

**Real Estate Conveyancing in 5 European Union Member States:
A Comparative Study**

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Real Estate Conveyancing in 5 European Union Member States: A Comparative Study

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I. Introduction

The increasing economic integration of Europe has resulted in increased attention of the European Commission and its Directorate General for Competition on the so called "liberal professions" of the Member States, and the various Member-State legal and economic regulations of these professions. One area of recent European Commission interest has been the liberal profession of public notary as it has existed in some 21 of the 27 current Member States of the European Union, in some cases for many centuries. Question has been raised whether Member State regulations defining, qualifying and regulating this profession may result in unnecessarily high costs being imposed on parties engaging in routine transactions in which participation by public notaries is legally required.¹

The current focus of EU regulatory interest is the process of purchasing and selling real estate. In most of the EU Member States with civil law traditions, the

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¹ Public notaries as officers and practitioners in most civil law systems are sometimes referred to as "latin notaries" in order to contrast them from Anglo-American "notaries public". The latter are not necessarily legally trained and have very limited functions, generally the taking of oaths and acknowledgments and other minor civil tasks. Anglo-American notaries public do not play any significant role in the transfer of real estate. In this study the terms "notary" and "public notary" refer exclusively to the civil law or "latin" public notary.

conveyancing of real estate is performed by public notaries, either as a matter of legal requirement or as a matter of custom and usage. In many Member States the profession of public notary is highly regulated. Typical regulatory axes include limitation of entry, high educational qualifications, regulation or strong self-regulation of practices, and regulation of minimum and maximum fees.

Question has been raised within the EU Commission, Directorate of Competition, whether the role of public notaries in real estate conveyancing leads to the imposition of costs that are not reasonably justified by the work required or by other legitimate public policies of the respective Member States. This comparative study of real estate conveyancing law, practices and costs in 5 Member States of the European Union is submitted as an additional resource and perspective for the Commission.² The Member States included in the study are Estonia, France, Germany, Sweden and the United Kingdom. Two states of the United States are included as a control and perspective external to the EU.

A. Executive Summary

Modern real estate conveyancing involves a number of complex and interrelated activities to meet the needs and requirements of diverse economic and regulatory interests involved in the ownership, transfer and financing of residential real estate. In all of the European jurisdictions studied the function of effectuating transfer of title has become relatively straightforward and routine thanks to efficient systems of title registration. Complexity is lent to real estate transactions by the many legal, financial

and regulatory considerations that surround and attend the transfer and the financing of the purchase. Most of the work of conveyancers deals with these considerations rather than the now relatively simple task of passing title to the property from seller to buyer.

The variety of these considerations external to the pure conveyance among the jurisdictions under study makes it very difficult to compare the cost and efficiency of conveyancing institutions or professionals. Consumer protective legislation, incidence of taxation, public and communal rights and interests all impose complexity on real estate transactions and are all different among the countries under study. Varying provisions of national substantive law (other than regulations of the conveyancing function) also affect the nature and degree of performance required of conveyancers. Finally, and likely of greatest significance, requirements of financing banks, and the market for real estate financing itself, seem to vary greatly among the countries under study, thus imposing different burdens on conveyancing professionals and their clients. It is thus very difficult to compare conveyancing efficiency or cost on an "apples to apples" basis.

It is also very difficult to find appropriate proxies to make economic comparisons of conveyancing systems or institutions on an international basis. Attempts to gauge relative efficiency or quality of conveyancing services or systems based, for instance, on the comparative number or amount of post transactions disputes, or the professional liability insurance premiums paid or claims sustained by conveyancing professionals are of very dubious validity. There are simply too many other variables, such as local

² The study has been supported by the Conseil des Notariats de l'Union Européenne (CNUE), Brussels, Belgium.

substantive and procedural law, other professional exposures, and claims-friendliness of local legal cultures affecting these purported proxies to permit any reasonable correlation with quality or efficiency of conveyancing services.

It is also evident that conveyancing costs represent a relatively insignificant element of costs attendant on the transfer of real estate. In all of the jurisdictions under study real estate brokers' commissions dwarf charges by conveyancing professionals. In most jurisdictions real estate transfer taxes in various forms also contribute more to overall transaction cost than do fees of lawyers or notaries.

Within the range of transactions studied, fees of conveyancing professionals to advise transaction participants, to create necessary documentation, and to attend to change in registration of ownership range from 0.30% to 1.65% of the value of the transaction, depending on the amount of the transaction, whether a purchase money mortgage is involved, and the jurisdiction in question. In Sweden, conveyancing costs are lumped with brokerage costs and are compensated by a broker's commission. This does not mean that these services are free or are rendered at low cost. In fact, it appears that the role of brokers in conveyancing enables Swedish brokers to collect full sales commissions in a large number of transactions in which brokerage services are not needed. In the United States the absence of comprehensive registration of title systems and the development of a secondary market for mortgages has led to an explosive development of the title insurance industry, which has tended to impose higher costs on conveyancing participants.

There is no reasonable correlation between kind or degree of regulation of

conveyancing professionals and conveyancing costs among the jurisdictions under study. There are far too many other variables among jurisdictions to make a meaningful comparison based on any particular feature or degree of professional regulation.

Transaction costs based on the value of the transaction tend to favor low value transactions at the expense of high value ones. In view of the fact that there are many transactions of low value compared to the number of high-value transactions this approach tends to promote access to justice and make high quality conveyancing services available to lower-income consumers at reasonable cost. Brokerage commissions, taxes, and fees of professionals in some jurisdictions tend to have this effect. However there is no indication in any case that any such incidental cross subsidy unreasonably burdens or distorts the market in either high or low value property.

No comparison of costs can be complete without considering the quality of the services rendered. For most purchasers and many sellers of residential real estate, the purchase of a home is one of the most important legal transactions of their lives. While many aspects of residential real estate purchases and sales are routine, the variety of individual circumstances, the complexity of government and financial institution requirements, and the importance of the transaction to the individual strongly suggest the importance of good legal advice to the key transaction participants, above all, the buyer, and strict regularity in implementation of the transfer. The notarial systems of Estonia, France, and Germany provide independent neutral legal advice to all transaction participants by highly qualified professionals who are subject to stringent

standards of oversight, financial responsibility, and specialized expertise. These systems also promise a high degree of regularity in real estate transactions in general.

In England each transaction participant can obtain independent legal advice from his or her own lawyer. Sometimes buyers' lawyers also represent financing banks, which may affect their independence as far as buyer-bank issues are concerned. Recently, licensed conveyancers are also authorized to effectuate transfers. The quality of legal advice from such sources is hard to gauge.

In Sweden it appears that buyers do not have access to independent legal advice unless they take the unusual step of consulting a lawyer outside the transaction. The conflicting obligations of real estate brokers and their structural allegiance to sellers do not make them good sources of independent legal advice to buyers. Although the Swedish system appears to work in the context of Swedish culture, one can question whether it can be extended abroad.

In the United States Maine buyers do not generally obtain their own legal advice, but are served by title companies or lawyers whose loyalty is to the financing institutions which instruct them. In New York participation by buyers' lawyers is more frequent, but at additional cost. Significant monies are channeled to lawyers for financing entities through required title insurance on which they receive generous commissions.

Analysis of the costs of real estate transfer in the various systems under study produces a mixed picture. No one country is the lowest or highest cost for all of the various hypothetical transactions posited. Estonia and Germany clearly offer consumers at the lower end of the value spectrum high quality conveyancing services at

the lowest absolute cost of the countries studied. Conveyancers in the United States and England tend to favor higher-value transactions and impose a proportionally greater cost on the lower value purchases and sales.

All of the countries under study offer consumers a degree of choice in conveyancing professional to handle their transaction. A purchaser of property in Estonia, France and Germany is free to select a notary of his choice to document the transaction. In Sweden the seller's broker usually prepares the agreements and documents the purchase. In England each party is free to choose his own solicitor, although if the transaction is financed, the buyer's solicitor may also have to be acceptable to the financing bank. In the U.S. the parties are theoretically free to choose their own counsel, but in practice contract drafting is often performed by brokers and closings are managed by title companies or lawyers representing financing banks.

All of the EU Member States under study are in the process of converting their land registry systems to electronic data base format in order to permit electronic inquiry, electronic transmittal of land transfer documents and ultimately, direct access to the database to effectuate land transfers and re-registrations. Currently Estonia, France and Germany have made good progress toward all-electronic land register systems with the prospect of electronic effectuations of land transfers within sight in the future. The systems in England and Sweden permit electronic inquiries, but further progress toward electronic transfers and re-registrations depends on finding an effective way to make sure that the system will not be degraded by errors and inconsistencies on the part of the various conveyancers who would like to have access to the system. The patchwork

of state systems and local recording facilities within the United States has retarded the development of both land registration and electronic conveyancing to date.

Ultimately there is no evidence that conveyancing costs are affecting the market for real estate in any of the Member States under study. Each Member State's conveyancing system reflects its national public policies and priorities and appears to respond to the requirements of transaction participants and financing entities. There is no evidence that the diversity of such systems impedes cross-border investment in European real estate.

B. Methodology of Study

The study is based on more or less traditional comparative law methodology. An effort has been made to identify the political, social and economic function of the legal institutions under study and the public and private interests and values involved. National reports describing the real estate conveyancing system of each of the countries in the study have been prepared with assistance from professional organizations in the case of Germany, France and Estonia and by the Reporter with the aid of research assistants in the case of the other jurisdictions studied. Each of the national reports is based on a common outline designed to elicit the information keyed to the functions, interests and values identified.

Eight more or less typical real estate transactions have been hypothesized for comparison purposes. The hypothetical transactions are purchases and sales of

residential real estate of moderate value. Very high value residential and commercial real estate transactions have not been compared. The lower and average value transactions are by far the most common and involve strong elements of public interest in consumer protection and access to legal services. The national reports include estimates of as many categories of transaction cost as could be conveniently identified and isolated.

Identified costs have then been plotted, compared and analyzed using Quantrix modeling software. The extent to which comparisons and analysis have produced relevant and helpful data is discussed in some detail in the analytical portion of this report.

Information available through the national reports has been supplemented by the Reporter's own investigation of real estate conveyancing practices. This has included actual witnessing of live real estate conveyancing transactions in Germany and France and significant personal experience with real estate conveyancing in one of the United States. The Reporter has also met with academic colleagues with expertise in real estate law in Germany, Sweden and England and discussed the legal basis and operational function of the systems in those Member States. These discussions included visit to a Land Registration Office in Hassleholms, Sweden and to the headquarters of the English Land Registry in London and observation of the process of registration of land transfers in both locations. These observations supplement the systematic collection of data with immediate impressions of the dynamics of the real estate conveyancing process as it occurs in practice in the relevant jurisdictions.

Finally, the Reporter has reviewed literature, other published and unpublished studies of conveyancing practices in certain of the countries under study and has consulted and corresponded with practitioners in an effort to obtain complete and current information relevant to the study.

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II. The Problem

Every Member State of the European Union recognizes and provides for the private ownership of real property. Bundles of rights and privileges with respect to defined areas of the Earth's surface are associated with private parties, both natural persons and corporate entities. These bundles of rights are defined, protected and regulated by national, regional and local law and by state agencies which register, regulate and tax privately owned real estate.

The legal systems of all EU Member States permit and provide processes for parties voluntarily to transfer their rights to real estate to others both by inter-vivos transfer and by testament. In the modern era transfer of interests in real estate typically involves some sort of contractual agreement accompanied by some form of public notice of the transfer, either by recording the instrument of transfer or by an entry in a register of real estate ownership.

Historically the economic and social importance of real estate ownership and the resulting need for high degrees of certainty and accuracy in real estate transactions

have led to development of significant bodies of private and public law defining and regulating the process. Historically most dealings with real estate have required the assistance of jurists to determine and verify the nature and extent of rights in real estate, to advise parties on the nature of existing or potential interests in real estate or restrictions on its development or use, to prepare instruments of transfer and division of real estate rights and interests, to attend to proper registration of real estate interests, and to represent parties in disputes involving real estate.

Although it is common to refer to real estate as “private property” in fact, all rights and interests in real estate are defined by public legislation and case law. In modern times, one’s ability to hold and own real estate exists only by virtue of a network of laws enforceable with governmental power that enable private parties to obtain support and recognition of particular relationships to parts of the earth’s surface. Public legislation does not stop at creating “private” real property rights, but goes on to regulate in some detail how these bundle of rights may be used, to tax them and their use, and to regulate what may be done with them and how they may be conveyed.

Ownership, use, and transfer of real estate have long been matters of vital public policy to every modern state. Thus any study of the processes by which interests in real estate are created or transferred in any particular Member State, as well as any effort to compare them, must take into account all the ways the Member state regulates real estate and the process of its transfer in its overall public interest.

A. Real Estate Conveyancing in Theory

In its simplest theoretical core, the process of transfer of real estate need not be complicated. It can be broken into a few steps.

- 1) The real estate is identified;
- 2) The parties agree on the terms of the transfer;
- 3) The rights leave the prior owner and arise in the new owner; and
- 4) Some form of public notice of the new ownership is provided.

We have early accounts of transfer of land in England by “livery of seisin”. The selling owner took the purchaser to the property, they traversed its bounds together, the purchaser exchanged the agreed on payment for a symbolic clod of earth delivered in the presence of witnesses. The transfer was published by the opportunity of the public to observe the actual presence of the parties or their agents on the real estate in connection with the transfer.

Modern transfers of real estate have substituted written instruments for the physical walking of the property and the livery of seisin. The effectiveness of the transfers vis a vis the public is ensured through publication of the instruments of transfer in some public record or by actually registering ownership in a public land register.

B. Real Estate Conveyancing in Practice

Real estate conveyancing in practice bears little resemblance to the simple theoretical model just discussed. This is largely because of the following additional factors that are not part of the core theoretical model:

1. Typically buyers of real estate need external financing that is secured by the real estate being purchased, so that the transfer process must provide a way to accommodate the needs of the finance entity simultaneously with passage of title.
2. Governments at all levels have significant interests related to 1) the actual transfer of real estate and how it takes place, and 2) permissible uses of the real estate after the purchase, all of which may affect whether a transaction is ultimately feasible. The transfer process must therefore address any requirements of the first kind and make it possible to ascertain with some accuracy any requirements of the second kind.
3. Public facilities for the registration and recordation of transfers as well as the degree of protection of parties and third parties provided by such systems vary a good deal. Some jurisdictions invest significant public money, defrayed in part by transfer fees, in sophisticated user-friendly systems that provide a high degree of certainty. The public registry or recording systems in other jurisdictions can be rudimentary and provide very little certainty of ownership in themselves. Any transfer procedure or system must accommodate the requirements of the registry system and any shortcomings therein.
4. Buyers must have ways to ascertain the physical condition, the presence of contaminants, and the legal status of potential rights and restrictions on ownership and use before they commit their funds to a purchase. The transfer process must be so structured to allow investigations and give the parties

appropriate protection while these are being carried out.

These factors are more or less external to the conveyancing system and the parties who make that system work. They represent serious constraints under which any conveyancing system must work.

Making a comparative study of the cost of professional assistance in the effectuation of real estate transfers among several legal systems is seriously complicated by several factors. A sovereign may, as a matter of public policy, require specific measures accompanying the transfer of real estate to protect consumer parties or to implement other public policies. Compliance with these requirements can significantly affect the work required of the conveyancing professionals who attend to the transaction.

The same is true of the requirements of third-party financing entities. To the extent that these entities require special assurances of the primacy of their secured position or special documentation as a result of conditions in the marketplace for such financial services, a real cost is imposed on the transfer to accommodate their interests.

The cost of effectuating real estate transfers is directly impacted by the kind of system for registration of title or recordation of title instruments offered by the respective public authorities. Primitive systems tend to impose costs on the users. More sophisticated systems may provide quicker and more certain effectuation of title transfers, but may require a higher level of expertise on the part of the conveyancing professional.

Finally, the transfer of real estate and the activities of professionals involved with

the transfer frequently include the provision of professional services in addition to the mere effectuation of the transfer of title to the real estate. The most important of these is the provision of legal advice to one or more of the participants in the transaction. Other such services include the handling of escrow funds and matching payment to performance. Frequently the professionals handling the transfer of title are also required to collect and remit transfer taxes in behalf of the state. In some cases the professionals handling real estate transfers are expected to maintain records of the transaction over extended periods of time and have such records accessible in the event some future question about the transaction arises.

The nature and extent of these additional services varies from jurisdiction to jurisdiction. It is hard to dismiss any of them as unnecessary or trivial. For instance, systems which provide one or both parties to real estate transfers with independent legal advice about potential issues that may arise may well enjoy a higher level of confidence and satisfaction on the part of those parties which receive the advice, if not a lower rate of future litigation and dispute. Making any kind of economic assessment of the value of these services on an objective basis is impossible.

It is also clearly the case that the market for real estate is and always has been essentially a local one. The value of almost all real estate derives from its location. Cost of real estate, both improved and unimproved, varies tremendously based solely on location. To the extent that the different locations of real estate are within different political entities, such political entities can impose costs and taxes related to local concerns on real estate transactions without significantly burdening any kind of

interstate or international market for real estate as a commodity. While it is conceivable that such costs or taxes could reach such an extreme level as to affect cross-border interest, differences in such costs, taxes, etc. as presently observed, do not rise anywhere near this level.

C. Steps and Functions in the Transfer of Real Estate.

Among the various systems that are the subject matters of this study, the following discrete steps and performances have been identified as performed or provided in at least some of the subject systems.

1. A buyer and seller are brought together and mutually decide to sell and purchase the real estate in question. This is commonly the function of real estate brokers, although other professionals may also be involved, particularly in the later stages of negotiating and refining the terms of the deal. In many cases, however, buyer and seller make contact and negotiate the essential terms of their deal without the assistance of brokers.
2. The parties' agreement to purchase and sell is incorporated into a written document. Most systems employ some form of initial agreement to structure the overall sale and purchase transaction. Sometimes part or all of the negotiations in step 1 involve the serial exchange of written offers in the form of proposed agreements. Although the form and theoretical basis for such agreements varies from jurisdiction to jurisdiction there are various common elements including:
 - i) The initial agreements are in writing and signed or assented to by both seller

and buyer.

- ii) The agreements are often accompanied by payment of a part of the purchase price as a deposit, earnest money, or escrow to demonstrate the buyer's good faith. These monies are frequently held in escrow by a third party and are subject to refund based on various contingencies.
- iii) Actual passage of title and possession generally takes place at a time after the signing of the agreement either automatically on the fulfillment of described conditions, such as payment, or following an additional "closing" at which additional confirmatory or executory instruments may be signed.
- iv) The agreements are frequently made conditional on various determinations to be made before the transaction becomes final such as:
 - (1) Examination of title
 - (2) Appraisal of the property by a real estate appraiser at a given value or more
 - (3) Physical Inspection of the property by the buyer or by a home inspector or engineer
 - (4) Survey of the property and certification of size or square area of a dwelling
 - (5) Certifications from third parties as to absence of asbestos, lead paint, or other contaminants
 - (6) Non-exercise of right of first refusal by a public authority
 - (7) Buyer's ability to secure financing in a specified amount and with specified terms

(8) Buyer's ability to sell Buyer's existing house at a given price within a specified time

3. The various conditions to closing are addressed and complied with. This can involve cost and effort by the parties to the transaction as well as by real estate professionals such as brokers, lawyers or notaries. The allocation of the responsibility to comply with conditions and to establish that compliance has taken place varies from system to system.

Some of the most important of these conditions are:

1. Examination of the title. The buyer needs to be sure before he pays his money that he will receive good title to the real estate in question. This function can range from nearly trivial in jurisdictions with modern and efficient title registration systems to costly and time consuming in jurisdictions with old fashioned deed recordation systems, particularly if title insurance will be required by the buyer or a financing bank. The work may be actually performed by a public notary, by a lawyer for the buyer or for a financing bank, by a title or title insurance company, or even a real estate broker. Although the title to most real estate may be fairly straightforward, in some cases the existence of restrictions or easements may require some professional explanation and advice to enable a buyer to determine the actual effect of these on the value or utility of the property.

2. Arranging inspections, etc. Often improved real estate is sold subject to a condition that permits inspection by an expert and gives the buyer the right to back out of the transaction if the report is unfavorable. These inspections may be arranged for by lawyers, notaries, brokers, or the parties themselves. Some such inspections, such as inspections for lead paint or asbestos may be required by consumer protective legislation. Typically the cost for the expertise is borne by the buyer.
3. Arranging for financing. This is generally an assignment for the buyer. Preliminary contract in hand, the buyer goes to the bank and applies for mortgage financing on the purchase. The money will be lent secured by a first lien on the property to be purchased, and in some cases partly or completely guaranteed by government agency or private mortgage insurance. This can be time consuming and expensive. In different financing markets loan origination fees may be payable and there are generally fees for credit reports, title examinations, bank title insurance.
4. Sale of the buyer's house. Sometimes a contract to purchase a house will be made contingent on sale of the buyer's previous house within a specified period of time at a specified minimum price. In some areas this condition can be inserted in a whole chain of contracts, which thus become mutually dependent on

each other.

4. Upon fulfillment of all conditions the balance of the purchase price is paid, title and the right to possession passes, and a lien is created in favor of any financing entity. This step may involve a “closing” separate from the signing of the agreement and the execution and delivery of title deeds, mortgages, and other instruments, or it may occur more or less automatically upon a determination that the conditions in the basic transfer contract have been satisfied. In most systems, however, the passage of beneficial ownership occurs at the time the purchase price is paid in full, which is also when the lender acquires a security interest in the property. Most jurisdictions tax the transfer of real estate, and the computation and payment of the transfer tax is often an integral part of the execution of the transfer itself.
5. The transaction is reported to and recorded in a public register or records office. In some systems registration in the public register constitutes the actual passage of title, in other systems registration is declarative of the passage of title that took place between the parties upon the signing of the agreement, delivery of the deed, or some other prior event. In all systems registration or recording is necessary in order to make the change of ownership effective against other potential good faith purchasers of the real estate.
6. Because of the importance of enduring certainty in real estate transactions, there is a perceived value in maintaining records relating to such transactions for longer periods of time than business records are generally maintained and

preserved. In most systems professionals who execute real estate transfer are under a formal duty or informal expectation to maintain their files from the transaction, or portions of them, for considerable lengths of time in case question arises about the transaction at some time in the future.

III. Real Estate Conveyancing in Selected European Member States and States of the United States of America

The following portion of this report consists of a brief description of the process of real estate conveyancing in the five EU Member States and two states of the United States under study. The underlying information was derived from national reports prepared by professionals in their respective jurisdictions or by research assistants based on data derived from literature, interviews and statistical publications, supplemented in each case by the Reporter's research, actual observation, or experience with real estate transactions.

A. *Estonia*

As a part of reforms of the 1990's aimed at modernizing the Estonian legal culture and economy, the Estonian Parliament revived the institution of the civil notary and confided upon the notariat the responsibility for documentation and effectuation of all transfers of real estate. Estonia knew the institution of civil notary during its first period of independence, 1918-1939. During the period of occupation by the USSR, a state notary existed but did not perform transfers of real estate between private parties.

At the beginning of its second period of independence in 1990, Estonian lawmakers studied alternative models for documentation of real estate transactions and other important out-of-court juridic acts and agreements. The result of this study was a decision to recreate a modern civil notary system.

Real estate brokers assist with the sale of real property bringing sellers and buyers together and helping them to negotiate their basic deals, actual documentation of real estate transfers in binding contracts is the exclusive province of notaries. Brokers are involved in slightly more than 50% of all real estate purchases and sales. Brokerage commissions in Estonia range from 3-5% of the sales price of the real estate.

Real estate brokers sometimes prepare preliminary “contracts” for the transfer of real estate which are signed by seller and buyer. These contracts are not legally binding to effectuate transfer of the real estate. They are sometimes resorted to in the interest of deterring the parties from changing their minds pending proper documentation of their transaction by a notary.

Parties wishing to enter into a binding contract for the transfer real estate consult a notary. The notary checks the status of registered title and then prepares a contract setting for the terms of the transaction. The notary also answers the parties’ questions and provides independent advice to both parties about most aspects of the transaction. Notaries are not real estate appraisers, however, and generally do not opine on the adequacy of the purchase price or other economic terms of the deal. The parties are free to consult with and be advised by their own lawyers. In practice the participation of lawyers is not usual in ordinary sales of residential real estate.

To the extent that a sale is conditional on such factors as obtaining financing or satisfactory environmental inspection of the property, such conditions are incorporated into the contract. Completion of the transfer may also be subject to assent or release of rights of first refusal by a condominium association, or by a local or national governmental agency. For instance, the national government has a right of first refusal by law on the sale of real estate situated in the certain areas of the “old town” portion of Tallinn.

It is possible for a purchaser to pay a down payment of up to 10%, which may be held in escrow by the notary pending completion of the transfer. If the purchaser fails to pay the balance of the purchase price or complete the transaction without justification, the escrowed down payment may be turned over to the seller as a form of liquidated damages. On the other hand, if the seller is unable to convey good title or one of the conditions to transfer is not met, then the down payment is returned to the buyer.

Following the signing of the contract, the parties and the notary attend to fulfillment of any conditions to the transfer. If financing is required, the financing bank will communicate with the notary about securing a notation of its mortgage interest at the time of re-registration of title.

Once all conditions have been complied with, the notary advises the parties and any financing bank that the balance of the purchase price is due and schedules a closing. At the closing the final contract for the passage of title is signed along with an application to the land registry office to re-register the title in the name of the buyer. Three days after the application has been filed in the registry office, the balance of the

purchase price is paid to the seller and any other interested parties, such as a seller mortgagee.

The Estonian land register system is largely, if not completely, electronic. About 60% of the land area of the country has been registered. In built-up areas the percentage of registered land is higher - approaching 100% in urban areas that have experienced a growth in economic activity. Inquiries as to the registered ownership of property may be submitted electronically. Requests for re-registration submitted through notaries may also be in electronic form.

In Estonia title passes on re-registration. Possession, entitlement to income and risk of loss typically pass at an earlier time, generally on payment of the balance of the purchase price. The re-registration process can take some time, as long as 30 days, in which officials of the land registry examine the request and the supporting documentation, determine its formal sufficiency, and enter or approve the entry of the new ownership information in the registry data base. Land registration fees are significant. They are either collected by the notary and remitted to the land registry or paid directly by the buyer at the time the application for re-registration is submitted.

Estonian notaries have made extensive use of electronic data-processing capability to improve the service rendered to their clients. As of February 1, 2007, all Estonian notaries have access to "E-Notary", a program designed to assist in the preparation of real estate sales agreements and the necessary documentation to effectuate transfers right through accessing and submitting transfer information to the land registry system.

Estonian notaries are fully trained jurists appointed by the Estonian Ministry of Justice to serve notarial districts based on perceived need for additional notarial services. Currently there are 15 notarial districts in Estonia served by 94 notaries. Parties have free choice of notaries to document their transactions, regardless of the location of their offices. Notaries are compensated based on an official fee schedule based on the value of the property transferred. If a notary subjects land being conveyed to a mortgage in favor of a financing bank, the notarial fee is slightly increased to reflect the extra work and responsibility involved. General oversight of the practices of Estonian notaries is provided by the Estonian Chamber of Notaries to which all notaries belong.

B. France

Real estate transfers in France are accomplished by notaries. Real estate brokers are involved in slightly more than half of the transactions. Real estate brokers are paid commissions of approximately 6% of the purchase price. Although they are paid by the seller, the commissions are taken into account in negotiating the final purchase price of a brokered property. Notaries serve as brokers in less than 10% of the brokered transactions.

If the seller has placed the property with a broker and the broker finds a buyer, it is common for the broker to prepare the preliminary contract using either printed or electronic forms. Some brokers refer the parties to a notary for preparation of the preliminary contract. In almost all owner-negotiated sales the preliminary contract is

prepared by a notary. French notaries act as neutral conveyancing professionals regardless of which party has initially engaged their services. They document the sales agreement according to the specific circumstances presented after providing impartial advice to the parties to the transaction.

The initial contract sets forth the price and the terms and conditions of sale. The buyer almost always pays a deposit, generally equal to 10% of the purchase price, which is held in escrow by the broker or the notary as the case may be. Conditions of sale usually include various inspections and certifications, some of which are statutorily required. In the case of apartments or condominiums the seller must provide certification of square-meter area of the premises.

Other conditions include release of all rights of first refusal and restrictions on sale, and availability of purchase money financing. The French real estate transfer tax must be paid as a condition precedent to registration of the land in the name of the purchaser.

Although most smaller transactions are documented by single notaries, in more substantial transactions it is not uncommon in France for two notaries to collaborate in a single transaction. If seller and buyer both wish notaries in whom they have special confidence to participate in a sales transaction the notaries divide the work involved in effectuating the transaction and also divide the statutory fees. Generally this means that the notary commissioned by the purchaser attends to the drafting of the final sales agreement while the seller's notary sees to obtaining the necessary permits and releases of rights of first refusal. Rarely in residential transactions, but more frequently

in commercial matters a financing bank may request the participation of a notary with whom it is accustomed to work for the preparation of mortgages and loan agreements.

When more than one notary participates in a transaction the statutory fees are divided among them according to the tasks undertaken by the respective notaries, with the largest share of the fee going to the notary who drafts the final sales contract and presides at the contract signing. Although their participation may have been requested by various parties, all the notaries serve as neutral legal officers “for the situation,” and do not have special fiduciary or agency relationships with any party.

The preliminary contract is regarded as a binding legal agreement. If a buyer refuses without justification to complete a real estate purchase, the seller may retain the deposit as damages for the breach. If the seller refuses without justification to conclude the final purchase contract, the buyer is entitled to the return of the deposit. The buyer may also sue for damages or for an order compelling the seller to conclude the final purchase contract, although the latter relief is seldom granted. Although most preliminary contracts are in writing and signed by both parties, there is no ban on oral agreements that modify or expand on what is set forth in the written agreement.

Following the execution of the preliminary agreement, the parties attend to respective fulfillment of the conditions to closing. The buyer applies for purchase money financing of up to 90% of the purchase price. Most French banks which finance real estate maintain the loans in their own portfolios. If the bank agrees to provide the financing, a bank official, or in exceptional cases, a notary commissioned by the bank, will be in touch with the notary who will finalize the transaction, will forward information

and sometimes form documentation to the notary, and will be ready to disburse the loan proceeds to the notary at the time of final contract signing.

French law gives the locality in which real estate is located a right of first refusal on all private sales of real estate in case the locality needs the property for some public purpose. One of the tasks for a notary in effectuating a transaction is to get in touch with the relevant public authority and obtain a release of this right of first refusal. Generally this, as well as most of the pre-closing tasks, is performed by assisting personnel in the notarial office, although some country notaries may attend to this kind of task themselves.

French law also requires an inspection of residential premises for the presence of asbestos and lead-based paint in connection with every transfer of ownership. Arranging for this inspection and obtaining the necessary certificates are also tasks for the notary, usually in cooperation with the seller.

Needless to say, at an early point in the process the notary checks the real estate registry for the state of the title and the presence of mortgage liens or other rights or restrictions that may affect the utility or marketability of the property. If the property is subject to mortgage liens, the notary will contact the mortgagees to confirm the amounts due and the terms upon which the mortgages can be discharged.

Sales of apartments and condominiums in France have some special requirements. First of all the parties must be familiarized with the terms and condition of condominium agreements and other common-ownership arrangements affecting the property. Second, any rights of first refusal or requirements of prior approval of sale

will have to be addressed and complied with. Finally, French law requires that each sale of a condominium or apartment be accompanied by a certification by the seller of the square-meter area of the apartment or condominium computed according to a statutory formula. If the buyer subsequently has the property measured and the result is more than 5% smaller in area than certified by the seller, the seller is responsible for substantial damages. Thus, obtaining an accurate measurement and certification is of some importance in effectuating sales of this kind of property.

Once it appears as if all conditions to the completion of the sales transaction have been complied with, the presiding notary drafts the final contract and arranges for the parties to meet and sign the contract, generally in his office. In almost all cases a draft of the contract is prepared beforehand and sent to the parties and any other participating notaries for review, questions, or comments. Each contract is specially drafted for the terms and conditions of a particular sale, although electronic word-processing, stored clauses and form agreements make this work easier.

The contract signing takes place at the office of the presiding notary, usually the notary commissioned by the buyer if more than one notary is involved. Buyer and seller are both present. If there is a broker in the transaction, the broker generally attends to make sure that the transaction closes and to collect any commission due. Representatives of financing banks or notaries commissioned by banks are rarely present. The banks generally rely on arrangements made with presiding notaries to safeguard their interests.

At the contract signing, the presiding notary explains the various terms of the

contract to both parties. Compliance with the terms and conditions of the preliminary contract is confirmed, in many cases by actual production of the required certificates or letters of approval. At least some French notaries have taken advantage of high technology to facilitate this review and explanation of the terms of final contracts. For instance, a notary's signing room may be equipped with table-mounted computer monitors for all participants so that everyone can effortlessly follow the notary's explanations as he scrolls down through a document. If there are last minute changes to the contract, they can be made on the spot.

Once everyone is satisfied with the terms of the contract, the notary reviews the financial terms and details of the closing with both parties. Usually closing statements have previously been sent to all parties, which simplifies this process at closing.

After all details have been reviewed to the satisfaction of all concerned, the notary proffers the final real estate transfer agreement to the parties for signing. If there is a loan agreement, that is signed by the buyer at the same time. A mortgage that arises simultaneously with acquisition of the property is included in the final transfer agreement. No separate mortgage transfer document need be signed. If a person seeks to secure indebtedness by a mortgage lien on property already owned, that requires a separate agreement creating the mortgagee's interest in the real estate.

As the instruments are signed by the parties, the notary simultaneously arranges for the respective transfers of funds via a special notarial escrow account maintained at a particular bank which provides secure escrow services for all notaries. Typically the notary has already received a remittance of the loan proceeds from the

bank providing the purchase money financing. Upon closing the notary deposits this remittance along with any additional monies from the buyer or from the broker's escrow account into the notarial escrow account and draws remittances or electronically transfers funds to the seller and to any mortgagees.

The notary is also responsible for computing and paying all taxes due on the transfer. Since the proper payment of taxes is a condition precedent to registration of the land in the name of the new owner, prompt and accurate performance of this task is important to all parties. As of the writing of this report, notaries are able to make these tax payments electronically from their escrow accounts. Upon payment of the taxes the public authorities issue confirmation numbers which authorize the land register authorities to complete the registration.

The final step in the real estate transfer process is the registration of the transfer at the office of land registration. In most of France land registration records are maintained by an office in the Department of Inland Revenue (Direction Generale des Impots). In certain departments of Alsace-Lorraine land registers are maintained by land register magistrates under the auspices of the local courts.

In France title to real estate passes on signing of the final contract. Registration is not necessary to complete transfer of title between the parties. Registration is, however, necessary, to perfect transfer of title vis a vis intervening third party transferees or mortgagees.

Registration is completed by sending an application for registration signed by both the new and the old owner along with a copy of the final sales contract to the

appropriate land registry office together with the requisite fees and confirmation that the transfer taxes have been paid.

The process of completing public registration of land transfers can take some weeks from the time of the closing. During this “gap period” the buyer remains subject to some risk of an intervening sale or mortgage. In practice these are very rare occurrences. Registries process land transfers in the order received. Thus if a notary dispatches the requisite documents promptly following closing there is little likelihood that an interest arising in the gap period can come earlier to registration. Since notaries guarantee proper execution of land transactions entrusted to them, a presiding notary is absolutely liable for any damages sustained by a buyer as a result of late registration of the transfer.

French notaries have acted to reduce lag periods in the registration of mortgages to zero by the development of a system for electronic registration and dissolution of most mortgage interests. Thus, a notary who closes a pure mortgage transaction can insure that the mortgage is a valid first lien on the property as a matter of public register before the parties have left his office. Currently in process is a similar system for registration of all land transfers. While such a system involves some complications that do not exist for a mortgage-only system, the Council of French Notaries believes that the gapless electronic land transfer registration system will be functioning throughout France by the end of 2007.

Costs of real estate transfer in France consist mainly of brokerage commissions (where brokers are used), taxes, and notarial fees in inverse order of magnitude. In

addition, most transactions involve fees to inspectors for hazardous substances and square area of apartments and condominium. There are also fees charged by land registration offices for registration of transfers of ownership and mortgages.

Notarial fees are computed in accord with a statutory table of fees based on the role of the notary in the transaction and the amount of the transaction. If the work involved includes preparation of a loan agreement and seeing to the creation of the interest of a mortgagee, there is an additional fee payable by the mortgagor. There are no additional fees for obtaining the various approvals necessary to conclude a transaction, nor is the total fee different depending on the number of notaries involved.

Transaction documents prepared by and executed under the supervision of French Notaries partake of the character of "public documents" under French civil law. This status makes the documents self proving and of equivalent enforceability with court judgments.

French notaries are all fully educated jurists who have also received training to perform notarial services. They are required to maintain accounts at a particular bank to secure the handling of clients' funds, and are required to maintain liability insurance for professional malpractice. The number of notaries' offices in a given locality is limited to that number which the Ministry of Justice determines are necessary to serve the needs of the population there. The number of notaries in any one office is not regulated. Parties are free to choose notaries to document their real estate transactions regardless of geographical location of the notaries' offices. As indicated above, fees and charges of notaries are specified by statute.

Notaries and their work enjoy a high level of respect in France. In a recent opinion poll nearly 90% of the respondents expressed a good or very good opinion about notaries.

C. Germany

Real estate transfers in Germany are accomplished by notaries. Real estate brokers are involved in approximately 50% of all real estate sales transactions. When brokers participate, their role is limited to bringing buyer and seller together and negotiating the overall terms of sale. Brokers do not become involved in documentation of the transaction or effectuating the transfer. They are paid sales commissions of 3-5% of the purchase price, usually by sellers.

Once the parties have agreed on the economic terms of a real estate sales transaction, they engage the services of a notary to document³ the sale and to effectuate the transfer. The notary usually becomes thus involved at a relatively early stage of the transaction. Under German law a real estate transaction consists of three steps, a sales agreement that creates the obligation to transfer, a separate agreement of transfer, and title re-registration, which is required to complete the transfer even between the parties. The first two agreements and the request for re-registration are

³ It is difficult to find a single term to describe the notary's function in drafting and implementing a real estate sales contract. This report uses the term "documentation" connoting integration of the parties' agreement into a legally effective written form rather than terms such as "authentication" or "authentication", which lay greater emphasis on the notarial function of creation of genuine "public documents" with special evidentiary status in litigation. While these aspects of the notary's function are also of value in real estate transactions, in comparing systems for transfers of private real estate the roles of notaries as officers of the state is of comparative significance largely insofar as it may involve an enhanced level of accountability and discipline on the part of the practitioner.

usually contained in the same document.

German law requires that the contract for sale of the property and the contract of transfer be documented by a notary in order to effectuate a change in ownership by registration. Informal non-notarial contracts are legally void. To the extent that they are used at all, they serve as informal records of the state of negotiations between the parties.

Most notaries arrange for two consultations with the parties. The first meeting enables the notary to obtain from the parties their own particulars and the particulars of the transaction. A notary is under an obligation to verify the identity of the parties and determine their legal capacity to contract. The notary advises the parties about the potential legal risks and responsibilities that are involved in the envisaged real estate sales transaction, explains possible ways of how to adequately deal with such risks and answers the parties' questions. The notary is not expected, however, to assess the appropriateness of the purchase price or the purely economic terms and conditions as negotiated by the parties as long as it appears that the parties have acted knowingly and without deception or overbearing.

This first meeting may uncover potential issues or disconnects between the parties that have not yet been negotiated. The notary can impartially advise both parties on their existing and potential legal positions and sometimes acts as an informal mediator to help resolve disagreements. However, the notary can only offer options to solve controversial issues. It is ultimately up to the parties to reach agreement, with or without the aid of legal advice or representation.

The notary electronically checks the state of registered title at an early point in the process. All real estate titles in Germany have long been registered. The title registry lists each registered land owner in the locality with designations of the parcels owned, encumbrances, and other pertinent data. The land registries also contain catastral information, provided by the cataster authorities, in which the location, dimensions and registration number of each registered parcel are described in some detail.

The German land register is a part of the noncontentious jurisdiction of the local courts. Register offices are maintained in each locality, although some regionalization of land registries is currently taking place. Access to land registrations is open only to those who have a legitimate interest such as the registered owners, existing encumbrancers, execution creditors, parties with whom they are in actual contract or finance negotiations, and notaries effectuating real estate transactions in their behalf. The registries are staffed by registrars who have received three years of specialized legal training and who work under the overall supervision of a judge of the local court.

Registration of transactions has various effects: Transfer of title takes place only upon registration. Registration also gives rise to the legal assumptions that registered rights exist and belong to the person stated in the register and that a right that has been deleted from the register no longer exists. A bona fide purchaser acquires good title from a person registered in the land register even if this person is not the owner of the property. Thus, the rightful owner who by mistake is not registered would lose title

to his property to the purchaser acting in good faith. The same rules apply with regard to the kind and amount of encumbrances on a plot.

The far-reaching substantive effects of the registration, make it of eminent importance to all concerned that the register be in accordance with the actual state of rights *in rem* and that changes in the register be made with great care based on authentic legal instruments. It is the role of the notary to guarantee that registered transactions maintain a quality and accuracy that corresponds to the substantive effect of registration.

Land registry officials review each real estate transfer contract and application for change in registration only for formal requirements. They do not verify identities of parties or determine compliance with any sales contract conditions or payment, but rely on the submitting notary in these respects.

Land registration records are by now almost entirely converted to electronic form. Currently notaries and banks have electronic access to registration records in most registries on a state by state basis. However requests for changes in registration and the documents supporting such requests must still be submitted in writing. Further conversion measures to permit notaries to make electronic submissions of requests for re-registration of land or registration of encumbrances are under way and are expected to become functional within the next two years. The development of a fully electronic system of land registration is supported by the German notaries, who have already developed a fully electronic version of the commercial register, which functions at a comparable level of security and accuracy.

Following receipt of the details from the parties, the notary drafts the official contract for the purchase and sale of real estate. The sales contract itself does not pass title. Legal title formally passes with the conclusion of the agreement of transfer and the change in registered ownership in the applicable real estate register. In most cases the sales agreement and the agreement of transfer are contained in the same document.

German real estate purchase and sale contracts are custom drafted for each transaction. The contract identifies the parties and the real estate to be sold, sets forth the purchase price, and describes any conditions, qualifications or restrictions relative to the sale. The contract also states when the purchase price shall become due. As a rule the purchase price will not become due until the notary has become assured that several conditions have cumulatively been met:

- (i) All public and private permits which are necessary in the given case to make the contract gain legal effect, e.g. with regard to agricultural land, declarations by a proxy etc., have been obtained.
- (ii) A priority notice has been registered in the land register in order to secure the purchaser's rank in the land register and to protect the purchaser against intervening interests,
- (iii) Any statutory or contractual pre-emption rights – e.g. in favor of public authorities or condominium associations – have been waived.

- (iv) All documents required for the cancellation of existing encumbrances have been handed over to the notary as a fiduciary to enable discharge of the encumbrances out of the proceeds of the purchase.

The notary sends a draft of the contract to both seller and buyer for their review prior to the appointment for the formal reading of the contract, discussion, advice and signing. Contracts between business entities and consumers must be sent to the consumer party at least 14 days prior to the final signing meeting.

When the parties are ready to sign the contract, they meet at the office of the notary. The notary then reads the contract aloud in the presence of the parties, giving emphasis and pausing to explain legal terms and discuss the portions of particular importance. The reading aloud is a kind of discipline that insures that every term in the contract has been exposed to consideration by all parties. It also leads to more concise documents. If disagreements or questions arise as the contract is being read, they can be discussed and in most cases resolved on the spot, and the contract can be revised accordingly. Finally, when the parties are satisfied that the contract reflects their mutual intentions, they sign the contract in the presence of the notary.

In general purchasers of residential real estate do not make down payments, since the obligation to pay and the obligation to transfer title become binding as of the time the notarial contract is signed. Once the seller has signed the purchase and sales contract and the agreement of transfer, there is usually nothing more for the seller to do. It is then up to the notary to make sure that the buyer will acquire – except for the mortgage in favor of his bank – unencumbered ownership once he has paid the

purchase price. He will thus see to all prerequisites for the maturity of the purchase price as set out above be met. The notary enters the preliminary notice in the land register, asks for the release of any pre-emption rights in favor of municipalities, condominium associations or others and seeks to obtain any official approval required for the sale of the plot. The notary also communicates with the creditors of any encumbrances to be discharged in the course of the transaction. The creditors send the documents required for the discharge of the rights to the notary as a fiduciary. The notary, in consequence, will then make use of these documents only if the creditors have in fact been paid the amount due to them out of the purchase price.

On successful completion of all these steps, the notary informs the parties that the purchase price is due. After the purchase price has been paid and the tax certificate been received the notary proceeds to execute the sales contract through filing the application for registration as previously signed by the seller and buyer. Suits for damages or specific performance of ordinary real estate purchase and sales contracts are very rare and take place only in extraordinary cases. This is because the notarial document of transfer is self-executing and does not require any further private or official action in order to become effective.

Real estate conveyances in Germany are subject to various public and private legal preconditions and requirements. Some of these preconditions may have been fulfilled prior to signing of the agreement and this can be verified by the notary and noted in the agreement. Compliance with a specified requirement can also be made a condition to effectiveness of the sales agreement, which compliance is then verified by

the notary before allowing execution of the agreement.

The most important condition to a real estate purchase and sales contract is generally the buyer's ability to obtain financing for the purchase of the property. Whenever possible, the buyer seeks to make his arrangements with the bank before signing the contract. If such arrangements have not been finalized as of contract signing, the contract can be made conditional on finalization of finance arrangements according to customary or specifically described criteria. If the buyer can show that despite best efforts, such financing has not been available, the contract can be terminated without further liability to either party.

Other contract conditions include release of any rights of first refusal existing in favor of localities, condominium associations or others, and the obtaining of official approval for the sale of specially restricted land such as forest land or agricultural land. In such cases it is up to the notary to seek and obtain the necessary releases and approvals..

Purchases of older improved properties may involve inspections for the presence of contaminants such as mold and hazardous substances such as asbestos and lead paint. Usually these inspections are carried out before contract signing. If they come afterward they can constitute conditions of execution. If the results are negative the seller is usually obligated to remedy the condition or the buyer is given the right to terminate the contract.

Under German law the seller of improved real estate guarantees against defects. Although the parties to real estate transactions generally waive this broad

guarantee, if a seller has concealed a defect the waiver will not prevent the buyer from recourse against the seller upon later discovery.

Although a sales contract subject to conditions subsequent does not effectuate a change in registration of ownership until the condition is satisfied, the notary almost invariably enters a preliminary notice in the land register at the time the sales contract is signed. This protects the buyer against subsequent good faith purchasers and intervening seller-created interests.

Following the execution of the contract the buyer finalizes arrangements for financing. Generally the bank will insist on a mortgage on the acquired lot as a security for the loan. The bank informs the notary of the economic conditions of the mortgage leaving it to him to set up a mortgage deed that adequately serves these guidelines. Taking into account the mutual security interests of all parties (seller, seller's creditors, purchaser, purchaser's financing bank), the notary frames the mortgage deed in a way that bridges possible gaps and ensures legal security for all concerned. In order to protect the buyer's bank from a possible gap arising from payment of the loan proceeds prior to passage of the title and creation of its mortgage, the notary will advise the seller to authorize the creation of a lien on his land in favor of the buyer's bank prior to transfer of title. Simultaneously, the notary safeguards the seller against possible risks arising from setting up a mortgage on his property before the purchase price has been paid by providing that the mortgage serves as a security for the loan only if and to the extent the purchase price is effectively paid to the seller. Also, the notary will make the mortgage deed immediately enforceable.

Once the funds are ready and the notary has made sure that all conditions to payment and transfer have been fulfilled, including registration of the financing bank's lien, the notary declares the purchase price due by sending a maturity notice to both parties and the financing bank. The bank then pays the purchase price according to the notary's instructions, i.e. the amounts requested for the discharge of the encumbrances are paid directly to the seller's creditors with the residue of the purchase price going to the seller. The latter then sends the notary confirmation that the price has been paid, and the notary sends the agreement of transfer and the request for re-registration of title to the appropriate title registry office. In most cases the agreement provides that possession changes at this point, even though legal title passes only upon the actual re-registration of the property.

At the time the contract is signed, the notary also sends a copy of the contract to the tax authorities of the German state in which the land is located. The tax authorities compute and assess the real estate transfer tax as a percentage of the purchase price (3.5% in most German states, 4.5% in Berlin) to be paid by the buyer. The notary does not submit the request for re-registration to the land register office until receipt of a certificate by the tax authorities that the buyer has paid the taxes.

Effectuation of a change in real estate registration requires anything from a few days to a few weeks, depending on the workload of the registry office. Although there is technically a gap between payment and passage of title, the buyer's interest is protected against intervening claims of later purchasers or creditors of the seller by the preliminary notation entered at the time the notarial contract was originally signed.

The German system provides a high degree of security and legal protection to often inexperienced participants through the role and participation of the notary. All parties to a transaction receive independent advice on the risks and problems of the transaction they are entering into as well as on possible legal ways of adequately dealing with such issues. Notaries are personally liable for all damages caused by their negligence or malfeasance and such liability cannot be circumvented by setting up a corporate shield. Liability insurance is mandatory for all notaries. Regional notarial chambers have voluntarily established special funds to cover damages outside the scope of the statutory liability insurance .

The system is served by a corps of skilled and specialized practitioners whose responsibility it is to make the system work. German notaries have an official as well as a liberal professional status. Their numbers, qualifications, practices and fees are regulated by national and state legislation and regulations. The notaries are selected and appointed by the State Minister of Justice according to a merit system. Regardless of the type of civil law notary, whether “single-profession notaries” or “attorney-notaries”, they are fully qualified to work as judges and attorneys and, in addition to the legal training necessary to become a judge or a lawyer, have undergone further intense practical training. “Single-profession notaries” generally have to serve at least three years as “notarial candidates” (Notarassessoren) under the supervision of an experienced notary before they can apply to the State Minister of Justice for appointment as a notary. “Attorney-notaries” are likewise required participate in

special training classes in various areas of notarial practice and strict rules prevent conflicts of interest between the notarial function and the attorney practice of law. Notwithstanding the fact that the notary is bound to the district he is assigned to, parties have free choice of notaries to document their transactions.

Once officially appointed, the notary does not receive a salary from the state. Instead, he or she charges fees to the parties. Notarial fees reflect the “value” of the notary’s services and are based on the purchase price in a real estate sales transaction. The incidence and amount of fees is set forth in a statutory table of fees similar to the tables used for court costs in litigation. It has been suggested that the German fee schedule tends to subsidize many smaller transactions at the expense of the participants in a few larger ones. The public policy underlying this fee distribution is to allow access to the notarial institutions of justice for persons of modest means with smaller transactions. By law both parties are liable for the notary's fee. Between the parties the obligation to pay the fee is negotiable. In most residential real estate transactions the fee is paid by the buyer.

Notaries and their work are highly respected in Germany. A recent opinion poll indicated that over 90% of parties to conveyancing transactions were satisfied with the performances of the notaries who had documented their transactions.

D. Sweden

The process of transfer of real estate in Sweden appears to be dominated by licensed real estate brokers, who handle the actual transfer of real estate as an

incident to their brokerage services. It is estimated that up to 95% of Swedish residential real estate transactions involve the services of real estate brokers and the trend continues to be upward. Lawyers do not take part in most residential real estate transactions.

A person desiring to sell real estate in Sweden engages the services of a real estate broker in almost all cases. Although it is reported that lawyers facilitate real estate transactions in rare cases, generally large industrial property transactions, no one with whom the national reporter spoke has been able to recall any specific residential real estate transaction handled by a lawyer without participation of a broker. Apparently the occasional participation of lawyers relates only to commercial real estate transactions. It appears that even if the seller has a specific buyer in mind, the usual practice is to engage a broker to handle the transaction.

The high utilization of real estate brokers is likely fostered by the Swedish banks that offer financing for residential real estate transactions. It is reported that the banks generally encourage the use of real estate brokers in transactions where they are asked to provide financing. A potential borrower who has negotiated a real estate purchase himself is told by the bank that he really should work through a broker in the documentation and effectuation of the transaction.

Real estate brokerage listings that involve consumers must be in writing. Commissions are generally in the area of 3% of the sales price. Brokers are sometimes willing to charge commissions somewhat less than 3% on more expensive and more desirable properties and often require more than 3% for properties of lower

value or which are located in less active market areas. In rare instances when parties have themselves negotiated a sales transaction they theoretically can engage a broker solely to handle the documentation on a lump sum fee basis. This happens so rarely, however, that there are no statistics or information available on the level of these fees.

Brokers routinely advertise properties listed with them in print publications and on the Internet. A relative real estate boom in Sweden in recent years has made property relatively easy to sell. It usually takes only a few days, at most a few weeks, to find a buyer. Apartments in large cities such as Stockholm generally find buyers within 24 hours of listing.

Real estate transfer contracts are prepared by brokers using printed and electronic forms published by the National Association of Real Estate Brokers or commercially. The brokers are expected to alter or customize the forms to fit individual transactions. Contracts are typically short – at most 3 to 4 pages. Contract terms include a description of the property, usually by reference to the cataster, the purchase price, and any applicable restrictions or conditions. Contracts typically provide that title and possession shall pass only upon fulfillment of specified conditions, including payment of the purchase price in full. A 10% deposit is generally paid to the broker in escrow at the time of signing of the contract, with the balance to be paid within a specified time period. Both parties sign the sales contract. There is no particular form or formality prescribed and oral modification or elaboration of a real estate transfer contract is permissible. This will be followed by a sales confirmation agreement at the time the purchase is paid and any conditions to the sale have been fulfilled.

Sweden currently operates a centralized system of land registration which is electronically accessible to all licensed real estate brokers and to others given access to the system. It is very easy to check the status of title of any parcel of real estate or any owner of real estate. Encumbrances are noted on the electronic registration record. The broker is supposed to check the registry and advise the parties of any restrictions or outstanding mortgage interests.

Once the real estate contract has been signed, the buyer must finalize his arrangements for financing. It is relatively easy for the buyer's bank to check with the bank holding any outstanding mortgage debt to verify the terms and outstanding balance and to arrange payoff at closing.

In Sweden the creation of a mortgage encumbrance on real estate generates a stamp tax in the amount of 2% of the amount of encumbrance authorized. For this reason existing mortgage encumbrances on real estate are not generally discharged on sale, but are generally released by the seller's bank and transferred to the buyer's bank. If the amount of the existing encumbrance is not sufficient to cover the buyer's loan, the level of the encumbrance is increased and the stamp tax is paid on the difference.

Swedish law also permits localities to specify land with potential for public use that will be subject to a right of first refusal on the part of the locality in the event of sale although currently there is little use made of the right. However residential land and terraced house land with an area of less than 3,000 square meters as well as one and two-family houses are generally exempted from such right of first refusal, so that most

residential conveyancing transactions do not involve such a right of first refusal.

Payment of the purchase price and completion of the transfer are generally contingent on release of any applicable rights of first refusal. Sales of agricultural and forest land are subject to official approvals designed to dampen speculation in these resources.

Sweden currently does not require any inspection for physical condition or hazardous substances in residential real estate transfers. Swedish law exempts sellers from liability for even known defects or conditions which a buyer could have discovered by a careful inspection. Under current practice a standard residential real estate transfer contract authorizes the buyer to arrange for a professional inspection of the premises for condition and the presence of hazardous substances. If the inspection turns up serious problems the seller is typically obligated to remedy the problem or reduce the purchase price, otherwise the buyer has the right to terminate the contract and receive back the deposit.

Under Swedish law contracts for the purchase of real estate are binding obligations of the parties. If the buyer fails, without justification, to pay the balance of the purchase price when due, the seller can usually retain the deposit. In the usual case, failure or inability of the seller to perform results in the return of the deposit to the buyer. In a rare case a buyer might sue for damages or specific performance. A seller suit for damages is even rarer.

Although the parties may contract for passage of title on signing of the purchase and sales contract, almost all contracts provide for the passage of title to take place on the signing of a subsequent sales confirmation upon fulfillment of the contractual

conditions and payment of the purchase price. It is possible to register a purchase and sales contract containing a provision for deferred passage of title in order to protect the purchaser against intervening claimants. Such registrations are relatively rare.

Preliminary registrations require payment of a registration fee. Usually purchasers and even banks rely on the good faith of the various participants and avoid payment of the fee.

Purchase and sale of an apartment or condominium usually involves research into the terms of the condominium agreements and compliance with any requirements of approval or rights of first refusal. These details are handled by the real estate broker and the parties.

If the buyer's bank is particularly concerned about maintaining continuity of security throughout the transaction, it can arrange with the seller's bank provisionally to assume its secured position prior to the closing and can thereby receive confirmation that its interest has been registered before disbursing the funds. In the ordinary course, however, the parties and the banks will dispense with the additional delay and recording fees involved with this procedure and merely provide for the assignment of the mortgage position simultaneously with the passage of title at time of signing the sales confirmation agreement.

In the usual case the first sales contract provides that once the financing has been arranged and all conditions complied with the parties are to sign a sales confirmation agreement, at which time title actually passes. The signing usually takes place in the office of the buyer's bank. The banks generally arrange for remittance of

settlement sums between themselves. Any additional funds needed from the buyer are paid at this point. The balance due the seller after discharge of any seller indebtedness on the property is paid to the seller. At this point the signed confirmation agreement and request for notation of mortgage lien are sent to the appropriate land register office so that the transfer can be entered on the land register.

Although the process of inquiry into the land register has long been automated in Sweden, the actual registration of real estate transactions has not. The national registry system is administered by the governmental department of land survey through seven regional offices, each of which is responsible for maintaining the register for a particular region of the country. In each specific case the sales contract or the confirmation agreement and the buyer's agreement to the assignment of the seller's lien to the new mortgagee and/or the consent to creation of an increased lien must be forwarded in original form to the correct land registry office. That office, which is staffed by knowledgeable non-jurists with some jurist backup, examines the instruments for formal regularity and then enters the new information in the electronic register. The registry office also handles the assessment and billing of the real estate transfer tax of 1½% of the purchase price in the case of a sale to an individual or 3% of the purchase price if the purchaser is a corporation. The tax is usually paid by the buyer following registration. The registration process can take from a day or two to a few weeks, depending on the workload of the registry office. If the documents contain mistakes, as occurs in about 10%-15% of the filings, they are returned to the submitting broker for correction, which adds to the time for registration.

If, as is generally the case, the purchase and sale agreement has not been recorded beforehand, delay in registration does create a gap period in which the purchaser and new mortgagee are not protected against intervening interests. So far potential harm arising from this gap has not been seen as a serious problem in Sweden.

One problem which has arisen in a handful of cases in recent years is the sale of property by unauthorized persons to good faith purchasers. This has most often occurred with respect to seasonal vacation property during the off-season. The property is offered for sale by a wrongdoer posing as its ostensible owner. The purchase and sale occur in the ordinary course and the wrongdoer disappears with the sales proceeds. It is not until much later that the real owner finds that his property has been sold to a third party. While Swedish law ultimately protects the real owner against forged conveyance of his property by an imposter, the costs and dislocations caused by this form of fraud to the parties affected can be considerable.

There are two features of the Swedish system that have made this kind of fraud easier than it would be under other real estate transfer systems. The first was the absence of any form of official identification of the seller of real estate. Presumably the real estate broker who prepares the sales contract should ascertain the identity of the person with whom he deals. In the past it appears that real estate brokers have not been especially demanding in this respect. A new anti-money-laundering provision of Swedish law makes identification of the parties to transactions mandatory. Once the contract or purchase confirmation has been signed and forwarded to the land registry

office for registration, there is no way for that office to determine the authenticity of any signature. That office must assume that each signature is genuine.

The second feature of the Swedish system that facilitates this kind of fraud is the practice of the land registry office to notify only the buyer of the change of registration. The seller is routinely not notified of the change of registration at the time it occurs, presumably on the theory that the seller has consented thereto by signing the contract or confirmation agreement, as the case may be. It has been suggested, however, that if the Registry were to send a copy of the registration notice to the seller as well as the buyer at time of re-registration, the seller would at least be given some notice of a potentially irregular transaction and could bestir himself more promptly to protect his interests.

Real estate brokers in Sweden are licensed by the national government. There are no particular educational requirements beyond completion of two years of post-secondary education and completion of a 10-week practical training internship with a member of the Association of Real Estate Brokers. All brokers are required to maintain professional liability insurance policies with minimum limits of approximately 166,000 Euro.

According to the terms of governing regulations, the primary obligation of the broker is to obtain the best price for the seller. In tension with this fundamental obligation is the obligation of the broker to give full and complete information and advice to all parties to a real estate transaction.

Recent decades have seen increased regulation of the real estate brokerage

profession in Sweden, spurred on by an unacceptable level of perceived abuses by brokers. Now brokers are subject to oversight by a national brokerage regulatory agency which licenses all brokers who comply with the statutory requirements for licensure, processes complaints of broker malfeasance, and disciplines brokers to the point of withdrawal of licensure. In 2006 326 investigations of broker conduct resulted in 38 warnings, 3 license revocations and 4 criminal prosecutions. Brokers are also subject to civil liability for professional negligence and malfeasance.

Although brokerage is not obligatory in Sweden, it appears that the real estate brokerage industry may have used its customary role in the effectuation of real estate transactions to capture virtually the entire market of potential real state purchases and sales, including those transactions which do not require the traditional sales function of the broker at all. In each of the other jurisdictions under study the percentage of transactions in which brokers are utilized hovers between 50% and 70%. In Sweden, however, it is estimated that 95% of all real estate transactions involve the services of a broker, who is paid on the basis of a percentage commission of the purchase price. This suggests that there may be a cultural expectation that real estate transactions will be handled by brokers because brokers, as opposed to lawyers, are perceived to be the professionals who do that kind of work and payment of a brokerage commission may be perceived as the necessary cost of getting real estate transferred.

E. United Kingdom

The 20th Century saw the process of transferring real estate in England and

Wales gradually simplified by the nationwide implementation of a system of registration of real estate titles replacing the former common-law title deed system. The introduction of the registration system has taken place gradually as more counties were brought under mandatory registration requirements and the list of events triggering mandatory registration was expanded. By the beginning of the 21st Century approximately 55% of the land in England and Wales was registered. The land not yet registered consists largely of Crown properties and some large landed estates that have not changed hands in many generations. Scotland and Northern Ireland are just now in the process of changing from a recordation of deeds system to a land registry system.

Real estate brokers generally limit their roles to advertising and showing property, bringing buyer and seller together and assisting in the negotiation of an overall “deal”. An owner of real estate, who desires to sell, commissions a real estate broker to advertise the property and show it to likely prospects. It is uncommon for both buyer and seller to be represented by brokers. In most cases the buyer deals directly with the seller’s broker. Commissions on single-broker transactions are relatively low, averaging 1.5-2% of the selling price.

Contracting practice in England and Wales are currently being reformed in an effort to reduce the time needed for the buyer to obtain relevant information about the property such as the state of title, encumbrances, use regulations, condition, etc. Previously sellers and buyers would frequently reach informal and nonbinding agreements to sell and purchase before the buyer had obtained full information about

the property. The buyer would then invest considerable time and money in generating this information. Some sellers would then, at the last minute, hold up or "gazump" the buyer for an increased price. Some buyers would exploit the delay to chisel or "gazunder" the price lower.

Effective June 1, 2007 a seller is required to prepare a Home Information Pack (HIP) containing specified information concerning the property such as state of title, local and condominium regulations, and other information likely to be of interest to the buyer. When entering into negotiations for the purchase of residential property the seller is required to deliver the HIP to the buyer, who then takes it to his solicitor. Whether this will materially reduce the interval between decision to buy and a binding contract is yet to be determined. A proposal that the HIP include an engineering report of the condition of improvements on the property was ultimately rejected. Thus buyers will still be expected to commission their own inspections before exchange of contracts, which will mean that the interval between a "deal" and a binding contract will continue to be appreciable.

Generally the seller's solicitor is expected to prepare the initial draft of the contract. The buyer's solicitor, who bears the responsibility for searching the state of title, regulatory restriction, and the like, can comment on the contract and suggest changes. Ultimately the parties agree on and sign counterparts of the same contract, which, when exchanged, becomes a binding obligation to buy and sell.

Under English law written contracts for the purchase and sale of real estate are enforceable by an action for specific performance, or by a claim for damages. A

purchaser under a valid contract is said to have "equitable ownership" because such contracts were formerly specifically enforced in English equity court.

Inspection of residential real estate for hazardous substances and surveys to verify the size of property and location of improvements are commonplace in residential real estate transactions. This necessary because English law maintains the principle of "caveat emptor" under which the buyer takes the property subject to all defects except those which were known to the seller and could not have been discovered by the use of reasonable diligence by the buyer prior to the purchase. These inspections take place at the expense of the buyer and have been generally concluded before the parties enter into a binding contract for purchase. Complete engineering inspections of residential property are less common. Frequently buyers rely on appraisals performed for financing banks for information on building condition.

The parties attempt to get as many potential issues resolved before contracts are exchanged. In the past this has led to considerable delay in reaching binding contracts. Whether these delays will be reduced by the HIP is still open to question.

Almost all residential sales and purchase transactions are conditional in practice. The most common condition is the buyer's ability to obtain financing on the purchase. A second condition that figures in a great many UK purchase and sales transactions is the buyer's ability to sell his own home before completion of the contract is called for. These practical conditions must be fulfilled before the parties exchange binding contracts.

The residential real estate market in Great Britain has for some time been

characterized by “chain” transactions in which a succession of buyers and sellers simultaneously enter into a series of purchase and sales contracts under which they simultaneously become bound to sell their present houses and purchase their successors. If any buyer defaults, the entire chain can shatter. Delay in exchange of contracts or completion of a single transaction can result in major inconvenience to a number of parties who depend on the forging of a chain and the timely completion of each of the linked transactions.

The long duration of the interval between the mutual agreement to sell and purchase and the exchange of contracts caused by the buyer's need to investigate and the challenges of coordinating exchanges of contract in chain transactions cause a high proportion of anticipated purchases and sales to fail. And some deals which become binding contracts fail of closing because of failure of another link in a chain. It is estimated that approximately 30% of real estate sales and purchase transactions never make it from initial agreement to final closing and registration of title.

Following the exchange of contracts, which is usually accompanied by payment of a deposit of up to 10% to the seller's solicitor, the parties arrange for contract completion and transfer of title. This involves coordination with the financing entity and also with other parties in the chain. For instance, if the buyer's ability to purchase depends on prior or simultaneous completion of his own sale, then the participating solicitors have to coordinate completion with the parties to the other contract. With large chains coordination of completion can be a very time-consuming and challenging matter for the solicitors and their clients.

Generally the buyer's solicitor prepares the title deed. Once approved by the seller's solicitor, it is signed by the seller and held in escrow by the seller's solicitor. The buyer arranges his financing and signs the necessary loan agreements and mortgages to secure the bank's interest in the property immediately upon vesting of title in the buyer. A careful solicitor for the buyer updates the registry search to make sure that no intervening interests have been registered.

A solicitor can apply for registration of a priority in connection with search of the title to a property subject to a pending transaction. This priority will protect the solicitor's client from an intervening filing for up to 30 days from the date of the search. Although it is possible to register a contract for purchase and sale to get more complete protection against intervening registered interests, such preliminary registration is extremely rare. There are also some kind of overriding interests, such as easements by prescription, local land charges, or rights of other parties in possession against which there is no protection at all available.

At time of completion the buyer's solicitor arranges for transfer of funds to the seller's solicitor, who then delivers the transfer deed to the buyer's solicitor, who uses it to apply for re-registration of title in the name of the buyer. The mortgage is registered at the same time to make sure that the bank's interest arises simultaneously with that of the buyer. Transfer of possession usually takes place at time of payment.

A transfer tax based on the purchase price of the land must be paid before the deed will be accepted for re-registration. The buyer's solicitor generally arranges for the payment of the tax and obtains the necessary receipt from the taxing authority. The

receipt is forwarded to the Land Registry with the deed and the application for re-registration. There is delay in completion beyond any priority period in up to 30% of the re-registrations. In such cases the buyer is unprotected against intervening registered interests until the registration in fact takes place.

Registration can also be delayed if there are errors in the paperwork submitted to the Land Registry. Although most conveyancing is done by solicitors or registered land conveyancers, errors in documentation crop up surprisingly often – in up to 50% of all filings. Not all mistakes require rejection of an entire filing, but such mistakes do account for some re-registration delays.

The land registration system has greatly simplified conveyancing in England. Under the former common law deed recordation system a solicitor or paraprofessional had to search a chain of conveyances in order to give an opinion of title at the time of each transfer. Land registration has been available in Great Britain since the end of the 19th Century. Registration is now mandatory on any form of disposition, including mortgaging of unregistered land. The traditional deeds of title are being replaced by simple user-friendly forms to document transfers of title and secure re-registration.

Under the old system of title deeds, title would pass on execution and delivery of the deed to the purchaser or his agent. Under the new system, however, legal ownership of registered real estate passes at the time the new owner is registered. As mentioned above, a purchaser may obtain what is known as "equitable ownership" at an earlier stage, namely once a written contract has become unconditional, Equitable

ownership provides less protection than legal ownership against bona fide acquisitions by third parties.

Currently it is possible to get electronic access to the land registration system in order to check the state of title or the existence of encumbrances on a specific property. Work is underway to make all submissions to the registration system, including re-registrations and notation of mortgages, fully electronic. The system is even being configured to accommodate chain transactions and provide a “foolproof” electronic simultaneous completion of a series of linked transactions. One impediment to implementation of a system in which conveyancers have access to the database to directly effectuate land transfers is the concern that dispensing with the screen currently provided by the land register system personnel will cause the system to be degraded by an unacceptable level of conveyancer errors.

In most transactions buyer and seller, and sometimes the financing bank, are all represented by separate solicitors. Transactions in which either buyer or seller goes completely unrepresented are uncommon. Frequently the buyer's solicitor will appear for both the buyer and the financing bank. Such dual representation is specifically permitted by the Law Society's Code of Professional Ethics, subject to some constraints and disclosure requirements. Banks maintain list of solicitors from whom they will accept representation along with their customers. Each party is responsible to pay his or her own solicitor, who charges either on a per-transaction or hourly fee basis.

English solicitors are fully trained jurists who complete a university education

and supplementary professional training at law schools offering curricula approved by the Law Society. Although there is some specialization in real estate conveyancing among solicitors, many transfers of real estate in more rural areas are handled by local general practitioners.

In the last 20 years licensed conveyancers have been authorized to provide land conveyancing services to both buyers and sellers. Licensed conveyancers have the equivalent of two years training on real estate law and practice and are licensed by a national board to provide services to both buyers and sellers in real estate transactions. Although licensed conveyancers are permitted to play the same role as a solicitor in a real estate transaction, some solicitors have been reluctant to deal with licensed conveyancers on the same basis as with other solicitors, which has inhibited their ability to compete for clientele. Currently their penetration of the real estate conveyancing market is small, generally of the order of 3%.

F. United States -

Real estate conveyancing practices in the United States vary to some extent from state to state, although there are many common elements. This is because real property law is fundamentally state law, not federal or national law. Each state therefore establishes the legal basis for real estate ownership and transfer as well as the procedures by which interests in real estate may be transferred.

The basic system of real estate ownership and transfer in all of the United States came from England at the time of the American Revolution in the late 18th Century. After the Revolution each American state established its own system for land ownership and transfer, in each case based on the English Common Law. Interests in land are created and transferred by written instrument signed by the grantor and physically delivered to the grantee. In each state instruments of conveyance must be recorded in a public registry in order to protect against later grantees from the same grantor. The transfer of title occurs between the parties with the execution and delivery of the deed of transfer. Recordation merely provides publicity of the transfer in order to perfect it against the claims of some third-party claimants.

Despite the worldwide evolution of land registry systems starting in the middle of the 19th Century, the great bulk of land in the United States is not registered. At the end of the 19th Century the Torrens land registration system from Australia was introduced in twenty-three American states. It still exists in 10 States, California, Colorado, Georgia, Hawaii, Massachusetts, Minnesota, New York, North Carolina, Ohio, Virginia and West Virginia. In Massachusetts approximately 25-30% of the land area of the state has been registered. In no other state does the percentage of registered land exceed single digits.

The apparent lack of popularity of land registration may be related to the fact that in each state where it has been introduced, participation in the registration system is voluntary. Also, the American land registration process takes place within the courts in an expensive judicial process. A landowner can go to the considerable expense of

having his land registered, which will be of great benefit to subsequent purchasers of his land. However, most landowners do not directly experience a benefit themselves. A landowner's reluctance to incur a large expense that benefits future purchasers but produces no current benefit to the existing owner is understandable.

The result of this failure to make the transition to registered titles is that land conveyancing in the United States is made more expensive by the need to verify the seller's title anew each time the land is transferred. Title is verified by a "title search" in the indices and records in the Registry of Deeds for the locality in which the land is situated. If the records disclose a "chain of title" of consistent conveyances of the subject parcel for at least 40, or in some cases 60 years, then the apparent owner of the parcel is considered to have good title. Although electronic data processing capabilities have made access to registry of deeds indices and recorded instruments easier in some states, the basic process of verification of title remains the same as it was at the time the registry system was established more than 200 years ago.

In recent years the use of title insurance to protect lenders and owners of real estate from title defects and outstanding interests that could affect their ownership or security interests has become widespread in most, if not all of the American states. This development can be related to the growth of nationwide secondary markets for home mortgages.

In past times home mortgage lenders, mainly local savings banks and savings and loan associations, loaned their own funds on the security of private residences and

retained such loans in their own portfolios. Such lenders were willing to rely on certifications of local attorneys who had searched the titles to the mortgaged properties as to the quality of the titles and the primacy of the banks' mortgage liens.

In the last three decades of the 20th Century, however, deregulation of banking activities nationwide has permitted rapid development of a nationwide secondary market in home mortgages. The mortgages are typically “bundled” by financial intermediaries and sold to long term investors based on the interest rates of the obligations relative to the wholesale cost of money. Mortgage brokers comprise a vast new category of financial institutions. Their function is to originate mortgages for immediate resale and assignment to pools of mortgages to be sold on the secondary market. These purveyors of mortgage loans now compete to attract homeowners on the basis of competitive interest rates and terms. As of the writing of this report, the great majority of residential real estate mortgages are sold on the secondary market soon after origination, and practically all mortgages are documented in a form that makes them saleable on that market.

Bundling and selling mortgages on the secondary market requires that the obligations and security arrangements be standardized to a large extent. This means that not only loan documentation, but also documentation of transfers and practices relating to inspection of homes, surveys, etc. are designed to make the loan acceptable for sale. In particular, secondary market purchasers are not in any position to rely on title certifications by individual attorneys with respect to the security for their investments. In the absence of some public registry system this means title insurance.

The replacement of individual title certifications with title insurance is a direct result of the secondary market for real estate mortgages.

Title insurance companies base their underwriting decisions on title examinations. This means that virtually all mortgage borrowers are required to pay for a title search in order to convince the title insurance company that the property is insurable, and then pay the premium for the insurance policy itself. Moreover, a mortgagee insurance policy protects only the mortgagee. If an owner wishes insurance protection for his interest, he must purchase his own "owners policy" for an additional charge. In recent years competitive and regulatory pressure has caused title insurance companies to dispense with the requirement of a title search if the same company had previously insured title to the property and to give discounts on owners policies purchased in conjunction with mortgagee policies. However the net result is that the cost of conveyancing has been significantly increased by this development.

It should be noted that although most states have come to regulate the rates and some of the practices of title insurance companies, the provision of title insurance remains an incredibly lucrative activity. Loss ratios on title policies are in the neighborhood of 3-5% of the premium. Usually between 50% and 80% of the homeowner's premium is remitted to the title company or lawyer who placed the business as a "sales commission". This results in significant undisclosed compensation to lawyers who are asked to close real estate transactions on behalf of buyers or mortgagees.

Although title insurance provides American real estate lenders and purchasers with protection against financial loss, it does not protect against non-financial consequences of potential clouds on ownership, liens or defects in title, including the possibility of ouster from the property. In this sense, title insurance is an incomplete substitute for a system of land registration that provides a higher level of certainty of ownership and encumbrance.

Another development that has led to greater standardization of residential real estate transactions is the use of government and commercial mortgage insurance, particularly when the borrowers are not able to contribute the customary 20% of the purchase price as a down payment. The forms required by the Federal Housing Administration and by commercial mortgage insurers have generally tended to increase the complexity of the real estate conveyancing and finance process.

Recent decades have also seen significant increases in the use of home inspections for condition, defects and hazardous substances, either for the purchaser's peace of mind or as required by a lender, mortgage insurer, or the secondary market. The same is true of surveys. The cost of these is always borne by the buyer and the purchase contract is often made contingent on satisfactory results.

Although most American states have functionaries denominated as "notaries public", these individuals do not play any significant role in the transfer of real estate. American notaries need not be legally trained, although in some states lawyers obtain the powers of notaries automatically upon licensure. Bank officials, legal secretaries and assistants, real estate brokers, insurance brokers, and minor part time public

officials are frequently commissioned as notaries to complement their primary activities. The functions of American notaries generally relate to receiving oaths and acknowledgments to documents requiring such formalities, to authenticating certain kinds of documents, and in some states, to performing marriages. These functions frequently overlap with those of justices of the peace, oath commissioners, and the like. Although recordation of deeds and mortgages requires acknowledgement before a notary or other qualified officer in many states, acknowledgment is the merest of formalities and is performed perfunctorily and without fee as a part of the closing process, usually by the lawyer or para-professional conducting the closing. Fees for notarial services, when charged, are of the order of \$5 per oath or acknowledgment attested.

1. Maine

The State of Maine is representative of the smaller and more rural of the United States. With a population (2000) of approximately 1.2 Million it ranks in the lowest tier of states in terms of population. It is the least densely populated state in the northeastern part of the U.S. with 90% of the land area of the state covered with forest.

Real estate conveyancing in Maine tends to follow traditional patterns, although recent years have seen changes based on the introduction of title insurance, title companies and the secondary market for mortgages.

A seller of real estate in Maine can use the services of real estate brokers or can expose the property for sale on the market without a broker. In recent years various opportunities for pooled advertising and other services short of actual brokerage have been offered to owners desiring to “sell by owner”. Brokers charge commissions ranging from 5-7% of the sales price of property sold with their assistance. Frequently two brokers, one listing the property for the seller and the other having contact with the buyer, will “co-broke” the sale of a property and share the commission equally.

Usually the first step in a residential real estate transaction is a written offer delivered by the potential buyer or his broker to the seller or his broker. The offer is contained in a printed form contract for the purchase and sale of real estate provided by the broker or available for purchase in stationery stores or on line. The form contract is filled out with the terms of the offer. It is signed by the buyer and is accompanied by a small deposit of 1-5% of the proposed purchase price. The seller either accepts this offer and signs the contract, or changes the contract to a price and terms acceptable to him and signs the changed contract as evidence of his willingness to sell on the terms indicated. The buyer then has the option of accepting the seller’s counter-offer or revising his own offer by again changing the contract or substituting a new one. The process goes on until both parties have signed a contract containing the same price and terms.

In some sales without brokers, the parties agree orally on the terms of the deal and then either buyer or seller arranges for his lawyer to draft a contract containing the agreed on price and terms. In relatively rare cases both buyer and seller might have

their own lawyers look at the proposed contract, whether prepared by broker or by the lawyer for the other party.

The written broker-prepared contracts are considered binding obligations to sell and to purchase. In the event of default by either party, the contracts can be enforced by actions for damages or specific performance. Most contracts also provide that if the buyer defaults, the seller has the option to terminate the contract and retain the deposit as “liquidated damages”, which is the usual result if the buyer fails to purchase without justification. It is possible to record a contract in the appropriate registry of deeds to gain absolute protection against intervening interests, but in practice such recordation is rare.

Virtually all contracts now are conditional on a number of contingencies, any one of which can relieve the buyer of the obligation to purchase and entitle him to refund of the deposit. The contract provides for a closing within a specified number of days, usually in the range of 60-90 days after contract signing, subject to extension for specified causes or with consent of both parties.

The most common contingency is the ability of the buyer to obtain financing for a specified percentage of the purchase price on specified or normal terms. Other usual contingencies include satisfactory engineering inspection or survey, absence of hazardous materials such as lead paint, asbestos or radon gas, consent of the condominium association (in the case of condominiums), and, in some cases, buyer’s ability to sell his own house at a given price within a given time.

In the ordinary course of events the buyer takes the signed contract to a bank or mortgage brokerage company to seek financing. Real estate financing is available in Maine from a variety of local banks, savings banks and savings and loan associations as well as from mortgage brokers who sell mortgages in behalf of out of state lenders and financial intermediaries who package mortgages for resale on the secondary market. In recent years mortgage brokers and banks serving as mortgage brokers have largely supplanted local banks as the primary source of home mortgage financing. Without getting into the complexities of the home mortgage market in any detail, suffice it to say that a home buyer has a wide variety of financial products available with varying interest terms, down payments and maturities.

Once credit has been approved, the mortgage financier generally takes over responsibility for completing the transaction and making the closing happen. In the usual case the mortgage financier arranges for a title company to examine the title to the real estate, arrange for the placement of title insurance, and take care of the details of the closing. Title companies are a relatively new phenomenon in Maine. Usually owned by lawyers and staffed by para-professionals with lawyer backup, the title company performs the function performed by the bank's lawyer in earlier, simpler times. In more rural parts of the state lawyers representing the bank search the title, place the title insurance and arrange for the closing.

While it is possible for a buyer to be represented by his own lawyer with respect to the purchase, it is rare in practice. The title company performs all necessary services for all parties. The parties do not receive any particular professional advice

other than what they are able to garner from the brokers or from personnel of the title company with whom they come into contact.

During the interval between loan approval and contract closing the title company personnel conduct a title search in the county registry of deeds to determine the state of record title. The actual reviewing of recorded instruments in the registry of deeds is performed by para-professionals, although their work may be reviewed by lawyers. The cost of this search is borne by the buyer, although the seller is generally responsible for the correction of any title defects revealed by the search.

Maine, like most of the American states does not have any system of title registration for real estate. Deeds conveying real property are recorded in county registries of deeds where they are indexed by grantor and grantee and are available for inspection by the public. Some of the registries of deeds are automated to the extent of making recently recorded deeds accessible electronically. Older conveyances must be examined by consulting numbered bound volumes at the registry office. Recordation of deeds, mortgages, releases and other instruments is strictly by paper.

If the title search discloses marketable title, the title company arranges for the issuance of title insurance to protect the mortgagee against defects in title and, if requested, an "owner's policy" for the buyer. Title insurance is uniformly required by financing banks and mortgage brokers in Maine in order that the mortgage be saleable on the secondary market.

The rates of title insurance are now regulated in Maine. A mortgagee's policy

costs \$1.75 per thousand of face amount of the mortgage, an owners policy purchased alone costs \$3.00 per thousand dollars of value. When an owner's policy is purchased along with a mortgagee policy, the cost is generally \$75-100 above and beyond the cost of the mortgagee policy. These rates allow generous commissions in excess of 50% of the policy premium to the bank lawyer or title company as the insurance agent placing the policy.

The bank or the title company also arranges for the appraisal of the property, which is always a precondition of the mortgage commitment. The costs of the appraisal are borne by the buyer/borrower. The buyer is generally expected to arrange for any engineering or hazardous substance inspections, often with the help of the broker.

The title company usually gives the seller the option to prepare his own deed or have his deed prepared by his own lawyer. In most cases, however, it is easier to have the title company prepare the deed for which the seller will be charged a fee in the range of \$100-200 at closing. If the seller wishes any sort of legal advice concerning the transaction, he must consult his own lawyer, which rarely occurs.

Once the loan is approved, all inspections and other conditions have been satisfied, the title search and title insurance have been placed, the title company schedules a closing at its office or at the office of its attorney sponsors. State and federal law require the filling out and signing of myriad papers and forms for even the most simple house closing transaction. All of these forms are prepared by the title company before the closing.

Usually, both seller and buyer as well as any involved brokers attend the closing. The title company has received in escrow the proceeds of the buyer's mortgage loan pending signing of the loan documents and transfer of the real estate. The buyer brings any additional money necessary to close the transaction in the form of a bank check for good funds. The brokers are prepared to account for any deposits in escrow with them. All papers are signed in order by seller and buyer under the oversight of a lawyer or paraprofessional from the title company. In rare cases a lawyer for either buyer or seller may attend the closing to "hold the client's hand". Based on seller's and buyer's closing statements the title company then disburses the sales proceeds and arranges for immediate recordation of the deed, releases of any pre-existing mortgages of the seller, and the new mortgage by the buyer to the financing bank or mortgage company.

There is a gap in protection during the time the property is under contract up to the time the new documents are recorded during which intervening interests could arise and achieve priority. It is possible to avoid this gap by recording the signed contract, but this occurs very rarely. No serious problems have arisen in practice.

Maine title companies are basically extensions of bank lawyers, who previously did the work now done by the title companies. In more rural areas the bank lawyer sometimes functions in the capacity of the title company, in which the lawyer's charge to close the transaction is reflected in his bill to the bank, which is in turn paid by the buyer. In practice the interests of the bank receive the primary attention of the title

company, which often has a long-standing relationship with the bank or mortgage company for referrals. There is no particular regulation of title companies other than the usual regulation of the lawyers who own and operate them.

In cases where there is no bank financing, or where the parties wish independent legal advice, real estate sales transactions may involve participation by lawyers from one or both parties. In such a case each party is responsible for the fees and charges of its own lawyer, and the lawyers divide the work of preparing for the closing. The buyer's lawyer arranges for the title insurance. Such cases are relatively rare in the market for residential real estate.

2. New York

New York is one of the largest American states with a population of nearly 20 million inhabitants. Its importance in the American economy is much greater than its proportionate share of the national population because of the concentration of many businesses, particularly in the fields of banking, securities issuance and trading, and international finance, in the City of New York.

Within the state of New York there is some variation in real estate conveyancing practices between the "downstate" area that includes New York City and vicinity and the "upstate" area that is the remainder of the state. In the downstate area conveyancing costs are somewhat higher than upstate because of the greater participation of lawyers for both parties and more pervasive use of title insurance even for cash transactions.

Real estate brokers are used in the majority of transactions although many

owners choose to sell without engaging a broker. Some such owners may be approached by brokers in behalf of potential purchasers. Unless the owner agrees to pay a commission, such brokers are paid a reduced commission by the buyer if a purchase takes place. Brokerage commissions range from 5-7% of the selling price.

The function of the brokers is to list property for sale, advertise it, show the property to prospective purchasers and assist in the negotiations to reach a basic agreement to purchase. Upstate purchase negotiations through brokers are usually conducted in writing. A purchaser and his broker fill out a printed form real estate contract with the terms of the offer and tenders the contract with a small earnest money deposit to the seller's broker. The seller can either sign the contract in acceptance of the offer or change it to terms acceptable to him and sign it in changed form. The changed contract is then taken to the buyer, who can then accept the seller's counteroffer, or make a further counteroffer to purchase by further revising the contract or by tendering a new one with terms on which he will buy. When both parties have signed the same contract, the deal is made.

Downstate most negotiations for the purchase of real estate are conducted orally. Property listings usually include an "asking price" against which purchasers are invited to submit offers. A purchaser will submit an oral offer through a broker, who will relay that offer to the seller either directly or through the seller's broker. The seller can then accept the purchaser's offer or reply with a counter-offer. When both parties have manifested their oral assent to the same price and terms, the deal is considered made

and the next step is documentation. It must be emphasized, however, that oral contracts for the sale of real estate are not enforceable under the Statute of Frauds. Thus it is important to proceed rapidly to reduce the oral agreements to a signed writing that is binding on both parties.

Upstate, most sellers and purchasers rely on the printed broker's contracts and do not further formalize their agreements. Sometimes a purchaser may ask the advice of his lawyer before signing the printed contract form. More frequently the lawyer is first consulted after the contract is signed in connection with completion of the contract and financing the purchase.

Downstate most real estate contracts are drawn up by lawyers representing buyer and seller. The seller's lawyer usually prepares the first draft based on information about the deal provided by seller or broker. The buyer's lawyer then reviews the draft, suggests modifications and advises the buyer concerning its implications. When the form of the contract is satisfactory to all counsel and parties, counterparts will be signed and exchanged and the contract becomes binding.

Most real estate purchase contracts, both printed forms and custom drafted, are subject to conditions subsequent. The most common of these is the buyer's ability to obtain financing for a specified percentage of the purchase price on specified terms. Other common conditions include a survey of the property, inspections and certifications of the absence of hazardous substances such as asbestos, radon and mold, and in some case, the buyer's ability to sell his own house within a specified time period before the closing. If any of these conditions is not fulfilled the buyer may be

relieved on his obligation to purchase and the seller of his obligation to convey.

In almost all cases the conclusion of the purchase contract is accompanied by a down payment. The down payment can range from 1% - 10% of the purchase price and is generally held by either a broker or the seller's lawyer in escrow. Written contracts for the purchase of real estate, whether prepared by brokers on printed forms or custom drafted by lawyers are enforceable against both parties. If a seller fails without justification to convey, the buyer can sue for damages or specific performance. If the purchaser defaults, the seller can also sue for damages or specific performance, but in most cases will merely terminate the contract and claim any escrowed down payment as "liquidated damages".

Where the purchase is for cash, the lawyer for the purchaser will examine the title of the property at the local county registry of deeds. Although New York has provided for registration of real estate titles since the early 1900s very little real estate is actually registered, virtually none outside the City of New York. A title examination includes review of conveyances in the "chain of title" of the grantor and the property in question for at least 40 years. Many upstate purchasers conclude cash purchases in reliance of their lawyer's certification of title. Other upstate purchasers and all downstate purchasers purchase owner's title insurance. In recent years the use of title insurance is becoming ever more customary even in upstate areas in which traditional practices are still preserved to some degree.

When the purchaser needs to finance the purchase, the role of the financing

bank or mortgage broker tends to dominate the completion of the contract and the closing. The purchaser takes his contract to the bank or mortgage company and applies for a mortgage. Mortgage application and processing fees can be substantial. The mortgage lender always requires an independent appraisal of the property and commissions its own lawyer to do a title search and obtain title insurance protecting it as mortgagee. The requirements of the secondary market have tended to standardize mortgage documentation and procedures. State and federal consumer protective legislation has added to the paperwork.

During the interval between the contract signing and closing the parties deal with any conditions. Inspections are arranged for often with assistance from the brokers. Any title defects found during the title search and the interests of any existing lienors are addressed and arrangements made to discharge them at or before closing. If sale of the buyer's house is a condition of closing the buyer's or mortgagee's attorney coordinates with the parties to that transaction.

Completion of the transaction and the closing can be conducted by the seller's or the buyer's lawyer if the purchase is for cash, or by the bank lawyer or closing agent in the case of financed purchase. If the seller is represented, as is usually the case downstate, less frequently upstate, the seller's lawyer prepares the deed and sometimes also attends the closing. Mortgage loan documentation and bank paperwork is prepared by the bank lawyer or closing agent.

Closing agents in New York are entities in the business of closing real estate transactions. They are typically organized and operated by lawyers but are staffed with

para-professionals. Closing agents sometimes have referral relationships with banks or mortgage companies which use particular closing agents on a regular basis. They generally bill the buyer a set fee for documenting and closing the transaction.

The closing takes place usually at the office of the seller's lawyer or the place of business of the closing agent. By the time of closing the buyer will have the balance of the purchase price ready in good funds, usually consisting in large part of loan proceeds held in escrow by the closing agent pending a successful closing and signing of financing documentation. The seller or the seller's representative attends with the seller's deed. The bank is represented by its own lawyer or by the closing agent. The buyer, his lawyer (if any) and the brokers make up the remainder of the closing participants.

The closing consists of verification that all conditions have been satisfied, signing and delivery of the mortgage documents and the deed, and disbursement of the purchase price and loan proceeds. A title insurance binder is issued pending recording of the title and mortgage documentation. Title passes on delivery of the signed deed to the buyer or the buyer's agent.

Recordation is necessary to protect the buyer against a later conveyance to a good faith purchaser without notice, but does not affect title between the parties or as against anyone who has actual notice of the transaction. The buyer's lawyer, mortgagee lawyer or closing agent, as the case may be, submits the deed and mortgage to the county registry of deeds for recordation. Upon confirmation that the

deed has been recorded the owner and mortgagee title insurance policies are issued. Recording can take anything from a few hours to a few days depending on the workload of the registry of deeds.

In New York maintenance of real estate records is by county. In most counties it is possible to access registry indices and recently recorded conveyances and mortgages electronically. However submission of all instruments for record is still by submitting the paper originals

New York lawyers are subject to comprehensive regulation of qualifications, educational standards and conduct. Closing agents are not subject to special regulation other than indirectly by regulation of the lawyers who generally own and operate them.

IV. Comparative Analysis of Real Estate Conveyancing Systems

Comparative analysis of real estate transfer systems and their associated costs among jurisdictions is complicated by 1) varying systems of transferring land and perfecting such transfers, 2) varying public policies relating to consumer protection, effectuation of land use restrictions, and protection of public rights of acquisition, 3) varying mechanisms of taxation, and 4) varying requirements of financial institutions among the jurisdictions under study. These variations embody differing allocations of functions between public agencies and private actors in the different systems under study. For instance, most, if not all EU systems employ various forms of real estate

title registration systems, which nearly eliminate the cost of ascertaining the state of a landowner's title, but involve some investment of public resources in maintaining the system. The American system of recordation of deeds and other instruments affecting title requires a minimum of public resources, but requires private parties to expend significant sums in searching the title each time real estate is to be sold or mortgaged.

Another significant area of inter-jurisdictional difference involves the respective roles and requirements of real estate financing entities. While the existence of a secondary market for real estate mortgages may benefit consumers in the form of lower interest rates, the need for liquidity may lead to standardized requirements that impose burdens on the process of mortgage origination at time of transfer. This appears to be the case in the United States, where the secondary market has led to the widespread requirement of lender title insurance.

Any effort to analyze the cost and efficiency of real estate transfer systems and the professionals who work within them must take the most significant of these differences into consideration. One cannot fairly criticize charges for professional services that are driven by the failure of a government to provide a modern real estate title registration system, by governmental requirements designed to protect consumers, by systems designed to safeguard government interests in land use, land acquisition, or taxes, or by the needs of third-party financing entities. How such costs and charges can be reduced by governmental reform of underlying structures and institutions is beyond the scope of this study.

As is disclosed by the national reports and as will be discussed in somewhat greater detail below, careful study of the various land transfer regimens currently obtaining in the EU Member States under study and in the United States reveals that the transfer of real estate involves the same core functional steps in every jurisdiction. At the same time, there are many different elements arising from the legitimate requirements of diverse national policies or of third parties such as lenders. Thus, any form of fine-tuned comparison of costs of a particular function or functionary is very difficult and likely to be fraught with error. There is a high likelihood that one will be "comparing apples with pears."

Some have attempted to find proxies to permit comparisons of the economic efficiency of conveyancing professionals or the relative economic cost of various conveyancing systems. It has been suggested that comparison of the premiums paid for professional liability coverage by conveyancing professional in the various jurisdictions under study, or comparison of the frequency of post-transaction legal disputes among those jurisdictions can provide a measure of relative quality of conveyancing services. Although such proxies can sometimes provide meaningful results when other significant causative factors can be ruled out, it is rarely possible to rule out these other factors when making comparisons among legal systems and cultures.

For instance, the relative incidence of claims for professional liability by conveyancing professionals is likely to be affected as much or more by their respective substantive liability law frameworks, by the frequency in their respective legal cultures

of claims in general, and by other professional exposures to which they are subject as by the relative quality of their conveyancing services.

By way of example, if one considered the number and size of medical malpractice claims and insurance premiums as a measure of the relative quality of medical care among nations, the United States, in which claims are frequent and premiums are high, would rank very low on any comparative measure of health care quality. Of course the high frequency of claims and high premiums are more likely related to the robust law of professional liability and the claims-hospitable atmosphere that prevails in the United States civil justice culture.

It is also of doubtful validity to attempt to assign numerical values to various attributes of a legal function or institution and then seek to make a quantitative comparison among various nations. Although the use of numbers makes the process seem more objective, selection of the attributes to bear value, the assignment of value to the identified attributes, and finally determining whether the attribute exists in whole or in part in any legal culture is a highly subjective activity. It has been suggested more than once that this kind of analysis can be employed to support any conclusion merely by varying identified attributes, the associated values, or the determination of whether the attributes exist in various systems.

Ultimately much comparative law analysis defies quantitative techniques. Variations among substantive legal doctrine, legal cultures, public policies, the roles of other institutions, public-private resource allocations, make it basically impossible to

make valid comparisons using economic models. The best that can be achieved is to identify features that could be associated with quality or efficiency as well as other factors which may impact performance and leave the relative weighting of these features and factors to sound judgment, a sense of public priorities, and experience.

When one focuses on the fees and charges of real estate conveyancing professionals, it is also evident that those charges represent a relatively small element in the overall cost of real estate transfers. In all systems, the fees of real estate conveyancing professionals are dwarfed by the fees of brokers and by taxes imposed on real estate conveyances. One is tempted to ask whether comparison of a relatively tiny element of real estate transfer costs will result in any findings of overall significance in real estate transfer economies.

Finally, comparative analysis of the real estate transfer function discloses how little of the real costs are within the control of the professionals who effectuate the transfers or the systems of regulation under which they work. Most of what conveyancing professionals do in order to document and complete a real estate transaction is comply with requirements of legal rule, regulation, requirements of land registry system, and requirements of financing entity. There is very little room for conveyancers to exercise creativity in order to increase or decrease the amount of work involved in completing a real estate transfer.

A. Public-Private Allocation of Costs and Functions.

Cost and efficiency in transferring interests in real estate is affected by the degree to which the governing authority has seen fit to develop, invest in, and maintain

a modern system for land title registration and transfer. Some countries have chosen to develop modern centralized systems of land registration. These systems often require significant investment of public resources to get them running. They may also require more highly trained and expensive personnel than the old passive recording systems that they replace. On the other hand, such public investment may be justified by the expectation that the costs incurred by private parties to transfer interests in real estate will be reduced. A comparison only of the costs incurred by the private users of the system that does not also compare public investment and costs may not be giving the whole picture.

B. Public Policies - Consumer Protection.

Consumer protection requirements attending the transfer of real estate vary significantly in both form and content among the jurisdictions under study. At the one end of the spectrum are jurisdictions such as Estonia, France and Germany, which provide a high level of consumer protection both by virtue of specific disclosure requirements and protective measures and by virtue of providing legal advice of high quality from independent professionals in the form of the officiating notaries. Sweden's requirements for disclosure appear to be somewhat less rigorous, and there is no structural requirement of independent legal advice to the participants. Swedish brokers are not in a position to provide independent or impartial advice to transaction participants because of their own conflict of interest and their modest legal training. In

the U.S. consumer protection of real estate purchasers is even less, and the conveyancing system also does not provide any particular form of independent advice.

These different levels and forms of consumer protection represent policy judgments of the various political entities involved of the importance and value of consumer protection in the respective political economies. It is very hard to put a price on this kind of policy, which tends to represent a holistic political judgment rather than a reflection of any kind of competitive marketplace.

This does not mean that features of real estate conveyancing that are consumer protective are governmentally imposed. For instance, in several of the jurisdictions studied it has become customary to condition real estate conveyances on a determination of the status of hazardous substances such as asbestos, lead paint, and radon gas. The impetus for this development does not appear to have come from governmentally imposed requirements of prior disclosure or other regulation, but is rather the reaction of the marketplace to availability of information about the hazards of these substances and their practical effect on the value of real estate.

C. Role of Other State Policies

The complexity, time and cost of real estate conveyancing is also directly affected by other state policies. Prominent among these are policies to facilitate state acquisition of private property that might be needed or useful for public purpose. In Estonia, France, Germany, and Sweden some conveyances of real estate may be subject to potential legal rights of prior acquisition by designated governmental entities or privileged farmers in the case of agricultural land. In England and the United States

such rights do not exist to such a degree.

The existence of these rights requires that someone communicate with the relevant public authority or authorities and obtain a binding release of the acquisition right in order for the contemplated conveyance to take place. In the great majority of cases the rights do not exist or are routinely released. However botched or fraudulent performance of this function can adversely affect the effectiveness of the conveyance.

D. Requirements of Financing Entities

A very significant factor in the cost and complexity of real estate conveyancing is found in the requirement of financing entities. Most purchases of residential real estate are financed by long term mortgage loans. The degree and form of security demanded by lenders in the different economies under study can have a serious impact on the cost of making a transfer of real estate that involves mortgage financing. Because of the predominance of financed transactions, the requirements of mortgage financiers may have an indirect effect on the form and costs of all real estate transfers.

One example of this is the effect of the relatively late development of a secondary market for real estate mortgages in the United States which has led to heavy reliance on the use of title insurance since the 1970s. In France and Germany a secondary market for mortgage was established in the 19th Century by the activities of public authorities, Prussian and German mortgage banks and French *credit foncier*. This early interest of powerful banks and public authorities in the development of simple and

clear instrumentalities may have had significant impact on the formalization of land registration and mortgage law.

Another current influence may be the role of Swedish banks in requiring that licensed real estate brokers coordinate transactions in which mortgage financing will be required. These requirements are the product of financial markets and practices that are generally beyond the control of conveyancers or the bodies that regulate them.

E. Comparative Costs and Points of Incidence of Costs

Subject to and in light of the foregoing observations on cost comparisons in general, an effort has been made in this study to compare costs incurred in the transfer of real estate in the jurisdictions under study by posing a number of hypothetical transaction scenarios and then obtaining estimates of the costs associated with various aspects of the transactions. The estimated costs have been modeled using the *Quantrix* financial modeling program to enable comparative analysis. A number of simplifying assumptions have been made.

First of all, the study has focused solely on transfers of residential real estate at purchase prices from 100,000 Euro to 1,000,000 Euro. More expensive residential properties and all other forms of commercial, industrial, agricultural and institutional property have not been examined or compared. The reason for this is that the lower and average value transactions are by far the most common ones. It is also believed that finding “typical” transactions outside the low and middle residential area would be difficult and that the likely variations among individual transactions at the higher end of the residential spectrum and in other market segments would be great.

Modeled in this preliminary report are purchases of real estate for 100,000 Euro (unimproved lot), 250,000 Euro (condominium or small house); 500,000 Euro (house and lot) and 1,000,000 Euro (larger house and lot). In light of the high percentage of real estate transfers that require mortgage financing, it seems important to look at costs associated with financed as well as cash transactions. Versions of each purchase transaction financed at a level of 75-80% of the purchase price have also been included and the professional fees and certain other costs associated with the financing have been estimated.

It must be stressed that a number of costs associated with financing have not been captured or estimated in the study. There is no comparison of interest rates, loan origination fees or points, or other charges related to the cost of money. The variation among these fees can be substantial. Nor is there any reflection of miscellaneous loan application fees, appraisal costs, loan servicing fees, credit report fees, or the like. These fees are also highly variable among jurisdictions and even among lenders within a jurisdiction. There may be some overlap between these charges and the charges which have been captured and compared. For instance, a bank may prepare its own documentation in house without imposing an identified charge for such work on the buyer, but also charge a substantial loan origination or application fee which may directly or indirectly help defray the cost of this work.

While the study attempts to capture taxes levied by governmental authorities on the transfer of real estate, there is no reflection of ordinary *ad valorem* real estate taxes

on the property itself, although provision for payment or pro-ration of such taxes often figures in real estate closings. The same is true for utility assessments and fees and charges incident to the release of lien of prior indebtedness.

For each of the 7 jurisdictions under study various costs incident to the purchase and sale of real estate have been estimated for each of the hypothetical scenarios posited above. For those countries with notarial systems, cost estimates for notarial services as well as state taxes and recording fees have been derived from the official tables of costs in force in the respective jurisdictions. For countries in which conveyancing is done by lawyers, estimates of lawyers fees for representation of buyer, seller and mortgagee, as the case may be, have been provided by the authors of the national reports or have been derived from published sources for the respective jurisdictions.

In the case of Sweden there is no separate conveyancing fee. Brokers who handle conveyances are compensated through brokers' commissions. An effort has been made to estimate the collective cost for this service to the class of conveyancing parties as a whole and then to spread the cost to the hypothetical transactions.

Commissions for brokerage services have been estimated based on information provided by the authors of the respective national reports.

In many jurisdictions it has been customary for buyers to engage home inspectors or engineers to determine the condition of property and/or the possible presence of hazardous substances. Sometimes these inspections take place before the parties enter into a binding contract for purchase. Sometimes they are provided for

in the contract, and the buyer is given the right to rescind if the results are unfavorable. In some markets such inspections are customary only with respect to older properties.

It appears that some form of engineering inspection at some stage of the proceedings is usual enough in residential real estate transfers that the cost of such an inspection should be considered a transaction cost for purposes of comparative analysis of costs of real estate transactions. At the present stage of this study, the information available to the Reporter on this element is not sufficient for cost estimates for this cost in every jurisdiction. Cost estimates for engineering inspections have been included for those countries for which reasonable figures were obtained. The absence of a value for engineering inspections in the figures reported for other jurisdictions should not be interpreted as an absence of this cost in reality. Further investigation will be required for definitive values for all of the jurisdictions under consideration.

Appraisal fees are also required at least for financed transactions in most of the jurisdictions under study. They have been reported and included in total transaction costs for those jurisdictions which provided them. This may slightly compromise comparability of total transaction costs among jurisdictions, but does not affect comparability of professional conveyancing costs.

No effort has been made to analyze or compare the incidence of the identified costs on the respective parties to the transactions. The party initially responsible for various transaction costs varies by jurisdiction and by cost. It is assumed however that all costs ultimately are reflected in the purchase price of real estate and the willingness

of buyers to pay that price.

The various cost estimates have been analyzed in *Quantrix* modeling software. The use of *Quantrix* permits an almost complete flexibility in analysis and presentation of the information obtained. All cost estimates have been entered and analyzed in national currencies. All values are then converted to Euro for comparability in presentation.

Table C attached as Appendix A is a presentation of the cost information captured with respect to the 8 hypothetical transactions analyzed in this Report.

It can first be observed that the largest element of cost associated with real estate transfers in all of the countries under study is real estate brokerage. The following Table A-1 shows the estimated broker's commissions payable in each jurisdiction for each hypothetical transaction:

Table A-1 Broker's Commissions on Hypothetical Sales of Real Estate

	<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>
<i>Estonia</i>	4,000€	4,000€	10,000€	10,000€	20,000€	20,000€	40,000€	40,000€
<i>France</i>	6,000€	6,000€	15,000€	15,000€	30,000€	30,000€	60,000€	60,000€
<i>Germany</i>	4,000€	4,000€	10,000€	10,000€	20,000€	20,000€	40,000€	40,000€
<i>Sweden</i>	3,000€	3,000€	7,500€	7,500€	15,000€	15,000€	30,000€	30,000€
<i>United Kingdom</i>	2,000€	2,000€	5,000€	5,000€	10,000€	10,000€	20,000€	20,000€
<i>U. S. - Maine</i>	6,000€	6,000€	15,000€	15,000€	30,000€	30,000€	60,000€	60,000€
<i>U. S. - New York</i>	6,000€	6,000€	15,000€	15,000€	30,000€	30,000€	60,000€	60,000€

As can be seen in Table A-1, broker's commissions range from a low of 2% of sales price in the United Kingdom to a high of 6% of sales price in France and the U.S. In all cases brokerage fees are calculated as a straight percentage of the sales price

without any rate discount for more expensive properties.

The second highest category of costs in most jurisdictions is the various forms of real estate transfer taxes. In Estonia there is no real estate transfer tax as such, but capital gains tax on the sale of the real estate becomes due at the time of sale. This tax is not reflected in this study. Table A-2 summarizes real estate transfer taxes payable in each of the hypothetical transaction scenarios:

Table A-2 - Real Estate Transfer Taxes on Hypothetical Sales of Real Estate

	<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>
<i>France</i>	5,090€	5,090€	12,725€	12,725€	25,450€	25,450€	50,900€	50,900€
<i>Germany</i>	3,500€	3,500€	8,750€	8,750€	17,500€	17,500€	35,000€	35,000€
<i>Sweden</i>	1,500€	1,500€	3,750€	3,750€	7,500€	7,500€	15,000€	15,000€
<i>United Kingdom</i>	-€	-€	2,499€	2,499€	15,000€	15,000€	39,999€	39,999€
<i>U. S. - Maine</i>	335€	335€	837€	837€	1,674€	1,674€	3,348€	3,348€
<i>U. S. - New York</i>	304€	304€	761€	761€	1,522€	1,522€	3,044€	3,044€

As can readily be seen from Table A-2, transfer taxes are substantial in all jurisdictions except for Estonia. In most cases this tax is a simple percentage of the consideration paid for the property, and hence burdens large transactions much more heavily than small ones.

The primary focus of this study is that portion of costs associated with transfers of real estate that are paid to conveyancing professionals to effectuate the transfer from contract formation through completion of registration or recording. Included are

costs for conveyancing professionals to document and perfect the interest of a mortgagee to secure purchase money financing for the buyer.

Table B-1 shows the total costs associated with professional conveyancing for each transaction scenario and for each of the jurisdictions under study. It should be noted that the estimates for Sweden were derived by proxy according to the methodology described in the next section below. The estimates for the United States include the cost of title insurance on the theory that this is provided by conveyancing professionals to secure title and that the conveyancing professionals receive the lion's share of the premium. Conveyancing costs for the United Kingdom do not include "searches fees" paid to various registries in order to determine the state of title, public restrictions, adverse interests, etc., on the ground that such fees are paid directly or indirectly to real estate conveyancing professionals, although such examination is part and parcel of the conveyancing function and although title searches are included in the professional functions of conveyancers in other countries.

All estimates are subject to the assumptions and conventions described in the immediately following section of this report.

Table B-1 - Total Professional Conveyancing Costs

	<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>
<i>Estonia</i>	379€	446€	922€	967€	1,827€	2,143€	3,620€	4,170€
<i>France</i>	1,354€	1,670€	2,691€	3,213€	4,754€	5,964€	8,879€	11,051€
<i>Germany</i>	559€	746€	1,109€	1,401€	1,987€	2,654€	3,742€	4,934€
<i>Sweden</i>	900€	900€	2,250€	2,250€	4,500€	4,500€	9,000€	9,000€
<i>United Kingdom</i>	1,484€	1,584€	1,614€	1,864€	1,888€	2,387€	2,603€	3,602€
<i>U. S. - Maine</i>	860€	936€	1,259€	1,336€	1,887€	1,963€	3,143€	3,219€
<i>U. S. - New York</i>	1,228€	1,647€	1,614€	2,094€	2,257€	2,926€	3,410€	3,410€

Taking the purchase of a lot or small dwelling for 100,000€ in cash, the conveyancing costs range in the following order, lesser to greater: Estonia (379€), Germany (559€), United States (Maine) (860E), Sweden (900€), United States, NY (1,228€), France (1,354 €), and United Kingdom, (1,484€). On the other extreme, on the purchase of a house for 1,000,000€ to be financed with a mortgage of 750,000€ the order of costs is scrambled and becomes, lowest to highest, United States, Maine (3,219€), United States, New York (3,410€), United Kingdom (3,602€), Estonia (4,170€), Germany (4,934€), Sweden (9,000€) and France (11,051€).

On the other hand, if one considers the relationship of professional conveyancing compensation to other costs of a real estate transfer, one finds a different lineup. One also realizes what a small part of the cost of transfer of real estate is composed of compensation to conveyancing professionals in all systems.

Table B-2 relates conveyancing costs to overall transfer costs for each country and each transaction.

Table B-2 - Conveyancing Costs as Percentage of Total Transfer Costs

	<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>
<i>Estonia</i>	8.43%	9.74%	8.22%	8.58%	8.09%	9.30%	8.01%	9.04%
<i>France</i>	10.79%	12.94%	8.78%	10.27%	7.83%	9.60%	7.35%	8.96%
<i>Germany</i>	6.68%	8.54%	5.41%	6.65%	4.88%	6.32%	4.62%	5.91%
<i>Sweden</i>	15.03%	11.95%	15.97%	13.13%	16.31%	12.63%	16.49%	12.93%
<i>United</i>	36.98%	38.51%	16.39%	18.46%	6.76%	8.40%	4.05%	5.51%

<i>Kingdom</i>									
<i>U. S. - Maine</i>	11.93%	12.08%	7.36%	7.57%	5.62%	5.75%	4.73%	4.80%	
<i>U. S. - New York</i>	15.85%	20.00%	9.15%	11.52%	6.63%	8.42%	5.11%	5.10%	

As can readily be seen, conveyancing fees are in most cases a very small percentage of the total transfer costs experienced on a real estate purchase and sale transaction. The incidence of taxes and the level of broker compensation influence this relationship directly. For instance, the 36.98% ratio of conveyancing costs to overall transfer costs for a lot or small dwelling purchase for 100,000€ in the United Kingdom reflects the fact that there is no real estate transfer tax on a transaction of that size. On the other hand, the fact that the percentage drops in the US and in the United Kingdom as the size of the transaction increases, reflects a structure in which other transfer costs such as real estate brokerage commissions and taxes increase as a percentage of the value of the property, while conveyancing costs remain more or less level. The moderate percentage decrease with increasing transaction size in France and Germany corresponds to the structure of fees in those jurisdictions, which increase with transaction size, but not on a linear basis. In Sweden, where conveyancing costs are related to brokerage commissions, the percentage of costs remains the same, while in Estonia, otherwise a low-cost jurisdiction, the percentage of costs increases, reflecting the fact that other costs, such as the state fee for registration, do not increase with increasing transaction value as fast as the notary fee does.

F. Assumptions and Limitations of Analysis

Comments on simplifying assumptions or limitations of cost estimates for each jurisdiction follow:

1. Estonia

There are no particular assumptions that are not obvious from the model. Notarial fees are computed in accord with the statutory table applicable to transactions of the values hypothesized. There is no reflection of any real estate transfer tax nor is the capital gains tax that Estonians are required to pay on sale of real estate included.

2. France

There are no particular assumptions that are not obvious from the model. Real estate broker fees are computed at 6%. Notarial fees are derived from the statutory table. Included is a lump sum notaries overhead fee. Although engineering inspections may be common in France, no data has been captured for them as of this stage of the study.

3. Germany

Real estate brokerage commissions in Germany are variable ranging from 3% to 5%. Four percent is typical for many smaller to medium-sized residential listings and has been chosen for this study. Although engineering reports and inspections for hazardous substances are becoming more common in Germany, the study has not

attempted to estimate the cost of these in its hypothetical transaction scenarios.

4. **Sweden**

Sweden poses a difficult case for this comparative study because the conveyancing function is performed by real estate brokers who are compensated for this function by their real estate commissions, currently generally 3% of the purchase price of the property. Although it is said that in rare instances brokers will attend to the documentation of real estate transactions for flat fees, the rarity of this occurrence is confirmed by the total absence of data on the frequency and amount of such fees.

Without some data to establish the price which a broker would charge to document at transaction in which he did receive a sales commission, an arbitrary allocation of either a fixed amount or a percentage of the sales commission to the documentation function lacks any scientific or logical basis.

An indirect clue to the amount charged by brokers for documentation of transactions in which there are no traditional brokerage services needed may be derived by examining the difference between the percentage of transactions in which brokers are involved in Sweden and the percentage of transactions involving brokers in the other lands under study in which transactions are documented without the participation of brokers. This difference in utilization may give an inkling of the extra brokerage cost that is carried by all transactions by virtue of the role of brokers in the documentation and effectuation of real estate transfers.

In Sweden it appears that up to 95% of all real estate transactions are handled by brokers. It also appears that banks exert some influence on customers to utilize the

services of a broker in effectuating purchases of real estate, and that there may be some generalized societal expectation that transactions in real estate will be accomplished with the aid of brokers.

The use of brokers in the other EU countries under study ranged from a low of 50% in Germany and 52% in France to a high of perhaps 70% in England. Assuming an average of not more than 60% use of brokers in the other EU member states versus, say 90% (to be conservative) in Sweden, this means that brokerage charges are being paid in Sweden in 30% of transactions in which brokers fees are not being paid in other EU lands. There is nothing to indicate that Swedish brokers are much more efficient at selling real estate than brokers in other EU member states or that they offer their customers non-brokerage services (other than the conveyancing services that are the subject of this study) which are not made available to brokerage customers elsewhere. These circumstances tempt one to infer that the additional use of brokerage in Sweden and the additional cost paid for brokerage by Swedish real estate buyers and sellers may be a reasonable proxy for the cost imposed on the market generally for the conveyancing function provided by the brokers.

Assuming that the average brokerage commission of Swedish brokers is 3% of the sales price, one could get an idea of the system-wide cost of broker-provided conveyancing by multiplying the 3% brokerage commission by the percentage difference in brokerage utilization between Sweden and the other Member States under study, say 30%. The result, say .9% of the purchase price of each parcel could

be used as a crude approximation of the amount charged by the Swedish brokerage industry for the conveyance services rendered.

It can be argued that a straight .9% of the value of each transaction would tend to understate the cost of services for the smaller transactions and overstate the cost for larger on the theory that the effort required to document and complete a large value transaction is not that much greater than with a small one. This may be true. However the fact is that Swedish brokers do compute their commissions as a strict percentage of the sales price, so that this kind of disproportion or cross-subsidy is built in.

Engineering inspections are common and have been estimated with respect to each of the transaction scenarios.

5. **United Kingdom**

There appears to be very little published data on fees charged by solicitors for handling real estate transactions on behalf of their clients. Nor does the Law Society make such data generally available. Individual firms of solicitors also seem reluctant to disclose the amounts that they charge their clients for these services.

The best form of data that has come to the attention of the Reporter is data for the costs for buyer and seller representation and other costs has been abstracted from the 2006 "Costs of Moving" Study by the Land Registry and the University of Greenwich. That Study summarizes in tabular form various costs incurred by buyers and sellers in a number of hypothetical real estate transactions, none of which corresponded exactly to the hypothetical transactions used in this Study.

In order to achieve the best comparability possible, this study computes such

costs as real estate agent's (broker's) commissions and transfer taxes based on the values chosen for the present comparative study. Brokers commissions have been estimated based on 2% of the purchase price.

The estimates of fees for buyer's solicitor, seller's solicitor, and land registry fees were taken from those transactions of the Greenwich tables which are closest in size to the values used in this Report. Thus, the seller's solicitor's fee for a 100,000 Euro purchase of land in this study came from the figure reported for a £60,000 transaction in the Greenwich table. Figures for the 250,000€ transaction came from the Greenwich tables value for a £150,000 purchase and so forth. The Reporter has included charges for engineering inspection services from internet advertisements for such services.

The Greenwich tables do not include any cost for services rendered to a mortgagee in connection with a real estate transaction. When a solicitor acts for both buyer and mortgage, the Law Society would apparently countenance an up-charge of up to 0,25% of the purchase price as compensation for the additional work in behalf of the bank. It is unclear whether solicitors are able to impose this charge in practice. Conservatively an up-charge of 0.1% has been used as the fee for services rendered to the bank in those transactions involving mortgage financing. This has been computed and separately stated as "Bank Lawyer's Fee" in the Quantrix model, although it only applies if the bank lawyer and the buyer's lawyer are the same. Since this seems to be the case in most residential real estate transactions in the United Kingdom, it appears to be a reasonable reflection of actual costs incurred. If a

separate solicitor represented the interests of the bank, one could expect higher charges.

The Greenwich tables include a sum for "Search Fees", which are understood to consist of fees charged by the Land Registry and various other public registries as well as the charges of professional search firms for retrieving information relating to the state of the title to real estate, use and zoning restrictions, easements, public licenses and inspections, and the like. Only a part of these charges redounds to the benefit of professional conveyancers or their agencies. On the other hand, it appears that the information that is supplied by these registries to the buyer's solicitor and his client is the same kind of information that a buyer's lawyer would seek in a title examination in the United States, for which the buyer's lawyer would charge the buyer. For these reasons the Reporter included these fees in "total conveyancing costs", which also include fees and expenses paid to conveyancing professionals, title companies, and title insurance companies, and the portion of brokerage commissions allocated to the conveyancing function.

6. **United States**

(1) ***Maine***

Brokerage commissions in Maine range from 5% for large residential properties to 10% for undeveloped land and some forms of commercial property. Six percent is quite usual for ordinary residential property, although in the last few years brokers have been trying to establish 7% as the norm for property under \$1,000,000 in value.

In Maine it has become usual for purchasers of real estate to reserve the right to

have the property inspected by an engineer and tested for presence of asbestos, lead paint, and radon gas. The costs of these inspections, which are borne by the buyer can amount to several hundred dollars in any one instance. A conservative estimate of \$300 for such inspections and reports is included in the Maine figures in this study, although in individual cases such fees can be much higher. For instance, if a land survey is required, it can add several hundred dollars to the cost of closing a real estate purchase.

. It is assumed that the purchaser desires owner's title insurance for the amount of the purchase price. Not all owners require title insurance if they are not financing the purchase with a mortgage loan. If the purchase is being financed, title insurance for the mortgage becomes mandatory. In that case, since owner's title insurance is available for a very slight additional charge, it is generally purchased,

It is assumed that purchasers who are purchasing for cash will engage their own lawyers for a brief review of documents and examination of title, while purchasers who are financing their purchase through banks will not hire their own lawyers, but will rely on the bank's lawyer to attend to the review of documents and the examination. It is assumed that the closing at which the deed is signed and delivered and the purchase money is paid will be handled by a title company of the buyer's or bank's lawyer, as the case may be. These assumptions correspond with reality in the great bulk of cases.

(2) New York

Cost estimates are for "up state" counties in the less urban parts of the state. Costs in the "down-state" area of New York City and surrounds will be somewhat higher.

Brokers commissions are estimated at 6%. It is assumed that the contract is negotiated by real estate brokers, but that lawyers for the seller and purchaser or mortgagee are involved prior to the closing. Costs for title examination are included in the buyer's lawyer's fees.

G. Country-by-Country Comparative Analysis

Considering the salient policy criteria identified above, one can venture some comparative evaluation of the real estate conveyancing systems and the roles of real estate conveyancing professionals of the EU Member States and the states of the United States under study.

1. Estonia

Estonia's new system appears to provide a high degree of quality and security in real estate transfers at reasonable cost. The implementation of a nationwide electronic land registration system has facilitated access to land ownership information and promoted certainty of land ownership. The function of the Estonian notary appears to be similar to that of the notary in both France and Germany, as a neutral quasi-official legal resource to document and effectuate transfers of real estate as well as other

specified juridic acts.

Although brokers play a role in slightly more than half of sales and purchases of residential real estate in Estonia, it is of significance that neither buyer nor seller can be bound to buy or sell real estate by any document other than a notarial contract. This guarantees that the parties will both have access to and receive impartial legal advice concerning the risks and responsibilities of the transaction they are planning to enter into before they are legally committed.

Notaries in Estonia have also made good use of data processing technology to make their operations more efficient and to speed the completion of transactions. Further improvements, particularly in the lag between submission of an application for re-registration and the re-registration itself, are to be anticipated. There is currently a lag between submission and re-registration during which a fraudulent seller could enter into a second sales contract, but there is no indication that problems have arisen as of the time of this report. Estonian notaries anticipate no difficulty in transitioning to a completely electronic system under which notaries will have direct access to an electronic land register in order to effectuate instantaneous changes in title and registration of encumbrances.

Real estate transfer costs for the 8 hypothetical transactions in Estonia are set forth in Table C-1.

Table C-1 - Real Estate Transfer Costs in Estonia

		<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>
<i>Costs</i>	<i>Broker's Commission</i>	4,000€	4,000€	10,000€	10,000€	20,000€	20,000€	40,000€	40,000€
	<i>Purchase Price</i>	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
	<i>Mortgage Amount</i>	-€	74,996€	-€	187,511€	-€	400,000€	-€	750,000€
	<i>Notary Fee - Contract</i>	379€	-€	922€	-€	1,827€	-€	3,620€	-€
	<i>Notary Fee Combined Contract & Mortgage</i>	-€	446€	-€	967€	-€	2,143€	-€	4,170€
	<i>Recording/Registration Fee</i>	110€	136€	294€	304€	754€	909€	1,600€	1,977€
	<i>Total Transfer Costs</i>	4,488€	4,582€	11,215€	11,271€	22,581€	23,052€	45,220€	46,147€
	<i>Total Conveyancing Fees</i>	379€	446€	922€	967€	1,827€	2,143€	3,620€	4,170€
	<i>Convenancing Fees as percent of Total Costs</i>	8.43%	9.74%	8.22%	8.58%	8.09%	9.30%	8.01%	9.04%
	<i>Conveyancing Fees as percent of Purchase Price</i>	0.38%	0.45%	0.37%	0.39%	0.37%	0.43%	0.36%	0.42%
	<i>Broker's Commission as percent of Total Cost</i>	89.12%	87.29%	89.16%	88.72%	88.57%	86.76%	88.46%	86.68%

Costs of the Estonian notarial system appear to be very moderate. For smaller transactions the Estonian system produces the lowest costs of any system under study. This is significant, because of the large number of lower-cost and average value transactions and the importance of insuring that citizens of less means have access to high-quality legal services in effectuating transactions of great importance to them and the national economy. For larger transactions the Estonian system is less costly than Sweden, France and Germany, but slightly more expensive than Sweden, the United Kingdom and the US.

2. France

In France the level of service provided by notaries using France's nationwide and partly electronic land registration system is very high. Such services as effectuating more or less instantaneous notation of mortgage interests and disbursing

funds to pay all interested parties at the time of final contract signing tend to facilitate real estate transfers and reduce costs and delays as experienced by the parties.

The French notarial system also provides the parties with independent legal advice from a neutral legal officer at the time they are actually bound to make the transfer. Although some preliminary contracts are prepared by brokers, such contracts are limited, as a practical matter, to affecting the earnest money deposited with the broker, and not the ultimate ownership of the property.

The French notarial system also permits the participation of more than one notary if either party or even a financing bank so desires. Participation of more than one notary is more common in transactions of larger value than the ordinary sale of a small house or apartment. This option enhances the freedom of choice that the parties enjoy in the selection of neutral officers to document their transactions and permits a party to secure the participation of a notary in which it has particular trust and confidence based on past experience. Under the current schedule of fees, participation of additional notaries does not increase the total costs paid by seller and buyer.

Table C-2 sets forth real estate transfer costs for 8 hypothetical transactions in France.

Table C-2 - Real Estate Transfer Costs in France

		<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>
<i>Costs</i>	<i>Broker's Commission</i>	6,000€	6,000€	15,000€	15,000€	30,000€	30,000€	60,000€	60,000€
	<i>Purchase Price</i>	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
	<i>Notary Fee - Contract</i>	1,154€	1,154€	2,391€	2,391€	4,454€	4,454€	8,579€	8,579€
	<i>Notary Fee - Mortgage</i>	-€	316€	-€	522€	-€	1,210€	-€	2,172€
	<i>Notary's Overheads Charge</i>	200€	200€	300€	300€	300€	300€	300€	300€
	<i>Real Estate Transfer Tax</i>	5,090€	5,090€	12,725€	12,725€	25,450€	25,450€	50,900€	50,900€
	<i>Recording/Registration Fee</i>	100€	100€	250€	250€	500€	500€	1,000€	1,000€
	<i>Mortgage Registration Fee</i>	-€	45€	-€	90€	-€	240€	-€	450€
	<i>Total Transfer Costs</i>	12,544€	12,905€	30,666€	31,278€	60,704€	62,154€	120,779€	123,401€
	<i>Total Conveyancing Fees</i>	1,354€	1,670€	2,691€	3,213€	4,754€	5,964€	8,879€	11,051€
	<i>Conveyancing Fees as percent of Total Costs</i>	10.79%	12.94%	8.78%	10.27%	7.83%	9.60%	7.35%	8.96%
	<i>Conveyancing Fees as percent of Purchase Price</i>	1.35%	1.67%	1.08%	1.29%	0.95%	1.19%	0.89%	1.11%
	<i>Broker's Commission as percent of Total Cost</i>	47.83%	46.49%	48.91%	47.96%	49.42%	48.27%	49.68%	48.62%

Costs for notarial conveyancing services in France seem to be comparable to costs in Sweden, and England for smaller transactions and somewhat higher than costs for larger transactions than is the case in the other jurisdictions under study. The relationship of French notarial fees to all costs attending real estate transfers in France appears to be moderate at 7-13% of total transfer costs for all transactions.

3. Germany

German conveyancing practices provide a high level of security and certainty through use of the preliminary notation on the title registry which provides positive protects against all intervening interests pending completion of the transaction and actual change in registered ownership. German parties also have access to high quality independent advice concerning real estate transactions and their

consequences, and professional implementation of all stages of the transaction.

Table C-3 sets forth transfer costs for the 8 hypothetical transactions included in the study.

Table C-3 - Real Estate Transfer Costs in Germany

		<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>
<i>Costs</i>	<i>Broker's Commission</i>	4,000€	4,000€	10,000€	10,000€	20,000€	20,000€	40,000€	40,000€
	<i>Purchase Price</i>	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
	<i>Notary Fee - Contract</i>	454€	454€	904€	904€	1,654€	1,654€	3,154€	3,154€
	<i>Notary Fee Contract Effectuation</i>	105€	105€	205€	205€	333€	333€	588€	588€
	<i>Notary Fee - Mortgage</i>	-€	187€	-€	292€	-€	667€	-€	1,192€
	<i>Real Estate Transfer Tax</i>	3,500€	3,500€	8,750€	8,750€	17,500€	17,500€	35,000€	35,000€
	<i>Recording/Registration Fee</i>	311€	311€	648€	648€	1,211€	1,211€	2,336€	2,336€
	<i>Mortgage Registration Fee</i>	-€	177€	-€	282€	-€	657€	-€	1,182€
<i>Total Transfer Costs</i>	8,370€	8,734€	20,507€	21,081€	40,698€	42,022€	81,078€	83,452€	
<i>Total Conveyancing Fees</i>	559€	746€	1,109€	1,401€	1,987€	2,654€	3,742€	4,934€	
<i>Conveyancing Fees as percent of Total Costs</i>	6.68%	8.54%	5.41%	6.65%	4.88%	6.32%	4.62%	5.91%	
<i>Conveyancing Fees as percent of Purchase Price</i>	0.56%	0.75%	0.44%	0.56%	0.40%	0.53%	0.37%	0.49%	
<i>Broker's Commission as percent of Total Cost</i>	47.79%	45.80%	48.76%	47.44%	49.14%	47.59%	49.34%	47.93%	

Overall costs and professional conveyancing costs for transferring real estate, with or without financing, appear to be moderate. For smaller transactions, German professional conveyancing costs are lower than all other countries under study except for Estonia. This is significant because of the number of transactions of small homes and condominiums is much larger than the number of higher value transactions and the German fee structure gives purchasers and sellers of the smaller and average value

properties access to legal services of the same high quality as are available to the buyers and sellers of property of greater value. For larger transactions, conveyancing costs in England and the United States appear to be slightly lower, and costs in Germany and Estonia are almost identical.

4. **Sweden**

The almost total absence of participation by jurists in land conveyancing in Sweden leads to apparent economies in conveyancing costs. Documentation and effectuation of real estate conveyances in Sweden are performed by the brokers who offer the property for sale and are compensated by a single commission for both services. Efficiency in real estate transactions is fostered by a modern nation-wide title registration system with electronic access for authorized persons, including real estate brokers.

Table C-4 summarizes real estate transfer costs, converted to Euro equivalents, for the eight hypothetical transactions in Sweden.

Table C-4 - Real Estate Transfer Costs in Sweden

	Sale of Land for 100,000	Sale of Land for 100,000 with new mortgage for 75,000	Sale of House for 250,000	Sale of House for 250,000 with new mortgage for 150,000	Sale of House for 500,000	Sale of House for 500,000 with new mortgage for 400,000	Sale of House for 1,000,000	Sale of House for 1,000,000 with new mortgage for 750,000
Costs								
Broker's Commission	3,000 €	3,000 €	7,500 €	7,500 €	15,000 €	15,000 €	30,000 €	30,000 €
Purchase Price	100,000 €	100,000 €	250,000 €	250,000 €	500,000 €	500,000 €	1,000,000 €	1,000,000 €
Mortgage Amount	- €	75,000 €	- €	150,000 €	- €	400,000 €	- €	750,000 €
Inspection/Engineer Fee	500 €	500 €	500 €	500 €	500 €	500 €	500 €	500 €
Real Estate Transfer Tax	1,500 €	1,500 €	3,750 €	3,750 €	7,500 €	7,500 €	15,000 €	15,000 €
Mortgage Tax	- €	1,500 €	- €	3,000 €	- €	8,000 €	- €	15,000 €
Recording/Registration Fee	89 €	89 €	89 €	89 €	89 €	89 €	89 €	89 €
Mortgage Registration Fee	- €	41 €	- €	41 €	- €	41 €	- €	41 €
Broker Contract and Implementation Charge	900 €	900 €	2,250 €	2,250 €	4,500 €	4,500 €	9,000 €	9,000 €
Total Transfer Costs	5,989 €	7,530 €	14,089 €	17,130 €	27,589 €	35,630 €	54,589 €	69,630 €
Total Conveyancing Fees	900 €	900 €	2,250 €	2,250 €	4,500 €	4,500 €	9,000 €	9,000 €
Conveyancing Fees as percent of Total Costs	15.03%	11.95%	15.97%	13.13%	16.31%	12.63%	16.49%	12.93%
Conveyancing Fees as percent of Purchase Price	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%
Broker's Commission as percent of Total Cost	50.09%	39.84%	53.23%	43.78%	54.37%	42.10%	54.96%	43.09%

Does this mean that conveyancing services are “free” in Sweden? Definitely not. There is no “free lunch”. The work of conveyancing must be done by someone. The brokerage industry appears to be willing to perform the conveyancing function at a cost of subjecting transactions that do not require brokerage services to the payment of brokerage commissions.

While it is difficult to break out the portion of the Swedish broker’s commission that represents compensation for conveyancing services, one notes that Swedish parties employ brokers for virtually all real estate transactions. It seems scarcely conceivable that virtually all Swedish buyers and sellers need brokers to get them together on a sale and purchase. The experience of the EU Member States and the

American States under study suggests that under ordinary economic conditions, parties will make use of brokers in about 50-70% of transactions. Multiplying the percentage of Swedish transactions that are brokered in excess of this base percentage by the standard brokers commission in Sweden indicates that Swedish buyers and sellers collectively are paying something approaching 1% of total transaction value to brokers real estate transaction services other than traditional brokerage.

The quality of advice available to buyers and sellers in Sweden is somewhat questionable. Although recent years have seen efforts to increase professionalism and public accountability of the real estate brokerage profession, the issue of deficiencies in the legal quality of Swedish brokerage services appears to be still under discussion. The reason for these shortcomings seems to be twofold: For one thing, Swedish brokers in spite of a certain amount of professional training necessary for licensure, still lack the profound legal expertise and qualification of fully educated jurists. Secondly, the role of a real estate broker is somewhat difficult to reconcile with that of a provider of impartial legal advice to transaction participants. Brokers are oriented to making a sale. Their compensation is totally dependent on the sale happening. They are selected and retained by sellers, and have a special responsibility to insure that their sellers get the best price for their properties. If a buyer wishes independent advice from a legal professional in a real estate transaction, he must consult and pay a lawyer, which is apparently not customary in Sweden.

Although regulation of real estate brokers has been steadily increased, there are

continued complaints about the quality of conveyancing services rendered as well as about the quality of documentation submitted to Land Registry Offices. The Swedish system appears to perform more or less adequately under the particular economic and social conditions of Sweden. Whether it should be considered a model for other modern political economies might be subject to question.

5. **United Kingdom**⁴

It appears clear that the United Kingdom has made progress toward simplifying real estate conveyancing and reducing costs by the final implementation of the universal land registration system. Title examination costs of the kind that are still prevalent in the United States have disappeared in Great Britain. Ease of reference to the registry system helps English conveyancers to accommodate long chains of conveyances each conditioned upon the other. Further improvements are expected with impending developments in electronic access and implementation of applications for re-registration or mortgage notation.

Table C-5 sets forth transaction costs with respect to the 8 hypothetical transactions in the United Kingdom.

Table C-5 - Real Estate Transaction Costs in the United Kingdom

⁴ For purposes of land law and conveyancing practices, the United Kingdom is divided into three sub-jurisdictions, England and Wales, Scotland and Northern Ireland. This study was restricted to law, practices and costs in England and Wales, in which occur the great bulk of land transactions in the United Kingdom. Later references in this report to United Kingdom or Great Britain should be understood to refer to England and Wales, where the great bulk of real estate transactions are carried out.

		<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>
<i>Costs</i>	<i>Broker's Commission</i>	2,000€	2,000€	5,000€	5,000€	10,000€	10,000€	20,000€	20,000€
	<i>Purchase Price</i>	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
	<i>Searches Fees</i>	304€	304€	304€	304€	304€	304€	304€	304€
	<i>Buyer's Lawyer's Fee</i>	608€	608€	676€	676€	815€	815€	1,183€	1,183€
	<i>Seller's Lawyer's Fee</i>	571€	571€	635€	635€	768€	768€	1,116€	1,116€
	<i>Bank Lawyer's Fee</i>	-€	100€	-€	250€	-€	499€	-€	999€
	<i>Inspection/Engineer Fee</i>	441€	441€	514€	514€	705€	705€	1,102€	1,102€
	<i>Real Estate Transfer Tax</i>	-€	-€	2,499€	2,499€	15,000€	15,000€	39,999€	39,999€
	<i>Recording/Registration Fee</i>	88€	88€	220€	220€	323€	323€	617€	617€
<i>Total Transfer Costs</i>	4,013€	4,112€	9,848€	10,097€	27,916€	28,415€	64,321€	65,320€	
<i>Total Conveyancing Fees</i>	1,484€	1,584€	1,614€	1,864€	1,888€	2,387€	2,603€	3,602€	
<i>Conveyancing Fees as percent of Total Costs</i>	36.98%	38.51%	16.39%	18.46%	6.76%	8.40%	4.05%	5.51%	
<i>Conveyancing Fees as percent of Purchase Price</i>	1.48%	1.58%	0.65%	0.75%	0.38%	0.48%	0.26%	0.36%	
<i>Broker's Commission as percent of Total Cost</i>	49.84%	48.63%	50.77%	49.52%	35.82%	35.19%	31.09%	30.62%	

Parties in the United Kingdom generally have the benefit of high quality independent legal advice through their own solicitors. This results in relatively high costs for the smaller and average value transactions. In fact, for the purchase of a lot for 100,000€ the total conveyancing fees in the UK were the highest of the 6 jurisdictions studied. On the other hand, the apparent high percentage of conveyancing fees to overall transfer costs with respect to the smallest transactions is due to the absence of a transfer tax for transactions of less than £100,000.

By the same token, conveyancing fees are relatively flat as transaction size increases. For the largest transactions, UK conveyancing fees are among the lowest among the jurisdictions considered.

It should also be observed that brokers' commissions in the UK are significantly lower than in the other jurisdictions under study.

6. United States

Costs for real estate conveyancing in the United States appear to be unnecessarily increased by the absence of a modern title registration system and the widespread use of title insurance as a substitute. Although parties to real estate transactions have the ability to obtain legal advice from their own lawyers, most real estate transactions take place without participation of lawyers for the buyer or seller. What legal advice is available comes from title companies and lawyers acting for financing banks or mortgage intermediaries.

Table C-5 sets forth transfer costs for each of the 8 hypothetical transactions in both Maine and New York (upstate).

Table C-6 - Real Estate Transfer Costs in Maine and New York, USA

Maine		<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>
Costs	<i>Broker's Commission</i>	6,000€	6,000€	15,000€	15,000€	30,000€	30,000€	60,000€	60,000€
	<i>Purchase Price</i>	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
	<i>Title Examination Fee</i>	228€	228€	228€	228€	228€	228€	228€	228€
	<i>Buyer's Lawyer's Fee</i>	148€	-€	148€	-€	148€	-€	148€	-€
	<i>Seller's Lawyer's Fee</i>	103€	103€	103€	103€	103€	103€	103€	103€
	<i>Bank Lawyer's Fee</i>	-€	148€	-€	148€	-€	148€	-€	148€
	<i>Appraisal Fee</i>	-€	266€	-€	266€	-€	266€	-€	266€
	<i>Inspection/Engineer Fee</i>	-€	152€	-€	152€	-€	171€	-€	171€
	<i>Real Estate Transfer Tax</i>	335€	335€	837€	837€	1,674€	1,674€	3,348€	3,348€
	<i>Owners Title Insurance</i>	228€	304€	628€	704€	1,256€	1,332€	2,511€	2,587€
	<i>Title Company Fee</i>	152€	152€	152€	152€	152€	152€	152€	152€
	<i>Recording/Registration Fee</i>	14€	14€	15€	15€	15€	15€	15€	15€
	<i>Mortgage Registration Fee</i>	-€	44€	-€	44€	-€	44€	-€	44€
<i>Total Transfer Costs</i>	7,208€	7,747€	17,112€	17,651€	33,577€	34,135€	66,507€	67,064€	

<i>Total Conveyancing Fees</i>	860€	936€	1,259€	1,336€	1,887€	1,963€	3,143€	3,219€
<i>Convenancing Fees as percent of Total Costs</i>	11.93%	12.08%	7.36%	7.57%	5.62%	5.75%	4.73%	4.80%
<i>Conveyancing Fees as percent of Purchase Price</i>	0.86%	0.94%	0.50%	0.53%	0.38%	0.39%	0.31%	0.32%
<i>Broker's Commission as percent of Total Cost</i>	83.24%	77.45%	87.66%	84.98%	89.35%	87.89%	90.22%	89.47%

New York (upstate)		Sale of Land for 100,000	Sale of Land for 100,000 with new mortgage for 75,000	Sale of House for 250,000	Sale of House for 250,000 with new mortgage for 150,000	Sale of House for 500,000	Sale of House for 500,000 with new mortgage for 400,000	Sale of House for 1,000,000	Sale of house for 1,000,000 with new mortgage for 750,000
		Costs	<i>Broker's Commission</i>	6,000€	6,000€	15,000€	15,000€	30,000€	30,000€
<i>Purchase Price</i>	100,000€		100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
<i>Buyer's Lawyer's Fee</i>	342€		342€	342€	342€	342€	342€	342€	342€
<i>Seller's Lawyer's Fee</i>	419€		419€	419€	419€	419€	419€	419€	419€
<i>Bank Lawyer's Fee</i>	-€		304€	-€	304€	-€	304€	-€	-€
<i>Appraisal Fee</i>	190€		190€	228€	228€	228€	228€	266€	266€
<i>Real Estate Transfer Tax</i>	304€		304€	761€	761€	1,522€	1,522€	3,044€	3,044€
<i>Owners Title Insurance</i>	467€		467€	853€	853€	1,496€	1,496€	2,649€	2,649€
<i>Mortgagee Title Insurance</i>	-€		114€	-€	176€	-€	365€	-€	-€
<i>Recording/Registration Fee</i>	27€		27€	27€	27€	27€	27€	27€	27€
<i>Mortgage Registration Fee</i>	-€	64€	-€	64€	-€	64€	-€	64€	
<i>Total Transfer Costs</i>		7,750€	8,233€	17,631€	18,175€	34,035€	34,768€	66,748€	66,812€
<i>Total Conveyancing Fees</i>		1,228€	1,647€	1,614€	2,094€	2,257€	2,926€	3,410€	3,410€
<i>Convenancing Fees as percent of Total Costs</i>		15.85%	20.00%	9.15%	11.52%	6.63%	8.42%	5.11%	5.10%
<i>Conveyancing Fees as percent of Purchase Price</i>		1.23%	1.65%	0.65%	0.84%	0.45%	0.59%	0.34%	0.34%
<i>Broker's Commission as percent of Total Cost</i>		77.42%	72.88%	85.08%	82.53%	88.15%	86.29%	89.89%	89.80%

Considering the lack of high quality legal advice for the participants, conveyancing costs seem relatively high. For a purchase of a lot of land for 100,000 Euro conveyancing costs (including title insurance) in New York are second only to the UK and France. Maine seems somewhat more reasonable with costs somewhere in the middle between the UK, New York and France on the one hand, and Germany, Estonia and Sweden on the other. As is the case with the United Kingdom, conveyancing costs are relatively flat in comparison with jurisdictions where costs are

computed as a percentage of transaction value.

A serious limitation of the American model is the proportion of conveyancing costs which go to the lawyer for the bank or mortgage company, either directly or in the provision of mortgagee and owner title insurance. Of the transaction parties, the bank or mortgage company is the least likely to require transaction specific advice. That the bank lawyer gets a large share of the conveyancing costs appears to reflect conditions in the mortgage market rather than a considered allocation of legal advice and costs therefore.

In terms of quality of advice all of the European jurisdictions under comparison, with the possible exception of Sweden, provide better access to advice for transaction participants than appears to be the case in New York or Maine. Moreover, the title registration systems in all of the EU Member States under study spare their purchasers of real estate the cost of title insurance, which burdens purchasers in the United States, which have not seen fit to upgrade their own real estate title systems.

H. The Relationship of Regulation of Conveyancing Professionals to Real Estate Conveyancing Costs.

Based on the information collected from the five European Union Member States included in this study there appears to be no correlation between conveyancing costs to the degree or type of regulation of conveyancing professionals. The conveyancing of real estate is highly regulated in every one of the jurisdictions studied. In all jurisdictions under consideration the qualifications and practices of professional

conveyancers is regulated by governmental authorities. In all jurisdictions (except for Sweden and in the case of licensed conveyancers in the UK) conveyancers are required to have a complete legal education and qualify as jurists. Most jurisdictions require that they undergo qualification examinations, maintain competence through ongoing education, and maintain liability insurance against claims for malpractice.

Costs do not appear to behave in any way that can be correlated with kind or degree of regulation of conveyancer. In many instances, notarial jurisdictions, which have the most stringent level of conveyancer regulation, turn out to have the lowest costs. In the only jurisdiction (Sweden) which permits real estate brokers to handle conveyances, it appears that brokers have used their conveyancing function to garner brokerage commission income in virtually all sales transactions, a proportion that is much higher than the share brokers are able to capture in the other jurisdictions under study. In the US the absence of strong rate regulation permits lawyers to maintain title companies to receive title insurance commissions on the order of 70-80% of the premiums paid by the buyers and mortgagors who are required by the secondary mortgage marketplace to purchase the insurance.

It has been suggested that the regulation of rates of notaries in Estonia, France, and Germany has permitted a degree of cross-subsidization of transactions of small value by transactions of large value. Whether this should be considered an economic inefficiency or sound social policy is very much open to question. By basing notarial fees on transaction value, Estonia, France and Germany make it possible for consumers with lower- and average-value transactions to have access to the same

high quality of legal services as do those with larger amounts at stake at a more affordable price. It can also be observed that the market practices of brokers, who charge the same percentage of sales price for all brokerage transactions, the premium structures of title insurance companies, which charge a flat percentage of the value of the property insured, and the mandates of taxing authorities, which levy transfer taxes on the same basis, all have the same effect.

On the other hand, it does appear that the degree of regulation maintained in Estonia, France and Germany provides a stronger guarantee that transaction participants will actually partake of meaningful advice and independent professional guidance in completing transactions which might be the most important legal matter of their lives and that such transactions will be completed in a responsible and orderly manner.

Buyers and sellers in those lands where regulation is less stringent appear to get less access to independent advice in comparison to banks and financial institutions, which use their economic clout to influence how the transaction is closed. Thus, in the less regulated climate of Maine and New York banks receive good advice and representation by their lawyer and title companies at the expense of the buyer and seller, who frequently go without independent advice or representation. In Sweden both the quality and the independence of advice that buyers can expect from their sellers' real estate brokers is seriously open to question. Real estate brokers are oriented to and motivated to making a sale and earning a commission, not to giving

independent legal advice to anyone, least of all to buyers whom they are trying to convince to purchase. Even in England, buyers have to share counsel with their banks. Moreover, the large percentage of real estate purchase and sale transactions which "fall through" between initial agreement and exchange of contracts suggests that the interval before the parties are both bound by exchange of contracts remains unacceptably long and subjects the parties to hazard.

Reduced regulation of conveyancing professionals in Sweden and England appears to be accompanied by a relatively high rate of errors in effectuating real estate re-registrations. Although no statistical comparison has been made, reports of significant numbers of errors in registry filings in both Sweden and England can be contrasted with an almost total absence of reported errors in Estonai, France and Germany.

Effective regulation of conveyancing professionals may gain in importance as efforts are made to transition to a totally electronic land registration system permitting transfers and re-registrations to be made directly by conveyancing professionals accessing the registry databank. Such a system would inevitably dispense with individualized review of transfer documents by land registry personnel. Developments to date with direct electronic registering and releasing mortgage liens by notaries in France suggest that a highly trained, cohesive cadre of conveyancing professionals can make such a system work. Whether a larger group of lawyers from general practice or real estate brokers can be entrusted with unmediated access to the public land registry data bank is a question with which land registry officials in both England

and Sweden are currently struggling.

V. Conclusions

Based on the information obtained and reviewed, the following conclusions are submitted:

1. Comparison of the costs or efficiency of conveyancing professionals in effectuating the conveyance of residential real estate is complicated by differing requirements of national and local law, taxation and real estate regulation, local real estate market conditions, national and local real estate title registration systems, national substantive real property law and the requirements of local banks, all of which impact the conveyancing function and the work to be performed by conveyancing professionals. These factors affect not only the gross amount of work to be done and associated costs, but also the allocation of work and costs among transaction participants and between public and private agencies in a way to make direct costs comparison extremely difficult. Comparison of costs and efficiency are also of little meaning unless the quality of the services rendered and the degree to which public policies are implemented can be taken into account.
2. Subject to the foregoing limitations, Table C attached represents a detailed current estimate of potential costs for conveyancing services along with certain other transaction costs for hypothetical purchases and sales of residential real estate with or without mortgage.
3. In all the countries studied, fees and costs of conveyancing professionals represent a tiny portion of the value of most real estate transactions, generally of the order of less than 1%, and are generally dwarfed by real estate brokerage costs and in some cases by taxes. There is nothing to indicate that conveyancing costs are a significant burden on lively real estate markets in any of the countries studied.
4. The average value of real estate transactions in the EU jurisdictions studied has been reported to range between 130,000 € in Germany up to 297,000 € in England. These are the most numerous transactions, and the ones in which conveyancing costs mean the most to the participants. From an economic point of view these transactions have the greatest impact on the conveyancing market. Hence transactions of average value should play a primary role in a

comparative study of conveyancing systems. Higher value residential real estate transactions (500,000 -1,000,000 €) are small in number compared with transactions of low and average value.

5. Conveyancing costs in notarial jurisdictions appear to be relatively low for residential real estate transactions of average value. Conveyancing costs in common-law jurisdictions (United Kingdom and the U.S.) are higher for low and average value transactions, but somewhat lower for the transactions of higher value.
6. Conveyancing costs in Sweden are hard to isolate because conveyancing is done by brokers, who are paid a commission that covers both brokerage and conveyancing. The fact that almost all transactions are brokered suggests that the brokers' roles as conveyancers enable them to charge brokerage commissions in transactions in which brokerage services are not needed. Allocation of the broker's commissions in the estimated percentage of cases where ordinarily one would not expect that brokerage would be needed (30%) results in an estimate of the cost of conveyancing services of approximately .9% of the purchase price of the property. It appears thus fair to conclude that in Sweden conveyancing costs for low and average value transactions are not lower than in the other jurisdictions under study..
7. Residential real estate transactions participants, particularly buyers, need independent legal advice for successful completion of real estate purchases and sales. In Estonia, France and Germany parties are assured of high quality neutral legal advice and accomplishment of their transactions by public notaries. Sellers and buyers in the United Kingdom have access to advice from their own solicitors, who in some cases also represent financing banks. Sellers and buyers in the United States may hire their own lawyers, but frequently rely on lawyers or title companies representing financing banks. Parties to Swedish transactions are generally not advised by lawyers, but by the sellers' real estate brokers. Economic conflicts of interest and limited professional expertise may compromise the quality of broker-provided advice.
8. Real estate conveyancing in Estonia, France and Germany is facilitated by modern land registry systems which are in the process of converting to all electronic access and transaction effectuation. Procedures are being developed to give notaries access to these systems not only to view records, but also to enable them to effectuate real estate transfer, mortgage creation, and mortgage discharge instantaneously by direct electronic access to the registry databases. England is also modernizing its land registry systems, but is struggling with a high rate of errors in registry submittals and is concerned about the wisdom of allowing the variety of persons currently authorized to provide conveyancing services access to the electronic database. Sweden is in a similar situation.

The states of the United States lag badly in implementing modern title registry systems, which leads to excess costs for title insurance.

9. European title registration systems currently depend on title registry officials to screen conveyancing documents for errors and deficiencies. As land registration systems approach the “gold standard” of contemporaneous contract signing and passage of title by giving conveyancing professionals access to registry data bases to make conveyances and input information on mortgages, this level of control will likely decrease. It will be all the more important that conveyancers exercise a high degree of quality control in document preparation and submittal in order to maintain the integrity of the register. Estonia, France and Germany which use compact groups of highly competent, impartial and publicly accountable notaries for conveyancing, appear to be in a good position to maintain this level of quality control in the all-electronic age.
10. This study has found no evidence that deregulation of conveyancing services leads to lower cost or higher efficiency among the countries under consideration. The contrary appears to be true. In the most highly regulated jurisdictions such as Estonia and Germany, average costs are low (particularly for the numerous market-relevant transactions of low and average value), the registry systems function effectively and consumer satisfaction appears to be high. On the other hand in England, with somewhat less regulation, one sees high costs for the many smaller transactions, a high rate of failure of transactions (30%) and a low level of reported consumer satisfaction. In Sweden the real estate brokers have gained control of the conveyancing process and are apparently able to garner sales commissions in many transactions where brokerage is not needed. Questions about the impartiality and quality of legal advice to participants can also be raised in Sweden. In the U. S. partial deregulation of conveyancing has permitted banks to distort the system to benefit them and their lawyers at the expense of consumers.
11. It appears clear that the market for real estate conveyancing services is far from a perfect market and that deregulation does not lead to improved services at lowest cost. It appears that groups such as banks, lawyers and brokers are able to influence costs and practices based on their strategic positions in the marketplace. Costs and practices are also affected by public title registry systems and the provisions of local substantive real property law. Enlightened regulation appears to be doing a better job at cost minimization and consumer protection than the “free” market.

- 12. There appears to be little reason to foster standardization of real estate conveyancing regulation, practices or costs within the EU. Real estate is inherently a local matter. Differences in costs and practices within the EU are not so significant that there is any risk of impeding real estate development or commerce among the Member States.

- 13. If one were to start “from a clean slate” and design a system for effectuating real estate transactions, the model of a single neutral professional to attend to legal aspects of the transaction and accomplish the transfer of title by direct access to a public registry appears to offer strong advantages in terms of cost efficiency and systemic integrity over models of collaborating party-retained conveyancers or fully deregulated models. All models require some regulation. The effectiveness of the model will depend in large part on the quality of the regulation.

Respectfully Submitted:



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Appendix A
QUANTRIX TABLES

Table C- Real Estate Transfer Costs in Selected EU Jurisdictions and States of the U.S.- (In Euro Equivalents)

			<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>
<i>Estonia</i>	<i>Costs</i>	<i>Broker's Commission</i>	4,000€	4,000€	10,000€	10,000€	20,000€	20,000€	40,000€	40,000€
		<i>Purchase Price</i>	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€

		<i>Mortgage Amount</i>	-€ 74,996€	-€ 187,511€	-€ 400,000€	-€ 750,000€			
		<i>Notary Fee - Contract</i>	379€	-€ 922€	-€ 1,827€	-€ 3,620€	-€	-€	
		<i>Notary Fee Combined Contract & Mortgage</i>	-€ 446€	-€ 967€	-€ 2,143€	-€ 4,170€	-€	-€	
		<i>Recording/Registration Fee</i>	110€	136€ 294€	304€ 754€	909€ 1,600€	1,600€	1,977€	
		<i>Total Transfer Costs</i>	4,488€	4,582€ 11,215€	11,271€ 22,581€	23,052€ 45,220€	45,220€	46,147€	
		<i>Total Conveyancing Fees</i>	379€	446€ 922€	967€ 1,827€	2,143€ 3,620€	3,620€	4,170€	
		<i>Convenancing Fees as percent of Total Costs</i>	8.43%	9.74% 8.22%	8.58% 8.09%	9.30% 8.01%	8.01%	9.04%	
		<i>Conveyancing Fees as percent of Purchase Price</i>	0.38%	0.45% 0.37%	0.39% 0.37%	0.43% 0.36%	0.36%	0.42%	
		<i>Broker's Commission as percent of Total Cost</i>	89.12%	87.29% 89.16%	88.72% 88.57%	86.76% 88.46%	88.46%	86.68%	
France	Costs	<i>Broker's Commission</i>	6,000€	6,000€ 15,000€	15,000€ 30,000€	30,000€ 60,000€	60,000€	60,000€	
		<i>Purchase Price</i>	100,000€	100,000€ 250,000€	250,000€ 500,000€	500,000€ 1,000,000€	1,000,000€	1,000,000€	
		<i>Notary Fee - Contract</i>	1,154€	1,154€ 2,391€	2,391€ 4,454€	4,454€ 8,579€	8,579€	8,579€	
		<i>Notary Fee - Mortgage</i>	-€	316€ -€	522€ -€	1,210€ -€	-€ 2,172€	-€	2,172€
		<i>Notary's Overheads Charge</i>	200€	200€ 300€	300€ 300€	300€ 300€	300€ 300€	300€	300€
		<i>Real Estate Transfer Tax</i>	5,090€	5,090€ 12,725€	12,725€ 25,450€	25,450€ 50,900€	50,900€	50,900€	
		<i>Recording/Registration Fee</i>	100€	100€ 250€	250€ 500€	500€ 1,000€	1,000€	1,000€	
		<i>Mortgage Registration Fee</i>	-€	45€ -€	90€ -€	240€ -€	-€ 450€	-€	450€
			<i>Total Transfer Costs</i>	12,544€	12,905€ 30,666€	31,278€ 60,704€	62,154€ 120,779€	120,779€	123,401€
			<i>Total Conveyancing Fees</i>	1,354€	1,670€ 2,691€	3,213€ 4,754€	5,964€ 8,879€	8,879€	11,051€
			<i>Convenancing Fees as percent of Total Costs</i>	10.79%	12.94% 8.78%	10.27% 7.83%	9.60% 7.35%	7.35%	8.96%
			<i>Conveyancing Fees as percent of Purchase Price</i>	1.35%	1.67% 1.08%	1.29% 0.95%	1.19% 0.89%	0.89%	1.11%
		<i>Broker's Commission as percent of Total Cost</i>	47.83%	46.49% 48.91%	47.96% 49.42%	48.27% 49.68%	49.68%	48.62%	
Germany	Costs	<i>Broker's Commission</i>	4,000€	4,000€ 10,000€	10,000€ 20,000€	20,000€ 40,000€	40,000€	40,000€	
		<i>Purchase Price</i>	100,000€	100,000€ 250,000€	250,000€ 500,000€	500,000€ 1,000,000€	1,000,000€	1,000,000€	
		<i>Notary Fee - Contract</i>	454€	454€ 904€	904€ 1,654€	1,654€ 3,154€	3,154€	3,154€	
		<i>Notary Fee Contract Effectuation</i>	105€	105€ 205€	205€ 333€	333€ 588€	588€	588€	
		<i>Notary Fee - Mortgage</i>	-€	187€ -€	292€ -€	667€ -€	-€ 1,192€	-€	1,192€
		<i>Real Estate Transfer Tax</i>	3,500€	3,500€ 8,750€	8,750€ 17,500€	17,500€ 35,000€	35,000€	35,000€	
		<i>Recording/Registration Fee</i>	311€	311€ 648€	648€ 1,211€	1,211€ 2,336€	2,336€	2,336€	
	<i>Mortgage Registration Fee</i>	-€	177€ -€	282€ -€	657€ -€	-€ 1,182€	-€	1,182€	
			<i>Total Transfer Costs</i>	8,370€	8,734€ 20,507€	21,081€ 40,698€	42,022€ 81,078€	81,078€	83,452€
			<i>Total Conveyancing Fees</i>	559€	746€ 1,109€	1,401€ 1,987€	2,654€ 3,742€	3,742€	4,934€
		<i>Convenancing Fees as percent of Total Costs</i>	6.68%	8.54% 5.41%	6.65% 4.88%	6.32% 4.62%	4.62%	5.91%	
		<i>Conveyancing Fees as percent of Purchase Price</i>	0.56%	0.75% 0.44%	0.56% 0.40%	0.53% 0.37%	0.37%	0.49%	
		<i>Broker's Commission as percent of Total Cost</i>	47.79%	45.80% 48.76%	47.44% 49.14%	47.59% 49.34%	49.34%	47.93%	

Sweden	Costs	Broker's Commission	3,000€	3,000€	7,500€	7,500€	15,000€	15,000€	30,000€	30,000€
		Purchase Price	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
		Mortgage Amount	-€	75,000€	-€	150,000€	-€	400,000€	-€	750,000€
		Inspection/Engineer Fee	500€	500€	500€	500€	500€	500€	500€	500€
		Real Estate Transfer Tax	1,500€	1,500€	3,750€	3,750€	7,500€	7,500€	15,000€	15,000€
		Mortgage Tax	-€	1,500€	-€	3,000€	-€	8,000€	-€	15,000€
		Recording/Registration Fee	89€	89€	89€	89€	89€	89€	89€	89€
		Mortgage Registration Fee	-€	41€	-€	41€	-€	41€	-€	41€
		Broker Contract and Implementation Charge	900€	900€	2,250€	2,250€	4,500€	4,500€	9,000€	9,000€
		Total Transfer Costs	5,989€	7,530€	14,089€	17,130€	27,589€	35,630€	54,589€	69,630€
		Total Conveyancing Fees	900€	900€	2,250€	2,250€	4,500€	4,500€	9,000€	9,000€
		Convenancing Fees as percent of Total Costs	15.03%	11.95%	15.97%	13.13%	16.31%	12.63%	16.49%	12.93%
		Conveyancing Fees as percent of Purchase Price	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%
Broker's Commission as percent of Total Cost	50.09%	39.84%	53.23%	43.78%	54.37%	42.10%	54.96%	43.09%		
United Kingdom	Costs	Broker's Commission	2,000€	2,000€	5,000€	5,000€	10,000€	10,000€	20,000€	20,000€
		Purchase Price	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
		Searches Fees	304€	304€	304€	304€	304€	304€	304€	304€
		Buyer's Lawyer's Fee	608€	608€	676€	676€	815€	815€	1,183€	1,183€
		Seller's Lawyer's Fee	571€	571€	635€	635€	768€	768€	1,116€	1,116€
		Bank Lawyer's Fee	-€	100€	-€	250€	-€	499€	-€	999€
		Inspection/Engineer Fee	441€	441€	514€	514€	705€	705€	1,102€	1,102€
		Real Estate Transfer Tax	-€	-€	2,499€	2,499€	15,000€	15,000€	39,999€	39,999€
		Recording/Registration Fee	88€	88€	220€	220€	323€	323€	617€	617€
		Total Transfer Costs	4,013€	4,112€	9,848€	10,097€	27,916€	28,415€	64,321€	65,320€
		Total Conveyancing Fees	1,484€	1,584€	1,614€	1,864€	1,888€	2,387€	2,603€	3,602€
		Convenancing Fees as percent of Total Costs	36.98%	38.51%	16.39%	18.46%	6.76%	8.40%	4.05%	5.51%
		Conveyancing Fees as percent of Purchase Price	1.48%	1.58%	0.65%	0.75%	0.38%	0.48%	0.26%	0.36%
Broker's Commission as percent of Total Cost	49.84%	48.63%	50.77%	49.52%	35.82%	35.19%	31.09%	30.62%		
U. S. - Maine	Costs	Broker's Commission	6,000€	6,000€	15,000€	15,000€	30,000€	30,000€	60,000€	60,000€
		Purchase Price	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
		Title Examination Fee	228€	228€	228€	228€	228€	228€	228€	228€
		Buyer's Lawyer's Fee	148€	-€	148€	-€	148€	-€	148€	-€
		Seller's Lawyer's Fee	103€	103€	103€	103€	103€	103€	103€	103€
		Bank Lawyer's Fee	-€	148€	-€	148€	-€	148€	-€	148€
		Appraisal Fee	-€	266€	-€	266€	-€	266€	-€	266€
		Inspection/Engineer Fee	-€	152€	-€	152€	-€	171€	-€	171€
		Real Estate Transfer Tax	335€	335€	837€	837€	1,674€	1,674€	3,348€	3,348€
		Owners Title Insurance	228€	304€	628€	704€	1,256€	1,332€	2,511€	2,587€
		Title Company Fee	152€	152€	152€	152€	152€	152€	152€	152€
		Recording/Registration Fee	14€	14€	15€	15€	15€	15€	15€	15€
		Mortgage Registration Fee	-€	44€	-€	44€	-€	44€	-€	44€

	<i>Total Transfer Costs</i>	7,208€	7,747€	17,112€	17,651€	33,577€	34,135€	66,507€	67,064€	
	<i>Total Conveyancing Fees</i>	860€	936€	1,259€	1,336€	1,887€	1,963€	3,143€	3,219€	
	<i>Convenancing Fees as percent of Total Costs</i>	11.93%	12.08%	7.36%	7.57%	5.62%	5.75%	4.73%	4.80%	
	<i>Conveyancing Fees as percent of Purchase Price</i>	0.86%	0.94%	0.50%	0.53%	0.38%	0.39%	0.31%	0.32%	
	<i>Broker's Commission as percent of Total Cost</i>	83.24%	77.45%	87.66%	84.98%	89.35%	87.89%	90.22%	89.47%	
<i>U. S. - New York</i>	<i>Broker's Commission</i>	6,000€	6,000€	15,000€	15,000€	30,000€	30,000€	60,000€	60,000€	
	<i>Purchase Price</i>	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€	
	<i>Buyer's Lawyer's Fee</i>	342€	342€	342€	342€	342€	342€	342€	342€	
	<i>Seller's Lawyer's Fee</i>	419€	419€	419€	419€	419€	419€	419€	419€	
	<i>Bank Lawyer's Fee</i>	-€	304€	-€	304€	-€	304€	-€	-€	
	<i>Appraisal Fee</i>	190€	190€	228€	228€	228€	228€	266€	266€	
	<i>Real Estate Transfer Tax</i>	304€	304€	761€	761€	1,522€	1,522€	3,044€	3,044€	
	<i>Owners Title Insurance</i>	467€	467€	853€	853€	1,496€	1,496€	2,649€	2,649€	
	<i>Mortgagee Title Insurance</i>	-€	114€	-€	176€	-€	365€	-€	-€	
	<i>Recording/Registration Fee</i>	27€	27€	27€	27€	27€	27€	27€	27€	
	<i>Mortgage Registration Fee</i>	-€	64€	-€	64€	-€	64€	-€	64€	
		<i>Total Transfer Costs</i>	7,750€	8,233€	17,631€	18,175€	34,035€	34,768€	66,748€	66,812€
		<i>Total Conveyancing Fees</i>	1,228€	1,647€	1,614€	2,094€	2,257€	2,926€	3,410€	3,410€
		<i>Convenancing Fees as percent of Total Costs</i>	15.85%	20.00%	9.15%	11.52%	6.63%	8.42%	5.11%	5.10%
	<i>Conveyancing Fees as percent of Purchase Price</i>	1.23%	1.65%	0.65%	0.84%	0.45%	0.59%	0.34%	0.34%	
	<i>Broker's Commission as percent of Total Cost</i>	77.42%	72.88%	85.08%	82.53%	88.15%	86.29%	89.89%	89.80%	

TABLE D - Real Estate Transfer Costs in Selected EU Jurisdictions and States of the U.S. (In National Currencies)

		<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>
<i>Estonia</i>	<i>Broker's Commission</i>	62,500kr	62,500kr	156,250kr	156,250kr	312,500kr	312,500kr	625,000kr	625,000kr
	<i>Purchase Price</i>	1,562,500kr	1,562,500kr	3,906,250kr	3,906,250kr	7,812,500kr	7,812,500kr	15,625,000kr	15,625,000kr
	<i>Mortgage Amount</i>		1,171,815kr		2,929,867kr		6,250,000kr		11,718,750kr
	<i>Notary Fee - Contract</i>	5,915kr		14,399kr		28,540kr		56,562kr	
	<i>Notary Fee Combined Contract & Mortgage</i>			6,976kr		15,109kr		33,489kr	
	<i>Recording/Registration Fee</i>	1,717kr	2,125kr	4,593kr	4,750kr	11,783kr	14,203kr	25,000kr	30,890kr

		<i>Total Transfer Costs</i>	70,132kr	71,601kr	175,242kr	176,109kr	352,823kr	360,192kr	706,562kr	721,046kr	
		<i>Total Conveyancing Fees</i>	5,915kr	6,976kr	14,399kr	15,109kr	28,540kr	33,489kr	56,562kr	65,156kr	
		<i>Convenancing Fees as percent of Total Costs</i>	8.43%	9.74%	8.22%	8.58%	8.09%	9.30%	8.01%	9.04%	
		<i>Conveyancing Fees as percent of Purchase Price</i>	0.38%	0.45%	0.37%	0.39%	0.37%	0.43%	0.36%	0.42%	
		<i>Broker's Commission as percent of Total Cost</i>	89.12%	87.29%	89.16%	88.72%	88.57%	86.76%	88.46%	86.68%	
France	Costs	<i>Broker's Commission</i>	6,000€	6,000€	15,000€	15,000€	30,000€	30,000€	60,000€	60,000€	
		<i>Purchase Price</i>	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€	
		<i>Notary Fee - Contract</i>	1,154€	1,154€	2,391€	2,391€	4,454€	4,454€	8,579€	8,579€	
		<i>Notary Fee - Mortgage</i>		316€		522€		1,210€		2,172€	
		<i>Notary's Overheads Charge</i>	200€	200€	300€	300€	300€	300€	300€	300€	
		<i>Real Estate Transfer Tax</i>	5,090€	5,090€	12,725€	12,725€	25,450€	25,450€	50,900€	50,900€	
		<i>Recording/Registration Fee</i>	100€	100€	250€	250€	500€	500€	1,000€	1,000€	
	<i>Mortgage Registration Fee</i>		45€		90€		240€		450€		
			<i>Total Transfer Costs</i>	12,544€	12,905€	30,666€	31,278€	60,704€	62,154€	120,779€	123,401€
			<i>Total Conveyancing Fees</i>	1,354€	1,670€	2,691€	3,213€	4,754€	5,964€	8,879€	11,051€
			<i>Convenancing Fees as percent of Total Costs</i>	10.79%	12.94%	8.78%	10.27%	7.83%	9.60%	7.35%	8.96%
			<i>Conveyancing Fees as percent of Purchase Price</i>	1.35%	1.67%	1.08%	1.29%	0.95%	1.19%	0.89%	1.11%
		<i>Broker's Commission as percent of Total Cost</i>	47.83%	46.49%	48.91%	47.96%	49.42%	48.27%	49.68%	48.62%	
Germany	Costs	<i>Broker's Commission</i>	4,000€	4,000€	10,000€	10,000€	20,000€	20,000€	40,000€	40,000€	
		<i>Purchase Price</i>	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€	
		<i>Notary Fee - Contract</i>	454€	454€	904€	904€	1,654€	1,654€	3,154€	3,154€	
		<i>Notary Fee Contract Effectuation</i>	105€	105€	205€	205€	333€	333€	588€	588€	
		<i>Notary Fee - Mortgage</i>		187€		292€		667€		1,192€	
		<i>Real Estate Transfer Tax</i>	3,500€	3,500€	8,750€	8,750€	17,500€	17,500€	35,000€	35,000€	
		<i>Recording/Registration Fee</i>	311€	311€	648€	648€	1,211€	1,211€	2,336€	2,336€	
	<i>Mortgage Registration Fee</i>		177€		282€		657€		1,182€		
			<i>Total Transfer Costs</i>	8,370€	8,734€	20,507€	21,081€	40,698€	42,022€	81,078€	83,452€
			<i>Total Conveyancing Fees</i>	559€	746€	1,109€	1,401€	1,987€	2,654€	3,742€	4,934€
			<i>Convenancing Fees as percent of Total Costs</i>	6.68%	8.54%	5.41%	6.65%	4.88%	6.32%	4.62%	5.91%
			<i>Conveyancing Fees as percent of Purchase Price</i>	0.56%	0.75%	0.44%	0.56%	0.40%	0.53%	0.37%	0.49%
		<i>Broker's Commission as percent of Total Cost</i>	47.79%	45.80%	48.76%	47.44%	49.14%	47.59%	49.34%	47.93%	
Sweden	Costs	<i>Broker's Commission</i>	27,778kr	27,778kr	69,444kr	69,444kr	138,889kr	138,889kr	277,778kr	277,778kr	
		<i>Purchase Price</i>	925,926kr	925,926kr	2,314,815kr	2,314,815kr	4,629,630kr	4,629,630kr	9,259,259kr	9,259,259kr	
		<i>Mortgage Amount</i>		694,444kr		1,388,889kr		3,703,704kr		6,944,444kr	
		<i>Inspection/Engineer Fee</i>	4,630kr	4,630kr	4,630kr	4,630kr	4,630kr	4,630kr	4,630kr	4,630kr	
		<i>Real Estate Transfer Tax</i>	13,889kr	13,889kr	34,722kr	34,722kr	69,444kr	69,444kr	138,889kr	138,889kr	
		<i>Mortgage Tax</i>	-kr	13,889kr	-kr	27,778kr	-kr	74,074kr	-kr	138,889kr	

	Recording/Registration Fee	825kr	825kr	825kr	825kr	825kr	825kr	825kr	825kr
	Mortgage Registration Fee		375kr		375kr		375kr		375kr
	Broker Contract and Implementation Charge	8,333kr	8,333kr	20,833kr	20,833kr	41,666kr	41,666kr	83,333kr	83,333kr
	Total Transfer Costs	55,455kr	69,719kr	130,455kr	158,607kr	255,454kr	329,903kr	505,455kr	644,719kr
	Total Conveyancing Fees	8,333kr	8,333kr	20,833kr	20,833kr	41,666kr	41,666kr	83,333kr	83,333kr
	Convenancing Fees as percent of Total Costs	15.03%	11.95%	15.97%	13.13%	16.31%	12.63%	16.49%	12.93%
	Conveyancing Fees as percent of Purchase Price	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%
	Broker's Commission as percent of Total Cost	50.09%	39.84%	53.23%	43.78%	54.37%	42.10%	54.96%	43.09%
United Kingdom	Broker's Commission	£1,361	£1,361	£3,404	£3,404	£6,807	£6,807	£13,615	£13,615
	Purchase Price	£68,074	£68,074	£170,184	£170,184	£340,368	£340,368	£680,735	£680,735
	Searches Fees	£207	£207	£207	£207	£207	£207	£207	£207
	Buyer's Lawyer's Fee	£414	£414	£460	£460	£555	£555	£805	£805
	Seller's Lawyer's Fee	£389	£389	£432	£432	£523	£523	£760	£760
	Bank Lawyer's Fee		£68		£170		£340		£680
	Inspection/Engineer Fee	£300	£300	£350	£350	£480	£480	£750	£750
	Real Estate Transfer Tax	£-	£-	£1,701	£1,701	£10,211	£10,211	£27,229	£27,229
	Recording/Registration Fee	£60	£60	£150	£150	£220	£220	£420	£420
	Total Transfer Costs	£2,731	£2,799	£6,704	£6,874	£19,003	£19,343	£43,786	£44,466
	Total Conveyancing Fees	£1,010	£1,078	£1,099	£1,269	£1,285	£1,625	£1,772	£2,452
	Convenancing Fees as percent of Total Costs	36.98%	38.51%	16.39%	18.46%	6.76%	8.40%	4.05%	5.51%
	Conveyancing Fees as percent of Purchase Price	1.48%	1.58%	0.65%	0.75%	0.38%	0.48%	0.26%	0.36%
	Broker's Commission as percent of Total Cost	49.84%	48.63%	50.77%	49.52%	35.82%	35.19%	31.09%	30.62%
U. S. - Maine	Broker's Commission	\$7,884	\$7,884	\$19,711	\$19,711	\$39,422	\$39,422	\$78,844	\$78,844
	Purchase Price	\$131,406	\$131,406	\$328,515	\$328,515	\$657,030	\$657,030	\$1,314,060	\$1,314,060
	Title Examination Fee	\$300	\$300	\$300	\$300	\$300	\$300	\$300	\$300
	Buyer's Lawyer's Fee	\$195		\$195		\$195		\$195	
	Seller's Lawyer's Fee	\$135	\$135	\$135	\$135	\$135	\$135	\$135	\$135
	Bank Lawyer's Fee		\$195		\$195		\$195		\$195
	Appraisal Fee		\$350		\$350		\$350		\$350
	Inspection/Engineer Fee		\$200		\$200		\$225		\$225
	Real Estate Transfer Tax	\$440	\$440	\$1,100	\$1,100	\$2,200	\$2,200	\$4,400	\$4,400
	Owners Title Insurance	\$300	\$400	\$825	\$925	\$1,650	\$1,750	\$3,300	\$3,400
	Title Company Fee	\$200	\$200	\$200	\$200	\$200	\$200	\$200	\$200
	Recording/Registration Fee	\$18	\$18	\$20	\$20	\$20	\$20	\$20	\$20
	Mortgage Registration		\$58		\$58		\$58		\$58

		<i>Fee</i>										
		<i>Total Transfer Costs</i>	\$9,472	\$10,180	\$22,486	\$23,194	\$44,122	\$44,855	\$87,394	\$88,127		
		<i>Total Conveyancing Fees</i>	\$1,130	\$1,230	\$1,655	\$1,755	\$2,480	\$2,580	\$4,130	\$4,230		
		<i>Convenancing Fees as percent of Total Costs</i>	11.93%	12.08%	7.36%	7.57%	5.62%	5.75%	4.73%	4.80%		
		<i>Conveyancing Fees as percent of Purchase Price</i>	0.86%	0.94%	0.50%	0.53%	0.38%	0.39%	0.31%	0.32%		
		<i>Broker's Commission as percent of Total Cost</i>	83.24%	77.45%	87.66%	84.98%	89.35%	87.89%	90.22%	89.47%		
U. S. - New York	Costs	<i>Broker's Commission</i>	\$7,884	\$7,884	\$19,711	\$19,711	\$39,422	\$39,422	\$78,844	\$78,844		
		<i>Purchase Price</i>	\$131,406	\$131,406	\$328,515	\$328,515	\$657,030	\$657,030	\$1,314,060	\$1,314,060		
		<i>Buyer's Lawyer's Fee</i>	\$450	\$450	\$450	\$450	\$450	\$450	\$450	\$450	\$450	
		<i>Seller's Lawyer's Fee</i>	\$550	\$550	\$550	\$550	\$550	\$550	\$550	\$550	\$550	
		<i>Bank Lawyer's Fee</i>		\$400		\$400		\$400		\$400		
		<i>Appraisal Fee</i>	\$250	\$250	\$300	\$300	\$300	\$300	\$300	\$350	\$350	
		<i>Real Estate Transfer Tax</i>	\$400	\$400	\$1,000	\$1,000	\$2,000	\$2,000	\$4,000	\$4,000	\$4,000	
		<i>Owners Title Insurance</i>	\$614	\$614	\$1,121	\$1,121	\$1,966	\$1,966	\$3,481	\$3,481	\$3,481	
		<i>Mortgagee Title Insurance</i>		\$150		\$231		\$479				
		<i>Recording/Registration Fee</i>	\$36	\$36	\$36	\$36	\$36	\$36	\$36	\$36	\$36	
		<i>Mortgage Registration Fee</i>		\$84		\$84		\$84		\$84		
				<i>Total Transfer Costs</i>	\$10,184	\$10,818	\$23,168	\$23,883	\$44,724	\$45,687	\$87,711	\$87,795
				<i>Total Conveyancing Fees</i>	\$1,614	\$2,164	\$2,121	\$2,752	\$2,966	\$3,845	\$4,481	\$4,481
				<i>Convenancing Fees as percent of Total Costs</i>	15.85%	20.00%	9.15%	11.52%	6.63%	8.42%	5.11%	5.10%
		<i>Conveyancing Fees as percent of Purchase Price</i>	1.23%	1.65%	0.65%	0.84%	0.45%	0.59%	0.34%	0.34%		
		<i>Broker's Commission as percent of Total Cost</i>	77.42%	72.88%	85.08%	82.53%	88.15%	86.29%	89.89%	89.80%		

Appendix B - National Reports

Comparative Analysis of Land Conveyancing in 5 European Member States

Peter L. Murray

2007

National Report - Real Estate Conveyancing in Estonia⁵

1. Legal Bases and Practical Execution of Real Estate Conveyancing

- a) General description of the process of a real estate purchase and sales transaction.

If you wish to purchase, sell, lease or rent real estate in Estonia, it is possible to use the assistance of real estate broker. The real estate brokers offer mediation service – they mediate between the buyer and seller. The role of the real estate brokers consists in establishing contact between the buyer and seller and contributing to agreement on the significant conditions of the contract.

Lawyers do not participate in the preparation of the purchase and sales contract – the contract is prepared by the Notary. A lawyer might act in the transaction as the counselor of one of the contracting parties. If there should occur any dispute in the execution of the contract, if one of the contracting parties does not fulfill the contract, or if one of the contracting parties fulfills the contract to some extent, but does not do so in appropriate manner, the lawyer is the representative of contracting party both in a non-judicial dispute between the parties and also any judicial dispute.

⁵ The Reporter thanks the Estonian Chamber of Notaries for comprehensive contributions to this National Report, and Attorney Maria Ait, Tallinn, Estonia, HLS LLM 2007, for research and editorial

A contract for the purchase and sale of real estate alienation is prepared and attested by the Notary who sets forth the details mentioned in the contract both from the registries and on the basis of the documents presented by the parties. The Notary equally represents and counsels in the conclusion of the contract both contract parties, explaining the circumstances pertaining to the contract and mentioning the restrictions related to the object of the contract.

In real estate offices dealing with real estate appraisal professional appraisers utilize price-lists established by the office proper. The fee for appraisal of an apartment starts from 1000-1200 Estonian kroons. The Notary has no right to demand appraisals from the contract parties, the appraisals are necessary for applying for a bank loan.

In an auction sale, the contract is considered concluded upon acceptance of the highest bid. It is presumed that the auctioneer is authorized to give consent to the best bid. A bidder is bound to his bid until a better bid is made. A bidder is not bound to a bid in the absence of a better bid, if no acceptance is given within a reasonable period of time following the bid. If several persons made equal bids at the same time and no better bid follows, the auctioneer has the right to select the person making a better bid among the auction participants making equal bids.

A pre-contract is an agreement, according to which the parties are obliged to conclude a contract in the future on the conditions agreed upon in the pre-contract. If the law requires a certain form for a binding contract, a pre-contract must also be

concluded in the same form in order to be legally binding. Since a notarial form of contract is legally required for the alienation of real estate, if a pre-contract concerning a real estate transaction is to be legally binding, it must also be approved by the Notary. In practice, parties to real estate transactions often sign printed form contracts provided by real estate brokers and make deposits of up to 5% of the purchase price in escrow with brokers to evidence the seriousness of their intent to enter into a binding contract. Although these non-notarial pre-contracts are not legally sufficient to compel a transfer of ownership of the subject premises, if the buyer fails to complete the purchase, the deposit can be turned over to the seller as a form of damages.

If the parties enter into a purchase and sales agreement prior to the actual transfer agreement, the buyer usually pays earnest money. The earnest money is the sum given by one contract party to the other contract party upon the conclusion of a contract and guaranteeing its fulfillment. When a contract is secured by earnest money and is fulfilled, it is presumed that the earnest money shall be applied to the fulfillment of the payment obligation. In case of impossibility of execution the earnest money shall be reimbursed. If the contract secured by the earnest money shall remain unfulfilled due to the fault of the party providing the earnest money, the earnest money shall be paid to the other contract party. If the contract party receiving the earnest money demands damages for loss inflicted on it due to the non-execution of contract, the earnest money shall be applied to the compensation. In case the contract secured by the earnest money shall remain unfulfilled due to other reason than the fault of the

contract party providing the earnest money, the contract party providing the earnest money may demand the reimbursement of the earnest money.

The contract shall be worded in cooperation between the customers and Notary – the customers express the wish on what is the object of agreement and the Notary words it in legally correct way and advises the customers, if the desired agreement is non-compliant with legislation.

b) Relevant Provisions of Estonian Real Estate Law

If a contract condition is for the benefit of a third party, everyone's agreement is necessary for determining the condition. The contract parties may amend the contract concluded for the benefit of a third party or terminate it also without the third party's consent, provided that legislation or contract shall not otherwise provide.

A contractual obligation shall be fulfilled in accordance with the contract or legislation. In the fulfillment of the obligation one should adhere to principles of good faith and rationality, taking into account customs and practice. The obligation shall be considered executed in appropriate manner, if it has been fulfilled to a person authorized for acceptance of fulfillment at the right time, in the right place and right manner. In case a creditor has accepted the item offered to it/him/her as the fulfillment of obligation, it is presumed that the fulfillment was complete, the item offered as the fulfillment was indebted and obligation was fulfilled in appropriate manner. The debtor shall fulfill the obligation with the quality corresponding to the contract or legislation. If

the quality of fulfillment of contractual obligation does not emanate from the contract or legislation, the contract party should fulfill the obligations taking into account the obligations with at least average quality. If for the fulfillment of obligation there is owed an object with type features, and the objects included in this type have different quality, the debtor shall fulfill the obligations with the object of at least average quality. The debtor shall fulfill the entire obligation at once, if it is possible and the contract or the nature of credit relations does not otherwise provide.

Monetary obligations may be fulfilled in cash. Monetary obligation can also be fulfilled in other way, if it has been agreed by the parties or if it is usually utilized in the economic activities in the place of payment. If the creditor has an account, which is meant for the settlement of accounts, in the credit institution in the state, where the monetary obligation should be fulfilled, the debtor may fulfill the obligation by transferring the indebted sum to this account, in case the creditor has not directly prohibited it. In case of fulfillment of monetary obligation by transferring the indebted sum to the creditor's account the obligation shall be considered fulfilled after the crediting of the creditor's account in the amount of the indebted sum. If the creditor accepts as the fulfillment of monetary obligation the cheque, promissory note or other similar instrument of payment offered to it/him/her and the instrument of payment is later cashed, the obligation shall be considered fulfilled following the acceptance of the instrument of payment.

In practice, if a buyer is purchasing with his own funds, he signs a funds transfer order at the time the transfer contract is signed at the office of the notary. If the buyer

is paying with funds being borrowed from a bank, the buyer also signs a transfer order to the seller, and the bank then transfers funds to the buyer's account for transfer to the seller.

The possession over the object is acquired through receiving the actual power over the object or over the means (e.g. keys to an apartment), which provide the opportunity of actual power over the object. For the acquisition of possession it is enough to have the agreement between the previous possessor and acquirer, in case the acquirer is able to execute actual power over the object. Indirect possession is acquired through the transference of the right to demand delivery of the object to the acquirer, in case the object alienator proper or a third party remains in possession of the object. The possession is transferred pursuant to the agreement entered in the contract between the contract parties – either already prior to the conclusion of the contract, during the conclusion of the contract or e.g. following the payment of the purchase sum. In practice possession is usually given at the time of payment of the purchase price and execution of the final transfer agreement. The possession finishes, when the possessor abandons the actual power over the object or loses it in another way. Temporary obstacle or hindrance to the execution of actual power shall not terminate the possession.

A contract concluded for the establishment of usufruct shall be attested by the Notary. Usufruct may be terminated upon the agreement between the usufructuary and owner. The usufructuary shall have the right to demand the termination of usufruct on

the condition that s/he compensates to the real estate owner the loss inflicted due to the termination of usufruct. The usufructuary shall notify the real estate owner of the wish to terminate the usufruct six months in advance. The real estate owner may demand the termination of the usufruct, if:

- 1) the usufruct has lost any significance for the usufructuary;
- 2) the loss substantially exceeds the usufructuary's benefit;
- 3) the usufructuary does not provide security to the real estate owner.

Ownership is complete legal power of a person over the object. The owner shall have the right to possess, use and command the object, and demand from all other parties to avoid the violation of these rights and elimination of the consequences of violation. Ownership occurs exclusively on the basis established by the legislation. For the transference of immovable property there is required a written agreement between the authorized person and another party, which is attested by the Notary (real-right contract) and performance of the corresponding entry in the land registry, unless legislation otherwise provides.

Estonia has no real estate tax, but rather a land tax of 1-2.5% of the land value per year. In case of acquisition of land or occurrence of the right of use before July 1 of the current year the land tax obligation occurs for the owner or user from July 1 of the same year. In case of acquisition of land or occurrence of the right of use following July 1 the land tax obligation occurs for the owner or user from January 1 of the year following the year of the acquisition of land or occurrence of the right of use. Upon the occurrence of land tax obligation for the new owner or user the land tax obligation

finishes for the previous owner or user. The obligation to pay the communal fees is transferred either at the time agreed in the contract (e.g. transference of possession) or with the transference of ownership.

For the conclusion of real estate transactions there is envisioned the notarial form, i.e. all real estate alienation contracts have to be attested by the Notary. Real estate alienation transactions cannot be performed in such way that the customer independently prepares the contract and the Notary attests the customer's signature on it. For the conclusion of a real estate conveyance the contracting parties address the Notary, who attests the contract and sends it to land registry, where the amendment of registry entry is performed.

There are no special rules for the alienation of condominiums and similar residential premises.

c) The Estonian Land Registry System

The entry into the land registry is obligatory for all ownership forms related to real estate. All real estate conveyancing transactions require the entry of amendments in the land registry. The land registry is operated by the land registry departments of the county courts, where the entries are made and amended by assistant judges. The entries in the land registry have legal power and the correctness of entries is presumed. Of existing land approximately 60 % is registered in the land registry.

All real estate is entered into the land registry, unless legislation otherwise provides. For each parcel of real estate entered into the land registry there is opened an independent registry part and a separate number is allocated to it (real estate number). Real estate owned by the state or local municipal entities is entered in the land registry, in case it is encumbered by real right or if the owner requests the performance of entry.

The real rights pertaining to real estate are entered into the land registry. In regard to limited real rights possessed by each subsequent owner of the real estate there is made a note on basis of the application of the real estate owner also into the land registry part of his/her real estate. The application may be unattested. Mortgages, as limited real rights, are registered in a fourth section of the registry. If a mortgagee requests, the existence of a mortgage can also be noted in the first section of the registry which lists the estates.

The process of registration is governed by regulations issued by competent registry officials, usually the district judge or assistant judge maintaining the registry. The right to submit a registration application shall be held by a person, whose right the entry concerns or in whose benefit the entry is made. The registration application must be approved by a Notary. In practice notaries prepare and approve the application for registration or re-registration and forward them to the registries.. The registration application approved by the Notary and the authorization document for the submission of registration application are considered equal to the digitally signed registration application and authorization document.

A registration application shall include in case of natural person applicant the name, personal ID-code (in case of its absence the date of birth) and address (residence), in case of private-law legal person the name, address and registry code if present, and in case of public-law person the name. The registration application shall include the real estate registry part number, the entry into which is applied for (excluding the application for entry into the opened registry part), and the content of the applied real right.

The registration application shall be supplemented by the following documents:

- 1) signed final transfer agreement ;
- 2) required approvals in the case of real estate where governmental or other approval is required for transfer;
- 3) transcript of court ruling or compulsory auction deed, if the registration is applied for on the basis of a court ruling or compulsory auction deed;
- 6) certificate of fee payment;
- 7) other documents necessary for registration and emanating from legislation.

The land registry is kept in the Estonian language. Documents in foreign language are submitted together with a translation into the Estonian language attested by a Notary. All money sums are transferred into the land registry in Estonian kroons.

All registration applications coming to the land registry department are immediately registered in the land registry journal and numbered in accordance with the time of arrival of the application.

After examining the registration application, the person competent for registration is required to make the entry regulation within three months following the day of acceptance of application. The application concerning the real estate alienation or encumbrance or making the note shall be examined no later than within one month following the day of arrival of the application. The judge nominated by the chairman of county or city court may prolong the period for registration in case of circumstances demanding further examination or revisions. If a registration application has deficiencies preventing registration or if there is missing a necessary document, the registry official responsible for making the entry shall set a deadline for the elimination of the deficiency.

In case the land registry makes an error in an entry, and the entry incorrectness is manifested before the person making the entry regulation has signed it, the correction is performed without making the new entry regulation. If there is an error in an entry, and error is manifested after the person making the entry regulation has signed it, the land registry department enters a proposed official correction of the incorrect entry and notifies the parties of the correction proposal, who have a specified period of time to present counter proposals. Following the expiration of the deadline the registration official makes the decision to correct the entry.

If any party suffers damage due to an incorrect entry in the land registry, the person suffering the loss may address the court for the compensation of damage.

In case of electronic land registry the land registry is the land registry part saved on the data carrier determined for this, which can be continuously reproduced in an

unchanged legible form. In case of electronic land registry, the land registry journal is also kept electronically, which is envisioned for internal use by the land registry department and authorized persons given access to this electronic journal. The order of keeping the electronic land registry journal is confirmed by the Minister of Justice. The data of the registry parts of all land registry departments are saved and stored in one data processing centre, with which the land registry departments have direct connection and which is determined by the Minister of Justice.

Starting from February 1, 2007 it is possible to transfer to the land registry the entry application via the information system “E-Notary”. E-Notary is a computer program utilized for the preparation of notarial final transfer agreements. It simultaneously provides the basis for a digital archive and enables communication with other registries. Entering the real estate number, E-Notary finds and displays with the help of the details from the electronic land registry the other details of the real estate – address, area, owner, encumbrances and restrictions, applications in procedure. It also finds and provides the opportunity to append to the contract from the Land Cadastre page the real estate plan, etc.

E-Notary is the Notary’s assistant in procuring the information required for a contract from data bases, wording the contract, conveyance of the contract to different registries and following the implementation process of the contract. The program complies and provides support to the other registries for observing the information from

the state registries transferred into the electronic form, information processing and change of information in the registries.

E-Notary, developed by the Chamber of Notaries, has high data security. Files are not kept as before in local computers, but in a central server, in the administration of which strict data security rules are observed.

2) More Detailed Description of Typical Real Estate Purchase and Sale Transaction

Real estate buyers and sellers usually find each other either via an advertisement published in printed media, on the Internet, or with the intermediation of a real estate broker. The role of the real estate broker is to find a person wishing to sell or buy real estate on terms which suit the customer. The commissions charged by real estate brokers differ, being dependent among other factors also on the field of activity.

Although Estonian law in the field of obligations provides the opportunity to use the system of offers and acceptances, in practice it is not implemented. Sometimes parties do fill out form purchase and sales agreements with the assistance of real estate brokers. These are not binding contracts for the transfer of real estate. They record the state of negotiations and, if a deposit has been paid, may regulate the handling of the deposit in case the transaction is not completed.

A binding contract is prepared in the Notary's office, where according to the customers' wish the Notary prepares the contract draft. In the conclusion of the contract, lawyers may represent the contract parties, counsel them and provide assistance in reaching the agreements between the parties. This is rarely done in the

case of ordinary residential real estate transactions. The notary is the representative of all contract parties, counseling them equally.

If consent of a third party (e.g. a spouse) is required for the completion of a transaction, the Notary mentions it to the customer and asks the customer to obtain the necessary consent. The parties agree on how the expenses for the notarial contract will be borne by the persons interested in the transaction.

No written appraisal is necessary for the Notary to prepare a contract. An appraisal is needed e.g. when applying for bank loan. In addition, when attesting the transaction no presentation of property inspection reports is necessary. Sometimes, in the case of improved property, the parties agree that the buyer shall have the right to have the property inspected before the transaction will become final.

The existence of environmental restrictions applicable to the property is determined by the Notary, and in case of restrictions they are added to the contract. The restrictions include a pre-emptive right of the state, the Notary conveys the contract to the Ministry of the Environment.

The Notary controls prior to the attestation of the contract the circumstances related to the ownership right of the object of contract.

There is no need for title insurance. Notaries are liable for their own mistakes in drafting contracts and effectuating real estate transfers

An existing mortgage can be waived if the mortgage holder is involved in the contract. However, usually the mortgage accompanies the real estate.

The sums emanating from the contract can be deposited on the Notary's account, from which the money is transferred in the period established by the contract (e.g. within 3 days following the presentation of the contract to the land registry). In the usual case the parties present bank transfer orders at the notary's office at the time of signing of the final transfer agreement.

The remedy of specific performance of contracts for purchase and sale of real estate is not excluded, but in practice it does not occur. In case of withdrawal from the contract each of the contract parties may demand the return of the items transferred on the basis of the contract and assignment of fruit and other benefits, if it transfers all the transferred items. If return or assignment is excluded due to the nature of the transferred items, among other factors, if the transferred items consist in the receipt of service or utilization of object; if the contract party has consumed, alienated, encumbered with the right of the third party or processed the transferred item; or if the transferred items are destroyed, instead of return or assignment the contract party is required to compensate the value of the transferred items. If the object subject to return or assignment has deteriorated, and the deterioration did not occur as the result of appropriate utilization of the object, the decrease of the object value should be compensated.

If two persons (parties of the balance of accounts) are obliged to pay to one another a money sum or fulfill the other obligation of the same kind, either of the parties (party balancing the account) may balance its claim against the claim of the other party, if the party balancing the account has the right to fulfill its obligation and demand from

the other party the fulfillment of its obligation. As the result of the balance of accounts the claims of the parties of the balance of accounts end in the overlapping amount from the moment, when they could be balanced, if the parties do not agree otherwise. If interest has already been paid for one or both claims, the balance of accounts does not go retroactively more than until the end of the last period of time, for which the interest was paid.

In case the contract parties do not reach an agreement pertaining to the claims emanating from the non-fulfillment of the contract, they should address the court for the settlement of dispute.

The transference of obligations is conducted in the order envisioned by the contract, but usually through the transference of ownership. The average period from the preparation of the contract until the performance of the entry in the land registry and transference of ownership depending on the region of operation constitutes 1 week to 1 month. The prerequisite for the transference of ownership is the real-right contract attested by the Notary and the registration application.

Transfer of ownership occurs upon making the entry in the land registry . The land registry entry has legal significance and the correctness of entries is presumed.

For all registrations and re-registrations in the land registry a state fee is charged. The sizes of state fees and the order of calculation is established by the state fee legislation. The Notary usually collects from the customer the state fee and transfers it to the account of the Ministry of the Finance. In some cases the customer

himself/herself pays the state fee, making a bank transfer or cash deposit at the bank to the account of the Ministry of the Finance.

3) Education and Role of Conveyancing Professionals

The Notary is the bearer of a public legal position, to whom the state has given the right to attest circumstances and events of legal significance and perform other official deeds securing legal certainty.

A Notary is a natural person, who fulfills the official function provided to her/him by the state through legislation. The Notary is neither a state official nor an entrepreneur. S/he is the representative of the liberal profession, who occupies the Notary position in his/her name and responsibility. The Notary is appointed for lifelong office. The number and work regions of the Notaries is determined by the Minister of Justice. The Notary's work region is the county. There are 15 work regions of the Notaries in Estonia, which as of February 1, 2007 employed the total of 94 Notaries.

The principal field of Notary's activities is the attestation of civil-law transactions significant for the persons. The Notary attestation increases the protection of the persons' rights and feeling of security in the solution of legal questions. The objective of the attestation is to secure the stability of the relations between persons and hereby avoid possible subsequent legal disputes. In the performance of the official deeds, the Notary is subject exclusively to legislation and other legal acts. The Notary makes the decisions pertaining to official deeds independently. Nobody has the right to issue to the Notary any obligatory instructions for the performance of official deeds.

The Notary is required to be impartial in regard to the immediate participants in the official deeds (such as real estate contracts) and also the persons, whose rights and interests are touched by the deed. The Notary shall secure that in the performance of the deed the interests of the inexperienced and incompetent participant would not be damaged. The Notary shall provide to the persons impartial legal advice.

Differently from the other counselors, the Notary is required equally to protect the interests of both parties and observe that the transaction would be balanced. The Notary shall also impartially consider the persons who are not direct participants in the Notary's official deed, but whose interests may be damaged through it. The Notary shall be credible in regard to all persons, whose rights and interests are touched upon by his/her official deeds.

A Notary is obliged to keep secret all information received through the official activities and the contents of the performed deeds. The requirement of confidentiality also includes the employees of the Notary office. Information concerning a Notarial action shall be provided by the Notary exclusively to the persons participating in it or their representatives, as well as to the court in civil, criminal and administrative cases and, as required by court regulations, to the investigative organs.

A Notary is personally liable for damages incurred by wrongful violation of the official obligations. All Notaries are required to carry professional liability insurance.

The Notary's deeds are mainly divided in three:

1. attestation of transactions, declaration of intention and other events of legal significance;
2. simpler deeds – mainly confirmation of signatures and transcripts;
3. settlement of inheritance cases.

Attestation is the Notary's principal official deed, as the result of which there is created the notarial instrument. The original of a notarial instrument is kept in the Notary's office. The participants in the transaction shall be issued copies of the instrument, which supplement the original in legal proceedings.

During the notarial attestation of a transaction the Notary confirms the personal identity of the persons signing the transaction. If a document is presented to a Notary solely for attestation, the notation by the notary is made on the document presented to the Notary a transcript is not preserved at the Notary's office.

The principal transactions subject to Notary attestation are as follows:

- real estate, construction or apartment acquisition or alienation contracts;
pledge contract, commercial pledge contract, contracts for the establishment of mortgage;
- other contracts for the establishment of limited real rights (e.g. building permit, real servitude, usufruct, personal right of utilization);
- contracts of alienation and pledge of the membership in building association;
- commercial association foundation contracts, merger and division contracts, contracts of alienation and pledge of the share of limited liability company;
- marital property contracts or contracts of division of the spouses' joint property;

- testaments;
- authorization contracts.

A party can ask a Notary for the attestation of other transactions, which do not require notarial attestation. .

When drafting and attesting to contracts for the transaction of real estate the Notary has an obligation to counsel both parties. The Notary is required to ascertain the significant facts and circumstances for the performance of the transaction. When the legal objectives have been established, the Notary shall counsel the participants in the transaction on the different opportunities for the performance of the transaction and explicate what are the advantages or deficiencies of one or another solution, what solution is the most correct, certain and practical in the present case.

In this respect the Notary is expected to try to make sure that mutual mistakes of fact and misapprehensions are excluded, that suspicions are dissolved, and that the transaction will not damage the interests of the inexperienced and incompetent participant. The Notary shall word the notarial final transfer agreement containing the declaration of intention of the participants in the transaction and his/her explanations, making sure that these are clear and unambiguously understood. The Notary helps through explanation to prevent thoughtless steps in significant legal questions when assuming obligations or assigning rights, as well as the damage to the rights and benefits of the persons with limited legal knowledge.

For securing the validity of the attested transaction the Notary follows the requirements for the performance of the deed. The Notary's primary tasks are to ascertain the personal identity, legal capacity and capacity to exercise will, marital status and right of representation. The Notary may represent the participants in the transaction in public registries, conveying to the registries the documents related to the completed official deeds.

Notary fees are fixed by legislation. The Notary must charge fees in the amount and order established by the Notary Fees Act. It is prohibited to the Notary to conclude agreements for changing the fee rates established by the legislation. In the attestation of the transactions, the basis for the calculation of the Notary fee is the value of the item or right constituting the object of the transaction.

A Notary instrument must be prepared in the Estonian language. According to the wish of the participants in the transaction, the Notary may prepare the Notary instrument in another language, if s/he has sufficient command of this language. In case a participant on the basis of his/her declaration or according to the Notary's observations has insufficient command of the Estonian language or if the Notary instrument is prepared in a foreign language, the Notary instrument shall be translated to the participants. In case a participant should demand it, the written translation shall be prepared and given for examination. In case the Notary does not translate himself/herself, a translator chose by a participant or Notary shall prepare the translation. According to the Language Act, the expenses related to the utilization of a translator shall be born by the participant requiring the translation.

The Ethics Code of the Chamber of Notaries establishes the professional ethics principles of the Notary as the bearer of a public-law profession. The objective of the Ethics Code is to contribute to the conscientious and impeccable maintenance of the Notary's profession, observance of the professional ethics principles and dignified behaviour. The fulfillment of these requirements is provided by the awareness of each Notary of the rights and obligations accompanying the Notary's position, adherence to the pledge given in the oath of office and public opinion.

4) Transaction Costs

The following elements of cost occur in transactions involving the purchase and sale of real estate. Some assumptions with respect to these costs are reflected in the table of costs for hypothetical transactions set forth below:

- a) Brokerage commissions vary according to the price list of the real estate office. Usually 3-5 % of the property value. A commission rate of 4% has been used as this rate is typical of the rate charged for apartments and residential property.
- b) Notary fees have been computed in accordance with the rates established in Notary Fee Act. The Notary fees depend on the value of the alienated property (~ 0,3 % of the transaction value).
- c) in case for the conclusion of the sales contract there should be submitted different documents, the contract party shall pay for this in case there is envisioned some fee for issuing these from various institutions.

- d) for licenses and operation permits and registrations of the Registry of Economic Activities, necessary for the activities to be carried out on the premises, the acquirer is expected to pay,
- e) the state fees according to the rates mentioned in the table included in the State Fees Act. Depend on the value of the alienated property.
- f) appraisal expenses according to the price list of the real estate office, loan borrowing expenses depend on the price list of the bank,
- g) Notary fee for a mortgage depends on the mortgage amount (in the calculation of the Notary fee the transaction value for the establishment of a mortgage equals $\frac{2}{3}$ of the real estate value).
- h) Electronic investigation of the ownership right from the land registry is for pay, when appearing in the land registry department free of charge. The Notaries have the opportunity to use the land registry free of charge.
- i) No title insurance is envisioned.
- j) There is no real estate transfer tax as such. However if a seller of real estate realizes a profit on the sale, there is income tax constituting 22 % of the purchase sum. No income tax is levied on the revenue received from the alienation of real estate, construction or apartment as movable property or membership in a residential association if:
 - 1) a significant part of the real estate or the object of the apartment property or building right are the residential premises, which the taxpayer prior to alienation used as his/her permanent or principal residence, or

2) a significant part of the real estate or the object of the apartment property or building right are the residential premises, and the real estate has been transferred into the taxpayer's ownership by means of restitution of the illegally alienated property, or

3) a significant part of the real estate or the object of the apartment property or building right are residential premises and the mentioned residential premises and the land related to them have been transferred into the taxpayer's ownership by means of privatisation with the right of pre-emption, and the size of the real estate does not exceed 2 hectares, or

4) a summer cottage or garden house as movable property or significant part of immovable property has been in the taxpayer's ownership for more than two years, and the size of the real estate does not exceed 0,25 hectares, or;

5) the taxpayer used the construction or apartment as movable property prior to the alienation as his/her permanent or principal residence or if the construction or apartment as movable property has been transferred into the taxpayer's ownership by means of restitution of the illegally alienated property or privatisation with the right of pre-emption, or

6) the summer cottage or garden house is a construction as movable property and has been in the taxpayer's ownership for more than two

years, or

7) the taxpayer used as the member of the residential association the apartment located in the residential building owned by the residential association as his/her permanent or principal residence.

Table C-1 – Real Estate Transaction Costs in Estonia (national currency)

	<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>
<i>Costs</i>	<i>Broker's Commission</i>	62,500kr	62,500kr	156,250kr	156,250kr	312,500kr	312,500kr	625,000kr
	<i>Purchase Price</i>	1,562,500kr	1,562,500kr	3,906,250kr	3,906,250kr	7,812,500kr	7,812,500kr	15,625,000kr
	<i>Mortgage Amount</i>		1,171,815kr		2,929,867kr		6,250,000kr	11,718,750kr
	<i>Notary Fee - Contract</i>	5,915kr		14,399kr		28,540kr		56,562kr
	<i>Notary Fee Combined Contract & Mortgage</i>		6,976kr		15,109kr		33,489kr	65,156kr
	<i>Recording/Registration Fee</i>	1,717kr	2,125kr	4,593kr	4,750kr	11,783kr	14,203kr	25,000kr
<i>Total Transfer Costs</i>	70,132kr	71,601kr	175,242kr	176,109kr	352,823kr	360,192kr	706,562kr	721,046kr
<i>Total Conveyancing Fees</i>	5,915kr	6,976kr	14,399kr	15,109kr	28,540kr	33,489kr	56,562kr	65,156kr
<i>Conveyancing Fees as percent of Total Costs</i>	8.43%	9.74%	8.22%	8.58%	8.09%	9.30%	8.01%	9.04%
<i>Conveyancing Fees as percent of Purchase Price</i>	0.38%	0.45%	0.37%	0.39%	0.37%	0.43%	0.36%	0.42%
<i>Broker's Commission as percent of Total Cost</i>	89.12%	87.29%	89.16%	88.72%	88.57%	86.76%	88.46%	86.68%

Comparative Analysis of Land Conveyancing in 5 European Member States

Peter L. Murray

2007

National Report - Real Estate Conveyancing in France⁶

1. Legal Bases and Practical Execution of Real Estate Conveyancing

- a. General description of the process of a real estate purchase and sales transaction.

An intermediary is involved in 52% of residential real estate transactions (real estate agents, real estate brokers and notaries. Notaries represent nearly 10% of this fraction⁷). There are no intermediaries for 48% of transactions, as the deal is negotiated between individuals. The market share of transactions between individuals has been stable for several years now.

The broker's role is to:

- check the value of the asset for sale
- obtain an exclusive or non exclusive mandate to sell
- prepare marketing documents
- place advertisements in various real estate media and particularly on the internet
- advertise the property for sale in shop window.
- find a buyer
- organise viewings with the potential buyers
- monitor the sales process with the seller
- in some cases prepare a preliminary agreement between the seller and the buyer

⁶ The Reporter thanks Maitre Jean-Pierre Ferret and Maitre Olivier Pavy for their comprehensive and helpful contributions to this National Report.

⁷ The term "broker" as hereinafter used will refer to real estate agents, whether acting for buyer or seller, as well as notaries, when functioning as real estate agents and not performing functions reserved to notaries.

- send the file to the notary for the completion of the sales deed
- attend the signing of the final transfer agreement and collect the brokerage fees due.

In a private transaction between two individuals the notary drafts all agreements. He prepares the preliminary agreement and then, later, the final transfer agreement. Whatever the case, notaries guarantee the fairness of the contract. In most cases, it is the seller's notary who drafts the preliminary agreement because he has the seller's title deed to the property.

When there is a broker involved in the transaction, sometimes the broker may draft the preliminary contract and deposit any down payment (usually 10% of the purchase price) in his own escrow account. In rare cases the broker may consult a notary for assistance. More frequently the broker refers the clients to a notary for the drafting of the preliminary agreement as well as the final transfer agreement.

When the sale is negotiated by a notary, acting as a broker, the latter will draft the preliminary contract alone or with the assistance of another notary (same as above). The presence of more than one notary does not result in any additional cost for the buyer. The French national regulation for notaries defines procedures for fee sharing.

The notary drafts the agreements for both parties (seller/buyer) with a duty to advise both parties. The notary is a «one-stop shop» for the buyer since he centralises all the documents and information for executing the sale. External

participations are only involved on a “vendor” basis. Pursuant to a 1955 decree, any change in the title to a property must be drafted in an official instrument, i.e. an instrument drafted by and signed under the supervision of a notary.

Once the preliminary agreement has been signed, the notary is responsible for making sure that all conditions precedent to performance of the agreement have been complied with before the final transfer agreement can be signed.

Financing for the purchase must be obtained within a contractual period mentioned in the preliminary agreement (a mandatory minimum period was defined by the law of July 13, 1979 – for the protection of the property borrower)

The buyer becomes the owner on the day the final transfer agreement is signed. The certificate of ownership and the statement of costs are sent after the registration formalities have been duly carried out in the national property register.

At the signing of the final transfer agreement, the notary breaks down the taxes on the property sold between the seller and the buyer. After registering the sale, the land registry department changes the building owner’s name in order to send future tax bills directly to the new owner. After the signature of the final sales deed the notary takes care of the publication formalities in the property register.

i. Features of French real estate law relating to conveyancing.

Pursuant to the French civil code (art 1583 Code Civil) a sale of real estate is complete when there is agreement on the thing to be sold and the price. To permit registration of the sale in the property register, this agreement must be noted in an official instrument, in other words, an instrument drawn up by a notary.

When transferring an apartment or condominium there is a special obligation to consult the building administrators to obtain:

- all the information on the building (the building's records)
- copy of the minutes of the last co-owners annual meeting
- the seller's situation concerning payment of co-ownership charges
- certificate for payment of the sums due by the seller to the co-ownership at the final sale (payment made by the notary by debiting from the sale price)

ii. The French Real Estate Registry

France has a nationwide system for registration of titles to and encumbrances on real estate. Except for the three departments of Alsace-Moselle (Haut Rhin – Bas Rhin and Moselle), the tax departments (mortgage office) keep the register of publications of changes in property ownership.

The department is run by a registrar of mortgages in charge of keeping the register and ensuring compliance with recording deadlines.

In Alsace Moselle, the property register is known as the “land register” and is kept by a magistrate. The land register is managed within the district courts and therefore depends on the ministry of justice. The tasks are performed by magistrates (known as land register magistrates) assisted by court clerks present in each district court in Alsace and Moselle.

Registration is obligatory for all instruments affecting title to real estate. Currently 100% of all property in private ownership is registered. The exception is

property which is in the public domain. This exception is being eliminated by the new French Code General of the Property of the Public People (CGPPP) . Registration is not the event on which title passes. A signed final sales instrument is sufficient for change of ownership. However a change of ownership is protected against third parties only after the sales instrument is recorded in the Mortgage Office.

The average time required to register a transfer of real estate is 42 days. If there are errors or omissions in a submission to the Registry the document is refused and must be revised before being resubmitted. If the mistake originates from the instrument itself and prevents the publication, the notary must draw up a corrective instrument.

Registry files and documents are maintained as electronic files on computerized databases. The computer files are under the jurisdiction of the Inland Revenue Department of the Ministry of Finance. Documents must be filed for registration in the registry office for the sector in which the property is located.

Currently the French Registry System permits notaries electronic access to the registry to check the status of titles. The Inland Revenue Department has developed a method for the electronic remittance of taxes and the issuance of an electronic receipt that permits documents to be registered. There is currently direct electronic submission of mortgages and mortgage discharges. Within 2007 it is expected that French notaries will be able to submit applications for publication of change of ownership electronically and even effect the change in registrations

electronically themselves. This will permit a transfer agreement or mortgage to be registered on the same day that it is signed.

The property is generally appraised when the transaction is negotiated by a notary. Appraisals are much more infrequent in other kinds of transactions (directly between individuals or brokered). Building inspections are rarely requested or carried out except for buildings that require extensive restoration.

French law requires that a number of mandatory technical surveys must be carried out before the preliminary contract:

- asbestos– lead – termites (see prefectural decrees)
- the building's classification in terms of exposure to natural and/or technological hazards
- survey of the property's energy efficiency
- control safety of the gas installation (as of 01/11/2007)
- checking the electricity installation (pending measure)
- checking the sewage system (as of 1/1/2013).
- for co-ownership buildings (condominiums), the seller must certify the precise surface area of the premises being sold.

When preparing for the signing of the final transfer agreement, the notary consults the creditors registered on the building in order to find out the amount of the capital to be reimbursed. Outstanding loans are paid off by debit from the sales price and the appropriate discharge formalities.

1. Detailed Description of a Purchase and Sale of Real Estate in France.

Any one who wants to acquire or sell property in France is faced with two options: - find the buyer or seller by themselves (for instance through placing classified ads) or use the services of an intermediary - estate agent, notary or attorney (especially if they are foreigners).

A real estate broker is entitled to a commission on the property transaction if he succeeds in finding a buyer for the seller or vice versa. The profession of estate agent is strictly regulated by the law of January 2, 1970. One can only be an intermediary if one has received a mandate from the seller (in most cases) or possibly from a person looking for property to buy.

The mandate given to the estate agent must include three crucial remarks otherwise the mandate will be considered null and void

- The duration of the mandate
- The amount of the commission due to the estate agent.
- The person (seller or buyer) who must pay the commission (generally the seller).
- The estate agent's commission is usually calculated as a percentage of the building's sale price. It is often paid by the seller but can be decided by mutual agreement that it will be paid by the buyer. The commission is effectively due to the estate agent only after the transaction has been completed (article 6 of the law of 2/1/1970).
- The estate agent is not entitled to fees when:
 - The seller has signed a sales contract not accepted by the potential buyer.
 - The sales contract signed by both parties contains a condition precedent not yet realized or a premium option.

The Notary: is a mandatory participant in the sale. He handles all the legal paperwork and drafts the official documents. The notary may also participate in the

sale as an intermediary.(broker) but is not permitted to serve solely as a broker in transactions in which he does not serve as notary. In this case, the notary is paid a negotiation fee which is set by a scale. To be paid this negotiation fee, the notary must have:

- A written mandate from the client specifying how the fee is to be calculated
- Arranged the meeting between the buyer and the seller.
- Drafted the instruments or participated in their drafting.

In some sales transactions, especially ones involving foreign purchasers, an attorney may be consulted to represent and advise his clients at all stages of the property acquisition or sale process from the search for the property through the negotiation of the preliminary contract down to the verification of the terms of sale. An attorney retained by the buyers informs them on the amount of the fees directly linked to the acquisition of the property and on French property tax laws. A seller's attorney advises the seller on the possible taxes to be paid after the sale, especially if the seller is a foreigner.

A real estate purchase and sales transaction usually takes place in two stages: (1) Signature of a preliminary sales contract; (2) Signature of the final transfer agreement drawn up by a notary.

A. *Stage 1: The sales contract.*

As soon as a seller and a potential buyer agree on the terms of a sale, they can sign a sales contract ("*Promesse de vente*" or "*Compromis de vente*"). The sales contract is an agreement under which the seller promises to sell his/or her property to the potential buyer in consideration for a determined price while granting the potential buyer a period of time to perform the steps necessary to become the confirmed buyer.

There are two types of sales contracts, a) the unilateral sales contract, and b) the synallagmatic sales contract

1) The Unilateral sales contract

Under the unilateral sales contract, the seller agrees to sell his property to the potential buyer for a fixed price. The potential buyer has the option of buying or not buying the property. He can decide during the time set forth in the promise to exercise the "option" and acquire the property or not. Although the beneficiary of the option is not bound to buy, he must pay a reservation fee, which often forces him to buy. The purchaser has a 7-day right of rescission starting with the signature of the unilateral sales contract. If he exercises this right the reserved amount of money is restored to him within 21 days.)

This fee constitutes the consideration for the benefit granted by the seller to the beneficiary of the promise by agreeing to reserve his property for a certain time.

The reservation fee is generally 10% of the sale price. It is paid to the intermediary (broker or notary) who drafts the promise. If the beneficiary of the option decides to buy during the option period, the amount of the fee is deducted from the

purchase price. The option must be exercised under the conditions set forth in the agreement (often by registered letter with acknowledgement of receipt). If the beneficiary does not exercise the option due to his own reasons, the seller keeps the reservation fee as compensation. If the sales contract was signed subject to a condition precedent (obtaining a loan or a planning permit for example) which did not occur, the amount of the reservation fee must be returned to the beneficiary on production of reasonable documentary in proof of inability to obtain the required permit or loan.

In order to be valid, a non-notarial sales contract must be registered within 10 days of the acceptance of the promise (article 1840 of the French General tax code). This time frame is extended to one month if the instrument was drafted by a notary.

The effects of a unilateral sales contract vary according to point in time, namely before the option is exercised (before the beneficiary of the promise declares his intention to buy) and after the exercise of the option.

Before the option is exercised the promising party remains owner of the property and may continue to use it but must in return assume the risks. He cannot sell the property to another person other than the beneficiary of the promise at the risk of being held liable and having to pay compensation. The amount of any such compensation may be defined in the agreement, otherwise will be fixed by the judge. If at the end of the option period, the beneficiary has not exercised the option, the promise will be considered as obsolete and the promising party can fully dispose of his property. This rarely happens, as the beneficiary does not wish to lose the 10% fee already paid.

After the option has been exercised a bilateral contract for sale is formed but will only produce its legal effects once the official sale has been carried out at the notary's office. If one of the parties refuses to negotiate the sale in the office of the notary, that party can be obliged to do so by legal means.

(2) The synallagmatic sales contract. The parties agree, one to sell, the other to buy, the property at a fixed price. The synallagmatic agreement differs from the unilateral agreement in the sense that it includes the agreement of the seller and the buyer. Pursuant to article 1589 of the Civil Code, "A sales contract is the same as a sale, where there is reciprocal consent of both parties as to the thing and the price". The buyer must therefore measure the scope of his commitment as he gives his final agreement. Nevertheless, the parties often agree to include one or two conditions precedent in the promise. The most common conditions precedent include in particular, obtaining the loan by the buyer or the non exercise of the pre-emptive right.

If the sales contract includes a condition precedent, the sale, although already formed, is not final since it will depend on a conditional, future and uncertain event (article 1168 of the Civil code) which might not occur. The synallagmatic sales contract can entered into by private signature. In which case, it must be drawn up in at least duplicate (article 1325 of the Civil Code) or in the office of a notary. It does not need to be recorded to be valid. The parties generally decide that a 10% advance will be paid by the buyer. The buyer can then decide to cancel the acquisition and lose this sum. If the seller decides not to sell, he will be required to return twice the amount of the earnest money received to the buyer.

2) Content of the sales contract

Both unilateral and synallagmatic sales contracts must contain:

- The civil status of the parties
- The essential data concerning the sold property, as well as the origin of the property.
- The surface area of the privately-owned parts if it concerns the sale of a unit in a condominium (Carrez law on the surface area)
- The sales price.
- A remark stating that the price will be paid directly or indirectly, even in part, with the help of a loan (article L 312.15 of the Consumer Code).
- The execution time, in other words, the period at the end of which the sale instrument must be signed with the notary. This is generally, two to four months.
- The cooling-off period. The buyer has a period of 7 days to change his mind (article L 271.1 of the French Construction and Housing Code).

This cooling off period begins as from receipt by the buyer of a copy of the sales contract sent by registered letter with acknowledgement of receipt. A buyer who changes his mind within a period of 7 days (following the registered letter with acknowledgement of receipt) does not suffer any kind of financial penalty. According to the law of 1/6/2001, the buyer cannot pay a deposit during the cooling-off period unless it is an acquisition contract for a new building. If the sales contract is entered into by a professional with a financial warranty and if the buyer changes his mind, his deposit must be returned to him within a period of 21 days.

The seller must also give the potential buyer a certain number of documents to certify the soundness of the property

- Certificates as to the presence or absence of asbestos, lead paint, and termites (see prefectural decrees)
- The building's classification in terms of exposure to natural and/or technological hazards
- Survey of the property's energy efficiency

3) Contractual conditions based on financing

A sales contract may contain a condition that protects the buyer who wishes to finance a property transaction through one or several loans (article L312.16 of the Consumer Code). If the buyer does not obtain the solicited loan, the sales contract becomes null and void.

B. Stage 2: The execution of the official transfer agreement

The notary handles the formalities linked to the sale. He also collects for the central and local governments the rights or taxes due each time the property changes ownership.

The parties are free to choose any notary they want. Each party may choose to have his own notary without having to pay more fees for that matter.

After the sale, the notary must record the sale in the property register at the relevant address in the building's sector.

Transaction Costs.

The appended table estimates transaction costs for various typical transactions involving residential real estate. Brokerage commissions can vary substantially. They are estimated at 6%, which is near the average for the property values involved in this study.

Notarial fees have been derived from the statutory schedule of notarial emoluments. Taxes and filing fees are likewise derived from statutory sources.

When a notary also acts as a real estate broker, the fee that may be charged for the brokerage function is also regulated by statute. In all cases the total compensation to the notary for performing both functions is substantially less than the total compensation payable to a broker and a notary to perform the same functions.

TABLE C-2 – Real Estate Transfer Costs in France

	<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>	
<i>Costs</i>	<i>Broker's Commission</i>	6,000€	6,000€	15,000€	15,000€	30,000€	30,000€	60,000€	60,000€
	<i>Purchase Price</i>	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
	<i>Notary Fee - Contract</i>	1,154€	1,154€	2,391€	2,391€	4,454€	4,454€	8,579€	8,579€
	<i>Notary Fee - Mortgage</i>		316€		522€		1,210€		2,172€
	<i>Notary's Overheads Charge</i>	200€	200€	300€	300€	300€	300€	300€	300€
	<i>Real Estate Transfer Tax</i>	5,090€	5,090€	12,725€	12,725€	25,450€	25,450€	50,900€	50,900€
	<i>Recording/Registration Fee</i>	100€	100€	250€	250€	500€	500€	1,000€	1,000€
	<i>Mortgage Registration Fee</i>		45€		90€		240€		450€
<i>Total Transfer Costs</i>	12,544€	12,905€	30,666€	31,278€	60,704€	62,154€	120,779€	123,401€	
<i>Total Conveyancing Fees</i>	1,354€	1,670€	2,691€	3,213€	4,754€	5,964€	8,879€	11,051€	
<i>Convenancing Fees as percent of Total Costs</i>	10.79%	12.94%	8.78%	10.27%	7.83%	9.60%	7.35%	8.96%	
<i>Conveyancing Fees as percent of Purchase Price</i>	1.35%	1.67%	1.08%	1.29%	0.95%	1.19%	0.89%	1.11%	
<i>Broker's Commission as percent of Total Cost</i>	47.83%	46.49%	48.91%	47.96%	49.42%	48.27%	49.68%	48.62%	

Comparative Analysis of Land Conveyancing in 5 European Member States

Peter L. Murray

2007

National Report - Real Estate Conveyancing in Germany⁸

A. Legal Foundations and Practical Proceedings of a Real Estate Transaction

1. Course of a Typical Real Estate Transaction

An owner of a piece of real estate who wishes to sell his property puts it on the market, either on his own or with the help of a real estate broker. Once the buyer and seller have found one another and agreed on the essential key points of the contract of sale, the buyer consults with his bank to establish the terms of the financing of the purchase price. After that, the parties engage the services of a notary to accomplish the

⁸ The reporter thanks Dr. Wolfgang Roesing for comprehensive contributions to this National Report and Benjamin Letzler, HLS 2007 for the English translation.

transaction. The notary electronically examines the Land Register (Grundbuch). At a meeting with the parties, he inquires into the details of the intended contract. He explains to the parties the legal background to the contract, notes any risks that may exist, and makes specific suggestions for minimizing risks.

The notary then drafts the sales and transfer agreement on the basis of his conversation with the parties and his examination of the Land Register and sends it to the parties for their review. After the notary has answered any remaining questions from the parties, an appointment is made for the notarial documentation of the contract. For contracts of sale between consumers and entrepreneurs, the law generally requires that the draft contract be sent to the consumer at least 14 days in advance of the final documentation. In parallel to the preparation of the contract, the financing bank will communicate to the notary the economic terms of the mortgage leaving it to him to draw up a mortgage document that adequately serves these guidelines.

At the documentation session, the notary reads the contract of sale aloud to the parties and once again explains the meaning of the individual provisions. Should the need arise for changes to the agreement, the notary will generally make these changes to the contract text on the spot. The mortgage is generally documented right after the documentation of the sales and transfer agreement.

After the documentation of the contract, the notary applies for the registration of a priority notice with the land register that serves to secure the buyer's rank and protects him against the seller's insolvency as well as intervening rights of third parties. The notary also obtains all of the declarations necessary for the buyer to acquire, after

payment of the purchase price and the transfer tax, unencumbered ownership of the property (e.g. waiver of any statutory or contractual pre-emption rights of local authorities, condominium associations, etc., creditors' consent to the cancellation of encumbrances not assumed by the buyer). The notary also notifies the Finance Office responsible for levying the land transfer tax; the Finance Office in turn issues a corresponding tax assessment notice to the buyer.

Once the notary has all of the declarations necessary for the buyer to acquire unencumbered ownership, he communicates to the parties that the purchase price is due.

At this time, the financing bank or, if outside financing is not being used, the buyer pays the purchase price. To the extent that holders of unassumed encumbrances on the real estate demand payments for discharging their claims, these payments are made directly to the creditors and deducted from the purchase price. The remainder of the purchase price is then paid over to the seller himself.

Matching payment of the purchase price with delivery, the keys to the purchase property are handed over to the buyer. Possession, right to use, and responsibility for the property (= economic ownership), passes to the buyer at this point.

After payment of the purchase price, the notary is notified accordingly. As soon as the notary has confirmation from the Finance Office that the land transfer tax has been paid, he will apply for the registration of the property in the Land Register to be transferred and the unassumed encumbrances on land to be erased. With the transfer in the Land Register, legal ownership passes to the buyer.

2. Fundamentals of Real Estate Law with Regard to Transfers of Property

a) Legal Bases

The legal provisions essential for the drafting and execution of a real estate contract of sale are to be found in the following laws:

- The Bürgerliches Gesetzbuch (BGB, German Civil Code), esp. §§ 433 ff. BGB on the sales contract, §§ 873 ff. BGB on real estate law, and §§ 90 ff. BGB on the term “object of property” (Sache).
- The Grundbuchordnung (GBO, Land Register Code), which governs the composition of the Land Register and the procedures to be observed.
- The Wohnungseigentumsgesetz (WEG, Apartment Ownership Law) with special provisions for apartment ownership.
- The Erbbaurechtsverordnung (ErbbauVO, the Heritable Building Rights Ordinance) with special provisions for heritable building rights.
- Numerous public-law provisions, and in particular: the Baugesetzbuch (BauGB, Town and Country Planning Code) (the local authorities’ pre-emption rights, provisions on development costs), Grundstücksverkehrsgesetz (Real Estate Transaction Law, requiring official authorization for the sale of lands used for agriculture and forestry), Grundstücksverkehrsordnung (Real Estate Transaction Ordinance, applicable in the area of the former GDR, requiring official authorization for sales contracts to secure possible restitution claims based on

dispossessions that occurred in the German Democratic Republic), and environmental protection laws (pre-emption rights).

b) The Principles of Separation and Abstraction

German law is based on the so-called principles of separation and abstraction. According to the principle of separation one has to distinguish between the obligatory sales agreement and the transfer agreement as two separate contracts. The sales agreement merely establishes the obligation to transfer title, whereas the transfer agreement fulfils this obligation by effectuating the transfer of legal ownership.

The principle of abstraction states that defects in the (obligatory) sales agreement as a rule do not affect the validity of the transfer agreement. Only in exceptional cases will a defect lead to the invalidity of both agreements (e.g., when the seller lacks legal capacity). However, should the buyer become owner of a property on the basis of a valid transfer agreement, though the (obligatory) sales agreement is invalid, the seller will have a claim to have the property returned and transferred back to him under the legal provisions governing unjust enrichment (§§ 812 ff. BGB).

The principles of separation and abstraction serve to enhance legal certainty with regard to title in that the validity of the (obligatory) sales agreement which due to the complexity of issues involved generally is more prone to legal defects than is the transfer agreement does not affect the validity of the transfer of title.

Both the sales agreement and the transfer agreement require notarial documentation to be valid (§ 311b para. 1 BGB for the sales agreement; §§ 873, 925 BGB for the transfer agreement). Formal defects of the sales agreement can be cured

when the transfer agreement is documented and the change of owners is recorded in the Land Register. In practice, both the sales and the transfer agreement are generally contained in the same notarial document.

c) Special Features of Apartment Ownership

In Germany, the principle applies that ownership of land extends to all objects (Sachen) permanently attached to the ground (essential components, §§ 94, 95 BGB). Separate ownership of real parts of buildings is not possible.

The WEG (Apartment Ownership Act) modifies this principle by allowing for the creation of apartment ownership. The law defines apartment ownership as a co-owner's interest in land inseparably linked to special ownership of certain closed spaces used for residential purposes. Each of these units of apartment ownership has its own page in the Land Register.

The transfer of apartment ownership generally follows the same rules as the transfer of land, § 4 para. 3 WEG. Differences can nonetheless arise from the fact that allowances can be made, when first creating apartment ownership, for disposition over individual units of apartment ownership to be permitted only with the consent of the other apartment owners or of the management of the apartment building. If such consent requirements have been instituted, a contract will only come into effect when these consents have been submitted.

d) Special Features of Heritable Building Rights

The ErbbauVO (Heritable Building Rights Ordinance) provides that a plot of land can be encumbered to the benefit of a third party, who acquires the alienable and

heritable right to have a structure on or under the surface of the plot of land, § 1 para. 1 ErbbauVO. This heritable building right represents an additional exception to the principle that land and its structures share a common legal fate. A heritable building right appears on its own page in the Land Register. Though the heritable building right is designated a right related to real estate, it is nonetheless transferred essentially according to the rules governing real estate itself, § 11 ErbbauVO. When the heritable building right is established, an agreement can be made requiring the consent of the owner of the plot of land encumbered with the heritable building right to the sale or encumbrance of the heritable building right. This consent then becomes an additional precondition for the effectiveness of the sales contract and the transfer of the heritable building right.

e) Charges on Real Property

Of the charges on real property, only Grundschulden (non-accessory mortgages) and Hypotheken (accessory mortgages) are of practical significance, and in business practice, credit institutions employ the Grundschulden almost exclusively. The reason for this lies with the greater flexibility of the Grundschuld in that the Grundschuld – in contrast to the Hypothek – is not accessory to the secured claim.

With a Hypothek, the security interest depends on the continued existence of the claim. Should the claim be extinguished, the bank loses, by operation of law, the security on the real estate as well. On the other hand, whenever a new claim shall be

secured or the secured claim be exchanged, a new Hypothek must be created, or the notary must be retained again to modify the existing Hypothek.

The relevant legal provisions define the Grundschild, by contrast, as independent of the continued existence of the secured claim. The Grundschild is initially unaffected when the claim is extinguished, that is, when the loan is repaid. The security on the real estate and the secured claim are, however, connected to one another through contractual agreements (the so-called security agreement). The security agreement states that the debtor can oppose the creditor's utilization of the security for as long as he stays current on his loan obligations. If the mortgage no longer secures a claim, the owner can demand the erasure of the encumbrance. A formless change to the security contract suffices in the event that a new claim should be secured or the secured claims be exchanged. The Grundschild itself need not be changed.

The Grundschild (like the Hypothek as well) comes about through an appropriate agreement between the owner of the property and the creditor, followed by the entry of the mortgage into the Land Register (§§ 873, 1191 BGB). Although the agreement to set up either form of mortgage requires no form to be valid in itself, entry into the Land Register requires at least the notarial certification of the signature of the property owner on the document establishing the land charge. In practice, however, land charges are notarially documented almost without exception, because the banks insist on receiving title that is immediately enforceable. To make this possible, the property owner must submit himself to immediate enforceability in a notarial document;

certification of signature alone is insufficient, § 794 para. 1 no. 5 ZPO (Zivilprozessordnung, German Code of Civil Procedure). The advantage of an immediately enforceable title is that the bank can directly initiate compulsory sale proceedings should the debtor cease to satisfy his duties of payment. This avoids time-consuming and costly court proceedings in which the debtor would otherwise have to be ordered by the court to allow foreclosure proceedings. In this way the enforceable notarial document replaces the court order as the basis for the compulsory sale. At the same time, the notary attempts to protect the debtor's legal interests by way of intensive explanation of the consequences of such submission to immediate enforceability. Also, during the compulsory sale proceedings the debtor could raise objections to the title claim with the court.

Regardless of whether the title being enforced is a court order or a notarial document, the compulsory sale takes place through a specific proceeding of the local court (Amtsgericht), acting as the competent enforcement authority. Sale of the property outside of a public auction by the court can only take place with the consent of all parties, including the owner. Such private sales are not uncommon, since they often achieve a higher price for the property than would a public auction.

Grundschulden can be set up with or without an accompanying mortgage certificate. In practice, though, the right to such certificate will generally be waived to save costs and avoid the risk of a later loss of the certificate. The transfer of an uncertificated land charge to a new creditor must be entered into the Land Register,

which in turn requires presenting the prior creditor's declaration of transfer in a notarial act (notarially documented or with certified signature).

f) Priority Notice, §§ 883, 888 BGB

Priority notice is a special means of security that is a standard usage in real estate contracts of sale for securing the buyer's claim to transfer of the property. The priority notice comes into being once it has been entered into the Land Register and the underlying secured claim in fact exists. Entry into the Land Register can take place on the basis of the property owner's consent to the registration, which consent must be declared in a notarial act.

Priority notice functions like a reservation in the Land Register. Thus, any registration in the Land Register following entry of the priority notice (encumbrances of the property, transfers of ownership, etc.) will be invalid vis-à-vis the beneficiary of the priority notice. Hence, the priority notice does not freeze the Land Register, but the buyer can demand the erasure of entries that are invalid vis-à-vis him, § 888 BGB. The priority notice also provides protection for the buyer in the case of the seller's insolvency. The insolvency administrator is obliged to fulfill in natura a claim secured by priority notice (§ 106 Insolvenzordnung, German Insolvency Law). The buyer is not relegated to a monetary claim subject to reduction according to the insolvency ratio of assets to claims.

g) Pre-emption Rights under Public Law

Of particular significance in the execution of real estate contracts of sale is the local authority's pre-emption right pursuant to §§ 24 ff. BauGB, which must be

respected in every contract of sale for real estate. The pre-emption right is linked to certain preconditions, and can only be exercised by the local authority when the public welfare justifies so. After the sale of real estate, ownership can only be transferred if the competent local authority has confirmed either the irrelevancy of the pre-emption right in the given case or its intention not to exercise the right. The notary will obtain this confirmation for the parties and file it with the Land Register.

Additional pre-emption rights exist under specific acts, in particular pre-emption rights under environmental protection law and historic monument preservation law. During the drafting of the contracts, the notary also has to take these rights into consideration as they arise.

h) Requirements for Authorizations Under Public Law

Among the many requirements for authorizations under public law, the Grundstücksverkehrsgesetz (Law on the Transfer of Real Estate) and the Grundstücksverkehrsordnung (Regulation on the Sale of Real Estate) are particularly relevant in practice. Under certain circumstances, the Grundstücksverkehrsgesetz requires state authorization of contracts of sale concerning agricultural and forestry real estate. The Grundstücksverkehrsordnung must be observed in the sale of real estate situated in the former GDR. In the latter case, the validity of the contracts of sale depends on a state authorization in order to secure possible restitution claims based on former dispossession within the GDR. Regardless of the kind of authorization arising under public law, it will be up to the notary to seek it on behalf of the parties.

3. The Land Register System in Germany

a) The Cadastral Map (Liegenschaftskataster) and the Land Register (Grundbuch)

In Germany, real estate is recorded in two registers, the Cadastral Map and the Land Register. The Cadastral Map contains detailed specifications on the actual dimensions of real estate (maps on the location of real estate, the land parcel number, the size of the plot, the mode of usage, e.g. “building area and open space,” “agricultural area,” etc.). Legal relationships (e.g. ownership, encumbrances etc.), by contrast, are identified in the Land Register. The specification data that also appears in the Land Register (land parcel number, size, mode of usage) is taken from the Cadastral Map. The Cadastral Map is maintained by the state Surveying and Cadastral Offices, whereas the Land Registry Offices are departments of the local courts (Amtsgericht). Mutual obligations of communication between the Cadastral Maps and the Land Registries ensure that the registers contain consistent information. In the future, this alignment will take place electronically.

b) Structure of the Land Register

The organization of land registration and the procedures to be applied by the Land Registry Offices are subject to uniform federal regulation through the Grundbuchordnung (Land Register Regulation).

In principle, all plots of real estate must be registered in the Land Register. There is an exception of such obligatory registration for real estate owned by the state, the communities, and the churches, as well as for rivers, etc. There is no registration obligation for these. In practice, the full territorial grounds of Germany are all but entirely catalogued in the Land Registers.

In principle, every plot of real estate will have its own page in the Land Register, although multiple plots of real estate belonging to the same owner can be combined on a single Land Register page. A page in the Land Register is always made up of four parts:

- Inventory with land parcel number, size and mode of usage of the real estate,
- Division I with information on the owner,
- Division II with information on all encumbrances with the exception of charges on land (easements, beneficial interests, etc.),
- Division III with information on charges on land (esp. mortgages).

All real rights encumbering real estate are recorded in the Land Register, and only have effect from such time as they are recorded there. This ensures the greatest possible transparency. However, certain restrictions under public law (e.g. a requirement for a minimum distance between neighbouring buildings) are not listed in the Land Register in some federal states, but instead recorded in a separate Directory of Public Easements (Baulastenverzeichnis) maintained by the planning authorities.

Entries in the Land Register are made by administrative officials with specialized legal training (Rechtspfleger). These officials have completed a three-year program of study specifically addressed to the requirements of their profession. The Land Registry Office is headed by a judge who oversees the work of these officials.

c) The Registration Process

Registering an entry in the Land Register regularly requires that four preconditions be present:

- an application,
- consent to the registration by the party whose rights will be affected by the registration, or – for re-registration of the owner –of the transfer agreement
- documentation of such consent to the registration or of the transfer agreement in the required form
- pre-registration of the party whose rights will be affected by the registration.

In general, registrations in the Land Register are only made at the request of a party. In exceptional cases, the Land Registry Office will make registrations *sua sponte* (in particular for official objections, § 53 GBO, see below), § 13 GBO.

A registration can only be made when the party whose rights are affected by the registration consents to it, § 19 GBO (so-called *Eintragungsbewilligung*, consent to the registration). It is generally not necessary to present the agreement as to the establishment of a right regarding real estate (§ 873 BGB) or to the transfer of this right. It is only when transferring ownership of real estate that the Land Registry Office requires submission of the transfer agreement itself, § 20 GBO.

The Land Registry Office will only recognize consents to registration when these are presented as notarial acts (either notarial documents or private documents with signatures certified by a notary), § 29 GBO. This requirement is intended to achieve the greatest possible security for the correctness of the Land Register. Involvement of a notary ensures at a minimum (i.e. in the case of notarial certification of signature) the detailed review of the identity and legal capacity of the party consenting to the registrations in the Land Register. Since this task would overtax the Land Registry

Office personnel, the legislature has delegated it to notaries as bearers of public office. In addition, the involvement of a notary creates an additional layer of legal oversight and thus in effect serves a filtering function before applications reach the Land Registry Office. In most cases, the notary also drafts the necessary consent to the registration, although this is not required by law. In such a case, the notary takes responsibility for the correctness of the contents of the consent. He is also obliged to advise the parties of the consequences of the registration and of any associated risks. This notarial role helps to prevent the submission of erroneous or careless applications and makes the work of the Land Registry Office significantly easier.

The party whose rights are affected by, and which therefore must consent to the registration must already have been entered into the Land Register (§ 39 GBO). This ensures that the historical sequence of entries is documented, permitting the review at any time in the future as to whether the correct person gave consent.

It is common practice for the notary to present the application for registration to the Land Registry Office. The Land Registry Office will then notify the notary as to the entries it has made. The notary reviews these for correctness and forwards the notification of the registration to the parties. In exceptional cases in which the application is not submitted by a notary, the parties (e.g., the new and prior owners) are informed directly by the Land Registry Office.

d) Duration of the Registration Process

The registration of a priority notice generally occurs within a few days of receipt of the application. The registration of the transfer of ownership, which, owing to the

safeguard of the priority notice, is less time-critical, tends to take place within a few days to two weeks after the application is made.

e) Effects of the Land Register

Registration in the Land Register is required when transferring ownership of real estate or encumbering real estate with a right. Encumbering, erasing, changing the content of, or transferring a right also requires registration (see §§ 873, 875, 877 BGB). The registration is constitutive of the validity of these legal changes.

The law links various effects to registration in the Land Register.

(1) Presumptions, § 891 BGB

Under § 891 para. 1 BGB, a presumption exists in favor of the party for whose benefit a right is registered to the extent that the right exists. Pursuant to § 891 para. 2 BGB, the erasure of a right is linked to the presumption that the right does not exist. Both presumptions are rebuttable, although only through full proof of the contrary. A mere shaking of the presumption, for example by displaying reasonable doubts as to the accuracy of the registration, is insufficient.

(2) Public Faith in the Land Register, § 892 BGB

Section 892 para. 1 sentence 1 BGB provides that the Land Register is considered accurate for the benefit of a party who acquires a right on real estate or a right to such a right by way of a legal transaction, unless an objection is registered in the Land Register or the acquirer is aware of the inaccuracy of the Land Register.

Section 892 para. 1 sentence 2 BGB concerns the scenario in which the owner of the real estate is restrained in his capacity to dispose over the property in specific ways,

e.g. because insolvency proceedings are ongoing with regard to his assets. Only if such limitations are thoroughly reflected in the Land Register or their existence is positively known to the acquirer, will they be binding upon an acquirer. In this connection, even grossly negligent ignorance of the existence of such (unregistered) limitations on the part of the acquirer will not disturb trust in the omitted registration of the restraint on disposal in the Land Register. Among the situations not covered by § 892 para. 1 sentence 2 BGB, by contrast, is that of a seller who lacks authority of disposal because of lack of legal capacity. Absence of legal capacity cannot be reflected in the Land Register, and so public faith in the Land Register is not extended to it. Consequently, even an acquirer in good faith receives no ownership from a party lacking legal capacity. In such a case, however, should the initial acquirer of the plot of real estate, having been unjustly entered into the Land Register, then sell to a third party, the third party can acquire ownership in good faith under § 892 para. 1 sentence 1 BGB.

Section 892 BGB produces the result that the acquirer receives the property as though the registration corresponded to the accurate legal status. In consequence, the previously entitled party loses ownership. That party, however, may be able to make claims for unjust enrichment or damages.

Should the plot of real estate have been sold, the previously entitled party has a claim against the seller for the disgorgement of the purchase price paid by the acquirer in good faith (§ 816 para. 1 sentence 1 BGB). Should the seller no longer have the assets to repay the value of the buyer's consideration, the originally entitled party will have no claim (§ 818 para. 3 BGB), unless the seller was aware of his lacking

authorization (§ 819 BGB). In such a case, the seller cannot raise the defense of loss of assets.

Should the real estate have been transferred without charge, there may be a claim against the acquirer in good faith for transfer back of the real estate (§ 816 para. 1 sentence 2 BGB). This is because in the eyes of the law an acquirer who does not pay is less worthy of legal protection than an acquirer who pays. Should a first acquirer in good faith who acquired the property free of charge have transferred the property to a third party, the previously entitled party can demand that the first acquirer disgorge the full purchase price, if the property was sold for money, or, if the property was transferred to a second acquirer free of charge, demand the return of the property from the second acquirer (§ 822 BGB).

A claim for compensation may exist against the seller for intentional illegal (sittenwidrig) damages if the seller who was unjustly entered into the Land Register knew of his lacking authorization and consciously intended to harm the real owner by transferring ownership of the property to a third party (§ 826 BGB).

f) Errors in the Land Register

In view of the Land Register's far-reaching effects, it is of decisive importance for all involved that the Land Register reflect the actual state of legal relations. The design of the Land Register's procedures and the double legal review carried out, first by the notary, then by the Land Registry Office, largely prevent errors from entering the Land Register.

Should discrepancies nonetheless come about between the contents of the Land Register and the actual state of legal relations (owing to an error by a party, or innocently, for example when a person acts whose lack of legal capacity is not apparent), the parties can draw on various means to effect a correction of the Land Register or prevent an acquisition in good faith.

Pursuant to § 894 BGB, the actual possessor of the right can demand that the party mistakenly entered into the Land Register consent to the correction of the Land Register. Should the latter party refuse to consent, the true owner is left to sue the registered owner in court, and there to produce proof of the incorrectness of the Land Register. The true owner can protect himself from forfeiting rights in the meantime, as might occur via an acquisition in good faith, by entering an objection into the Land Register, § 899 BGB. Such an objection can be entered on the basis of a temporary injunction issued in a court proceeding on provisional legal protection. It is sufficient in such a proceeding to show merely that the incorrectness of the Land Register is plausible; the incorrectness need not have been fully proven yet. The objection eliminates good faith in the contents of the Land Register and thus prevents acquisitions in good faith, § 892 BGB.

Should the Land Register be rendered incorrect by an error made by the Land Registry Office itself, the Office can, pursuant to § 53 GBO, enter an objection on its own behalf – regardless of any negligence on its part in the causation of the erroneous entry.

Should a party suffer damages caused by the Land Registry Office's error, that party may also have a claim to restitution of damages according to the principles of official liability, § 839 BGB, Art. 34 Federal Constitution. A precondition to such a claim, however, is that the Land Register official have been at fault (that is, having acted negligently or with intent). In such cases, the state is liable to the parties; the state can then take recourse against the official in cases of intent or gross negligence. A no-fault state obligation to make parties whole for forfeiture of rights resulting from an acquisition in good faith is unknown to the German legal system.

g) Examination of the Land Register

Work to digitize the Land Registers, which were long maintained on paper, has been ongoing since the mid-1990s. At the present, this conversion process is nearly finished, such that it is possible almost anywhere in Germany to examine the contents of a Land Register electronically.

Not all persons are entitled to freely examine the Land Register, however. Examination is only permitted to those persons who can present a legitimate interest for doing so, § 12 GBO. The background to this is the protection, anchored in constitutional law, of the private sphere of the landowner (Art. 2 para. 1 in connection with Art. 1 Federal Constitution). For example, it is not possible, without more, to research in the Land Register whether property owned by a neighbor or a celebrity is subject to charges on land, since this would permit drawing conclusions as to the financial circumstances of the landowners.

On the other hand, anyone who owns a real right to the real estate in question has a legitimate interest. Likewise, banks reviewing whether to extend credit to a client have a legitimate interest in examining the Land Register with regard to the client's real estate. The same applies for a landowner's creditors who wish to foreclose on the owner's assets. By contrast, a person who wishes to buy a certain plot of real estate but does not know the landowner and wishes to discover the latter's identity by examining the Land Register does not have a legitimate interest. Upon the initiation of concrete negotiations for sale, however, the party interested in buying is entitled to examine the Land Register.

The federal states are in charge of maintaining the Land Registers and organizing the Land Registry Offices, as indeed the Federal Constitution grants to the German federal states responsibility for the administration of justice on the whole. To gain online access to Land Registers, one must sign up in every federal state. A central registration system allowing institutional users access to all the federal states at a reasonable price is planned for the near future. At the present time, it generally costs 10 € to examine the Land Register, or 5 € for online examination by institutional users. Repeated examinations, for example following successful registration of rights, cost 7.50 € and 2.50 €, respectively.

h) Electronic Land Register Communications

Electronic Land Register communications are to be distinguished from the question of the electronic keeping of the Land Registers and the opportunity to examine Land Registers online. At the present time, the submission of applications to the Land

Register and of consents to the registration must be done on paper. In the future, all communication with the Land Registry Offices is to take place electronically, such that the documents, too, will be submitted electronically. This has already been the practice for registrations in the Commercial Register since 01.01.2007.

Presently, preparatory work is underway for the introduction of electronic legal communication with the Land Registry Offices. Work is planned to be finished by 2010.

B. Detailed Description of a Land Register Transaction in Germany

1. The Involvement of Brokers

Approximately 50% of the sales contracts for immovable property in Germany take place through brokers. In almost all cases, the broker is commissioned by the seller. The broker's only duty is to make contacts. In particular, he is not obliged to provide advice on legal or construction questions. He also does not play an active role in the conclusion of the sales contract.

The broker is not required to have any specialized training to practice his profession. He need solely have an authorization under trade law pursuant to § 34 c Gewerbeordnung (Trade Code). Such an authorization is refused only when the applicant lacks the reliability necessary for the broker's profession, or if insolvency proceedings have been initiated with regard to his assets. The absence of the necessary reliability is presumed when the applicant has a final and absolute conviction for a crime involving assets.

The broker's claim to a commission comes about following the conclusion of the notarial sales contract. The agent's commission is generally borne entirely by the buyer.

The amount of the commission is not set forth by law, but is rather fully negotiable. At the same time, negotiations as to the agent's commission seldom take place. Typical commissions are 3 – 4% percent of the purchase price. This is often considered too high relative to the service provided by the agent, since the claim exists independently from how much the broker actually contributed to the conclusion of the sales contract. It can come about that the agent will earn his commission just by putting a listing in his window and telling someone the seller's phone number.

2. Preparation of the Completion of the Contract

a) Producing a Draft Contract

The task of the notary is to provide independent and impartial assistance to the real estate transaction, thus serving the certainty of the law and the best-possible realization of the intention of the parties. To this end, the notary provides legal advice to the parties in a conversation in advance of the notarial certification. The careful explication of the facts at an early stage of the proceedings puts the notary in a position to determine the intention of the parties, point out legal risks of the desired drafting, and make suggestions as to how such risks can be avoided (see § 17 para. 1 sentence 1 BeurkG [Beurkundungsgesetz, Notarial Documentation Law]). The notary must seek to arrive at balanced contractual provisions that put neither party at a legal disadvantage. The notary must exercise care that errors and ambiguities be avoided, and in particular that inexperienced and inexpert parties be thoroughly protected (§ 17 para. 1 sentence 2 BeurkG). The notary must also exercise care that the contract contains no illegal agreements (for example agreements running against public policy). In short, the notary

must do absolutely everything to secure the legally flawless and impartial execution of the parties' individual intentions in the transfer of real estate.

Naturally the notary may not comment on whether the agreed-upon purchase price is reasonable for the market, as long as the contract is not illegal (*sittenwidrig*) because extortionate, which would make it null and void. Rather, the notary's task is the creation of a reasonable legal context within which the parties can exercise their economic freedom.

Before the draft sales contract is completed, the notary examines the Land Register. Because of the aforementioned public faith in the Land Register, a title search or the securing of additional title insurance is not necessary. Depending on the facts, the notary may suggest that the parties acquire further information (e.g., regarding development work, such as the expansion of streets, encumbrances for construction or canals, etc.) from local administrations or authorities. The legislature has placed responsibility for the gathering of this information solely with the parties, not with the notary, although the latter can gather this information on their behalf.

The notary then prepares a draft of the sales contract on the basis of the information acquired and the advising conversation. The notary will not use preprepared form contracts, but rather draft the contracts individually for the specific circumstances of the case. Nor, indeed, would it be possible to work from set form contracts, given the innumerable different fact patterns that can affect contracts of sale and the very wide variety of drafting options the parties have under German freedom of contract. In each transaction, the principles of secure contract drafting, in particular the avoidance of

uncertain and thus risky advance performance, are to be borne in mind. Attention must also be paid to the liability jurisprudence of the courts, which set high standards for the proper preparation of a contract of sale. Here the notary will consider extensive specialist literature and knowledge gained from continuing legal education.

The draft contract is sent to the parties before the documentation date for their review. For contracts between private persons and business entities (consumer contracts), the contract should generally be made available to the consumer at least two weeks prior to the documentation (§ 17 para. 2a sentence 2 no. 2 BeurkG).

The involvement of lawyers alongside the notary in the preparation of the draft is extremely uncommon in the case of transfers of residential real estate. For the transfer of large commercial properties, to be sure, the lawyers of the companies involved may sometimes become involved.

b) Building Inspections

An examination of the construction of the buildings or improvements on property to be purchased by an expert engineer or architect before the conclusion of the contract is not required by law, and is uncommon in practice. The primary reason for this lies both with the German Civil Code's system of legal guarantees and with the contract drafting.

Under the relevant legal provisions, the seller is liable for all defects in the purchase property that exist at the time when economic ownership passes to the purchaser. This applies to defects that do not become apparent until later, but existed, unknown, at the time of the passage of economic ownership. This legal provision does

not, however, generally match the intention of the parties. The statutory guarantee is therefore often largely disclaimed in contract drafting, at least outside of the consumer sector. In such a case, the seller is usually nonetheless obliged to disclose defects of which he is aware. Should the seller fail to fulfill this duty, he will be liable to the buyer for the concealed defects.

3. The Conclusion of the Contract

a) The Requirement of Notarial Documentation

The sales contract does not take effect until it is notarially documented. Any declarations made prior to that time are generally nonbinding. Thus listings and information signs put up by the broker or seller are not binding offers. Oral statements as to the condition of the property under contract made before the notarial conclusion of the contract have legal consequences only under special circumstances.

b) The Procedure of Notarial Documentation

The Beurkundungsgesetz (Notarial Documentation Law) contains provisions governing the procedures for notarial documentation. These provisions guarantee that the notarial documentation requirement fulfills its legal purpose, in particular its cautionary and documentary functions.

The procedural provisions for notarial documentation ensure that the actual intention of the parties is determined, that it is implemented in legally flawless form, and that the parties are made aware of the consequences of their actions. For example, the notary must establish the legal capacity of and any agency relationships involving the parties (§§ 10 ff. BeurkG). The document must be read aloud in the presence of the

parties and then be authorized by them. The reading aloud of the document permits the background to the contract to be explained again to the parties and their questions answered. The conversation that ensues sometimes reveals additional problems that need to be resolved in the contract. The notary explains to the parties the possibilities for resolution, and adjusts the contract correspondingly. Should a person without a command of the German language take part in the notarial documentation, an interpreter must be provided (§ 16 BeurkG) in case the notary does not speak the language himself and can thus not ensure a correct translation. Special procedural provisions also apply when a handicapped person is involved (§§ 22 ff. BeurkG).

c) Drafting the Content of the Contract

A large number of interests both of the parties and of the public are to be considered when drafting the content of the contract.

One central point of interest for the parties among themselves is that of safeguarding both parties against unsecured advance performance. The interests of a large number of participants must be balanced in this regard: The buyer wishes to pay the purchase price only once it is certain that he is acquiring unencumbered ownership. The seller, on the other hand, is prepared to transfer possession and ownership of the purchase property only when he has received the purchase price. In addition, the interests of the creditors of the rights to be dissolved and of the bank financing the buyer also require careful consideration.

aa) Date on which the Purchase Price becomes due

Sales contracts usually provide that the purchase price is due to be paid only after the buyer can be certain that he will acquire unencumbered ownership following payment of the purchase price (as well as the land transfer tax). For this to be the case, various preconditions must be fulfilled. All of the authorizations necessary for the contract's validity must have been issued, and the priority notice in favor of the buyer must have been entered into the Land Register. In addition, the local authority must have provided a statement to the effect that its pre-emption right either does not exist or will not be exercised. Also, the notary must have consents to the erasure of any encumbrances not assumed by the buyer. Still more preconditions apply in complicated cases. The notary seeks all of the necessary declarations for the parties, and applies for the registration of the priority notice as well. Should all preconditions be fulfilled (in a normal case, within 10 to 14 days following the notarial documentation), the notary informs the parties that the purchase price is due. Contracts of sale generally require payment of the purchase price within 14 days following notification that payment is due.

bb) Payment of the Purchase Price, Dissolution of Existing Encumbrances

In concluding sales contracts, one must consider the interests not only of sellers and buyers, but also of creditors holding existing encumbrances – in particular mortgages – and of the bank financing the buyer. Existing mortgages are often not assumed, but rather erased and replaced with the registration of a new financing mortgage. The creditors of existing mortgages are only prepared to consent to the erasure of their security interests, however, when the fulfillment of their claims against the seller is made certain. The buyer's bank, in turn, pays out the purchase price loan

only once erasure of the existing encumbrances and creation of the financing mortgage are ensured. Here, too, the notary acts as a neutral intermediary between the interests of all involved

After the notarial documentation of the contract of sale, the notary sends the creditors of the rights to be erased a draft consent to the erasure, with the request that they return it. If the mortgage secures a still-existing debt, the creditor, when sending back the consent to the erasure, will not give the notary free reign to make use of it. Instead, he will instruct the notary only to make use of the consent to the erasure only once he, the creditor, has confirmed to the notary his receipt of a specified settlement price paid out of the purchase price. Here the notary must make certain that the total sum of settlement amounts does not exceed the purchase price, since encumbrance-free delivery of the property could be endangered otherwise. When giving notice that the purchase price is due, the notary alerts the buyer that the settlement amounts demanded should be deducted from the purchase price and paid directly to the creditor of the mortgage, not to the seller (which would create a risk that the money might then not be forwarded to the creditor). Only the remainder of the purchase price will be paid to the seller himself. Once the demanded settlement sums are paid, the notary submits the consent to the erasure to the Land Registry Office and applies for the erasure of the rights.

This course of action, however, initially only makes certain that the property is free of encumbrances. The protection of the buyer's bank through a financing mortgage runs into the difficulty that a mortgage can be created only by the present owner, and

the buyer only becomes the owner after paying the purchase price. Yet without this mortgage, the buyer cannot pay the purchase price. The circle is broken by the notary generally recommending that the following legal steps be taken: The seller grants to the buyer authority, before the transfer of ownership, to establish a mortgage on the still-foreign real estate. To prevent misuse at the expense of the seller, however, the buyer's bank agrees that the mortgage up until passage of title will serve solely as security for the loan of the purchase price, and thus be of direct value to the seller himself. Should the payment of the purchase price not come to pass, the seller can demand that the mortgage be erased from the Land Register.

cc) Transfer of Possession, Use, and Responsibilities

Agreements regularly stipulate that the transfer of possession, use, and responsibilities is matched to the payment of the purchase price. From that moment on, the buyer is responsible for the real estate and may use it for his own purposes, and at his own cost (transfer of economic ownership).

Difficulties can arise when the parties insist on an accelerated transfer of possession. In such cases, the notary must make efforts to minimize as much as possible the risks through appropriate contractual formulations. In some such cases, it is agreed that the closing will be done through a notarial escrow account, with the transfer of possession following payment of the purchase price into the escrow account. A payment of the purchase price to the seller does not take place until the buyer can be certain of acquiring unencumbered ownership. The registration of the change of

ownership in the Land Register itself does not take place until the purchase price has been paid to the seller.

dd) Transfer of Ownership

The registration of the change of ownership in the Land Register has a constitutive effect. As discussed above, preconditions for the transfer of ownership include agreement as to the transfer of ownership (Auflassung) and the registration of the change of ownership in the Land Register, §§ 873, 925 BGB. The registration of the change of ownership in the Land Register can occur only after payment of the purchase price, so as to prevent unsecured advance performance by the seller. At the same time, the Auflassung is usually stipulated in the document for the contract of sale, so as to save the parties a second trip to the notary. An additional precondition for the transfer of ownership is a confirmation from the Finance Office that the land transfer tax has been paid. The transfer of ownership in the Land Register generally takes place six to eight weeks after the documentation of the sales contract. Delays due to the buyer exhausting the period granted for payment of the land transfer tax are not uncommon.

4. Requirements for Authorizations

Sales contracts for real estate must often take required authorizations into account. Alongside the aforementioned public-law authorizations and the required consents for the sale of owned apartments and heritable building rights, such requirements may arise in cases in which a representative acts for one of the parties with authority subject to subsequent approval by that party. In addition, court approval is required for a contract of sale involving a seller represented by legal representatives

(guardians, parents) because of lacking or limited legal capacity.

In all such cases, the sales contract only comes into effect when the required authorization has been issued. The notary must independently review whether authorizations need to be acquired in a particular case, and must advise the parties as to any such requirements for authorizations (§ 18 BNotO, Bundesnotarordnung, Federal Notary Act). The notary generally acquires the authorizations for the parties.

5. Land Transfer Tax

In the past, the land transfer tax has been a federally uniform 3.5% of the purchase price. In the course of the federalism reform, however, the federal states have gained the power to choose other percentages. To date, however, only the federal state of Berlin has made use of this opportunity, having raised its land transfer tax rate to 4.5% effective January 1, 2007.

The notary is obliged to inform the Finance Office responsible for collecting the land transfer tax of the documentation of any sales contract, and to send them a copy of the document. The Finance Office then issues a land transfer tax assessment. Although the seller and the buyer are jointly and severally liable for the tax obligation, the assessment is initially sent only to the buyer, whom the sales contracts generally obliges to pay the tax.

The land transfer tax assessment mandates payment within four weeks. Once the Finance Office has advised the notary that the tax has been paid, the notary applies to the Land Registry Office to transfer ownership.

Part 2: The Legal Position of Notaries, In Particular Their Regulation Under Vocational Law

A. The System of Preventive Justice

The administration of justice in Germany may be divided into two parts: classical contentious jurisdiction and the preventive administration of justice. Whereas classical jurisdiction is *cura posterior*, arising after the emergence of a conflict, the preventive administration of justice is the forward-looking means by which the state creates a dependable space for citizens' personal and economic development. To this end, the state provides citizens in various walks of life preventative protective mechanisms and assistance. The individual and social costs created by court proceedings to enforce a contract in the case of breach are viewed as inefficient, and are thus sought to be avoided whenever possible.

There are many layers to the tasks and areas of preventive justice. To ease economic transactions, the state creates registers, such as the Commercial Register and the Land Register, and certifications, such as the certificate of inheritance, which enjoy public faith. Legal transactions can rely on this public faith even if the contents of the register or certification do not reflect the actual legal status. This arrangement accepts the fact that the true holder of a right can be harmed in such a situation, indeed for the very reason of achieving legal certainty. At the same time, the design of the proceedings prevents errors in the registers to the greatest extent possible. Lastly, for particularly important legal transactions, the state has created requirements of notarial documentation to protect the parties and legal relations on the whole. If this formal

requirement is not respected, the legal transaction will be accorded neither recognition nor effect.

These examples show that, in the domain of the preventive administration of justice, the state does not restrict itself to merely offering optional state services. Rather, it intervenes consciously in the rights of citizens to protect participants, support settled legal relations, and prevent ex ante the emergence of costly and time-consuming legal conflicts. In consequence, the activities that occur as part of the preventive administration of justice, like those of contentious jurisdiction, have the character of state action.

This system is based on an understanding of the state and of the administration of justice according to which independent and impartial organs of the administration of justice are justified in intervening in the affairs of citizens for the betterment of the public welfare.

B. The Notary as Part of the Preventive Administration of Justice

As an independent holder of public office, the notary carries out tasks in the area of the preventive administration of justice (§ 1 BNotO).

Among the notary's most important tasks are his responsibility for notarial documentations and certifications (§ 20 BNotO).

The legislature has required the form of documentation for a number of legal transactions of special importance for the parties and for the public in real estate law, family law, inheritance law, and corporate law.

The German system of private law views notarial documentation not merely as an act in which public documents are established. The documentation proceeding also serves the goals of providing legal review of the document's content and of overseeing the procedures used, thus guaranteeing that the content of the document matches the intention of the parties, who have been made aware of its full legal implications. As a matter of substantive law, the legislature has assumed a situation-specific need to protect all parties in such cases where it has made notarial documentation a precondition for the validity of a contract (e.g. § 311b para. 1, 1410, 2276 para. 1 sentence 1 BGB, §§ 2 para. 1 sentence 1, 15 para. 3 GmbH-Gesetz [Corporations Law], § 23 para. 1 sentence 1 AktG [Stock Corporation Act]), or of a declaration (e.g. § 1750 para. 1 sentence 2 BGB), or of an application (e.g. § 1752 para. 2 sentence 2 BGB). The state's active role in the documentation proceeding seeks to fashion a proceeding for the uncovering and elimination of legal risks and dangers arising from issues involving the mutual consent of the parties, unclarity as to the facts, and the formulation and drafting of legal transactions.

The documentation process has various functions typically described as the cautionary function, the protection against excessive haste, the protection of the parties through notarial instruction and contract drafting, the clarification and evidentiary functions, the enforcement function, and the oversight function. These elements are of great importance, particularly with regard to real estate transactions.

1. The Cautionary Function and the Protection Against Excessive Haste

The requirement of notarial documentation is particularly justified for real estate transactions. Most citizens buy real estate only once or twice in their lives. The average citizen is thus barely familiar with this kind of transaction. The transaction is of very great significance for the citizen, who in many cases will be indebted for decades to come. In addition, the acquisition of real estate means entering into an entire bundle of obligations, such as private and public-law encumbrances on the land, property taxes, legal duties to maintain safety, dangers of liability for pre-existing pollution, etc. The possible liabilities and financial burdens that ensue can easily amount to multiple times the value of the real estate, in particular for real estate thought to be of little value.

By going to the notary, the citizen becomes aware of the special significance of the acquisition of real estate. He is likewise prevented from acquiring real estate without first thinking over the decision, as would be possible were there no formal requirements for acquisition. The fact alone that citizens are required to make their declarations before a notary has the result that they must confront the significance of the legal transaction.

2. Protection of the Parties Through Notarial Instruction and Contract Drafting

The first implication of the notarial documentation is that the parties to a legal transaction will be informed when they enter into it, since the notary must instruct them as to the legal content of the transaction. This protection of the parties applies not only to consumers, but also to any party whose statements of intent are notarially authenticated. This is particularly advantageous for small and mid-sized companies.

Yet the protective function of notarial documentation goes further. Since the notary is not permitted to certify invalid contracts, he provides a material guarantee of the correctness of the legal transaction. Part of the notary's duty to achieve a balanced contract drafting is an explicit norm requiring the notary to protect weaker parties (§ 17 para. 1 sentence 2 BeurkG). This duty has particular importance in real estate transactions, since citizens generally engage in such transactions once or twice in their lives, and have correspondingly little experience of the process.

3. Clarification and Evidentiary Functions

The notary's task is not limited to providing the parties with a valid document. Rather, the notary must ensure that the agreement contains correct and clear provisions. This clarification function is manifested in the notary's official duty to investigate the intention of the parties and clarify the facts, as well as in the duty of formulation, in fulfillment of which the notary seeks to reproduce the parties' agreements in a clear and unambiguous way.

Furthermore, in court the notarial document provides full proof of the parties' statements of intent and the notary's determinations of fact that it contains. Particularly significant among these determinations is that of the identity of the parties.

These functions have essential significance for the parties. This is particularly the case for real estate transactions, since the legal relations surrounding real estate, in view of their lastingness, can give rise to conflicts decades after the closing of the contract. The notarial documentation makes the matters of the contract closing and the contents of the contract indisputable from the start. Should the contract closing or the

contents of the contract nonetheless be contested by one side, legal enforcement in a later proceeding will be eased significantly by the notarial documents implications as evidence and as clarification. The notary's activities thus contribute considerably to the avoidance of legal conflicts, and the public benefits when the legal system is burdened with fewer proceedings.

In the eyes of the German legal system with its characteristic "double tier" system of preventive justice and cura posterior, i.e. court proceedings, this involvement of a judge-like independent and impartial notary is regarded as a significant advantage over the involvement of two lawyers. Neither of the lawyers would be obliged to work toward an unambiguous contract drafting. The lawyer's duties flow from the attorney-client relationship, and are directed solely at creating favorable provisions for the party the lawyer represents. It is certainly conceivable that a lawyer will accept unclear provisions that can open "back doors." Were only lawyers involved in a real estate transaction, the transaction – from the German point of view – would thus be substantially more prone to legal disputes than it is with the involvement of a notary with explicit official duties. In consequence, the notary's activities contribute considerably to the avoidance of legal conflicts, and the public benefits when the legal system is burdened with fewer proceedings.

4. The Enforcement Function

Notarial documents are immediately enforceable like court orders. This is advantageous for buyer and seller alike. The seller receives an executory title for the

purchase price, and the buyer receives the same for the purchase property, which may be yet to be vacated by the seller. This unburdens the legal system, since the state courts do not need to do additional work in cases of failure to fulfill contractual obligations. Instead, the seller and buyer can effect their rights immediately. Notarial involvement in real estate transactions carries out a considerable unburdening of state budgetary and staffing resources, leading to a simpler, less expensive, and swifter realization of legal rights that aids business and the public alike.

5. The Oversight Function

The notary carries out his activities, particularly in the realm of real estate transactions, simultaneously in the interest of the parties and of the entire state. Worthy of particular emphasis here is the filtering function the notary exercises in the process preceding registration in public registers.

The requirement of notarial documentation serves the goal of ascertaining the identity and appraising the legal capacity of the signatories. What is more, the Land Registry Office receives a pre-screened declaration, which significantly simplifies the court's own legal review of the document.

The Land Register in its present form, with its far-reaching consequences of good faith, would not be conceivable without the participation of notaries in its proceedings. One can rely on the contents of the Land Register with the consequence that acquisition in good faith is possible and the actual possessor of the right can lose his property. Against the backdrop of the constitutionally anchored guarantee of property (Article 14 Federal Constitution), this can only be justified when the greatest

possible degree of protective mechanisms are introduced to ensure that the Land Register does not become incorrect. This is achieved above all through the notarial responsibilities for documentation and certification.

The notary must determine the identity of the parties, thus minimizing the risk of falsification. He must also appraise the legal capacity of the parties. These two appraisals would overtax the Land Registry Offices on logistical grounds alone. The Land Registry Offices are also decisively relieved of burdens by notaries preparing the facts of each case and drafting the relevant declarations. If the Land Registry Office had to work directly with ordinary citizens most often lacking in legal training, there would be need for substantially more work on the part of the Land Registry Office, and its ability to function would be endangered. Lastly, a double review always takes place – first that of the notary, followed by that of the Land Registry Office – before a registration can be made in the Land Register. This design element in the proceedings justifies the public faith in the Land Register as against Article 14 of the Federal Constitution.

It is by contrast questionable, at least under German Constitutional Law, whether a Land Register permitting good-faith acquisition but making use of no comparable preventative protective mechanisms (ascertainment of persons' identities by public officials, appraisal of legal capacity) to prevent incorrect Land Register entries could be reconciled with the constitutional guarantee of the rights of property. This is even the case if a person who suffers legal disadvantages owing to an incorrect Land Register has a claim for damages against the state. Under German constitutional law, the constitutional protection applies to the specific physical property. An equation of

property to its monetary value, declining to protect specific property to the greatest extent possible because monetary damages are guaranteed, can hardly be reconciled with this understanding of the guarantee of property.

C. The Significance of Provisions Under Vocational Law for the Fulfillment of Notarial Tasks

The notary's vocation – like the judge's vocation – always exists as a part of the legal system, and therefore requires design by legislation, that is, by setting forth the vocation's status, its tasks, and its fundamental official duties. The notary's vocation is not a vocation that would be possible without a legal context, such as the physician's vocation.

Here the German legal system creates an indissoluble nexus between the notarial documentation requirement, the law governing notarial documentation proceedings, and the notarial vocational law. The requirement of notarial documentation under civil law is instituted to pursue the aforementioned cautionary, instruction, clarification, and oversight functions. Notarial documentation law as procedural law and notarial vocational law are two kinds of public law that ensure that the goals are achieved that civil law seeks through its requirement of the observation of form.

I. Characteristic Aspects

The securing of these goals is achieved through three aspects that characterize the notary's status and vocational law:

1. Bearer of Public Office

2. Independence

3. Impartiality

These aspects are the key to understanding the notarial vocational law. All additional official duties flow from these principles. They are necessary for the notary to be able to fulfill his functions in the realm of the preventive administration of justice. The official duties are set forth in the BNotO and the BeurkG.

1. The Notary as Bearer of a Public Office

The notary's activities in the realm of the preventive justice have the character of state action. Under the case law of the Federal Constitutional Court, the tasks administered by the notary place him close to the judge, and the notary is thus termed a bearer of a public office in § 1 BNotO.

The compulsory design of the documentation procedure as a procedure under public law likewise compels a public-law bearer of office to carry out this procedure and guarantee the attainment of the goal connected to the procedure. Without the public-law design of the notarial documentation procedure, the legal consequences of the notarial document, in particular its evidentiary effect and its enforceability akin to that of a court order, would be inconceivable.

Notaries' status-distinguishing public office directly dictates that notaries be appointed by the state, like judges, in a set quantity (§§ 4, 12 BNotO), so as to guarantee a sufficient professional practice and effective oversight of the profession. To supply all regions of the country with notarial services, the justice authorities of the federal states assign each notary an official seat. The notary must also have an office

there. Since the central task for each notary is to attend to the needs arising in his area, the notary should only do documentations within his region of office. This almost always corresponds to the region of the local court at which the notary has his seat.

There is, however, the principle of the free choice of notaries, namely that citizens can freely choose their notaries. Thus a notary in Munich can notarially authenticate a sales contract for real estate in Hamburg, just as long as the parties travel to the notary in Munich. Competition for notarial services is thus secured, especially since there is more than one notary in almost all regions of office.

The notary's office is a personal office, which may be neither transferred nor bequeathed. Applicants are selected according to personal and professional qualifications alone (Art. 33 para. 2 Federal Constitution). In general, notaries are only selected from among those with the best scores on the Second State Examination in law. The office must be exercised in person; actions of office cannot be delegated to employees. The notary is permitted to advertise, but such advertising may not come into conflict with the public office (§ 29 para. 1 BNotO).

As part of the legal authorities, notaries are integrated into the authorities' tightly knit system of oversight. Oversight over notaries is carried out by the chief judge of the regional court (Landgericht), the chief judge of the higher regional court (Oberlandesgericht), and the justice minister of the federal state in which the notary serves. These authorities can also undertake disciplinary proceedings against the notary. The possible sanctions range from simple censure to monetary fines to removal from office. At regular intervals (in the first years of the notary's work, every two years,

then every 3-5 years), a judge appointed by the chief judge of the regional court goes to the notary's offices to carry out a detailed review of the notary's activities. The review involves an extensive examination of the notary's files to determine whether the notary is fulfilling his official duties (duties of documentation, drafting of documents, archiving of documents).

2. Independence

The notary is distinguished by his independence. This independence relates both to his relationship with the state authority that named the notary to his post and reviews his performance and to his relationship with the parties to a given documentation.

The notary, like a judge, is personally and objectively independent from the authorities that name him to his post. He enjoys a lifetime appointment – although he must retire from office at the age of seventy – and cannot be removed from office against his will. Only in certain cases provided for by law (such as unfitness to carry out his duties or serious violations of official duties) can the notary be stripped of his office. In addition, the notary is not subject to any kind of professional directives.

The notary's independence from the parties to a given documentation is the precondition for him to be able to fulfill his duties of office, in particular his duty to provide impartial counsel. His official activities are oriented exclusively along the lines of the provisions set forth by law. If the parties wish to have an action notarially authenticated that is illegal (*sittenwidrig*) or improper (*unlauter*), the notary must refuse to do the documentation. On the other hand, when the notary is presented with an agreement that fulfills the legal requirements, he has no right to refuse to carry out the

requested notarial documentation. Instead, he must do the work for the parties (the so-called Amtsgewährungsanspruch, the right to the guarantees of office). For example, notaries are forbidden to decline official transactions because they find them economically uninteresting.

3. Impartiality

The duty of impartiality (neutrality) is both a consequence of public office and a distinguishing duty of office (§ 14 para. 1 sentence 2 BNotO). The notary is in essence an impartial advisor to the parties. In his official activities, he must always consider the concerns of all the parties and bring the parties to a reasonable compromise. This also applies in cases in which the notary has been retained for the notarial certification only by a single party. In particular, the notary is, unlike the lawyer, not the representative of the interests of one party.

This duty of neutrality arises from both the notary's vocational law and the notary's rules of procedure. Under the vocational law, the notary must avoid even the appearance of partiality or dependence (§ 14 para. 3 sentence 2 BNotO). Furthermore, a notary is prohibited from arranging lending and real estate transactions, in other words taking on the role of a broker (§ 14 para. 4 sentence 1 BNotO). Nor may a notary engage in corporate participations in a manner inconsistent with his office (§ 14 para. 5 Satz 1 BNotO).

Impartiality in the law of notarial documentation is ensured by the relevant rules of procedure. Documentations are invalid, for example, when spouses and direct relations (parents, children, etc.) take part in the documentation (§ 6 BeurkG). There are

numerous other legal prohibitions on collaboration, such as when the matter involves persons closely situated to the notary (§ 3 BeurkG).

II. Important Individual Aspects

1. The Notary's Duty to Perform Notarial Acts

It follows from the notary's position as bearer of a public office that he cannot refuse official matters that are brought to him without a sufficient reason (§ 15 BeurkG).

The notary is always engaged in a public-law proceeding. Essential parts of his decisions in how to handle the proceedings are appealable. In particular, a notary's refusal to take an official action can be reviewed by a court (§ 15 para. 2 BNotO). In this proceeding, the notary's position is not that of a party, but rather that of a court of first instance, the decision of which is open to review.

2. The Duty of Continuing Legal Education

Section 14 para. 6 BNotO states that a notary must pursue continuing legal education to the extent necessary for his official activities. The fulfillment of this duty is also reviewed by the oversight authorities. The regulations purposely omit to dictate how many hours of continuing legal education should be taken, since it is not possible for general statements to cover the ever more swiftly changing laws and the emerging case law. What is dispositive is that the notary fulfill his obligation of continuing legal education to the extent "necessary."

Notaries do a considerable amount of continuing legal education. The notarial professional institute DAI e.V., only one of several providers of continuing legal education events specifically aimed at notaries, organized over 200 continuing

education events with over 9,000 participants in the first half of 2006 alone. Notaries are also required by law to subscribe to the Federal Law Gazette, the Law Gazette of their respective federal state (Bundes- und Landesgesetzblatt), and the German Notarial Journal (Deutsche Notarzeitschrift, DNotZ), which both contains the official announcements of the Federal Chamber of Notaries (Bundesnotarkammer) and is a professional publication. Alongside the DNotZ, notaries regularly subscribe to numerous other professional publications and/or online services. In sum, we may assume that the average notary spends at least 50 hours annually on continuing legal education.

D. The Law Governing Notarial Costs

Notarial costs are determined according to a federal law, the so-called *Kostenordnung*. It governs not only notarial costs, but court costs as well. The notary is required to charge fees according to the *Kostenordnung*. Fee agreements are not permitted. The constitutional principle of equality in and of itself forbids bearers of public office from charging arbitrary amounts for their legally mandated services. No court is permitted to negotiate its fees with a citizen. For the notary, too, the public-law character of his function and activities dictates the necessity of a fixed fee schedule.

The fee schedule sets fees according to the amount in question. Behind this principle is the conception of allowing all citizens equal access to the law. Because the state has prescribed the notary's involvement, it must take care as well that the fee amount is just and reasonable for a citizen's particular transaction. By setting the fee according to the amount in question in the transaction, the legislature has ensured that less prosperous citizens will still have the opportunity to conclude legal transactions if

notarial documentation is required by law. The legislature has therefore set fees for small transactions that do not cover the time invested by the notary. Higher fees for higher amounts in question effect a cross-subsidization. This cross-subsidization affects every notary, since a notary – in contrast to “free” providers of legal services – cannot seek out his clientele. Instead, he is fundamentally obliged to take on every matter brought to him by a citizen unless special grounds for refusal exist. What is dispositive for a macroeconomic evaluation of this system vis-à-vis freely negotiable fees is the conception that the fees must be apportioned so that no participating group of persons is either excessively burdened or privileged.

E. Liability of the Notary

Should the notary intentionally or negligently violate his duties of office, he will be obliged to pay damages to the injured party (§ 19 BNotO). The relevant case law places very strict requirements on the notary's duties of care. The notary's full assets are exposed to liability for his violations of his duties. There is no limitation of liability for notaries as exists, for example, for lawyers.

Under the Bundesnotarordnung, notaries have a duty to get malpractice insurance (§ 19a BNotO). The legal minimum malpractice insurance amount for negligence violations is 1,000,000 €, of which the notary is to insure 500,000 € himself, and an additional 500,000 € through insurance arranged via the regional chambers of notaries. Most notaries secure additional insurance protection beyond the minimum amount required by law. The average amounts insured range between 2,000,000 € and

3,000,000 €. It is not uncommon for notaries to arrange malpractice insurance specific to the individual case of a particularly high-value transaction.

The public trust in notaries is of such high significance that there even exists insurance protection against the situation – obviously extremely rare in practice – of intentional harm. To this end, the chambers of notaries have taken out special fidelity insurance for all their members. In excess of their legal obligations, all notaries pay into a fund for violations of fidelity, and which is used to address the financial consequences that ensue when a citizen has been harmed by a notary's intentional conduct and has no other possibility for compensation.

Part 3: Transaction Costs

The following table sets forth estimated transaction costs for purchase and sales of residential real estate in values ranging from 100,000 € to 1,000,000 €. According to the web site of the Institut fuer Staedtebau, Wohnungswesen und Bausparwesen, e. V., Berlin the average price in Germany in 2006 for residential property was 155,125 € (houses) and 119,000 € (apartments).

TABLE C-3 – Real Estate Transfer Costs in Germany

	<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>	
<i>Costs</i>	<i>Broker's Commission</i>	4,000€	4,000€	10,000€	10,000€	20,000€	20,000€	40,000€	40,000€
	<i>Purchase Price</i>	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
	<i>Notary Fee - Contract</i>	454€	454€	904€	904€	1,654€	1,654€	3,154€	3,154€
	<i>Notary Fee Contract Effectuation</i>	105€	105€	205€	205€	333€	333€	588€	588€
	<i>Notary Fee - Mortgage</i>		187€		292€		667€		1,192€
	<i>Real Estate Transfer Tax</i>	3,500€	3,500€	8,750€	8,750€	17,500€	17,500€	35,000€	35,000€
	<i>Recording/Registration Fee</i>	311€	311€	648€	648€	1,211€	1,211€	2,336€	2,336€
	<i>Mortgage Registration Fee</i>		177€		282€		657€		1,182€
<i>Total Transfer Costs</i>	8,370€	8,734€	20,507€	21,081€	40,698€	42,022€	81,078€	83,452€	
<i>Total Conveyancing Fees</i>	559€	746€	1,109€	1,401€	1,987€	2,654€	3,742€	4,934€	
<i>Conveyancing Fees as percent of Total Costs</i>	6.68%	8.54%	5.41%	6.65%	4.88%	6.32%	4.62%	5.91%	
<i>Conveyancing Fees as percent of Purchase Price</i>	0.56%	0.75%	0.44%	0.56%	0.40%	0.53%	0.37%	0.49%	
<i>Broker's Commission as percent of Total Cost</i>	47.79%	45.80%	48.76%	47.44%	49.14%	47.59%	49.34%	47.93%	

Comparative Analysis of Land Conveyancing in 5 European Member States

Peter L. Murray

2007

National Report - Real Estate Conveyancing in Sweden ^{***}

Part 1: Legal basis and procedure of real estate transactions

- A. Outline of the origination and implementation of a typical agreement for sale of real estate
1. The seller instructs the agent in writing to broker the sale of the freehold property.
 2. The agent inspects the real estate properties register and checks whether according to this register licensing requirements must be observed, in particular requirements of consent of the seller-spouse, rights of pre-emption of a local authority, licensing requirements for the sale of real estate properties used for agricultural or forestry operations as well as apartment buildings. The agent is not required to check any existing further licensing requirements not shown in the register.

^{***} The Reporter thanks Dr. Marius Kohler for comprehensive contributions to this National Report, and Professor Hans Heinrich Vogel, University of Lund, Sweden, and Judge Thed Adelswärd for helpful information about land conveyancing in Sweden, including a tour of the District Registry at Haessleholm, Sweden.

3. The agent places advertisements about the property for an average of around two weeks in the internet as well as in newspapers and offers a viewing appointment.
4. The buyer gets in contact with banks to seek financing. The bank inspects the land register, checks the economic circumstances of the buyer and if applicable issues a confirmation of financing. The lending limit is typically 90 % of the purchase price.
5. Offers are received by the seller, typically in connection with a bidding procedure. The bidding procedure, in which the prospective buyers are given the possibility to make offers of the purchase price, is not regulated by law and frequently leads to disputes in practice. Thus, the prospective buyers regularly succumb to the error that the contract must be concluded with the highest bidder. In actual fact, however, the seller decides as it may see fit. The interested parties are often not informed sufficiently on this by the agent. The duration of the bidding procedure varies depending on the type and location of the property and on average is around one week.
6. The buyer obtains an expert opinion on the state of construction of the real estate from a technical expert. Although a technical expert's opinion on the freehold property is not a binding legal requirement, it is nonetheless of great importance for the buyer. Under Swedish law relating to agreements for sale, the buyer bears the risk for defects that it would have been able to discover in the event of a thorough expert opinion on the property. At the same time, a strict

standard of care is set by the courts. The seller is not liable for such recognizable defects; it is only obliged to give information in specific exceptional cases.

According to the basic conception of Swedish law the technical expert's opinion is to be obtained before the conclusion of the contract. Frequently, however, it is drafted only subsequently, since the seller and the agent are pushing for a quick conclusion of the contract. Due to the continuously booming real estate market^{†††} since the middle of the 1990s, the seller is actually in a strong negotiating position and can therefore regularly successfully achieve a quick conclusion of the contract without a prior expert opinion. In the standard agreements there are in this case typically clauses that grant rights (to reduce the purchase price, rescind the contract, or recover damages) to the buyer in the event that defects are found in the subsequent expert opinion. These provisions of the contract sometimes lead to disputes after the event.

7. The agent drafts the agreement for sale on the basis of standardized form contracts that are issued by organizations of agents or publishing houses. Agreement of sale forms are also freely available from stationer's shops. There is neither a formal requirement for legal advice nor is legal advice before the conclusion of the contract regulated by law. If, as is regularly the case, the purchase price is financed, the crediting banks generally demand an agreement for sale drafted by an agent even if the parties to the agreements for sale have

already reached agreement without the intervention of an agent. Legal advice by a lawyer is not usual in residential real estate transactions.

8. The draft contract is sent to the parties and the buyer's bank.
9. The contract is signed in the real estate agent's office. The contract is (in ca. 95 % of cases) subject to the condition of complete payment of the purchase price, so that contrary to the general principles of Swedish law of property, the ownership is not transferred to the buyer immediately on conclusion of the contract, but only on conclusion of the so-called final transfer agreement on payment of the purchase price (see below sub 13).

The agreement for sale is drafted very succinctly; it regularly has a length of only two to four pages. It contains predominantly standard clauses on the description and condition of the real estate, transfer of possession etc. No principle of completeness must be observed. In the absence of a requirement as to form, oral agreements are also admissible to modify or supplement the written agreement for sale.

The agent's work is usually restricted to inserting the personal data of the parties involved and the details of the real estate parcel in the standardized form contracts. An individual contract drafting that takes into account the anomalies of the specific case takes place only very rarely.

10. The buyer pays a deposit of 10 % of the purchase price to a trust account of the agent ("*handpenning*"). The *handpenning* is intended primarily to provide security to the seller. In the absence of a specific contractual provision

otherwise, it constitutes the legal maximum amount for the seller's claims for damages on account of non-payment by the buyer. The agent concludes a deposit agreement with the parties, in which the terms of the investment and disbursement of the money is regulated. It is also frequently stipulated in the agreement that the *handpenning* also serves to provide security for the agent's claim against the seller for payment of the agent's commission and in this sense the agent is even entitled to a right to prior satisfaction.

11. The agent obtains any licenses required for the validity of the contract.

Swedish law however recognizes only a small number of licensing requirements. In other respects, as mentioned at the beginning, the agent is not obliged to check a licensing requirement of the contract not shown in the real estate properties register.

12. The buyer's bank enquires at the seller's bank about the status of any liabilities of the seller to be discharged. The banks agree independently about the redemption amounts to be paid to the seller's bank. The collaboration between the banks is made easier by the fact that only a small number of banks are active in real estate financing on the Swedish market. The coordination of the payment of the purchase price is not one of the duties of the agent.

13. The signing of the final transfer agreement by both parties in the office the buyer's bank takes place on the date of the intended purchase price payment and the transfer of possession, benefits and burdens. This is typically the

case around three months after conclusion of the agreement for sale. After a repeated inspection of the land register, the buyer's bank transfers the requested discharge amounts directly to the seller's mortgagee bank and the remaining amount of the purchase price to a bank account of the seller. The seller's bank confirms the receipt of the payment and transfers its real estate liens securing the financing to the buyer's bank (sending a paper mortgage by post or by transfer of an electronic mortgage electronically). If the real estate liens assumed are insufficient to secure the buyer's loan liability to its bank, the buyer authorizes the entry of a further real estate lien on the property in the land register. Subsequently, the keys are handed over.

14. The buyer's bank applies for the registration of the transfer of ownership of the freehold property and if applicable the entry of the new real estate lien, presenting an original counterpart of the final transfer agreement. In the case of real estate liens assumed, the buyer's bank applies for the registration of the transfer of ownership of the real estate as well.
15. The land registry checks whether the formal minimum requirements set for the final transfer agreement are satisfied. Entries are only upon payment in advance of the registration fees.
16. After registration of the transfer of ownership, the land registry sends a corresponding notification of the entry to the buyer only, and not to the seller. The notification of entry is sent conditioned on payment of the real estate transfer tax levied by the land registry in trust for the tax and revenue

authorities. The buyer's bank also receives a notification about the entry of a land charge in the land register. In the case of newly created land charges, ordinarily only an electronic mortgage is issued, which is entered in an electronic register.

B. Legal framework for real estate transactions

I. Main features of law of property in relation to property transactions

1. Legal sources

In Sweden, there is no self-contained systematic, uniform codification of the law of property, let alone civil law in its entirety. The most important regulations under real estate law are contained in an own statute, the Real Estate Code (*Jordabalken*) from the year 1970 (hereinafter referred to as "JB"^{†††}).

The *Jordabalken* comprises in 24 chapters a complex set of regulations, which deals – in places in very great detail – with a wide range of relevant points of law in relation to real estate properties. The Code is subdivided into two sections, whose first (Chapters 1-18) deals with substantive real estate law, while the second (Chapters 19-23) applies to land registration matters. The provisions regarding land registration matters are supplemented by the Land Register Ordinance [*Förordning om Fastighetsregister*] (2000:308).

The individual Chapters regulate the definition of immovable property (Chapter 1), fixtures and fittings (Chapter 2), the law concerning the respective interests of

neighbours (Chapter 3), the transfer of real estate properties through purchase, exchange and transfer by way of gift (Chapter 4), the legal consequences of the third-party challenge to a disposal of a property (Chapter 5), the real estate lien (Chapter 6), rights of use and enjoyment and servitudes (Chapter 7), various aspects of tenancy (Chapter 8-12), heritable building rights (Chapter 13), easements (Chapter 14) and right to electricity (Chapter 15), acquisition by long adverse possession (Chapter 16), the legal consequences of double and multiple dispositions (Chapter 17), bona fide acquisition (Chapter 18), general principles of entry in the land register (Chapter 19), entry of ownership (Chapter 20), entry of heritable building rights (Chapter 21), of liens (Chapter 22) and further rights of use and enjoyment including servitudes (Chapter 23) as well as the entry of property that is not intended to be fixtures and fittings (Chapter 24).

In Swedish law, there are a restricted number of rights in rem in one property; further rights beyond those regulated by law are not recognized and may not be created by way of private agreements.

The *Jordabalken* is supplemented by further statutes and ordinances. The most important of these statutes and ordinances are the following:

Real Estate Formation Act, Fastighetsbildningslag (1970:988)

Real Estate Register Act, Lag (2000:224) om fastighetsregister, together with the Real Estate Register Regulations, Förordning (2000:308) om fastighetsregister

^{###} Without further designation, hereinafter, §§ refer to sections of the Real Property Act

Mortgage Register Act, Lag (1994:448) om pantbrevsregister, together with the Mortgage Register Regulations, Förordning (1994:598) om pantbrevsregister

Land Registration Regulations, Inskrivningsförordning (2000:309)

Pre-Emption Act, Förköpslag (1967:868)

Real Estate with Leased Buildings Acquisition Act, Lag (1975:1132) om förvärv av hyresfastighet m.m.

Land Acquisition Act, Jordförvärvslag (1979:230), together with the Land Acquisition Regulations, Jordförvärvsförordning (1991:736)

Real Estate Acquisition and Conversion to Tenant Ownership or Cooperative Rental Tenancy Act, Lag (1982:352) om rätt till fastighetsförvärv för ombildning till bostadsrätt eller kooperativ hyresrätt

Act on the Leaseholder's Leased Property Acquisition Rights, Lag (1985:658) om arrendators rätt att förvärva arrendestället

Act on the Licensing of Certain Real Estate Acquisition Transactions, Lag (1992:1368) om tillstånd till vissa förvärv av fast egendom

Real Estate Agents Act, Lag (1995:400) om fastighetsmäklare, together with the Real Estate Agents Regulations, Fastighetsmäklarförordning (1995:1028)

National Land Tax Act, Lag (1984:1052) om statlig fastighetsskatt

Real Estate Properties Taxation Act, Fastighetstaxeringslag (1979:1125)

Expropriations Act, Expropriationslag (1972:719)

Management of Collectively Used Systems Act, Lag (1973:1150) om förvaltning av samfälligheter

Utility Easements Act, Ledningsrättslag (1973:1144)

Planning and Building Act, Plan- och bygglag (1987:10), together with the Planning and Building Regulations, Plan- och byggförordning (1987:383)

Tenant-Ownership Act, Bostadsrättslag (1991:614), together with the Tenant-Ownership Regulations, Bostadsrättsförordning (1991:630)

Housing Management Act, Bostadsförvaltningslag (1977:792)

2) Ownership and further rights in real property

a) Ownership

Under Swedish law, natural and legal persons may be entitled to various interests in movable and immovable property. The most comprehensive interest is the right of ownership (*äganderätt*). According to the Swedish constitution, in particular as far as immovable property is concerned, it enjoys particular protection against expropriation.

No legal definition of the concept of ownership exists. Usually, in Sweden, ownership is understood as the epitome of the options of disposal of property recognized by the legal system. The core of the concept of ownership consequently has

meaning only after a comprehensive look at the restraints on the individual's power of disposal resulting from a plethora of statutes, ordinances and further legal provisions.

The right of disposal of an owner of real estate in Swedish law is in various respects restricted in the collective interest. A general restraint based on old Swedish legal tradition that is quite remarkable in comparison to other legal systems is the so-called "Everyman's Right" (i.e. the right to walk freely in nature)(*allmansrätt*), by virtue of which the owner of real estate is in principle required to permit anybody to cross or stay temporarily on its property unless the property consists of living quarters or commercially used real estate or there is a risk of damage such as e.g. in the case of cultivated woods and forests. Everyman's Right includes the right to pick berries, mushrooms or flowers, to swim in lakes and camp temporarily in woods.

Other restraints on ownership exist by virtue of provisions under the law concerning the respective interests of neighbours and the law concerning the protection against harmful effects on the environment. Restraints on the power of disposal for the protection of persons and the environment may be stipulated in a development plan. It is regularly shown in the real estate properties register whether a property is included in a development plan.

Besides exclusive ownership, co-ownership of a property can also be established in the sense that the co-owners are each entitled to a certain inchoate share of the property. Disposition of the property requires the consent of all co-owners. Specific restraints must be respected if a property is in co-ownership of married couples or if members of an extramarital cohabitation acquire a property for the purpose of living

there together. If only one spouse or member of an extramarital cohabitation is entered as owner in the real estate register, under Swedish law the other person may be entitled to a so-called concealed co-ownership right (*dold samäganderätt*), which grants him/her a legal power similar to ownership.

A further form of ownership is so-called joint ownership (*egendomsgemenskap*). It corresponds to the relationship between the partners of a so-called simple partnership (*enkelt bolag*). Since the simple partnership has no legal capacity, partnership assets are held in joint ownership. In the internal relationship between the partners, no partner may dispose of assets belonging to the partnership assets without the prior consent of the other partners.

b) Heritable building right

The phenomenon of the heritable building right (*tomträtt*) is known in Sweden. The heritable building right is considered as a right of use and enjoyment of the real estate. In its legal formulation it is aligned with the right of ownership. It can only be granted by the public authorities. In practice, it is exclusively the local authorities that issue heritable building rights to the local authority's own properties for the benefit of private and legal persons. The rights are created through written contract and this must be entered in a special register of heritable building rights.

The holder of a heritable building right may encumber the heritable building right with liens or transfer or bequeath it as a whole. It may also grant rights of use and enjoyment and easements. Conversely, a servitude on another property or heritable

building right may be created for the benefit of the holder of a heritable building right. Bona fide acquisition of a heritable building right is possible to the same extent as in the case of freehold property .

The heritable building right is for an unlimited period and may only be terminated after the expiry of a certain time periods. In the absence of an agreement to the contrary, the first time period is supposed to be at least 60 years; each subsequent period is at least 40 years. If the heritable building right authorizes purposes other than the erection of an apartment building, shorter time periods of not less than 20 years may be agreed upon. The landowner make use of its right of termination only if a justified interest in a different kind of use of the property exists. The holder of the heritable building right has no right of termination; it may only transfer the heritable building right to another person.

The ground rent must in each case be determined in a fixed amount for certain periods. In the absence of contractual agreements to the contrary, these are at least ten years. The amount of the rent is determined by the value of the real estate. The long time periods until the adjustment of the ground rent can in part lead to significant fluctuations of the rent depending on change in the value of the real estate within the ten years. The introduction of shorter statutory periods has been under discussion for some time.

In the event of termination of the heritable building right, the landowner is obliged to redeem the building together with fixtures and fittings through the payment of compensation to the holder of the heritable building right. This obligation may be

contracted out of agreements or limited in its scope if the heritable building right was not created for residential purposes.

The heritable building right is transferred in accordance with the rules regarding the acquisition of real estate, whereby the entry is made in the register of heritable building rights.

c) Land charges

Swedish law in principle recognizes only one legal form of real estate lien (*panträtt*). This is similar to a German certified land charge as a right of exploitation and has the function to serve a creditor as security for its claim – regularly, but not imperatively a pecuniary claim – against the landowner or a third party. It is also considered as an ownership interest. The lien grants to the lienor in the event of a judicial sale of the property a right to satisfaction from the property in the amount of its secured claim in accordance with the priority of the lien. The priority is in principle determined in accordance with the time of the application for entry in the land register.

The lien is generally created by the entry and transfer of the land charge certificate or alternative transfer. First, the current landowner must apply in writing to the land registry for the entry (*inteckning*) of the lien in the land register. The person designed as owner in the land register considered as the owner. The acquirer of the property after filing its application for entry in the land register, is then entitled to file the application for entry of the lien. The application must state the amount of the sum of money and indicate the real estate properties to be encumbered. The entry may cover

several properties only if they are located in the same land registry district and the same owner is entitled to them.

If the application for entry in the land register is authorized and the lien is entered in the land register, the land registry issues a mortgage bond as documentary evidence of the lien entered in the land register. If the lien does not serve as security for a third-party claim, the owner thus obtains an ownership interest in the amount shown on the mortgage bond, which grants it a right for disbursement of the amount indicated on the bond in the event of a judicial sale.

The creation of the lien as security for a claim on the other hand additionally requires the pledgor to transfer the mortgage bond to the recipient of security in pledge for the claim. In this regard, an allocation of funds agreement is required, which as a general rule must be drafted in writing. If the amount of the secured claim is less than that stated on the mortgage bond, the person providing security retains an ownership interest in the amount of the excess sum, which it may in turn use as a means of providing security by way of an assignment by a subordinated pledge.

The real estate lien may also be created for future claims. If the property is transferred before the claim arose, the recipient of security may also assert the lien against the new owner as long as it does not act in bad faith in relation to the person providing security's status as owner up to the time in which the claim arose.

In the year 1991, during the introduction of the electronic land register, the so-called IT-mortgage bond (*datapantbrev*) was created. In this case, the registration of the mortgagee in an electronic mortgage bond register replaces the physical issue and

transfer of mortgage bonds. This measure actually introduced a real estate lien without a land charge certificate.

d) Leasehold and tenancy interests as rights of use and enjoyment in rem

In Swedish law, leasehold interests in relation to real estate properties are understood as institutions under the law of property. At the same time, the principle that purchase does not supersede a lease basically applies. However the statute states a number of exceptions that hollow out the practical significance of the principle. Leasehold and tenancy interests can obtain protection of vested rights against subsequent acquirers of a property through an entry in the land register. If they are not entered in the land register, the landowner is in other respects required by operation of law to stipulate a reservation for the continued existence of these rights, whereupon they obtain binding force against the acquirer in the event of alienation of the property. If the alienor omits to do this, the lease and tenancy are nonetheless not extinguished, if they – as is regularly the case – were established in a written contract and the leaseholder or tenant is already in possession of the leased property at the time of the alienation. If no written contract is reached, the lease or tenancy agreement may still come into existence in the end against the successor in title of the landowner if this successor in title does not terminate it within three months after the transfer of ownership.

In the case of alienation of the property, the lessee and tenant respectively may be entitled to a right of pre-emption. If the owner recovers the property after the expiry

of the contract, it is obliged, subject to certain preconditions, to pay a redemption amount for buildings erected on the property.

3. Real Estate and Movable Property

The provisions stipulating the criteria for the differentiation between immovable property (*fast egendom*) with fixtures and fittings on the one hand and moveable property on the other are of central importance for Swedish law of property. The differentiation is regulated in such a way that everything that is immovable property and fixtures and fittings appurtenant to this is considered as real estate, while all other objects are considered as moveable property. In this sense, it should be born in mind that moveable property is not only moveable physical objects (*lösöre*) but in addition also includes for example claims, restricted rights in rem to real estate properties such as liens or rights of use and enjoyment, equity interests in a trading company as well as membership rights in associations if they constitute an economic value (such as in particular in the case of the housing rights associations stated in greater detail below), co-ownership interests in movables, securities, shares and also intellectual property rights.

The characteristics of the fixtures and fittings is significant above all in connection with the alienation of a property or its encumbrance with a lien, or in the event of individual or collective execution against property. In the case of the purchase of the property, in the absence of an express agreement to the contrary, the contract covers the fixtures and fittings. In the case of the encumbrance of the property with a lien, this

must strictly also comprise the fixtures and fittings. The judicial sale of the property likewise covers the fixtures and fittings; the same applies in the case of insolvency of the landowner.

The owner of a moveable property thus loses its protection under the law of property or any right to preferential satisfaction as soon as the property becomes fixtures and fittings of the property of another person. In particular, reservations of rights to terminate the contract and retentions of title of the alienor of moveable property lose their protective character against third parties and also inter partes as soon as the property becomes the fixtures and fittings of a property; a different regulation applies only to so-called industrial appliances.

The concept of fixtures and fittings on the real estate is legally defined. Thus, for example, buildings standing on the property are accordingly considered as fixtures and fittings. As a basic rule, there is an presumption that moveable property is fixtures and fittings of real estate if it is connected externally in a particular manner to the property. Even if the landowner individually alienates property considered as fixtures and fittings, the property continues to be considered as fixtures and fittings until it is observably removed on inspection. If the property is alienated as a whole before the removal of the moveable property, in the absence of an agreement to the contrary, the buyer of the real property also acquires the fixtures and fittings. This applies even in the event of the bad faith of the acquirer in relation to the previous alienation of the property to another person. It must be born in mind, however, that there is an exemption to this basic rule for moveable property that was introduced to the real estate without falling into the

ownership of the landowner. The buyer of the property is in this case entitled to a right to reduce the purchase price or rescind the contract if it assumed in good that such property had been acquired by it as fixtures and fittings of the underlying real estate.

Finally, it must be born in mind that the ownership of land on the one hand and the buildings standing on the land on the other – even outside of the heritable building right – may become separated. This is for example the case if a possessor of a property erects a building on the property at its own expense in the exercise of a right of use and enjoyment to the property granted to it by the owner. Such a building will not become immovable property, irrespective of whether the use of the building was intended for a definite or indefinite period. Such a situation occurs particularly in the case of holiday homes in Sweden. In this sense, the legal character of such a building is of a special kind in that despite its legal nature as moveable property the buildings cannot be pledged as such property. This leads to a significant restriction of its usability as collateral. Without the characteristic as property it cannot be subjected to a charge on real estate according to Swedish law. The only course open is a simple security interest in personal property.

4. Principle of consensus

Swedish real estate law recognizes neither a principle of abstraction nor a principle of separation. The transfer of ownership of real estate takes place at conclusion of a valid agreement for sale, unless the contract is made subject to a

condition. The subsequent entry in the real estate register has in principle only declaratory significance.

In the case of multiple dispositions by the same owner however slightly divergent rules apply. Irrespective of the time of the conclusion of the contracts, the acquirer that first applies for entry in the register is granted priority if it did not act in bad faith relative to an earlier disposal by the owner as of the time of conclusion of the contract. For the validity of the registration as well as the possibility of bona fide acquisition, see in other respects, below sub II. 5.

5. Housing right

Ownership of dwellings may not be established directly under Swedish law. It is possible however – on the basis of a self-contained statute, the Housing Rights Act (*bostadsrättslag*) – to acquire a right of use and enjoyment to a dwelling for an indefinite period, a so-called housing right (*bostadsrätt*) if the apartment building and land is in the ownership of a so-called housing rights association (*bostadsrättsförening*). The housing right is then acquired through the acquisition of a share in the housing rights association. The right, more precisely the share in the association, is alienable, hereditary and pledgeable and thus approximates an ownership interest. Monthly charges that are supposed to cover the expenses of the association for ongoing maintenance and management costs must be paid to the housing rights association. The holder of the housing right is obliged to observe the articles of the housing rights association.

Combination forms also exist such as one-family housing settlements, in which the real estate together with buildings standing on it are in the individual ownership of the occupants, while collectively used systems such as collective garages, green areas or routes are in the ownership of such a housing rights association.

II. The Swedish real property register

1. The Register System in General

Swedish law recognizes a real estate register (*fastighetsregister*). In contrast to German law, no separate cadastral map exists. Rather, the real estate register also contains details of the location, size and type of use of each property as well as a real estate map with details of the real estate boundaries including recommendations under construction planning law. Since 1 July 2000, all registerable information about real estate properties is contained in a single, nationwide, real estate register. Before then the details were spread over different registers that together formed the so-called real estate register system (*fastighetsregistersystemet*). The earlier registers now form sections of the uniform real estate properties register.

The real estate register is administered by the Central Land Survey Authority (*lantmäteriet*). However, various authorities reserve the right to provide entries depending on the subject matter of the entry. Thus, cadastral details are in principle entered at the instigation of cadastral authorities (*lantmäterimyndigheter*), while details furnished by owners or details of encumbrances of the property are entered by the registry officials appointed by the courts of first instance (*inskrivningsmyndigheten*).

Originally, a registry was affiliated with each court of first instance; this was however changed in the course of centralization. Now, there are only seven registry locations for the whole of Sweden. The processing of the applications is largely the responsibility of registry officials without any legal training. More challenging cases are dealt with by the few employees with legal training. The management and supervision is carried out by a judge of the affiliated court of first instance (*inskrivningsdomare*). He/she supervises the registration and decides if necessary about particularly complicated applications.

The real estate properties register contains in detail primarily the following information about each property:

- Size, precise location, type of use, information about rezoning or partitioning carried out as well as relevant details of the development plan;
- Details of the real estate owners, date of entry of acquisition of ownership, the date of acquisition transfer agreement and the agreed purchase price;
- Details of heritable building rights;
- Details of restraints on disposition by the owner;
- Details of encumbrances of the property, i.e. real estate liens, easements, rights to electricity and rights of use and enjoyment. It must be born in mind, however, that the names of the lienors are not always shown, rather, the land registers frequently only contain the information whether mortgage bonds exist at all for the property and, if yes, with what amounts these have been granted;
- Details of the assessed tax value;
- Details of any existing special area protection;
- Details of collectively used systems (*samfälligheter*).

The combination of the most varied factual information (details furnished by owners, cadastral data, real estate encumbrances, restraints on disposals, licensing

requirements, construction planning information, tax assessment details) in one single register connected merely through its joint relation to a specific property has led to some disadvantage in relation to the legibility and clarity of the register. Thus, the land registries regularly reject applications for entry in the land register by real estate agents owing to insufficient consideration of the content of the register.

The priority of various real estate rights is in principle determined by the time of filing the applications for entry in the land register.

The real estate properties register is a public register. Private persons can therefore also inspect the register.

Besides the real estate properties register, two further real estate related registers exist. One is the register for electronic-mortgage bonds established in 1994 and the other is the already-mentioned register of heritable building rights, which in its structure resembles the real estate register.

2. The Requirement of Registration

In Sweden, a comprehensive registration obligation exists in relation to the existing inventory of properties. By now more than 95% of the land is registered. The registration system has its legal roots in a statute from the year 1875. The most important reform took place in 1973, when the electronic land register in Sweden was first introduced.

The registration procedure is regulated in the second section of the Real Estate Code. Here provisions regarding various types of registration and their respective requirements of entry are found. In other respects, the regulations are supplemented by

three further legal sources, the Real Estate Properties Registration Act (*lagen om fastighetsregister*), which contains provisions regarding access to the register and its disclosure of information, the corresponding Real Estate Properties Registration Regulations (*förordningen om fastighetsregister*) with regulations regarding the procedure for keeping the electronic register as well as a comprehensive regulation (*inskrivningsförrordningen*) that lays out and specifies in further detail the content of individual provisions of the Real Estate Code.

3. The Legal Effect of Registration

The entry of the change of owner is in principle merely declaratory. On conclusion of a valid unconditional agreement for sale, the ownership of the property passes into the ownership of the acquirer. Under substantive law neither possession nor entry in the land register is required. While this is not expressly provided in the statute, it can be derived from a comprehensive review of regulations of the Real Estate Code and the Law on the Execution of Civil Judgments.

Although the acquirer theoretically obtains protection against attachment of the property by the seller's creditors and can freely dispose of it on conclusion of the agreement for sale, this principle meets with certain restrictions in practice. The application for entry of ownership and the entry itself thus obtain a significant practical significance. For instance, the creation of new liens by the acquirer is impossible until its application for registration of transfer of ownership has been filed since only the person entitled to apply for registration as owner in the land register is entitled to file the

application for the entry of a lien in the register. Before filing an application re-registration with supporting documents, the acquirer of a property may use liens as security only if these have already been entered and the corresponding certificates are in its possession.

In addition, as mentioned, in the case of multiple disposals, the principle of the priority of the earlier filing of the application applies irrespective of the time of the conclusion of the contract. Finally, it must be born in mind that in contrast to the transfer of ownership, for the creation of a real estate lien, the registration is constitutive for the origination of the right.

4. Application Procedure.

The application for entry in the register must be filed in writing and by signed by the registered owner. The property concerned by the entry must be recorded with sufficient certainty. If the registration is based on a contract such as is the case with purchase of property, the original final transfer agreement must additionally be enclosed.

The application for entry of liens is usually filed by the owner's lending bank. The application is signed by the owner; the mortgage bond is however sent by the register directly to the bank.

The registry official compares the information contained in the application with the content of the register. If the application also requires signing by a spouse or extramarital cohabiting partner, the civil status of the applicant is checked by means of

the data contained in the civil records register available to the registry official. The signatures in the application are not otherwise checked for authenticity; in particular no comparison with other recorded signatures of the registered owner is made.

In registration of the transfer of ownership, documentary proof that the entry has taken place together with a receipt for the fees paid for the entry and the real estate acquisition tax is sent to the acquirer, but not to the seller after the execution of the application (on this, see below sub Part 2). This form of notification has already lead to problems due to its vulnerability to fraudulent machinations. There have been several cases of agreements for sale with a forged signature of the owner. After the introduction of the identity check by the agent as required by the Money Laundering Act of 1 January 2005 this risk is reduced.

5. Protection of Good Faith Acquirers

The loss of ownership of land by the party genuinely entitled to a bona fide acquirer is possible in Sweden. The content of the land register is accorded a positive as well as negative publicity impact. At the same time, bona fide acquisition always requires the transfer of the property in a single transaction, the bona fide acquisition by way of the universal successor in title is generally excluded.

If the alienor is not the owner, the acquirer may become the bona fide owner if the acquisition takes place in the form of a transfer, the alienor is entered as owner in the land register in the event of the transfer and the acquirer acts in good faith in the event of the transfer. The alienor may not be the real owner of the alienated property if its

own acquisition was invalid or not valid against the lawful owner on other grounds.

Since no distinction is made in Swedish law between a contractual agreement under the law of obligations and the disposition of property interests, all grounds for the invalidity or cancellation of the transfer agreement have the effect that the acquirer of ownership does not obtain or loses again and thus is not the owner of the property.

If the acquisition takes place in the form of a purchase, exchange or transfer by way of gift, it takes place through transfer.

A point of contact for good faith is the entry of the alienor as owner in the register. Even if in principle little information regarding the position of the party entered under substantive law may be inferred from the entry, by the entry, this party thus possesses the formal entitlement to dispose of the property. In its favour, the assumption applies therefore that it is the correct owner.

An acquirer is considered as bona fide if it neither knew nor ought to have known at the time of the transfer that the alienor was not the lawful owner. A somewhat justified suspicion is sufficient to have the acquirer considered as a mala fide acquirer. The presence of good faith, however, is only required on conclusion of the transfer agreement. If the acquirer subsequently becomes mala fide, this is not fatal. If the alienation takes place, as in most cases, through agreement for sale and final transfer agreement (on this, see in greater detail below at sub III. 7), good faith is determined as of the time of the conclusion of the agreement for sale.

The good faith of the acquirer is controverted irrespective of its actual knowledge if circumstances are recorded in the land register that may give rise to doubts about the

entitlement of the alienor. Thus, for example, it may be noted in the land register that the real owner has brought an action for avoidance of the acquisition by which the alienor has obtained the property. Restraints on disposal to the detriment of the alienor or the exercise of the right of pre-emption of the local authority may also be entered in the land register and thus hinder a bona fide acquisition.

If the acquirer is mala fide in relation to the alienor's status as owner, but has resold the property to a bona fide third party, without itself having been entered as owner in the land register, this third party becomes the owner being bound by the legal situation of the other party to the contract. In the case of this exception, the bona fide third-party acquirer can assume that the other party to the contract had obtained the freehold property from the registered and thus lawful owner.

Good faith also relates to the freedom of the alienated property from existent encumbrances that are not entered but capable of entry in the land register, such as in particular servitudes.

A double disposition, in which the party still entered as owner of the property after a sale sells it once again to a bona fide third party is not a case of bona fide acquisition in the above-mentioned sense. In this situation, the party that first files the application for registration of the transfer of ownership acquires the title, provided that it was not a mala fide alienor in relation to the earlier disposal.

Despite the satisfaction of the definitional elements for bona fide acquisition, it is nonetheless excluded in certain legally regulated cases. This concerns particularly serious cases in which the previous owner's acquisition of the property from the lawful

owner was invalid. These include on the one hand cases in which the mandatory formal requirements applicable for a valid transfer were not satisfied in the event of an earlier transfer of the property. A bona fide acquisition is excluded if the purchase agreement was forged or issued under duress (direct physical force or the threat of such). Bona fide acquisition is also impossible if the owner was in insolvency, not of full legal capacity, was under the influence of a mental disturbance or could not dispose of the property because of the appointment of a guardian under the Act on The Children and Parents Code (*föräldrabalk*) at the time of the conclusion of the agreement for sale. Despite the wording being formulated in comparatively broad terms, in practice this regulation has little significance.

For a judicial clarification of the question of one's position as owner, the statute makes available the specific institution of the action for avoidance. The actual owner brings an action against the acquirer that last applied for entry as owner in the land register. Before the bona fide acquirer has filed an application, the alienor is the defendant in such a legal dispute. If the lawful owner is victorious in such a case, the judgment is also valid against the bona fide acquirer. Its bona fide acquisition is thus without any significance. If, on the other hand, the bona fide acquirer has already applied for its entry as owner, the action of the original lawful owner must be directed against it; the acquirer may then successfully cite its bona fide acquisition in opposition.

A bona fide acquisition of fixtures and fittings allegedly belonging to the property is not possible under Swedish law. Even if the buyer assumes in good faith that the

building belongs to the property, it does not acquire them, but has at best rights under a warranty against the seller.

6. Legal Consequences of Incorrect Register Information

In accordance with a special feature of Swedish law, the original owner whose right is lost through bona fide acquisition may have a claim for damages against the state for its loss. On payment of the damages by the state, the aggrieved party's claims for damages against the third parties pass by operation of law to the state. The bona fide acquirer that does not obtain ownership of the property despite its good faith in the above mentioned special cases is entitled to the same claim against the state.

This regulation is based on the idea of state liability for hazards which the registration of the real estate and the protection of good faith based on the registration system has created as a “general operational risk” for landowners. In practice, state liability does not fully cover these hazards, due in part to a comparatively narrow statutory definition of the claim for reimbursement. Contributory fault of the aggrieved landowner regularly leads to a partial or even complete discontinuance of the claim. Such contributory fault sometimes consists of the failure to bring an action for avoidance against an inaccurate register before this possibility was taken from it through the bona fide acquisition by a third party.

As shown by statistical enquiries of the Swedish Central Office of Statistics for the Administration of Justice (*Domstolsverket*) in the year 1999, the provision for state liability has also played a small role in practice. There have been recoveries in only three cases from the time of the the entry into force of the state liability provision in the

years 1972 until 1998. The total sum of 1,296,000 SKr (142,741 €) awarded in these cases shows the minimal relevance of this provision for practitioners.

7. Registration times

The period of processing an application for entry in the land register is subject to significant fluctuations depending on the complexity of the content of the application and workload of the competent district registry. The average processing time for an application for entry in the land register that does not raise points of law is estimated at one week in Sweden. In relation to the duration of entries of liens, a survey carried out in June 2004 revealed a range from one day at the quickest land registry and 12 working days at the slowest.

8. Electronic land register or e-conveyancing

The Swedish land register is kept electronically. All register data can be retrieved electronically.

Although anyone can go to the district registry offices and inspect the registries there free of charge or can make enquiries from by telephone, electronic access is only permitted to certain institutional users for a fee. In Sweden, in particular real estate agents and financial institutes regularly make use of this.

The register transactions themselves are still carried out by paper means. While the establishment of an electronic application procedure has been discussed politically, however, so far, it has not been implemented.

III. Creation and implementation of the real estate purchase agreement in detail

1. Involvement of Real Estate Brokers

Parties may negotiate and conclude real estate purchase agreements between themselves without any third-party involvement. Almost invariably, a real estate agent (“*fastighetsmäklare*”) brokers the sale of the property, drafts the real estate purchase agreement and is helpful to the parties in the implementation of the contract. Recent inquiries made by the largest professional association of Swedish agents, *Mäklarsamfundet*, show that in the year 2005, 84% of all real estate purchasing agreements were implemented by agents and that in this regard over the years an ever increasing tendency has been noted. Other estimates are that as many as 95% of all real estate transactions in Sweden involve the participation of real estate brokers.

It has already been pointed out that in Sweden there is a certain amount of tension between the legal requirements for the performance of real estate brokerage services on the one hand and the practical incentives affecting this performance on the other. According to the Real Estate Agents Act (*Fastighetsmäklarlag*), the real estate agent is obliged to safeguard the interests of both parties, thus not only those of its principal. Inasmuch, he/she has the position of a middleman, whom both the seller and the buyer are supposed to be able to trust in relation to contract drafting to as far as possible implement both of their wills. In economic terms, however, and thus above all in with regard to the amount of the sales price, however, the agent is required primarily to follow the specifications and interests of its principal. Moreover, since the broker is

only compensated in the event of a completed sale, the broker has a significant economic incentive that may be at variance with his duty to one or the other of the parties. That these circumstances strain the concept of unconditional neutrality is perceived critically in Sweden even by the professional association of agents. Despite intensive efforts by the state supervisory authority based on findings of failure to observe this requirement, restriction or abolition of the principle of neutrality has not been seriously considered as a political matter.

In addition to performing its central duty to its principal by bringing a prospective buyer to purchase the subject property, the real estate agent is obliged to advise both parties in the event of the real estate transaction, which also comprises advice on points of law, unless the parties have already been legally advised otherwise, for example by lawyers. In addition, the real estate agent usually drafts the real estate purchase agreement and helps the parties in drafting and compiling the documents required for the implementation, in particular the final sales agreement usually signed on payment of the complete purchase sum.

If the buyer is a consumer, the real estate agent must carry out additional duties. Thus, the agent must draw up a written description of the real estate for the buyer. Besides the precise name of the property, this description must contain its ground space and so-called assessment value (*taxeringsvärde*) relevant for tax purposes, the name of the owner, existing encumbrances as well as buildings erected on the property together with their age, size and type of use. Furthermore, the real estate agent is required to hand over to the buyer a written listing of expected future costs associated

with the ownership and use of the property, unless the buyer dispenses with this in writing.

The buyer and the seller may be represented at the preliminary discussion with the agent and on conclusion of the contract; they do not therefore have to be present personally. Usually, the seller of the property concludes a contract with the real estate agent, in which the agent assumes the obligation to work towards the placement of prospective buyers. If the agent is instructed by a consumer that he/she is selling or intends to buy a property used for his/her private use, the agent's agreement must be in writing. Exclusivity agreements that prevent the real estate seller from using other agents must be limited to a maximum of three months. Thereafter the seller is again entitled to retain other agents to broker the sale of its property. While such agreements may be extended, such extension can take place at the earliest one month before the expiry of the set term.

In practice, the short period of exclusive listings results in a significant pressure on the agent to make every effort for a quick identification of the other party to the agreement. The commission falls due if a real estate purchase agreement has come into existence due to the intermediary activity of the real estate agent, but in practice is only paid if the sale is actually completed.

2. Conclusion of the contract

Preliminary incomplete agreements or option contracts in which an owner of property is obliged to alienate its property and/or in which a buyer is obliged to

acquire property are in principle invalid in Swedish law. Contracts that establish an obligation to alienate or acquire property, must, in order to be valid, have a certain legally stipulated minimum content, which includes among other things the declaration by the seller that the ownership is transferred to the buyer. Mere declarations of intention or obligation to sell or buy property are thus not binding under Swedish law. An exception to this is recognized however for contracts relating to gifts.

A buyer may undertake in a so-called deposit agreement (*handpenningsavtal*) to pay damages if it subsequently does not enter into a binding agreement for sale. Such a contract is considered as valid. According to its legal nature, this is a kind of preliminary contract with an undertaking to pay contractual penalties. The buyer pays a deposit on conclusion of the contract, the so-called *handpenning*. If the purchase does not take place, in the absence of a contractual provision to the contrary, the seller is thus entitled to the amount of the deposit. Conversely, however, a "*handpenningsavtal*" does not establish an obligation to pay damages by the seller to the buyer if the seller subsequently does not wish to conclude a contract with the buyer. The seller thus retains the freedom to decide against the conclusion of an agreement for sale; it must however pay back the deposit if it does not wish to conclude the purchase.

Such deposit contracts are rare in practice. In the usual case there are deposits in connection with the conclusion of the purchase and sale contract itself,

which serves the seller as security for the performance of the contract by the acquirer.

The Real Estate Code contains formal regulations for the acquisition of a property. Accordingly, a written agreement regarding the purchase must be drawn up, which is signed by the buyer and the seller and must contain certain minimum details. These include the precise name of the property, the details of the purchase price, the declaration regarding the transfer of ownership of property as well as the name of the parties and their signatures. A purchase deed that does not comply with these formal regulations is void. The defect cannot be cured either by an entry in the real estate properties register or by a partial or complete performance of the contract.

Furthermore the law requires that the signature of the alienor must be attested by two witnesses. A breach of this regulation, however, does not lead to the invalidity of the agreement for sale. The defect can be remedied later in response to a notification by the land registry.

In the case of a married alienor, the spouse must consent to the alienation if the property is the joint dwelling of the married couple. If the alienor fails to observe this regulation, his/her spouse may challenge the alienation in writing within three months after obtaining knowledge of the disposition.

If the agreement for sale states a price other than the actual purchase price, this no longer results in the invalidity of the entire contract. Rather, the purchase price stated in this case in the agreement for sale is considered as the legally agreed

price. The earlier statutory regulation to the contrary was amended in the year 1992 in order to prevent one of the parties from being able to challenge an alienation even a fairly long time after the conclusion of the contract by invoking the ostensible character of the legal transaction. In individual cases, in order to avoid inequities, the valid purchase price as shown in the purchase deed can however be adjusted judicially.

With the formally valid purchase and sales contract the buyer can apply for the registration of the transfer of ownership in the register.

The parties are in principle free to draw up the contract by themselves and negotiate its content. Standard agreements can in other respects be obtained without any difficulty from bookshops. As a general rule (see above), however, the contract is drawn up by a real estate agent, who thus also assumes legal responsibility for its legal validity, the appropriate implementation of the interests of both sides as well as the correct reproduction of the registered data. Financing banks regularly make the use of an agent a condition for the grant of a loan.

Each agent has a series of standard agreements, in part drafted by him/herself, partly accepting forms devised and issued by its professional association. Although such standard agreements may be sufficient in many cases, the agent nonetheless remains obliged legally and under the regulations governing his/her professional activities to check in each individual case the necessity of adjustments and modifications of standard agreements in consideration of special features of the respective case in actual as well as legal terms.

In practice a number of failures to implement this requirement have been reported. The cases of complaints officially published by the State Supervisory Authority for Agents (Fastighetsmäklarnämnd) in their annual reports on brokers' work bear witness to this (on this, see in greater detail below at sub Section D).

3. Title Search, Title Insurance

The Swedish land register system and Swedish real estate law do not provide 100% legal certainty in the seller's capacity and power of disposition. If for example the seller has achieved its registration as owner on the basis of a forged purchase and sale agreement, this defect of title is not necessarily overcome by a bona fide acquisition based on the content of the register. Such an acquisition can be validated only by adverse possession after 20 years of possession as owner.

A so-called "title search" and as well as title insurance neither usual in Sweden nor is their introduction politically intended. Rather, the government holds the view that the publicity impact of registration, although restricted, grants sufficient protection in real estate transactions, particularly in connection with the described state liability for loss of rights caused by incorrect content of the register.

4. Public Law Licensing Requirements and Rights of Pre-emption

In a typical case of sale of real estate with an apartment building on it, no licences worth mentioning must be obtained. Restrictions on acquisition of real estate

by foreigners that existed until the 1990s have in the meantime been set aside without replacement.

A special case deserves mention, however. If the purchase concerns a part of a parcel of land in the register, an application for carrying out the partition in the cadastral map must be filed within six months of the conclusion of the contract. Otherwise, the agreement for sale loses its validity. The same is true the case of the refusal of the application by the authority

Licences are required in individual cases of land used for agricultural or forestry operations the Land Acquisition Act (*Jordförvärvslagen*). The corresponding provisions have been clearly eased in recent years. State controls exist in the interest of social tenancy protection in the event of the acquisition of apartment buildings in order to prevent speculation transactions undesired by the state.

In certain cases, the local authority in which the real estate is located can be entitled to a right of pre-emption. Such a right of pre-emption exists however only if the property is required for specific public purposes such as e.g. the creation of residential space or the preservation of buildings of cultural interest. Residential land and terraced house land with an area of less than 3000 m² and one and two-family house are generally exempted from this right of pre-emption. In the vast majority of private purchased of propertys there is thus no communal right of pre-emption.

If the property sold is subject to a local authority right of pre-emption, the real estate broker undertakes the application for registration of the sale at the local authority, presenting the agreement for sale. This must thereupon decide within three months

whether it wishes to exercise its right of pre-emption. If it does so, it enters into the agreement for sale subject to the same conditions negotiated between the buyer and the seller.

If the tenants of an apartment building located on a property assessed as a leased property are interested in acquiring the property and acquiring housing rights (*bostadsrätter*) instead of leasing rights, they have the possibility to obtain a right of pre-emption to the property. The lessees must form a housing rights association for this purpose (*bostadsrättsförening*), which then applies for registration of the entry of their interest in an acquisition of the property in the real estate properties register. The entry is valid for a period of two years after filing the application. In the event of a potential sale, the owner of the property is required to offer it first to the housing rights association, which can accept the offer within three months. If the alienor refuses to make this offer, the alienation of the property is invalid, unless the contract was concluded subject to the waiver by the association of its right of pre-emption. Before the registration of a real estate acquisition, the registry authority checks whether an offer for the acquisition of the property has been made to the housing rights association.

5. Appraisals

Real estate appraisals are usually not obtained in Sweden unless required by a financing bank. If, as is almost always the case, a real estate agent is involved in the sale, he/she usually has sufficient expertise to be able to determine a reasonable

purchase price by him/herself. The purchase price is additionally regularly determined by means of the bidding procedure described at the beginning.

In contrast, the agent is obliged to advise the buyer to have the property investigated for defects by an expert before the conclusion of the contract, unless this has already occurred through the seller. The reason for this is a comparatively rigid statutory warranty provision, according to which, with the exception of cases of fraudulent intent by the seller, the buyer is responsible for defects that it ought to have been able to discover in the event of a careful inspection of the property. Guided by their interest in the conclusion of the contract as quickly as possible, the agent and the seller frequently press for a waiver of the investigation before the conclusion of the contract. The standard agreements in this case contain clauses that grant the buyer rights (reduction of the purchase price, rescission, and damages) in case defects are found by a later expert inspection. These provisions in contracts are sometimes framed in a way as to be capable of being misunderstood, erroneous in law or are formulated in an unbalanced way and therefore lead to disputes.

6. Discharge of Liens; Risks of Unsecured Advance Performance

Usually the discharge of real estate liens encumbering the alienated property takes place between the seller's creditor bank and the acquirer's financing bank. The coordination of the purchase price payment with the discharge of encumbrances is not one of the duties of the agent. The acquirer's bank transfers to the alienor's bank the amount needed for the release of its mortgage and transfers the excess amount to the

seller. Then, usually on the same day, the parties sign the final transfer agreement in the building of the acquirer's bank.

The idea of safeguarding the parties to the contract as far as possible against the risk of unsecured payment in advance is not fully implemented in. The background to this is the open and pronounced trust placed by the parties involved, including the banks, in the proverbial honesty of the Swedes. Thus, it is considered as sufficient protection everywhere if the transfer of ownership is takes place subject to the purchase price payment. This occurs as a practical matter through the time-staggered drafting and signing of two agreements, the agreement for sale that includes all provisions under the law of obligations as well as the so-called final transfer agreement as confirmation of the purchase price payment. However, this procedure is followed only if the buyer and seller expressly agree that the purchase shall require besides the agreement for sale a final transfer agreement as well. Without a reservation providing for a final transfer agreement, the purchase and sale agreement alone would be sufficient for the entry of the ownership of the buyer. This typically would not be in the interest of the seller, since, on conclusion of the agreement for sale, as a general rule, the complete purchase price has not been paid.

Usually, the parties agree that the buyer pay a deposit (often referred to as good faith deposit, "*handpennig*",) to a trust account of the real estate agent involved on conclusion of the purchase and sale contract and that the payment of the residual purchase price take place at the same time as the economic transfer at an agreed time. The deposit is typically between 2% and 10% of the purchase price. It serves the seller

as security for the fulfilment of the buyer's obligations in due form and – in the absence of an informal contractual agreement to the contrary – limits its claim for damages to the case of a breach of duty by the buyer. The brokerage agreement between seller and broker also typically provide that the good faith deposit also secures the broker's claim for a commission with priority before the claims of the seller.

The real estate agent must in such cases conclude a deposit agreement with the parties involved, which unmistakably indicates the type of money investment intended for the deposit and the specific preconditions of its disbursement. Often, reservations of the right to rescind the contract are additionally agreed in the agreement for sale in case the buyer has not obtained necessary financing with its bank or if other preconditions to the sale have not been realized.

There are no particular priority notices registered in the Land Registry as in German or English law. Functionally closest to these is the institution of the so-called “dormant entry” (*vilande lagfart*). If the acquirer has not yet become the owner by virtue of an agreement for sale concluded subject to a condition (typically that of the complete payment of the purchase price) it may nonetheless file an application for entry of the contract in the register, with the help of which, in particular, it prevents the bona fide acquisition by a third party in the meantime. This dormant entry also protects against an insolvency of the seller and individual judicial execution by creditors of the alienor. Despite the security offered by this option, it is used rarely in practice on account of the additional registration fee charged for the dormant entry. The banks also accept certain security risks in the purchase price financing. In the classical case of a financed

purchase, the loan proceeds are paid to the seller on the date of signing the final transfer agreement and thus some time before the entry of the real estate lien securing the crediting bank. An acquirer is only entitled to encumber property as of filing the application for registration of the transfer of ownership. The purchase price payment thus takes place at a time at which the financing bank's loan is not yet secured against intermediate entries or the loss of the power of disposition by the seller. Sometimes, in the case of risky transactions the banks have the seller as registered owner of the property create the lien in favor of the financing bank before the funds are paid and the final transfer deed signed. This is relatively infrequent, however, in residential transactions. Settlement through trust accounts, for example of the agent or a bank, is unusual.

7. Enforcement

The possibility of the buyer being subjected to judicial execution on its obligation to pay the purchase price within the time specified is unknown in Swedish law. In the event of delay in payment the seller is entitled to recover for the loss caused by the default and, if so provided for in the contract, possibly to rescind the contract and recover of the loss – the latter possibly limited by the amount of the *handpfennig*.

8. Passage of Economic Ownership

Usually the transfer of possession, benefits and burdens of the property to the buyer takes place on the date of payment of the purchase price and signing of the final

transfer agreement. The seller then delivers to the acquirer the keys and all supporting documents still in its possession and of importance for the property sold, e.g. land surveying maps, partition deeds and unused mortgage bonds.

Until the transfer of possession, according to the statutory regulation, the seller bears the risk for any accidentally occurring damage or reductions in value of the property. In the case of default by the purchaser, however, this risk passes to the acquirer.

Usually, it is about three months from the conclusion of the purchase and sale contract and to the time of payment of the purchase price and signing of the final transfer agreement. This time span is typically selected by the parties involved, so that the acquirer has the opportunity to secure the financing of the purchase in the meantime. Usually the buyer files the application for registration of the transfer of ownership in the land registry along with the the application for entry of a real estate lien in favour of the financing bank on the date of the transfer of possession. The implementation of the registration of the transfer of ownership takes on average around one week.

8. Real Estate Transfer Tax

The real estate transfer tax (*stämpelskatt*) is 1.5 % of the purchase price in the case of acquisition by private persons and housing rights associations and 3% in the case of acquisition by legal persons and associations of persons, in particular trading companies. If purchase price is less than 85 % of the taxable value - recorded in the

real estate properties register- the acquisition is considered as a gift with the consequence that the real estate acquisition tax is replaced by the obligation to pay gift tax. The buyer and the seller have a joint and several liability for the payment of taxes in relation to the state. Between the buyer and the seller this is usually borne by the buyer.

The payment of the taxes in accordance with the regulations is a precondition for the registration of the acquisition of ownership. The tax is levied directly by the land registry in trust for the tax and revenue authorities when transferring the entry documents to the acquirer.

C. Position of the conveyancing professional responsible for the conclusion and implementation of the agreement for sale

Even if under Swedish law the valid conclusion of a real estate purchase agreement does not require any participation by a third party particularly familiar with the legal or economic implications of such a transaction, the Swedish real estate market is virtually controlled by brokers. Virtually all agreements for sale, currently 84-95%, are brokered and concluded by agents. This may be at least partly related to the fact that the banks financing a purchase of property regularly require more than a mere handwritten agreement for sale of the parties involved, and generally insist on the participation of an broker to insure regular execution of the transaction. Lawyers or other legally qualified advisors on the other hand are accorded no role in real estate conveyancing other than in large, typically commercial transactions.

1. Legal Sources

The activity of the Swedish real estate agent is to a large extent subject to state regulation and control. The most important agent-related legal sources are the following:

- Real Estate Agents Act (*Fastighetsmäklarlag*) (1995:400)
- Real Estate Agents Regulations (*Fastighetsmäklarförordning*) (1995:1028)
- Real Estate Agents Supervisory Authority Regulation (*Förordning med instruktion för Fastighetsmäklarnämnden*) (1998:1808)
- Guideline for Agency Services for Consumers (*Riktlinjer för tillhandahållande, utförande och marknadsföring av fastighetsmäklartjänster i konsumentförhållanden*) (KOVFS 1996:4)
- Professional Code of Real Estate Agents (*Mäklarsamfundets Etiska Regler*)

2, Professional Regulation of Real Estate Brokerage

Real estate agencies can look back on an old tradition in Sweden. Traditionally the activity of brokers was carried out without special statutory basis solely on the basis of professional practices and customs, supplemented by the specifications of judges in the highest courts. State regulations for the admission to the real estate agent profession and for supervision of its exercise were as good as nonexistent. There was the possibility that the agents would subject themselves voluntarily to a kind of regulation under the law governing professional matters and ethics by the chambers of

industry and commerce. However, only around 30% of the real estate agents made use of this.

Increasing complaints about the unlawful exercise of the profession gave rise to the requirement for sector-specific state regulation and in 1984 led to the passing of the first Real Estate Agents Act. It contains basic requirements of professional codes of conduct for the exercise of a profession. Central concerns of the regulation were the introduction of a state admissions procedure for controlling the aptitude of agents and the establishment of a supervisory authority for controlling the agent's compliance with legal obligations.

During the 1980's and 1990's it became evident that additional regulation of brokers and agents was required. A major issue was the question of neutrality of brokers between the parties to real estate transactions. The question about the balance between the requirement of an impartial exercise of a profession and the dependence on and obligation to follow instructions from the principal, regularly the seller was at the center of the discussion.

The Swedish government thus stated in 1994 in its official justification of the draft bill of a new Real Estate Agents Act (Prop. 1994/95:14):

“The draft bill aims in particular at an improved protection of the individual in his/her dealings with real estate agents. (...) Numerous provisions are proposed in consideration of a stricter admission control and supervision as well as an improved control of the observance of the Act. (...)

As regards the preconditions for the registration, a strengthening of the requirements of the aptitude is proposed by the introduction of an explicit requirement of probity. Further, it is proposed that only the person who intends to work for commercial gain as a real estate agent shall obtain the right to registration and thus admission to the profession. A real estate agent shall be obliged to take out professional liability

insurance to cover his/her responsibility ensuing from a breach of his/her legal obligations. (...)

There are agents who in many respects no longer engage in their profession in an acceptable manner. (...) For this group of agents, as well as for those who carry out the real estate agent activity without the required approval (by registration), neither the valid civil law provisions nor the requirements of conduct developed by practitioners based on good agent's custom. It is necessary to supplement these rules by a well functioning supervisory system so that the purpose of the Act can be realized."

In all three areas of admission to the profession, exercise of the profession as well as control in relation to the observance of the provisions applicable to both, there was significant need for action in to the unanimous view of all parties involved.

With regard to the admission to the profession, the Swedish government harshly criticized the professional competence of numerous brokers as being unsatisfactory in relation to the complex legal and economic implications associated with a purchase of real estate property. In addition, government pointed to the brokers' frequent lack of personal aptitude for the profession owing to their having committed criminal acts. In this regard, the government expressly stated:

"There are numerous examples in which district governments (which were originally responsible for admission to the profession, note by reporter) due to the great tax debts, criminality or comparable circumstances the applicant agent classifies this person as unsuitable for the profession and rejects its registration, however, the Court of Appeal in the appellate proceedings on the basis of a close interpretation of the hitherto applicable law of admissions set aside the decision of the district court"

At the same time, the trust of the general public in the professional status of the agent was from the point of view of the legislative organs so permanently shaken that within the scope of the legislative procedure for a new Real Estate Agents Act it was even proposed to raise the probity effectively in the form of a certificate of good character as a precondition for being admitted to the profession. Only the misgivings in relation to the

legal admissibility of such a strict regulation led in the further course of the procedure to a refusal of the admission or rather its revocation in the event of a recognized improbity of the agent instead.

Transferring the implementation of the admission procedure as well as the professional supervision to the professional organization of the agents itself was considered, however expressly ruled out for fear of falling short of a real improvement of the situation. Instead, a governmental supervisory agency, the so-called fastighetsmäklarnämnd, was created to serve this purpose.

Addressing the problem of lack of impartiality of real estate agents the new Real Estate Agency Act finally enacted in 1995 attempts a difficult balancing act: on the one hand, it adheres to the requirement of neutrality. On the other, the preamble of the Act recognizes that where “purely business considerations” stand in the foreground impartiality ends and the agent is obliged to represent the interests of his/her principal,.

The handling of the purchase price is used as an example. Here, the agent is obliged to work towards obtaining a price that is as high as possible in the interest of the seller instructing him/her:

“Both parties shall be able to rely on the agent to deliver complete and correct information in each case and support both of them to the extent demanded by good professional custom. There is however no contradiction that the agent in the question about purely business considerations rather supports its principal than the other side. The principle in general also does not expect the agent to apply stricter neutrality if for example the price of the brokered property is concerned.”

The Act does not take on the difficult question of the demarcation between the required neutrality on the one hand and permitted or even required unilateral safeguarding of

interests on the other, but gives over these to the supervisory authority competent for the fleshing out and further development of the concept of “good professional custom” (*god mäklared*) in the respective individual case.

D. Main Features of the Current Brokerage Law.

1. General Provisions

The new Real Estate Agency Act applies to all persons who professionally broker real estate, buildings on real estate properties of others, heritable building rights, cooperative housing association rights, ownership rights with regard to dwellings, leasehold rights or leasing rights.

In principle, the provisions of the Act may not be deviated from to the detriment of a consumer who sells a piece of real estate for private use or or sells that he/she has possessed mainly for private use.

Each real estate agent must be registered at the state supervisory authority. This does not apply to lawyers or real estate agents that only broker rental rights.

For a a real estate agent to be registered, it is required that he/she

- is of adult age,
- has not fallen into bankruptcy or is subject to a professional ban or has a guardian under the The Children and Parents Code (*föräldrabalk*),
- has taken out professional liability insurance in the amount of 1.5m SKr (ca. 166,000 euros) for each claim,

- has a sufficient training in accordance with the further requirements established by the supervisory authority (on this forthwith),
- intends to work for commercial gain as a real estate agent,
- appears honest and in other respects suitable as a real estate agent.

The professional qualification required for the admission currently requires a theoretical training of around 2 years at a university covering selected areas of civil and tax law, economics and construction technology. Currently one quarter of the training time (20 out of 80 credit-units) is taken up by instruction in points of laws. To this must be added as a general rule the completion of a 10-week work placement at an admitted agent.

Besides this, no further restrictions on admission exist. There is no needs-related examination or numerical restriction on the admission of real estate agents. At present, 5,800 agents are registered at the supervisory authority; yearly currently around 600 new agents are added.

Once registered, the agents in Sweden are not currently subject to any statutory obligation whatsoever regarding their professional further education. The supervision of the real estate agents is carried out by a state Real Estate Agents Supervisory Authority (*fastighetsmäklarnämnd*). The authority must ensure that the real estate agents comply with their statutory duties in their activity. This occurs on the one hand through control of agents in individual cases, for which complaints can be filed with the authority by clients or third parties, on the other hand through a routine check of the agent at regular intervals. Each agent is obliged to have files, bookkeeping and other documents

checked by the authority and to provide all information requested by it. A further central duty of the supervisory authority consists of the implementation and interpretation of the abstract concept of “good professional custom” to be observed by agents, typically by means of specific decisions in individual cases.

According to the Regulations on the Establishment of the Real Estate Agents Supervisory Authority (*Förordning med instruktion för Fastighetsmäklarnämnden* [1998:1808]), the supervisory body is composed of a president, a deputy president and a maximum of six members. Both the president and his/her deputy must be trained lawyers with experience as judges. All members are appointed by the government.

The registration of a real estate agent must be revoked by the authority if one of the conditions for his/her admission has ceased to apply, if he/she does not pay the prescribed registration fee or if he/she in other respects contravenes his/her obligations under the Real Estate Agents Act. The decision regarding revocation is immediately enforceable but is subject to the judicial review by the administrative court. Anyone who intentionally professionally brokers real estate without the required admission is sentenced to an administrative fine or a term of imprisonment of up to 6 months.

2. Brokers' Core Duties in Practice

(a) An agent's agreement must be concluded in writing. An exclusive contract is limited to a term of three months, may however be extended as from one month before the end of the period specified. The agent may not rely on contractual conditions that

were not included in the contract or agreed in writing in another way to the detriment of the principal. An exception to this applies in relation to a change of the price of a brokered property. Frequently, the supervisory authority sees itself occasioned to warn the agent on account of contracts drafted erroneously for his/her benefit in this regard. Breaches in this area seem to be so prevalent that the supervisory authority recently impressively pointed out the applicable legal position in an official circular letter of 26 September 2006^{§§§}.

- b) Deposits that the agent has received must be transferred to the seller without delay unless agreed otherwise. Money and other assets that the agent receives for the account of another must be kept separated from his own assets.

Numerous reprimands put forward by the supervisory authority concern defectively formulated safekeeping agreements which particularly with regard to the agent's claim to commission are reprehended for unlawfully and unilaterally favouring his interests to the detriment of those of the contracting party^{****}.

- c) The real estate agent may in principle not buy real estate for which he has received a brokering assignment by himself, and also not place a real estate with

^{§§§} Cf.

http://www.fastighetsmaklarnamnden.se/pdf/fmn_god_fastighetsmaklarsed_uppdraagsavtalet.pdf.

^{****} Examples of this from the recent past are shown in the annual report of the supervisory authority for the year 2005;
http://www.fastighetsmaklarnamnden.se/pdf/fmn_arsbok_2005_prel.pdf.

closely associated persons. If the agent or person closely associated with him acquires real estate, for which the agent has had a brokering assignment beforehand, the agent must report the acquisition without undue delay to the supervisory authority.

- d) The agent is prohibited from dealing in real estate properties. He must also in other respects refrain from each activity that is likely to shake the trust in him as an agent. In particular, he may in principle not act as the representative of the seller or the buyer.
- e) The agent must give buyer and seller advice and information that they require in relation to the real estate and in connection with the acceptance to the extent that corresponds to a good real estate agent custom. He must work towards the seller furnishing all details regarding the real estate before acceptance that can be assumed to be of importance for the buyer, and should see that the buyer inspects the real estate or has it inspected as far as possible prior to the acquisition.

Besides the general requirement of neutrality, this is by far the agent's most important duty and at the same time the requirement which seems to give increasing rise to the Supervisory Agency for sensitive sanctions. In particular, agents rather often seem to fail to point out to the acquirer in breach of duty that the agent himself regularly has carried out no inspection at all in connection with the placement and also is not obliged to, and that this rather is an obligation of the buyer. In addition,

the agents frequently press – and against the background of the booming market regularly successfully – for a quick conclusion of the contract even before an intensive survey of the property by the buyer which then – against the interest of the acquirer – can only take place in the time between conclusion of the contract and the purchase price payment. Often, the supervisory authority agent must be cautioned for this reason. That the acquirer then must be comprehensively insured (in particular by granting rights of retention or claims for purchase price reduction and/or damages), at least by way of the contract drafting in case of the subsequent discovery of defects, finally according to the agency's reports appears likewise to be frequently not or only insufficiently regarded^{††††}.

- f) Furthermore, the agent must check who has the right of disposal of the real estate and what mortgages, easements or other rights encumber it, whereby in this regard, however, in principle a mere inspection of the land register or other public registers is considered as sufficient. Here too, in practice, frequently errors crop up despite the limited requirements. Thus, according to its own data, the real estate registers must object to the applications for entry submitted by agents in an average of 10-15% of cases because they failed to take sufficient account of the information shown on the register.

^{††††} Increasing complaints in connection with defectively formulated contract clauses in this regard have given the supervisory authority cause only recently to publish an official circular letter with recommendations on formulation cf. http://www.fastighetsmaklarnamnden.se/pdf/fmn_god_fastighetsmaklarsed_besiktning_klausuler.pdf.

- g) If the placement relates to a real estate that is purchased primarily for private use, the agent must make available to the buyer a so-called written description of the real estate. The description must contain details of the status of ownership rights on the real estate, its encumbrances, the position together with real estate area as well as the officially assessed tax value. Furthermore, it must also give information about the age of the building, its size and construction type. These requirements are of a formal nature and can be fulfilled without any difficulties. The supervisory authority, though, appears to regularly have reason to caution the agent on account of his disregard of this duty^{****}.
- h) Until the start of 2005, the agent under Swedish law was not subject to any obligation to check the identity of the seller and the buyer before or in connection with the conclusion of the agreement for sale. That this substantially eased fraudulent real estate transactions was, as far as can be seen, not recognized as a serious issue. As of 1 January 2005, the agent is now under a duty to control the identity of both seller and – if the purchase price reaches at least 15,000 SKr (ca. 1,660 euros) – buyer or his representative as a consequence of the Swedish Money Laundering Act (Lag 1993:768).

^{****} Of this, the most recent annual report for the year 2005 (http://www.fastighetsmaklarnamnden.se/pdf/fmn_arsbok_2005_prel.pdf) again provides instructive testimony.

To what extent the agents actually comply with this obligation cannot be estimated currently. The intensive clarification work of the supervisory authority in connection with the introduction of the obligation^{§§§§} as well as recent announcements by the authority to rigidly control implementation of this legal obligation by the agent^{*****}, may be taken however as an increased distrust of the authority in the agent's fidelity to the law also in this respect.

4. Remuneration

Unless agreed otherwise, the remuneration of the agent is calculated in accordance with a certain percentage of the purchase price (commission). This also corresponds to the general practice. Binding specifications in relation to the amount do not exist in this sense either on the legal or professional level. The lists of commissions originally once issued by the professional organizations to the agent were abolished. No statistical enquiries in relation to the commissions charged by the individual agents exist. On average, at present commissions in the amount of ca. 3-4% of the respective purchase price may be agreed. In the presently hotly fought market the fee may be lower in individual cases. This is the other way around in cases of low market value or in the event of difficult to place properties on the land), where commissions tend to be higher. The commission is borne by the seller.

^{§§§§} Cf.

http://www.fastighetsmaklarnamnden.se/pdf/fmn_allmrad_atgarder_mot_penningtvatt.pdf.

^{*****} Cf. the notification in an official circular letter of March 2006, published at http://www.fastighetsmaklarnamnden.se/pdf/fmn_tillkannagivande_060306.pdf.

The agent a claim for the commission only if the contract is brought about as a result of his/her real estate agent activity. If the agent has received an exclusive listing and a transfer agreement is concluded without his/her mediation within the period of the exclusive assignment, the agent is nonetheless entitled to his/her commission. The remuneration of the agent may be lowered if the agent has breached his/her obligations to the buyer or the seller when carrying out the assignment. This does not apply however if the breach is insignificant.

E. Recent developments

1. Legislative and Governmental Measures

In March 1996, the legal committee of the Swedish Lower House of Parliament passed a resolution to set up a working group on the evaluation of the improvements with regard to the guarantee of responsible, qualified real estate agent activity achieved by the introduction of the new Real Estate Agents Act of 1995. The working group came to the result in June 1997 that while on the one hand the state supervisory authority had rendered services for the improvement above all of the professional qualification of the agents by passing a series of guidelines regarding the requirements set of the training of agent. Overall, however, it must be stated that the goal to achieve an efficiently functioning supervision of the real estate agent activity, to discover misuses within the professional status of the agents more quickly had not been achieved with the 1995 law. As a consequence, the government commissioned a special survey on 12 November

1998 with the goal of generating proposals for structuring the agent's supervision in order to guarantee widespread fidelity to the law and the observance of the good professional customs. So far this has not resulted in further legislation. The supervisory authority is attempting further to strengthen the training requirements for agents, at shorter intervals each time, in order in this way to reduce the risks of defective real estate agent activity.

2. Statistical Data

Interesting information about the type and extent of unlawful or objectionable conduct on the part of brokers in Sweden is provided by the annual investigative reports published by the Supervisory Agency in anonymized form since 2000.⁺⁺⁺⁺ An evaluation provides the result that after an average of 19% in the year 2000 in the meantime still in around 15% of the cases investigated by the authority the agent concerned was cautioned or the authority even withdrew his admission to the profession. In addition, each year there is a series of criminal proceedings on account of broker services performed without required licence.

Furthermore, it appears that admissions of brokers must be withdrawn by the Agency rather often on account of breaches by the broker of formal professional requirements (in particular the absence of sufficient insurance coverage). Current

⁺⁺⁺⁺ Available in the internet at <http://www.fastighetsmaklarnamnden.se/>.

statistical enquiries of the Agency⁺⁺⁺⁺ show that this was the case in the years 2003 to 2005 in around 20% of all cases surveyed by the Agency.

Ultimately, the problem seems to boil down to the fact that despite the ongoing process of strengthening professional regulation on education as well as on the proper fulfilment of brokers' duties of care the basic problem remains that contrary to the expectation of the law a broker nonetheless feels and acts rather more like a dealer than as a legal adviser.

Part 2 Transaction costs

In principle, the following costs are regularly incurred by the parties in connection with the conclusion and implementation of a Swedish real estate agreement of a typical kind

I. Brokerage Commission

As mentioned, regularly a commission of on average around **3%** of the purchase price is agreed. This covers the real estate agent activity of the agent as well as the drafting of the agreement for sale or bill of sale with the implementation duties incumbent on him/her (if necessary obtaining a licence). If the activity of the agent in the individual case is greater on account of the type or location of the property (in particular in the commercial real estate sector) the commission can, as stated, turn out clearly higher.

⁺⁺⁺⁺ Cf. http://www.fastighetsmaklarnamnden.se/pdf/fmn_arsredovisning_2005.pdf, P. 19 f.

If the parties have reached an agreement without the brokerage activity of an agent and use the agent merely for providing assistance in the formulation of the agreement for sale, it is said that a fixed price can be negotiated. As already stated, this occurs extremely rarely in practice, so that reliable figures in relation to the amount of the then agreed fixed fee are lacking. Also in view of the rarity of such cases, a distorted view of reality would be created, one wanted to apply such an agent's fixed price with regard to the structure of the transaction costs.

II. Costs for legal advice

Insofar as the purchase is a standard transaction - at least from the point of view of the parties according to type and volume - without a legal or economic complexity worth mentioning, the parties typically consult no further professional advisers besides the agent. Parties may not be qualified to determine whether a particular purchase of property is a standard case. The agent is only conditionally able to do this due to his/her regularly only limited legal knowledge. As a consequence, the agent also frequently does not recognize the necessity to use the services of specialist advisors, consequently in Sweden by a lawyer, for the correct formulation of the agreement for sale. The result is that legal advice from lawyers is a very rare occurrence in the purchase and sale of residential real estate in Sweden.

III. Costs for the inspection of the property by an expert

Under Swedish law, as stated, the acquirer is subject to a comparatively far-reaching liability for property defects that it ought to have discovered in the event of a thorough search in accordance with the regulations. This leads to the buyer to have the real estate surveyed by a construction expert. The amount of the costs incurred for this varies understandably in the individual case depending on the type of property; it should however move at **ca. 500 euros** in the case of a typical private purchase of a mid-sized one-family house.

IV. Register fees

For the implementation of an agreement for sale in accordance with the law governing the register, legally fixed fees in the amount of 825 SKr (ca. 90 euros) are incurred irrespective of the amount of the purchase price or the tax assessment value of the property for a registration of the transfer of ownership. They are levied by the registry at the time the acquirer submits the materials to be registered.

V. Real estate transfer tax

The real estate transfer tax is for private persons and housing rights associations is 1.5% of the purchase price or the higher tax value if applicable, for legal persons **3%**. It is likewise collected by the registry when sending the proof of entry by the acquirer and consequently paid to the tax and revenue authorities. The buyer and the acquirer are however jointly and severally liable to the tax and revenue authorities.

VI. Financing Costs; Mortgage Tax

For the creation of a real estate lien, stamp duty in the amount of 2% of the nominal amount in each case is incurred. The registry court charges for the entry of the lien a fixed fee in the amount of 375 SKr (ca. 35 euros). The costs for the assumption of available liens for financing purposes are regularly not invoiced separately, but are included in the general loan costs.

TABLE C-4 – Real Estate Transfer Costs in Sweden

	<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>	
<i>Costs</i>	<i>Broker's Commission</i>	3,000€	3,000€	7,500€	7,500€	15,000€	15,000€	30,000€	30,000€
	<i>Purchase Price</i>	100,000€	100,000€	250,000€	250,000€	500,000€	500,000€	1,000,000€	1,000,000€
	<i>Mortgage Amount</i>	-€	75,000€	-€	150,000€	-€	400,000€	-€	750,000€
	<i>Inspection/Engineer Fee</i>	500€	500€	500€	500€	500€	500€	500€	500€
	<i>Real Estate Transfer Tax</i>	1,500€	1,500€	3,750€	3,750€	7,500€	7,500€	15,000€	15,000€
	<i>Mortgage Tax</i>	-€	1,500€	-€	3,000€	-€	8,000€	-€	15,000€
	<i>Recording/Registration Fee</i>	89€	89€	89€	89€	89€	89€	89€	89€
	<i>Mortgage Registration Fee</i>	-€	41€	-€	41€	-€	41€	-€	41€
	<i>Broker Contract and Implementation Charge</i>	900€	900€	2,250€	2,250€	4,500€	4,500€	9,000€	9,000€
<i>Total Transfer Costs</i>	5,989€	7,530€	14,089€	17,130€	27,589€	35,630€	54,589€	69,630€	
<i>Total Conveyancing Fees</i>	900€	900€	2,250€	2,250€	4,500€	4,500€	9,000€	9,000€	
<i>Conveyancing Fees as percent of Total Costs</i>	15.03%	11.95%	15.97%	13.13%	16.31%	12.63%	16.49%	12.93%	
<i>Conveyancing Fees as percent of Purchase Price</i>	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%	0.90%	
<i>Broker's Commission as percent of Total Cost</i>	50.09%	39.84%	53.23%	43.78%	54.37%	42.10%	54.96%	43.09%	

Comparative Analysis of Land Conveyancing in 5 European Member States

Peter L. Murray

2007

National Report – Real Estate Conveyancing in England^{§§§§§}

1. Legal Bases and Practical Execution of Real Estate Conveyancing

- a. General description of the process of a real estate purchase and sales transaction.

Real estate transactions in England and Wales are accomplished in two steps - first the contract and then the contract completion. This leads to three stages in the process, first the pre-contract stage, second the post-contract, pre-completion stage, and third, the post-completion stage.

The first step in the pre-contract stage is for the seller to commission a real

^{§§§§§} The Reporter thanks Charles Harpum, Esq., London, England, Ina Popova, Esq., London, England, HLS LLM 2007, Susan Knowles and John Manthorpe, Land Registry of England and Wales, and Dr. Wolfgang Roesing for comments, research assistance and various contributions to this National Report.

estate broker to market the property. Various forms of advertising refer potential buyers to the broker.

With the assistance of the broker, the buyer and the seller agree on the purchase price and the key elements of the sale.

The buyer and the seller each then instruct a solicitor or licensed conveyancer to represent their respective interests in forming and then completing a contract for the transaction.²¹ Sellers are encouraged to arrange for legal representation even before placing property on the market so that the seller's solicitor can collect the information necessary for transmittal to the buyer's solicitor.

As soon parties are both represented, the seller's solicitor transmits information about the property to the buyer's solicitor and also proposes a form for the purchase and sales contract. The draft contract is accompanied by an extract from the Land Register showing the state of the seller's ownership of the property at issue. In the case of unregistered land, the seller ordinarily provides copies of past deeds in the seller's chain of title.

The buyer's solicitor reviews the materials received from the seller and attempts to obtain as much relevant information about the premises as possible. This includes information about possible municipal or other administrative land use restrictions, pending assessments, taxes and other charges that is gathered from local offices and registries. The buyer's solicitor also reviews the Land Register for recent

²¹ As will be discussed below, in England parties to real estate transactions can be represented by both solicitors, who are fully qualified jurists, and by licensed conveyancer, who receive some training in real estate law. In the balance of the report, the term "solicitor" should be read to include

encumbrances.

The buyer arranges for bank financing of the purchase price and obtains from a bank a commitment letter setting forth the terms on which financing will be made available. These terms generally include an appraisal and inspection of the property to determine whether the value will support a mortgage to secure the financing sought.

The buyer may also commission an engineering inspection of the property. As will be seen below, this is of importance, since in England the rule of “buyer beware” (*caveat emptor*) applies, and the seller is not responsible for property defects that are obvious or could be discovered by a reasonably careful buyer. In many cases buyers dispense with the cost and delay that such an inspection entails, relying instead on the bank appraisal for a general impression of the condition of the premises.

If the buyer’s investigations are favorable, and further negotiations between their solicitors have reached agreement on the details of contract completion, the parties each execute a counterpart of the same written contract for purchase and sale of the real estate. The contracts are then “exchanged” so that each party has a copy of the contract signed by the other party. A party becomes bound to the contract when he has signed it and delivered a signed copy to the other party.

Generally the parties do not meet in person during the process of contract preparation or at the time of execution. Once the form of contract has been agreed on by both solicitors, each party executes a counterpart at the office of its own solicitor and the signed counterparts are then exchanged by the solicitors. Usually the parties’

“licensed conveyancer” as well.

solicitors accomplish the exchange telephonically, each acknowledging that he or she holds a counterpart of the contract signed by his or her respective client as a fiduciary for the other. With this telephonic agreement the contract becomes binding.

At the time of exchange of contracts, the buyer pays an earnest money deposit generally of the order of 10%, which is held in escrow by the seller's solicitor in a special trust account maintained for such purposes.

Following the exchange of contracts, the respective solicitors work on contract completion. Generally the buyer's solicitor proposes a form of transfer deed for review by the seller's solicitor. At the same time, the financing bank prepares the mortgage documentation, including a mortgage deed. In the great bulk of residential real estate transactions, the financing bank is represented by the buyer's solicitor. This form of simultaneous representation of potentially adverse contracting parties is permitted by a special protocol of the Law Society. Each bank maintains a list of solicitors from whom it will accept representation in this dual capacity. If the solicitor selected by the buyer is not on the list, then the bank will require its own solicitor. All costs of representation of the bank's interest are borne by the buyer, regardless of whether the bank is using the buyer's solicitor or has its own representation.

Once the form of the deeds and mortgages have been agreed on, the seller signs the deed and the buyer signs the mortgage. The buyer only required to sign the deed if there are positive obligations which the buyer is assuming or undertaking in connection with the conveyance.

The mortgagee bank makes available the mortgage proceeds generally by

deposit in an escrow account maintained by the solicitor representing its interest. The seller's solicitor attends to the discharge of any encumbrances on the property that will not be assumed by the buyer and determines the amount of the sales proceeds that will be required to obtain a final release at completion.

Shortly before completion, the buyer's solicitor makes a final official search at the Land Registry to determine whether intervening interests have arisen since the last search. As a part of the search he requests in behalf of the buyer a priority period of 30 days, during which intervening interests submitted for registration will not be effective against the buyer's title, if the buyer's application for re-registration is filed within the priority period.

On the date of completion, the buyer's solicitor causes the balance of the purchase price to be transferred to the escrow account of the seller's solicitor. The bank then confirms to the seller's solicitor the receipt of the funds. The transfer deed is then dated with the date of completion and sent to the buyer's solicitor for registration. At this point the buyer generally receives possession of the property.

The seller's solicitor then pays the sums necessary to discharge outstanding encumbrances from its escrow account and obtains releases, which are sent to the buyer's solicitor for registration.

Within 30 days of the conveyance the buyer's solicitor attends to the payment of the Stamp Duty Land Tax to the Revenue Service. Upon payment the Revenue Service issues a confirmation that the tax has been paid. This confirmation is a pre-requisite to re-registration of the land in the name of the buyer.

As the final step, the buyer's solicitor applies to the Land Registry for re-registration of title to the premises in the name of the buyer and for registration of any purchase money mortgage. The Land Registry examines whether the seller is the registered owner and whether the documentation tendered is in proper form. If there are errors in the documentation, the papers are returned to the buyer's solicitor for correction. Once re-registration has been accomplished, the Land Registry notifies the buyer, but not the seller, of the successful change of ownership.

b. Brief Synopsis of English Real Estate Law Relevant to Modern Conveyancing.

The historical complexity of English real estate law, with its division into legal and equitable estates and interests has been simplified by 20th century legislation and the gradual implementation of a Land Registry system throughout England and Wales. Currently legal interests are generally utilized for creation and transmittal of ownership of real estate accompanied by immediate possession and utilization of the premises. Trusts and other forms of equitable interests are used for planning of estates or to provide for secondary beneficial interests. One significant difference between legal and equitable interests lies in their effect against third parties. Interests in law are generally effective against anyone. Equitable interests, however, may be subjected to the rights of a bona fide purchaser for value of the legal estate, who buys without knowledge or notice of the equitable interest. The interests of financing banks are secured by mortgages, by which the banks obtain legal interests in real estate to

secure payment or discharge of mortgage debts.

Legal estates in land consist of freehold estates and leasehold estates. A freeholder has the most absolute form of ownership legally recognized, including the right of possession and exploitation to the extent permitted by law. The terms and rights of ownership of leaseholders are determined by their leases. Some leaseholds can run for very long terms, such as 99 years or 999 years, and can approach freehold interests as a matter of practical economics.

A particular real estate locus can simultaneously support both freehold and leasehold interests. Leaseholds can in turn be subleased.

Multiple parties can own real estate jointly. Some joint tenancies affect the entirety of a particular locus. Each of the joint owners has a described share in the undivided whole of the property. "Tenants in common" own undivided shares which they can in turn individually transmit to others. In the case of "joint tenancy", upon the death of any tenant the survivor or survivors automatically succeed to the interest of the deceased co-tenant. Joint tenancy is frequently utilized by married couples as a means of land ownership for their marital residence.

Although it is possible to create a condominium or similar form of co-ownership based on tenancies in common among freeholders, enforcement of reciprocal rights and responsibilities in such arrangements can be clumsy and inefficient. As a matter of practice, condominiums utilize the leasehold model. The individual units are leaseholds of the overall facility, which remains in freehold ownership. Usually the freehold is owned by an administrative entity that is in turn owned by the owners of the leasehold units.

When the leasehold unit is sold, the purchaser also obtains the seller's interest in the freehold administrative entity.

The Commonhold and Leasehold Reform Act 2002 now proposes to create a "commonhold" model for condominium ownership. The idea is to create freehold units in a collectively owned property under which the unit owners will also have undivided proportional interests in the common areas and facilities. A "commonhold association" of all of the unit owners is charged with administration of the facility. Adoption of this model has been slow because of novelty and perceived complexity.

The English Statute of Frauds (See Section 2 of the Law of Property Act of 1989 (Miscellaneous Provisions)) requires that contracts for the purchase and sale of real estate be in writing signed by each party to be charged therewith. The purchase and sales agreement completely integrates the agreements of the parties. In some cases the doctrine of estoppel may prevent one party or the other from relying on a failure to comply with these requirements to frustrate completion of an agreement entered into in good faith by the other. As a matter of practice, the Statute of Frauds is satisfied if each party has a copy of the contract signed by the other. The contract becomes binding when the signed copies are exchanged. Today, this exchange takes place telephonically between solicitors, in which case the subsequent physical exchange is merely confirmatory of the legal effect that has already been obtained by the telephone conversation.

Written contracts for the purchase and sale of real estate are binding and can be specifically enforced. It is said that they create "equitable title" in favor of the purchaser

once their conditions have been fulfilled. This is because historically a purchaser would resort to the equity court to obtain an order that the seller complete the conveyance of the legal title promised.

Transmission of legal ownership of a leasehold or freehold estate requires the seller to execute and deliver to the buyer a title deed to the property at issue. A title deed describes the property to be conveyed and constitutes the free act of the grantor to transfer the property to the grantee. The original deed must be signed by the grantor or authorized representative and also by witnesses to the grantors' signatures. A signed deed is only effective on its delivery to the buyer or the buyer's agent. As is the case with contracts, a deed in the hands of the seller's solicitor can be constructively delivered to the buyer when the seller's solicitor acknowledges that the purchase price has been paid and that he now holds the deed in a fiduciary capacity for the buyer. Subsequent physical delivery is merely confirmatory of the previous legal act.

The requirement that the authenticity of the grantor's signature be merely witnessed and not otherwise guaranteed means that forgery of real estate conveyances is relatively easy. The Land Registry is not in any position to make an independent determination of the authenticity of any of the signatures on deeds tendered for title re-registration. According to the Land Registry, from mid-2005 to mid-2006 some 31 cases of deed forgery led to losses in the amount of 8.6 Million pounds. Forgeries are significantly reduced by the fact that the great bulk of land conveyances involve the services of solicitors or licensed conveyancers, who are required by anti-

money-laundering regulations to determine the identity of the parties by whom they are employed.

Traditionally English land law differentiated between mortgages, by which the borrower (“mortgagor”) conveyed legal title to the mortgaged property to the lender (“mortgagee”) subject to a right of redemption to payment or discharge of the secured debt, and liens or charges, which gave the lender a mere security interest in the collateral. Under current law a mortgagor retains legal title to the property subject to the mortgage, and the mortgagee gets a security interest under which he can cause the property to be sold and the proceeds applied to discharge the debt in the event of default.

A mortgage is created in the same fashion as a transfer of land. The owner of the real estate executes mortgage deed that constitutes a written declaration of his intention that the real estate secure a particular claim or kind of claim in favor of a particular creditor. Under current law, mortgages of registered real estate become legal interests in the real estate only upon registration. Therefore they have a similar status as contracts for purchase and sale, valid between the parties but of limited validity against third parties, and therefore of limited value as security.

Mortgages of unregistered real estate become legally valid upon execution and delivery, but also trigger the legal requirement that the land be registered. If registration does not take place within two months, the interest of the mortgagee becomes equitable only and subject to potential rights of third parties.

A mortgagee obtains a number of rights in the standard mortgage of residential

real estate. Of these, the most important is the right to sell the mortgaged property in the event that the mortgagor fails to comply with its obligations of repayment as provided for in the loan agreement between the parties or fails to comply with various covenants and agreements such as maintenance of the mortgage property, payment of taxes, etc. Prior to exercising his right to sell the mortgagee must give notice to the mortgagor and grant to him the opportunity to cure any default. There is not obligation to sell at public auction, but the mortgagee must insure that the premises are fairly exposed to the market. A mortgagee can sell a mortgagor's dwelling only after court judgment stripping the mortgagor of possession of the premises, which judgment can be deferred if the mortgagor can show a potential for curing the default in the foreseeable future. The sales proceeds after expenses of sale are used to defray the outstanding balance on the secured loan, with the balance being paid to junior encumbrancers in order of priority, with any remainder going to the mortgagor.

Once the mortgage debt has been paid, the mortgagor has a right to require the mortgagee to discharge the mortgage by appropriate entry in the Land Register. This requires that the mortgagee issue a written release conforming to the requirements of a deed for submittal to the Land Registry.

c. The English Land Registry

Real estate law in England and Wales has been fundamentally reformed and modernized through the foundation and gradual expansion of the English Land Registry. The Land Registry was founded in 1862 as an independent agency of

government. Currently its main office is in London. There are 24 District Registries covering the entirety of England and Wales.²² Currently the organization and activities of the Land Registry are regulated by the Land Registration Act of 2002 and the Land Registration Rules of 2003.

The Land Register is organized around the registration of freehold and leasehold estates in land located in England and Wales. All freehold interests and leaseholds of more than 7 years in duration can be registered. Each registered estate has its own electronic page. Those pages which are legally related include appropriate cross references.

Registration is limited to legal interests. Equitable interests are not susceptible of registration. When real estate is subject to a trust, the existence of the trust and any relevant restrictions on alienation may be registered, but the identity of beneficiaries and other terms of the trust remain private.

At the beginning, registration of real estate in England and Wales was conceived as a voluntary step. In 1897 registration was made mandatory upon sale of any property in central London. Over time the geographic area for mandatory registration as well as the variety of events triggering the obligation to register was gradually expanded. Since 1990 the sale of any unregistered land in England or Wales requires registration. Since 1998 registration has also been required if title to land passes on death or by voluntary gift, or if land is mortgaged or leased for more than 7

²² Both Scotland and Northern Ireland have historically maintained systems of deed recordation rather than title registration. Land registration is currently being introduced there, but currently lags in comparison with England and Wales, upon which

years.

Currently something like 20.5 million estates in land have been registered covering approximately 55% of the entire area of England and Wales. Remaining unregistered land consists largely of public preserves, Crown lands, and the lands of some large landowners who do not sell or convey land other than by succession. The Land Registry continues to encourage these landowners voluntarily to register their holdings, and hopes to have all land registered by 2012. Although most of the land that is on the active real estate market in England and Wales is now registered, it is estimated that up to 15% of all conveyances still involve unregistered property.

The registry page for each estate in land contains three registers. They are the A (Property) Register, the B (Proprietorship) Register and the C (Charges) Register. The Property Register includes the designation of the estate as either freehold or leasehold, and in the case of leasehold estates, a short description of the key terms of the lease. The original lease is in any event maintained in the records of the Land Register.

The Property Register also describes the particular parcel that is the subject matter of the estate. Usually the Register refers to a registered plan which provides the location and general boundaries of the property. These plans are not intended as precise delineations of the boundaries of any property. There is no official cataster in England that legally defines the boundaries of any property so as to bind parties to real estate transactions. The need exactly to define the boundaries of land to be registered

this National Report is based.

was originally a serious hurdle to land registration. Successive reforms to promote registration relaxed the degree of exactitude required for property descriptions. In some cases this inexactitude can lead to boundary disputes and litigation.

The Property Register also contains references to rights that are appurtenant to the estate described such as rights of way or easements.

The Proprietorship Register identifies the person who is the registered proprietor or owner of the described estate of law. It is presumed that the registered proprietor has the right to dispose of the estate unless explicit restrictions on alienation have been included. The Proprietorship Register also includes the price paid for purchase of the estate.

The Charges Register sets forth various encumbrances on the estate such as mortgages, restrictive covenants, and the like. The entries are ranked in the order of their legal priority, which generally derives from their respective times of registration.

Although the English Land Register provides interested parties with comprehensive information about the title to registered land, there are some areas where the Land Register does not provide a potential buyer with complete protection. The basic principle is that unregistered rights and obligations will not be valid against most purchasers. On the other hand, there are some rights and interests that may affect a purchaser even though they are not registered.

Covenants existing prior to the initial registration of an estate may not be accurately described in the charges register. There is no obligation on the part of the Land Registry to determine whether covenants created in land to be registered are in

fact valid and effective. The applicant for registration is required merely to make reference to them, in which case an appropriate reference will be entered.

There are a limited number of “overriding interests” that can bind owners and future purchasers of registered land. These have been steadily reduced, as recently as in the Land Registration Act of 2002. As a practical matter some of them continue to be of some significance. Of these the most important are leases of less than 7 years duration, local land charges, and rights of persons in actual occupation of the real estate. Leases of less than 7 years duration are valid between the parties and against third parties without registration in the Land Register. Local land charges are potential encumbrances which are not listed in the Land Register but are contained in Local Land Charges Registers maintained by local communities. These may include financial charges such as street repair assessments or use restrictions such as restrictions on building in the neighborhood of nature preserves.

Under English law persons of age (other than the owner of the estate to be conveyed) such as wives, living companions, grown children, or short-term tenants, who are actually in possession of the subject real estate may generate a lien against a benefited estate for the value of any improvements, maintenance or enhancements to value derived from their presence on the property or invested money, time or energy. Traditionally a purchaser took subject to these rights regardless of whether he had knowledge of them. According to the Land Registration Act of 2002, a purchaser of a previously registered estate does not take subject to such rights if the claimants possession of the property was not known to the buyer at time of contract completion

and if such possession could not have been discovered through reasonable diligence as of that time. The extent of due diligence required is not yet clear. As a matter of practice, careful conveyancers require that all persons of age who are found on or about the premises sign the contract relinquishing and releasing any such rights as they may have.

Any system for the protection of ownership interests through registration must deal with intervening interests that arise between the economic transaction of the parties and the completion of the registration process. The English Land Registry system addresses this problem by permitting registration of a purchase and sales contract and by granting a priority period for searches commissioned in behalf of a buyer of the property. As a matter of practice, English conveyancers rely primarily on the priority period for protection of buyers. Shortly before completion of the transaction and the payment of the purchase price, the buyer's solicitor commissions an official search at the Land Register and requests the grant of a priority period of up to 30 work days. During this time there is no barrier to new entries. However if the person for whose benefit the search was conducted files an application for re-registration within the 30 day period, no intervening registration can be effective against him. The priority period also offers protection against the bankruptcy of the seller. Usually a priority period is also requested in the name of the financing bank in order to guarantee the priority of its mortgage interest. If there are delays in contract completion, the priority period can be extended by application to the Land Register filed within the original priority period.

It is also possible to register the purchase and sales agreement immediately following exchange of contracts. This can only be done if the estate in question has already been registered. Registration of the purchase and sales agreement results in an unlimited priority period. If the purchase and sale is not completed, the registration of the contract can be an encumbrance for future transactions. In any event it is rarely used in practice.

Although protection against intervening interests is required to give the buyer and the financing bank an absolute legal guarantee that their respective interests are paramount, in practice filings of applications for re-registration of land are frequently delayed beyond the expiration of the priority periods, thus forfeiting the absolute protection provided. It is estimated that such late filing occurs in as many as 30% of ordinary transactions. The cause may be unexpected delay in completion following the last official search, or delay in post-completion payment of stamp duty tax and the receipt of payment confirmation required for re-registration. This kind of relaxed attitude may derive from the parties' (or their solicitors') reciprocal confidence in each other's honesty and the regularity of affairs, but in some cases leads to disappointment, disputes and litigation.

The Land Register is a public record and is accessible to all who are willing to pay the modest fees for access and use. Access is had under either the number of a registered estate or the location of parcel. This means that interested persons can learn the amount paid and the amount borrowed for acquisition of any particular parcel of property. However ordinary users do not have the facility to search under persons'

names to determine the nature and extent of all their holdings.

Currently access to the Land Register is available via the Internet as well as via a dedicated computer network to which solicitors and other interested commercial users can subscribe. Almost all requests for searches or information can be made electronically and payment of the appropriate fees can be made by credit card or via accounts maintained by the Land Register for regular customers.

Requests for re-registration, entry of mortgage or charge, or release of mortgage or charge, must be made in writing, using forms prescribed by the Land Register. There is no requirement that a request for re-registration of land be filed by a solicitor or licensed land conveyancer. Private parties can (but rarely do) file their own applications for re-registration of property based on transactions, gifts or other transfers accomplished without legal assistance. The Land Registry Web Site provides comprehensive instructions and forms for use of all its services. The vast majority of applications for re-registration are filed by solicitors and licensed conveyancers, who are familiar with the technical requirements of English land law and the Land Registry System.

Despite the comprehensive advice available in printed form and on the Land Registry web site, there is a surprisingly high rate of incomplete applications and mistakes in the application process - estimated by the Land Registry as high as 50% . In some cases these can be corrected by telephone or electronic communication between the Land Registry examiner and the party filing the application. In other cases the forms and papers must be returned to the submitting party for correction or

completion, thus delaying the registration process.

Currently all applications for re-registration, mortgage notation, etc. are filed in paper form. Transmission of the paper applications and necessary processing at the Registry offices involves some delay. A pilot project to permit applications for release of mortgages to be made electronically is under consideration. Further progress to an all electronic system permitting practitioners direct access to effect re-registrations electronically is subject to concerns about potential degradation of the Land Register by giving access to careless or unqualified practitioners or the public.

When an application for re-registration of real estate is filed, the staff of the Land Registry check to make sure that the seller has a good title according to the Register and that the necessary forms are correctly filled out and the necessary papers (transfer deed) properly executed and witnessed are provided. If the land is not registered, the determination of good title requires an examination of title deeds providing a chain of title for the premises covering at least 15 years prior to the date of registration.

Prior to 2003 the Land Register issued certificates of title evidencing registered ownership of real estate. Transfer of the property required surrender of the original certificate. This was considered an additional protection against forgery and fraud. Since 2003 certificates of title are no longer issued and it is no longer necessary to surrender any certificate in connection with a transfer. The Land Registry merely notifies purchasers that the transfer of ownership has been registered. There is no systematic notification of sellers. The discontinuance of certificates coupled with the lack of notification to sellers reduces safeguards against fraud and forgery. To date,

however, forgeries and fraud affecting the Land Register have not been seen as serious problems.

Generally applications for re-registration of registered estates in land are completed within a week of the date of application. First registration of unregistered land, which requires a careful examination of the underlying proof of title, generally takes considerably longer.

The complete implementation of the Land Register system by the Land Registration Act of 2002 brought about a fundamental change in English land law. Previously title passed between the parties to a conveyance on the execution and delivery of a title deed. Registration was required only to make the conveyance effective against third parties without notice of the transfer. Now, however, re-registration of registered land is required in order to complete the transfer of ownership to the buyer, and the transfer is legally effective only when re-registration takes place. Unregistered land continues to be conveyed on delivery of the deed. If registration is not effected within two months, however, the legal interest of the buyer decays to a mere equitable ownership that may be subject to the claims of intervening third parties.

The Land Registration Act of 2002 has also further strengthened the rights of purchasers to rely on the Land Register. The person identified as proprietor of an estate in the Land Register is entitled to sell it or encumber it. This is so even if the designation as proprietor is the result of mistake or legally ineffective transactions. This ability to convey is not dependent on the good faith or lack of knowledge of the purchaser.

On the other hand, the rights of any registered owner, whether or not based on a good faith purchaser, may be subject to a proceeding for rectification to correct errors arising from present or past transactions involving the estate. If it is shown that the present or previous transaction was legally ineffective, the rights of even a good faith purchaser may be adversely affected. This is in contrast with the Continental-European legal culture, in which the rights of a good faith purchaser receive more absolute protection. In England the good faith purchaser may be relegated to a claim for damages.

Both the Land Register and English courts can require that errors in the Land Register be rectified. In general rectifications that affect the title of a registered proprietor in possession of an estate in land require the proprietor's consent, unless the proprietor contributed to the error through fraud or negligence, or unless there are other grounds for rectification without his consent. In general the Land Registry is obligated to rectify errors in the Land Registry which are brought to its attention.

An important feature of the English Land Registry system is the legal responsibility of the State for losses sustained by private parties by reason of errors in the Land Registry. Liability is strict - there is no need to prove negligence or wrongdoing on the part of the Registry or any official. If an entry in the Registry is wrong (whether by fraud, forgery, or otherwise) and a party suffers loss in reliance thereon, the State indemnifies the loss, subject, of course, to a right of subrogation against any responsible party.

Indemnities are likewise payable when a party may suffer loss resulting from

rectification of the Land Register, so long as his conduct did not contribute to the need for rectification. Damages are subject to reduction in cases where the claimant's own lack of care may have contributed to the error. Parties who base their titles on transfers without consideration are charged with lapses and misconduct of their transferors. Indemnities are ultimately capped by the value of the estate concerned. In the year 2005-2006 the Land Registry paid indemnities totaling approximately 14 Million pounds.

2. Detailed Description of a Real Estate Transaction

a. Role of the Real Estate Broker

Real estate brokers participate in approximately 70% of all transactions of residential real estate. The seller commissions a broker, who provides solely sales and marketing services and does not offer legal advice. Brokers advertise listed properties in newspapers, by signs and notices posted in their offices, and on the Internet. Generally a buyer deals directly with the listing or seller's broker. Co-brokerage of residential property is rare.

The broker shows the listed property to prospective purchasers and solicits expressions of interest and oral offers against the listing price and terms. The broker relays offers and counteroffers between the parties until they have reached oral agreement on the price and general terms of the sale. At this point the broker's work is largely over. The broker is not involved in drafting any contract or in holding any escrow deposit. In some cases the broker may be asked to deliver the keys to the

buyer at the time the purchase price is paid.

Brokerage commissions are not regulated and are agreed on by the parties. In the case of ordinary residential real estate brokerage commissions are generally of the order of 2% of the purchase price and are paid by sellers, who take the amount of the commission into consideration in agreeing on a sales price.

b. Chain Transactions

Residential real estate transactions in England are often linked to and dependent on other residential real estate transactions to form long chains of buyers and sellers whose ability to buy or sell is directly dependent on successful conclusion of the purchase or sale of other properties. Many residential real estate buyers are only willing (and in some cases able) to buy a new home if their old home can be simultaneously sold. Sometimes these chains can extend to 8 or more linked transactions, all of which must be simultaneously completed. Failure of a single transaction to complete can jeopardize the entire chain.

It is estimated that two-thirds of all residential real estate transactions occur in such chains, which, on the average, consist of 4 separate purchases and sales. Needless to say, the coordination of these many transactions is a great challenge for all concerned, but mainly for the solicitors representing the various parties, in most cases as both buyer and seller. Ultimately both the exchange of contracts, in which all the parties become bound to convey, as well as the completion, when the money flows from one party to the other up the chain, must be coordinated to take place

simultaneously.

The fact that a difficulty in any one of the transactions constituting a chain will delay or jeopardize the entire chain means that chain transactions are characterized by a level of uncertainty and delay far greater than individual purchase and sales arrangements. This causes stress and discomfort for the participating parties as well as the potential for excess legal expense and other economic burdens. It may also contribute to the relatively high failure rate of English residential land transactions and the public's relatively low degree of satisfaction with land conveyancing in England and Wales. Nonetheless, as of the present time, potential solutions such as bridge loans and temporary interim rentals have not found much traction.

c. Participation of Solicitors and Licensed Conveyancers

There is no requirement in English law that parties employ solicitors to handle real estate transactions. Self representation is permitted, but rarely occurs. In almost all cases both parties to a residential real estate transaction are represented by their own solicitors. In cases where there are encumbrances to be released or created, the financial institutions involved typically employ the seller's or buyer's solicitor, as the case may be, to represent their respective interests.

The Law Society of England and Wales has developed the "National Protocol for Domestic Conveyancing" to guide solicitors in representing their respective clients in the completion of a residential real estate transaction. This represents an effort to unify and standardize practices, which otherwise are somewhat variable based on locality

and even among individual practitioners. The protocol includes forms for use in connection with various stages of transactions. The Seller's Information Form contains a list of the information and documents that a seller should be prepared to assemble and provide. The Fixtures, Fittings and Contents Form is used to specify the fixtures and personal property that will be sold with the real estate. The Complete Information and Title Form sets forth the conditions to completion. The forms package also contains a form Standard Agreement for Sale.

The extent to which solicitors follow the prescriptions of the National Protocol varies widely. In some cases its requirements are seen as too rigid, and many solicitors have developed their own forms and procedures.

d. Drafting of the Purchase and Sales Contract

Most purchase and sales contracts are based in large part on standard form contracts similar to the Standard Conditions of Sale from the Law Society. Contracts proposed by sellers may be drawn slightly to favor the seller, but are generally acceptable to buyers. Buyer-drawn contracts, although much less common, are usually acceptable to sellers as well.

Usually the seller's solicitor proposes the first draft of the contract and sends it to the buyer's solicitor, along with a bundle of additional information about the subject premises. This information includes comprehensive information about the title and boundaries of the property and may include mention of any serious defects in the property known to the seller. There is no requirement to make comprehensive

disclosure about the condition of real property. The principle of *caveat emptor* applies, and a buyer takes real estate subject to all defects which are obvious or could be discovered with reasonable diligence.

The buyer's solicitor may suggest revisions and changes to the seller-proposed contract. Ultimately the two solicitors reach agreement on the form of contract that will apply to the transaction in question.

Most English residential real estate contracts are more or less unconditional. The seller is obliged to convey and the buyer is obliged to purchase. Once contracts have been exchanged, the buyer has equitable title and both parties generally have the right of specific performance, i.e. to relief compelling the other party to perform. Contracts made conditional on ability to obtain financing, on sale of one's own house, or on satisfactory inspection for physical condition, are very rare. Contracts which are unconditional and enforceable according to their terms are particularly important for chain transactions. If conditional contracts were permitted, an entire chain could fail on the failure of a condition in a single contract.

For this reason such matters as arranging financing, physical inspection of the premises, and even negotiating the sale of the buyer's own home must be accomplished in the interval between the time when the parties have orally agreed on a sale and purchase and the time of exchange of contracts. This particularly burdensome to the buyer, who is the party that must do most of the work during this interim pre-contract period, and who must bear the risk that time and effort invested may be wasted if contracts are not ultimately exchanged.

The need for the buyer to take all the steps to insure that financing will be available, that the condition of the property is satisfactory, and that the buyer's own home will simultaneously sell means that there is often a considerable period of time after the parties have orally agreed on a purchase and sale during which they are not legally bound. During this interval, if the seller receives a better offer, the seller may withdraw from the negotiations and the buyer has no effective recourse. If the period between oral agreement and exchange of contracts becomes too protracted and the market is hot, a seller may demand an increase in the agreed on purchase price as an inducement to tolerate the delay and ultimately sign the contract. This practice, known as "gazumping" has become fairly common in the active real estate market in England in the 1990s and early 2000s.

The sometimes extended period required to complete due diligence before contract exchange can also be burdensome to sellers under time pressure to sell their property. It is not uncommon for a buyer, after taking some time to determine condition, financing, etc., to demand a price reduction as the price for an exchange of contracts and prompt completion. This practice has earned the sobriquet "gazundering". Both gazumping and gazundering are products of the long period between the decision to buy and sell and the conclusion of a binding contract in English practice.

e. Buyer's investigation and preparation for contract exchange.

Because of the doctrine of caveat emptor, it is incumbent on the buyer to make

sure that the condition of the house corresponds with his expectations before becoming contractually bound to purchase it. The seller has no obligations to disclose defects in the physical condition of the property. In matters relating to the title, the seller is obliged to disclose encumbrances and defects of title that the Seller is, or in the exercise of reasonable diligence, should be aware of and that are not known to the Buyer or ascertainable in the exercise of due diligence.

Thus it is incumbent on the buyer to make a careful investigation of all circumstances, including potential legal interests, governmental and private restrictions, encumbrances and charges, and any other matters that may affect title to or use of the property. To assist the buyer in this undertaking it is expected that the seller will place all available information at his disposal. The solicitor is usually responsible for gathering and transmitting this information.

As already indicated, at the time a draft contract is proposed, the seller's solicitor usually provides to the buyer's solicitor an extract from the Land Register describing the seller's estate, or in the case of unregistered land, copies of deeds showing a satisfactory chain of title of at least 15 years duration. A buyer of unregistered land must check to make sure that the obligation to register did not arise at the time of a previous conveyance, in which case it would be the seller's obligation to effect registration before the transaction could proceed.

The buyer's solicitor must also perform a series of searches and enquiries for encumbrances, charges and use restrictions that are not necessarily ascertainable from the Land Register. In some cases solicitors employ specialized agencies to

perform these searches, in which case the charges of such agencies are disbursements to be added to costs borne by the buyer. Some solicitors perform the searches and enquiries themselves, particularly when required to do so by the standards of a potential financing bank.

The principal additional searches and enquiries include checks in the Local Land Charges Register in which local land charges and other potential overriding interests are recorded, enquiries with local authorities responsible for land use, building permits, environmental protection for either generalized or specific restrictions or other provisions affecting the subject property, an enquiry with the applicable water and sewer authority about service to the subject premises, any existing assessments or rates therefor, and the existence of rights or easements for service to neighboring parcels, and a check to see if a part of the property is registered as local commons or village green, in which case building would be seriously restricted. Some encumbrances on unregistered estates are registered in the Land Charges Department of the District Land Registry in Plymouth. Such encumbrances are indexed not by estate number, but according to the name of the owner of the premises at the time the encumbrance was created. In order to make sure to catch encumbrances created by previous owners, it is necessary to request that the indices be searched under the names of several past owners of the estate in question.

It is also usual for the buyer's solicitor to pose a number of follow-up questions about the state of title, encumbrances and use restrictions and other matters based on the materials provided with the contract proposal.

With improved property, it is very important for the buyer to obtain reliable information about the condition of the property. If the property is being financed, the bank requires a property appraisal that will include a physical inspection and some information about condition. A more complete inspection and analysis of physical condition can be had from an engineering inspection of the property. Although some buyers go to the expense of commissioning such an inspection, a majority of buyers save the expense and rely on the limited information available from the bank appraisal despite the rigors of *caveat emptor*. A complete engineering study of residential real estate is requested in only about 2% of the cases. In any event the buyer usually makes some physical inspection of the property to ascertain who is actually living there and thus may be able to assert some kind of overriding interest based on possession.

Finally, there are a limited number of circumstances in which the consent of third parties to a sale of a particular estate may be required. This is rarely the case with freehold land. In some leases the landlord may retain a right to approve sales of the leasehold. Although it will ultimately be the seller's responsibility to obtain any necessary consents, the buyer's solicitor has the burden to determining what will be required and then requesting the seller's solicitor to obtain it.

f. Arrangements for financing.

One of the most important pre-contract undertakings for most buyers is to arrange for mortgage financing to cover at least part of the purchase price of the property. Approximately 75% of all purchasers finance at least a part of the purchase

price through a mortgage with a bank or other financial institution. Existing mortgages are rarely assumed by new purchasers. Usually any existing mortgage is paid and discharged with the proceeds from a new mortgage obtained by the buyer. The buyer's solicitor is under a duty to make sure that the financing is committed before allowing his client to sign a purchase and sales agreement.

It is usual in the case of residential real estate transactions for the buyer's bank to retain the buyer's solicitor simultaneously to represent its interests as mortgagee. This dual representation is permissible under the conditions laid down in a special protocol issued by the Law Society. Banks maintain lists of solicitors whom they will accept for this purpose. If a buyer's solicitor is on the list of the bank chosen to provide the financing, the buyer can save the cost of having to pay for a separate solicitor to represent the bank. If not, then the buyer can either select a solicitor who is on the bank list or will have to reimburse the bank for representation by its own solicitor.

It is not common for buyers' solicitors to provide them with written legal opinions about the state of title or condition of the property or the transaction. However when also representing a bank, the solicitor is expected to provide the bank a written opinion on the state of title and other legal matters relevant to protection of the bank's interest in the property as security for its loan. The solicitor also prepares in behalf of the bank a proposed mortgage deed by which the buyer will grant the bank a mortgage on the premises simultaneously with the purchase. Generally this mortgage deed is signed in advance by the buyer and held in escrow by the solicitor. The loan agreement and other papers relating to the loan transaction are generally prepared by the bank. The

solicitor is not directly involved in the negotiations between the buyer and the bank for the terms of the loan other than as necessary for preparation of the mortgage.

Once the bank is satisfied with the proposed mortgage transaction, it issues a commitment letter to the buyer setting forth the amount and general terms of the loan to be granted. Based on this commitment letter, the buyer can have some confidence that the funds will be available and can go forward with the exchange of contracts.

Seasonably before the date set for completion of contracts, the bank wires the mortgage proceeds to an escrow account of the buyer's solicitor, who holds them pending the completion. At completion the buyer's solicitor transfers the funds to a similar account of the seller's solicitor and attends to registering the mortgage along with the conveyance. In order to protect the bank, the solicitor generally requests a 30-day priority period for the mortgage as well as for the underlying re-registration. As is the case with re-registration of titles, registration of mortgages fairly frequently occurs after the expiration of the priority period, which occasionally leads to problems caused by intervening interests.

g. Exchange of Contracts

Once the preliminary examinations and enquiries are complete and financing is arranged, the parties can complete the exchange of contracts.

The formal requirements for a binding contract for the conveyance of real estate are set forth in the Law of Property Act (Miscellaneous Provisions) 1989. Basically what is required is a written agreement signed by both parties. This requirement of mutual signature is satisfied if each party signs a counterpart of the contract and

delivers the counterpart containing his signature to the other party.

In practice, particularly in chain transactions, when the timing of the exchange is very important, the parties sign counterparts with their respective solicitors in advance. The solicitors hold the signed counterparts until the moment agreed on for the exchange. At that moment they telephonically agree that each will hold its client's signed contract as fiduciary for the other, thus constructively completing the exchange. The contracts can then be physically delivered at leisure. This method of exchange permits a large number of exchanges to take place simultaneously as is required for the successful implementation of chain transactions.

A binding contract for the purchase and sale of property is said to pass equitable title, in that each party acquires the right to seek specific performance of the contract in the event that the other defaults. Even though the buyer does not thereby acquire the right to possession of the property, he bears the risk of damage or loss, and therefore must insure the property as of the date of exchange of contracts. At the same time, the buyer's future ownership of the property is not fully secure from possible intervening rights until and unless a search with request for priority is instituted. Even this will not protect against all overriding interests. This priority search usually takes place shortly before contract completion.

It is also usual upon exchange of contracts for the buyer to pay a down payment of up to 10% of the purchase price to the seller's solicitor to be held in escrow pending completion. If the buyer fails to complete the contract and pay the balance of the purchase price, the seller's attorney may turn these funds over to the seller as a form

of liquidated damages.

h. Completion

Since most of the steps requiring extensive time have taken place before contract exchange, in the usual case completion can follow soon afterward. The average is two weeks following exchange of contracts. Seller's solicitor must determine the amounts needed to discharge any existing encumbrances and frequently obtains a signed release deed in escrow pending receipt of the necessary funds at completion. This enables the seller's solicitor to pay the encumbrancer with funds deposited in escrow at completion and deliver the release deed to the buyer's solicitor simultaneously with the transfer deed.

Shortly before completion the buyer's solicitor conducts a final search to make sure that no intervening interests have arisen since the first search, and applies for a priority of 30 days to cover the time required for payment of the stamp duty land tax and filing of the application for re-registration following completion.

English solicitors have developed techniques to permit completions to be coordinated so that all completions in a chain transaction can take place simultaneously. Funds are transferred from escrow accounts as deeds are delivered to buyers' solicitors by courier. At the same time, the seller's solicitor arranges, sometimes through the good offices of the broker, for the keys to be delivered to the buyer.

i. Payment of Stamp Duty LandTax and Re-registration

Following completion the first duty of the buyer's solicitor is the payment of the stamp duty land tax, which is a pre-requisite to obtaining re-registration of the estate purchased. The tax is a graduated percentage of the purchase price paid, ranging from 1% of the purchase prices over 125,000 pounds but less than 250,000 pounds to 4% of the portion of the purchase price over 500,00 pounds for residential property. The amount of the purchase price up to 125,000 pounds is tax exempt.

The buyer's solicitor computes the tax and files a tax return with the Revenue Service usually accompanied by a remittance of the tax itself. The Revenue Service reviews the return. If satisfied, the Revenue Service sends the buyer's solicitor a certificate acknowledging payment.

The final action of the buyer's solicitor is to file the transfer documents, including any discharges of prior mortgages and any new mortgage with the appropriate District Office of the Land Registry accompanied by the proper form applications and the prescribed filing fees. If the land is unregistered, the buyer's solicitor must file proof of chain of title for at least 15 years and comply with all requirements for an initial registration.

j. Remedies for breach of contract

If a purchaser fails to pay the purchase price when due and thus makes completion impossible, most English purchase and sales agreements give the seller the option of retaining the deposit in lieu of suing for specific performance. If, on the other hand, the seller fails or refuses to convey the premises at completion, the buyer

generally is given the option of rescinding the arrangement and receiving back any deposit or of suing the seller for specific performance.

If the seller makes material misrepresentations during the course of negotiation of the purchase and sales agreement, the buyer may be justified in seeking rescission of the contract, damages for fraud, or both.

3. Reforms and Future Developments

Although the complete implementation of the Land Registry system throughout England and Wales has modernized English land law and conveyancing to a great extent, there is still widespread dissatisfaction with its performance. Studies by government agencies have disclosed that many consider the system as inefficient and that up to 40% express dissatisfaction with its performance.

The main difficulty is the high percentage of purchase and sales transactions that fail between the stage when the parties think that they have reached a deal between themselves and ultimate completion. Approximately 30% of all oral agreements to purchase and sell never materialize. It is estimated that Britons invest up to a million pounds a day in solicitors fees, search fees, and inspection report fees for real estate transactions that do not come to fruition.

The great bulk of failed real estate transactions crater during the interval between initial agreement of the parties and the exchange of contracts. The likelihood that something will cause a tentative agreement to falter increases with the time between the tentative agreement and a binding legal obligation. In England and Wales

the time from party agreement to exchange of contracts averages up to 14 weeks, a period of time considerably longer than is usual in either Europe or the United States.

The informal agreement-binding contract interval is extended in England for three reasons, 1) the need for the buyer to determine the physical condition of the premises as well as the state of the title before exchange of contracts, 2) the multiplicity of searches and enquiries required by the structure of land registration in England, and 3) the frequency of chain transactions, which delays exchange of contracts for all members of the chain until the most tardy is ready to proceed.

As of June 1, 2007 a seller of residential real estate will be legally required to prepare and deliver to potential buyers a Home Information Pack containing specified items of information and documentation concerning the parcel being sold. The idea is to reduce the number of failed transactions by accelerating the exchange of information pending contract preparation and exchange. The Home Information Packs are to be assembled by the seller's solicitor or broker and are to be delivered to prospects at the commencement of serious negotiations.

Each Home Information Pack is required to contain a sales statement, in which the identity of the seller, the exact property to be sold, and the status of occupancy of the property are stated with exactitude, a description of the seller's title or abstract from the title registry, standard searches of local authorities, charges, etc., and the EU-required energy performance certificate.

The original proposal to require that a Home Information Pack also contain an engineering report on the condition of any improvements was dropped as impractical in

light of the unlikelihood that a buyer would feel comfortable in relying on a report prepared at the behest of the seller.

Practitioners have not reacted to the new requirement with enthusiasm. Many maintain that the Home Information Pack will not result in fewer searches, but in more. A buyer may not feel comfortable in dispensing with his own standard searches just because the seller has done them in the past. The value of searches diminishes also with the passage of time. Otherwise most of the information required in the Home Information Pack is already promptly provided by sellers either at the outset of the transaction or as soon as a buyer's solicitor requests it.

The Land Registry is currently exploring "e-convenancing", whereby conveyancers could get direct access to the Land Register data base to implement transactions electronically without the intermediation of paper forms or officials in the Land Registry. This development would eliminate current problems caused by delays in the transmittal and processing of paper documentation. The hope would be to approach the "gold standard" of a system in which title could pass and all interests be protected simultaneously with the transfer of the purchase money. This development is seen as particularly desirable to facilitate the chain transactions which are favored by the English real estate market.

Fairly prompt implementation of a system of electronic transmittal of certain documents, either in pure digital or in facsimile form, to the District Registries for review and entry by Registry officials seems a likelihood. Pilot projects are anticipated in 2008/2009. If pure electronic submittals are to be allowed, some form of electronic

signature system will have to be introduced to protect against unauthorized or forged submissions.

The step of permitting conveyancers to make changes in the registry without the participation of public officials seems a lot more problematical. Currently Land Registry officials protect the integrity of the Registry and the quality of registered titles by carefully reviewing each submittal to make sure that it is correct in form and corresponds to the state of the records on file. Omission of this step, which currently catches many errors, could seriously compromise the quality of the Registry. Under the English system landowners themselves, all solicitors, and licensed conveyancers can prepare title deeds and other documents affecting title to real estate and submit them for registration. It is hard to imagine that such a large and disparate group of potential users could be trained and disciplined to the extent that might be required to maintain a good level of quality in a Registry that any one of them could directly access and change.

4. Professional Regulation of Conveyancing

As indicated above, under English law, parties to land transactions are permitted to prepare their own documentation and to represent their own interests in negotiating and completing their transactions and in registering and re-registering their estates of land with the English Land Registry. The complexity associated with current-day conveyancing and the amounts frequently at stake in real estate transactions mean that few parties do their own conveyancing. For the largest part, conveyancing is the

purview of English solicitors, and to a small extent, licensed conveyancers. Only solicitors and licensed conveyancers are permitted to perform conveyancing services for others for compensation.

English solicitors have been active for many centuries in the field of professional conveyancing, in which they have historically enjoyed a professional monopoly.

The profession of licensed conveyancer arose in the late 1980's, when Parliament authorized this new category of real estate professionals in an effort to expand the market for conveyancing services available to consumers. As of the date of this report, there are approximately 101,000 solicitors and less than 1,000 licensed conveyancers. It is estimated that licensed conveyancers are active in about 3% of real estate transactions, largely in the lower-cost residential market. Some licensed conveyancers work in solicitors' offices. Others have their own firms, which in some cases employ solicitors as well.

The formal educational training of solicitors generally consists of a 3-year university degree in law plus a year of more practical training at a one-year Legal Practice Course or a university degree in some other discipline followed by a year of intensive legal education ending in a Common Professional Examination before the Legal Practice Course. All solicitor candidates are also required to complete a two-year traineeship in the office of a practicing solicitor or solicitor's firm.

English solicitors are required to maintain annually-renewable practice licenses, to carry liability insurance and to participate in continuing legal education programs. Their professional activities are regulated through codes of ethics promulgated by the

Law Society as well as by comprehensive statutory regulations.

Licensed conveyancers receive specialized training in legal rules and practices relevant to conveyancing. After a series of short courses offered by various colleges a conveyancer candidate must pass an examination administered by the Council of Licensed Conveyancers and then complete a two-year traineeship in the office of a some firm actively involved in land conveyancing. There are two grades of license. The full license authorizes a land conveyancer to open and operate his own firm. The limited license authorizes activity only as an employee of another licensed land conveyancer or solicitor.

The roles of both solicitors and land conveyancers are to represent the interests of their respective clients with skill and loyalty. Ordinarily this duty of loyalty will preclude these professionals from representing the interests of more than one party to a particular transaction, particularly when those parties may have differing or even opposing interests. In some cases simultaneous representation is permissible if the parties, after being properly warned, freely consent to the dual representation. Some relationships are inherently so adverse that dual representation is never considered proper. For instance, a single solicitor or registered land conveyancer would not be allowed simultaneously to represent and advise a builder and the builder's customer with respect to the building and purchase of a house.

Dual representation of a buyer of real estate and a financing bank is expressly permitted and is routine in residential real estate transactions. Pursuant to a Law Society protocol, the role of the lawyer in representing the bank is restricted to

preparation of loan documentation and cannot extend to negotiating the financing deal with his other client.

In recent years the duty of solicitors and conveyancers to ascertain the identities of their clients with reasonable certainty has been confirmed by legislation aimed at combating money-laundering. Although this requirement may not prevent all possible forgeries, the risk of such losses is materially reduced when conveyancing professionals participate in transactions.

Both solicitors and licensed conveyancers are required to maintain professional liability insurance with high coverage limits to protect their clients against mistakes in the performance of their professional duties. The Law Society and the Council of Licensed Conveyancers also maintain client fidelity funds to which solicitors and conveyancers are respectively required to contribute. These funds provide discretionary reimbursement to clients damaged by professional breach of trust or fraudulent conduct not covered by liability insurance.

5. Transactions Costs

It has been difficult to obtain accurate estimates of costs for conveyancing professional services required by parties to real estate transactions in England. Fees are agreed on by the parties and are not the subject of uniform regulation. There are few published studies containing reliable estimates of fees that can be used for a comparative study of the kind here undertaken.

That having been said, the most reliable recent study appears to be the Cost of

Moving Home Survey - 2006 undertaken by the University of Greenwich in cooperation with Woolwich, PLC, a subsidiary of Barclays Bank. In the course of the study some 11,000 professional conveyancers (solicitors and licensed land conveyancers) were surveyed about the costs of residential real estate transactions in England and Wales. The results of the survey have been published in tabular form. Although the transaction values set forth in the Greenwich tables do not exactly correspond with the transaction values hypothesized in the present study, there are Greenwich numbers that are close enough to serve as fair proxies for all of the hypothetical transactions chosen for comparison in the present study.

The following categories of costs have been tracked:

- i. Brokers commissions - Broker's commissions have been estimated at 2% of the purchase price in each case. This does not factor in the circumstances that a broker is used in only about 70% of the cases.
- ii. Costs for legal advice and representation - There is wide variation among law firms and conveyancers in the manner of computation of legal fees and the size of the fees themselves. For the purpose of this study, the average figures of the Greenwich study have been used. The Greenwich study does not include figures for representation of a financing bank and the preparation of mortgage documentation. Although the Law Society considers a

charge by the buyer's solicitor of an additional .25% of the face amount of the mortgage for simultaneously representing the bank to be reasonable, in practice the usual charge for this additional function is of the order of .1% of the mortgage amount. It also appears to be the case that the additional work involved in examining potential purchases of leasehold estates usually means an additional charge to the buyer of up to 150 pounds.

iii. The need for a number of specialized searches in addition to the solicitor's title check at the Land Registry has led to the imposition of a charge for search fees in addition to the ordinary lawyer's fees. These values have been taken from the Greenwich study for the hypothetical transactions here reviewed. The charge for searches seems to include both fees paid to registries and public offices and compensation of professional search firms who make inquiries that are sometimes also made by solicitors or land conveyancers. Since the searches charge is a part of the process whereby conveyancing professionals determine the state of title and restrictions affecting the property, the Reporter has elected to include them as part of the professional conveyancing fees in this study.

- iv. Charges for an engineering inspection remain problematical. Not all home buyers commission such an inspection. The values set forth in the accompanying table were obtained from Internet sites advertising this service.
- v. Land Registry charges come from the Land Registry Fee Order of 2006.
- vi. The Stamp Duty Land Tax is computed according to the graduated rates as published by the Revenue Service.

**TABLE C-5 – Real Estate Transfer Costs in England and Wales
(national currency)**

	<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>	
<i>Costs</i>	<i>Broker's Commission</i>	<i>£1,361</i>	<i>£1,361</i>	<i>£3,404</i>	<i>£3,404</i>	<i>£6,807</i>	<i>£6,807</i>	<i>£13,615</i>	<i>£13,615</i>
	<i>Purchase Price</i>	<i>£68,074</i>	<i>£68,074</i>	<i>£170,184</i>	<i>£170,184</i>	<i>£340,368</i>	<i>£340,368</i>	<i>£680,735</i>	<i>£680,735</i>
	<i>Searches Fees</i>	<i>£207</i>	<i>£207</i>	<i>£207</i>	<i>£207</i>	<i>£207</i>	<i>£207</i>	<i>£207</i>	<i>£207</i>
	<i>Buyer's Lawyer's Fee</i>	<i>£414</i>	<i>£414</i>	<i>£460</i>	<i>£460</i>	<i>£555</i>	<i>£555</i>	<i>£805</i>	<i>£805</i>
	<i>Seller's Lawyer's Fee</i>	<i>£389</i>	<i>£389</i>	<i>£432</i>	<i>£432</i>	<i>£523</i>	<i>£523</i>	<i>£760</i>	<i>£760</i>
	<i>Bank Lawyer's Fee</i>		<i>£68</i>		<i>£170</i>		<i>£340</i>		<i>£680</i>
	<i>Inspection/Engineer Fee</i>	<i>£300</i>	<i>£300</i>	<i>£350</i>	<i>£350</i>	<i>£480</i>	<i>£480</i>	<i>£750</i>	<i>£750</i>
	<i>Real Estate Transfer Tax</i>	<i>£-</i>	<i>£-</i>	<i>£1,701</i>	<i>£1,701</i>	<i>£10,211</i>	<i>£10,211</i>	<i>£27,229</i>	<i>£27,229</i>
	<i>Recording/Registration Fee</i>	<i>£60</i>	<i>£60</i>	<i>£150</i>	<i>£150</i>	<i>£220</i>	<i>£220</i>	<i>£420</i>	<i>£420</i>
<i>Total Transfer Costs</i>	<i>£2,731</i>	<i>£2,799</i>	<i>£6,704</i>	<i>£6,874</i>	<i>£19,003</i>	<i>£19,343</i>	<i>£43,786</i>	<i>£44,466</i>	
<i>Total Conveyancing Fees</i>	<i>£1,010</i>	<i>£1,078</i>	<i>£1,099</i>	<i>£1,269</i>	<i>£1,285</i>	<i>£1,625</i>	<i>£1,772</i>	<i>£2,452</i>	
<i>Conveyancing Fees as percent of Total Costs</i>	<i>36.98%</i>	<i>38.51%</i>	<i>16.39%</i>	<i>18.46%</i>	<i>6.76%</i>	<i>8.40%</i>	<i>4.05%</i>	<i>5.51%</i>	
<i>Conveyancing Fees as percent of Purchase Price</i>	<i>1.48%</i>	<i>1.58%</i>	<i>0.65%</i>	<i>0.75%</i>	<i>0.38%</i>	<i>0.48%</i>	<i>0.26%</i>	<i>0.36%</i>	
<i>Broker's Commission as percent of Total Cost</i>	<i>49.84%</i>	<i>48.63%</i>	<i>50.77%</i>	<i>49.52%</i>	<i>35.82%</i>	<i>35.19%</i>	<i>31.09%</i>	<i>30.62%</i>	

National Reports - Real Estate Conveyancing in States of the United States

Comparative Analysis of Land Conveyancing in 5 European Member States

Peter L. Murray

2007

National Report: United States – Maine²³

I) Legal Bases and Practical Execution of Real Estate Conveyancing

a. The Roles of Real Estate Brokers and Legal Professionals in Real Estate Transactions.

The role of the real estate broker is (1) to advise lay people about the market value of real properties, (2) to represent sellers by marketing their properties and guiding the sellers through the sales process, and (3) to represent buyers by locating properties that meet the buyers' needs and guiding them through the sales process. In most transactions, the brokers are the only people who advise the selling and buying parties; attorneys become involved only when it is necessary to transfer "title" (ownership).

A typical conveyance begins when a prospective buyer contacts a real estate broker, describes his or her interests, and inquires about available property (let us assume it is a home). The buyer could choose the particular broker because the buyer encountered an attractive home bearing the broker's For Sale sign, or because the

²³ The Reporter thanks John Sheldon, Esq., Falmouth, Maine, for most helpful contributions to

buyer saw a published advertisement about the home, or because the buyer simply decided to start looking for a home by going to a broker first.

As a general rule, brokers work for the seller and get paid by the seller. So, for example, if the buyer responds to a sign on the property by going to the broker who placed the sign, the broker is deemed the seller's broker and will represent only the seller. If the buyer is interested in a property that the broker has not "listed," the broker will help the buyer negotiate the purchase of the property, but is still the seller's agent. The ethics of this arrangement may seem strange—the buyer is obviously relying on the broker to advance the buyer's interests, and the broker is obviously negotiating with the listing broker on the buyer's behalf—but the broker will truly represent the buyer's interests only if the buyer hires, and pays, the broker to do so. It is rare for that to happen.

If there's only one broker—the listing broker—that broker receives the entire sales commission. If there are two brokers, one negotiating for the seller and one for the buyer, the brokers split the commission equally. In either event the seller pays the entire commission, and the buyer pays none of it.

The negotiation for the terms of the conveyance are conducted by the opposing brokers²⁴ or by the broker and the unrepresented party. (Of course, a seller may be

the research for and preparation of this National Report.

²⁴ Hereafter the broker assisting the buyer will be called the "buyer's broker" and the brokers in a two-broker negotiation as "opposing brokers." Notwithstanding that true "buyers' brokers"—brokers whom the buyers pay for representation and who have

unrepresented too; for purposes of this discussion, however, it is assumed that both the buyer and the seller are using brokers.) Attorneys are normally not involved because all brokers use a single, standard, pre-printed “Purchase and Sale Contract” that indicates all of the contract provisions that normally attend the conveyance.

The negotiation proceeds in writing. Relying on his or her broker’s experience with real estate values in the vicinity and with conveyancing procedures, the buyer settles on a purchase price and the other provisions for his or her offer (such as the amount of the initial deposit, the buyer’s inspection rights, contingency of financing (if the buyer can’t get bank financing the contract fails), and duration of the offer). The broker reduces these terms to writing on the standard contract form and then delivers it and accompanying deposit (a check) to the seller’s broker. The buyer’s signature on the contract “binds”—i.e., commits—the buyer to those terms if the seller accepts them.

If the seller accepts the terms of the offer, he or she signs the contract the buyer offered, at which point the parties are mutually bound to the contract. If the seller wants to alter any of the terms, the seller signs a contract bearing his or her preferred terms and forwards it to the buyer, which the buyer may accept by signing or may amend and return it to the seller for the latter’s consideration. Typically, the parties will exchange amended contracts several times until they have narrowed all terms to an acceptable point and both have signed a final, single contract.

no duty to the seller—are rarely used, this is the ordinary usage.

There is no requirement that a purchase and sale contract be notarized or solemnized in any particular manner; it is their signatures that bind the parties to the written terms of the contract. The terms must be in writing, however; whatever isn't written into the contract is not enforceable. This illustrates why, notwithstanding standardized contracts, the unrepresented party may be at a disadvantage if he or she is not experienced in real estate conveyancing. Many laypeople would probably be willing to rely on oral promises, not realizing that only written terms are enforceable.

When the parties reach agreement, buyer pays a deposit of between 1% and 10% of the value of the property to the seller's broker, who deposits the payment in a trust, or "escrow," account, to be utilized when the transaction "closes"—i.e., when title is passed and the balance of the purchase price is paid. The deposit protects the seller by providing some liquidity in case the buyer wrongfully backs out of the contract. (The buyer's remedy for wrongful breach is a court order requiring the seller to convey the property.)

After the contract becomes binding on both parties, the buyer normally hires a qualified person to inspect the property. If the buyer is purchasing for cash, which occurs in a minority of cases with residential property, the buyer also hires an attorney to confirm that the seller actually owns what is to be conveyed. The former confirms the physical condition of the property. The contract will have provided certain disclosures, required by law: the size and condition of the septic system, the presence of lead paint, and the results of previous radon tests are examples. No such disclosures fully protect the buyer, however, not only because the seller might not be

truthful but also because the disclosure requirements aren't exhaustive; many conditions can affect the quality of a home (mold, for example) but need not be disclosed. If the inspector discovers a fault that the buyer deems significant the buyer may terminate the contract (and receive a refund of the deposit), or may renegotiate the price.

The typical buyer will need to finance the purchase with a commercial (bank) loan. As soon as the contract is signed, if not before, the buyer must find a lending bank. This involves satisfying a bank that the buyer is credit-worthy, that the property's value is adequate to secure the loan, and that the mortgage deed will convey marketable title to the bank. Ordinarily the bank will have the property appraised in connection with the application and may also engage a lawyer or title company to confirm that the title is satisfactory, or at least insurable. When the buyer obtains financing approval, his or her broker notifies the seller. Most contracts contain provisions making the buyer's obligation conditional on obtaining financing so that failure to obtain commercial financing justifies termination of the contract.

Although buyers who are getting mortgage financing may engage attorneys to advise them and represent their interests, in most cases such buyers rely on the attorney or title company for the bank to take care of the details and make sure that the transaction closes.

An important responsibility of the buyer's or bank attorney is to determine whether, and to what extent, the seller owns the property. Traditionally the attorney would "search the title" in the local Registry of Deeds, where written records of all real

estate conveyances are kept, to determine if the seller has “marketable title”—i.e. owns what he purports to sell. Most such conveyances are evidenced by “deed,” a document that memorializes the transfer of title of any parcel of real property. The attorney reads the recorded deed which the seller obtained title, then compares that with the deed by which the seller’s seller obtained title, and so forth, back to a point about 40 years prior to the date the present seller acquired title. The purpose is to confirm that nobody in that “chain of title” has conveyed any interest in the property to any third party who might interfere with this buyer’s ownership. Such conveyances often include the seller’s mortgage, but they might include transfers of outright title to someone else or of title to a portion of the premises, granting the right to use the premises (an “easement”), or suffering a lien for unpaid taxes to be recorded. Discovery of a “defect” in the chain of title could justify termination of the contract, or it could be a “curable defect”—for example, a mortgage lien the seller gave to a bank that will be paid and satisfied when this transfer occurs.

Recent years have seen fundamental changes in the nature of real estate conveyancing in the Maine. Bank deregulation in the last quarter of the 20th Century has led to the development of a national and international secondary market in home mortgages, which are "bundled" shortly after origination and sold as mortgage-backed securities to investment houses and their clients. The secondary market demands a uniform standard of protection for mortgage collateral in the form of title insurance. All buyers of residential property must provide title insurance protecting the mortgagee from potential defects in title up to the amount of the mortgage. Thus, the attorney for

the bank wears a new hat, as agent for a title insurance company. The attorney does not directly guarantee the quality of the title but sells the buyer a policy that insures the buyer against claims adverse to the owner's interests. Whether, and to what degree, the attorney who sells the policy will search the title and determine its quality depends on the attorney's relationship with the title insurer.

It is also the attorney's responsibility to determine how much of the annual real estate taxes will have accrued against the seller by the time of the closing.

If (a) the inspection report satisfies the buyer, (b) the attorney's title search reveals "clear title"—i.e. no title defects—or the attorney is able to provide title insurance, and (c) the buyer qualifies for financing, the parties gather for the "closing," a formal proceeding to consummate the terms of the contract. The reason for this formality is the American common law rule that the seller (called in this context the "grantor") can transfer title to the buyer (the "grantee") only by physically delivering the deed to the latter.

In residential property sales, the seller is rarely represented by an attorney. It is, however, the seller's responsibility to produce a deed conveying the property to the buyer. In most cases the buyer's attorney or the bank attorney, as the case may be, are willing to draft a deed for the seller, for which they are separately paid by the seller from the closing proceeds.

The closing is may be conducted by an attorney (the "closing attorney"), who is responsible for assuring that all the terms of the contract are met and who protects the mortgage bank's interests. Or the closing may be conducted by a paralegal, a person

who is trained to conduct closings. It is becoming frequent for title insurance companies to conduct closings on transactions for which they provide title insurance. In such cases, the closings are usually conducted by paralegals.

This is a typical, simple closing:

The seller's broker delivers the deposit to the closing attorney;

The buyer delivers a check from the bank for the balance of the purchase price to the closing attorney;

The attorney/paralegal prepares and delivers (or mails) checks to all who are to be paid. These would include the seller's mortgage note holder, the seller, the brokers, the attorney who searched title (and/or is selling the title insurance policy), local taxing authorities—for the seller's pro-rata share of the property taxes—the Registry of Deeds for recording costs, and the closing attorney him- or herself, or the paralegal's firm, for conducting the closing.

The seller signs the deed and acknowledges his signature before a notary public and then hands the deed to the buyer.

The buyer signs the mortgage note and mortgage deed, acknowledges the mortgage deed before a notary public, and then hands the deed, note and mortgage to the lawyer or paralegal conducting the closing on behalf of the bank.

After the closing concludes, the attorney/paralegal delivers the buyer's deed and the mortgage deed to the Registry of Deeds for recording, and the mortgage note to the bank. Recording the documents perfects the title of the buyer and the mortgage lien of the bank. The Registry of Deeds notifies taxing authorities of the change in title, to be reflected in tax records.

In Maine only documents which have been acknowledged before a notary public or other person qualified to take acknowledgements such as a justice of the peace, may be recorded in a registry of deeds. Under Maine law an attorney is authorized to act as a notary, which is why no individual notary (also called a "notary public") participates when an attorney conducts a closing. On the other hand, when a paralegal conducts the closing the paralegal must be qualified as a notary. The purpose of the notarization is to provide a reliable witness to the fact that the person who signed the deed did so "as his/her free act and deed"*—i.e. voluntarily and not as the result of duress. Notarization of a deed in Maine does not require the signatory to give an oath. This is because the purpose of the notarization is to establish not the truth of the statements on the deed (that was the responsibility of the attorney who searched title) but rather the free and voluntary state of mind of the signatory.

B. Fundamental features of real estate law.

* "Deed" in this context is synonymous with "act," and refers to the seller's behavior, not to the document the seller signs.

1. In Maine the conveyance of real estate requires two physical acts. First, the owner (grantor) must sign a deed, which is a written document that, by its own terms, purports to convey title to the buyer (grantee). Second, the grantor must—physically—deliver the deed to the grantee (or the grantee’s agent). The reason for these formalities is to guarantee that the owner of the real estate may be identified beyond doubt. The deed satisfies this requirement in part, by providing written evidence of the grantor’s intention; the delivery of the deed provides formal evidence that the grantor’s intent was met.

2. If the property is a condominium or similar unit, whatever rules and requirements may exist for the transfer of such units will be found in the local Registry of Deeds. The attorney searching title for a person who is buying a condominium will have discovered such rules in the title search; the rules serve as a restriction, or condition, on the ownership of a unit in a condominium complex and, because they amount to terms of, or restrictions on, ownership, they must be found in the chain of title in order to apply to the buyer. Some such restrictions will have to be resolved by recording a new instrument. For example, some Condominium Owners’ Associations have a “right of first refusal,” i.e. the right to buy any unit offered for sale; it is the attorney’s responsibility to discover such a right and the seller’s responsibility to extinguish it by recording the Owners’ Association’s release of its right. Not all claims against a condominium unit will necessarily be recorded in the Registry of Deeds; typically, for example, unpaid condominium fees and assessments will not show up in the title

search, and it is the title attorney's responsibility to contact the condominium Owners' Association to determine whether such matters need to be addressed at closing.

C. Perfection of real estate conveyances.

1. Each county in Maine has a Registry of Deeds, where deeds are recorded in order to perfect the grantee's title against the claims of third parties. Maintaining the Registry is one of the principal responsibilities of county government. Typically, the Registry is managed by the Register of Deeds, an elected official who is responsible directly to the voting public for the proper maintenance of the records.

2. Any person who intends to claim any interest in real estate must record such claim in the Registry of Deeds. An "interest in real estate" means any claim to ownership, use or value of the land; such claims include (but are not limited to) those of grantees, mortgagors, persons claiming a lien (i.e. a money debt owed by the owner), persons claiming easements, and persons who claim the right to restrict or control the owner's rights of use (for example, a condominium owner's association).

3. The registering, or "recording," of a deed does not convey the real estate; that happened previously and (usually) elsewhere, when the grantor executed the deed and delivered it to the grantee. Recording the deed serves to provide the grantee with a means to notify the public of the conveyance. Once a deed is recorded, it secures title in the grantee's name against any person who, without the grantee's consent, might claim an interest in that real estate but who has not previously recorded written notice or evidence of such claim. It is rare for a grantee not to record a deed; the importance of

doing so is almost as well understood as the requirement to register your automobile before driving it.

4. “Recording” a deed requires (1) presenting the deed itself to the an appropriate member of the registry staff, (2) presenting a “Transfer Tax Form” indicating the parties to the sale, the location of the property and the amount of the purchase price; (3) paying the recording fee and the transfer tax. The Register will accept the deed for recording if (1) it has been signed by the person purporting to be the grantor, (2) the grantor’s signature has been acknowledged by a notary public or an attorney at law, and (3) the fees are paid. The recording fee is a flat rate based on the number of pages of the document to be recorded; it serves to support the operation of the Registry. The transfer tax goes to the State. (The recording fee and transfer tax are discussed further below.)

As soon as the Register determines that the deed satisfies formal requirements and that the necessary fees have been paid, the Register records the essentials of the conveyance—names of the grantor and grantee, date of deed, date of recording, general location of the property and nature of the recorded document (deed, mortgage, lien, etc)—in a computerized database of conveyances called an Index. The deed itself goes into a chronologically maintained file of documents to be photocopied and compiled in the next “book” of deeds and real estate documents. The person who records a deed receives a receipt from the registry staff, which acknowledges that the staff has received and recorded the document and received the fee. The entire recording process takes only a few minutes.

In traditional registries, as soon as 300 pages (more or less) of such documents have been photocopied those photocopies are bound into a book, which is given a sequential number and placed on the shelves with all previously bound volumes. Once each recorded document is photocopied, the grantee or recorder of the document will receive the original document in the mail; the document will bear a stamp showing the date of the recording and the Book and Page at which it can be found in the Registry.

Computerization is catching up, however, and in some registries deed books are a thing of the past: When a document is presented for recording, it is indexed in the registry's database and the document itself is electronically scanned. Within minutes, the recording is completed and the staff returns the original document to the presenter; the registry retains no hard copy.

5. At no point does the staff of the Registry of Deeds proofread the deed. The staff reviews the deed only for (1) the formal prerequisites to recording and (2) the details that go in the index. If the recorded document is flawed, the flaw becomes part of the public record.

6. If Registry staff commits an error in the recording process (for example, fails to properly index a recorded document) that affects the ownership rights of a person who has properly recorded a document, or who asserts a right based on a reasonable interpretation of the Registry's records, that person has no remedy against the Registry or its staff. This is because Maine law protects state employees from civil liability for their errors or omissions. The only protection against damage from such causes lies in title insurance.

7. There is no other method of perfecting one's title against claims of *all* third parties. It is possible, however, that imperfect recording will nonetheless perfect title against some parties. For example, if a purchaser fails to record his deed properly but nevertheless delivers a copy of the transfer tax form to the appropriate tax assessor, the purchaser will have perfected his title against anyone who knows of that transfer tax form. This is because such third party will "be on notice" of the transfer of title, notwithstanding that the Registry will not have recorded the deed. Note that his rule is based on the fact of the third party's *actual knowledge*, not on the fact of the recording.

Part II: Transaction costs

1. Transfer costs generally:

a. Normally, broker's (brokers') fees are paid by the seller. When two brokers are involved, one representing the seller and one represent the buyer, the brokers split the fee that the seller pays. When only the buyer has a broker does the buyer pay the broker a fee.

b. The broker's (brokers') fee covers preparation of the sales contract.

c. It is the broker's responsibility to advise the client about the value of the real estate; if a client wants independent advice the client must pay the independent advisor.

d. The broker's fee covers the broker's preparation of the purchase and sale contract.

e. The broker's fee covers obtaining standard official approvals; however, if such approval requires independent advice—for example, the advice of a septic system expert, or waiver of administrative rules requiring an attorney's support—the person who depends upon such advice or support must pay for it.

f. The grantor is responsible for conveying "clear title," which means title unencumbered by third party claims of any sort. Thus it is the grantor's responsibility to pay whatever it takes to "clear" title, including document preparation and recording fees.

g. The grantee pays for the recording costs for documents that secure title in him or her, including mortgages.

h. If the grantee will rely on independent financing for a purchase, it is the grantee's responsibility to pay all fees and costs necessary to obtain such support.

i. As mentioned above, it is the grantee's responsibility to pay for advice to determine what the grantor must do to "clear" the title. At the least, that means that the grantee must pay an attorney to search title in the Registry of deeds to determine what actual or theoretical claims against the title may exist. In the event of an actual claim—for example, a mortgage lien—it is the grantor's responsibility to extinguish that lien. In the event of more theoretical claims—for example, uncertainty about whether an easement affects the property, or whether an heir of a previous owner might assert a claim—the buyer will normally obtain coverage from an insurance company that will indemnify against such claims.

j. The grantor and the grantee share in paying the cost of transfer taxes equally.

k. Title insurance. Traditionally, a bank would rely on an attorney's "opinion of title," which was the attorney's warranty that title was marketable and that the bank would have clear title to convey if it had to foreclose. If the opinion was flawed and the bank or the buyer suffered a monetary loss as the result, the attorney (or the attorney's malpractice insurance company) was responsible.

The opinion of title is now being replaced by title insurance—the direct indemnification of the owner and bank from an insurance company, bypassing the issue of the title opinion attorney's malpractice. The reason for this shift is principally three: attorneys who certify title don't always stay in business; title insurance will insure against technical defects in title that a conscientious attorney might not be willing to ignore; title insurance can indemnify whoever buys the mortgage debt and mortgage as an investment on the secondary mortgage market.

Typically, the attorney of the buyer or the bank will search the title and issue the title insurance policy. The attorney can, theoretically, receive a double fee: for the title search and a premium for selling the insurance policy. Many attorneys, however, fold the double fee into a single fee that is lower than the combination.

For any transaction involving a mortgage that may be sold on the secondary mortgage market, title insurance indemnifying the bank is a necessity; the buyer will have to pay an additional fee for an insurance "rider" extending protection to subsequent purchasers of the debt and mortgage. Some mortgage loans are "in house," however, meaning that the bank intends to hold them. For such loans title

insurance may not be necessary, depending on the bank's confidence in the attorney who performs the title search.

Even if the bank insists on title insurance, the buyer may elect to save money and not buy a policy indemnifying himself or herself, if the title search revealed no title defects.

I. The secondary mortgage market and mortgage brokers. Traditionally the mortgage lending institution—the “bank”—was a local institution that arranged for the loan and provided the loan funds. There are now many mortgage lending institutions with no local offices. They rely on independent mortgage brokers to find buyers who want their loans—essentially, to commit the buyer and lender to each other and to render the funds available at closing. (The term “secondary” mortgage market comes from the fact that the lender itself is not the “primary” actor in these transactions; the primary actor is the broker.) In these arrangements, the mortgage broker's fee comes either directly or indirectly from the buyer.

If the loan bears interest at no more than the “par” rate (which floats and can vary daily), the lending institution will not pay the broker for generating the loan, so the broker must recover its fee by charging the buyer what is known as “points.” A “point” is 1% of the loan amount. How many points a broker charges depends on the amount of the loan; for a loan for \$50,000 a broker might charge 3 points, whereas for a loan of \$300,000 the broker might charge ½ point. (A loan for less money does not mean less work for the broker; federal governmental regulations require substantial paperwork for all secondary mortgage market loans, no matter what the amount.)

The higher above par the interest rate for the loan is, the more the lending institution will pay the broker to generate the loan, so the less the buyer will pay in points. Whether the buyer will opt for the lower interest rate and pay points, or the higher rate and fewer or no points, depends on a calculation that includes the period of time the buyer actually expects to own the property (and thus pay on the mortgage loan), the dollar amount of the points, and the interest rate spread at issue.

m. Closing costs. A closing requires (1) a location large enough to accommodate at least the grantor, the grantee, and the closing attorney or paralegal; (2) the preparation of the numerous forms required by law; (3) the availability of a trust, or “escrow,” checking account whence received funds may be disbursed; (3) someone trained to conduct the closing. The fee for conducting the closing, called “closing costs,” may vary from a few to several hundred dollars, depending on the complexity of the closing and the local going rate for such services.

2. The costs of typical transactions.

In every conveyance “for value”—i.e., in which title is conveyed in return for compensation paid—a transfer tax must be paid. In Maine, the transfer tax is \$4.40 per \$1,000 of value. Therefore, if the sale price is \$100,000, the transfer tax is \$440.00. By law, the seller pays half and the buyer pays half.

In order to record a document, every registry charges \$16 for the first page and \$2 for each additional page. Therefore it costs \$18 to record a 2 page deed, \$26 to record a 6 page mortgage.

The typical broker's fee in Maine is 6% of the sale price. Thus for the sale of a \$100,000 home, a single broker earns \$6,000; if there are two brokers each would earn \$3,000.

If the bank demands title insurance, the buyer/mortgagor must pay for it. The bank will demand insurance on the value of the secured debt ("lender's insurance"). Such insurance costs the buyer \$1.75 per \$1,000 of value. Such a policy names only the bank as an insured. If the buyer obtains title insurance for his or her own indemnification ("owner's insurance"), such insurance indemnifies the buyer to the amount of the purchase price. The cost of owner's insurance is normally \$3 per \$1,000 of value, but this calculation can be complicated, and the actual cost of insurance increased or reduced, by several factors.²⁵ For purposes of this discussion, it is assumed that every buyer wants owner's insurance and will pay the basic rate of \$3 per \$1,000 and, further, that the cost of the owner's policy includes the cost of the attorney's title search (a prerequisite to title insurance).

²⁵ What affects to the cost of owners insurance are the facts that (1) the buyer gets a reduced rate if he or she buys an owner's policy along with a lender's policy, (2) the bank may insist on adding several endorsements onto the basic insurance policy (i.e., additions to coverage, for example to permit transferring indemnity to whoever may later purchase the mortgage on the secondary mortgage market), and (3) whether the bank insists on having a mortgage loan inspection (a simplified survey to confirm that all buildings lie within the borders of the parcel).

TABLE C-6A – Real Estate Transfer Costs in Maine

	<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>	
<i>Costs</i>	<i>Broker's Commission</i>	\$7,884	\$7,884	\$19,711	\$19,711	\$39,422	\$39,422	\$78,844	\$78,844
	<i>Purchase Price</i>	\$131,406	\$131,406	\$328,515	\$328,515	\$657,030	\$657,030	\$1,314,060	\$1,314,060
	<i>Title Examination Fee</i>	\$300	\$300	\$300	\$300	\$300	\$300	\$300	\$300
	<i>Buyer's Lawyer's Fee</i>	\$195		\$195		\$195		\$195	
	<i>Seller's Lawyer's Fee</i>	\$135	\$135	\$135	\$135	\$135	\$135	\$135	\$135
	<i>Bank Lawyer's Fee</i>		\$195		\$195		\$195		\$195
	<i>Appraisal Fee</i>		\$350		\$350		\$350		\$350
	<i>Inspection/Engineer Fee</i>		\$200		\$200		\$225		\$225
	<i>Real Estate Transfer Tax</i>	\$440	\$440	\$1,100	\$1,100	\$2,200	\$2,200	\$4,400	\$4,400
	<i>Owners Title Insurance</i>	\$300	\$400	\$825	\$925	\$1,650	\$1,750	\$3,300	\$3,400
	<i>Title Company Fee</i>	\$200	\$200	\$200	\$200	\$200	\$200	\$200	\$200
	<i>Recording/Registration Fee</i>	\$18	\$18	\$20	\$20	\$20	\$20	\$20	\$20
	<i>Mortgage Registration Fee</i>		\$58		\$58		\$58		\$58
<i>Total Transfer Costs</i>	\$9,472	\$10,180	\$22,486	\$23,194	\$44,122	\$44,855	\$87,394	\$88,127	
<i>Total Conveyancing Fees</i>	\$1,130	\$1,230	\$1,655	\$1,755	\$2,480	\$2,580	\$4,130	\$4,230	
<i>Convenancing Fees as percent of Total Costs</i>	11.93%	12.08%	7.36%	7.57%	5.62%	5.75%	4.73%	4.80%	
<i>Conveyancing Fees as percent of Purchase Price</i>	0.86%	0.94%	0.50%	0.53%	0.38%	0.39%	0.31%	0.32%	
<i>Broker's Commission as percent of Total Cost</i>	83.24%	77.45%	87.66%	84.98%	89.35%	87.89%	90.22%	89.47%	

Comparative Analysis of Land Conveyancing in 5 European Member States

Peter L. Murray

2007

National Report: United States – New York²⁶

Conveying real estate in the United States can be a complex and costly multi-transactional process. The relationships and economic activity that comprises the real estate industry in New York State is paradigmatic of the residential conveyancing transactions that take place throughout the United States, and may serve as a basis for assessing the comparative practical and financial efficacy of New York's approach to the same. Regionalization of practice occurs within New York, as it does in other states, because residential real estate is bought and sold in localized markets wherein unique regional and local customs flourish with guidance from professional organizations. As such, the process by which real estate is conveyed in New York is the subject of this report.

²⁶ The Reporter thanks Indira Odamtten, Esq., Clinton, New York for her contributions to the research for and preparation of this National Report.

The type of legal relationships which exist between market participants, and the fundamental governance mechanisms which regulate their interaction during real estate conveyancing transactions are the initial focus of this report. The focus will then become one of cost as the latter portion of this report attempts to capture and analyze the transaction costs and expenses incurred in the conveyancing process by focusing on two distinct markets; one being an upstate market that encompasses two medium-sized cities and their suburbs wherein the conveyancing of residential homes is a swift business, and the other being a downstate market, i.e., New York City (Manhattan), where the conveyancing of condominium and other similar dwelling units is prevalent. Furthermore, the discussion will in most instances deal with residential real property as opposed to commercial real property.

1. THE LEGAL BASES FOR, AND PRACTICAL EXECUTION OF, REAL ESTATE CONVEYANCING TRANSACTIONS

a. OVERVIEW OF REAL ESTATE CONVEYANCING TRANSACTIONS

In New York State, a real estate conveyance unfolds in a series of transactions much like a play unfolds in a series of acts. Before the final curtain can close on a play, the drama is scripted to unfold in a series of acts. The same is true of real estate transactions. Before a real estate conveyance can close, a number of transactions must take place. The drama of the real estate conveyance stems from the unavoidable complexities of a process which often creates a need for a broad range of expert

advice. What follows, is a brief introduction to New York State's residential real estate market and its participants, as well as an overview of the relevant practical and legal acts by which parties contract to buy and sell parcels of improved and unimproved real estate.

New York has an estimated population of 19,254,630 persons²⁷ living in its 62 counties, 62 cities, 553 villages, and 932 towns. All of which, cover a total area of 54,471.144 square miles.²⁸ According to United States Census Bureau data for New York, there were 7,819,359 housing units in 2004. In the year 2000 the homeownership rate was 53.0%, the percentage of housing units in multi-unit structures was 50.6%, and the median value of owner-occupied dwelling units was \$148,700.²⁹ Notably, moreover, there were 7,056,860 households in New York State with 2.61 persons per household in 2000, the per capita money income was \$23,389 in 1999, and the median household income was \$44,139 in 2003.³⁰

Against this statistical backdrop, market participants (consumers with the assistance and intermediation of real estate professionals) purchase and sell real

²⁷ U.S. Census Bureau: State and County QuickFacts, available at <http://quickfacts.census.gov/qfd/states/36000.html> (December 17, 2006) (Data derived from Population Estimates, 2000 Census of Population and Housing, 1990 Census of Population and Housing, Small Area Income and Poverty Estimates, County Business Patterns, 1997 Economic Census, Minority- and Women-Owned Business, Building Permits, Consolidated Federal Funds Report, 1997 Census of Governments and last revised Thursday, 08-Jun-2006 09:33:49 EDT).Id.

²⁸ New York State Geography, available at http://www.iloveny.com/info_center/state_facts_geo.asp (December 17, 2006) (of the 54,471.144 square miles, 47,223.839 square miles are land and 7,247.305 square miles are inland water).

²⁹ U.S. Census Bureau: State and County QuickFacts, supra at footnote 1.

³⁰ Id.

estate. Every real estate conveyance requires a party willing and able to buy real estate, and a party willing and able to sell real estate. Not required, but usually utilized for their expertise are real estate brokers.³¹ Real estate brokers match prospective buyers with prospective sellers. The real estate broker acts in this matchmaking capacity under a brokerage agreement that requires that the broker act as an agent of the buyer or the seller, or in some cases on behalf of both parties.

Once the parties are matched, the team of real estate professionals involved in facilitating the transaction typically grows in number as financing and due diligence review become necessary. In addition to the likely real estate broker, the associated real estate agent and/or salesperson, a mortgage broker, lending institution, and the parties' respective real estate attorneys often lend their services to the remaining transactions. The parties then sign a contract of sale, the execution of which occurs without acknowledgment, and is accomplished with or without prior attorney approval. When the contract of sale is executed, a down payment is placed in escrow, financing issues, if any, are addressed by the real estate broker if they are also licensed mortgage brokers,³² a separate mortgage broker, or through the lending institution

³¹ Whenever used in this Report, the meaning of the term "real estate broker" shall include all other agents and salespersons the real estate broker is authorized by the buyer or seller to engage, e.g., "associated real estate brokers" and "real estate salespersons". The terms "real estate broker", "associated real estate broker", and "real estate salesperson" are more particularly described in footnotes 6, 7, and 8 *infra*.

³² If a broker is licensed as both a real estate broker and a mortgage broker, then that person can wear both hats during the conveyancing transaction and assist the buyer with financing issues. In practice, this integration of services works well, and most real estate brokerage houses in New York State have a subsidiary that brokers mortgages.

directly; and requests for due diligence work, i.e., title work, title insurance and home inspection are made in anticipation of closing.

All the documents generated by these activities, including but not limited to the deed, certificate of inspection, abstract, surveys, water, sewer and bankruptcy affidavits, powers of attorney, Uniform Commercial Code (“UCC”) financing documents, and mortgage documents, are forwarded to the escrow/settlement agent who is to oversee the closing ceremony.

The escrow/settlement agent then prepares the HUD-1 statement which shows all the costs that will be paid at closing on the real estate conveyance, obtains necessary bank approval thereof, and cuts checks for payment to involved real estate professionals and third parties as prescribed by the conveyancing documents.³³

At the closing ceremony the property transaction is consummated. Although closing practices are dictated by regional custom, as a general matter, all necessary parties are present or legally represented, identities are verified, transactional documents are finalized, financial calculations and adjustments are reviewed and necessary documents, money and information are exchanged.

The closing usually takes place at the office of the seller's attorney but occasionally at the office of the lenders' counsel. When all the requisite documents are reviewed to be sure that the conditions and promises of the contract of sale are fulfilled, signed by the parties, acknowledged before a licensed notary (usually the

³³ Checks may be cut, e.g., for the payment of the real estate broker, mortgage recording tax, or those prorated county and/or school taxes which may come due prior to the commencement of payment of such carrying costs from a designated escrow

settlement agent) as needed, various jurisdictionally dependant costs are payable and paid at closing. Costs typically paid by a purchaser include the balance due on the purchase, fees to record the deed and the mortgage, utility bills, escrow fees, attorneys fee for the bank attorney, taxes, special assessments, financing charges, inspection fees, origination fees, rent payable if possession is taken before closing and adjustments. The deed and keys to the property are then transferred to the buyer who has the right to immediately possess and occupy the house unless the contract of sale specifies that buyer occupation occur at a later date.

Thereafter, and per the terms of the contract of sale, the settlement agent, buyer, or the abstract company duly records the deed and relevant transfer of title documents by filing them in a designated public recording office and with appropriate governmental agencies. Recordation is done to perfect the transfer and essential to the protection of the purchaser and lender from the rights of third parties subsequently asserted over the real estate. In New York, the recordation of contracts, deeds, and mortgage documents generally occurs at the county level and differences with regard to recording procedures and requirements exist from county to county.

I.1.B. FUNDAMENTAL FEATURES OF REAL ESTATE LAW RELATING TO CONVEYANCING TRANSACTIONS

The primary industry controls on real estate conveyancing in New York are federal, state and local in origin. Whatever the origin, the primary objective of

account., and dispersed at the closing.

regulating conveyancing transactions is to protect the public from unlawful, incompetent and/or unscrupulous actions by market participants.

Real estate transactions are governed by a wide body of federal statutes, and state statutory and common law. Within this system of governance, the requirements established for the transfer of real property differ from one state to the next; and within states, from one region to the next.

On the local level, zoning ordinances regulate land use. These ordinances vary from municipality to municipality. Municipalities in New York State are authorized to establish a certain zone whereby only certain uses of property are allowed, and where the size and location of structures are regulated, as long as the zoning regulations are pursuant to a comprehensive plan.

I.1.C. PERFECTION OF REAL ESTATE CONVEYANCES

In New York, various procedures are used to finalize real estate transfers and perfect the conveyance against potential claims of third parties. Recordation of necessary real estate transfer documents is essential to perfection of title. In order to protect a purchaser or lender from the subsequent rights of third parties over the real estate, it is essential to record the relevant documents by filing in a public recording office. Generally the recordation of contracts (a rare occurrence), deeds and mortgages occurs at the county level with recording procedures and requirements differing from county to county.

2. A TYPICAL RESIDENTIAL REAL ESTATE CONVEYANCE

A. PURCHASE AND SALE OF A RESIDENCE

While the use of a team of real estate professionals is not required to buy or sell real estate in New York, these industry professionals play important roles in most real estate conveyancing transactions. What follows is a detailed portrayal of a typical real estate conveyancing transaction, including fairly discrete portrayals of the various roles played therein by real estate professionals. Specifically, the progress of a typical purchase and sale of a residential home is described in some detail. Immediately thereafter, the steps by which a condominium apartment or similar dwelling unit is typically purchased and sold is described in similar detail.

b. HOW PARTIES TO A TRANSACTION COME TOGETHER

In the context of the typical residential conveyance, the parties to the real estate transaction come together because a landowner who is intent on selling his encumbered or unencumbered land contacts a brokerage firm or real estate agency for assistance. While use of a broker is not a requirement of New York State law, such use is widely accepted as the most efficient way to bring a prospective seller and a prospective buyer to the negotiation table.

A prospective seller usually contacts a brokerage firm on referral from neighbors, friends, colleagues, and professional advisors who may include the seller's lawyer or financial advisor. At the brokerage firm or real estate agency a licensed real

estate broker,³⁴ associated agent,³⁵ and/or salesperson³⁶ are eager to assist the real

³⁴ Whenever used in this Report, the term “‘real estate broker’ means any person, firm, limited liability company or corporation, who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or negotiates or offers or attempts to negotiate, a loan secured or to be secured by a mortgage, other than a residential mortgage loan, as defined in §590 of the Banking Law, or other encumbrance upon or transfer of real estate, or is engaged in the business of a tenant relocater, or who, notwithstanding any other provision of law, performs any of the above stated functions with respect to the resale of condominium property originally sold pursuant to the provisions of the General Business Law governing real estate syndication offerings. In the sale of lots ... the term ‘real estate broker’ shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.” Art 12-A Real Property Law (“Real Estate License Law”), Section 440-a (1).

³⁵ Whenever used in this Report, the term “‘associated real estate broker’ means a licensed real estate broker who shall by choice elect to work under the name and supervision of another individual broker or another broker who is licensed under a partnership, trade name, limited liability company or corporation. Such individual shall retain his or her license as a real estate broker as provided for in this article; provided, however, that the practice of real estate sales and brokerage by such individual as an associate broker shall be governed exclusively by the provisions of this article as they pertain to real estate salespersons. Nothing contained herein shall preclude an individual who elects to be licensed as an associate broker from also retaining a separate real estate broker’s license under an individual, partnership, trade name, limited liability company or corporation. Art 12-A Real Property Law (“Real Estate License Law”), Section 440-a (2).

³⁶ Whenever used in this Report, the term “‘real estate salesperson’ means a person associated with a licensed real estate broker to list for sale, sell or offer for sale, at auction or otherwise, to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate, or to negotiate a loan on real estate other than a mortgage loan as defined in §590 of the Banking Law, or to lease or rent or offer to lease, rent or place for rent any real estate, or collects or offers or attempts to collect rent for the use of real estate for or in behalf of such real estate broker, or who, notwithstanding any other provision of law, performs any of the above stated functions with respect to the resale of a condominium property originally sold pursuant to the provisions of the General Business Law governing real estate syndication offerings.” Art 12-A Real

estate owner effectuate the prospective sale for a commission (typically 6% of the total sales price, falling squarely within a 5% to 7% range), fee (flat or fixed fees for discrete services are being marketed to, and desired by, prospective sellers with greater frequency), or other valuable consideration paid for by the seller.

In a general sense, a broker serves as an intermediary between a buyer and seller of real estate and works to facilitate the transfer of ownership from the seller to the buyer by coordinating the activities of the other professionals (e.g., the parties' respective real estate attorneys, mortgage broker, and the home inspector) who may be called upon to assist in the real estate transfer. Thus, real estate brokers help buyers and sellers negotiate real estate transactions from the outset of the conveyance.

At the initial meeting between the real estate broker and the prospective seller, the real estate broker should provide the prospective seller with information regarding the type of agency relationship that will be formed by the parties' agreement to enter into a brokerage agreement. Various types of brokerage agreements are allowed in New York,³⁷ and they are as follows:

- i. Non-exclusive: A non-exclusive agreement is also known as an open listing. Under this type of agreement the real estate owner may hire several brokers and any one broker is only entitled to commission when a buyer is procured;

Property Law ("Real Estate License Law"), Section 440-a (3).

³⁷ Net Listings are prohibited in New York. They are a type of brokerage agreement whereby the seller indicates a specific price for which the property is to be sold. The broker's commission is the difference between that price and the sales price received.

- Exclusive Agency: Under an exclusive agency agreement the prospective seller can only hire one broker. The seller can, however, sell the property without a broker, in which case the owner is not liable to pay the broker a commission or fee;
- Exclusive Right to Sell: Under an exclusive right to sell agreement, the broker has the exclusive right to sell the real estate. Where the real estate broker has an exclusive right to sell, the broker receives a commission if the transfer is made either by his efforts or those of the seller.
- Multiple Listings: multiple listings are an arrangement among a group of brokers whereby a participating broker can sell property that is exclusively listed with any of the other participating brokers. The “listing broker” obtains the listings and the “selling broker” sells the property. These two brokers split the commission and the listing service receives a small fee.

Pursuant to Section 443 of Article 12-A of New York State’s Real Property Law which governs the conduct of all real estate licensees who wish to act as agents of potential buyers and/or sellers of real property, the licensee is required to educate the prospective seller as to the rights and obligations which will be created under any of the above brokerage agreements.

The negotiation of rights and obligations under a brokerage agreement typically includes a discussion as to whether and to what extent the broker is authorized to engage subagents (through a multiple listing service or different real estate office), associated brokers, or work with other agents (i.e., the buyer’s or seller’s agent) on a cooperative basis. As a general rule, any sub or associated agents owe fiduciary duties to both the principle and the principle’s agent. Moreover, disclosure regarding the vicarious liability, or rather lack thereof, for the conduct of the sub or associated agent should be made. Neither the seller nor the buyer are vicariously liable for the conduct of such sub or associated agents.

If an understanding on these points is reached between the prospective seller and the real estate professional, the real estate broker or sales agent will usually enter into a brokerage agreement with the seller. Though there is no New York State requirement that a brokerage contract be a signed writing,³⁸ many brokers opt to memorialize their understanding in a writing signed by the parties.

Under a brokerage agreement, the broker duty is one of an agent to principal. The broker typically promises to assume the role of seller's agent and act only on behalf of the seller in consideration of the seller's promise to pay said broker a commission or fee(s) upon the happening of a predetermined event, e.g., production of a purchaser willing and able to buy, or the consummation of the real estate transfer.

Having been advised by the real estate broker or sales agent that they should consider seeking legal advice before signing a brokerage, a seller may choose to retain an attorney to ensure that the terms of the brokerage agreement are in the seller's best interest. In the vast majority of conveyances, however, a seller will wait until a prospective buyer has been identified and preliminary negotiations are soon to be underway before involving an attorney.

Pursuant to a brokerage agreement, a seller's agent is considered a fiduciary with common-law duties of reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and a duty to account. A seller's agent is further obligated to act in the best interests of the seller subject to any specific provisions set forth in the written agreement between the broker and the seller. Under a typical seller

³⁸ The Statute of Frauds only applies to direct transfers of realty, and not actions

representation or listing agreement a seller's agent essentially markets the seller's property to as many prospective buyers as possible, and procures a buyer who is willing and able to enter into a contract of sale upon the seller's terms and conditions. In so doing, a seller's agent usually performs four main functions: setting the listing price, finding potential buyers, prepping and showing the listed real estate to interested buyers, and advising the seller once an offer to purchase has been received on negotiating counteroffers and reaching a mutually agreeable outcome.

In a second somewhat atypical beginning to the real estate conveyance, a buyer who wishes to purchase the real estate of another that is offered directly by the seller in what is called a "for-sale-by-owner" or "FSBO", consults with a real estate agent. After the prospective buyer and the agent converse about the rights and obligations which will attach to a brokerage relationship, the real estate broker or sales agent will usually sign a buyer representation agreement with the buyer. Under such agreements the broker promises to act only on behalf of the buyer, thereby becoming the buyer's agent. Contrary to the vast majority of conveyances, there is a brokerage cost to the buyer in this situation, and the buyer, now the broker's principle, promises to pay the broker a commission or service fee(s). Like a seller's agent, a buyer's agent is considered a fiduciary with common-law duties of reasonable care, undivided loyalty, confidentiality, full disclosure, obedience and a duty to account. A buyer's agent is further obligated to act in the best interests of the seller subject to any specific provisions set forth in the agreement between him and the buyer. Unsurprisingly, a

to enforce brokerage contracts.

buyer's agent is charged with locating real estate that satisfies the buyer's needs and budget, and opening contract of sale negotiations with the seller of the coveted property. A buyer's agent may also assist a buyer by referring the buyer to one or more professionals to settle contingencies. For example, a real estate broker or sales agent might refer a prospective buyer to a particular financial lender, mortgage broker, house inspector, or attorney.

In the third, and least typical, variation on the opening scene of the conveyance, a real estate broker acts as a dual agent in real estate conveyancing transactions. Acting directly or through an associated licensee, the real estate broker represents the seller *and* the buyer in a real estate conveyance but only after full disclosure has been made and the consent of the parties has been obtained in a signed writing. Notably, a dual agent cannot provide all of the fiduciary duties listed above and sellers and buyers who elect dual representation should understand that they are giving up their right to undivided loyalty.

C. HOW A CONTRACT OF SALE IS FORMED

Leaving to one side discussion of the types of brokerage relationships which may begin subsequent real estate conveyancing transactions, once an interested buyer and seller are matched a price must be agreed upon. Negotiations between the parties, vis-à-vis their agents who act as intermediaries, begin.

In most cases, the seller will have stated an asking or listing price for his real estate in agency listings online and in traditional newsletters, and through multiple listings services. The buyer need not accept the listing price that is commonly viewed as an invitation to negotiate. More often than not, the buyer will offer a price lower than that advertised by the seller and seek the inclusion of contractual terms other than those requested by the seller. Upon receipt of the offer, the seller may accept, hold firm to the original price listed, or extend a counter offer to the buyer. Through a series of offers and counteroffers, agreement between the parties is reached as to the price of the real estate, the amount of down payment required, the length of time available to the buyer in which to obtain the requisite financing (if needed), contingencies related to the condition of the real estate, and personalty inclusions and exclusions.

Once the parties are mutually agreed, the prospective buyer will be asked to sign a document that may be called a binder, receipt, purchase offer or agreement. Such document is often accompanied by “earnest money” or a down payment in certified funds which is deposited in a third-party (or “settlement or escrow agent”) controlled escrow (or “settlement service”) account until closing (“settlement”).

At this point in the process, localization of the real estate practice by regional custom becomes evident. Differences in custom and practice exist between New York’s “upstate” (North of Dutchess and Orange Counties) and “downstate” (South of Dutchess and Orange Counties) regions. Upstate, a buyer’s agent often prepares the offer and the seller’s agent presents parties with a standard printed form contract prepared by the Real Property Law Section of the New York State Bar association in

conjunction with regional bar associations. The standard form contract which make no representations as to whether it meets the plain is intended to deal with matters common to most transactions, rather than any one particular transaction, are often presented to the parties by the seller's agent for their signature within hours of reaching an informal agreement subject to timely approval by the parties' respective attorneys. Downstate, however, it is customary for buyer's agent to prepare the offer while leaving preparation of the contract of sale to the seller's attorney.

When the parties involve their respective attorneys prior to memorializing their agreement, the seller's attorney generally prepares and negotiates the initial contract after obtaining and reviewing a number of essential documents including: the deed, survey, title insurance policy, promissory notes or mortgages on the property, certificates of occupancy, tax bills, fuel and utility bills, leases, permits for elevator, pools, etc. The purchaser's attorney thereafter reviews and negotiates the contract as drafted by the seller's attorney to insure that the seller is obligated to convey good and marketable title. In so doing, the purchaser's attorney typically reviews the contract, deed, title search and title insurance policy, zoning ordinances and restrictions, as well as the documents referred to in the title policy, such as survey, certificate of occupancy to check for compliance with building codes and regulations, and bills related to real property tax, heating, cooling and electric.

In any event, the written contract should identify the buyer and seller, their attorneys, the subject real estate, the party (i.e., the escrow/settlement agent) who will be holding the certified contract deposit (usually the seller's attorney), the names of the

broker or brokers, the current real estate taxes, and contain all of the other terms and conditions of the transaction such that the parties' respective rights and obligations are particularly described. The typical enforceable contract of sale will also contain contingency provisions and party representations as to what will occur in the event their "best laid plans" go awry, e.g., the buyer is unable to obtain the necessary financing within the certain period of time or the seller is unable to deliver good title. Furthermore, the contract generally provides for the apportionment of outstanding expenses at closing.

The respective rights and obligations of the parties with respect to the subject real estate are fixed once the parties sign the contract of sale. Thereafter, performance of the contract terms must begin and most of the subsequent preparation, alteration and approval of formal conveyancing documents are left to party attorneys because the seller's agent risks violating the provisions of the judiciary law which limit the practice of law to attorneys admitted to practice in New York.

d. REQUIRED APPROVALS FROM THIRD PARTIES AS CONDITIONS TO THE CONTRACT

In addition to its basic terms, contracts of sale may also include in their provisions various contingencies. Many of these provisions are contingent upon the approval of third parties. For instance, the typical contract of sale will state whether or not the purchase is contingent on the purchaser obtaining financing in an amount and upon the terms needed to effectuate the transfer. This provision is known as the "Financing Contingency".

Contracts of sale in New York are not generally made contingent upon satisfactory home inspections. Most contracts of sale state that the real estate is being sold in an “as is” condition. When real estate is sold “as is”, the seller will not be responsible for any repairs to the home requested by the purchaser after the contract of sale is executed. Ergo, the prudent purchaser should obtain a professional home inspection prior to signing a contract of sale, and negotiate repairs with the seller or obtain a reduction in the purchase price sufficient to offset repair work by the purchaser.

e. APPRAISALS, BUILDING INSPECTIONS, AND ENVIRONMENTAL INSPECTIONS

Obtaining appraisals, building inspections, and environmental inspections are important steps in the conveyance of real estate. Buyers and/or lenders typically insist that an appraisal be conducted. Buyers seek to have real estate they are interested in purchasing appraised to determine value before submitting an offer and also for financing purposes. Lenders typically request appraisals as a precondition to approving a mortgage.

Although a recently enacted law requires sellers of real property to deliver a Property Condition Disclosure Statement to the buyer, or allow a \$500 credit at closing, the reasonably prudent buyer will usually arrange for an inspection of the premises by an engineer, architect, contractor or licensed home inspector prior to the signing of the contract. A written report of inspection follows investigation into the systems and components existing on the premises within five business days after the inspection. If the buyer does not engage a professional to inspect the premises, the contract of sale

will often set forth the consequences if defects are found with the premises. Under New York law, the buyer of a newly constructed house has a duty to inspect the condition of the house and land, and to ask questions about any conditions observed. Likewise, the duty to inquire about taxes, school districts, and zoning falls to the buyer. Where the house is newly constructed, however, the buyer is protected by a statutory housing merchant implied warranty under General Business Law Section 777-a.

Environmental inspections play a key role in real estate transfers, especially in transfers of commercial real estate. If hazardous substances are found on property which is owned, being sold, or otherwise liable the owner of the real property can be held liable under federal and state law. Where a question exists as to the environmental condition of real estate being sold, counsel for a purchaser and/or lender review documentation and public records to determine if there are hazardous substances on the property. In such situations, buyer's counsel will typically incorporate environmental provisions into the contract of sale requiring, e.g., that the seller: test the property, provide reports from experts and the government, provide escrows for clean-up of hazardous substances and to reduce the sales price in the event hazardous substances are located on the property.

f. TITLE EXAMINATION OR TITLE INSURANCE AS A CONDITION TO THE CONTRACT
A purchaser of real estate has the right to receive marketable title to real property unless he or she agrees otherwise. After the contract of sale has been signed, the buyer usually demands assurance that the seller can convey title to the real

estate as agreed. In Upstate New York, the buyer's attorney will usually make his or her own examination of the title records and issue a certificate of findings or, alternatively, a written title opinion based on an abstract of title. Downstate, a purchaser generally obtains a title examination and title insurance through a title or abstract company that provides the purchaser with a certificate of title. If the purchase is financed through a bank, the bank will almost certainly require title insurance in the form of a "lender's policy" or "mortgage policy" to cover the amount of the loan. The buyer will usually purchase an "owner's policy" or "fee policy", usually for the amount of the purchase price, to protect the buyer against any title loss, thereby ensuring the value of the property. Title insurance is desirable, if it is not required, because responsibility to pay any and all costs or reimbursements associated with a claim, e.g., one of fraud, by a third party made against title is borne by the insurance underwriter. The lender's policy of title insurance runs until the mortgage is paid in full.³⁹ An owner's policy of title insurance, on the other hand lasts indefinitely, i.e., for as long as the buyer or the buyer's heirs retain an interest in or obligation with regard to the real property.

Moreover, while there are no established title standards of general applicability in New York State, the New York State Land and Title Association, Inc. has set the

³⁹ When a homebuyer refinances a mortgage, the refinance lender will generally require that a new title search be conducted and a new policy of title insurance issued to cover the cost of the new loan amount. This is true even where the refinance lender financed the original purchase. In many cases, however the cost of the new policy will be less than the cost of the original if a borrower refinances within ten (10) years of the issuance of the original title insurance policy. Currently, the reissue rate in New York is fifty percent (50%) of the standard rate for the first \$475,000, and seventy percent

industry standard with its publication of “Recommended Practices” and the issuance of title insurance is regulated by the New York State Insurance Department pursuant to Insurance Law, Article 64, Sections 6401 et seq.

New York is divided into two zones for title insurance purposes. Zone 1 contains most of the Counties in the State while Zone 2 encompasses the Southeastern corner of New York State, including New York City and the city of Albany. More specifically, the State is divided as follows:

Zone Counties

- | | |
|---|--|
| 1 | Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Erie, Essex, Franklin, Fulton, Genesee, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Monroe, Montgomery, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Otsego, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Tioga, Tompkins, Warren, Washington, Wayne, Wyoming, and Yates |
| 2 | Albany, Bronx, Columbia, Dutchess, Greene, Kings, Nassau, New York, Orange, Putnam, Queens, Rensselaer, Richmond, Rockland, Suffolk, Sullivan, Ulster and Westchester |

The premium rates for Zone 1 rates do not include the cost of searching title while the rates charged in Zone 2 do. Consequently, a separate fee for searching may be

(70%) thereafter.

charged in Zone 1. In both zones, the cost of municipal department searches is not included in the premium rates charged. Owner's and mortgage policy rates for each zone are set forth as follows⁴⁰:

OWNER'S AND MORTGAGE POLICY RATES

ZONE 1

Amount of Insurance	Owner's Policy	Loan Policy
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First \$35,000 or less	\$356	\$299
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MINIMUM PREMIUM

(EXCEPT SIMULTANEOUSLY ISSUED POLICIES)

Each additional \$1,000(or fraction thereof)

From	To			
35,001	50,000	7.92		6.61
50,001	100,000	4.94		4.10
100,001	500,000	3.98		3.31
500,001	1,000,000	3.56		2.96
1,000,001	5,000,000	3.25		2.71
5,000,001	10,000,000	2.96		2.47
10,000,001	15,000,000	2.76		2.31
15,000,001	and up	2.48		2.07

⁴⁰ See www.tirsa.org/p2s01.htm for the owner and mortgage policy rates as set forth above. Title Insurance Rate Service Association, Inc. publishes a manual for title insurance rates in New York which serves as the industry standard.

ZONE 2

Amount of Insurance	Owner's Policy	Loan Policy
First \$35,000 or less	\$402	\$344

*MINIMUM PREMIUM
(EXCEPT SIMULTANEOUSLY ISSUED POLICIES)*

Each additional \$1,000(or fraction thereof)

From	To		
35,001	50,000	6.67	5.55
50,001	100,000	5.43	4.54
100,001	500,000	4.36	3.64
500,001	1,000,000	3.98	3.31
1,000,001	5,000,000	3.66	3.05
5,000,001	10,000,000	3.25	2.71
10,000,001	15,000,000	3.07	2.55
15,000,001	and up	2.76	2.31

With respect to searching title, what is considered a “complete search” differs according to the zone in which the real property is located. In Zone 1, a complete search is one taken back “forty years to the next warranty deed” and owner’s title insurance is traditionally not obtained, In Zone 2, the chain of title is searched back a period of forty (40) years while a longer search is may be conducted as to covenants, restrictions, and easements depending upon the location and the period in which the covenants, restrictions and easements were first recorded. In Zone 2 owner’s title insurance is traditionally obtained.

In most counties in New York, excepting those counties that have a Register (Bronx, Kings (Brooklyn), New York (Manhattan), and Queens), searches of the deeds,

mortgages, UCC-1s that comprise the title history of a parcel of real estate are conducted in the County Clerk's Office. In all New York counties, judgments, notices of pendency, mechanic's liens, and UCC-1s against personalty are filed in the County Clerk's office.

g. DISCHARGING EXISTING LIENS AND ENCUMBRANCES

After the contract of sale is signed, the buyer's or bank attorney will order a lien search from a title or abstract company to examine public records for any judgments or liens against the both the buyer and the seller. Lenders require that any outstanding judgments, liens, or loans be paid off at or prior to closing.

h. HOW THE PAYMENT OF THE PURCHASE PRICE IS HANDLED

Payment of the purchase price is usually accomplished by adding the down payment, usually in escrow, to the remaining amount owed on the purchase price at closing. If lender financing was used by the buyer in making the purchase of real estate, the bank usually wires the loan proceeds to the bank attorney who delivers such proceeds to the seller at closing. If no financing is used the buyer must give the seller a certified check for the outstanding amount on the purchase price.

i. RISK OF LOSS AND REMEDIES FOR BREACH OF THE CONTRACT OF SALE

As the purpose of a real estate contract is to provide written documentation of

the terms and conditions on which a buyer and a seller agree for the sale of a piece of property, failure of either party to live up to those terms and conditions can result in a lawsuit for breach of contract.

New York, has adopted the Uniform Vendor and Purchasers Risk Act, which puts the risk of loss on the seller until the purchaser takes title or possession of the real estate. This is contrary to the common law rule with regard to risk of loss whereby the doctrine of equitable conversion places the risk of loss on the purchaser if the real estate is destroyed by no fault of either party between the time the contract is signed and the time of transfer of the deed.

Furthermore, while there is no requirement under New York State law that a real estate contract be recorded, if an executory contract of sale (one yet to be performed) is recorded, the purchaser may enforce his right to performance against a purchaser who after the recording, purchases or acquires by exchange, the subject realty or any part thereof from the seller's devisees or distributees.

In most contracts, however, certain provisions, known as contingencies, allow either party, or both, to cancel the contract under certain circumstances. While some contingencies involve inspections to find defects in the property, others, including the mortgage-commitment and home-sale contingencies, go to the heart of the buyer's ability to go through with the purchase.

A seller can legitimately default on a purchase contract if inspection issues or home repairs cannot be satisfied. A seller can legally reject the sale of a home on the grounds of irreconcilable contingencies. If, however, there are no default remedies or

dispute resolution clauses in the contract of sale that obligate the seller to fix such problem(s), then the seller is in breach of contract. A seller can also legally claim contract damages; prompting the seller to cancel the existing offer and demand a higher price. Contract damages are typically sought where the accepted purchase price of the home turns out to be significantly less than the sale price of another home in the immediate area that has appraised at equal or lesser value.

Likewise, where a contract of sale includes a clause that states the sale of a home is contingent upon the seller's purchase of a new home and the purchase of the new home falls through, the seller can legally stop the sale of the present home. On rare occasion, a seller may cancel the sale for emotional reasons; e.g., the home is a family estate of priceless emotional value to the seller who feels that they cannot convey the property to another. As emotional contingencies are rarely allowed for in purchase contracts, the buyer would doubtless seek to enforce his or her rights to the property, recompense, or other costs.

Further, where the default of a sale occurs because there is more than one property owner, or the property being sold is an estate in which all heirs must agree to the terms of the sale, and any owner(s) does not agree to the sale of the home, or to the terms involved, the sale is defunct. The seller who originated the sale has the right to withdraw from the purchase contract, and will not be subjected to legal consequence.

If a seller has illegitimately backed out of a home sale, the first thing the buyer's attorney does is review the contract of sale for unsatisfied contingency clauses, default remedies, or dispute resolutions since it is that document which sets forth the parties' rights and obligations. If the purchase contract does not include these, or the conditions stated in the contract do not cover the reason for the default, a lawsuit may be filed for monetary and punitive damages based upon seller fraud and deceit. The buyer may also be able to sue the seller for "specific performance," which designates the real estate property as being unique and specific, and can force the seller to complete the sale under court petition.

j. TIME FROM COMPLETION OF THE CONTRACT OF SALE TO CLOSING

The time it takes from execution of the contract of sale until closing on the transfer of residential real estate can range anywhere between sixty (60) days and one hundred and ninety (190) days.

k. THE PREREQUISITES TO AN ACTUAL TRANSFER OF OWNERSHIP

The actual transfer of title to real property occurs by a deed at a closing where it is executed, acknowledged and delivered. A deed must be in writing to comply with the Statute of Frauds, and it must identify the parties and the land involved and it must be acknowledged before a notary and delivered. The types of deeds most commonly used in New York are:

- Bargain and Sale Deed With Covenant Against Grantor's Acts ;
- Bargain and Sale Deed Without Covenant Against Grantor's Acts;
- Quitclaim Deed;
- Warranty Deed With Full Covenants;
- Executor's Deed; and
- Administrator's Deed

The form of deed by which transfers are customarily made vary according to the type of real estate being transferred and from zone to zone. In Zone 1, the Warranty Deed With Full Covenants is traditionally used in the transfer of residential and commercial properties; likely offsetting the fact that owner's title insurance is not typically obtained. In Zone 2, the Bargain and Sale Deed With Covenant Against Grantors Acts is typically used in the transfer of residential and commercial properties.

I. THE ROLE OF REGISTRATION/RECORDATION

New York is a "race-notice" jurisdiction. This means that every prior conveyance not recorded is void as against any such person who subsequently purchases in good faith without notice ("subsequent bona fide purchasers") and whose conveyance contract or assignment is fully recorded.

New York's recording statute (Real Property Law Section 291) provides that the deed to real property and mortgage must be acknowledged and include a certificate of authentication (Real Property Law Sec. 333), if necessary, before it is recorded. There are differences from jurisdiction to jurisdiction, i.e., from county to county, as to the formalities required for recordation.

m. HOW TRANSFER RELATED TAXES ARE ASSESSED, COLLECTED AND PAID

"Closing apportionments" are typically included within the terms of the contract of sale, and refer to those prorated adjustments to income, expenses or charges, usually to the date of closing, e.g., school, county and city taxes. The expenses are generally apportioned so that the seller pays expenses that have accrued prior to, and are outstanding at closing, and the purchaser pays the expenses subsequent to the conveyance of the deed.

n. PURCHASE AND SALE OF A CONDOMINIUM UNIT AND SIMILAR DWELLING UNITS

A condominium apartment, a so-called "condo" is a building in which apartments are owned by individuals. Condominium apartments are defined as "real property" and the buyer obtains a deed upon purchasing the apartment. In keeping therewith there is a separate tax lot for each apartment, obligating the owner to pay real estate taxes on the apartment. The owner of a condo will also have to pay common charges on a monthly basis for the maintenance of the building. These common charges are separate and in addition to the real estate taxes. Nor do they include the building's

mortgage and interest given that a condominium cannot have an underlying mortgage by law.

Financing the purchase of a condo is very flexible. Indeed, a buyer can finance up to 90% of the purchase price. Moreover, while there is an application process it is not highly formal, and few buyers are rejected.

Assuming that a desirable property has been found on which an offer will be placed, and the prospective buyer has spoken to a bank or mortgage broker (if financing) to determine a suitable price, the following there are eight to nine additional steps to purchasing a condominium unit or similar dwelling unit, e.g., a cooperative apartment.

- i. Offer: Offers are made orally downstate, e.g., in New York City while they are made in writing in upstate New York. A bid or offer will be placed through the buyer's agent who will convey your offer to either the seller's agent or to the seller directly.
- ii. Counter-offer and Negotiations: The seller may "counter" the buyer's offer. This will begin a negotiation process that will eventually lead to a "meeting of the minds," at which point price, terms, and closing date have been agreed upon.
- iii. Real Estate Attorney: At this point, the buyer typically contacts a real

estate attorney familiar with the real estate in your area to represent him or her. The seller's attorney will begin preparation of a contract of sale, and during that time the buyer's attorney will begin to examine the financial condition of the building in which the buyer wishes to purchase.

- iv. After the buyer's attorney concludes that the financial condition, by-laws and board minutes of the building are satisfactory and that the contract of sale is also acceptable, the buyer's attorney will advise/allow the buyer to sign the contract. At this stage the buyer will usually be required to present a deposit of 10% of the purchase price. The contract will then be forwarded with the deposit to the seller for his signature. The deposit will be held in the seller's attorney's escrow account until closing. It is important to note that until all parties have signed the contract, and it has been delivered, the seller can still entertain and accept other offers.
- v. If financing, the buyer should move forward with his or her loan application.
- vi. By this time, the buyer will have received the board requirements and application materials from the buyer's real estate agent. The buyer will then work to complete all of the required materials which

typically include: an application, a financial statement, all requisite support for the buyer's financial statement, two years of tax returns, bank statements, letters of personal and financial reference, letters of professional reference, the contract of sale, bank documents (if financing) indicating that the buyer's loan is in place, etc.

- vii. Once the buyer's application materials are complete, the buyer's real estate broker review the application. Then, assuming it is accurate, it will be forwarded to the managing agent for review. Upon determination that it is in order and that credit checks were acceptable, the complete application will be forwarded to the Board of Directors. The approval process can take approximately 3 to 8 weeks after submission of the application materials.
- viii. In the case of a condominium, there is generally no formal interview. The buyer's application will be reviewed, and if all required materials are included and in order, an approval is typically granted.
- ix. After approval by the Board, a closing may be scheduled.

Assuming a loan can be secured in a timely fashion, one can move from contract to closing on a condominium in about 60 days. However, the cooperative process is more involved, and 60 to 90 plus days is not unusual.

3. SAMPLE TRANSACTIONS WITH ESTIMATED COSTS

Transaction costs vary in relation to the type of property purchased and, in situations wherein a mortgage is used to finance the purchase, the type of loan selected by the purchaser. That being said, the estimated costs incurred in the purchase of residential homes and condominium units are generally greater than those costs incurred in the purchase of a cooperative. What follows is a breakdown of the various costs to be expected and analysis of the estimated costs associated with numerous sample transactions.

i. Generally Included Transfer Costs

What follows are descriptions of the transfer costs generally included in a conveyance, and identification of the party from whom payment is expected.

a. BROKER COSTS

It is a general rule that the broker becomes entitled to a commission or fee when the services they are hired to perform are completed. Such fees range from 5% to 7% with a commission of 6% being the standard. Some brokers offer fixed price fees, payable at closing upon transfer of title. For example, one broker in Oneida County, New York, offers a fixed brokerage fee of \$2,499.00 if the real estate is sold through the efforts of that broker, if the broker fails to sell the real estate, the seller's agent receives a 3% commission. Whatever the compensation scheme, this cost is usually paid by the seller as a buyers typically contracts for the cost his or her buyer's broker to be paid by the seller.

b. CONTRACT OF SALE PREPARATION COSTS

When a real estate broker prepares a standard printed form contract of sale and presents it to a buyer and a seller for their signature, the broker is prohibited from charging fees for such service by law. In the event an attorney prepares or counsels a client regarding the contract of sale as is customary in the Downstate area, a fee of \$75 to \$125 is typically charged for such service.

c. OTHER COUNSEL AND NEGOTIATION OF THE CONTRACT OF SALE COSTS

Costs for attorney counsel and negotiation of a contract of sale, other than broker's fees, is usually included in the aforementioned \$75.00 to \$125.00 fee.

d. COSTS FOR THE FORMAL DOCUMENTATION OF THE SALES CONTRACT

There are no costs for the formal documentation of the contract of sale applicable in New York State.

e. COSTS RELATED TO THE PERFORMANCE OF THE SALES CONTRACT

As a general matter any costs involved in the performance of the contract of sale such as obtaining required official approvals, is included in the parties' respective attorneys' fees with the exception of costs associated with obtaining lender financing of the conveyance, and title review and insurance; expenses which are described below.

f. RECORDATION COSTS

Across the State of New York, it costs approximately \$33 to record the first page of a deed and mortgage and \$3 per additional page. Recordation of the equalization form costs \$75 for improved real estate, and \$165 for unimproved real estate.

Recording the TP-584 form generally costs \$5.

ii. COSTS RELATED TO THE DISCHARGE OF PRE-EXISTING LIENS

A lien search typically costs anywhere between \$250.00 and \$300. Recording a discharge costs approximately \$33.50 for the first page and \$3 for each additional page. If such documents are not prepared by the lender, the cost of preparation can be anywhere between \$75 and \$150.

iii. FINANCING COSTS

Most house buyers in New York State finance 80% or more of their purchase price with a mortgage loan from a lending institution. One-time bank closing costs for a purchaser to obtain a mortgage, including appraisal, application, loan processing, and other related costs vary by financial lender. However, when a financial lender is used in effectuating a purchase of real estate, that lender is obligated to furnish the buyer/borrower with a "Good Faith Estimate" of closing costs, including financing costs, within three days of receipt of the purchaser's mortgage application. Such costs usually include the following estimated costs:

- i. Mortgage application and processing: application and processing fees are paid to the mortgage broker or lender to cover the cost of the

application fee, credit report, and loan processing. Such services can cost between \$500 and \$1,000.

- ii. Appraisal: When a mortgage application or loan processing fee does not include the cost of a home appraisal, the fee for such is usually collected at closing. An appraisal for an average one-family residential home can cost between \$250 and \$350, for an average two-family residential home the cost may be in the ballpark of \$450, for an above-average home, the cost of a appraisal can be anywhere between \$450 to \$1,500.
- iii. Discount points: Prior to closing, discount fees may also be paid by the borrower to the lender in order to lower the interest rate on the mortgage. One point is equal to 1% of the loan.
- iv. Document preparation fee: Lenders charge borrowers for the cost, usually between \$150.00 and \$300, of preparing the loan documents necessary for closing.
- v. Mortgage tax: 0.75% of borrowed amount paid by borrower, and 0.25% paid by lender.
- vi. Tax service fee: During the term of a mortgage loan, the borrower is required to pay real estate taxes. Regardless of whether such taxes are paid directly by the lender or through an escrow account with the lender, the lender pays an independent service to monitor whether the real estate tax payments are being made. The cost of this independent monitoring service is usually between \$75 and \$80.

- vii. Flood certification: The cost of having a lender determine whether or not the subject real estate is located in a federally designated flood zone is between \$15 and \$25. This fee is usually charged by an independent service.
- viii. Wire transfer fee: A lender will wire the loan proceeds to its attorney who will bring the loan proceeds to the closing in the form of checks. The cost to wire money is between \$15 and \$30.
- ix. Underwriting or administrative fee: Lenders charge borrowers for the administrative costs of processing and approving the loan. This cost ranges from \$300 to \$500.
- x. Prepaid interest: At closing the borrower may be required to prepay the interest assessed for the first month of the loan. It is not an additional expense but one which covers the interest on the loan accruing from the closing date until the last day of the month in which the closing occurs.
- xi. Lender's legal fees: The cost of having the mortgage lender review title and the lien search as well as attend closing, where necessary, is usually between \$500 and \$750.

In addition to the above one-time bank costs, the lender requires that the borrower make provision for homeowner's insurance and private mortgage insurance as follows.

- xii. Homeowner's Insurance: Lenders require that the subject home be insured against possible property damage. Normally, the borrower pays the first year's insurance premium prior closing and an estimated monthly amount thereafter into a lender established escrow account.
- xiii. Private Mortgage Insurance: If less than 20% of the purchase price is put down on the real estate purchase, many lenders protect their interest in the event of default by charging the borrower for the cost of private mortgage insurance ("PMI"). This cost is payable on a monthly basis.

- xiv. TITLE COSTS

If the purchaser's attorney performs the title examination as is customary in Upstate New York, the costs of title examination are usually included in the fee earned by that attorney. Attorney fees for the seller may range from a few hundred dollars to \$1,200 depending upon the complexity of and amount of expertise required by the conveyancing transactions. For a buyer, the attorney costs are generally higher, typically costing anywhere between \$1,000 and \$3,000.

Title insurance costs are calculated according to schedules of insurance rates promulgated by New York State and dependent upon zone. As discussed above, New York State is divided into two zones (Zone 1 and Zone 2) for title insurance rate purposes. Thus the amount of title costs depends upon the zone in which the real estate is located and the amount of liability attached to the transaction. Moreover, the

cost of an owner's policy is distinguished from that of the mortgagor's policy per the schedules of insurance rates.

The total cost of a title insurance policy varies depending on several factors including, the amount insured and the searches requested.

i. TRANSFER TAXES

New York State's Transfer Tax is \$2.00 per \$500 of the purchase price or \$4 per \$1,000. New York State's mortgage tax for a one or two family dwelling is 1.05% less \$30.00 on the entire total. For commercial property, vacant land or three or more dwelling the mortgage tax is 1.05% of entire total. Where the lender is natural person, and not an institution, the tax is 08% less \$30.00 on the entire total.

TABLE 6-B – Real Estate Transfer Costs in New York

	<i>Sale of Land for 100,000</i>	<i>Sale of Land for 100,000 with new mortgage for 75,000</i>	<i>Sale of House for 250,000</i>	<i>Sale of House for 250,000 with new mortgage for 150,000</i>	<i>Sale of House for 500,000</i>	<i>Sale of House for 500,000 with new mortgage for 400,000</i>	<i>Sale of House for 1,000,000</i>	<i>Sale of house for 1,000,000 with new mortgage for 750,000</i>	
<i>Costs</i>	<i>Broker's Commission</i>	\$7,884	\$7,884	\$19,711	\$19,711	\$39,422	\$39,422	\$78,844	\$78,844
	<i>Purchase Price</i>	\$131,406	\$131,406	\$328,515	\$328,515	\$657,030	\$657,030	\$1,314,060	\$1,314,060
	<i>Buyer's Lawyer's Fee</i>	\$450	\$450	\$450	\$450	\$450	\$450	\$450	\$450
	<i>Seller's Lawyer's Fee</i>	\$550	\$550	\$550	\$550	\$550	\$550	\$550	\$550
	<i>Bank Lawyer's Fee</i>		\$400		\$400		\$400		
	<i>Appraisal Fee</i>	\$250	\$250	\$300	\$300	\$300	\$300	\$350	\$350
	<i>Real Estate Transfer Tax</i>	\$400	\$400	\$1,000	\$1,000	\$2,000	\$2,000	\$4,000	\$4,000
	<i>Owners Title Insurance</i>	\$614	\$614	\$1,121	\$1,121	\$1,966	\$1,966	\$3,481	\$3,481
	<i>Mortgagee Title Insurance</i>		\$150		\$231		\$479		
	<i>Recording/Registration Fee</i>	\$36	\$36	\$36	\$36	\$36	\$36	\$36	\$36
<i>Mortgage Registration Fee</i>		\$84		\$84		\$84		\$84	
<i>Total Transfer Costs</i>	\$10,184	\$10,818	\$23,168	\$23,883	\$44,724	\$45,687	\$87,711	\$87,795	
<i>Total Conveyancing Fees</i>	\$1,614	\$2,164	\$2,121	\$2,752	\$2,966	\$3,845	\$4,481	\$4,481	
<i>Conveyancing Fees as percent of Total Costs</i>	15.85%	20.00%	9.15%	11.52%	6.63%	8.42%	5.11%	5.10%	
<i>Conveyancing Fees as percent of Purchase Price</i>	1.23%	1.65%	0.65%	0.84%	0.45%	0.59%	0.34%	0.34%	
<i>Broker's Commission as percent of Total Cost</i>	77.42%	72.88%	85.08%	82.53%	88.15%	86.29%	89.89%	89.80%	