtained in the initial entry is maintained.
- > Once the presentation entry originated by the Notary's communication has expired, the presentation of the deed also allows for a new presentation entry; however, in this case, the rank of priority of the mortgage is determined by that of the new entry.
- > Registrations must be carried out in all cases within the period of validity of the entry created by the physical presentation of the deed, or its possible extensions.

2. REGISTRATION: FUNCTIONING OF THE REGISTER

2.1 Traditional. Computerized.

There is only one system of registration and operations of the Land Registry, based on the notary communication and presentation entry mentioned in the previous section.

Within the term of the presentation entry, the document must be assessed and registered. If the registration is not done because of defects that can be rectified, then the interested parties can rectify them within the term of validity of the presentation entry or have recourse to qualification.

The registration of the mortgage in the Registry is constitutive, and it only exists starting on the date of its inclusion in the Registry.

The important basic principles on the operations of the Registry are:

- > The principle of priority: the first act to be registered is exclusively preferred (superiority of rank) over any other that has not been presented, or that has been presented afterward, even if it is from an earlier date.
- > The principle of chain of title: to register or annotate deeds for which the control and rights in rem are declared, transmitted, modified or extinguished on property assets (among them the mortgage), there must first be the written or annotated right of the grantor or the individual in whose name the mentioned acts are granted. In the event that the right is registered for a different person, the registration will be denied.
- > The above-mentioned principle of speciality.
- > The principle of assessment: the assessment of deeds that are to be registered includes assessment of the legality of the form of the deed itself, the capability of the granters, and the validity of the acts contained, in accordance with applicable law.

2.2 Accessibility: national and cross-border

In order for the mortgage to have access to the registry (except for certain special mortgages that are not common in commerce), it must be formalised in the form of a public document delivered to a Spanish Notary.

Documents delivered in a foreign country may be registered as long as they contain the legalisation and other requirements for its authenticity in Spain. In this sense, mention must be made of the Hague Convention of 5 October 1961 ("Apostille"), ratified by Spain, which abolishes the requirement of legislation for certain foreign public documents.

The observance of foreign forms and solemnities and the necessary legal aptitude and capability for delivery may be accredited through, among other means, a report by a Notary or a Spanish Consul, Diplomat, or official who is competent in the applicable legislation. The Registrar is authorised to disregard these means if he or she has sufficient knowledge of the foreign legislation and includes this information in the corresponding entry.

Documents not issued in Spanish are to be translated for the purposes of the Registry, by the Language Interpretation Office or by a competent official authorised by international laws or agreements, and, if applicable, by a Notary, who will be responsible for the translation. The Registrar will be authorised to disregard the need for an official translation if he or she knows the language.

2.3 Body in charge of registration

The Land Registries are part of the Ministry of Justice, under its General Registries and Notaries Directorate.

Each Registry is headed by a Registrar, who is responsible for it and whose principal duty is to assess and register the documents. Registrars are public officials of the Ministry of Justice, but they enjoy independence in their duties, and their decisions may be appealed through the above-mentioned General Registries and Notaries Directorate.

3. COST

3.1 Constitution (fees, notary): Notary fees, calculated on the maximum guaranteed amount and folios used.

3.2 Registration

> Registrar fees, calculated on the maximum guaranteed amount.

> Tax on Documented Legal Acts, also calculated on the maximum guaranteed amount.

The percentages approximately included in all of the mentioned expenditures with maximum guaranteed amounts are indicated below:

Maximum Amount	Notary	Registry	Taxes	Total
5,000,000	1.20	0.56	0.50	2.26
10,000,000	0.73	0.37	0.50	1.60
15,000,000	0.52	0.28	0.50	1.30
20,000,000	0.41	0.23	0.50	1.14
50,000,000	0.28	0.20	0.50	0.98

3.3 Others: For the purposes of studying and making a decision on an operation, credit entities normally require updated registered certification that justifies the absence of charges on the estates to be mortgaged and their appraisal; the cost of issuing this certificate is paid by the client.

4. DURATION OF VALIDITY OF THE MORTGAGE

The action of the creditor derived from the mortgage expires in twenty years from the day on which it was executed.

The registration entry will be cancelled by expiry once twenty years have passed from the day of the loan, whose guaranteed compliance must be satisfied in its entirety, on express request, and as long as there is no entry indicating a judicial complaint or modification of the deed.

There is also a specific judicial procedure for the release of mortgages that have expired.

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

1.1 Preliminary measures/actions

- > Before beginning a distraint procedure, the Court can be requested to adopt cautionary measures such as preventive seizure of the unmortgaged property or the constitution of the mortgaged property in administration in order to pay the credit with its rent or fruits.
- > The procedure of property expropriation begins with the request for distraint accompanied by the legally required documents, first to require the debtor to repay the claimed amounts. If the debtor does not pay within the anticipated period, it is decided to seize the properties, except when these are mortgaged to guarantee the debt, and the corresponding certification of deeds and charges of the seized or mortgaged properties are obtained from the Land Registry.
- > Once the certification is obtained, the seized assets are appraised by a Court-appointed expert who is familiar with the distraint; this appraisal is not necessary in the case of mortgaged assets, as their appraised value is fixed beforehand in the deed creating the mortgage.
- > Once the type of appraisal has been determined for auction purposes, which is the result of deducing the amount of charges on the property preferentially to that of the distrainer, we proceed to the sale.

1.2 Forced sale: form and conditions

The Law establishes three possible procedures for the sale of seized or mortgaged properties:

- > Sale agreement between the distrainer, the distrained party and any individual who accredits legitimate interest in selling the property in the best possible conditions; this agreement must be approved by the Judge transacting the distraint.
- > Sale by a person or specialised entity designated by the Court after petition by the distrainer or the debtor, in this case with the consent of the distrainer, in order to proceed to the sale of the property under the predetermined conditions and time period.
- > Judicial auction, which would be held one time. The Law provides different results of the auction depending on the percentages that may be reached by the different bids on the type of appraisal, including the possibility of auction without bidders.

1.3 Subsequent measures:

- > In the case of sale of the seized or mortgaged property, the Court rules in favour of the highest bidder, who constitutes the property deed to register the estate in the Land Registry, and will send for the seizure or the notice of distraint and subsequent charges on the property sold, a warrant that is also registered in the Land Registry.
- > There will also be an order to deliver the property into the possession of the distrainer, except when there are occupants with the right to enter the property.

1.4 Distribution of the proceeds of the sale: description and possible incidents

- > The proceeds of the sale of the property that has been seized or mortgaged go first to pay the distrainer the amounts claimed as principal and, after appraisal and liquidation, as interests and costs. In the case of mortgage liquidation, the total to be paid to the distrainer cannot exceed the limits of liability to which the estate was affected by each of the costs that can be claimed.
- > Any remaining proceeds go to pay any subsequent charges. If there are none, then the remaining proceeds are given to the distrained party, except when the debt exceeds the limits of mortgage liability, in which case it will be paid to the distrainer of this debt.
- > The proceeds of the sale will be delivered to a creditor other than the distrainer if a binding judgement has not been obtained in his or her favour in proper arbitration proceedings established by Law.

1.4.1 Lender's right on his borrower's right to rent

The distraining lender can request the Judge to establish the property in administration to pay the debt claimed with the proceeds from rent. The designated Administrator must be accountable to the Court that designated him or her.

1.4.2 What happens if the borrower has renounced his right to his rent?

If the borrower has waived the right to rent out the property and, despite this, the property is being rented out by the purchaser of the estate, either by extrajudicial sale or by sale at auction, then he or she can exercise the actions against the debtor as well as against the tenant.

1.5 Consumer protection rules in the context of a foreclosure procedure

The distrained party can petition the Court for nullity of the seizure when legally non-seizable assets have been seized; he or she can also request its reduction or modification when the seizure is considered excessive in relation to the amount claimed or when the guarantee can vary without endangering the purpose of the distraint.

2. WRIT OF EXECUTION

2.1 Conditions to be fulfilled to render a deed (or a judicial decision) enforceable

Our Law recognises two types of executive deeds, judicial and extrajudicial:

- > The judicial type includes judicial rulings and resolutions of the binding sentence, the binding arbitral awards and judicial resolutions that approve transactions or agreements between parties. The executive action based on these deeds will expire if it is not exercised within the five consecutive years following the binding sentence, award or ruling.
- > Public documents, certificates of commercial contracts taken over by a public officer, bearer documents or legally-issued registered documents, and stock vouchers represented in debits, are all extrajudicial executive titles. In this case, a distraint will be transacted only for a quantity above 50,000 pesetas in cash, in convertible foreign currency or in tangibles or in kind, that may be calculated in terms of cash.

2.2 Conditions pertaining to and procedure for enforcing a writ of execution within the national territory

We are interested in the procedures of money distraint and expropriation of pledged or mortgaged assets, in terms of the fundamental activity of the Credit Entities.

2.3 Exequatur (extension of foreign judgements)

2.3.1 Description of the procedure for enforcing a foreign writ of execution in your country

There are three methods for making a foreign judicial ruling enforceable in Spain.

- > Conventional. It is necessary for there to be a treaty between Spain and the country of origin of the ruling. The treaty simplifies ordinary paperwork.
- > De facto reciprocity. This method enters into play when there is no bilateral treaty, and its application is subsidiary. In practice, it is not operative because of the difficulty in proving the regime of reciprocity (de jure or de facto) of treatment in the country of origin of the ruling.
- > Independent internal control. This comes into play when there is no treaty and reciprocity cannot be proven.

In this case, the foreign ruling must meet four requirements:

- > It must refer to a personal action
- > It must not have been pronounced by default
- > The basic obligation of the ruling must be licit in Spain

The ruling must meet the requirements to be considered authentic and have authority to attest in Spain.

Petition	<ul style="list-style-type: none"> - Written with the signature of the barrister and solicitor to the High Court - Legalised testimony of the ruling ("Apostille" of the Hague Convention) - Translation.
Summons	<ul style="list-style-type: none"> - The summoned party has nine days to formulate further arguments - The legal proceedings are passed on to the Attorney General's Office for nine days, so that it may issue a sentence on the matter
Ruling	<ul style="list-style-type: none"> - The High Court will adopt a resolution granting or denying the official approval. - This ruling may not be appealed.

2.3.2 Maximum time taken by this procedure

We are not able to specify the term in which the ruling is issued.

2.3.3 Existence of any bilateral conventions simplifying procedures

The official approval procedure may be simplified by the application of a bilateral convention.

Spain has signed and ratified bilateral treaties on this subject with the following countries: Switzerland, Colombia, France, Italy, Germany, Austria, Czechoslovakia, Israel, Mexico, Brazil, China, Bulgaria, Morocco, the USSR, Uruguay, and Romania.

As a member of the European Economic Community, Spain has signed the 1968 Brussels Convention, which includes all of the countries of the European Union.

This Agreement establishes a very simplified procedure for obtaining official approval of the judicial rulings given in one of the countries that has signed the Convention.

These simplifications are:

- > The party against whom the distraint is requested does not have the right to formulate further arguments, although he or she does have the right to appeal.

- > It is the jurisdiction of the Court of First Instance, not the High Court, although it is possible to appeal to the High Court.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1 Who has the right to initiate the procedure for a forced sale? The action of the mortgage distraint is the responsibility of the creditor, who must accompany the request with the deed that meets all of the formal requirements of the Law. For the distraint of mortgages that have been created in favour of Entities authorised to establish the mortgage loans or credits, it will be sufficient to present, along with the request, Land Registry certification of the registration and subsistence of the mortgage, along with a copy of the mortgage deed, total or partial; the latter is only in reference to estates to be distrained.

3.2 The stage at which this procedure becomes demurrable on third parties: The rights of third parties registered subsequent to the registration of the mortgage can be protected with respect to the creditor before the procedure has begun. In another case, the appropriate procedural moment for third parties to be informed of the existence of the procedure is when this existence is accredited to the Court through the certification of title deeds and registry charges that should be contributed to the distraint once the request for payment has been made.

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset: Subsequent creditors may participate in the appraisal of the properties for auction when the distraint is decreed by seizure, and but in the mortgage procedure in which the value of the assets is previously determined in the mortgage deed. Also, it is established that the creditors can judicially consign mortgage responsibility in distraint to substitute in the rights of the plaintiff.

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee: In our Law, certain rights can affect the mortgage rank in favour of Public Institutions or Entities, such as Public Finance or Social Security, salary credits and rights recognised by the Horizontal Property Act.

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people): The Law establishes that, if the mortgaged property is a family residence, the distrained party – one time only, and without the consent of the plaintiff – can free the consigned asset from the unpaid payments or expired periods and interest on arrears.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a forced sale procedure (without incident): Although this depends on the city and the Court in which the distraint is processed, the average term of distraint is currently between 7 and 9 months.

4.2 Maximum possible duration of a forced sale procedure: When there are important incidentals (which are not common in this type of procedure) we cannot specify the maximum duration.

4.3 Most frequently occurring incidents

- > Delays caused by unsuccessful notifications to the debtor or previous creditors
- > Opposition by the debtor, citing errors in the determination of the quantity that can be claimed.

4.4 Typical duration of the distribution procedure: 3 months.

5. COST OF THE FORCED SALE PROCEDURE

5.1 Cost of the procedure:

5.1.1 Fixed: All of the costs of the sale are variable, depending on the amount of the credit being distrained and the sale price, excepting the judicial or notarial communications costs.

5.1.2 Proportional (percentage of the adjudication value)

- > Barrister fees (on the amount of the judicial claim)
- > Solicitor fees (on the amount of the judicial claim)
- > Land Registrar fees (on the amount of the mortgage responsibility)
- > 7% Estate transfer (on the adjudication value)

5.1.3 Example for an adjudication value of 100,000 euro

Legal Counsel: Fees calculated according to the guiding scale of the College of Barristers of Madrid, based on the calculation of the amount of the claim. In this case, 100,000 Euros (including 16% VAT). 8,957 EUR

Solicitor: Fees calculated according to the guiding scale of the College of Solicitors of Madrid, based on the calculation of the amount of the claim. In this case, 100,000 Euros (including 16% VAT).	811 EUR
Land Registry: Percentage on the quantities guaranteed by the mortgage	150 EUR
Communications	60 EUR
SUBTOTAL	9,978 EUR
Land Registry: Percentage on the quantities guaranteed by the mortgage	7,000 EUR
TOTAL	16,978 EUR

5.2 Who pays the cost? The cost of the distraint (legal counsel, solicitor and registration expenditures) would, in principle, be sustained by the distrainer. Subsequently, and once the mortgaged asset(s) have been sold at auction, the creditor will be able to recoup these expenditures against the property that has been sold, as long as the amount obtained at the auction allows. The Estate Transfer Tax (7% on the sale price) will be paid by the successful bidder on the estate that has been auctioned.

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

The legal regulation relative to the creation of the mortgage and its hierarchy are to be found in the Civil Code, the Trade Code and the Mortgages Act and its Regulations.

2. THE RANK OF PRIORITY BETWEEN PREFERENCES AND MORTGAGES

2.1 Principle

The mortgage right in rem gives preference to its holder with respect to the value of the assets mortgaged with respect to ordinary or regular creditors, those without special privilege, or those that are superior to that of the mortgage.

The hierarchy of different mortgages on a single asset is determined in accordance with the principle of temporal priority, with respect to the date of registration, so mortgages with earlier registration are preferred over those registered later. Priority is thus determined by the date of registration, and not the date of formalisation of the deed.

The place occupied by each mortgage in the Registry is called the rank (first, second, third, etc.). The rank can be permuted, downgraded or even subordinated by the interested parties.

2.2 Existence of hidden preferences and mortgages: Although the creditor's right to the mortgage is constituted and registered, there can be other creditors with the right to payment who are preferential to the creditor.

2.3 Preferences likely to take precedence over the mortgage

- > Superprivilege of workers, for the salaries of the last 30 days worked (Article 32.1 of the Workers' Statute).
- > Privilege in favour of the State on property assets for the amount of the most recent expired and unpaid annuity on them (Articles 71, 73 and 74 of the General Tax Act and 1923.1 of the Civil Code).
- > Privilege of insurers on the assets covered by two years of insurance premiums (Article 1923.2 of the Trade Code)
- > Privilege of the credits of the proprietors' association for unpaid community payments corresponding to the present year and the year before.

3. EFFECTS OF THE BORROWER'S / OWNER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

First, Spanish law only allows for individual merchants or businesspeople and companies to declare bankruptcy. Civil debtors must turn to the file of the meeting of creditors, whose consequences are different than those of declaration of bankruptcy.

Bankruptcy rarely occurs unexpectedly. Normally, it is preceded by a more or less long period in which the businessperson attempts first to remedy the situation and then to reduce the effects of bankruptcy through operations on his or her assets, which may be damaging to all creditors, or which may benefit some and harm others.

For the purpose of providing protection to creditors in these operations, the Spanish system authorises the judge to decide whether or not to determine the date to which the effects of the declaration of bankruptcy are retroactive, so that all acts of authority or administration after the date fixed by the judge will be void without further formality.

If the judge does not deem it necessary to set back the date of the bankruptcy to a time before its declaration, the acts of administration and control subsequent to the date of this declaration will be void.

This is absolute nullity, which will affect everyone, independently of whether the third party is unaware or has good faith (Article 878 of the Trade Code).

The Law completes the system of reintegration, also establishing suspicious periods which would be counted backwards from the date on which the retroaction is definitively established, in virtue of which:

- > Certain acts carried out during periods prior to the date of retroaction are considered void and ineffective (Articles 879 and 880 of the Trade Code).
- > Certain acts can be annulled if there is proof of fraud (Articles 881 and 882 of the Trade Code).

In consequence, despite being created and duly registered, mortgages may be declared void due to the effect of the declaration of bankruptcy and the establishment of the date of retroaction. The establishment of this date by the judge is discretionary. This nullity will also extend to the procedure of distraint if it has been done.

The only legal exception in mortgage matters that our legislator has introduced in recent years to the regime of nullity brought on by the declaration of bankruptcy and the establishment of its period

of retroaction, is the exception of mortgages that are protected by the legislation of the mortgage market, whose regulation is found in Law 2/1981 of 25 March and its Regulation adopted by Royal Decree 685/1982 and modified by 1.289/1991.

This regulation is exceptional and refers exclusively to property mortgages (excluding naval mortgages and mortgages of superposition of guarantee of other already existing obligations). It refers to mortgages that can cover the issuing of mortgage market deeds and must also meet certain conditions.

3.1 Conditions under which the validity of the mortgage constituted during the suspect period (or risk period) may be called into question

Aside from those mortgages created under the legislation of the mortgage market, in accordance with the above-mentioned system of retroaction, we may distinguish various possible cases:

- > If the mortgage has been created after the date of retroaction of the bankruptcy, it will be automatically void.
- > If the mortgage has been created within the month prior to the date of the retroaction of bankruptcy and guarantees debts from earlier dates or cash loans whose delivery is not verified (for example, debt refinancing), the mortgage will be considered fraudulent and ineffective (Article 880.4 of the Trade Code). In this case, there is a legal presumption with respect to the existence of fraud.
- > If the mortgage was created within the two years prior to the date on which the effects of the retroaction were fixed, the mortgage may be subject to revocation as long as the simulation made in fraud of creditors was proven (Article 882 of the Trade Code).

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to the classification of his preferential right: The creditors affected by the declaration of bankruptcy in the manner that we have mentioned in the above section, can lose their mortgage right and thus the right to execute their credit separately from the rest; they must meet with the rest of the creditors, and be subject to the liquidation operations of the bankruptcy.

3.3 List of claims which, in the event of bankruptcy, take priority over the mortgage whereas, without bankruptcy, no such priority exists: The declaration of bankruptcy will modify the mortgage privilege (the right to separate distraint) only if its establishment is affected by the retroaction period. Credits preferable to mortgages (see section 2.2) can exist independently of the declaration of bankruptcy. It is evident that, in a context of a suspension of payments, there are more possibilities for these preferential creditors to appear.

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy: The declaration of bankruptcy does not modify the conditions of distraint when mortgaged property assets are being sought, as they can be distrained separately. One exception to this principle would be if the retroaction date were earlier than that of the creation of the mortgage. In this case, the distraint could be paralysed.

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

There are no risks other than those mentioned above. However, we must mention that the Spanish Government is currently concluding a new Bankruptcy Act that should enter into force this year, in 2001, thus meeting the commitment that was publicly accepted when the New Civil Lawsuit Act entered into force in January 2001. It is a modern, advanced law that will put an end to the problems of legal insecurity that result from the institution of the retroaction of the bankruptcy.

FRANCE⁶⁰**I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL****1. CONSTITUTION****1.1 Who can create a mortgage?**

In French law, a mortgage is a right in rem relating to real estate, accessory to a loan. Article 2114 of the Civil Code defines it as follows: "A mortgage is a right in rem on the properties charged as security for the fulfilment of an obligation."

A mortgage can be contractual, registered by order of the court or statutory. We will only look at contractual mortgages here.

A contractual mortgage is created by the owner (private individual) of real estate or by the holder of a right in rem relating to real estate on one or more given properties.

Only the owner of the property, with the power to dispose of the properties in question, can create a mortgage. It must be noted that a mortgage on the family residence must be agreed to by both spouses, whatever their system of marital property and nationality.

1.2 Procedure: formalities

A contractual mortgage is created by a contract.

It must be noted here that in French law, the term "contract" can cover both the agreement between the parties and the instrument that records this agreement. The mortgage is created by a contract that records the commitment of the owner creating the mortgage, and it is recorded by an instrument, the mortgage instrument.

The mortgage instrument must be executed in the presence of a notary (i.e. it must be an authenticated deed).

The mortgage is validly created by the contract. However, it only becomes binding on third parties and comes into force after registration at the mortgage registry.

French law also contains a right to preferential payment attaching to specific immovables known as the "money lender's preferential right". The rights conferred by the money lender's preferential right are comparable to those conferred by the mortgage, but the preferential right is conferred by the law and comes into force on the day on which the loan agreement is signed and the payment is made, if it is registered in due time.

The money lender's preferential right can be registered if the (officially recorded) loan agreement states that the loan was intended for the purchase and, by acknowledgement from the vendor, that the payment was made using the borrowed sum.

Unless otherwise specified, developments relating to the mortgage are applicable to the money lender's preferential right.

1.3 Is the mortgage accessory to a loan or can it be a separate deed? By definition, in French law a mortgage is an accessory to a loan.

1.3.1 One contract (credit and mortgage)**1.3.2 Two contracts (credit and mortgage)**

The mortgage charge contract is legally separate from the credit agreement, in that the parties'

⁶⁰ With respect to France, it should be noted that changes relating to the law on sureties, sales procedures and notary taxes have recently occurred in French legislation.

agreement relating to the loan and the parties' agreement relating to the creation of the mortgage are not combined.

However, in practice in most cases, the notary records the credit and the mortgage in the same deed and in this sense a mortgage loan contract is concluded.

However, it is possible to delay the creation of the mortgage by authorising a mortgage undertaking or a mortgage mandate. These procedures do not call into question the accessory nature of the mortgage; even if it is taken after the loan, it is not independent from it.

Mortgage undertakings or mortgage mandates have the disadvantage of not ensuring the creditor's rank and only give rise to obligations to do.

1.3.3 Is it possible to pledge real estate for "all present and future debt to the pledgee"?

The debt secured by the mortgage must be specified. It is not therefore possible to create a mortgage "for all present and future debt to a creditor".

1.3.4 Reuse of the security when changing lender

Repayment of the principal original debt: If the lender is changed, the original debt is usually repaid, using a loan granted by the new lender. Given the accessory nature of the mortgage, the first registration becomes void, and the new lender has to register a new mortgage to secure its loan.

Assignment: However, if a debt is paid by a third party, French law allows for the creditor's rights to be assigned to them. This means that the rights of the original creditor can be assigned to the new lender. The Civil Code provides for two methods (art. 1250):

- > assignment by the creditor, who receives his payment from a third party; this assignment must be express and carried out at the same time as the payment, which obviously implies that the original creditor is agreeable to receiving the payment;
- > assignment by the debtor, who assigns the rights of the original creditor to the new lender; legally, this assignment is carried out "without the co-operation of the creditor", but if the latter refuses to sign the acknowledgement of assignment, the operation is made more difficult.

Assignment of debt: If the debt is assigned, the mortgage is transferred to the assignee at the same time as the assigned debt.

The new creditor, the assignee of the debt, must in principle carry out the formalities set out in the Civil Code to make the assignment binding on third parties, and request a marginal note on the entry in the mortgage register.

However, the law allows for certain methods of assignment of debt that are exempted from these formalities (particularly in the context of securitisation, or assignments to real estate credit companies).

1.4 Consumer protection rules with respect to the creation of mortgage collateral

The creation of a mortgage does not give rise to specific consumer protection measures; such protection is amply provided by:

- > for mortgage loans, the credit agreement procedure,
- > in general, the intervention of the notary, who is bound by a duty of counsel.

2. REGISTRATION: FUNCTIONING OF THE REGISTER

2.1 Traditional, computerised: In France, the mortgage registry functions traditionally in that entries are made on slips of paper with a standard format. Work to computerise the system is underway and has been facilitated by recent legislation.

2.2 Accessibility: national and cross-border: Any person can request mortgage information without having to prove any specific interest. There are no conditions relating to the nationality or place of residence of the requester. However, requests for information must comply with strict formalities and be submitted on a form provided by the authority (or compliant with the authority's template). There is currently no electronic information request system. The rules for consulting the land register (in Alsace Lorraine) are slightly different.

2.3 Body in charge of registration: The land registration department is part of the ministry for finance, and more specifically the General Tax Division. The organisation is centred around the offices of the mortgage registry, distributed over the whole country. In Alsace Lorraine (made up of the departments of the Bas Rhin, Haut Rhin and Moselle), there is a Land Registry judge.

3. COST

The costs of creating the mortgage include:

- > The notary's fees, for the authenticated deed;
- > The costs incurred for land registration;
- > The «disbursements» such as the cost of mortgage statements, or the mortgage registrar's «salary».

For a loan of € 100,000 in mainland France, the cost of mortgage registration is in the region of € 2,206, i.e. 2.2% of the amount of the secured obligation; this cost can be lower when the mortgage secures certain welfare loans (subsidised or regulated loans), or when the operation can be guaranteed by a money lender's preferential right (€ 1.469), as certain taxes are not collected in this case.

4. DURATION OF VALIDITY OF THE MORTGAGE

The mortgage comes into force on the date on which it is registered.

The moneylender's preferential right must be registered within two months after the contract of sale; it then comes into force from the day of the contract of sale. If the two-month deadline is not met, it deteriorates into a mortgage and comes into force on the date on which it was registered.

The registration protects the preferential right or mortgage for a variable period, set by the creditor, depending on the term of the debt:

- > if the last due date is set in the future, the registration can be effective until up to two years after this due date, within a limit of 35 years;
- > if the last due date has not been set, or if it is prior to or concomitant with the registration, the registration can be made for a period of 10 years.

The mortgage can be renewed before the expiry of the time limit.

II. ENFORCEMENT PROCEDURE ON A PROPERTY

Preliminary comments

The procedure described applies to the sale of real estate in France, with the exception of the departments of the Haut Rhin, Bas Rhin and Moselle («Alsace Lorraine» or «Alsace Moselle»), where a specific enforcement procedure applies. This special procedure is characterised by the important role given to the notary, who is appointed by the district court when it issues the order to commence the procedure.

The real estate foreclosure procedure is public.

The special procedure for real estate credit companies and certain credit institutions created by the decree of 1852 has been abolished.

If a collective procedure is taken against the borrower («bankruptcy»), specific measures for realising the assets through foreclosure are introduced. It must be remembered that collective procedures lead to the suspension of individual proceedings, and do not therefore enable the creditor to take proceedings for foreclosure.

Whatever form the forced sale takes, certain features relate to the existence of a variety of preferential purchase options.

1. BRIEF OUTLINE

1.1 Preliminary measures/steps

Before any legal proceedings commence, a variety of amicable debt recovery measures are implemented in accordance with each lender's particular policy. The borrower may in addition benefit from procedures for dealing with situations of overindebtedness set out by the Consumer Code.

Obtaining a writ of execution: A creditor who wishes to pursue the forced sale of its debtor's real estate to obtain payment of good, liquid, payable sums due to it must have or obtain a writ of execution (Civil Code art. 2213 and former Code of Civil Procedure art. 551).

In theory, the real estate lender will have an authenticated deed endorsed with the writ of execution.

If not, it will first have to have its debtor ordered to pay by the courts, before starting the foreclosure procedure on the basis of a final judgement endorsed with the writ of execution.

Serving of an order to pay:

For the sale to take place, the creditor must have an order to pay the sums due with a view to foreclosure served on the debtor by a bailiff.

The order must contain certain compulsory elements, set out in article 673 of the former Code of Civil Procedure:

- > Mention of the writ of execution,
- > Copy of a special power to foreclose,
- > The warning that if payment is not made, the order may be registered at the mortgage office and will constitute foreclosure from the time of registration,
- > Indication of the foreclosed property, together with various elements allowing for it to be accurately identified,
- > Copy of the register of the land tax roll for the foreclosed property;
- > Indication of the court before which the forced sale will be carried out;

- > instruction to counsel to conduct proceedings;
- > Indication that the debtor can request that the foreclosure be converted into a voluntary sale.

If the debtor is an individual, the order must also specify the following:

- > Indication that the debtor may, if they are in a situation of overindebtedness, refer to the commission for the overindebtedness of private individuals;
- > Indication that the debtor may obtain legal aid;
- > Finally, indication that the debtor may contest the reserve price if it is obviously too low, if the foreclosure relates to the main residential property.

Registration of the order to pay – Foreclosure

If payment is not made, the registration of the order at the mortgage registry of the area in which the real estate is located constitutes foreclosure of the property. The foreclosure is effective from the filing of the order to pay at the mortgage office (art. 686 of the former Code of Civil Procedure).

The order must be registered within a maximum of 90 days from the time it is served, otherwise it is null and void and must be reissued.

A writ of attachment is valid for three years; beyond this time, a judgement extending its effects is required.

Terms and conditions of the sale

Filing of the terms and conditions: Within 40 days following the registration of the order, the execution creditor's solicitor files the terms and conditions of the sale with the registry of the Regional Court before which the sale by auction of the foreclosed property will take place.

This document contains a statement of the writ of execution, the order registered, the description of the foreclosed property, the conditions of the sale (terms and conditions of payment and guarantees to be provided by the purchaser) and the reserve price set by the execution creditor.

Summons to examine the terms and conditions: A week after the terms and conditions are filed with the registry, the bailiff summons the debtor and the creditors with a security registered on the property to examine the terms and conditions and to submit their objections and comments three days before the possible hearing.

Objections and comments of the parties: possible hearing: The hearing only takes place if comments or objections have been raised (hence its name). Its date is set in the summons, together with the date of the sale.

If there are no objections, or after they have been settled at the possible hearing, the terms and conditions become final and the formalities of advertising with a view to the sale can be carried out.

1.2 Forced sale: form and conditions

On the date set in the summons or, in the event of a hearing, 30 to 60 days later, the hearing proper is held, preceded by advertising in a legal announcements journal, by poster or by advertisements in the daily newspapers (former Code of Civil Procedure, arts. 699 and 700). The execution creditor's solicitor carries out these formalities. Specific formalities may be necessary if certain preferential purchase options can be exercised.

On the day of the hearing, the sale takes place at the request of the execution creditor or any other registered creditor.

The bids are made on the reserve price by representation by solicitors.

The sale takes place «à la bougie»; the bidder who makes the last and highest bid after three 1-minute candles, lit in turn, have burnt out, is declared the highest bidder (former Code of Civil Procedure, arts. 705 and 706).

If there are no bids, the execution creditor is named the highest bidder. Within three days after the sale, the solicitor is obliged to state the identity of the purchaser, who can himself name his principal (i.e. reveal the identity of the true purchaser on whose behalf he was acting) within 24 hours.

For 10 days, any party involved has the right to make a firm offer higher than the auction price, which entitles them to have the auction reopened. If a higher firm offer is made formally to the registry of the Regional Court, the property will subsequently be put back on sale.

1.3 Subsequent measures

The allocation of property, entered on the terms and conditions of sale, forms the purchaser's title deed after registration at the mortgage office. In principle this registration must be required within two months (former Code of Civil Procedure, art. 750).

The allocation of property, which is a «judicial settlement» is not subject to appeal to a superior court or on points of law, at least insofar as it does not settle an objection to foreclosure. However, action to set it aside can be taken.

1.4 Distribution of the proceeds of the sale

Payment by the highest bidder: The highest bidder must pay the adjudication costs and the price (deposited at the Bank for Official Deposits) within the deadlines set out in the terms and conditions, failing which the property is resold.

Agreement of the parties: If the registered creditors, the execution creditor, the debtor and the highest bidder agree, an authenticated lifting of the foreclosure with cancellation of the entries is carried out.

No agreement: Procedure for the distribution of the proceeds: Otherwise, a procedure for the distribution of the proceeds of the sale among the creditors is commenced. A judge who specialises in this procedure, known as the Juge aux ordres, splits the price paid in accordance with the priority (rank) of the securities registered.

Amicable settlement: If the registered creditors, the debtor and the highest bidder, convened by the Judge, come to an amicable settlement on the distribution of the price, the Judge summons all of the parties to appear within one week of the order to commence the procedure. He produces a price distribution report and orders the issuing of documents indicating the order in which the highest-ranking creditors should be paid and the cancellation of the other entries.

The entries are cancelled from the registers of the mortgage registry on presentation of a copy of the Judge's order.

Judicial procedure: If an amicable settlement is not reached, the Judge records the absence of agreement and commences the judicial procedure.

The registered creditors are then summoned by a bailiff to produce their titles and claims within 40 days, failing which they lose their right to payment. The Judge produces a statement of claims; he has a legal period of 20 days to do this, but the congestion of the courts means that this is not always possible. He also produces the provisional distribution report. The proving creditor is notified of this document, and may contest it. The objections are settled at a hearing of the Regional Court, in the presence of the Juge aux Ordres. If there are no objections, or when a ruling has been given on the objections, the Judge closes the procedure, and liquidates the cancellation and procedure costs, which are paid in preference to the other creditors.

When the order to close the procedure has become final, the judge orders the issuing of the documents indicating the order of payment and the cancellation of the entries, as for an amicable procedure.

1.5 Consumer protection rules in the context of a foreclosure procedure

The judicial nature of the foreclosure procedure is seen as offering the execution debtor specific protection.

However, various provisions give the debtor additional protection:

- > He can ask for a period of grace; the presiding judge can postpone or stagger the payment of the sums owed for a maximum period of two years; the judge's decision suspends any execution procedures that may have commenced.
- > An overindebted debtor can refer to the commission for overindebtedness, which can ask the judge to suspend the execution procedures; this period of suspension (which can be up to one year) must allow for either the production of a recovery plan, or if this plan fails, the adoption of recommendations by the overindebtedness commission. The recovery plan or the commission's recommendations can contain measures for the rescheduling or waiver of the debt.
- > The debtor can also ask the court, after the order has been registered, to convert the forced sale into a voluntary sale, before the court or before a solicitor.
- > If the foreclosed property is his main residential property, he can file an objection against the reserve price of the property set by the execution creditor. The judge can then alter the reserve price by increasing it. If after this alteration there are no bids, the property is put back on sale at successively lower prices, set by the judge, down to the amount of the initial reserve price.

2. WRIT OF EXECUTION

2.1 Conditions to be fulfilled to render a deed or judicial decision enforceable

The writ of execution is a document endorsed, under legal conditions, with the authority to execute; it allows for the enforcement of the debt. The authenticated deeds, executed in the presence of a notary, recording an obligation to pay, are endorsed with the authority to execute. The Solicitor gives the lender an execution copy. In some cases, judgements are also endorsed with the authority to execute.

2.2 Conditions pertaining to and procedure for enforcing a writ of execution within the national territory: A creditor who has a writ of execution, whether it is the original writ (officially recorded) or he has obtained a final judgement ordering the debtor to pay, can commence the foreclosure procedure.

2.3 Exequatur (extension of foreign judgements)

Within Europe, the rules for enforcing foreign judgements are contained in the Brussels convention of 27 September 1968 and the Lugano convention of 16 September 1988.

A creditor who, in his State of origin, has a judgement that is enforceable in that State, refers by simple request to the President of the Regional Court in order to obtain the authority to enforce the judgement. He must give an address for service within the jurisdiction of the court referred to and produce a duplicate of the judgement containing the conditions required to establish its authenticity.

The debtor against whom enforcement is requested can appeal against the decision granting authority to enforce the judgement.

The judgement endorsed with the exequatur makes the judgement from the State of origin enforceable. The execution will be carried out in accordance with French law.

The authority to enforce the judgement can be obtained by the same procedure for authenticated deeds, if they are enforceable in the State of origin and if they are not contrary to French public order.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1 Who has the right to initiate the forced sale procedure: The forced sale procedure can be initiated by creditors with a good, liquid and payable debt, in possession of a writ of execution.

3.2 The stage at which this procedure becomes binding on third parties: The registration of the order to pay at the mortgage registry constitutes foreclosure of the property.

3.3 Legal means available by which any other mortgagees can assert their rights, particularly in respect of the valuation of the mortgaged asset: The other mortgagees can raise comments or objections on the terms and conditions of the sale, and attend any hearing that takes place. They can also take part in the auction, if they feel that they can obtain a higher sale price in this way.

3.4 Existence of rights to preferential payment that could affect the priority of the mortgage guarantee: In principle, the rights to preferential payment attaching to specific immovables are published in such a way that the creditors know their rank; the most notable exception to this is the preferential right of the association of co-owners of a building on the co-owner's lot.

However, in the event of a collective procedure, (commercial mortgage) general, unpublished preferential rights, and particularly the preferential right of employees, may take precedence over the mortgagee. As mentioned above, the legal costs are deducted before the price is distributed.

3.5 The existence of legislation prohibiting or restricting the right to proceed with the forced sale

The forced sale is always possible under the conditions set out by the law. However, certain provisions can be opposed to the expulsion of the former occupier, who becomes an unlawful occupier after the final sale.

Firstly, expulsions cannot take place during the winter period.

Secondly, the State representative can refuse the assistance of the police for the expulsion for reasons of appropriateness (a particularly difficult social situation, the need to re-house people first, etc.). In such an event, the State pays the owner compensation.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a sale procedure (without objections): The minimum duration of a forced sale procedure without objections is approximately 300 days to the final sale. On average, the duration of a procedure without objections is between 8 and 18 months.

4.2 Maximum possible duration of a forced sale procedure: Depending on the type of objection, these can extend the procedure by several months; cases vary, and the maximum duration can be up to 4 or 5 years. However, these are marginal cases, from which no conclusions can be drawn.

4.3 Most frequently occurring objections

The measures to protect the borrower that can delay the progress of the procedure, in particular requests for a stay of execution (paragraph 1.5), were mentioned earlier.

In addition, there are various procedural objections (in the technical meaning of the term, i.e. objections arising from the foreclosure procedure and directly related to it). These objections must be raised, in principle, at least three days before the possible hearing. The first objections cited are those that occur most frequently.

- > **Opposition to the order after registration of the order:** This is the most frequent occurrence, where the debtor feels that the foreclosure is unjustified; the grounds of objection vary.
- > **Nullity of the proceedings:** if the nullity of procedural steps is recognised, the proceedings can be started again from the last valid step; nullity can be after the possible hearing; they must then be raised at least five days before the adjudication hearing.

Conversion of the foreclosure into a voluntary sale by public auction: The execution debtor can request conversion into a voluntary sale. It can be decided on by agreement between the parties; if there is no agreement, it can be pronounced by the Judge at a possible hearing. If the sale is converted, it can be carried out by auction, either in court or before a Solicitor.

- > **Creditor's right to take the place of an inactive creditor:** this can be requested one week after the notice to continue the execution against the debtor, given from one solicitor to another solicitor, from the first execution creditors;
- > **Claim to the ownership of the foreclosed property:** this objection allows a third party, the real owner of the property, to oppose the sale and bring an action to establish ownership;
- > **Concurrence of several foreclosures:** The provisions of the code aim to combine the proceedings.

4.4 Typical duration of the distribution procedure: The distribution procedure can be quite quick for amicable procedures, and significantly longer for judicial procedures; in the latter case, no accurate rules can be drawn, as the duration depends on the number of creditors and the objections raised, and can be as long as two years or more. The duration of distribution procedures is however a problem of limited importance for creditors; the terms and conditions almost always provide for provisional payment. This provisional payment is obtained within approximately 7 months after the final sale.

5. COST OF THE FORCED SALE PROCEDURE

5.1 Cost of the procedure

5.1.1 Fixed: partly fixed

5.1.2 Proportional: partly proportional

5.1.3 Example for an adjudication value of € 100,000: The cost of the procedures amounts to € 7,000.

5.2 Who pays the costs? The above costs are payable by the highest bidder.

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

Mortgages and preferences, as forms of security, are the prerogatives associated with obligations to ensure their enforcement (Civil Code - Title XVIII: Preferences and mortgages - articles 2092, 2093, 2094 and following).

Definition of the mortgage

Property right in rem, accessory to a claim, which, in the event of non-payment on the due date, gives the creditor the right of distraint on the property, in whoever's possession it is, and to obtain payment by preference from the proceeds (Article 2114 of the Civil Code).

Definition of the preference: A right conferred by law on a creditor, on account of the nature of the claim, to be preferred to other creditors as regards the selling price of one or more of the debtor's goods (Article 2095 of the Civil Code).

Main differences between preferences and mortgages: In principle, the preference has priority over the mortgage. The preference is always based on law, the mortgage may be legal, judicial or contractual. The law specifies the goods covered by the preference, which may be a general preference (covering a group of goods) or a special preference (covering specific goods), whereas the mortgage relates to a named building and all its immovable accessories.

2. RANKING OF PREFERENCES AND MORTGAGES

2.1 Principle

Special preferences are classified by date order of the acts creating them. However, in the event of registration outside the time limit, the preference is considered as a mortgage and is ranked on its registration date. The ranking of the creditor does not depend on the date of registration of his preference, unless it is late. For example, for the preference of the seller, the registration must be carried out within a period of two months of the sale, but the preference is ranked on the date of sale.

2.2 Existence of hidden preferences and mortgages

With one exception, there are no longer any hidden preferences or mortgages under French law on security. The preference granted to the trustee of the joint owners to guarantee the payment of the service charges and certain work is a hidden special preference on the jointly owned property. The general preferences on immovable property (relating to movable and immovable property) are not publicised.

2.3 Preferences likely to take precedence over the mortgage

In principle, the preference takes precedence over the mortgage.

2.3.1 Enumeration

A distinction may be drawn between two types of preferences:

- > preferences relating to a set of goods: the general preferences;
- > preferences on specific goods: the special preferences.

The general preferences relate:

- > either to all the movable property
- > or to all the movable and immovable property (general preferences on immovable property).

The main general preferences on immovable property are:

- > **the super-preference of salaries**, which guarantees, in the event of a court settlement or the liquidation of the property, the payment of the fraction not subject to attachment of the remuneration for the last 60 days for employees and for the last 90 days for commercial travellers and merchant seamen.
- > **the preference of legal costs**, which guarantees the costs incurred during uninterrupted proceedings to wind up the property of the debtor or to preserve it in the interests of consumers. It is imposed on the price of the goods, which are sold in the interests of all the creditors.
- > **the preference of salaries**, which guarantees the last six months of salaries and, for servants, those of the past and current year.
- > **the preference of authors**, artists and composers which guarantees the payment of royalties for the last three years on the use of the works.

The special preferences relate to specific assets.

The special preferences on immovable property are:

- > **the preference of the seller of immovable property:** it is in favour of the seller for the sales price and the co-exchanger for the payment of cash adjustments. It secures the claim and its accessories. It must be published within two months of the sale.
- > **the preference of joint heirs** is granted to all the joint heirs of jointly owned property, of a joint estate, of a company to ensure equal division in terms of value. It covers all the immovable property to be divided. It secures the claims resulting from the division (article 2103-3 Civil Code). It must be published within two months.
- > **the preference of contractors, masons, architects and other workers:** in favour of those who have carried out work on a building. It covers the building constructed or repaired and its implementation is restricted to the added value deriving from the work done. Two official reports (one on the inventory of fixtures and the other on the acceptance of the work done) must be registered and the preference is ranked on the date of the first report.
- > **the preference of division of property:** it is for the deceased's creditors to protect them from the possible insolvency of the heirs and the risk of confusion of the property. It must be registered within four months of the death and is ranked on the date of death (Article 2103-6 - Civil Code).
- > **the preference of the person providing capital or the money lender:** in favour of the person who has enabled the buyer to pay the purchase price. It must be registered within two months of the sale (article 2103-2 - Civil Code).
- > **the preference of the first-time property owner:** this guarantees the first-time property owner with a rent-ownership contract governed by the Act of 12 July 1984 the repayment of the down-payment on the price, should he decide not to buy at the end of the rent period; in fact, some of the sums paid by the first-time property owner during this period should be offset against the sales price in the event of purchase of the housing. It must be registered within two months of signing the rent-ownership contract and is ranked on the date of the contract (article 2111-1 - Civil Code).
- > **the preference granted to the trustee of the joint owners to guarantee the payment of the service charges and certain work:** this guarantees the payment of some of the service charges of the joint owners and certain work carried out during the current year and the past four years. This is a hidden preference (no publication). The preference of architects and contractors on the value they have added to the property has priority over the other special preferences on immovable property, on account of this added value.

The preference of joint ownership is ranked equally with the preference of the vendor or lender. However, it takes priority over them as regards the charges and work of the current year and the past two years.

The other special preferences on immovable property are classified in the date order of the deeds establishing them.

2.3.2 Conditions

The general preferences on immovable property have priority over all the mortgages and special preferences. However, they only relate to the immovable property if there are insufficient movable goods to pay the preferential creditors off.

The special preferences are analysed as legal mortgages, receiving a more advantageous classification. They take precedence over mortgages, on condition that they have been registered within a

certain period and when they relate to the same immovable property as the mortgages.

This registration does not confer rank; ranking depends on the nature of the claim and the date it was created. If the preference is recorded after the time limit, it is ranked on the date of registration, since it has degenerated into a mortgage.

2.3.3 Rank

The rules governing equality of rank between preferences are the following:

1. General preferences on immovable property: See point 3.2 above.

2. Special preferences on immovable property

> **Conflicts between these preferences:**

- priority of the preference of architects and contractors on the real value added to the property since the registration;
- the other preferences are ranked in date order of the deed creating them.

However, the preference of joint ownership is ranked equally with the preference of the vendor or lender and takes priority over them as regards the charges and work of the current year and the past two years.

> **Conflicts between these preferences and the legal mortgages:**

- priority of the preference of architects and contractors on the real value added to the property since the registration;
- the registration of the other preferences has retrospective effect to the date of the deed creating them.

3. EFFECTS OF THE BORROWER'S / OWNER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

3.1 Conditions under which the validity of the mortgage constituted during the suspect period may be called into question

Some acts concluded during the suspect period⁶¹ are null and void. The collateral constituted during this period to secure a debt contracted before the constitution of this collateral must be cancelled in order to respect equality between the creditors.

This nullity refers to all contractual forms of security granted on the goods of the debtor: mortgages, pledging of business assets, pledge.

Mortgage registrations or pledging ordered by the court as a precaution in favour of a creditor are also void if they occur during the suspect period. However, if provisional registration is prior to the suspect period, definitive registration may validly occur during the suspect period, since it has retrospective effect to the date of the provisional registration.

Consequence of the stoppage on mortgage registrations: Article 57 prohibits the registration of mortgages, pledging and preferences after the judgement opening the legal remedy. In consequence, a mortgage validly granted before this judgement, but not registered, can no longer be registered after the judgement and will therefore become ineffective

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to this preferential right: Creditors holding claims subsequent to the opening of the proceedings are paid before the other secured creditors, including in some cases the holders of in rem security interests in immovable property (article 40 of Act of 25 January 1985)

⁶¹ Period between the cessation of payments and the judgment opening the proceedings.

3.3 List of claims which in the event of bankruptcy take precedence over the mortgage when they do not take precedence under normal circumstances

A distinction should be drawn according to the type of bankrupt enterprise.

- > In the event of winding up by the court, the claims guaranteed by security interests in immovable property come after the super-preference of employees and the legal expenses only.
- > In the event of total assignment of the enterprise, the claims duly created after the judgment opening the proceedings are paid in priority to all other claims (except the claims qualifying for the super-preference of employees) and especially before the claims benefiting from an in rem security (mortgage or preference).

The claims arising after the judgement opening the bankruptcy, whatever their nature, take precedence over the claims secured by a mortgage.

Unsecured creditors may hence take precedence over mortgagees. However, in the event of the assignment of the enterprise, the in rem securities are allocated in varying ways (see below: Modification of the conditions for enforcement of the security).

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy

Mortgagees may find time limits imposed on them, i.e. only be paid long after the due date stipulated in the contract.

In the event of the enterprise continuing to operate, if the continuation plan provides for payments in instalments, the mortgagee is reimbursed at the same times as the other creditors. He does however retain the benefit of his security, except where he has renounced it or if the court has replaced it by a guarantee with equivalent advantages.

In the event of an assignment schedule, where the mortgaged property is included in the assignment, the court allocates to the property in question a share of the value of the delivery price. It is on this share, which the judge determines freely and which may consequently be incommensurate with the value of the property, that the mortgagee will be able to exercise his right.

However, where the security guarantees a loan granted to the enterprise to enable it to acquire the pledged goods, the encumbrance of the security is transferred to the assignee, who must pay off the instalments agreed to the creditor.

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

The so-called Neiertz Act of 31 December 1989 (codified under articles L 331-1 and following of the Consumer Code) organises the measures to assist over-indebted private individuals. The debtor may lay his case before an administrative committee which will help him to conclude an out-of-court settlement with his creditors. The court may, at the request of the committee, pronounce the suspension of the enforcement proceedings for the duration of the proceedings before the committee which may not exceed one year. If this procedure to arrive at an out-of-court settlement fails, the committee may, at the debtor's request, recommend a certain number of measures to recover the debtor's situation. The committee may also delay or schedule payment of the debts; it may decide that the sums corresponding to the delayed instalments bear interest at a reduced rate or that the payments are allocated firstly to the capital. The rate relating to the delayed instalments may be reduced without limit, possibly to zero. In principle, the committee does not have the power to impose remission of debts on the creditors. A remission of debts may however be obtained if the creditors accept in the context of the contractual settlement plan.

There is an important exception to this principle in the case of a debt persisting after the sale of the

housing which the debtor had bought using a mortgage loan. Where the sales price does not allow the entire loan to be reimbursed, the borrower, who normally remains the debtor for the outstanding balance, may be granted a remission of debts by the court. In the absence of opposition, the court renders the recommended measures enforceable. In the event of opposition by one of the parties, the court decides on the opposition. It may decide on the same measures as those which the committee can recommend. Before deciding, it may order the enforcement by interim payment of some of the measures recommended by the committee.

It is expected that these provisions will be amended shortly under the law against the exemptions.

HUNGARY

I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL

1. CONSTITUTION

1.1 Who can create a Mortgage?

Please note that in compliance with the purpose of this report, i.e. surveying the efficiency of mortgage collateral from the aspect of mortgage lenders' in Member States, our answers are restricted to mortgage rights registered in the land register. There are three types of mortgages in Hungary which might be charged on real estate:

- > mortgage or hypothec (an accessory charge - «*jelzálogjog*»);
- > independent mortgage lien (a non-accessory charge - «*önálló zálogjog*»), and
- > limited security lien (an accessory charge securing all claims of the mortgagee deriving from a particular legal relationship - «*keretbiztosítéki jelzálogjog*»).

Due to the fact that residential mortgage loans will be almost exclusively secured by an independent mortgage lien, our answers will refer to this kind of mortgage, unless indicated otherwise. In case of commercial real estate-financing borrowers are reluctant to accept an independent mortgage lien construction, due to the fact that this kind of mortgage might enable the mortgagee to satisfy its claims from the real estate without respect to the underlying legal relationship up to the sum registered in the land register, should the independent mortgage lien be assigned. In terms of the Civil Code an independent mortgage lien is negotiable without assigning the correspondent claim too. In case of commercial real estate financing it is rather the limited security lien which will be chosen by the parties.

The owner has to give his consent to have a mortgage right registered in the land register; however, the mortgagee has to file a petition for entering the mortgage. The decision of the court may substitute the consent of the owner.

1.2 Procedure: formalities

1.3 Is the mortgage accessory to a loan or can it be a separate deed? Description of systems and consequences

Should the above question refer to the formal requirement of including the creation of the mortgage right into the loan contract, our answer is no. Separate deeds (i.e. documents) may certify both the creation of the mortgage and the signing of the loan contract. Mortgages and limited security liens will only become effective, if the loan contract is effective and valid. On the contrary, the independent mortgage lien might be substantively effective regardless of the effectiveness and validity of the loan contract. Rights and facts of legal importance may be registered and data may be amended in the land register solely on the basis of documents or resolutions of authorities as prescribed by law. Legal representation is mandatory in proceedings launched upon request. Legal representatives are attorneys (law offices), legal counsels and notaries public acting on behalf of the client.

Please note that the creation of a mortgage will always be notarised in the banking practice in Hungary, as notarised documents provide for a privileged enforcement procedure, exempting the mortgagee to prove the existence and the maturity of his claim in court.

Hungarian real estate law – just like German and Austrian regulation – is based on the authenticity of land registry («ingatlan-nyilvántartás») entries. Following that, on the basis of rights registered and facts recorded in the real estate register, it is to be presumed that such registered rights and recorded facts pertain, until proven otherwise, to the right-holder thereof. In the event of abrogation

of any right or fact, it shall be presumed, until proven otherwise, that such abrogated right or fact does not prevail. So the registration has constitutive meaning (the right comes into force and abrogates through registration). Only those rights and facts listed in the relevant act can be entered into the land registry. Such rights and facts include besides the right to ownership mortgage, independent mortgage lien, right of execution, etc. Registration fees are maximised.

1.3.1 One contract (credit + mortgage)

Please see above.

1.3.2 Two contracts (credit and mortgage)

Please see above.

1.3.3 Is it possible to pledge real estate for «all present and future debt to the pledgee»?

In case of an independent mortgage lien the parties are not requested to indicate the underlying legal relationship – in this sense this kind of mortgage may serve as a security for all present and future debts of the mortgagor. In case of registering a limited security lien a particular legal relationship or title has to be indicated, although the limited security lien may also secure future claims.

1.3.4 Re-use of the security when changing lender

An independent mortgage lien may be assigned (negotiated) and – following that – secure the debt towards the new lender.

1.4 Consumer protection rules with respect to the creation of mortgage collateral

Only the general consumer rules apply: any standard contract condition that is deemed unfair may be contested by the injured party, etc.

1.5 Schedule: time necessary to get a mortgage registered and entrusted with official authority

The file number assigned to an application shall be entered on the title deed/land registry extract («tulajdoni lap») called an index («széljegy») on the day when submitted, and this fact shall be indicated on the application. However, there are no strict deadlines until when the mortgage right has to be entered, with the only exception that land registry offices shall register mortgages as well as restraint of alienation and encumbrance in favour of mortgage banks within eight (8) days by law.

Should the claimant request a fast track settlement of the index and pay a fee of HUF 10.000,- (approx. € 37,-), the petition will be expedited within 8 days.

2. REGISTRATION: FUNCTIONING OF THE REGISTER

2.1 Traditional, computerised

There is a land registry system in Hungary, operating a 'Unified Land Registry System' - which is the integration of cadastre and legal registry on a legal basis. The 'Unified Land Registry System' is fully electronic, land registry extracts of public faith can be obtained from any of the land registry offices or those notary publics and attorneys-at-law having an audited connection to the system. The Hungarian land registry system is conducted by competent land registry offices («földhivatal») subordinated to the Ministry of Agriculture and Regional Development. A possible change for a judicial conduction of the system is discussed. However, we assess that it is beneficial to maintain the current system - as in this case obligatory public-administration deadlines apply for the registration procedure.

2.2 Accessibility: national and cross-border

The «Unified Land Registry System» is only accessible to persons having a separate agreement with and a safe electronic connection to the Ministry of Agriculture and Regional Development – attorneys-at-law, notary publics and local governments may request to access the system. We suppose that there are no accessibility points in abroad – the accession of Hungary to the EULIS-program is in progress.

2.3 Body in charge of registration

The Hungarian land registry system is conducted by competent land registry offices subordinated to the Ministry of Agriculture and Regional Development as indicated above.

3. COST

3.1 Constitution (fees, notary)

Due to the fact that petitions to be filed with the land registry require a notarised form or the countersignature of an attorney-at-law, the involvement of a notary public or an attorney-at-law is inevitable. Attorneys invoice 0.5 to 1% of the deal in case of sale and purchase of residential real estate. Drafts of mortgage loan contracts will be provided in practice by the commercial or the mortgage bank. Such contracts will be notarised, assuring a privileged enforcement procedure – exempting the mortgagee from proving the existence and the maturity of his claim in court in a contradictory proceeding. Notary publics have a common chart indicating exact fees. Such fees ascend progressively depending on the amount of the mortgage; however, they will be reduced by 50% if it is a unilateral contract – which is the common case regarding the establishment of mortgages – and the remaining fee by another 50% when the document will be prepared by the client, i.e. the credit institution. The general limit would be HUF 125.000,- (approx. € 440,-).

3.2 Registration

The fee to register a mortgage right amounts to 5% of the secured debt, but no more than HUF 12.000,- (approx. € 42,-).

3.3 Others

Purchasers of real estate are also required to pay a property acquisition duty.

4. DURATION OF VALIDITY OF THE MORTGAGE

There are no statutory time limits upon which the mortgage would cease. As a consequence, the mortgage right will never be erased from the land register automatically, even not if the secured commitment or debt is dissolved. An application will be needed in each case.

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

1.1 Preliminary measures/actions

On the basis of the enforceable deed of the court or the notarial document it is the bailiff's office selling the property. As indicated above, there is no contradictory court proceeding required, if the document, upon which the enforcement procedure will be introduced, is notarised.

1.2 Forced sale: form and conditions

There are three alternatives to sell the property:

- > Sale at auction;
- > Open tender;
- > Sale to a third party specified by the creditors and the debtor jointly.

In case of sale at auction the price can be reduced by law up to 50% of the appraised value, in case of residential property up to 70%. Should the sale at auction of the residential property fail at 70%, a second auction will be arranged within three (3) months; however, the minimum price may not be less than 70% of the appraised value either. Following that the price may be reduced to 50%. The appraised value of the property has to be set out by the forensic expert. At an open tender the price upset is the appraised value. In case of sale of the property to a third party specified by the creditor and the debtor, the price has to be determined in advance. Is the creditor a credit institution, it might be entitled by the mortgagee to sell the property itself at a price set in the agreement of the parties.

1.3 Subsequent measures

There are no further measurements required, upon the sale at auction the ownership of the buyer will be registered in the land register.

1.4 Distribution of the process of the sale: description and possible incidents

The ownership right of the new owner acquiring real property by execution sale shall only have the following encumbrances:

- a) Easement;
- b) Right of use for public purposes;
- c) Usufruct recorded in the real estate register;
- d) Usufruct by virtue of law even if such is not recorded in the real estate register.

The rights of the new owner of a real property shall not be limited by any usufruct, whether or not recorded in the real estate register, if the holder of such usufruct is liable to satisfy the claim of the judgment creditor, or if it was established by contract after the mortgage has been attached.

1.4.1 Lender's right on his borrower's right to rent

Due to the fact that it is only the owner or the beneficial owner who are entitled to rent the real estate the lender has no right on his borrower's right to rent.

Pursuant to Section 7 (1) of the Act No. LIII of 1994 on Judicial Execution the principle source of satisfying money judgments by judicial execution shall be the funds administered by a financial institution in the name and on behalf of the judgment debtor and/or from the judgment debtor's wages, remuneration, salaries, emoluments received on the basis of employment, etc. received regularly or periodically for the performance of work. If it is apparent that a money judgment cannot be executed within a relatively short period by attachment on wages or on

funds administered by financial institutions, any property of the judgment debtor that can be seized may be subjected to execution. However, a real property seized may be sold only if the claim is not covered in full by other property of the judgment debtor, or can be satisfied only after an unreasonably long time.

Despite the general rule as above the notarised mortgage deed enables the lender to commence the forced sales procedure of the real estate directly. Yet notwithstanding the right of the lender to a privileged enforcement procedure we presume that he would rather restructure his loan contract with the borrower if there is a tenant paying a rent on a regular basis – allowing settling the instalments for the borrower.

1.4.2 What happens if the borrower has renounced his right to his rent?

Considering the above, it has no direct effect on the enforcement procedure. Should the borrower fulfil its payment obligations based on the loan contract, the lender will be entitled to initiate the forced sales procedure.

1.5 Consumer protection rules in the context of a foreclosure procedure

Also in this case the general consumer rules apply only.

2. WRIT OF EXECUTION

2.1 Conditions to be fulfilled to render a deed (or a judicial decision) enforceable

In the context of this survey we might declare that the forced sales procedure should be initiated either based on a final judgement of the court or a notarised document. As a general rule, the enforceable document may be issued if the writ of execution:

- a) contains an obligation (ruling against the debtor);
- b) is definitive or is subject to preliminary execution; and
- c) the deadline of performance has expired.

It is in each case the court of first instance issuing a certificate («végrehajtási lap») of execution on the basis of a final judgement in a civil case. The court where the debtor has his permanent residence shall issue a writ of implementation («végrehajtási záradék») on a notarial document, if the document contains:

- a) a commitment for performance and consideration, or a unilateral commitment;
- b) the names of the obligee and the obligor;
- c) the subject matter, quantity (amount) and legal grounds of the obligation;
- d) manner and deadline of performance.

If an obligation is rendered contingent on a condition or date, the occurrence of such condition or date shall be verified by a notarised document as well. The execution may be implemented if the claim expressed in the notarial document is subject to execution by court procedure, and if the performance deadline of the claim has already expired. The court shall issue a writ of implementation for a notarised mortgage contract, if the performance deadline of the claim has already expired.

2.2 Conditions pertaining to and procedure for enforcing a writ of execution within the national territory

On the basis of the enforceable deed of the court or the notarial document it is the bailiff's office selling the property.

2.3 Exequatur (extension of foreign judgements)

2.3.1 Description of the procedure for enforcing a foreign writ of execution in your country

The resolutions of foreign courts and foreign arbitration tribunals (hereinafter jointly referred to as «foreign resolution») shall be executed on the basis of the provisions of the relevant Hungarian Acts, international convention or on the basis of reciprocity. The resolution of a foreign court may be executed if – according to its nature – it is in compliance with the provisions as above, e.g. if it is a court verdict in a civil lawsuit. When filing for execution, the creditor shall enclose the foreign resolution to be executed, and a Hungarian translation thereof if requested by the court.

In respect of a foreign resolution that may be executed, the competent court as below shall issue a decree of confirmation of execution for such foreign resolution in which to confirm that it may be executed in accordance with Hungarian law the same way as a decision of a Hungarian court or arbitration court. In the course of execution of a foreign resolution the provisions set forth in the relevant Hungarian Acts and in the international conventions shall also be applied, and jurisprudence based on reciprocity shall also be taken into consideration.

The above provisions are applicable in case of resolutions of European courts as well, unless the Council Regulation 44/2001/EC contains provisions to the contrary. Based on the judgment of a foreign court a certificate of execution shall be issued by the local court of competence of the debtor's domicile or registered address, in the absence of such, by the location of the debtor's executable assets or, in respect of the Hungarian branch or commercial representative offices of foreign-registered companies, the local district of the county court of competence by the location of such branch or representative office (in Budapest, the Central District Court of Buda). Based on the judgment or agreement of an arbitration court either within or outside of Hungary, a certificate of execution shall be issued by the Metropolitan Court of Budapest or the county court of competence by the debtor's domicile or registered address, in the absence of such, by the location of the debtor's executable assets or, in respect of a Hungarian branch or commercial representative offices of foreign-registered companies, the court competent for the location of such branch or representative office. It is also Buda Central District Court being entitled to issue a certificate of execution on the basis of a decision of the Council of the European Union, the European Court of Justice or the European Commission if the debtor has his residence or permanent seat in Budapest, or in the absence of such, if he has executable assets or – in respect of a Hungarian branch or commercial representative office of a foreign-registered company – the branch or representative office in Budapest. In the countryside the county court will be in charge of issuing a certificate of execution.

2.3.2 Maximum time taken by this procedure

There are no time limits.

2.3.3 Existence of any bilateral conventions simplifying procedures

Please see the relevant EU legislation. Hungary also has a large number of bilateral enforcement agreements with non-EU countries.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1 Who has the right to initiate the procedure for a forced sale?

Any claim against the owner of the real estate may result in a forced sale procedure. Following that both commercial banks and mortgage banks require registering a restraint on alienation and encumbrance in favour of the bank.

'Restraint on alienation and encumbrance' recorded in the land register prohibits any kind of alienation or encumbrance of the real estate by the owner - without the prior written consent of the beneficiary of such right. Any disposition contrary to a prohibition of alienation or encumbrance stipulated by contract shall be null and void provided that the prohibition has been entered into the land register.

Such provisions can be considered as a further security, as the debtor will not be able to use the real estate as a collateral and encumber it for the benefit of a third party without the former consent of the bank. We point out that this provision also hampers the borrower to enter into a new credit contract (e.g. an equity release agreement), resulting in a lower PD-rate. There is also less chance for a foreclosure procedure to be commenced by a third party, as no second rank mortgage rights will be recorded effectively. As a further advantage, registering a restraint on alienation and encumbrance will anticipate the assignment of the real estate. This is particularly important, because the privileged way of enforcement based on a notarial deed is only warranted if the owner is still identical with the owner indicated in the notarised document when commencing the procedure.

In case of Hungarian mortgage banks 'restraint on alienation and encumbrance' will be recorded in favour of the mortgage bank by law simultaneously with acquiring a mortgage right upon any real estate. Registry offices shall register mortgages as well as restraint of alienation and encumbrance in favour of mortgage banks within eight (8) days by law. Furthermore, pursuant to Subsection 2, Section 8 of the Mortgage Bank Act mortgage banks are only allowed to refinance (purchase) mortgage loans if there is a 'restraint on alienation and encumbrance' recorded.

3.2 The stage at which this procedure becomes demurral on third parties.

At the point in time when the right of execution is registered in the land register.

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset

The bailiff shall notify any registered mortgage holder immediately upon obtaining the land registry extract («tulajdoni lap») from the land registry office. Upon the notification the mortgage holder(s) will have the possibility to enforce his/their claim in the forced sales procedure. In order to participate in the procedure an application has to be submitted to the court issuing the writ of execution within eight (8) working days following the receipt of the notice. The court issuing the writ of execution shall rule on the direct involvement of the lien holder in the execution procedure requested.

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee.

Until 1st January 2007 only 50% of the purchase price from the sale of the property will be disbursed immediately to mortgage holders if the judgement debtor is a company (an economic organisation). Following disbursing the aforementioned 50% of mortgage holders' claims, costs of the foreclosure procedure will be settled. Unfortunately, the costs of the foreclosure procedure are specified by law on such a wide scale (i.e. unpaid salaries, taxes, etc.) that there is very little chance for mortgage holders to have the remaining part of their claims settled. However, this regulation will change on 1st January 2007. In forced sales procedures to be commenced after 1st January 2007 the purchase price from the sale of the property minus the costs of sale shall be exclusively used to satisfy the claims of mortgage holders holding a hypothec or an independent mortgage lien, with the only exception that until 1st July 2007 costs emerging to make good damages caused to the environment might be charged against the purchase price from the sale up to 50% of the price.

As a further burden of granting loans to economic organisations we mention Section 49/D of the Act No. XLIX of 1991 on Bankruptcy Proceedings, Liquidation Proceedings and Members' Voluntary Dissolution, prescribing that even the 50% of the purchase price from the sale of the pledged property may be used to satisfy claims secured with a mortgage, if such mortgage was established at least one year prior to the date of the commencement of the liquidation procedure. Yet, also this restriction will

be abolished from 1st January 2007. If the foreclosure procedure has been commenced in order to satisfy claims based on unpaid child support, other support and employees wages, and there are also due claims secured by a mortgage, moreover the price from the sale of the property doesn't cover all claims, the satisfaction of unpaid child support, other support and employees wages precede the satisfaction of claims secured by a mortgage. If there are several claims secured by mortgage, such claims shall be satisfied in the sequence of the registration of the liens mortgages.

Please note that even claims secured by a mortgage will not be satisfied, if not due. This might result in a situation, where the mortgagee loses his security, following the enforcement procedure based on any due claim awarded by the court. This might justify a clause in any loan contract, providing for the acceleration of the claim if an enforcement procedure is commenced against the debtor.

In case of an independent mortgage lien the right to issue a notice with immediate effect should be granted to the lender, in order to be secured for the case, when an enforcement procedure is opened.

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people).

There are such restrictions in favour of home owners living in their property being subject of a foreclosure procedure. Please see our comments under item II./1.2. In respect of residential properties, the reserve price can be reduced to seventy (70) %, if it is the only residential property of the judgment debtor, it is his residence and it has been for six (6) months prior to commencement of the execution procedure. The property is deemed to be a residential property, if the property (title of ownership) was created for residential purposes and is registered in the real estate register, or is in the progress to be registered as a detached home or condominium.

See also our comments under item II./1.4.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a forced sale procedure (without incident)

There are no statistics on the possible length of the procedure, according to our information it takes no longer than six months in case of residential property.

4.2 Maximum possible duration of a forced sale procedure

No, there are no legally binding timeframes.

4.3 Most frequently occurring incidents

If the judgment creditor has not acknowledged the termination (diminution) of the claim, he may file a lawsuit for the termination (limitation) of the execution. The court effecting execution shall suspend the execution if requested by the judgment creditor, and if such suspension does not injure the rights of any other party. If a mortgage holder has filed a petition in order to participate in the forced sales procedure, the court shall suspend the execution within three (3) working days of receipt of the petition. The same court shall notify the bailiff immediately.

The court effecting the execution may accept the request of the judgment debtor and suspend the execution, if the judgment debtor is able to validate the reasonable cause therefore, and if the judgment debtor had not been previously fined for contempt during the execution procedure.

The court may hear the parties involved if it deems it necessary to resolve the request for suspension. The court will make a decision on suspension considering the number of dependant relatives to be supported by the judgment debtor, or, an example whether the judgment debtor or any dependent relative suffers from a serious illness. Further reasons for suspension may be natural disasters during the execution procedure to which the judgment debtor has also fallen victim.

If the foreclosure is for the evacuation of a residential property, the suspension may be ordered only once upon the judgment debtor's request for a maximum period of six (6) months.

If a request for a legal remedy has been filed against the executable document or the process of the bailiff, the court adjudicating the legal remedy may suspend the execution. The court may also suspend the forced sales procedure in the cases permissible as set forth in the Code of Civil Procedure or another Act. The court shall rule on the suspension of execution within fifteen (15) days and shall immediately notify the bailiff regarding its decision. A request for legal remedy against the writ of suspension shall have no dilatory effect on suspension.

The court issuing the writ of suspension shall review the reasons for the continuation of suspension if so requested by either party concerned.

A suspended execution process may be continued upon order by the court issuing the writ of suspension, or by another court defined in the Code of Civil Procedure or another Act.

A forced sales procedure shall be temporarily discontinued, if the identity of the judgment debtor cannot be established for lacking the necessary information, or an example the judgment debtor was granted respite for performance, or was permitted to perform in instalments.

4.4 Typical duration of the distribution procedure

The distribution is part of the forced sales procedure.

5. COST OF THE FORCED SALE PROCEDURE

5.1 Cost of the procedure:

5.1.1 Fixed Unless otherwise provided by law, the costs of the forced sales procedure shall be advanced by the judgment creditor and borne by the judgment debtor. The fee of the procedure is HUF 1.000,- (approx. € 4,-) if the claim is less than HUF 500.000,- (approx. € 1.785,-); and one (1) % of the claim exceeding HUF 500.000,-.

5.1.2 Proportional (percentage of the adjudication value)

Please see above.

5.1.3 Example for an adjudication value of € 100.000

The costs of executing a claim of € 100.000,- would amount to € 1.000,-.

5.2 Who pays the costs?

Please see our comment under item 5.1.1.

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

The land register enjoys the «public faith»

Rights registered and facts recorded in the real estate register for the benefit of a party acquiring in good faith shall be construed as true, until proven otherwise, even if such deviate from the actual legal status. For the purposes of real estate registration, a person acquiring a right in a real property by payment of consideration, as trusting in the real estate register, shall be construed as a party acting in good faith.

Official Entries and their Scope

For the purposes of real estate registration, rights and entitlements are created upon being recorded in the title deed.

Public Access

Registers of real estate shall be public information. A real estate registration title deed may be reviewed without restriction by any person, notes may be made and official copies may be requested.

Mandatory Application

Proceedings for the registration of rights and the recording of facts of legal importance concerning a real property shall commence upon the request of the client or upon the order of an authority. Only such rights and facts of legal importance may be registered and recorded in the real estate register which are designated in the application or in the order of the authority.

2. THE RANK OF PRIORITY BETWEEN PREFERENCES AND MORTGAGES

2.1 Principle

Priority Sequencing

Unless otherwise prescribed by this Act, the position of an entry of record in the real estate register, and thus the sequence of such records, shall be determined by the filing date of the applications for such. A ranking may be established solely on the basis of an application for which a document serving as grounds for the registration has been attached.

2.2 Existence of hidden preferences and mortgages

As outlined above, the usufruct by virtue of law will even burden the ownership right of the auction buyer, if not recorded in the real estate register.

2.3 Preferences likely to take precedence over the mortgage

2.3.1 Enumeration

2.3.2 Conditions

2.3.3 Rank

There are no such preferences except those indicated under item II./3.4.

3. EFFECTS OF THE BORROWER'S / OWNER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

3.1 Conditions under which the validity of the mortgage constituted during the suspect period (or risk period) may be called into question;

The creditor, and on behalf of the debtor, the liquidator may file in court within 90 days from the point of time of gaining knowledge, but no later than 180 days from the date of publication of the notice of liquidation a petition contesting:

- a) contracts concluded by the debtor within the timeframe of five years preceding the date when the court received the petition for liquidation or thereafter, if such contracts intended to conceal the debtor's assets or to defraud any creditor, and the other party had or should have been aware of such intent;
- b) contracts concluded by the debtor within two years preceding the date when the court received the petition for liquidation or thereafter, if such contracts intended to transfer the debtor's assets without any compensation or to undertake any commitment for the encumbrance of any part of debtor's assets, or if the stipulated consideration constitutes unreasonable and extensive benefits to a third party;
- c) contracts concluded by the debtor within ninety days preceding the date when the court received the petition for liquidation or thereafter, if such contracts intended to give preference and privileges to any creditor, such as the amendment of an existing contract to the benefit of a creditor, or to provide financial collateral to a creditor that does not have any.

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to the classification of his preferential right;

There are no changes except the fact that at the point of time when the bankruptcy procedure is commenced all claims against the insolvent company accelerate and become due.

3.3 List of claims which, in the event of bankruptcy, take priority over the mortgage whereas, without bankruptcy, no such priority exists;

Please see our comments under item II./3.4.

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy.

Forced sales proceedings in progress against the debtor at the starting date of liquidation in connection with any assets falling under the sphere of liquidation shall be abated forthwith by the court (authority) enforcing the execution, and the assets seized and the funds yet unpaid, remaining after deducting the costs of the execution proceeding, shall be transferred to the appointed liquidator. The right of execution on the debtor's real estate, if any, shall cease at the starting date of liquidation.

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

We cannot indicate any other risks.

Acts of law and by-laws used to answer the above questionnaire:

- > Act No. IV of 1959 on the Civil Code;
- > Act No. LIII of 1994 on Judicial Execution;
- > Act No. XLIX of 1991 on Bankruptcy Proceedings, Liquidation Proceedings and Members' Voluntary Dissolution;
- > Act No. CXLI of 1997 on Real Estate Registration;
- > Act No. XXX of 1997 on Mortgage Banks and the Mortgage Bond;
- > Decree of the Agricultural Minister No. 109/1999. (XII. 29.) on the Execution of the Act No. CXLI of 1997 on Real Estate Registration;
- > Decree of the Minister of Justice No. 14/1991. (XI. 26.) on the fees of notary publics.

IRELAND

NB: Responses set out relate to residential mortgage lending

I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL

1. CONSTITUTION

1.1 Who can create a Mortgage? Anyone with an interest, legal or equitable, in a property can create a mortgage.

1.2 Procedure: formalities: Must be in writing.

1.3 Is the mortgage accessory to a loan or can it be a separate deed? Description of systems and consequences: A mortgage is generally a separate deed. While it can be separate to the loan document, it must comply with Consumer Credit Act 1995.

1.3.1 One contract (credit + mortgage): Generally not

1.3.2 Two contracts (credit and mortgage): Generally

1.3.3 Is it possible to pledge real estate for «all present and future debt to the pledgee»? Yes.

1.3.4 Reuse of the security when changing lender: No. The mortgage is vacated and the new lender commences the process over.

1.4 Consumer protection rules with respect to the creation of mortgage collateral: The Consumer Credit Act 1995 includes an obligation that mortgage protection insurance must be obtained.

1.5 Schedule: time necessary to get a mortgage registered and entrusted with official authority: Depending on their age and geographical location, properties in Ireland are registered with either the Land Registry or the Registry of Deeds. Registration with the Land Registry takes up to 18 months while registry by the Registry of Deeds takes from 6 to 8 weeks.

2. REGISTRATION: FUNCTIONING OF THE REGISTER

2.1 Traditional / Computerised: Both the Land Registry and the Registry of Deeds operate on a traditional basis however the changeover to electronic has commenced.

2.2 Accessibility: national and cross-border: While a registration must be made by a solicitor with an address in the Republic of Ireland or Northern Ireland, the register can be accessed electronically via an internet account or by post or phone regardless of the whereabouts of the person seeking access.

2.3 Body in charge of registration: The ultimate responsibility lies with the Department of Justice, Equality and Law Reform.

3. COST

3.1 Constitution (fees, notary): A fee of € 600 (on a € 50,000 loan) or € 1,200 (on a € 100,000 loan) is payable to the solicitor and is likely to be included in the legal fees of any underlying property transaction. Stamp duty (statutory tax on legal documents) on mortgages is 0.1%, to a limit of IR£ 500 (€ 634.87), mortgages under IR£ 200,000 (€ 253,947.60) are exempt.

3.2 Registration: Fee for registering a charge, payable to the Land Registry, currently IR£100 (126.97 Euro).

3.3 Others: Land Registry Searches IR£40-60 (50.79 - 63.49 EUR); Family home declaration IR£12-14 (15.24-17.78 Euro)

4. DURATION OF VALIDITY OF THE MORTGAGE

Until vacated.

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

1.1 Preliminary measures / actions

The first action taken is generally the issuance of a letter (or letters) of demand for the payment of arrears followed by letters advising of the institution's intention to instigate possession proceedings. Most credit institutions would then seek an order in the Circuit Court for possession of the property. A number of institutions choose to seek this order through the High Court.

1.2 Forced sale: form and conditions

Once the institution acquires an order for possession, it takes possession, and then sells the property as mortgagee in possession. The method of sale (i.e. auction / private tender / private treaty) will depend on a number of factors including the circumstances of the repossession, the area in question and the advice of the estate agent, however the lender will take steps to ensure that the best price is achieved.

1.3 Subsequent measures

There are no subsequent measures nor are there any required.

1.4 Distribution of the process of the sale: description and possible incidents

Following the sale of the property, once the institution has paid itself it becomes trustee of any outstanding monies, if there are no other creditors, the balance is paid to the borrower.

1.4.1 Lender's right on his borrower's right to rent: Most mortgage lending is in relation to properties which are owner occupied. On most mortgage deeds, the borrower is prohibited from letting the property without obtaining the prior written consent of the lending institution. Where a borrower rents out the property without that consent and the lending institution becomes aware of that fact, it is obliged to serve the court proceedings on the tenant also (who has a right to be represented in court at the proceedings seeking possession of the property)

1.4.2 What happens if the borrower has renounced his right to his rent: Not generally applicable.

1.5 Consumer protection rules in the context of a foreclosure procedure

There are no specific rules as foreclosure procedures are determined by the rules of the court in Ireland.

2. WRIT OF EXECUTION

2.1 Conditions to be fulfilled to render a deed (or a judicial decision) enforceable

The deed must have been registered in the Land Registry or the Registry of Deeds. An institution cannot obtain an order of possession unless the mortgage has been registered.

2.2 Conditions pertaining to and procedure for enforcing a writ of execution within the national territory

Once the court has given an order for possession of the property, the execution order is sent to the Sheriff for the area where the property is located. He will notify the borrowers, and any tenant in the property, that he will be present at the property on a specified date to take possession of it. On that date he will attend at the property and formally hand over possession of the property to a representative of the lending institution.

2.3 Exequatur (extension of foreign judgements)

Order 42A of the Rules of the Superior Court of Ireland and the 1988 Enforcement of Foreign Judgements Act refer, copies of which are attached.

2.3.1 Description of the procedure for enforcing a foreign writ of execution in your country: /

2.3.2 Maximum time taken by this procedure: /

2.3.3 Existence of any bilateral conventions simplifying procedures: /

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1 Who has the right to initiate the procedure for a forced sale

Any owner of a legal, equitable or statutory mortgage has the right to initiate the procedure for a forced sale.

3.2 The stage at which this procedure becomes demurrable on third parties

At the time of the issuing of proceedings, any third party claiming an interest in the property has the right to apply to the court to be heard if they have not already been served with the proceedings.

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset

Other creditors can raise issues with the lending institution once the lending institution has obtained possession of the property and wishes to sell the said property.

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee

If the mortgage which is being enforced is a second mortgage, then the lending institution will have to ensure that the first mortgagor is paid in full. Any property taxes due and any capital gains tax liability that exists would also have to be paid.

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people)

Family law does provide some protection to spouses – which will be dealt with in court. These rights may have been waived.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a forced sale procedure (without incident)

18 months to 2 years approximately (from issuance of proceedings)

4.2 Maximum possible duration of a forced sale procedure

There is no maximum duration.

4.3 Most frequently occurring incidents

Examples of frequently occurring incidents would include claims by family members, title disputes, planning issues, alleged non-compliance with court procedures & right of way access issues.

4.4 Typical duration of the distribution procedure

4 – 6 weeks after the closure of the sale of the property, distribution will be nearly immediate in the absence of specific incident or query.

5. COST OF THE FORCED SALE PROCEDURE

The cost varies from case to case, depending on the number of court applications and whether or not the court proceedings are defended.

5.1 Cost of the procedure

5.1.1 Fixed: No.

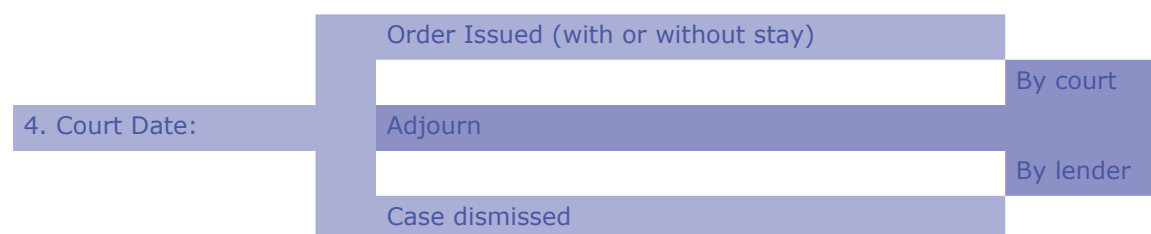
5.1.2 Proportional (percentage of the adjudication value): No.

5.1.3 Example for an adjudication value of 100.000 euro: Not Applicable.

5.2 Who pays the costs?: Generally the borrower.

Repossession Process

1. Non-mandatory attempts to improve account.
2. Advise consumer intent to instigate possession proceedings.
3. Application : Court (Circuit or High)



5. Order Issued (with or without stay) sent to local sheriff.
6. Repossession: by voluntary surrender.
 by eviction / order executed.
7. Sale.
8. Distribution of proceeds.

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

If it is a first legal mortgage the only items that might rank in priority are a small number of property taxes and capital gains tax but these would not prohibit or delay the enforcement of the mortgage. The lending institution would have to ensure that these taxes are paid out of the sale proceeds.

2. THE RANK OF PRIORITY BETWEEN PREFERENCES AND MORTGAGES

There is a provision in Ireland for certain taxes particularly in relation to loans to limited companies to take precedence over registered charges.

Hidden preferences in Ireland would be rights in favour of a spouse under our Family Home Protection Act 1976 and amending legislation in that if a mortgage is taken without the prior consent of the spouse, the mortgage is void. There is also provision for a hidden preference in relation to taking a mortgage which was preceded by a voluntary transfer to the borrower. In such circumstances if the transferor is bankrupted with 2 years of the date of the transfer, it is possible for the assignee to set aside the said transfer in which case the mortgage would also fail.

2.1 Principle

In Ireland a priority would be the right to enforce a claim in preference to others. In relation to registered land, this refers to registered burdens or registered land rank inter se according to the order in which they are created.

In the Registry of Deeds, registered deeds rank inter se according to their date of registration, irrespective of whether the deed transfers the legal or equitable estate. As between registered and unregistered deeds, the unregistered deed is deemed void against the registered one. Registration gives priority but it does not amount to notice i.e. a party clearing through a registered deed who has actual notice of a prior unregistered deed cannot rely on the priority given to the Registry of Deeds (Ireland) Act 1707, Section 4. In relation to judgement mortgages, a judgement mortgage does not obtain priority over a prior unregistered mortgage.

In the absence of registration, priority as between equitable interests or between legal and equitable interests is determined by the equitable maxim where equities are equal, the first in time prevails; where the equities are equal, the law prevails.

2.2 Existence of hidden preferences and mortgages: /

2.3 Preferences likely to take precedence over the mortgage

2.3.1 Enumeration

- > General preferences on immovable and movable property

Definition

With regard to a lien, which is a type of preference, a right is conferred by law and not by contract upon a person to retain possession of or to have a charge upon the real or personal property of another until certain demands are satisfied. There are many liens over property (e.g. an Innkeeper's Lien or a Carrier's Lien or a Solicitor's Lien over title deeds) but a very important lien is that of an unpaid vendor of freehold or leasehold land. This lien covers the unpaid price plus interest and will bind not only the purchaser but also persons claiming under him.

- > General preferences on immovable property
- > Special preferences on immovable property

> Special preferences on certain immovable property

2.3.2 Conditions: /

2.3.3 Rank: Priority is governed by date of registration.

3. EFFECTS OF THE BORROWER'S / OWNER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

3.1 Conditions under which the validity of the mortgage constituted during the suspect period (or risk period) may be called into question

If the mortgage is created for full value and the lending institution has no notice of any potential bankruptcy of the borrower, then the mortgage would be valid.

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to the classification of his preferential right

Not applicable

3.3 List of claims, which, in the event of bankruptcy, take priority over the mortgage whereas, without bankruptcy, no such priority exists

None

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy

Assignee of bankruptcy would have to be a party to any court proceedings.

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

Too varied to list

ITALY

I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL

1. CONSTITUTION

1.1 Who can create a mortgage?

The source legitimising the mortgage claim may be the law (legal mortgage: Civil Code, Art. 2817), a court judgement (judicial mortgage: C.C., Art. 2818), or a voluntary act on the part of the debtor or of a third party in respect of someone else's debt (voluntary mortgage: C.C. Art. 2821).

Legal mortgage. In expressly determined cases, and in some circumstances with reference to the cause of the credit, the law entitles some creditors to the registration of a mortgage on the property of the debtor: a) to the vendor of real estate or vehicles sold, for fulfilment of the obligations deriving from the act of sale (C.C., Article 2817.1, Royal Decree 436 of 15 March 1927); to co-heirs, partners and other co-practitioners for the payment of balances on properties allocated to the co-practitioners upon whom such obligation rests, as a consequence of the fact that the value of the good received is greater than their respective quota (C.C., Art. 2817.2).

Judicial mortgage. Grounds for registration of a mortgage may be any court sentence or other appropriate judicial provision (injunction, arbitration ruling, foreign sentence rendered executive) that condemns the debtor to the payment of a sum of money or to the fulfilment of another obligation or to the compensation of damages (C.C., Art. 2818).

Voluntary mortgage. The owner of the good may grant a mortgage by contract or by unilateral declaration; the act - which can be drafted in public law form or as a private act -- must be in writing on pain of being deemed void (C.C., Art. 2821). If the mortgage is granted on the goods of other persons or by a person who acts without the requisite authority, the registration of the mortgage may be validly made only once the property has actually been transferred to the grantor or once the effective owner has ratified the concession of the mortgage (C.C., Art. 2822). A similar set of rules governs mortgages on future property (C.C., Art. 2823), in that the mortgage can be validly registered only when the property comes into existence.

1.2 Procedural formalities

The mortgage is established by registration in the public real estate registry, and more specifically with the office of real estate registries of the place in which the property is located (C.C., Art. 2827). Registration has the effect of establishing the right of pre-emption, and hence only upon completion of this formality does the creditor have the power to expropriate the good, also in respect of a third party purchaser, and possibly to satisfy his claim out of the proceeds, in that only from that moment does the mortgage exist (C.C., Art. 2808.1 and 2852). The mortgage is assigned a rank at the moment of registration, and the rank is determined by the date of registration, even if it is for a conditional or a future claim, or for a claim that may possibly arise out of an existing relation (C.C., Art 2852, 2853).

The object of the mortgage can only be goods that are exactly indicated (the property must be specifically designated with indication of its nature, the municipality in which it is located, and the number of the land registrar identification data: C.C., Art. 2826), and it must be registered only for a defined amount (C.C., Art. 2809). Obligations resulting from order or bearer instruments may also be covered by mortgage (C.C., Art. 2831.1); in this case the registration is made in favour of the present possessor of the instrument and annotated on the instrument and is automatically transferred to subsequent possessors of the instrument, with no need for any further annotation.

1.3 Is the mortgage accessory to the loan or can it be a separate deed?

Description of systems and consequences: Being accessory implies that the mortgage is strictly bound up with the claim that it guarantees. In fact, the mortgage is extinguished when the credit claim is annulled by a court sentence or declared null or void or cancelled; and, of course, when the credit claim is satisfied the mortgage lapses and is cancelled from the register.

1.3.1 One contract (loan plus mortgage): /

1.3.2 Two contracts (loan and mortgage): /

1.3.3 Is it possible to pledge real estate for «all present and future debt to the pledgee»?
/

1.3.4 Reuse of the security when changing lender.

The mortgage may be granted either by separate act or as part of the loan contract to which it relates; a mortgage may also be registered in respect of conditional credits or for credits that may possibly arise out of an existing relationship (C.C., Art. 2852).

It is possible under Italian law to assign the mortgage to another lender by way of annotation in the Public Registers (art. 2843 of the Civil Code).

1.4 Consumer protection rules with respect to the creation of mortgage collateral

There are no special rules governing the creation of the mortgage when the debtor is a consumer; naturally, the voluntary mortgage as a form of guarantee falls within the scope of the Directive, which the Member States have transposed into law, on unfair clauses in consumer contracts.

1.5 Schedule: time necessary for the notary to prepare the contract and for the mortgage to be registered

The time required to draw up the act is not long, in the sense that once the proper documentation is procured (e.g. the identifying data of the good), the act itself is drawn up within a few days. Registration, although it may take between 30 and 40 days depending on the location of the office with jurisdiction, does not constitute an obstacle to the granting of the mortgage loan, in that in the loan contract the creditor is authorized to carry out the formalities of registration.

2. REGISTRATION: FUNCTIONING OF THE REGISTER

2.1 Traditional or computerized

The register is computerized. The combination of the ministerial decree of 30 July 1985 (for the mechanization of the conservatories of property registers in application of Law 52 of 27 February 1985, published in **Gazzetta Ufficiale** 183 of 5 August 1985), which modifies Book VI of the Civil Code and mortgage service rules) and of the ministerial decree of 10 October 1992 (*Gazzetta Ufficiale* 295 of 16 December 1992) and ministerial decree of 17 July 1993 (*Gazzetta Ufficiale* 176 of 29 July 1993) provides for the possibility of computer communication of the data concerning the registration and transcription of the mortgage by public officers authorized to operate with the conservatory of property registers (i.e., notaries, chancellors and municipal secretaries).

2.2 Accessibility: national and cross-border

Access is national.

2.3 Body in charge of registration

The body charged with registering mortgages is the Conservatoria dei Registri Immobiliari (Conservatory of Property Registers). These conservatories belong to the Finance Ministry. The Conservatory of Property Registers is the body assigned by law to ensure the correct implementation of property

information under the rules laid down by the Civil Code and special legislation. Article 2663 of the Civil Code requires that registration shall be done at the Conservatory in whose jurisdiction the property is located; and Article 2827 provides that the mortgage be registered «in the conservatory of the place in which the property is located.» Hence the territorial jurisdiction is that the registration formalities are executed at the conservatory in whose jurisdiction the property is located. The jurisdictions of the conservatories have been set by interministerial decree (Ministries of Finance and Justice) of 29 April 1972 (Gazzetta Ufficiale 92, 9 April 1973).

3. COST

3.1 Constitution (taxes, fees, notary)

There is a tax for the registration of the mortgage, equal to 2 percent of the value of the formality (the value of the mortgage). There are also modest fixed charges, indicated in Legislative Decree 347 of 31 October 1990 approving the codified law of measures on mortgage and property office taxes.

3.2 Registration

Notary fees are set by decree of the Ministry of Justice of 5 June 1987, published in Gazzetta Ufficiale 136, 13 June 1987. The fees vary with the value of the formality (the value of the mortgage). For example, for a formality (mortgage) valued at between 154,937 and 206,582 Euro, the notary's fee is about 268 Euro; for a value between 258,228 and 387,342 Euro, it is about 340 Euro.

3.3 Other costs: /

4. DURATION OF VALIDITY OF THE MORTGAGE

The registration of the mortgage is effective for twenty years after the date of registration. Registration ceases to be effective unless it is renewed before the expiration of this term (C.C., Art. 2847).

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

Enforcement procedure (governed by the Code of Civil Procedure, Art. 555 ff.) permits the mortgage creditor (the plaintiff) to obtain the forced sale of the property. The other creditors of the debtor may participate in the enforcement procedure (as intervening creditors). The proceeds of the sale are used by the court to reimburse (under a distribution plan drafted by the court itself and approved by the creditors) the expenses sustained for the procedure and to pay, in observance of pre-emptive rights, all the creditors taking part in the forced sale proceeding. If money is left over upon conclusion of the procedure, it goes to the debtor.

Expropriation of property begins with an attachment, which is executed by notification to the debtor and subsequent registration of an act indicating exactly which properties are to be subjected to expropriation and enjoining the debtor from any act whatever that can remove said property from its use to secure the claim (C.P.C., Art. 555). With the attachment, the debtor is named as custodian of the attached property and accessories, including appurtenances and fruits, without compensation. However, the expropriation court may, at the behest of the creditor attaching the property or intervening in the expropriation proceeding, and after hearing the debtor, name as custodian a person other than the debtor. The debtor, or the custodian, has limited powers over the property: in order to rent it he must get the court's authorization, after hearing the parties and other persons interested.

1.1 Preliminary measures/actions

The creditor must take certain actions preliminary to enforcement, whose function is to announce to the debtor the intention of foreclosing and expropriating the mortgaged property; these acts, with which the debtor must be served, are the mortgage in executive form and with the writ of execution. The former is the document in which the creditor's right of forcible satisfaction is ascertained or established, and demonstrating that the claim is certain, liquid (i.e., of determinate amount) and payable (because it is not subject to conditions or time limits). The latter is the formal injunction to the debtor to fulfill the obligation – which is demonstrated by the executive document – within a period of not less than ten days, with the warning that failing such fulfillment forcible execution will be effected (C.P.C., Art. 480). This act becomes ineffective if execution does not begin within 90 days after it is served (C.P.C., Art. 481).

Forcible execution cannot be initiated until the term indicated in the writ of execution expires and in any event not before ten days have elapsed from the service of the writ, save when delay entails danger, in which case immediate execution may be ordered, with or without surety (C.P.C., Art. 482).

1.2 Forced sale: form and conditions

The sale of the property may be effected by auction or not by auction (C.P.C., Art. 503).

If the sale is by auction (C.P.C., Art. 576), there is a public competition between bidders before the expropriation court. Bids are conditional upon one another, in that each successive bid invalidates its predecessor. The property is awarded to the last bidder when three minutes have elapsed since the last bid without a higher bid being made (C.P.C., Art. 581). Even after the auction has been concluded, additional bids may be submitted within ten days, but such bids are not effective unless they are at least one-sixth higher than the final auction price (C.P.C., Art. 584). The enforcement court may delegate these sale operations to a notary (Law 302/1998, which introduced Article 592-bis of the Code of Civil Procedure).

Sale without auction (C.P.C., Art. 570) consists in bids submitted directly to the clerk of the enforcement court, with no contact between bidders; the bids are appraised by the court, with no obligation to take the highest. The bids are statements that contain an indication of the price, the time and the method of payment and all other elements useful to their appraisal. They cannot be revoked before twenty days have elapsed; a longer term may be fixed by the bidder. The effectiveness of the bid depends on the provision of a surety equal to one-tenth of the price.

When there is more than one bid, the executing court sends for the bidders and asks them to take part in competitive bidding starting from the highest bid submitted. If such competition cannot be held owing to the failure of the bidders to take part, the court may order the property's sale to the highest bidder or order a sale at auction (C.P.C., Art. 573). If there is only one bid, the court calls the parties and the creditors to hear their opinion concerning the sale and orders a sale at auction if the bid made does not exceed the value of the property by at least one-fourth (C.P.C., Art. 572).

Only if the auction fails can the creditor request the assignment, after payment, of the property, i.e. the direct attribution of the property subject to execution at a given value.

1.3 Subsequent measures

After the awarding of the property to the highest bidder, the latter must pay the price established within the deadline and in the form set by the court. Once the payment has been made, the court transfers the property to the assignee. Even if the payment has been effected, the court may suspend the sale when it deems that the amount offered is considerably lower than the fair price. If the amount has not been paid, the court declares the lapse of the assignee and orders a new auction.

1.4 Distribution of the proceeds of the sale: description and possible incidents

Once the sum of money is acquired, the enforcement court drafts a plan for its distribution, ranking the participating creditors. The plan must be deposited with the clerk of the court for consultation by the creditors and the debtor, and the date for their hearing set. If the plan is approved or an agreement between the parties is reached, the court orders the payment of the individual shares. If a dispute arises among the co-partitioners or between creditor and debtor (or a third party subject to the expropriation), the court shall order the case to be heard, if it has jurisdiction; otherwise it remits the parties to the competent court. If the court does not totally suspend the proceeding, it provides for the distribution of that part of the amount not subject to dispute.

1.4.1 Lender's right on his borrower's right to rent: /

1.4.2 What happens if the borrower has renounced his right to rent

If the property has been rented to a third party, either by the debtor (prior to the initiation of the foreclosure procedure) or by the custodian (whether he be the debtor or a third party) in the course of the procedure on court authorization, the proceeds form part of the goods subject to the enforcement procedure and thus form part of the procedure's total assets. If the executive action bears on properties mortgaged as security for real estate lending governed by the 1993 Banking Law, the custodian of the attached property pays to the bank the income from the properties mortgaged in his favour, after deducting the costs of administration and taxes, until his credit claim is satisfied (Banking Law, Article 41.3).

1.5 Consumer protection rules in the context of a foreclosure procedure

There are no express consumer protection rules. Bear in mind that the Code of Civil Procedure offers wide protection for the debtor subject to execution, providing for possible opposition both to the execution in general (when he contests the creditor's right to proceed to forcible execution, C.P.C., Art. 615) and to the single acts of execution: C.P.C., Art. 617). When the sale at auction is delegated to a notary, the debtor may ask the foreclosing court to provide him with the acts done as part of the delegated procedure; this court decides on the matter.

2. WRIT OF EXECUTION

Forcible execution can only take place in virtue of an executive instrument for a claim that is certain, liquid, and payable on demand. Executive instruments comprise: court judgements and provisions to which the law expressly attributes effective right of execution; commercial bills and notes and other credit instruments and other acts to which the law expressly attributes such effectiveness (e.g., deposit warrants, pledge or pawn tickets, warehouse warrants); acts received by a notary or other public officer authorized to receive them relative to the obligations of sums of money contained therein (C.P.C., Art. 474).

2.1 Conditions to be fulfilled to render a deed (or a judicial decision) enforceable: /

2.2 Conditions pertaining to and procedure for enforcing a writ of execution within the national territory

Whereas for commercial bills and other credit instruments, the possessor can initiate execution immediately (law on bills, Art. 63; law on cheques, Art. 55), court judgements and other judicial provisions, and acts received by notaries or other public officers, in order to be valid as instruments for forcible execution, must carry the executive formula (C.P.C., Art. 475), save where the law provides otherwise (as in real estate credit, pursuant to the Banking Law, Article 41.1, which lays down that in actions for execution in connection with real estate credit notice of the contractual right of execution is not required). The instrument can be transmitted in executive form – according to the procedure laid down by the law (C.P.C., Art. 475.2) – only to the party in whose favour the provision has been made or the obligation stipulated, or to his successors, with indication at the foot of the page of the

person to whom it was sent. Without valid grounds, no more than one copy in executive form can be sent to any one party (C.P.C., Art. 476).

2.3 Exequatur (extension of foreign judgements)

2.3.1 Description of the procedure for enforcing a foreign writ of execution

Law 281 of 31 May 1995 (reforming the Italian international private law system) introduced new rules on the effectiveness of foreign judgements and acts (abrogating Articles 796-805 of the Code of Civil Procedure as from 31 December 1996); this unifies the source of law regulating conflicts between Italian and foreign law.

In this regard, foreign judgements are now recognized in Italy with no necessity for resort to a proceeding when the conditions set in the law are fulfilled, there is no need for a ruling of recognition (which thus becomes contingent, exceptional) in that the general rule is automatic recognition in Italy of the foreign judgement, providing that the conditions prescribed by law are satisfied. These conditions include: a) that the court pronouncing the judgement had knowledge of the case according to the principles of jurisdiction found in Italian law; b) the act introducing the judgement was brought to the knowledge of the defendant in observance of the law of the place where the trial was held and the essential rights of the defense were not violated; c) the parties were present in court according to the law of the place where the trial was held, or their absence was declared in conformity with that law; d) the judgement is definitive according to the law of the place where it was pronounced (Art. 64).

When it is necessary to proceed with forcible execution – as when the recognition of the foreign judgement is disputed, or when the sentence is not complied with – any interested party may request that the court of appeal names the place where the judgement has been recognised, in order to verify the conditions for recognition of the judgement. The foreign judgement, together with the order accepting such request for recognition, constitutes an instrument giving the right to application and to forcible execution (Art. 67).

2.3.2. Maximum time taken by this procedure

We are not in a position to provide this information.

2.3.3. Existence of bilateral conventions simplifying procedures

Law 218/1995, Art. 2, specifies that its provisions shall be without prejudice to the application of the international treaties in force in Italy. Moreover, in the interpretation of these conventions, account must be taken of their international nature and of the need for uniform application.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1 Who has the right to initiate the procedure for a forced sale? The creditor attaching the property and any co-attaching creditors or other parties intervening, if they have an instrument giving right of execution.

3.2 The stage at which this procedure becomes demurrable on third parties: A third party claiming ownership or other property rights subject to mortgage enforcement may demur by recourse to the enforcement court before the sale or assignation of the property is ordered (third party demurral, C.P.C. Art. 619).

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset: Determination of the value of the mortgaged property is made by the court (save when the procedure is delegated to a notary, in which case the latter makes the valuation himself, also with the assistance of an expert appointed by the court).

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee:

See 2.1 above.

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people):

There is no such rule under Italian law.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a forced sale procedure (without incident)

A survey conducted by ABI (the Italian Banker's Association) in 1999 on credit recovery times found that in Italy forced sale procedures take an average of five years in the North and seven years in the South. ABI is currently monitoring the situation by gathering data from a representative sample of banks operating nationwide.

4.2 Maximum possible duration of a forced sale procedure

The law sets no maximum duration.

4.3 Most frequently occurring incidents:

A significant part of the excessive length of the recovery procedures reported above derives from the slowness in realizing the value of the property subject to mortgage execution. Other recurrent causes are: long-term postponement of hearings, procedural disputes, and verification of documentation.

4.4 Typical duration of the distribution procedure

We have no data on this. An initial collection of data is under way, with the monitoring that ABI has begun.

5. COST OF THE FORCED SALE PROCEDURE

5.1 Cost of procedure

5.1.1 Fixed: /

5.1.2 Proportional (percentage of the adjudication value): /

5.1.3 Example for an adjudication value of € 100,000: /

5.2 Who pays the costs? The costs sustained by the creditor (plaintiff) and co-plaintiffs who take part in the distribution are charged to the party subject to execution (C.P.C., Art. 95).

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

In general, a mortgage entitles the creditor to expropriate, also vis-à-vis a third purchaser, the mortgaged properties securing the credit and to preference in satisfying his claim out of the proceeds of the forced sale (C.C., Art. 2808).

2. THE RANK OF PRIORITY BETWEEN PREFERENCES AND MORTGAGES

2.1 Principle

The general principle is that creditors with a preference on immovable property are preferred to mortgage creditors, unless the law provides otherwise (C.C., Art. 2748.2). Exceptions are mortgages

registered by the creditors of a deceased person within three months prior to his decease and some cases of claims of the State for indirect taxes (C.C., Art. 2772).

2.2 Existence of hidden preferences and mortgages:

This is not possible, as under Italian law preferences and mortgages must be public.

2.3 Preferences likely to take precedence over the mortgage

In the above-mentioned principle (paragraph 1), the legislator stated that the general precedence of particular preferences on immovable property over mortgages, in fact seems to be applied consistently except for those cases indicated in the paragraphs c) and d) below.

In these cases the legislator stated in fact that a preference cannot be exercised if it damages the interests of those who have acquired real estate rights before the event which gives rise to the preference.

In order to formulate this concept more clearly, we can consider two cases in which the conflict between mortgage and preference on immovable property cannot be resolved in terms of absolute principles of predominance but following the principle «prior intempore, potior in iure».

2.3.1 Enumeration

The particular preferences on immovable property in force are stated by law under articles 2770, 2771, 2772, 2774 and 2775 of the Civil Code, which consist of the following:

- a. claims for legal expenses charged to preserve the debtor's assets and of forced sales in the creditors' common interest. The preference is exercised over the price arising from the forced sale of real estate.
- b. claims of the State concerning income taxes (or quotes of them) applied to property income (estimated or effective). This preference is exercised over the entire real estate owned by the debtor and located in the territory of the municipality in which the tax is due. The preference is limited to the taxes registered in the main supplementary, particular or extraordinary registers which are outstanding during the year in which the forced sale is initiated and during the previous year. If the matter is related to supplementary registers and the procedure refers to taxes relating to periods preceding the last two then the preference cannot be exercised for a sum higher than that deriving from the last two years, whatever is the period of reference of taxes.
- c. claims of the State for each kind of indirect tax (registration tax, inheritance tax and some kinds of value added tax) also take precedence, such as claims arising from the application of the local tax on increases of real estate value (INVIM).

This preference, as already observed, cannot be exercised if it damages rights previously acquired by third parties.

- d. claims of the State over facilities on which rents are due by public water grants, take precedence too.
- e. credits granted as contributions to public works performed by consortia on real estate benefiting from improvement works. However these preferences remain in existence only when those contributions are due under the provisions regulating the collection of direct taxes.

2.3.2 Conditions

Beyond the above-mentioned conditions it appears obvious that the preference does not exist or ceases to exist when the debt is repaid.

2.3.3 Rank: See above 2.1.

3. EFFECTS OF THE BORROWER'S / OWNER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

With the opening of bankruptcy proceedings, the mortgage may be subject to action by the bankruptcy receiver, under the bankruptcy laws (revocability of actions) and also under the Civil Code (ordinary revocation, action for nullity, simulation, etc.).

3.1 Conditions under which the validity of a mortgage constituted during the suspect period (or risk period) can be called into question

Revocation under bankruptcy covers the provision of guarantees consisting either in acts without compensation taken within the two years prior to the declaration of bankruptcy (bankruptcy law, Art. 64) or in acts with compensation consisting in granting: a) voluntary mortgages in the two years prior to the bankruptcy for pre-existing debts not yet fallen due and voluntary or judicial mortgages established within a year of the date of the bankruptcy for debts fallen due, when the mortgage creditor demonstrates that he had no knowledge of the state of insolvency of the person who then went bankrupt (bankruptcy law, Art. 67.1); b) guarantees for debts constituted simultaneously with the debt if effected within a year of the declaration of bankruptcy provided that the receiver demonstrates that the mortgage creditor knew of the state of insolvency of the person who then went bankrupt (Art. 67.2). The law specifies the cases in which the suspect period is restricted to ten days for voluntary mortgages granted to secure real estate loans (Banking Law, Article 39.4).

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to the classification of his preferential right

Not applicable

3.3 List of claims which, in the event of bankruptcy, take priority over the mortgage whereas, without bankruptcy, no such priority exists

The bankruptcy law, Art. 111, establishes the order in which the proceeds from the liquidation of the bankrupt's assets are to be distributed, as follows: 1) procedural expenses; 2) payment of creditors with pre-emption rights; 3) payment of unsecured creditors. To prevent the bankruptcy proceeding from annulling the preferences of creditors with pre-emption rights (e.g., mortgage claims), it is held that when the bankruptcy assets comprise mortgages (or special privileges) on immovable property, the procedural expense to be detracted from the proceeds of the forced sale of the property is solely that imputed to the property itself, including a portion of general expenses. Another opinion holds that the debts of the bankruptcy should be imputed proportionally to the amount realized from every single good.

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy: If prior to the declaration of bankruptcy a creditor has taken action for the expropriation of one or more of the bankrupt's properties, the receiver takes the place of such plaintiff creditor in the procedure (bankruptcy law, Art. 107). This principle does not apply in the case of execution on properties mortgaged to secure real estate loans when the action may be taken or continued by the bank also subsequent to the debtor's declaration of bankruptcy. The receiver in any event has the power to intervene in the execution, and the part of the proceeds therefrom exceeding the amount allotted to the bank in the distribution is assigned to the bankruptcy's assets (Banking Law, Article 41.2).

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

No other risks.

THE NETHERLANDS

I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL

1. CONSTITUTION

1.1 Who can create a Mortgage?

The owner of an immovable property or a registered ship can grant a mortgage on that property.

1.2 Procedure: formalities

A mortgage is established by a notarial deed drawn up between the parties in which the grantor has given a mortgage to the creditor on registered property, followed by the entry of the deed in public registers provided for that purpose.

1.3 Is the mortgage accessory to a loan or can it be a separate deed?

Description of systems and consequences: The mortgage is accessory to one or more existing or future loans or credit lines.

1.3.1 One contract (credit + mortgage)

The loan or credit line contract can be included in the notarial deed.

1.3.2 Two contracts (credit + mortgage)

It is possible to separate the loan or credit line contract from the mortgage. This is common practice with many banks.

1.3.3 Is it possible to pledge real estate for «all present and future debt to the pledgee»?

It is possible to grant a mortgage for all present and future debts of a debtor to a creditor, on condition that the notarial mortgage deed contains the facts on the basis of which the debts can be determined.

1.3.4 It is possible that the lender transfers a claim, secured by a mortgage? The mortgage security right follows the transferred claim. The mortgage cannot be reused by the buyer of the claim for other claims.

1.4 Consumer protection rules with respect to the creation of mortgage collateral

Reuse of the security when changing lender: There are no specific consumer protection rules for establishing a mortgage.

1.5 Schedule: time necessary to get a mortgage registered and entrusted with official authority

Normally it takes one day to get a registration of the notarial mortgage deed with the public register.

2. REGISTRATION: FUNCTIONING OF THE REGISTER

The establishing of a mortgage is completed by registration with the public register.

2.1 Traditional, computerised

The registration is traditional. Computerised registration is under construction.

2.2 Accessibility: national and cross-border

The public register can be consulted on-line on the condition that a contract has been concluded with the 'Kadaster'. A fee has to be paid for every consultation. The address of the Kadaster is: Dienst van het Kadaster en Openbare Registers, Fauststraat 1, NL - 7323 BA Apeldoorn.

2.3 Body in charge of registration

There are several regional registration offices (kadasters).

3. COST

Fees of the notary are freely negotiable within certain limits.

4. DURATION OF VALIDITY OF THE MORTGAGE

The validity of a mortgage is not restricted to a certain period.

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

1.1 Preliminary measures / actions

When a creditor wants to seize a property he must have an executory copy of a writ of execution. Writs of execution are: an enforceable sentence of a court, a notarial deed or notarial mortgage deed. Before a seizure of the property can take place a bailiff has to give an official written notice (summons) to the debtor that he has to pay his debts within two days after the notice. The notice must state that in case of non-payment the writ of execution will be carried out. The notice must be followed within twelve months by an official report (procès-verbal) of the bailiff to the debtor. This report must mention:

- > names, addresses and domiciles of the debtor and creditor;
- > the writ of execution
- > a precise indication of the immovable property in the Public Registers in order to render the procedure enforceable on third parties.
- > The writ of execution has to be registered in the Public Register.

1.2 Forced sale: form and conditions

The forced sale has to be announced by way of a writ to the:

- > mortgagor and the debtor, if they are not the same person
- > other creditors who have seized the property
- > other persons who according to the Public Registers have a right to the immovable property ending because of the forced sale (long lease, usufruct).

The notary is in charge of the forced sale. The notary fixes the date, hour and place of the forced sale within 14 days after his assignment. The forced sale is a public sale (auction). The notary takes care that at least 30 days before the auction the sale is announced in one or more posters and a local newspaper. The notary in consultation with the creditor draws up the conditions of the sale. The sale takes place in public and has two stages: by auction and – so-called – Dutch auction. The mortgagor and the mortgagee have the right to ask for a private foreclosure. For such a private sale the president of the district court has to be asked for permission via a barrister. The request to the president can

be handed in until one week before the auction. The request has to be accompanied by a complete agreement for the sale/purchase of the property. The agreement does not have to be signed by the mortgagee if the request is not made by him. Together with the request to the president a list of parties interested in the purchase of the property and mentioning their bids has to be produced. The clerk of the court immediately informs parties who have an interest in the property like other mortgagors and creditors about the request and the fact that they will be heard by the president. If the president allowed the request the private sale is concluded. If the request is handed in time the day set for the public sale lapses.

1.3 Subsequent measures

After the conclusion of the sale the buyer must pay the purchase price into the hands of the notary. First the costs of the forced sale are paid from the purchase price. The notary pays further the mortgagor first in rank; a surplus is handed over to the former owner. If there are more mortgagors, creditors etc. and there is no agreement on the partition of the proceeds between them, the notary has to deposit the proceeds of the sale with a bank or the Dutch Central Bank. The notarial deed of the sale must be registered in the Public Registers in order to transfer the property to the buyer.

1.4 Distribution of the process of the sale: description and possible incidents

1.4.1 Lender's right on his borrower's right to rent: The creditor who has seized the property has no right on the rent of the property.

1.4.2 What happens if the borrower has renounced his right to his rent: See 1.4.1.

1.5 Consumer protection rules in the context of a foreclosure procedure

There are no specific protection rules.

2. WRIT OF EXECUTION

2.1 Conditions to be fulfilled to render a deed (or a judicial decision) enforceable

Writs of execution are:

- > udicial decisions of a Dutch judge that are definitive or declared enforceable by provision
- > some authentic deeds, especially those made by notaries
- > other deeds, declared enforceable by law.

The writ of execution must be headed by the words 'In naam der Koningin' (in name of the Queen), placed by the judge or the notary.

2.2 Conditions pertaining to and procedure for enforcing a writ of execution within the national territory

See 1.1 and 2.1.

2.3 Exequatur (extension of foreign judgements)

2.3.1 Description of the procedure for enforcing a foreign writ of execution in your country

A decision of a judge in a foreign state can only be enforced if:

- a. there is a treaty between the Netherlands and the foreign state and
- b. a Dutch court has given a so-called exequatur on the foreign writ.

2.3.2 Maximum time taken by this procedure

There is no legally binding maximum time to the procedure. Nevertheless, the law prescribes the court to handle these exequaturs procedure with all due speed.

2.3.3 Existence of any bilateral conventions simplifying procedures

This point needs further study.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1 Who has the right to initiate the procedure for a forced sale? Every mortgage creditor has - independent of the rank of his mortgage - the right to initiate a forced sale procedure if the debtor fails to pay his debt secured by the mortgage.

3.2 The stage at which this procedure becomes demurrable on third parties

The mortgagor asks the notary to start the forced sale procedure. The notary gives notice of the forced sale procedure to other mortgagors and creditors who have seized the property.

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset

Not applicable.

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee:

The costs and the wages of people for the maintenance of the property after the registering of the mortgage have a higher preference than the mortgage. The building contractor has a higher preference than the mortgagor so long as visible that he is working on the property.

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people)

Not existent.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a forced sale procedure (without incident)

Four to six months.

4.2 Maximum possible duration of a forced sale procedure

No legal maximum duration.

4.3 Most frequently occurring incidents

- > the debtor starts a legal action in order to prevent the forced sale (application for a temporary injunction)
- > the notary delays the forced sale hoping that the debtor can pay the overdue debts.

4.4 Typical duration of the distribution procedure

In general the distribution of the proceedings is completed a couple of days after the registration of the sale in the Public Registers.

5. COST OF THE FORCED SALE PROCEDURE

5.1 Cost of the procedure

5.1.1 Fixed: There are no fixed costs.

5.1.2 Proportional (percentage of the adjudication value)

The acquirer of the property must pay a degressive percentage of the price.

5.1.3 Example for an adjudication value of 100.000 euro

Price	100.00,--
Notarial costs	600,--
VAT	100,--
Starting premium	1.000,--
Advertisements etc.	3.000,--

The buyer has in general to pay the costs of the sale except the costs of advertisements. These costs are due to the seller/mortgagor.

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

In principle, a creditor can lay claim to any of his debtor's goods in payment of the debt (art. 3: 276 BW). With the exception of the reasons for priority recognised by the law, the creditors all have equal right to obtain satisfaction out of the proceeds from the debtor's goods, in proportion to their claims, after the costs of enforcement have been met (art. 3:227 BW). Priority arises from pledging of goods as security, mortgaging, liens or any other reasons specified by law (art. 3:278 BW). Priority cannot be compelled on the basis of an agreement; however, the creditor can specify in an agreement that his claim has lower priority than attributed to him by law (art. 3:227 § 2 BW).

2. THE RANK OF PRIORITY BETWEEN PREFERENCES AND MORTGAGES

2.1 Principle

Pledging as security and mortgaging take priority over other liens, unless otherwise specified by law (art. 3:279 BW).

2.2 Existence of hidden preferences and mortgages

Concurrent creditors can obtain satisfaction of their claims from the proceeds of a certain part of the debtor's assets, without having to share the proceeds with the other debtors. (Examples: cross-settlement and retention.)

- > Cross-settlement: Cross-settlement is when one party (A) has a claim on another party (B), while at the same time B has a claim on A. These parties may waive their claims on each other, provided the conditions set by the law for cross-settlement are met (6: 127 BW).
- > Right of retention: This is the right which a creditor enjoys, under certain circumstances, to delay handing something over to the debtor until the claim has been met. This right of retention can also be exercised against the creditors of the opposing party. In case of enforcement, the retaining party has a lien on the proceeds, which can be exercised against any party against whom a right of retention can be exercised, including mortgagees (2: 290 BW).

2.3 Preferences likely to take precedence over the mortgage

2.3.1 Enumeration and

2.3.2 Conditions

- > Costs of enforcement, art. 3:277 par. BW. These include at least the costs of serving a court order. For the rest, however, there is no unanimity about precisely which costs comes under this heading.
- > Water Board taxes (art. 138 par. 3 of the Water Board Act).
- > Where Water Board taxes are imposed on the owner or the usufructuary under special laws, these taxes take priority over mortgages (and over all other liens, with the exception of art. 3:288a and 284 BW, to the extent that these costs are incurred after the tax assessment is made).
- > Claims for costs of conservatory measures, art. 3:284 BW. Costs of measures to prevent the claim lapsing take priority over mortgages, where the mortgage was raised previously.

2.3.3 Rank

The liens mentioned above take priority over mortgages.

3. EFFECTS OF THE BORROWER'S / OWNER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

3.1 Conditions under which the validity of the mortgage constituted during the suspect period (or risk period) may be called into question

If a debtor, before being declared bankrupt, carries out a legal action which he was not obliged to take, so that his creditors are prejudiced as a result, the receiver can declare these actions null and void after the bankruptcy (art. 42 FW). However, the receiver must be able to demonstrate that the debtor, or the person on whose behalf the debtor acted, knew or should have known that the creditors would be prejudiced by this action. If the legal action prejudicing the creditors is carried out within a period of not more than one year before the bankruptcy order, the normal burden of evidence is reversed; the parties involved are assumed to have known about the action, and it is up to them to prove otherwise (art. 43 FW).

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to the classification of his preferential right

Mortgagees are preferential creditors, i.e. they can lay claim to the property as if there had not been any bankruptcy (art. 57 FW). However, the rent from the immovable property (real estate) on which the mortgagee has a lien, forms part of the appropriable property, as of the date of bankruptcy (art. 35 par. 2 Fw).

3.3 List of claims which, in the event of bankruptcy, take priority over the mortgage whereas, without bankruptcy, no such priority exists

The retaining party (see II 2 above) therefore has priority over the mortgagee in case of the mortgagor's bankruptcy, and also has a right of summary enforcement.

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy:

The mortgagee has a right of summary enforcement, and, if the debtor is in default of his payment obligations, can seize the property without a court order. The receiver can give the mortgagee a reasonable period in which to exercise the right of summary enforcement (art. 58 FW). If the mortgagee does not sell the property within the set period (in execution of the debt), then he loses his rights as

a preferential creditor, in which case the receiver will realise the pledge, exercising the mortgagee's rights as preferential creditor. The cooling-off period (see IV below) also has an effect on enforcement by the mortgagee in case of bankruptcy of the mortgagor.

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

The receiver may decide, either on his own initiative or at the request of a party concerned, that all rights of third parties (namely preferential creditors) for claims on the appropriable property can only be exercised with his consent during a period of one month (which may be extended by a further period of one month) (art. 63a Fw). The idea is to provide a «cooling-off period» during which the receiver can form a judgement as to which goods should be included in the appropriable property and which should be kept out of it.

AUSTRIA⁶²**I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL****1. CONSTITUTION****1.1 Who can create a Mortgage?**

A mortgage can be created by the owner of the real property (a natural person or legal entity) in respect of its own debt or a third party's debt.

1.2 Procedure: formalities

The lien on a property is established by an entry in the charges register of the land register. The deed creating the lien must contain the exact description of the mortgaged property, the secured debt as an amount of money expressed in figures, and the mortgagor's express consent to the registration of the lien in the land register (declaration of consent to encumbrance).

1.3 Is the mortgage accessory to a loan or can it be a separate deed? Description of systems and consequences**1.3.1 One contract (credit + mortgage): /****1.3.2 Two contracts (credit and mortgage):**

Two forms of mortgage are common:

1. The fixed amount mortgage: this secures a specific credit or a specific loan. Its relationship to the secured loan is strictly dependent, i.e. it reduces or is redeemed to the same extent as the secured debt.
2. The maximum amount mortgage: this secures a complete credit relationship, not a particular credit. It is therefore not in a dependent relationship to a specific credit, but is only redeemed once it has been deleted in the land register or the whole financial relationship with the customer has been terminated.

In practice, two contracts (credit agreement and mortgage agreement) are normally concluded.

1.3.3 Is it possible to pledge real estate for «all present and future debt to the pledgee»?

A maximum amount mortgage can also be created for future obligations.

1.3.4 Reuse of the security when changing lender

If there is a change in the lender, the collateral can be transferred to the new creditor. (Normally the new creditor redeems the debt, and this also results in the transfer of the collateral.)

1.4 Consumer protection rules with respect to the creation of mortgage collateral

There are no separate consumer protection rules with respect to the creation of mortgage collateral, and accordingly the provisions on consumer credit agreements in the Banking Act (Bankwesengesetz) are used in addition to the Consumer Protection Act (Konsumentenschutzgesetz) and the provisions on consumer protection in the Civil Code (Allgemeines bürgerliches Gesetzbuch).

1.5 Schedule

Time necessary to get a mortgage registered and entrusted with official authority: Normally it takes an average of four weeks from the submission of the land register application until the mortgage is

⁶² Last updated in 2003.

registered in the land register. However, the priority of the mortgage is determined by the date on which the land register application is submitted.

2. REGISTRATION: FUNCTIONING OF THE REGISTER

2.1 Traditional, computerised

The Austrian Land Register is a computerized register containing information on the property, its owners and encumbrances.

2.2 Accessibility: national and cross-border

In Austria everyone has the right to inspect the land register and inform themselves of the legal relationships applying to a property. In theory, an enquiry through the legal database (an Internet service for which a charge is made) can also be made from abroad.

2.3 Body in charge of registration

The land register is maintained by the Land Register Courts (district courts).

3. COST

The following fees are payable when a mortgage is created: court fees, notary's fees.

3.1 Constitution (fees, notary)

The fee for the certification of the property owner's signature by a notary or the court depends on the amount of the debt, but is less than EUR 100 for a debt of EUR 100,000.

3.2 Registration:

Court fee: 1.2 % of the value of the right.

3.3 Others

In most cases, the deed creating the lien is executed by the credit institution; this does not involve any cost to the pledgor.

4. DURATION OF VALIDITY OF THE MORTGAGE

The lien on a property remains in force until it has been removed from the register.

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

1.1 Preliminary measures / actions

Warning and notification that the debts are due and payable; filing of action to obtain a court decision (judgment) permitting execution; once a non-appealable judgment has been obtained the lender can have its enforcement initiated through the court.

1.2 Forced sale: form and conditions

The property is sold by means of an officially conducted auction managed by the court. The lowest offer in the auction equals half the estimated value of the property; no bid of less than this amount by the prospective buyers will be accepted.

1.3 Subsequent measures

The successful buyer has to pay the highest bid (i.e. the purchase price obtained at auction) to the court within two months after the date on which the sale at auction becomes final and non-appealable.

1.4 Distribution of the process of the sale: description and possible incidents

Once the highest bid has been paid, the court sets a date for the distribution of the highest bid to the creditors; this is referred to as «setting of the highest bid distribution date». The borrower, the owner of the property, all the creditors and other entitled parties are invited to attend. The money is distributed according to the priority principle laid down in the land register.

1.4.1 Lender's right on his borrower's right to rent

The creditor's creation of the mortgage does not automatically result in the property owner's rent entitlement becoming pledged too. The rent entitlement would have to be assigned or pledged separately; however there are legal restrictions on this, as on enforcement in respect of rent entitlements.

1.4.2 What happens if the borrower has renounced his right to his rent

The property owner can no longer effectively waive the rent entitlement if that entitlement has already been assigned or pledged to the creditor and the tenant is aware of this. Where there has been no assignment or pledging, waiving the rent entitlement may in certain circumstances represent a reduction in the value of the pledge, and the mortgage creditor may have a claim for compensation as a result.

1.5 Consumer protection rules in the context of a foreclosure procedure

Execution proceedings are a highly regulated form of proceedings conducted by the court that are intended to protect the interests of all parties and have the object of achieving the highest possible proceeds at auction. Accordingly, no particular consumer protection regulations apply.

2. WRIT OF EXECUTION

2.1 Conditions to be fulfilled to render a deed (or a judicial decision) enforceable:

The normal procedure is to bring an action and to wait until the court decision permitting the claimant (lender) to proceed to execution has become absolute (at the first, second or third instance). Confirmation (by court stamp) that the judgment has become absolute should also be obtained from the court that handed it down. As well as judgments, there are other documents that carry the right to initiate execution proceedings. The most important of these are compositions and enforceable notarial instruments, both of which are immediately enforceable in principle.

2.2 Conditions pertaining to and procedure for enforcing a writ of execution within the national territory: /

2.3 Exequatur (extension of foreign judgements)

Foreign enforceable instruments are declared enforceable in Austria by the courts on application if there is «formal» reciprocity. That is, the reciprocity must be agreed by treaty; purely «factual» reciprocity is not sufficient.

2.3.1 Description of the procedure for enforcing a foreign writ of execution in your country

The execution proceedings are conducted in the same way as when an Austrian enforceable instrument is produced.

2.3.2 Maximum time taken by this procedure: None

2.3.3 Existence of any bilateral conventions simplifying procedures: There are a small number of bilateral agreements, e.g. with Israel or Tunisia. The bilateral agreements concluded with various European states have now been replaced by the Brussels Convention on Jurisdiction and Enforcement of Judgments (for the EU states) and the Lugano Convention (for the EFTA states) with the same content.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

- > Initiation of execution proceedings on the basis of an enforceable instrument, on application by a creditor (e.g. by the lender).
- > Valuation of the property by a sworn court expert on the court's instructions.
- > Determination by the court of the conditions for the auction; these are largely laid down by law.
- > Announcement of an auction date.
- > Auction conducted by the court. Each bidder must bring to the auction a security in the form of a savings book containing 10% of the estimated value of the property, and the successful bidder must hand this over to the court.
- > Acceptance of bid by the highest bidder (successful bidder).
- > Once the highest bid has been paid in by the successful bidder, who has two months to make payment, the money is distributed to the creditors according to the priority principle laid down in the land register at a meeting called by the court for that purpose.

3.1 Who has the right to initiate the procedure for a forced sale:

Any pledgee, but also any other creditor who holds an enforceable instrument.

3.2 The stage at which this procedure becomes demurrable on third parties

An action brought by a mortgage creditor must be entered in the land register on application by the court. This gives rise to a third-party effect inasmuch as the execution in respect of the pledged property can be conducted directly against any owner of that property.

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset:

The court must inform the mortgage creditors of the estimated value. At the same time, they are to be invited to put forward any objections they may have within a set time. The expert must respond to the objections and adjust the valuation where appropriate.

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee

There are legal liens held by the municipalities with a distribution that varies by region; these apply particularly for land tax and various public charges, e.g. sewerage and water charges. Amounts due to the tax offices and health insurance funds do not give rise to any such special priority rights.

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people)

No. For instance, execution proceedings may also be brought against minors, who must have appropriate representation.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a forced sale procedure (without incident)

Approximately six months from authorization of execution to acceptance of highest bid.

4.2 Maximum possible duration of a forced sale procedure

There are no statutory maximum periods laid down.

4.3 Most frequently occurring incidents

Assertion of (recently concluded) tenancy contracts. Filing of appeals to delay the proceedings.

4.4 Typical duration of the distribution procedure

Approximately six to ten months between the date on which acceptance of the bid becomes final and the distribution of the highest bid to the creditors.

5. COST OF THE FORCED SALE PROCEDURE

5.1 Cost of the procedure

5.1.1 Fixed: /

5.1.2 Proportional (percentage of the adjudication value)

The following have to be paid:

- > Standard fee: depends on the amount of the debt for which the creditor has instituted execution proceedings.
- > Valuation costs: depend on the property's value and the valuer's expenses. Between EUR 1,450 and EUR 3,600 on average.

The costs of the proceedings are not calculated on the value of the successful bid. Certain public charges are calculated pro rata to the value of the successful bid (item 5.1.2); however these are not part of the costs of the proceedings and do not depend on an auction process having been conducted by the court. They are real estate transfer tax (3.5% of the successful bid) and the fee for entering the property into the land register (1% of the successful bid), both payable by the successful bidder.

5.1.3 Example for an adjudication value of 100.000 euro

As stated, the amount of the successful bid is not relevant to the charges, and so the following example is given: Standard fee for execution proceedings initiated by a debt of EUR 100,000: around EUR 462.

Valuation costs for a property valued at EUR 100,000, assuming average expenses for the valuer: around EUR 870.

5.2 Who pays the costs

The petitioning creditor (i.e. the creditor on whose application the execution action was brought) must pay the costs of the proceedings (standard fee plus valuation costs) in advance. These costs are eventually to be paid by the obligor (the debtor), although in many cases the latter will be unable to do so.

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

2. THE RANK OF PRIORITY BETWEEN PREFERENCES AND MORTGAGES

2.1 Principle

According to the principle, property is encumbered by mortgages by registration in the Land Register. There are few exceptions to this principle (see points 2 and 3). The ranking by registration in the Land Register applies in the same way to contractual charges and charges established for the purposes of enforcement. The time of the respective application to the Land Registry is the sole decisive factor for the ranking. A restriction of the ranking principle may occur if the parties to the transaction change the ranking of the charge by mutual agreement. In other words, an agreement can be concluded between the parties concerned that the ranking of a mortgage is exchanged with the ranking of another mortgage on the same property. This is also recorded in the Land Register and then has effect vis-à-vis third parties. In this respect, the principle of ranking according to the point of time of submitting the applications can be changed by agreement.

2.2 Existence of hidden (unpublished) preferences and mortgages and

2.3 Preferences likely to take precedence over the mortgage

Rights recorded in the Land Register which are to be taken into consideration in the case of realisation, especially in the case of enforcement by the court, only exist to a very limited extent. The charge is effective even without registration in the Land Register. Such charges are limited to claims of public bodies, which are mostly due to the municipalities in whose territory the immovable property is situated. On the basis of the legal definition, this refers to «tax arrears, together with additional charges, fees for the conveyance of property and other public levies to be discharged on the property, for the three years preceding the date of issue of the additional charge», as well as the interest in arrears on this amount for not more than three years (§216(1)(2) Enforcement Act). These charges are therefore substantially limited by the Enforcement Act.

As far as we know, the charges are to be considered as ranking equally, but they are mostly of little economic importance. Of the charges of this kind regulated by Federal law, the liability for the tax on land and buildings, the levy on the value of land and inheritance tax are the most significant.

Some charges are regulated by Federal law and then apply throughout the territory of the Federal Republic of Austria, whereas others are regulated in Land laws and are then applied differently in the individual Länder of Austria. Apart from the charges which are not registered and are to be given priority, there are no preferences which precede registered mortgages.

However, a general prohibition to encumber property can be registered in the Land Register in favour of specific persons (spouse and close relations). This prohibition to encumber property does not influence the mortgages registered previously according to rank and their realisation, but does preclude the creation of further charges unless the consent is given of the person in whose favour the prohibition to encumber property was recorded.

3. EFFECTS OF THE BORROWER'S / OWNER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

It is assumed here that the borrower is also the owner of the property.

3.1 Conditions under which the validity of the mortgage constituted during the suspect period (period preceding the bankruptcy) may be called into question

In the event of the bankruptcy of the borrower, regulations apply under the Bankruptcy Act, as a

result of which the granting of a loan, the acceptance of repayments on loans and the creation of mortgages can be opposed.

The suspect period is the time from the opening of the bankruptcy proceedings back to the registration of the mortgage in the Land Register. This is in accordance with the current case law. A few years ago, it was still the point of time of the signing of the bond of security by the pledgor which was adopted.

Depending on the person and the objectives of the transaction, the Bankruptcy Act mentions several situations for opposition and time limits for opposition (suspect periods). For credit institutions as lenders, it is in practice only the provisions of §§ 30 and 31 of the Bankruptcy Act which are important. The suspect periods depend on these provisions and amount to 1 year according to § 30 and to 6 months according to § 31 of the Bankruptcy Act. The consequence of successful opposition to the mortgage would be that it cannot be enforced as security for the claims. The creditor is then not secured by the mortgage.

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to the classification of his preferential right

The ranking of the (unregistered and) registered charges is not changed by the opening of bankruptcy proceedings. It corresponds to the ranking to be observed in the case of individual enforcement, resulting from the ranking of the changes in the Land Register.

3.3 List of claims which, in the event of bankruptcy, take priority over the mortgage whereas, without bankruptcy, no such priority exists

Claims arising from the necessary administration of the property or the costs of the forced sale under the bankruptcy proceedings may be enforced as a priority in the proceedings involving the property as so called «special estate costs» (which are connected to the special estate «property»). In addition, the comments made under points 2 and 3 apply regarding the ranking.

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy:

The trustee in bankruptcy can avail himself of a simplified form compared to the normal enforcement procedure to bring the property to auction.

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

It is to be assumed that charges can already exist which impedes the realisation (e.g. rights to erect buildings on other people's land, charges on real estate, easements). The mortgagee must however expect these and take account of them in the valuation of the property and hence in the value of the mortgage.

The main risk in our opinion is currently the possibility to change the legal environment which restricts the realisability both by the group of people and the status of the property. To give a few examples:

- > Introduction of restrictions on the transfer of property to specific persons (e.g. regulations of the individual Länder on second homes)
- > Tightening up of the environmental provisions with a view to cleaning up polluted land or tightening up the provisions on the demolition of old buildings
- > Changes to the land allocation plans and building plans of a public nature, which may influence the future use of property.

POLAND

I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL**1. CONSTITUTION****1.1 Who can create a mortgage?**

A mortgage can be established on the basis of an agreement, a decision of the court or other authorities (legal procedure – only in particular cases, tax debt, etc.). To establish a mortgage, the entry to the mortgage register is compulsory – constitutive character of the registration.

1.2 Procedure: formalities:

In case of credits granted by banks, to create a mortgage collateral a simplified procedure exists. According to Art. 95 of the Banking Law Act, Bank books of account and excerpts from such books, signed by persons authorized to make declarations with respect to financial rights and obligations on behalf of the bank, and with the bank's seal affixed, together with all other declarations drawn up in this manner containing commitments, the release of obligations, the waiving of rights or confirmation of repayment of debt, and also attesting to the extension of a credit or cash advance and the amount, interest rate and repayment terms thereof, transfer of claim secured by a mortgage or a pledge by registration, shall be vested with the legal authority of official public documents and shall constitute the basis for performing entries in real estate registers and other public records. If a mortgage is established on the basis of an agreement (non-banking procedure), consent of the property's owner must be expressed in the form of a notary deed.

See also point 3.2.

1.3 Is the mortgage accessory to a loan or can it be a separate deed?**Description of systems and consequences:**

According to the Act on Mortgage Registers and the Mortgage, in order to secure a specified claim real estate may be encumbered with the right according to which a creditor may demand the satisfaction of its claim from the real estate irrespective of who has become the owner of the same and whether with the right of priority over personal creditors of the owner of the real estate.

In Poland a mortgage is of an accessory nature and does not constitute an independent right. The establishment and existence of a mortgage depends on the existence of the debt it secures (Art. 79, Art. 94 of the Act on Mortgage Registers and the Mortgage). As a rule, a mortgage may not be established if the debt it secures does not exist. The accessory principle underlines a strict dependence of one right – here a mortgage (also described as a non-independent, correlated or side right) – on another right (described as the main one). In the case of a mortgage, accessoriness consists of the linkage between the mortgage and the debt it secures where the existence, scope, content, transfer, execution, or expiry of the mortgage depends on the said debt. Polish law distinguishes two types of a mortgage: ordinary and deposit. Accessoriness understood as above applies to an ordinary mortgage, which is regarded by the Polish regulator to be the primary real security for the debt. An ordinary mortgage is used to secure a denoted debt, i.e. a specific claim, which originates from a specific legal relationship and currently exists. With respect to a deposit mortgage the regulator allows, by way of exception, for the «loosening» of the accessory principle. As a result, a deposit mortgage can be established and secure debts of non-designated value, in particular those that are future or conditional in their nature. However, a legal relationship from which a debt may originate must already exist. A future claim which is to be secured must originate from a specific legal relationship, with burdening a property with a mortgage securing a hypothetical debt which may occur at some time or originate from some legal relationship being impossible. The fact that securing non-existing claims, i.e. those that are yet to arise, is acceptable means that until a debt occurs a mortgage exists without it, this being an exception to accessoriness.

A deposit mortgage secures a debt up to a fixed maximum amount (Art. 102 of the Act on Mortgage Registers and the Mortgage). In practice, it is used to secure a debt from «an open» bank account, a revolving credit agreement, variable rate interests, claims for the payment of contractual penalties, etc. A deposit mortgage provides for numerous exceptions to accessoriness. For example, in the event a debt is repaid /expires, a deposit mortgage will remain valid if a legal relationship from which a securable debt may arise, still exists. Moreover, in the event of a credit amount being increased, the value of the mortgage will not have to be increased if the increased amount falls within the secured amount. Nonetheless, a deposit mortgage still remains an accessory right with just a few exceptions (loosened accessoriness). As a result of its accessory construction, a mortgage does not offer sufficient security for more complex transactions where changes are observed on the side of creditors, debtors, and a debt itself. An example can be difficulties with using the mortgage to secure loans granted by bank consortia (a problem with using one mortgage to cover numerous creditors), using an existing security by a new creditor (refinancing, consolidated loans), and with effective performance of securitisation transactions (the necessity to note changes of the creditor in the mortgage register).

Furthermore, it should be remembered that Polish law clearly describes the types/categories of debts, which can be secured, by one type of mortgage or the other. Therefore, free choice of the type of mortgage is not possible.

However, it should be emphasised that the basic legal construction is an ordinary (accessory) mortgage, with a deposit mortgage being used in the banking practice (e.g. in variable rate credits). Its great advantage is loosened accessoriness, which unfortunately also has its limits. Therefore, even a deposit mortgage does not allow for an effective performance of transactions on the mortgage market. As a result, bank circles and investors operating on the Polish property market support the introduction of a uniform form of security – a non-accessory right to a property, which would create a link between a debt and a security only at the claim level, ensuring its full flexibility in e.g. syndicate financing, securitisation transactions, and security transfers.

The below questions – one or two contracts – are secondary and rather technical in the context of accessoriness.

1.3.1 One contract (credit + mortgage)

In order to establish a mortgage a contract must be concluded between the owner of an encumbered property and the person with a secured claim. The declaration of intent requires the form of a notary deed. Whereas this form is obligatory for the debtor, the mortgage creditor can express his intent in a manner of his choice. The procedure for establishing a mortgage securing a bank's liability is different. In this case, a notary deed is not required. The owner submits his declaration in writing, using a standard format, and an entry is made on the basis of the bank's statement confirming the granting of a bank loan or credit, issued in line with Art. 95 of the Banking Law Act. The aforementioned statement must be included in the credit contract. However, this is most frequently done by a separate document.

1.3.2 Two contracts (credit and mortgage)

1.3.3 Is it possible to pledge real estate for «all present and future debt to the \ pledge»?

See point 1.3.

1.3.4 Reuse of the security when changing lender

Due to the accessory nature of a mortgage, re-using the existing security when changing the lender is impossible. For example, in the event of refinancing, the existing mortgage must be deleted from the mortgage register and a new mortgage should be established to secure a new claim.

1.4 Consumer protection rules with respect to the creation of mortgage collateral

The motion on entering into a mortgage register must enclose documents, which are basis of the entry. The Civil Code defines who is entitled to lodge a motion for the entry. Furthermore mortgage registers are public registers, which are held by district courts. The entry is a judgment of a court. The court notifies the participants in legal proceedings of the lodged entry. The notification includes an essential content of the entry. The participant in legal proceedings doesn't obtain the notification if he renounces the notification in the written form. There is a right of appeal against a judgment of a court on entry into a mortgage register (Art. 5181, Art. 62610 and Art. 62611 of the Civil Proceedings Code).

According to the Civil Proceedings Code, a plaintiff may demand establishment of existence or non-existence of a legal relation or rights by a court, if he has a vested legal interest in it (Art. 189).

Finally according to the Act on Mortgage Registers and the Mortgage, in case of a discrepancy between the legal status of the property as revealed in the mortgage register and the actual legal status, the person whose right is not entered, is entered incorrectly or is affected by an entry of a non existing encumbrance or limitation, may demand the elimination of such a discrepancy (Art. 10).

See also point 1.2.

1.5 Schedule: Time necessary to get a mortgage registered and entrusted with official authority

According to data for 2005 the average time was one month and a half. Although, this depends on the city/district.

2. REGISTRATION: FUNCTIONING OF THE REGISTER

2.1 Traditional, computerised

Mostly traditional but digitalisation is in progress. The reform consisting of the digitalisation of mortgage registers has been carried out in Poland since 2003. It is covering more and more courts, with existing mortgage registers being moved from the traditional/paper format to a computerised format. 100 out of 350 land and mortgage courts in Poland have already been reformed with 2.6 million out of ca. 18 million registers being computerised. They are kept in a central database, which will eventually hold all mortgage registers. The introduction of online access for those interested in using mortgage registers is planned in the near future.

2.2 Accessibility: national and cross-border

Pursuant to Art. 2 of the Act on Mortgage Registers and the Mortgage, mortgage registers are public. There is no evidence of any restrictions in access to mortgage registers by foreign investors. Certain restrictions exist in relation to the accessibility of mortgage register files (access to these files is not open for all; it is limited to notary publics and those with a legal interest). However, these restrictions are the same for both national as well as cross-border entities. The electronic mortgage register will also be public.

2.3 Body in charge of registration

The mortgage register department of the competent district court.

3. COST

As a rule, establishing a mortgage involves three types of cost. They include a civil transaction tax for establishing a mortgage, a notary fee and a court fee for entering the mortgage into the mortgage register.

The level of the above-named costs depends on the credit amount and the type of mortgage (ordinary, deposit).

3.1 Constitution (fees, notary)

As a rule, establishing a mortgage requires a notary deed. However, Polish law provides for a simplified procedure for establishing a mortgage for the bank (Art. 95 of the Banking Law Act). In such cases an entry into a mortgage register is made upon a special statement by the bank. The majority of bank mortgages in Poland are entered into mortgage registers under the simplified procedure. Hence, if the creditor is a bank, the overall cost of establishing a mortgage is reduced by the amount of the notary fees. Therefore, in the table notary fees have not been included in the overall cost. The notary fee depends on the value of a claim.

a) Notary fees – Regulation issued by the Minister of Justice dated 28 June 2004 on maximum notary fees (Journal of Laws of 2004 Nr 148, item 1564); According to the Regulation the maximum fee counted from the value of the claim amounts:

- 1) up to 3.000 PLN - 100 PLN;
- 2) over 3.000 PLN up to 10.000 PLN - 100 PLN + 3 % of the amount over 3.000 PLN;
- 3) over 10.000 PLN up to 30.000 PLN - 310 PLN + 2 % of the amount over 10.000 PLN;
- 4) over 30.000 PLN up to 60.000 PLN - 710 PLN + 1 % of the amount over 30.000 PLN;
- 5) over 60.000 PLN up to 1.000.000 PLN - 1.010 PLN + 0,5 % of the amount over 60.000 PLN;
- 6) over 1.000.000 PLN - 5.710 PLN + 0,25 % of the amount over 1.000.000 PLN, but no more than the six-time average monthly salary in the previous year.

The maximum notary fee for the preparation of a notary deed, in order to establish a mortgage amounts to 50% of the above mentioned fee. The notary fee for the preparation of a notary deed in order to establish a mortgage, which will be used as collateral for a banking credit granted for housing purposes or commercial activity, amounts to 1/4 of the above mentioned fee.

Additionally notary services are taxed at the rate of 22% VAT.

3.2 Registration

Court fees (registration) – the Law of 28.07.2005 on Court Fees in Civil Code Proceedings (Journal of Laws of 2005, Nr 176, item 1398).

The Act, which entered into force on 2nd March 2006, has introduced fixed fees in mortgage proceeding cases. The previously binding regulations provided for a complicated system of proportional fees, discounts, and exemptions. The Act should contribute to the improvement and acceleration of civil proceedings. The Act includes all important regulations concerning court fees in civil code proceedings. Additionally there is the Civil Transaction Tax (constitution of a mortgage) at the rate of 0.1% or 19 PLN in case of non-fixed value liabilities.

3.3 Others

See point 3.1. and 3.2.

Cost	Credit of PLN 200,000 = € 50,000		Credit of PLN 400,000 = € 100,000	
	Ordinary mortgage	Deposit mortgage	Ordinary mortgage	Deposit mortgage
Notary fees + VAT	427.5 PLN = € 106.8 + 94 PLN	427.5 PLN = € 106.8 + 94 PLN	677.5 PLN = € 170 + 149 PLN	677.5 PLN = € 170 + 149 PLN
Court fees for an entry into the mortgage register	200 PLN = € 50	200 PLN = € 50	200 PLN = € 50	200 PLN = € 50
Civil Transactions Tax	200 PLN = € 50	19 PLN = € 4.75	400 PLN = € 100	19 PLN = € 4.75

4. DURATION OF VALIDITY OF THE MORTGAGE

According to the Act on Mortgage Registers and the Mortgage, the expiration of the claim secured by a mortgage involves the expiry of the mortgage unless the special provision defines otherwise. In the case of the mortgage being struck off from the mortgage register without important legal causes such mortgage expires after ten years (Art. 94, Art. 95).

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

The only way accepted by Polish law to seek debt satisfaction by a creditor is through the courts. This is the case because Polish law – in the same way as other European legal systems – bans the conclusion of the so called *leges commissoriae* agreements for forfeiture of secured property in order to satisfy a mortgage debt in favour of a mortgage creditor.

The exclusivity of the court enforcement procedure is based on Art. 75 of the Act on Mortgage Registers and the Mortgage: «Satisfaction of a mortgage creditor from a property is carried out in accordance with the legislation on the court enforcement procedure unless the said property is subject to enforcement by an administrative enforcement authority». Therefore, mortgage enforcement is carried out in line with the relevant provisions of the Code of Civil Proceedings (Chapter VI., Enforcement from the property, Art. 921 – 10136).

The only exception from the court enforcement procedure is administrative enforcement, which is based on the Law of 17 June 1966 on Enforcement Proceedings in Administration.

Art. 75 of the Act on Mortgage Registers and the Mortgage is *iuris cogentis* in its nature, which means that the contractual exclusion of the enforcement procedure is not acceptable. An agreement aimed at satisfying a mortgage creditor without an enforcement procedure will be invalid. Any attempts to go around the described enforcement procedure are considered to be unacceptable, e.g. granting a mortgage creditor an irrevocable proxy to sell the said property (including the collection of its price) and satisfying the debt from the amount achieved from the sale.

1.1 Preliminary measures/actions

Pursuant to Art. 923 of the Code of Civil Proceedings, at the request of a mortgage creditor to initiate the enforcement procedure in relation to the property named in the request, an executor calls the debtor to repay the debt within two weeks under pain of description and estimation.

1.2 Sale: form and conditions

Polish law formulates, as a principle, the exclusivity of the sale of a property as the subject of the enforcement procedure. This is reflected in Art. 952 of the Code of Civil Proceedings: «The encumbered property is sold by public auction». The auction itself is public, and shows no attributes of a legal contract subject to free regulation by the parties involved. Pursuant to Art. 972 of the Code of Civil Proceedings: «An auction is public and is carried out in the presence and under the supervision of a judge».

1.3 Subsequent measures

1.4 Distribution of the process of the sale: description and possible incidents

1.4.1 Lender's right on his borrower's right to rent

1.4.2 What happens if the borrower has renounced his right to his rent?

1.5 Consumer protection rules in the context of a foreclosure procedure

2. WRIT OF EXECUTION

2.1 Conditions to be fulfilled to render a deed (or a judicial decision) enforceable

The basis for enforcement is a request filed by a mortgage creditor including an execution title. Pursuant to Art. 776 of the Code of Civil Proceedings: «An execution title is an execution title with the enforcement clause». According to Art. 777 of the Code of Civil Proceedings execution titles include:

- 1) a court decision which is legally valid or subject to immediate enforcement, as well as an amicable agreement reached in court;
- 2) a decision by a court official which is legally valid or subject to immediate enforcement;
- 3) a decision by an amicable court or an agreement reached in such a court;
- 4) a compromise reached in front of a mediator;
- 5) other decisions, settlements, agreements which in light of the Law are subject to court enforcement;
- 6) the notary deeds listed in pp. 4-6 in which mortgage debtors/property owners subject themselves to enforcement; and
- 7) the notary deed referred to in Art. 777, § 3 of the Code of Civil Proceedings.

Banks have the privilege to issue special execution titles (bank execution titles) - Art. 96-98 of the Banking Law Act. The reasons to introduce the concept of a bank execution title were the inefficiency of court claim satisfaction proceedings (a bank execution title allows for avoiding the first stage of the court proceedings) and the desire to speed up enforcement proceedings. In practice, the procedure is commonly practiced by Polish banks, which use bank execution titles in their enforcement proceedings.

The basis for issuing bank execution titles are bank's books or other documents recording transactions performed by the bank. A bank execution title should contain the following:

- > an indication of the bank issuing a bank execution title for which enforcement will be carried out;
- > an indication of the debtor obliged to make a payment;
- > the amount of debt including interest and payment dates;
- > an indication of date;

- > an indication of the bank activity, which is the basis for the enforced claim;
- > an indication of the maturity of the enforced claim;
- > a seal of the bank issuing the bank execution title and signatures of authorised bank officials.

Effectiveness of a bank execution title is conditioned to the debtor's written statement on his submission to enforcement.

The condition for carrying out enforcement – on the basis of a «general» or bank execution title – is granting this title the enforcement clause by the court (Art. 781 of the Code of Civil Proceedings and Art. 97 of the Banking Law Act). A request for granting the enforcement clause is examined by the court promptly, not later than 3 days from its submission (an instructive date). As a rule, when looking into requests for the enforcement clause the court examines formal aspects, rather than technical ones.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1 Who has the right to initiate the procedure for a forced sale

As a rule, initiating the enforcement procedure requires an active approach from a mortgage creditor. However, his passive position does not exclude the possibility of satisfying his interest because enforcement can also be initiated by another mortgage or personal creditor. A mortgage creditor with a valid execution title is obliged to approach the appropriate court executor, as an enforcement authority for the district court competent for a given area, with a request. The following are the stages of enforcement:

- 1) seizure of the property (Art. 923, and next, of the Code of Civil Proceedings);
- 2) description and estimation of the seized property (Art. 942, and next, of the Code of Civil Proceedings);
- 3) auction of the property (Art. 952, and next, of the Code of Civil Proceedings);
- 4) adjudication (Art. 987, and next, of the Code of Civil Proceedings);
- 5) award of ownership (Art. 998, and next, of the Code of Civil Proceedings);
- 6) division of the amount obtained from enforcement (Art. 1023, and next, of the Code of Civil Proceedings).

3.2 The stage at which this procedure becomes demurrable on third parties

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people)

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

As the Polish mortgage credit market is still young, due to the absence of an appropriately large sample of statistical information, the data relating to the duration of the enforcement procedures is not available.

4.1 Typical duration of a forced sale procedure (without incident)

4.2 Maximum possible duration of a forced sale procedure

Not specified by law.

4.3 Most frequently occurring incidents

4.4 Typical duration of the distribution procedure

5. COST OF THE FORCED SALE PROCEDURE

5.1 Cost of the procedure:

5.1.1 Fixed 5.1.2 Proportional (percentage of the adjudication value)

5.1.3 Example for an adjudication value of € 100.000

5.2 Who pays the costs?

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

2. THE RANK OF PRIORITY BETWEEN PREFERENCES AND MORTGAGES

2.1 Principle

2.2 Existence of hidden preferences and mortgages

An example of a hidden property encumbrance was the so-called statutory (secret) lien referred to in Art. 66 of the Act on Mortgage Registers and the Mortgage which was abolished in 2001. It was a statutory lien aimed at securing claims of the State Treasury or a local authority entity. It was established on the basis of specific provisions, by virtue of law. It was not entered into a mortgage register (hence, its secret nature) and enjoyed, with certain exceptions, a satisfaction priority over other mortgages. It was replaced by a compulsory tax mortgage, which is regulated in the Tax Ordinance Law (see below).

2.3 Preferences likely to take precedence over the mortgage

2.3.1 Enumeration

2.3.2 Conditions

2.3.3 Rank

A mortgage security gives a mortgage creditor the privilege of being satisfied from the secured property before the personal creditors of the property owner. This means that in the event of a property foreclosure the amount obtained from the sale of the said property will be first used to satisfy a mortgage creditor and only then personal creditors of the owner of this property, as long as there are still funds for their satisfaction. If a property is encumbered with several mortgages, their rank (priority) determines the order in which they are satisfied.

However, the priority of satisfying a claim of a mortgage creditor is not absolute as it is subordinate to guaranteed claims privileged in the light of law which are mainly listed in Art. 1025 § 1 and § 2 of the Code of Civil Proceedings (the so-called enforcement privileges). Art. 1025 § 1 of the Code of Civil Proceedings lays down the order for satisfying individual categories of claims from the amount obtained from enforcement. The satisfaction order is as follows:

1. enforcement costs;
2. alimonies;
3. claims connected with work, limited to 3 months, and pensions;
4. claims secured with a maritime mortgage;
5. **claims secured with a mortgage or** a register pledge;
6. claims connected with work unsatisfied under rank 3;
7. taxes, if not satisfied under rank 5;
8. claims secured with a pledge right or those enjoying a statutory priority not listed in earlier ranks;
9. claims of creditors carrying out enforcement;
10. other receivables.

Same as a mortgage, interest on the claims for the last 2 years prior to ownership allocation and enforcement costs in the amount not exceeding one tenth of the principal amount are satisfied under rank 5. The remaining interests and costs are satisfied under rank 10. In the case of co-operative rights, a claim of a housing cooperative, due to the non-paid up construction contribution connected with this right, will be satisfied before other mortgages.

Art. 1026 § 1 of the Code of Civil Proceedings regulates the situation when the amount obtained from the sale of the secured property is not sufficient for full satisfaction of all claims within the same category. In this case, claims within rank 5 (including mortgage claims) are satisfied in the order of their priority, it being determined by the relevant provisions of substantive law. The amount allocated to a creditor is primarily counted towards enforcement costs, followed by interest, and eventually the debt sum (Art. 1026 § 2 of the Code of Civil Proceedings). Furthermore, certain privileged claims are also outlined in the Tax Ordinance Law (Art. 34, in connection with Art. 36). According to the Tax Ordinance Law, a statutory lien owned by the State Treasury or a local authority entity as a security of certain tax obligations stated therein enjoys satisfaction priority over liens established for securing other types of debt. The only exception is a mortgage used as a collateral for bank loans and when a bank mortgage debt has been disposed of in favour of a securitisation fund (Art. 36 § 2 of the Tax Ordinance Law). In the event of a property being encumbered with a «tax» lien and the abovenamed mortgages, the satisfaction priority is determined, in line with the general terms and conditions, by the order of entries.

3. EFFECTS OF THE BORROWER'S / OWNER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

The new Bankruptcy and Rehabilitation Law adopted in 2003 has significantly strengthened the legal position of mortgage creditors. The Law has brought a number of important changes, including the provision where mortgage creditors are not satisfied from the general bankruptcy estate but from the collateralised item, i.e. the property itself. This results in a lower risk connected with mortgage lending for banks.

Polish law provides for the following two types of bankruptcy proceedings:

1. bankruptcy with a possible settlement between the debtor and its creditors;
2. bankruptcy, including the winding-up of the debtor's estate.

Claims secured by a mortgage are excluded from the settlement agreed under the bankruptcy proceedings unless a mortgage creditor agrees for their inclusion in the settlement (Art. 273 paragraph 2 of the Bankruptcy and Rehabilitation Law). In the event of the settlement being made and a

mortgage creditor having agreed for a mortgage to be included in the settlement, the mortgage shall remain valid. However, it secures the claim in the amount and on the payment terms specified in the settlement (Art. 292 paragraph 2 of the Bankruptcy and Rehabilitation Law). After the performance of the settlement, the mortgage of the mortgage creditor who has agreed to the settlement, expires.

If a settlement with creditors is not an option, the debtor's estate is wound up, with the aim of gathering the sum, which will go into the funds of the bankruptcy estate.

In the event of any secured claims, in particular those secured with a mortgage on components of the bankruptcy estate (properties), the separateness principle referred to in Art. 336 of the Bankruptcy and Rehabilitation Law applies. The separateness principle means that the sums obtained from the sale of items/rights secured with a mortgage are not included in the «general» bankruptcy estate. They are not subject to general division of the bankruptcy estate funds but are exclusively earmarked for the satisfaction of creditors whose claims were secured in this manner, i.e. with a mortgage. In this situation, pursuant to Art. 348 of the Bankruptcy and Rehabilitation Law a separate plan for the division of the sum acquired from the sale of items/rights is drawn up. «General» bankruptcy estate funds include only the sums remaining after the satisfaction of the claims secured by a mortgage. Art. 346 of the Bankruptcy and Rehabilitation Law determines the satisfaction order for individual claims within the separate bankruptcy mass by introducing three categories of privileged claims, which enjoy priority over mortgages. Claims secured by a mortgage are satisfied only after the satisfaction of alimonies, in the limited scope claims connected with remuneration for work and pensions for causing an illness, inability to work, disability or death.

3.1 Conditions under which the validity of the mortgage constituted during the suspect period (or risk period) may be called into question

According to Art. 81 paragraph 1 of the Bankruptcy and Rehabilitation Law, following the declaration of bankruptcy, it is neither possible to encumber components of the bankruptcy estate with a right of pledge, register pledge or revenue pledge, nor to make an entry in a mortgage register or a register relating to these components in order to secure a claim even if the claim had occurred prior to the declaration of bankruptcy. Paragraph 3 of the same article provides for an exception and says that this provision does not apply if a request for a mortgage entry has been filed with the court earlier than 6 months prior to the submission of a request for bankruptcy declaration. In other words making a mortgage entry after the declaration of bankruptcy is, for obvious reasons, impossible. This principle (a ban on entries into a mortgage register) applies to requests filed during the 6 months prior to the announcement of bankruptcy. Earlier requests are not covered by the ban.

Whereas Art. 81 contains a legislative error in this regard, it is evident that the intention of the regulator is as described above.

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to the classification of his preferential right

3.3 List of claims which, in the event of bankruptcy, take priority over the mortgage whereas, without bankruptcy, no such priority exists

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

In Poland a mortgage creditor must take into account numerous risks which result from the relatively limited experience, limited jurisdiction and the need for reforms during the development stage of the mortgage financing market. The furthest reaching reform project is the concept of *dług gruntowy* (land debt), which by being a flexible security on the property would also secure the borrower's rights.

PORTUGAL

I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL

1. CONSTITUTION

1.1 Who can create a mortgage?

A mortgage can be created by law (legal mortgage), by judicial decision (judicial mortgage) and by agreement between the parties or by will (voluntary mortgage). It is necessary to be the owner of the real right to be mortgaged.

1.2 Procedure: formalities:

The voluntary mortgage must be formalised by a notary or private deed. Mortgages only come into force after being registered. The register is constitutive.

1.3 Is the mortgage accessory to a loan or can it be a separate deed?

Description of systems and consequences:

The mortgage is an accessory right and can exist for future or conditional obligations.

1.3.1. One contract (credit and mortgage)

Normally the same deed formalises the obligation and the mortgage guarantee. However, it is also possible to formalise a mortgage to guarantee one or more previously formalised contracts.

1.3.2. Two contracts (credit and mortgage): See 1.3.1.

1.3.3. Is it possible to pledge real estate for «all present and future debt to the pledgee?

This is not possible. The maximum amount of the guaranteed obligation must be assigned to each mortgaged estate.

1.3.4. Reuse of the security when changing lender

When changing lender it is possible to reuse the mortgage, in compliance with the succession of rights or the remissions.

1.5 Schedule

Time necessary to get a mortgage registered and entrusted with official authority.

This depends on the Land Registry Office. Usually the time varies between 15 days and 2 months.

2. REGISTRATION: FUNCTIONING OF THE REGISTER

2.1 Traditional, computerised

In general the Register is traditional and paper-based. However there are several Land Registries where the register is computerised, particularly in the large cities.

2.2 Accessibility: national and cross-border

The Portuguese Land Register is not accessible from outside the country.

2.3 Body in charge of registration

The Land Register is a public service that is part of the Ministry of Justice.

3. COST

3.1 Constitution (fees, notary)

The cost of the notary deed is composed by a fixed amount of about € 50,00, and a variable one, which depends on the guaranteed amount.

3.2 Registration

The cost of the register in the Land Registry is basically the same, except the fixed amount, which is about € 17,50.

3.3 Others

There are no other costs.

4. DURATION OF VALIDITY OF THE MORTGAGE

The mortgage is normally valid while the credit exists. However the registers of all judicial mortgages and the registers of legal or voluntary mortgages up to € 2.500,00 are only valid for 10 years, at the end of which they may be renewed for a same period.

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

1.1 Preliminary measures/actions:

To submit a request for enforcement the debtor must be considered in default and the creditor must hold an executable deed.

1.2 Forced sale: form and conditions:

The mortgaged estate must be distrained by a judicial decision in the enforcement procedure. The distraint must be registered in the Land Registry. The sale is made by a person or specialised entity, designated by the Court, or by judicial auction, with proposals in sealed envelopes.

1.3 Subsequent measures:

The Court rules in favour of the highest bidder, which constitutes the necessary deed to register the property in the Land Registry.

1.4 Distribution:

The buyer must pay the purchase price, which, after the payment of the costs of the enforcement proceedings, is distributed among the creditors in accordance with the rank of priority of the guaranties.

2. WRIT OF EXECUTION

2.1 Conditions to be fulfilled to render a deed (or a judicial decision) enforceable: The public or private deed must be hand-signed by the debtor. The court decision must be final.

2.2 Conditions pertaining to and procedure for enforcing a writ of execution within the national territory: /

2.3 Exequatur (extension of foreign judgements)

2.3.1 Description of the procedure for enforcing a foreign writ of execution in your country: For public or private deeds it is necessary to observe the Convention of The Hague of 5th October 1961. Judicial decisions must be reviewed and confirmed by a Portuguese Court.

2.3.2 Maximum time taken by this procedure: For deeds, about 3 days. For judicial decisions, it varies, but normally from 1 to 1.5 years.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1 Who has the right to initiate the procedure for a forced sale: Creditors with a writ of execution.

3.2 The stage at which this procedure becomes demurrable on third parties: After the distraint of the mortgaged estate has been registered in the Land Register and other creditors have been notified to claim their credits.

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset: There is a phase in the enforcement procedure in which the other creditors guaranteed by the mortgaged and distrainted estate and other unknown creditors are publicly notified to claim their rights.

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee: There are special preferences that could affect the priority of the mortgage guarantee. These special preferences are not registered in the Land Register.

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people): None.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a forced sale procedure (without incident): From 18 months to 2.5 years.

4.2 Maximum possible duration of a forced sale procedure: About 10 years.

4.3 Most frequently occurring incidents: Attachments and problems with the register of the distraint in the Land Register.

4.4 Typical duration of the distribution procedure: About 3 months.

5. COST OF THE FORCED SALE PROCEDURE

5.1 Cost of the procedure: About 8% of the amount in debt or of the amount of the sale.

5.2 Who pays the costs: The product of the sale pays the costs.

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

Civil Code.

2. THE RANK OF PRIORITY BETWEEN PREFERENCES AND MORTGAGES

2.1 Principle: The principle is that a mortgage confers the right to a creditor to be paid with preference over other creditors who do not have special privileges or registered priorities.

2.2 Existence of hidden preferences and mortgages: There are hidden preferences that override mortgages and are defined as a facility the law confers on certain creditors, namely the State and the Social Security, regardless of registry.

2.3 Preferences likely to take precedence over the mortgage.

2.3.1 Enumeration: Credits arising from Court costs, taxes and duties concerning the mortgaged asset.

2.3.2 Conditions.

2.3.3 Rank:

- > Credits for Court costs.
- > State taxes.
- > Local rates.
- > The right of the promissory buyer of the mortgaged estate to retain the credit resulting from the default on the promissory contract.
- > Mortgage law.

3. EFFECTS OF THE BORROWER'S / OWNER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

The mortgage is maintained under the same terms and conditions.

3.1 Conditions under which the validity of the mortgage constituted during the suspect period (or risk period) may be called into question: The mortgage only loses validity if it is dated after the date set by the Court for reasons of bankruptcy.

3.2 Extent to which the bankruptcy changes the right of the mortgage with regard to the classification of his preferential right: When bankruptcy is declared all creditor privileges of the State, Local Authorities and Social Security are immediately extinguished and are considered common credit.

Therefore, mortgage credit improves its ranking in the case of bankruptcy.

3.3 List of claims which, in event of bankruptcy, take priority over the mortgage whereas, without bankruptcy, no such priority exists: /

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy: All lawsuits concerning real estate involving the bankrupt are dealt with in the bankruptcy process.

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

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FINLAND⁶³**I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL****1. CONSTITUTION****1.1 Who can create a mortgage?**

According to the Finnish Land Law Code, a mortgage is established by registering a mortgage on a real estate or a registered lease agreement and then by transferring the mortgage certificate of the mortgage to the debtor as a collateral for the debtor's claims. The applicant for the mortgage has to be the owner of the real estate. There are two preconditions: 1) the applicant must be the owner based on substantial law and 2) the owner must have a legal confirmation of possession of real estate. If a lease on land is being mortgaged the applicant has to be a leaseholder whose right is registered. The lease has to be of such a nature that it can be assigned without the obligation of hearing the owner of the estate.

1.2 Procedure: formalities

- > here are four separate phases in the process of creating a mortgage:
- > Applying for the mortgage. The applicant has to be the owner of the real estate. The mortgage is granted after the application has been duly delivered to the registration authority (the local district court) and a mortgage bond drafted by the authority has been given to the applicant as a certificate of the mortgage. No participation by a notary public is needed in this phase.
- > Pledge. This is the (in practise always written) promise of the debtor to give the mortgaged property as a collateral for the loan.
- > The assignment of the mortgage bond. This is a precondition for a binding lien.

The debt. A precondition for the existence of a lien is that the creditor has a valid claim from the debtor.

1.3 Is the mortgage accessory to a loan or can it be a separate deed? Description of systems and consequences: The extent of the pledge depends on the pledge commitment**1.3.1 One contract (credit + mortgage)**

The mortgage and credit are separate deeds, i.e. a mortgage can be granted even if there are no claims at the moment of the granting.

1.3.2 Two contracts (credit and mortgage)

As said, the mortgage and credit are separate deeds.

1.3.3 Is it possible to pledge real estate for «all present and future debt to the pledgee»? A pledge that has a special clause of mortgage can deal with one deed: A pledge that has a general clause of mortgage is a collateral for all liabilities of the owner of the pledge. It is quite common to use the latter to pledge a real estate for all present and future debt to the pledgee.

1.3.4 Reuse of the security when changing lender

It is possible to reuse the mortgage bond with a new lender.

1.4 Consumer protection rules with respect to the creation of mortgage collateral

According to Finnish Law, there are a few consumer protection rules to be taken into account when

⁶³ Last updated in 2003.

creating a mortgage collateral. Mortgage collateral arrangements have consumer protection character when a guarantee is given by a private person. According to the Finnish Guarantee And Pledge Act (Laki takauksesta ja vierasvelkapanttauksesta), a private guarantee given as a collateral for a loan is always a deficiency guarantee if the loan is granted for the acquiring of a dwelling or a leisure-time apartment or the repairing of such apartment and this property acts as a collateral for the loan. The same applies to a deficiency pledge if given for such loan. The rules governing consumer credit can also affect the relationship between the creditor and the mortgager. The consumer credit rules in the Finnish Consumer Protection Act (Kuluttajansuojalaki) apply to loans given to be used for purchases of dwellings. As mortgages often are connected with such loans, the parties in a mortgage arrangement must take into account e.g. the consumer-friendly rules governing the premature payment and collecting of the debt. The latter is also governed by the Debt Collection Act (Laki saatavien perinnästä) which defines e.g. the sound collection procedure in the case of consumer debt.

1.5 Schedule: time necessary to get a mortgage registered and entrusted with official authority

As there is no centralized registration body, the time necessary to get a mortgage registered varies between different parts of the country; i.e. the time depends on the registering judge in the district court that grants the mortgage. The registration times vary from a few days to a few weeks. However, the mortgage always gets the preference from the day of arrival of the application to the court.

2. REGISTRATION: FUNCTIONING OF THE REGISTER

2.1 Traditional, computerised

The present Finnish land register based on a computerised system was formed in 1987 in order to get all the significant information in one register. The land register is wholly computerised, in contrast to the earlier system which was manually managed.

2.2 Accessibility: national and cross-border

The computerised land register can be accessed if the person wishing to access the information has acquired the necessary passwords which are subject to a fee. One can get information about the purchase of these passwords from the Finnish Ministry of Justice. It is also possible to contact the register by phone and order the needed documents. There are no rules governing the accessibility to the register from outside Finland, i.e. the information should also be available to foreigners.

2.3 Body in charge of the registration

The body in charge of the registration process is the district court of the area where the mortgaged property is located.

3. COST

3.1 Constitution: ca. EUR 35

3.2 Registration: Registration has no separate fee.

3.3 Others:

If the content of the mortgage is changed or the mortgage certificate is changed to a mortgage bond, the fee is ca. EUR 22. Perhaps the most common change is that a certificate given in the days of the old Land Law Code is changed to a certificate that is in accord with the rules of the new Code. Order of an abstract of the register of mortgages costs ca. EUR 10.

4. DURATION OF VALIDITY OF THE MORTGAGE

If applied for on 1st of January 1999 or later the mortgage is valid until the mortgage is officially redeemed. Mortgages applied for and registered earlier must be renewed in ten years' time from the day of registration.

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

1.1 Preliminary measures / Actions

A compulsory auction requires a basis for enforcement. A basis for enforcement can be a normal judgement or a final decree in bankruptcy. The creditor who has that kind of judgement has to deliver an application for enforcement to the body in charge and pay an advance payment for the enforcement. The authority gives notice of the auction in the official newspaper and in a local newspaper. All the creditors of the mortgager creditors have to announce the debts in the presentation of claims. In the presentation of claims the creditors announce all the claims which they have from the mortgager. The presentation of claims is the event where creditors can deny the validity of the mortgager's other debts. The denial can deal with, e.g., the origin or the amount of the debt.

After the presentation of claims has been held, the authority which organises the auction shall draft a special writ called the list of creditors. The list of creditors contains every known creditor, their claims and the possible priorities of the claims.

1.2 Forced sale: form and conditions

The actual sale process proceeds by normal auction rules: buyers call their bids and the highest bid wins the auction. A creditor who has applied for the auction has the right to refuse to accept the highest offer. The buyer has to pay an advance payment immediately after the auction. The amount of the advance payment is one sixth of the total price.

1.3 Subsequent measures

After the auction the new ownership of the sold real estate is reported for entry into the land register. The mortgage is transferred to the buyer. The creditors get their share of the final price after the appeal period of 3 weeks is over.

1.4 Distribution of the proceeds of the sale: description and possible incidents

1.4.1 Lenders right on borrowers right to rent

The mortgagee has a right to the borrower's rent after the object has been executed.

1.4.2 What happens if the borrower has renounced his right to his rent?

The lender has an exclusive right to terminate the rent. If the case is considered to be a chicanery, it is possible that an offence of the right to lien can be considered to have taken place. It has its special rules in article 28 of the Penal Law.

1.5 Consumer protection rules in the context of a foreclosure procedure: See paragraph I.1.4.

2. WRIT OF EXECUTION

2.1 Conditions to be fulfilled to render a deed (or a judicial decision) enforceable

The creditor must have an enforceable courts decision.

2.2 Conditions pertaining to and procedure for enforcing a writ of execution in Finland

The writ has to become legally valid.

2.3 Exequatur (extension of foreign judgements)

2.3.1 Description of the procedure for enforcing a foreign writ of execution in Finland

A foreign writ is enforceable after a Finnish court of law has investigated the legality of the foreign writ. After the investigation, the foreign writ can be executed.

2.3.2 Maximum time taken by this procedure:

The procedure can take up to one year.

2.3.3 Existence of any bilateral conventions simplifying procedures

Finland is a party to a few bilateral conventions. The most important convention is the Brussels convention which seeks to harmonize the enforcement procedures across Europe. Finland also has a convention (ratified in 1977) with Sweden, Denmark, and Norway. Iceland has not ratified this convention but Finland has an older convention (1953) with Iceland. Finland has also entered into a convention with Austria (1995). This convention aims at simplifying the obligatory procedures.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1 Who has the right to initiate the procedure for forced sales?

The creditors and the bankrupt's estate have the right to initiate the procedure of a forced sale.

3.2 The stage at which this procedure becomes demurrable on third parties

The demurrer period starts when the presentation of claims is under way.

3.3 Legal means available by which any other creditor with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset: The head of the execution office leading the auction has the obligation to see that the final price does not fall short of the price of a comparable area.

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee

A special preference of this kind is the statutory right to the lien.

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people)

One of the factors that can prohibit the right to proceed with the procedure is the so-called debt arrangement. The contents of this arrangement are defined in the insolvency legislation and the arrangement must be ratified by a district court. If the mortgager has granted the debt arrangement, the prohibition on execution takes effect.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a forced sale procedure

A forced sale procedure takes approximately 2-3 months.

4.2 Maximum possible duration of a forced sale procedure

A forced sale procedure can sometimes take over a year.

4.3 Most frequently occurring incidents

There have been some problems with the debtor party. In the more difficult cases, debtors have caused problems especially when the announcement procedure is under way.

4.4 Typical duration of the distribution procedure

The typical duration of the distribution procedure is approximately 5 - 6 weeks from the auction.

5. COST OF THE FORCED SALE PROCEDURE

5.1 Cost of the procedure

5.1.1 Fixed: There are no fixed costs.

5.1.2 Proportional: The proportional costs vary between ca. EUR 1,682 - ca. EUR 3,364.

5.1.3 Example for an adjudication value of € 100,000

The costs are independent of the value of the property. If the object is worth € 100,000 the costs are approximately € 2,500.

5.2 Who pays the costs?

The creditor who has applied for the auction has to pay an advance payment for the auction costs. That and the rest of the costs are reduced from the final price before any other claims are paid.

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

The Finnish legal system protects the mortgage holder quite effectively. Mortgage holders have a strong position in the enforcement procedure as they are held as so called separatists. Only execution costs and the statutory right to lien are ranked higher in the priority list.

2. THE RANK OF PRIORITY BETWEEN PREFERENCES AND MORTGAGES

2.1 Principle

According to the new Land Law Code, there should be no unregistered preferences after 1st January 1999. The rank is given according to the registration date. If several mortgages are registered during the same day they have an equal rank unless a special rank, has been applied for. If preferences are registered on the same day as a mortgage, the preferences precede the mortgage.

2.2 Existence of hidden preferences and mortgages

As mentioned in paragraph 2.1 there should be no hidden preferences after January 1st 1999. But if there is a so-called legal right of lien for the balance of the purchase price, this hidden preference can last until December 31st 2009 (January 1st 1999 + 10 years). This exception applies to purchases of un-separated parcels. This kind of situation is very rare and does not represent a real risk.

2.3 Preferences likely to take precedence over the mortgage

Preferences are enumerated and ranked in the order which is defined in the Land Law Code.

Order:

1. Execution costs
2. Statutory right to lien (Land Law Code chapter 20, article 2)
3. Right to lien and registered special preferences, e.g. the right to rent
4. Unregistered right to possession
5. Selling price which has a protective clause by pactum reservati dominii
6. Claims that have foreclosed

3. EFFECTS OF THE BORROWER'S / OWNER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

3.1 Conditions under which the validity of the mortgage constituted during the suspect period may be called into question

The privilege of the mortgagee remain despite the bankruptcy. The creditors who are holders of a right to lien have a privileged statues, i.e. they are separatist creditors. The separatists can collect their claims outside of the bankruptcy process.

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to the classification of his preferential right

Bankruptcy does not change the rights of the mortgagee.

3.3 List of claims which, in the event of bankruptcy, take priority over the mortgage whereas, without bankruptcy, no such priority exists

According to the Bankruptcy Act's article 80, some claims take priority over the mortgage. Such claims are the various costs of taking care of the property and costs from sale of the objects.

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy

Bankruptcy changes the enforcement in comparison with the execution. Bankruptcy is defined as a general enforcement, whereas execution is specific execution. Bankruptcy precedes execution.

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

One of the risks that could face the mortgagee is the action for recovery.

SWEDEN

I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL

1. CONSTITUTION

1.1 Who can create a mortgage? The owner of the property.

1.2 Procedure: formalities

To constitute a mortgage, the owner of the property applies for a mortgage. The mortgage is then granted by a registrar of mortgages and a deed is issued. The deed is to be transferred to the creditor. In reality this procedure is now carried out electronically via the creditor (a bank or a mortgage company), acting on behalf of the owner. If the owner of the property cannot pay back the loan, the property is seized and sold at a compulsory auction. The priority of the mortgage is decided by the order in which mortgages were granted.

1.3 Is the mortgage accessory to a loan or can it be a separate deed

The mortgage can be a separate deed.

1.3.1 One contract: /

1.3.2 Two contracts: The mortgage is not really a contract. It is a deed which is connected to the credit contract.

1.3.3 Is it possible to pledge real estate for «all present and future debt to the pledgee»? No.

1.3.4 Reuse of the security when changing lender: It is possible.

1.4 Consumer protection rules with respect to the creation of mortgage collateral: The Consumer Credit Act regulates consumer protection for mortgage credits, such as early repayment, APRC and mortgage rate adjustments.

Chapter 4 of the Swedish Land Law Code contains special rules which provide a certain degree of consumer protection in connection with the sale of real property from business enterprises to consumers (see 4:19), which, in principle, make the rules on defects and deficiencies mandatory to the benefit of the consumer unless separate guarantees are given. Regarding the purchase of new small houses, it is common that a combined agreement involving the construction contract and purchase of real property is entered into. Here special rules on protection apply, which are found in the Swedish Consumer Services Act, in addition to the rules which apply in accordance with the Swedish Land Law Code. A special construction contract with special guarantee commitments is also used.

1.5 Schedule

After the application, the registrar draws up a draft decision. This is stored in a database and a diary note is printed out. This note together with the other documents in the case are left to another administrator. If everything is found to be correct, this administrator transforms the draft into a decision by signing the diary note. The deed is produced and transmitted to the applicant.

2. REGISTRATION: FUNCTIONING OF THE REGISTER

2.1 Traditional, computerised

2.2 Accessibility: national and cross-border

2.3 Body in charge of registration

Traditionally deeds are stored in paper form. Computerised deeds were introduced in 1994. A computerised deed is only available in the form of a note in the Real Estate Register, kept and administered by the National Land Survey Office, a government authority. This register contains information on all real estate and site leasehold rights in the country; such as ownership status, taxation value and mortgages of the real estate.

3. COST

Stamp duty has to be paid by the owner of the property, according to certain legislation. The stamp duty for a deed is 2% of the purchase price. An expedition fee has to be paid for the administration of the case, about 50 euros.

4. DURATION OF VALIDITY OF THE MORTGAGE

There is no maximum time for the validity of a mortgage; it is always valid until it is cancelled.

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

1.1 Preliminary measures/actions

The authorities of the Government Enforcement Administration (GEA) are responsible for the enforcement of both public (e.g. taxes) and private claims, including claims on property.

Private claims are usually based on decisions by general and administrative courts. But they also include titles based on summary procedures from the GEA. Repossessions and evictions are usually based on summary decisions. Titles on judgements must be legally binding, with the exception of summary decisions involving an obligation to pay. If the debtor fails to pay, he will receive a demand from the GEA to pay within a certain time period. If the period elapses without payment, the property is attached by the GEA, meaning that the debtor may not dispose of the property and the creditor who has made the application has a preference right compared to other creditors. Attachment of real estate is entered into the Real Estate Register.

1.2 – 1.4 Forced sale: form and conditions, etc.

The condition for enforcement is that there is a value above the mortgage. After attachment, the real estate is sold by the GEA by public auction. Before the auction, the real estate is appraised and described in a protocol that is available to the public. An announcement is published in the daily press at least three weeks before the auction. The property is exhibited to prospective buyers. Before the auction a supervisory meeting is held and the officer in charge of the auction goes through a list of parties concerned (mostly banks, loan associations, etc.). A protective amount is fixed (covering costs and the mortgages with better right than that of the creditor or the attachment of the actual debt for which the real estate is sold is not based on mortgage).

The auction starts with a presentation of the conditions for the sale. Bidding is made by bid and overbid and the highest bid is accepted. The enforcement officer in charge of the proceeding can refuse to accept the highest bid on the grounds that a higher bid can be obtained at a new auction. If the highest bid is accepted, the buyer must pay 10 percent of the purchased sum as down payment.

At a certain time after the auction a session is held to distribute the purchase sum among the creditors on the list of parties. The auction can be appealed within three weeks from the day of the auction. If the auction becomes legally binding, the buyer can move into the house. Should the debtor refuse to move out he can be evicted by the GEA at no cost to the buyer.

1.5 Consumer protection rules in the context of a foreclosure procedure

Almost all decisions by the GEA can be appealed against by the debtor or by a third party, normally within three weeks from service of the decision. The appeal is to be addressed to the District Court. Decisions that can be appealed against must include a written instruction on how to appeal.

2. WRIT OF EXECUTION

2.1 – 2.2 Enforceability etc.

The debt due will be tried by the competent authority (the Court of the Enforcement Administration) and then transformed into a writ of execution. The written application shall contain a reference to the mortgage contract, whether this is made up in data form or not. The application is remitted to the debtor, who may dispute the application. If not, the authority will immediately issue a decision, according to which the duty to pay is established and the property is attached. On the other hand, if the application is disputed by the debtor, the case will automatically be referred to an ordinary trial in court, ending with a writ of execution ordered by the Court.

In bankruptcy cases, the receiver (trustee) may choose between an ordinary procedure (see above) or a private sale, administered by himself. In the latter case, the property is sold with mortgages and other claims intact.

2.3 Exequatur (extension of foreign judgements)

No general right to extend foreign writs of executions concerning real property in Sweden exists, except for judgements in other Nordic Countries. With few exceptions, foreign judgements will be neither recognised nor enforced on the absence of statutory support therefore (often based on a treaty, e.g. the 1988 Lugano Convention). Even when foreign judgements are not recognised or enforced as such however, they may still be used by the parties as proof of certain facts or of the contents of foreign law in a Swedish proceeding.

In cases where there is a statutory support for recognition or enforcement, the recognition of the res judicata effect of a foreign judgement does not usually require any particular formalities, whereas a party seeking to enforce a foreign judgement will usually have to initiate a separate enforcement procedure in the Svea Court of Appeal in Stockholm.

One exception from the non-recognition principle applies for judgements obtained abroad where Swedish courts lack jurisdiction, e.g. concerning real property abroad. The foreign decision will be incorporated into the separate Swedish judgement. It emerges from the above that no maximum time is prescribed for the enforcement procedure in these cases, but a period of 6-12 months is not unlikely.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1 Who has the right to initiate the procedure for a forced sale?

The creditor or receiver in bankruptcy.

3.2 The stage at which this procedure becomes demurrable on third parties

The property is presumed to belong to the person who is registrated as the titleholder of the property. Proof of the contrary has to be provided by anyone who disputes the enforcement. If this third person cannot immediately prove that he owns the property, he is asked to bring his claim to the court. The

property cannot be sold before this case is decided.

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset

The valuation of the property is performed by GEA or by an external expert. This should be done within four months. Before the auction, a meeting with all the creditors is held where the creditors can look after their rights. A creditor who does not participate in this meeting loses his right.

3.4 Existence of special preferences that could affect the priority of the mortgage guarantee

The cost of the procedure and legal costs, such as provision to the administrator in bankruptcy.

3.5 Existence of legislation prohibiting or restricting the right to proceed with the forced sale (protection of certain categories of people)

Some rights connected with the property cannot be seized or annulated as a result of compulsory auctions (some tenancy rights, for instance) but this is seldom regarded as a major obstacle to the forced sale.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 – 4.2 Typical duration of a forced sale procedure - Maximum possible duration

According to the law, the property should be sold within four months after the distraint. But this is often difficult for the GEA to accomplish. Most often the property is sold within six months. The auction takes legal effect after three weeks.

4.3 Most frequently occurring incidents

It happens quite often that the former owner of the property, the debtor, refuses to move out from the house. A decision on eviction is then necessary. Another quite common incident is that the former owner has destroyed parts of the property or has removed fixtures of the property. Because of this, when it comes to small houses, an insurance policy often is taken out to protect the buyer. The premium for the insurance is paid from the purchase-sum (in reality the debtor).

4.4 Typical duration of the distribution procedure

This is not regulated by law. A distribution meeting is usually held four weeks after the auction and the reason for this is that there is a three-week delay before the auction takes legal effect. The buyer of the property at the meeting pays for the total amount of the purchase sum and the money is distributed to the creditors.

5. COST OF THE FORCED SALE PROCEDURE

There are certain costs for the administration of the procedure, about 1000 SEK.

Other costs are:

- > Costs of valuation of the property which is an actual cost and can vary.
- > Preparation costs, 1 % of the sales value of the property.
- > Selling cost, 2 % of the sales value.
- > Cost of the premium for a possible insurance policy, see above.

All these costs are to be covered by and paid out of the purchase-sum with best priority.

III. RANKING OF MORTGAGES AND PREFERENCES

1. GENERAL POINTS – LEGAL TEXTS

2. THE RANK OF PRIORITY BETWEEN PREFERENCES AND MORTGAGES

2.1 Principle

There is a special act on priority rights for different kinds of claims in case of insolvency and execution. This act distinguishes between special and general priorities. Special priorities are only applicable to certain fixed assets, for example mortgages. The creditors with special priorities get paid first, depending on which ranking they have. After this, if there is anything left, the creditors with general priorities get paid proportionally.

When the debtor is insolvent or bankrupt all creditors are in principle invited to join the execution. The process is then characterized as general execution, meaning that all assets which can be executed must be claimed. This form of execution is regulated in the Act on Insolvency.

2.2 Existence of hidden preferences and mortgages

A public announcement for hidden creditors is made in the newspapers.

2.3 Preferences likely to take precedence over the mortgage

A few special priority rights with «higher» ranking, for example mortgages on ships or airplanes. Also right of retention can take precedence over mortgages, and so can rights due to an insurance policy, as well as legal fees connected with the procedure of forced sale of the property. Normally these rights are insignificant when compared to mortgages.

3. EFFECTS OF THE BORROWER'S / OWNER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

3.1 Conditions under which the validity of the mortgage constituted during the suspect period (or risk period) may be called into question

The mortgage can be recovered if it is made during the last five years before the bankruptcy and the debtor through this action became insolvent and the creditor knew or should have realised that this was or was to be the case.

3.2 Extent to which the bankruptcy changes the rights of the mortgagee with regard to the classification of his preferential right

The bankruptcy in most cases does not change the preferential right of the mortgagee.

3.3 List of claims which, in the event of bankruptcy, take priority over the mortgage whereas, without bankruptcy, no such priority exists

The priorities are the same, but some are less relevant in non-bankruptcy cases.

3.4 Possible modification of the conditions for enforcement of the security on account of the bankruptcy:

The conditions for enforcement are basically the same, except that independent administrators only exist in bankruptcy proceedings.

4. VARIOUS OTHER RISKS FACED BY THE MORTGAGEE

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THE UNITED KINGDOM

This report sets out the Council of Mortgage Lenders' response to the Questionnaire updating the comparative study on real estate enforcement procedures in the EU. This response primarily covers the procedures adopted in England and Wales, but includes additional guidance on the position in Scotland and Northern Ireland in Annex 1.

The UK's financial services regulator, the Financial Services Authority, introduced rules governing the provision of first-charge mortgages («regulated mortgage contracts») on 31 October 2004.

I. CONSTITUTION AND REGISTRATION OF A MORTGAGE COLLATERAL

1. CONSTITUTION

1.1 Who can create a mortgage?

Any firm who creates, advises on, arranges or administers a first-charge mortgage must be authorised by the FSA. A lender which creates a second-charge mortgage would need to obtain a Consumer Credit Licence (Consumer Credit Act 1974). This is issued by the Office of Fair Trading to organisations involved in the provision of credit or associated businesses, for example, debt collecting, credit brokerage and credit referencing. The licence is renewable after five years and covers all employees of the licensed creditor.

Lenders seeking authorisation by the FSA will need to satisfy the «Threshold Conditions». These Conditions include the lender having adequate resources to implement the regulatory requirements, the establishment and maintenance of systems and controls, risk management and provisioning for liabilities, including contingent and future liabilities. Failure to obtain authorisation could result in imprisonment (for up to two years) or a fine – or both.

Non-UK firms wishing to offer cross-border services into the UK under the Single Market Directive may do so under the «passporting» rights. Similarly, authorisation may be given automatically to Treaty firms wishing to exercise their rights under the Treaty in respect of financial services not covered by the Single Market. The FSA will require a consent notice, or to be notified of a European Economic Area firm's intentions by its home State Regulator.

The FSA will consider that regulated mortgage lending has been carried out in the UK if the customer was in the UK at the time the contract was entered into, regardless of the location of the lender.

1.2 and 1.3 Procedure: formalities

Most mortgages are made on standard terms and conditions and are therefore not subject to negotiation. All mortgages must be deeds and so must be in writing. The signatures to all parties making the deed must be witnessed. The borrower will execute the deed by signing it in the presence of a witness who attests the signature. The deed will be returned to the solicitor who will then date the deed and deliver it when the transaction is completed and the loan is made available to the borrower. «Delivery» is a technical concept but it simply fixes the date on which the deed takes effect. After the deed of mortgage has been executed, the lender will send it to the Land Registry for registration and, when applicable, Companies House.

This procedure is very much paper-based. The Government is currently consulting on changes which allow the creation of a mortgage in electronic form using electronic signatures. The main differences between the two schemes will be:

- > The electronic mortgage will be in a prescribed form (but will incorporate terms and conditions by reference)– the paper mortgage does not.
- > The paper document must make clear that it is a deed. The electronic version does not but it will be regarded as such.

- > The borrower's electronic signature does not have to be witnessed but the signature on the paper deed does.
- > The electronic mortgage document does not have to be «delivered» but will simply state the date and time when it will come into effect.
- > Transmission to the Land Registry will be in electronic form, and not in paper form which is currently the case.

A mortgage will often secure further advances. A lender may make further advances on the security of the existing charge if in the meantime the lender has not received notice of a subsequent charge. If notice is received priorities need to be considered.

1.4 Consumer protection rules with respect to the creation of mortgage collateral

The FSA's mortgage rules are designed to make sure that borrowers are given clear and comprehensive information about the mortgage product they propose to buy. In addition, the lawyer undertaking the conveyancing work will also explain the full implications to the borrower which arise when taking out a mortgage. However, the lawyer cannot advise on the products in the market. Lawyers advise on the legal implications not the product selected by the borrower. Where the mortgage is being taken out on a residential property to secure, for example, business finance, the lawyer will usually be instructed by the lender to arrange for any party who will not personally benefit from the loan to receive independent legal advice. This should ensure that any accusations of undue influence by the benefiting party are avoided at a later date. A common example would be where a husband is mortgaging the family home to raise money for his business. In this case, the wife would need to be separately advised of all the implications.

The FSA regulatory regime also provides greater consumer protection rights. These include:

- > All borrowers receiving a standard pre-application illustration (the «Key Facts Illustration») setting out the key features of the mortgage product. Lenders must explain the importance of the illustration to consumers.
- > An illustration as part of the mortgage offer which will remind the customer of the product details; that the offer is not binding and who to contact if they have a complaint.
- > Post sale information which provides the borrower with a full reference document on the mortgage.

1.5 Time to get a mortgage registered

Land Registry data confirms that 90% of all applications are completed within 15 days. It is sensible to ensure that the land registry application is made during the priority period of the land registry search. Where the borrower is a company the charge must be registered at Companies House and this is subject to strict time limits.

2. REGISTRATION: FUNCTIONING OF THE REGISTER

The UK does not have a central register of all mortgages. However, there are separate land registration systems in England & Wales, Northern Ireland and Scotland. The Land Registry of England and Wales is a Government Agency, which is responsible for registering title to land in England and Wales. The Registry also records subsequent transactions affecting land once it has been registered. Established in 1862, the Registry provides a safe, simple and economic system for the registration of the transfer and mortgage of land.

Once a property or piece of land is registered:

- > Legal title is guaranteed on the basis set out in statute.
- > Filed plan is provided.

- > There is a public record of ownership, rights, covenants and mortgages.
- > Simple forms are used.
- > Disputes can be resolved more easily.

Registration is now compulsory following the sale of any land and in certain other circumstances. Currently, the Land Registry has details of more than 16 million registered properties in England and Wales however there are still many millions of properties not yet registered for which the Registry holds no information.

There are three parts to the Register:

The **Property Register** identifies the geographical location and extent of the registered property providing a short description and a reference to an official plan which is prepared for each title.

The **Proprietorship Register** sets out the name and address of the legal owner and shows whether there are any restrictions on their power to sell, mortgage or otherwise deal with the land.

The **Charges Register** identifies any registered mortgages and notices of other financial burdens secured on the property. The charges are registered in priority order depending on the date on which they are notified to the Registry, although priority can be varied by agreement.

2.1 Traditional, computerised

Since 2000, all registered title held by the Land Registry has been computerised and substantial progress has also been made in computerising title plans. These developments have allowed the Land Registry to improve the speed, quality and range of its services to customers. Applications to register a charge are sent via the post or document exchange. However, the electronic discharge of secured charges has now been introduced on a voluntary basis.

2.2 Accessibility: national and cross-border

Since December 1990, anyone can have access to the information held on the Register. Prior to that date, only registered owners and persons with the owner's consent could inspect the Register.

Conveyancers can obtain on-line access to the register from their own offices through Land Registry Direct. Customers can also access the register via post, fax and the telephone. The Land Registry has also been closely involved in the establishment of the National Land Information Service, which electronically links conveyancers to a wide range of information about land and property which will be available Nationwide from Autumn 2001. The Land Registry also intends to introduce a system by which both the execution of a mortgage and its registration will occur at the same time. However, this will require further legislation.

3. COST

3.1 Constitution

In England and Wales, taking out a mortgage will often be linked to the purchase of a property. The overall fees will therefore include the following:

- > Legal fees (£500 - £1,300)
- > Search fees (£150-£300 – depending on location of the property)
- > Land registration fees (£40-£800 – depending on the value of the property)
- > Valuation fees (£180-£320 – depending on value)
- > Higher lending charges
- > Mortgage application fees (£50 - £400)
- > Stamp duty (0% below £125,000 (residential), 1% to £250,000, 3% to £500,000 and 4% if higher).

Approximately 35% of mortgage business in England and Wales constitutes re-mortgaging. Here there will be:

- > Legal fees
- > Land registration fees
- > Valuation fees
- > Mortgage application fees

Many lenders offer standard packages for borrowers wanting to re mortgage with fees between £160 - £300 including VAT and disbursements.

3.2 Registration

The charges made for registering ownership of a property with the Land Registry are based on the price of the property. Table A below sets out the scale of charges.

Table A		Scale 1	
Value or Amount (£)			Fee (£)
0	-	40,000	40
40,001	-	70,000	60
70,001	-	100,000	100
100,001	-	200,000	200
200,001	-	500,000	300
500,001	-	1,000,000	500
1,000,001	and over		800

Where a mortgage is registered with the Registry, the fee is payable on the amount of the charge including any further advances. Each separate charge is subject to a separate fee. Table B sets out the scale of charges levied. However, no fee is payable for registering a mortgage which is made at the same time as the borrower becoming a registered proprietor and so a fee is paid under Table A above.

Table B		Scale 2	
Value or Amount (£)			Fee (£)
0	-	100,000	40
100,001	-	200,000	50
200,001	-	500,000	70
500,001	-	1,000,000	100
1,000,001	and over		200

4. DURATION OF VALIDITY OF THE MORTGAGE

The majority of mortgage products are for 20 to 25 years but typically many will redeem before this term.

II. ENFORCEMENT PROCEDURE ON A PROPERTY

1. BRIEF OUTLINE

Possession of a residential property in England and Wales by a lender will only take place if it is clear that there is no reasonable prospect of the mortgage arrears being repaid within a reasonable period. It is one of the major principles of the FSA's mortgage rules that possession of the property will be sought as a last resort when attempts to reach alternative arrangements with the borrower have been unsuccessful.

The rules set out how a lender should treat a borrower experiencing financial difficulties. This will include considering cases of financial difficulty and mortgage arrears sympathetically and positively and working with the borrower to develop a plan for clearing the arrears. It also covers situations when the lender has to seek possession of the property and the procedure for selling it.

Possession action via the courts is only taken once all options aimed at assisting the borrower have been exhausted. Further more, it is unlikely that the Courts would be willing to grant a possession order unless they are satisfied that all the options had been explored with the borrower. However, once legal proceedings have been started it is not necessarily the case that it will result in the property being repossessed. Commencing possession proceedings can in some cases act as a catalyst for the borrower realising the seriousness of the situation and starting to make repayments. In other cases, the Court process might be used to give some formal backing to a payment agreement already established between the lender and the borrower. For example, if a lender and borrower have entered into a repayment arrangement, a suspended possession order maybe obtained by the lender from the Court which would only then be implemented if that repayment arrangement failed.

1.1 Preliminary Measures/Actions

Possession proceedings are dealt with in the 230 county courts in England and Wales and cases are heard before a District or Circuit Judge (increasingly now a Deputy District Judge). The first stage of the legal process is for the lender to apply to the court for a possession order. This may follow a solicitor's letter to the borrower confirming that the lender will now be commencing legal proceedings for possession. The application triggers a claim to be sent by the court to the borrower. The Particulars of Claim will set out the facts which entitle the lender to possession. The Particulars of Claim will also include a Statement of Truth by the lender that the information set out in the claim form is correct. If the Statement of Truth is not included, the claim could be struck out. Under new possession procedures rules to be introduced in October 2001, the standard period between the issue of the claim form and the hearing date is not to be more than 8 weeks. On receiving the claim, the borrower is entitled to file and serve a Defence responding to the points raised by the lender. If they fail to do so, the borrower may still take part in the hearing but the court may take that failure into account in considering the question of costs.

Both lender and borrowers evidence must be filed and served at least 2 days before the hearing. This ensures that the court is able to consider the most up-to-date information on arrears at the actual hearing.

At the hearing, the judge can make one of three choices depending on the circumstances:

- > dismiss the case;
- > delay it to a later date, or
- > make an order for possession.

- > The first two choices are self-explanatory. If the judge chooses to make an order for possession, two types are available:
- > a suspended order, or
- > an outright order.

A **suspended order** is made where the judge considers that there maybe a chance that the situation can be recovered given time and that the borrower may be able to repay the arrears. The judge will grant the lender an order for possession, suspended for as long as the borrower meets the conditions set in relation to the rate and period over which the arrears should be repaid. This can be a number of years and could be for the remaining term. If the borrower subsequently defaults on this arrangement, the lender does not have to obtain a further outright possession order, but can simply apply to the court for a warrant of possession to evict the borrower. In practice, however, the lender will review the borrower's situation before going back to court to see whether there has been a change in circumstances which should be taken into account. If this is the case, the judge can issue a new suspended order and the process starts again. Therefore the time taken to obtain possession can be protracted.

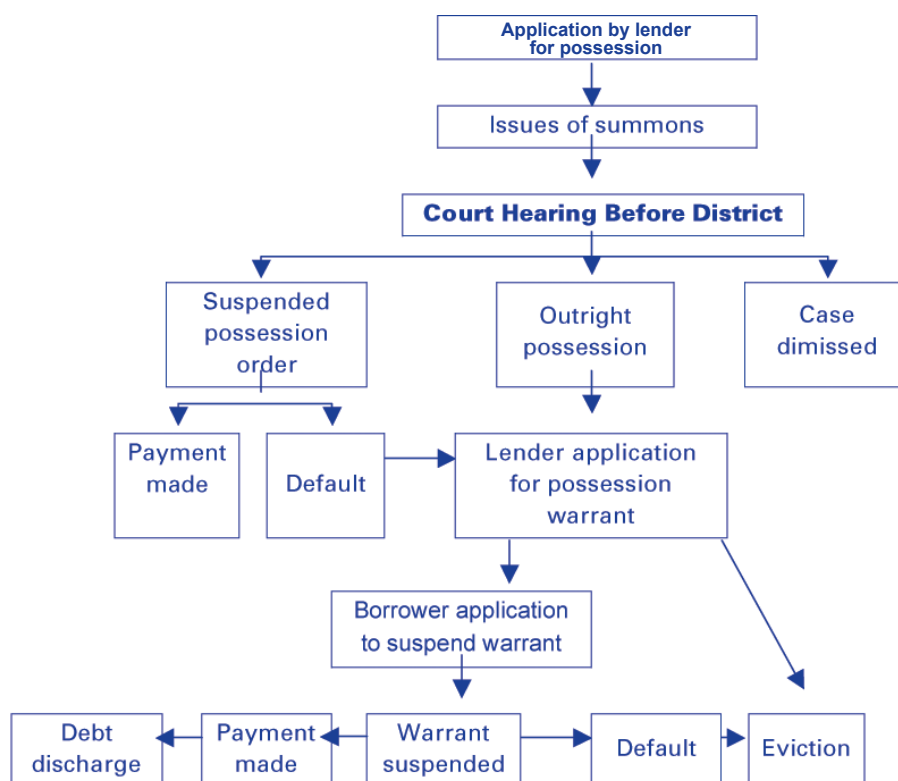
Example

During the second quarter of 2001, 16,696 mortgage possession actions were entered with the courts in England & Wales. A total of 12,159 possession orders were made, of which 7,456 were suspended orders.

If the judge believes that the situation cannot be rectified, an outright order, also known as a full possession order will be issued.

The Courts have broad discretion when considering individual possession cases. This can lead to similar cases being considered very differently between the different Courts.

Flow Diagram of Possession Procedure in England and Wales



Source: Mortgage Arrears and Possessions; perspectives from borrowers, lenders and the courts DETR

An outline of the procedure in Northern Ireland and Scotland is set out in Annex 1.

1.2 Forced sale: form and conditions

Lenders have to comply with Mortgage Conduct of Business Chapter 13. When selling properties which have been taken into possession, lenders are under a duty to obtain the best price reasonably obtainable. A lender is not bound to postpone the sale in the hope of obtaining a better price at some future date; however, the lender should allow sufficient time to permit, for example, proper advertising so that the best price obtainable may be achieved. Mortgage lenders generally use the following administrative procedures for selling properties which have been taken into possession:

- > **Administration:** The sale may be dealt with either via a lender's in-house department or through a separate property management company employed by the mortgage lender. Dedicated staff are responsible for co-ordinating the sale of properties in possession which will include reviewing the offers received from potential purchasers as well as monitoring the condition of these properties and their valuation.
- > **Valuation:** A valuation of the property is obtained from either one or two qualified surveyors and another from the appointed estate agent. Prices are usually reviewed every three to four months and more often when the circumstances justify a revaluation.
- > **Estate Agents:** Properties are usually marketed through an estate agent in the immediate locality of the property being sold. Agents may advertise properties in the local press, with such advertisements being repeated as and when necessary. Mail shots and national advertising may also be carried out in some cases. In general, lenders do not market these properties as «repossessed properties»; in many cases estate agents are specifically instructed not to do so.

- > **Report on Activity:** Estate agents are usually required to report on activity every four to six weeks if a property remains unsold. The estate agent will notify a mortgage lender of any offers received. Only when satisfied that the best price has been obtained, would the estate agent recommend this offer for acceptance. If the offer is substantially below the asking price, the agent must provide supporting evidence to suggest that this would be the best offer obtained. In practice, all offers are accepted or declined promptly. Where there are a number of very close offers on a property, a sealed bid procedure may be carried out whereby the person putting forward the best offer would be the successful purchaser.
- > **Visits to the Property:** The agent will usually visit the property on a regular basis and ensure that any repairs and maintenance to the property are carried out and that the property is secure. When properties are first put up for sale, mortgage lenders will usually arrange that essential repairs, cleaning and tidying of the garden are carried out. Whilst the estate agent will take care of minor repairs which are identified on the regular visit, other repairs usually require the approval of the mortgage lender. Where this work is carried out, estate agents will be required to obtain competitive estimates. Prospective buyers will normally be accompanied by the agent when viewing a property.
- > **Auction:** Properties in possession may be sold via auction. These properties are reviewed relative to sales experience and the length of time on the market. There are occasions when properties may be sold by auction because either the auction is specifically targeted at the type of property in question, e.g. a period type of residence, or the property will generally appeal to the speculator market because of its condition. Such properties are referred to an appropriate auctioneer. A catalogue would be issued and the properties are available for viewing. A reserve price is usually based on information relating to the number of viewings and general level of interest. A reserve price is set several days before the auction following consultation with a surveyor on the valuation of the property.

1.3 Distribution of the Proceeds of Sale

Following the sale of a property in possession in England and Wales, the proceeds of sale will be applied in the following way. First the lender will use the funds to meet the costs incurred in selling the property and to repay the outstanding mortgage including interest. If there are subsequent loans secured against the property any surplus will also be applied to repay these loans prior to any amounts being paid to the borrower. Guidelines for recovery are now set out in the FSA's rules. If there are insufficient proceeds of sale to repay the mortgage, the borrower will remain liable to repay any outstanding debt. Lenders have a legal right to recover any outstanding amount within 12 years. However, in 2000 CML lenders agreed that they would only seek to recover any amount within the first six years following the sale of the property in possession. If a lender has not made contact with the borrower during this period, then the borrower will not need to repay the amount.

1.3.1 Lender's right on his borrower's right to rent

Most mortgage conditions allow a borrower to rent out their property if they have obtained the lender's consent. Where a property has been let, the lender will usually allow the tenants reasonable time to find alternative accommodation before taking possession of the property. The Courts will also advise the tenants of the possession proceedings via a standard notice sent to the mortgaged property.

Following possession, there may be cases where a lender decides to postpone the sale of the property and rent it out. This may be where the property market is slow and a higher price would be obtained for the property if the sale was delayed, waiting for the market to improve. However this would not be a common practice and lenders would need to ensure that the rent was sufficient to meet any interest which continued to be charged, so that the borrower was not unfairly financially disadvantaged.

1.4 Consumer Protection Rules in the Context of a Foreclosure Procedure

Consumer protection exists under the mortgage rules which set out how lenders should treat borrowers experiencing financial difficulties. The Courts also play a key consumer protection role by invariably choosing to issue a suspended possession order where there is a prospect of the borrower being able to repay the mortgage arrears over a reasonable period of time. The Courts are keen to protect the borrower's interests, which is why lenders only take possession as a last resort and have to detail all the action they have taken to assist the borrower before taking legal action. Many borrowers fail to file a Defence as part of the legal proceedings and the Courts are exploring how they can encourage more borrowers to do so. The mortgage rules also require mortgage lenders:

- > To have a written policy/procedures for dealing 'fairly' with borrowers in arrears. This will need to be made available to borrowers so they can check whether they have been treated fairly. It is unlikely that a Court would issue a possession order where a borrower has questioned whether they have been treated fairly.
- > To give borrowers a 'reasonable' time to repay the mortgage arrears and the starting point should be those for the arrears to be paid over the remaining life of the mortgage. This would mean that lenders would need to agree a repayment arrangement with the borrower over the remaining term which could be a number of years.
- > Where a borrower is two months in arrears to send the borrower
 - a list of missed payments
 - total sum of outstanding arrears
 - arrears charges incurred
 - likely charges if arrears persist
 - consequences including possession
 - statement of the lenders willingness to discuss borrowers case with money advisers
- > The lender must not put any pressure on the borrower via excessive phone calls or make contact with the borrower in unsocial hours.
- > The lender will still be responsible for complying with the FSA rules even where the lender outsources arrears and possessions work to a third party.
- > Any recovery action for a shortfall following the sale of a property in possession must start within 6 years.

2. WRIT OF EXECUTION

2.1 and 2.2 Conditions to be fulfilled to render a deed or a judicial decision enforceable

A lender can only take possession where it has an outright possession order or the borrower has failed to maintain the conditions of a suspended order if the property is empty. Where this is not the case and the borrower will not leave voluntarily the lender must apply to the Court for a warrant of possession. Following this application, the bailiffs, who are employed by the Court are automatically informed. The bailiffs set a date for eviction, usually 3-4 weeks after the application for the warrant and usually both the borrower and lender are notified. However, even this does not mean that possession will actually take place. At any point up until the date of eviction, the borrowers can apply to have the warrant suspended, dependent on arrangements to discharge the debt. The Court will arrange a hearing before the judge to decide on the matter. If the terms of the suspension of the warrant are not met, or the application for suspension refused, the lender can re-issue the warrant for possession or issue a new warrant, without a further hearing in front of the judge. A new date for eviction will automatically be set and, providing there are no further appeals, possession takes place.

3. CARRYING INTO EFFECT OF THE MORTGAGE DEED

3.1 Who has the right to initiate the procedure for a forced sale?

In practice, it will usually be the lender with the first charge which initiates possession action. If subsequent secured loans are also in default, then these lenders are usually content to join-in the first charge lender's action. However there may be cases where the first charge mortgage is not in default but subsequent secured loans are and in these circumstances the subsequent lenders may pursue possession.

3.2 The stage at which this procedure becomes demurrable on third parties

3.3 Legal means available by which any other creditors with mortgage guarantees can claim their rights, especially in respect of the valuation of the mortgaged asset &

3.4 Other Creditors with Mortgage Guarantees

Where there is a mortgage guarantee, the insurance company will usually arrange for the lender to collect any payments from the borrower on their behalf. For example, if a lender has claimed on the guarantee for loss suffered following possession of a property, when the lender then pursues the borrower for any outstanding debt a proportion of the money recovered may be repaid to the insurer. More recently however, there have been cases where the insurance company has undertaken its own recovery action with the borrower, under their right of subrogation.

3.5 Restrictions of the Right to Proceed with the forced sale in connection with certain categories of people

Legislation does not place any restrictions on a lender being able to obtain possession due to certain categories of people living in the property. However if the borrower is elderly/ disabled or has a large family, these are all points which a lender will need to consider when taking possession action and the potential for adverse publicity. These are also issues which the Courts will take into account when deciding whether to grant an order and what type of order. The Court proceedings will also indicate whether a charge or notice of caution has been registered under the Matrimonial Homes Act 1983 which protects the position of a resident spouse who is not a party to the ownership of the property. If such a charge exists, notice of the proceedings will be given to that spouse.

4. TIME TAKEN BY THE FORCED SALE PROCEDURE

4.1 Typical duration of a forced sale procedure (without incident)

This can range between 8 to 12 months

4.2 Maximum possible duration of a forced sale procedure

Lenders will all have examples of cases where it has taken a long time to obtain possession due to the individual circumstances of the case.

4.3 Most frequently occurring incidents

- > Poor condition of the property.
- > Problems with the legal title to the property.
- > Vandalism.
- > Low demand for the type of property.

4.4 Typical duration of the distribution procedure

See 4.1 above

5. COST OF THE FORCED SALE PROCEDURE

5.1 Cost of the Procedure

The cost of bringing possession proceedings can range between £270 and £1,500. The cost of selling a property in possession can range between £1,400 and £3,000 and may increase with the introduction of the Home Information Pack.

5.2 Who pays the costs?

All costs are paid by the borrower, usually by debiting the mortgage account.

III. RANKING OF MORTGAGES AND PREFERENCES

1 & 2. GENERAL POINTS – LEGAL TEXTS & RANKING OF PREFERENCES AND MORTGAGES

The Land Registration system ensures that all charges over property are comprehensively recorded. Charges usually take priority in the order in which they are registered. Mortgage lenders often stipulate that their mortgage is the first charge over the property. There are a few cases where other charges secured against the property take priority over the mortgage. An example would include where a borrower has obtained a grant from a local authority to repair the home.

3. EFFECTS OF THE BORROWER'S / OWNER'S BANKRUPTCY ON THE RIGHTS OF THE MORTGAGEE

Where a borrower has been made bankrupt, the mortgaged property may have to be sold by the Trustee in Bankruptcy to pay off the debts. Where the Trustee takes this course of action, the secured lender will be the first to receive the proceeds of sale as they have the priority charge over the property. The Trustee will then use any surplus to repay the other creditors. If the Trustee cannot, for the time being, sell the bankrupt borrower's home, the Trustee may obtain a charging order on the borrower's interest in it. The amount covered by the legal charge will be paid from the sale proceeds when the property is sold. There may be cases where the property is not sold by the Trustee. However, if the borrower subsequently defaults on the mortgage repayments the lender can take possession in the usual way and will advise the Trustee of this action. Any surplus will then be paid to the Trustee. If the sale price is insufficient to repay the mortgage, then the lender must make a claim to the Trustee in Bankruptcy for the amount of the loss.

3.1 Conditions under which the validity of the mortgage constituted during the suspect period (or risk period) may be called into question

Where a borrower is aware that bankruptcy proceedings may be taken, the borrower might seek to protect the property by giving it to a member of their family. Under the Insolvency (No 2) Act 1994, if a person acquires an interest in a property within five years of the gift (and does so in good faith and for value), the court cannot set aside that transaction in the case of insolvency even if the person knew of the earlier gift. But the transaction can be set aside if the person also knew of the bankruptcy proceedings. In such cases, it will be assumed that the person had not acted in good faith. To avoid mortgages being set aside in these circumstances, where there has been a gift or undervalue transaction within the previous five years the lender will carry out a bankruptcy search against the undervalue transferor. If there is any doubt about the position, the lender may also take out indemnity insurance to protect their position.

3.2 PRIORITY CLAIMS

A mortgage will be a priority debt in insolvency proceedings and as lenders usually have a first charge over the property, then they will receive payment first from a Trustee in Bankruptcy.

ANNEX 1 – NORTHERN IRELAND

The legal process for possession in Northern Ireland is very similar to England and Wales. However, because County Court sittings can be irregular and less frequent, possession cases are heard in the High Court. They do not have to be heard before a High Court Judge but are heard before a Master of the Chancery Division. A further administrative difference is that, following an order from the High Court, subsequent dealings are with the Enforcement of Judgements Office (EJO). This is a separate agency which deals with enforcement.

The initial action entered at Court in Northern Ireland is called an originating summons. Writs are also used but are very rare. An originating summons is merely a notice to the borrower that an issue for action has been made. As in England & Wales, the borrower has 14 days from the issuing of the summons to respond.

If there is no response, or no satisfactory arrangement can be reached to rectify the situation, the lender may apply to the court by a notice of appointment for a hearing before the Master. The affidavit filed by the lender's solicitor and a notice to the borrower setting out the appropriate court procedure should he want to make an arrangement to pay, are sent to the borrower. The Courts in Northern Ireland try to list these within three weeks. As is the case for the district Judge in England and Wales, the Master has a number of options: dismissal; outright possession order; suspended possession order or a sale and possession order. The first three are the same as in England & Wales but the last type of order gives the power to place the sale into the hands of an agent. This removes the responsibility of this from the borrower which can help to avoid delays. This is a rare type of order used in only about 1% of cases.

About 50% of summonses result in a possession order of some kind. And about 50% of these are suspended. If the Master issues an outright possession order, this usually allows the borrower 28 days to deliver possession of the property to the lender or resolve the situation if possible. Only once this period has passed can the process move on. If the Master chooses to make a suspended order and the borrower subsequently defaults, the case must go back to the High Court where evidence that the terms of the suspended order have not been adhered to must be lodged. The Master will then make such order as he considers just. This differs from the System in England and Wales where it is not necessary to obtain a subsequent order.

Following the 28-day period in an outright order the lender then applies to the EJO for leave to enforce it. Once this is granted the borrower is allowed a further ten days to comply with the conditions of the court order before eviction. If the lender does not make an application for enforcement within three months of the service of a notice of intent to enforce, a fresh notice of intent must be applied for and served on the borrower before enforcement can be made.

As is the case in England & Wales there is an opportunity for the borrower to appeal against the order at any time. If the borrower objects to the enforcement order and the Master at the EJO believes that this justified, he can stay the High Court order for a period and reassess the situation.

ANNEX 2 – SCOTLAND

The Mortgage Rights (Scotland) Act will come into force in December 2002. In these cases, under Section 2 the Sheriff can suspend the possession action:

- > to such extent,
- > for such a period, and
- > subject to such conditions,

as the court thinks fit.

The court can only make a suspended order where the Sheriff considers it reasonable in all the circumstances to do so. In deciding whether to grant a suspended order and what the terms will be, the court must consider:

- > the nature and reasons for the default,
- > whether the applicant might be able to repay the arrears within a reasonable period,
- > any action taken by the lender to assist the borrower in repaying the arrears, and
- > the ability of the applicant and any other person living at the mortgage property to find reasonable alternative accommodation.

Section 1(2) of the Bill sets out who can apply for a suspended order. This will include:

- > the borrower (or proprietor where they are different), where property is the borrower's sole or main residence,
- > the borrower's (or proprietor's) spouse who is not a party to the mortgage, where the property is that person's sole or main residence with the borrower,
- > the borrower's (or proprietor's) partner whether same or opposite sex, where the property is that person's sole or main residence with the borrower, and
- > a partner of the borrower (or proprietor) who:
 - is the same or opposite sex,
 - is living in the property as their main home but the borrower (or proprietor) is no longer living there,
 - has had a relationship with the borrower (or proprietor) for at least six months before the borrower (or proprietor) left the property,
 - has a child under the age of 16 years with the borrower (or proprietor).

In the same way as other parts of the UK there is no final cut off for the borrower until the time of eviction. At any point up until then borrowers have the opportunity to appeal and lenders will consider various ways to remedy the situation.

The 2001 Act has been introduced to try and align the system with that in England and Wales.

4. TABLES

DESCRIPTIVE TABLES OF PROCEDURAL STEPS AND THE CORRESPONDING TIME INVOLVED

Belgium
Denmark
Germany
Greece
Spain
France
Ireland
Italy
The Netherlands
Austria
Portugal
Sweden
The United Kingdom

BELGIUM

PROCEDURAL STEPS	TIME TAKEN		
	Legal Minimum	Legal Maximum	In Practice
Serving of the order to pay by bailiff which takes place before the seizure (with optional registration - valid for six months)	/	/	/
Possible opposition by the mortgagor to the executory deed or request for another deadline, hence suspension of the order to pay becomes possible	/	15 days (+ time the possible procedure by the mortgagor will take)	/
Serving of a writ of seizure	15 days after the order to pay – if there is no request for a time limit or in the case of bankruptcy	6 month after the initial order to pay – which remains valid or which has been renewed	The mortgagor will not be granted 6 months of respite to make some payments or to give some explanations about the debt
Transcription at the mortgage registry	/	15 days after the seizure has been served	Depends on the diligence of the lawyer and/or the bailiff
Application by a creditor for the appointment of a notary	within a month of the transcription of the seizure	within 3 years of the transcription of the seizure	Longer than one month since the legal time limit is not provided for on pain of nullity
Order appointing the notary served by the judge dealing with seizures	No deadline, but served immediately		
Handing over of the original copy of the court order to the notary responsible for the procedure	within a fortnight of the judgement	/	Depends on diligence of the lawyer since not on pain of nullity
Drawing up of the articles and conditions for sale by the notary	No deadline	No deadline	Approx. 1 month, deadline depends on the diligence of the notary and complexity of the realisation. Generally, the notary has approx. 3 months at disposal (depends on the deadlines granted under following points)
Summons of the registered creditors	/	At least 1 month before the sale (on pain of nullity)	/
Possible opposition/ contestation about the articles and conditions by a creditor whom the summons have been served on	/	8 days (on pain of nullity)	/
Possible action for cancellation of the sale, donation, exchange (art. 1583 C.J.) if the registered creditors «whom the summons have been served on» prefer to do so	/	15 days within the serving of summons (not on pain of nullity)	/
Reference of the summons in the margin of the transcription of the seizure in order to make the seizure common to the registered creditors (influence on its cancellation)	/	8 days within the last summons (not on pain of nullity)	/
First session of the sale	/	Within 6 months of the order appointing the notary (on pain of nullity)	One or two more orders can possibly be necessary
Second session possible	Within 14 days	Within 30 days	Not on pain of nullity, set in the articles and conditions (posters and advertisements within at least 10 days)
Publication by notary of the possibility to make a higher bid	/	Within 5 working days of the adjudication (not on pain of nullity)	/
Higher bid possible	/	within 15 days of adjudication	/
Possible session of adjudication subject to higher bid	No deadline	No deadline	According to articles and conditions: generally 1 month

Payment of the costs by purchaser	Law refers to the articles and conditions (generally 8 to 15 days)		
The distrainee is informed of the adjudication	/	within 15 days after the expiry of the deadline for the payment of the costs	/
Transcription of the adjudication	within 2 months of the adjudication (art. 2 of the mortgage law)	/	
Payment of price	1 to 2 months (deadline indicated in the articles and conditions)	/	
Record (report) of the ranking	1 month (the mortgagees who possess an executory deed may contest the price). Within 1 month of the expiry of the deadline for the payment of the costs and possibly within 1 month of a judgement on nullity and possible appeal proceedings (art. 1643 C.J.)		
Summons to distrainee, the creditors who have an order to pay transcribed at the mortgage registry or the creditors who contested (art. 1644 C.J.)	/	within 15 days of the record of ranking	/
Possible contestation	/	within 1 month of aforementioned deadline- on pain of exclusion	/
Closure and delivery of the statement establishing the order of priority	If no contestation within 1 month (art. 1645 C.J.)	/	
Payments	no legal deadline	Depends on the diligence of notary and on deadline set at next step	
Act of receipt and release	no legal deadline (art. 1651 C.J.)	/	
Cancellations	no legal deadline, but follow immediately act of receipt and release (art. 1651 C.J.)	/	
Total time taken by the procedure on average	18 months (if the release of inscription is done out of court)		
Total costs	between 14 and 37.5% of the sales price.		

DENMARK

PROCEDURAL STEPS	TIME TAKEN		
	Legal Minimum	Legal Maximum	In Practice
An application is made to the bailiff's court for a writ of fieri facias (=distrain)	/	/	/
The bailiff's court will inform the debtor of the writ and if the property in question is used for permanent habitation, there will be an information meeting. The registered owner of the property in question will attend this meeting and in certain cases the Social Welfare Committee of the municipality in question as well.	Is a legal requirement	7 after receiving petition if possible	1 month
Should the debtor so request, he shall be granted a respite during which he may try to sell the property or in some other way stave off the auction.	/	4 weeks (to be extended at the court's discretion)	Legal limit
The bailiff's court will set a date for the auction.	/	/	/
Once the stay of execution has lapsed, the court may appoint an expert to value the property in question with a view to selling it, preferably on the open market.	/	4 weeks (to be extended at the court's discretion)	2 – 3 months
Limit for handing in auction terms (terms of sale) to the court	/	/	4 – 6 weeks before the forced sale
The bailiff's court will summon the debtor(s), mortgagee(s) and any other parties concerned by the forced sale	Legal limit	Not less than 3 weeks before auction	3 – 4 weeks before auction
The auction will be published in Statstidende (the Danish official gazette) as well as in a local daily newspaper.	Legal limit	Not less than 2 weeks before auction	2 – 3 weeks before auction
The auction is held The highest bid is confirmed by knock-down. The debtor and mortgagees who have not obtained full compensation for their loss may require a new auction to take place. This request must be submitted to the bailiff's court and the court will then set a date for the new auction.	Legal limit	Minimum 3 weeks	3 – 6 weeks
The bailiff's court will publish this new auction in the Statstidende (the Danish official gazette) as well as in a local daily newspaper.	Legal limit	Not less than 2 weeks before auction	2 – 3 weeks before auction
A new auction will be held. The highest bid will be knocked down.	/	/	/
The buyer will take over the property in question, providing a guarantee for the purchase sum.	/	/	/
If the buyer defaults in his obligations, the property may be put up for auction again (default action).	/	When the claim falls due	/
The auction bid will be met as follows:			

a) payment of amounts due, as well as special payments on irredeemable mortgages (mortgages which, at the discretion of the buyer, may be retained on the property)	No limit	Max. 4 weeks from auction	Legal limit
b) payment of redeemable mortgages (mortgages which the buyer must pay without delay)	No limit	Max. 6 months from auction	Legal limit
c) other amounts exceeding the auction bid which may be claimed (fees, other amounts owing, etc.)	No limit	Max. 4 weeks after auction	Legal limit
(Between creditors, the mortgage ranking determines the order of payment)			
Once all the conditions of sale have been met, an auction deed of sale will be issued by the bailiff's court at the request and for the account of the buyer.	No limit	Not later than 1 year of the forced sale	Legal limit
Average total time taken by the proceedings	/	4 to 6 months	/
Total costs of the proceedings on average	3 - 4% of the sales price		

GERMANY

PROCEDURAL STEPS	TIME TAKEN			
	Legal Minimum	Legal Maximum	In Practice	Customary
Notification of the foreclosure to the debtor by bailiff's order at the request of the bank, with a writ of execution containing submission to the forced sale.	1 week	None	6 weeks	2 weeks
Application to the court for the forced sale.	2 weeks	2 weeks after notification	Only depends on the creditor	2 weeks
Forced sale order granted by the Court.	A few days	none	6 weeks	2 weeks
Serving of this order on the debtor and deposit at the mortgage registry.	A few days	none	Approx. 4 weeks	1 week
Possible delays given to the debtor at his request (Rare in practice). Examination of the application again delays the proceedings by 2 months	/	/	/	/
Determination of the market value of the property by an expert whose conclusions may be contested (by creditors or debtor)	2	none	1 years	3 months
Determination of the auction day. Summons to the registered creditors who must, at this time, specify the precise amount of their claims.	3 months	6 weeks – 6 months	1 year	1 month after setting the market value. 3 – 5 months
	Before the forced sale			
Allocation	immediate	Max. 1 week, only longer in exceptional cases	8 weeks	immediate
Refusal to allocate and possible new allocation if the price obtained is less than 50% or even 70% of the estimated market value. (N.B. The creditor may be the highest bidder in the absence of higher bids provided he offers at least 50% of the estimated price. If not, a new sales date is set).	/	/	/	/
Distribution of the proceeds from the sale.	6 weeks	None	3 months	2 months
Total time taken	6 months	3 – 7 months	2.5 years	1 year
Total costs	Approximately 2000 Euro for the forced sale of a property with a market value of 100,000 Euro and a price obtained of 80,000 Euro, plus 3.5% tax on the price of the property transfer, plus registration costs (new ownership) in the land register.			

GREECE

Recovery by a bank of a mortgage loan secured by mortgage on a property located in Greece.

(N.B. A simplified forced sale procedure is applied to the banks, which allows them, unlike the other creditors, not to have to request the court's permission to start the sale of a property).

PROCEDURAL STEPS	TIME TAKEN
The bank services to the borrower an «order for payment»	no time limit
If the order for payment is not respected, the bank can confiscate the mortgaged property	no time limit
The borrower may contest the validity of the procedure before the court.	within 15 days of the confiscation
The bank publishes a «programme» determining the conditions of the forced sale and the day it will take place.	The forced sale can take place at least 40 days after the confiscation of the mortgaged property but no later than one year after.
This programme has to be published in a newspaper.	At least 15 days before the day of the forced sale
The borrower may ask the forced sale to be delayed for 6 months by proceeding before the court. He can try to repay his debt within this time (in practice it is often accepted by the court when housing loans are concerned).	/
Carrying out the sale before a «public notary»	/
Registration of the minutes of the forced sale by the notary at the competent authorities	/
The borrower may contest the validity of the forced sale before the court.	Within 90 calendar days after the registration of the results of the sale
The creditors have to announce their claims to the public notary.	Within 15 days after the forced sale
The notary has to draw up a list of the claims. The creditors may contest it within 12 working days and make the sharing out.	2 to 4 months
Total time taken on average	From 3 months to 2 years (without incident)
Total costs of the proceedings	about 16% of the sales price

SPAIN

PROCEDURAL STEPS	TIME TAKEN
Notarial act demanding payment addressed to the debtor.	No fixed deadline before the limitation for legal proceedings concerning mortgages (20 years from the date the payments cease).
Submission of the petition to court.	At least 10 days after the notarial act demanding payment.
Demand for payment addressed to the debtor by the court (this demand is the most frequently used: it replaces the abovementioned notarial demand for payment).	No legal time limit.
The court asks the Land Registry (which also covers the Mortgage Registry) where the mortgage is registered for a certificate of ownership and for information on in rem charges on the property.	No legal time limit is imposed on the court. 4 days after the court's request for the Land Registry (for each property).
Notification of the proceedings to third parties proving to be owners and to the holders of in rem rights and charges subsequent to the mortgage in the process of enforcement.	No legal deadline.
Application for the auction of the property and for the schedule to be set for sale by auction.	At least 30 days after the notification of the proceedings.
Payment of the rest of the price by the buyer (70% necessary to supplement the deposit to make a higher bid).	10 days from the approval of the sale.
Auction is successful if there are bid at 70% of the price set.	/
Bid below 70% of the fixed price:	<ol style="list-style-type: none"> 1. 10 days: Debtor could find a buyer that increase the best bid or pay the total amount of the credit. 2. 5 days: If the debtor doesn't find a buyer, the creditor could ask for the allocation on payment of: <ul style="list-style-type: none"> > 70% of the price set or > total amount of debt.
In the absence of the abovementioned facts, the court approve the public sale for the highest bid (at least, 50% of the price set)	/
In case of the lack of bid, the creditor could ask for allocation on payment. <ul style="list-style-type: none"> •50% of the price set or •total amount of debt. 	/
The price from the public sale is intended to pay the mortgagee. The court pays the creditor who has enforced his claim. The surplus, if any, is distributed among those who are entitled to receive it, i.e. the lower ranking creditors and the owner. There is no general distribution organised by the court.	/
The Judge approves the sale, orders the cancellation of the registration at the Land Registry, as well as any other registration or real charges subsequent to the registration in the Land Registry. He hands out to the person who purchased the property during the public sale, a judicial act which serves as a title of property for the registration in the Land Registry.	no legal deadline. It is not possible to determine the time taken (maximum or minimum).
The Judge transmits to the purchaser the property on which bid was made.	no legal deadline. It is not possible to determine the time taken (maximum or minimum).
Total time taken in practice: from the submission of the petition to the obtention of the title deed for the allocation.	7 to 9 months
Total costs of the proceedings:	15% to 5% of the price obtained, inversely proportional variation to the amount of this price.

FRANCE

Preliminary comment: A different procedure is applied in Alsace Moselle, the distraint, where the central role falls to the notary.

PROCEDURAL STEPS	TIME TAKEN		
	Minimum in Practice	Legal	Maximum in Practice
Serving of a foreclosure order on the debtor by the bailiff	1 month to 3 months		
Publication of the order at the Mortgage Registry. Equivalent to attachment of the property	1 day to 90 days maximum		Legal limit
Possibility of obtaining statements of mortgages (chronological list of the registrations concerning the property issued by the Mortgage Registry) on formality.	Legal limit	20 days minimum to 3 months	
Deposit of the articles and conditions at the record office of the district court (ordinary civil court) of the area where the property is situated. The conditions of allocation are laid down in it.	1 month to 40 days maximum		Legal limit
Summons to the debtor and to the registered creditors to examine the articles and conditions and to attend the possible hearing and the allocation hearing.	1 day to 8 days maximum		Legal limit
Possible hearing (so called as only takes place in the event of statements or opposition)	Legal limit	30 days to 60 days maximum	
Publication of statements	/	3 days max. before possible hearing	/
Allocation hearing (public auction before the district court by way of representation through a lawyer)	Legal limit	30 days to 60 days minimum	
Publicity prior to the allocation in the newspapers carrying legal announcements and the daily newspapers, by poster.	/	15 days min. to 30 days max. before allocation	/
SUBTOTAL	142 days	198 days	438 days
Allocation to the last and highest bidder (in the absence of bids, the prosecuting creditor is declared the successful bidder).(option to declare a third party successful bidder: option for buyer to declare that he is acting for a third party)	1 day to 3 days maximum Legal limit 1 day (maximum)		Legal limit
Option for bids at least one tenth higher (payment of costs)	Legal limit	10 days max. (15 days to 2 months)	Legal limit
Publication of the allocation judgement	1 month to 2 months		Legal limit
Application for opening the ranking by the prosecuting party	5 days to 8 days		Legal limit (time exceeded in practice)
Meeting for attempt at friendly settlement of ranking	1 month	18 days	3 months
Opening of judicial ranking	1 month min.	1 month	6 months
Summons to judicial ranking to prove claim	8 days	8 days	8 days
Proving of claim for ranking	1 month to 40 days		Legal limit

Statement of claims and record of the provisional settlement of ranking	1 month	20 days	3 months
Official notice of the record to the creditor proving his claim	1 month	10 days	1 month
Opposition to the ranking established	8 days to 30 days max.		Legal limit
Fixing of the date for hearing the opposition	1 month	/	1 month
Record of the final ranking settlement	1 month	53 days max. (incl. 15 days for appeal)	Legal limit
Opposition to material errors	/	8 days max.	Legal limit
Deletion of registrations. Delivery of certificate of priority	1 month to 3 months		/
Subtotal	291 days	295 days	707 days
Total costs on average: about 10-12% of the price of allocation	/		

IRELAND

Timetable for a mortgagee's obtaining possession of and selling a mortgage property in Ireland on default of the mortgagor.

PROCEDURAL STEPS	TIME TAKEN
Correspondence from mortgagee to mortgagor in attempt to persuade mortgagor to clear the arrears.	Varies from mortgagee to mortgagee but (say) up to 4 months.
Mortgagee puts case in solicitor's hands for legal action	/
Solicitor writes to mortgagor demanding payment of all arrears usually within 7 days or court proceedings will follow.	Usually 7 days but there is no legal time limit
No response from mortgagor. Solicitor begins possession proceedings by filing appropriate documentation with the local county court.	No time limit, but likely to be within 14 days of letter to mortgagor
Court sets date for hearing of mortgagee's possession action.	No time limit and varies widely from court to court. Average period: 12 weeks
At hearing court makes an Order for Possession in favour of mortgagee, but in most cases will suspend enforcement» provided mortgagor makes regular payments of normal instalments plus a proportion of the arrears.	There is no time limit within which the Order for Possession must be enforced. An Order for Possession lasts 12 years and once granted by the court it can be enforced at any time unless the court orders a stay of execution. The court will not, however, grant an Order for Possession where there is a non-owning spouse involved In such cases the court may adjourn the proceedings to enable the non-owning spouse to have an opportunity to clear the arrears The period of adjournment is a matter for the court to decide. If after the period of adjournment the arrears have not been cleared, the Order for Possession will be granted.
Mortgagor defaults in payments under court order so mortgagee's solicitors may apply to court for an Execution Order in respect of the property.	No time limit, but usually within one month of the mortgagor's default
The Court Registrar will make an Execution Order for the taking of physical possession of the property. Court Officer (the Sheriff) then notifies the mortgagee and the mortgagor of his intention to carry out the Execution Order and the date is set for taking possession of the property The mortgagee informs the local Community Welfare Officer of the intended repossession of the property at least 10 days before the repossession date.	No time limit, but usually four to six weeks from application for possession. However, the Execution Order must be executed within 12 months of the date of its being made.
Possession of mortgaged property having been obtained, mortgagee arranges sale of property.	No time limit and the period taken obviously varies according to market conditions, but on average sale will be completed 3-6 months after possession has been obtained.
On completion, mortgage notifies the mortgagor of the sale with details of the price obtained, costs incurred etc.	
He organises the distribution of the proceeds himself: payment of the costs, then mortgage claims in order of ranking and any surplus to the debtor (In the event of dispute only: intervention of the court Rare in practice).	Building Societies (but not banks and other lenders) must notify mortgagors of the sale with details of price obtained, etc. within 21 days of completion of sale.
Total time taken on average:	15 to 20 months
Total costs of the proceedings	5%

ITALY

Possibility of a forced sale irrespective of whether the asset is sold by auction or by other means

PROCEDURAL STEPS	TIME TAKEN
Notification of the enforceable title to the debtor (precluded for mortgage credit institutions); may be contained in the foreclosure order.	Yes
Notification of the foreclosure order (injunction to pay within a period of at least 10 days).	From 10 to 90 days (art. 480 and 481 c.p.c., except the case when the court fixes a shorter period of time)
Notification of the foreclosure procedure to the debtor (injunction by bailiff to refrain from any removal of the goods subject to the foreclosure).	From 10 to 90 days from the notification of the foreclosure order; failure to do so renders the foreclosure order null and void (art. 481, 492, 497 c.p.c.)
Registration of the foreclosure in the appropriate Land Register	Immediately, after notification to the debtor (art. 555 c.p.c.)
Deposit of the deed of injunction by the bailiff at the record office of the competent court	Immediately, after the deed is served by the bailiff (art. 555 c.p.c.)
Deposit at the record office of the enforceable title and of the foreclosure order	By the end of the fifth day from the deed of injunction (art. 557 c.p.c.). The bailiff must deposit immediately after the deed is served while the creditor must deposit by the end of the 5 th day
Deposit of the application for authorisation to sell the property attached	Within 10 days after the foreclosure deed is served on (art. 501 c.p.c.)
Determination of the value of the attached property by a technical expert appointed by the judge, who must submit his report within the time laid down by the judge.	Within the timing fixed by the judge. The court sets the time for the expert to be appointed and sets the value of the asset. (art. 568 c.p.c.)
Order to sell fixing the terms, the conditions and the deadlines, issued by the court in a hearing subsequent to the expert report	No deadline
After the allocation, further possible bids are increased by at least 1/6 of the price.	Within 10 days of the sale by auction (art. 584 c.p.c.)
Contest between the bidders and the successful bidder.	Possible contestations are solved by the expropriation Court.
Payment of the price by the final successful bidder	Within 60 days when auction is completed. For other forms of sale, within the time frame fixed by the court (art. 574, c.p.c.)
Court order to transfer the property	No deadline after the payment of price
Distribution of the proceeds:	
If there is only one creditor: Allocation in his favour of the amount due to him, after having heard the debtor	No deadline
If there are several creditors: Drawing up of the distribution plan between the creditors and deposit at the record office	Within 30 days of the payment of the price (art. 596 c.p.c.)
Meeting for the approval of the plan and, in the case of approval, issue of an order of payment to each creditor	More than 10 days after the summoning of the debtor and the creditors in order that they will have acknowledged the distribution plan (art. 596 c.p.c.)
Total time taken by the procedure on average	5 to 7 years (N.B.: Substantial variations possible)
Total costs of the procedure on average:	A study is currently carried out by ABI

NETHERLANDS

PROCEDURAL STEPS	TIME TAKEN
Borrower is in default	for some months (if the Code of Conduct for mortgages applies)
Instruction to the notary	no deadline
Announcement of the sale to the mortgagor, other mortgagees, borrower, seizers, people with limited rights by way of a writ	no official deadline; it is the start of the procedure after the notary has been instructed
Invocation of the let-stipulation	after the announcement of the sale
Setting of the date of the sale by the notary	within 14 days after the assignment being given to the notary
Advertisement	at least 30 days before the auction sale (first part of the sale)
Conditions of the public sale	communication to the rightful claimants etc. at least 8 days before the auction sale
Disputes about the conditions of the sale	no official deadline
(Private) Bids	possible until 14 days before the auction sale
Private foreclosure (if applicable)	the request to the President of the District Court may be handed in until 1 week before the auction sale
Auction sale and Dutch sale	in one session or in two sittings with at least one week in between
Announcement of the result of the sale	the day after the sale at the latest
Payment: costs of the sale purchase price	* within \pm 7 to 10 days after the sale * within 4 to 6 weeks after the sale
Expiry	no deadline, but is done quite quickly (depending on the cooperation of the parties concerned)

If everything and everybody are well organised and there are no special problems, the foreclosure procedure can be over and done with within a period of \pm 4 months

AUSTRIA

PROCEDURAL STEPS	TIME TAKEN
Borrower is in default	warning and notification, that the debts are due and payable; between 4 weeks and some month
Application to the court for the forced sale	anytime after the creditor has obtained a non-appealable (absolute) judgment
Determination of the conditions for the	about two weeks after beginning of the forced auction sale procedure
Determination of the market value	about two months
Setting of the date of the sale	no official deadline
Payment of the highest bid	The buyer has to pay the highest bid within two month after the date of the auction
Distribution of the highest BID	no legal limit; within one month after payment of highest bid
Total time taken	approximately six months from authorization of execution to acceptance of highest bid. Further six months until the distribution of the highest bid to the creditors.
Total costs	Approximately 1.500 to 2.000 EUR for the execution of a debt of 100.000 EUR plus 3,5 % real estate transfer tax, depending upon the value of the property, plus 1 % fee for the land register.

PORTUGAL

Preliminary comments: the ranking procedure takes place in parallel with the foreclosure.

PROCEDURAL STEPS	TIME TAKEN		
	Minimum in Practice	Legal	Maximum in Practice
#1 Advanced payment of legal costs by the petitioner	/	/	/
Foreclosure's declaration	/	/	/
Serving of the debtor by the court	5 days	30 days	365 days
Term for payment or opposition to the foreclosure by the debtor	20 days	20 days	20 days
IF opposition by the debtor: see #2	/	/	/
Distrain following court order	10 days	30 days	180 days
Obtain a certificate of distraint issued by the court	5 days	10 days	60 days
Register of Distrain at the mortgage office	15 days	1 day	180 days
Obtain a certificate issued by the mortgage office showing the registered charges, including the distraint	15 days	1 day	90 days
Summons of (i)registered creditors, (ii) tax authorities,(iii) debt's spouse (if not executed)	15 days	30 days	365 days
Edict Summons of unknown debtors	20 days	20 days	20 days
IF Opposition to the distraint by debt's spouse: see # 3	/	/	/
Tax authorities claims	25 days	25 days	25 days
Others creditors claims	15 days	15 days	15 days
IF opposition to creditors claims: see #4	/	/	/
Choice of sale's modality by the court, subject to debtor and majority of the reclaiming credits	10 days	15 days	45 days
Edict Summons of unknown debtors	20 days	20 days	20 days
IF Opposition to the distraint by debt's spouse: see # 3	/	/	/
Tax authorities claims	25 days	25 days	25 days
Others creditors claims	15 days	15 days	15 days
IF opposition to creditors claims: see #4	/	/	/
Choice of sale's modality by the court, subject to debtor and majority of the reclaiming credits	10 days	15 days	45 days
Sale's modalities advertising	10 days	10 days	10 days
Term for price's payment	15 days	15 days	15 days
Cancellation of registrations	15 days	15 days	45 days
#2 opposition by the debtor	/	/	/

Summons of petitioner	10 days	30 days	90 days
Reply to opposition	20 days	20 days	20 days
# 3 opposition by debtor spouse	20 days	20 days	20 days
Summons of petitioner	10 days	30 days	90 days
Reply to opposition	20 days	20 days	20 days
#4 opposition to creditors claims	15 days	/	/
Summons of all creditors including the petitioner	10 days	30 days	90 days
Reply to oppositions	10 days	10 days	10 days
Hearing of the parts	10 days	90 days	365 days
Judgement fixing the ranking (it can occur after the selling act)	10 days	15 days	45 days
Account for legal costs	5 days	30 days	730 days
Payment of legal costs	10 days	10 days	10 days
Average total time taken by the procedure #1	210 days	277 days	2175 days
Average total time taken by the procedure #1+ #2	240 days	327 days	2285 days
Average total time taken by the procedure #1+ #2 + #3	290 days	397 days	2415 days
Average total time taken by the procedure #1+ #2 + #3 + #4	345 days	542 days	2925 days
Sale's modalities advertising	10 days	10 days	10 days
Term for price's payment	15 days	15 days	15 days

Sales Modalities	Procedure	Advertising
Confidential proposals	Presented to the judge and open in a public audience – the most frequently used	Obligatory Previous the audience (10 days before) In the press and by edits.
Allocation to the (petitioner or a reclaim creditor);	Subject to higher conflicting offers – rarely used	Obligatory Previous the audience (10 days before) In the press and by edits. Summons to others creditors and debtor
special negotiations by a dealer	Used when there are no confidential proposals, for small sales (apartments, shops, etc) The petitioner and reclaim creditors have to agree with the sale's price	Usually done, in the press
auction by a established auctioneer.	Used when there are no confidential proposals or for big sales (buildings, factories, etc) The petitioner and reclaim creditors have to agree with the minimum sale's price	Usually done, in the press

SWEDEN

Applicable rules and timetable for a mortgagee's obtaining possession of and selling mortgage property in Sweden on default by the mortgagor (consumers).

It should be noted however that the rules described below are those concerning distraint/execution and NOT the rules about bankruptcy or insolvency proceedings in which case a different set of rules are [partly] applicable. The rules described below regarding public auction are however the same regardless of any bankruptcy or insolvency proceedings.

PROCEDURAL STEPS	TIME TAKEN
Borrower is in default and therefore given notice of early repayment of the loan (mortgage)	According to the Consumer Credit Act if the borrower since a month is late with a) one payment of at least 10 % of the loan, or b) two or more payments of at least 5 % of the loan or the borrower is to a considerable extent in default. (KkrL 21)
An application, orally or written, is made to the bailiff's court for a title of execution (=distrain). The application for an execution is normally based on a court decision, a settlement confirmed by the court or the bailiffs decision in the case of a demand notice. UB 2:1, 3:1	A distraint case should be handled within one (1) year from the day of the application of the distraint. The case may be prolonged for one (1) more year on demand of the lender if the application is filed to the bailiffs court six (6) months or less before the end of the first one-year period. There is no restriction in the number of occasions, when cases may be prolonged. UB 4:9 och 9a
A distraint should be handled as soon as all relevant documents have been submitted to the bailiffs court. UB 4:10	If the lender (applicant) grants a respite with the execution and the respite lasts for more than two (2) months the application is void. The same applies if there are more than two (2) respites within a period of at least one (1) year. UB 4:10
Before the distraint is executed the borrower must be informed of the application by mail or in another suitable way. UB 4:12	The borrower must get information of the case timely so that his interests can be looked after. UB 4:12
Distraint property shall be sold at a public auction or privately sold if there is basis for assessing that such a sale is likely to be more appropriate. UB 12:1 In case of a private sale the rules regarding the register of claims and the decision as to which is the lowest acceptable bid (protected amount) are also applicable (see below).	/
The bailiffs court will set the place and date for the auction.	Distraint property should be sold within four (4) months from the application to the bailiffs court unless the applicant or the borrower has filed a motion for respite. The court can only grant a respite on behalf of the borrower if there are special circumstances. Only in extreme cases may a respite be granted for a period exceeding one (1) year. UB 12:11
The bailiff's court summons the lender(s), borrower(s) and any other parties concerned by the auction and information about the auction is published in Post- och Inrikes Tidningar (the Swedish official "Gazette"), often also in a local daily newspaper. UB 12:20	Information about the auction shall be made publicly known well before the auction and shall contain information about the meeting regarding the proof (lodgings) of claims as well as information of the meeting when the purchase sum shall be distributed between the lenders.
After the lodgings of claims the court registers the claims and decides which is the lowest acceptable bid (protected amount). UB 12:29	The final bidder is obliged to make a cash down payment of 10 % of the purchase sum. UB 12:35
If the protected amount is not offered or is not completed by the down payment there will be a new auction if the applicant so demands.. In such a case the same rules apply as described above. UB 12:42	The request for a new auction shall be submitted to the bailiffs court within a week from the first auction. If there have been two (2) auctions and there is reason to believe that the property cannot be sold within a reasonable time the court can refuse a demand for a new sale. UB 12:42
A meeting for the distribution of the purchase sum between the lenders is subsequently convened	The purchase sum shall be distributed as soon as possible. If the lenders agree on how the sum shall be distributed between them, the court will decide accordingly. UB 13:1 and 9
Once all the conditions of the sale have been met, an auction deed of sale will be issued by the court at the request and for the account of the buyer.	
Average total time taken by the proceedings	On an average one and a half year. The proceedings in the case of a demand notice takes about nine (9) months and in the bailiffs court four to five (4-5) months.
Total costs of the proceedings on average	There are fixed costs for the sale, independent of the value of the property sold, on an average amounting to 2-4 % of the purchase sum.

THE UNITED KINGDOM

Timetable for a mortgagee's obtaining possession of and selling mortgage property in England and Wales on default by the mortgagor

PROCEDURAL STEPS	TIME TAKEN
Correspondence from mortgagee to mortgagor in attempt to persuade the mortgagor to clear the arrears	Varies from mortgagee to mortgagee but (say) up to 4 months
Correspondence usually starts as soon as first payment is missed.	
Mortgagee puts case in solicitor's hands for legal action	Usually 6 months.
No response from mortgagor solicitor begins possession proceedings by filing appropriate documentation with the local county court.	No time limit but likely to be within 14 days of letter to mortgagor from the solicitor.
Court sets date for hearing of mortgagee's possession action.	No time limit and varies widely from court to court. Average period: 6 to 8 weeks
At hearing court makes an order for possession in favour of mortgagee but in most cases will «suspend enforcement» provided mortgagor makes regular payments of normal instalments plus a proportion of the arrears or makes a private sale.	The order will be for possession in 28 days but not to be enforced for as long as the borrower meets the conditions for repaying the mortgage. If there is no prospect of the arrears being cleared, the possession will be ordered after 28 days,. If there is a reasonable prospect of the property being sold by the mortgagor, the order may be suspended for 56 days, during which time, the sale can take place.
Mortgagor defaults in payments under court order, so mortgagee's solicitors apply to court for a warrant for possession of the property.	No time limit but usually within one or two weeks of mortgagor's default
Court officer (bailiff) sets date for «execution of the warrant» i.e. for taking physical possession of the property and notifies mortgagor and mortgagee of his intention.	No time limit but usually 3 to 4 weeks from application for warrant for possession
Possession of mortgage property having been obtained, mortgagee arranges sale of the property An estate agent will be instructed to place the property on the market and arrange a sale. A property will only be sold at auction if it has been on the market for a long time, or it is a particular type of property which will achieve a better sale price at auction. In all cases, the mortgagee must sell the property for the best price possible.	No time limit and the period taken obviously varies according to market conditions, but on average sale will be completed several months after possession has been obtained.
On completion mortgagee notifies the mortgagor of the sale with details of price obtained, costs incurred, etc. The solicitor will organise the distribution of the proceeds of sale: payment of the costs, then mortgagees claims in order of ranking and any surplus is paid to the debtor. (In the event of dispute only: intervention of the court. Rare in practice).The mortgagee may hold any surplus proceeds if one or more of the borrowers' whereabouts are unknown. The surplus would be placed in an interest bearing account.	Most lenders will notify mortgagors of the sale with details of price obtained etc. within 28 days of completion of sale. They are not however under any legal obligation to do so.
Total time taken	12 months on average (minimum encountered in practice: 6 weeks and maximum 2 years)
Total costs	4,74% for a sales price set at € 100,000