Legal security on property market:

Need for regulatory instruments

by

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I. Legal security

1. Fundamental legal values

The fundamental legal values – as we understand them and as they concern us in this review – are: security in legal trade and reliability of the institutions involved in the respective procedures.

1.2. Need for certainty and legal security

Anyone who participates in legal transactions, with particular reference to real estate property, places the highest priority on having transactions for the acquisition and for the sale of properties conducted securely, correctly and as quickly as possible. And investments will be made in the property market only where there is real legal security.

1.3. Legal security; Roman notarial system

The Roman model for the notarial system is the ideal instrument to employ, and the one best suited to achieve legal security.

The institution of the impartial notary, who does not merely represent one party but also has to take account of the needs and interests of all those participating in the transaction, is the one best suited for the function of a facilitator for the optimum achievement of the widest range of interests in the capacity of a common denominator, such as to enable a contract, well-balanced for all parties, to be configured at affordable rates with the need to retain no more than one trained legal specialist, rather than – as is normally the case under the English legal system – several lawyers.

1.4. Legal security as an indispensable component for development of the property market and of a country's competitiveness

Without legal security there can be neither any well-functioning property market nor any sustained, reasonable economic development in a country, or, to put it another way:

Legal security is the only route to economic success. Specifically in the property market, large sums of money are invested. This cannot happen without the appropriate legal security. This legal security is best assured if an efficient system of notaries according to the Roman model can collaborate with a property register system which has been set up nationwide and which operates reliably. If there is no legal security on the property market, then the country cannot achieve reasonable economic development, either. A company can be wisely advised to invest in a country and to set up a branch or a works in that country only if it is possible to achieve secure acquisition of land and if the status of such an acquisition can be protected by a corresponding entry on public registers available for substantiation at all times.[1]

II. Notary

II. 1. His function as freelance guarantor for legal security

According to the definition in §1 of the German Federal notarial regulations, the notary conducts a public office impartially. According to §2 of those regulations, the profession of notary is not a trade. In the German tradition, one aspect of the notary's functions reflects that he is a person invested with certain administrative powers by the State, and to that extent a sovereign function is transferred to him, a function which he exercises independently but without necessarily entering the category of a freelancer.[2] In that context, clearly, he is subject to State control to the extent that he has to abide by various restrictions and constraints laid down by law. This is monitored at regular intervals by supervisory bodies, the judiciary authorities, such as to ensure that the notary is performing the tasks entrusted to him conscientiously and in a legally satisfactory manner.

II. 2. His support for the property market

There are various important functions by which the notary supports the property market:

1. By the configuration of land purchase contracts, he contributes to the correct, well-balanced recording of the intentions of the parties to the transaction.

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[1] Refer *Didier Nourissat, Coordinateur de la Commission Titrement au Conseil Supérieur du Notariat (= Coordinator of Titling Committee, Senior Notarial Council)* in apf.francophonie.org/spip.php?article1443

[2] Refer *Frenz*, in Eylmann/Vaasen, Federal notarial regulations § 2 Section 10 ff.

2. By the setting-up of the notarial record, he produces a document that carries particular evidentiary weight. It is assumed that the content of the notarial record is correct and that the declarations given by the parties – as established in the notarial record – are indeed as they were given by the parties.

3. The notary, in his pursuit of the above-mentioned activities, also provides the crucial function of a filter for the access of documentation to public records. Only documents that have been certified by a notary or documents where at least the party's signature has been certified by the notary can be integrated into the register.[3]

Furthermore, the notary holds a right which is established in law[4] and a corresponding power which is also established in law: to submit all applications on the parties' behalf in relation to the register and furthermore to make such applications himself. Although the parties can make applications in their own right, they can do this only on the basis of the above described type of notarial documents that have to be attached to the applications.

In practice, this filter function has considerable value because it relieves the workload on registration Courts and makes their work far quicker and more effective. The parties themselves would not usually be able to arrive at the correct wording for petitions and applications, so that the upshot would be needless quantities of papers, documents etc. unless a notary were retained to produce the correct arrangement of the necessary formalities, organising them and handing them in to the property register in a controlled and well-organised way.

II. 3. Function of notary as promoter of social trust; His contribution to legal development and sustained economic progress.

The notarial system according to the Roman model establishes a stable anchorage for legal security in the legal system by providing the public with the certainty that their affairs can be entrusted with the notary with confidence. Naturally, this can work only if the notarial profession appropriately fulfils the high demands placed on it and if it reliably assures the fulfilment of those demands, for example by means of provisions including supervision at work, refresher training for the notaries etc., which is the way to ensure that the standard of quality achieved in the notarial system is always guaranteed. In this context, however, the notarial profession is not merely static, not merely providing a "braking" function, as supporters of the English legal system would be keen to argue. On the contrary: the notary is a driver for legal development, in fact he will be one of the first players to perceive any needs for further development in the law, be it in the form of corresponding rounds of legislation or in terms of Court verdicts.

[3] Refer, for example, § 29 Land register regulations or § 12 German commercial code.
[4] Refer, for example, §15 Land register regulations.

Often, too, the notarial system will inherently be able to promote legal developments by setting certain standards for specific types of transactions.

In this way, for example, we could point to the initiative promoted by notaries to improve building development contracts in Germany in the 1970s, giving them a more secure configuration in the interests – as they successfully argued – of adhering to more accurate standards in building development contracts.[5] This is a prime example of how notarial firms are required to establish such standards in the light of corresponding directives.

Only once this had been achieved did the legislator respond and issue corresponding legal standards in the form of brokerage and building development regulations.[6]

Since then, these regulations have – often at notarial firms' requests – been amended and supplemented, together with further extension for consumer protection.[7] For this to happen, the notarial system in a given country has to have access, including access via the centres of representation of its own interests, to political decisions and to the people who make those decisions. Conversely, however, it is also necessary that political decision-makers should include the notarial profession in the decisions that relate to the areas of law in which the notary operates. In Germany, for example, this is achieved by consulting the Federal chamber of notaries in all legislation projects relating to areas of law to which notarial activity relates, as early as the stage of the procedures of legislation, such as to enable the notarial profession to make its own proposals and suggestions (or the rejection of projects/suggestions for their improvement) in good time. Accordingly, no-one could over-emphasise the priority of sound, trust-based collaboration between the political system and the notarial profession.

And a notarial profession that operates to a high level of quality is highly esteemed – by the corresponding country's legislator – as a contact centre and expert of equal standing when it comes to legislation procedures, and its support will be appreciatively taken up.

Thanks to the contribution that the notarial profession makes to the development of law, and thanks to the high position of trust in which public opinion holds its activities, the notarial profession can make a substantial contribution to its country's economic development. And a country can develop in economic terms only if legally stable conditions prevail. However, this in turn is dependent on the legislator in a given country entrusting certain functions to the notarial profession. The notarial profession operates these functions in such a way as to counteract the extreme trends and bubbles that are prone to affect the economy.

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[5] Refer *Kanzleiter* in 50 Years of Federal Chamber of Notaries in Germany, 1961 to 2011, Special Edition of German Notarial Periodical, p. 89 ff.
[6] Refer Brokerage and building development regulations of 20-06-1974, German Law Gazette 1974 I 1314.
[7] Refer, for example, *Basty*, Building development contracts, 7th edition, 2012, Section 81.

I would go so far as to say: if the United States of America had operated a notarial system according to the Roman model, then it would have been possible to avoid the rise and the collapse of the property/credit bubble in 2007 with all of the devastating consequences that this entailed for the global economy. Then it would not have been possible for the credit agreements, allegedly negotiated by word of mouth, and for the American form of "accessory mortgages" that apparently arose, to have been bundled into credit packages on the basis of buildings that had not been more closely examined, and they could not have been sold on worldwide as securities.

At least, such securities would then have been based on claims that were actually secured and on credit relationships that were factual.[8]

II. 4. Influence of globalisation and new world economy

Since the "Iron Curtain" came down in 1989, the world economy has continued to achieve dynamic international development on an unprecedented scale, with the increasing engagement of flows of economic and commercial activity around the globe. This in turn has led to an increase in international contracts or in foreign market players' investments in respective countries.

The process of globalisation has recurrently revealed the co-existence of two legal systems on the European continent: the Roman/German model on the one hand and the English model on the other hand; in practice the convergence of these two systems frequently generates considerable problems. What better example could we select than the case of powers of attorney originating from a given legal territory – specifically powers of attorney from the English legal territory that have to be handled in the territory where the Roman notarial system prevails.

The European civil law system, and hence also the Latin American system, will quite rightly set specific requirements to protect the parties involved – requirements that relate both to the content of a power of attorney and to the fulfilment of various regulations upon form that do not exist merely for regulation's sake but rather to make certain of a guarantee that powers of attorney have genuinely been issued in the form appearing and by the person mentioned therein.[9] Of course, there is no better way to achieve this than by the use of a notarial record. But because this does not even exist in the English legal system – or not at least in the form in which it presents itself in the Roman notarial system – it is hard to come up with suitable rules for the recognition of powers of attorney from the English legal territory.

It is very surprising that this standard of legal security, on the other hand, is specifically described by English legal circles as a type of "blockading attitude" on the part of the Roman-model notarial system that could best be dealt with by abolishing it!

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[8] Refer *Shiller*, The Subprime Solution, p. 133 ff.
[9] Refer, for example, to the situation in the EU, *Kohler* and *Buschbaum*, IPRax 2010,313.

What they argue for is a simple solution to the problem, a problem which they brought into being in the first place. The solution for which they argue would lead only to a situation where the costs of legal consultancy and searches in the system operated in Europe would escalate to a scale similar to that in the United States, where by now it comes to 2.5% of the gross national product.

It may be that some major firms in the English-speaking countries would see this as a welcome development, but personally I believe that neither the economic nor the legal development of the affected countries would be aided, nor would such a development produce any positive outcome for the public; rather, it would make them considerably – and unacceptably – worse off.

II. 5. Notary exercises monitoring of legal compliance and establishes legal security.

A notary under the Roman-type system has more than one formal function to exercise in working towards the above described goals: whilst he applies official seals to documents and confirms the authenticity of signatures, he is (also) primarily responsible for content to the extent that he himself produces the text of the legal transaction or – where the transaction has been drafted and presented to him – he himself examines it for legal viability.

In this connection, he operates as a centre for what we could refer to as precautionary legal service, such that an impartial investigation of the legality of the transaction is exercised before the transaction is completed; by this means there is a marked reduction in the likelihood that the transaction will, downstream, become the subject of a dispute that has to be dragged out in the Courts. By virtue of this activity, firstly the notary relieves the Courts of workload and secondly he achieves legal security for the parties in the contract.

II. 6. Notary as promoter of new legal institutions.

In addition to the above-mentioned development in material law, the notary can and should also work towards reviewing the legal institutions in place, promoting the foundation of new ones where appropriate.

For example, in Germany a few years ago, the "Schiedsgerichtshof Deutscher Notare – SGH" (German Notaries Court of Arbitration) was founded, offering its services as a Court of arbitration to be designated by parties in the fabric of agreements, and providing notaries to man the arbitration panel according to a specific random code.[10] And in the past the notarial profession has been responsible for ensuring that special chambers attached to Courts – comprising the notarial right of appeal and also tort law as it affects notaries – have been set up such that these cases are adjudicated by specialists who are accustomed to dealing with such issues by virtue of frequent practice.[11]

[10] www.dnotv.de/Schiedsgerichtshof
[11] Refer §101 Federal notarial regulations.

II. 7. Notarial profession collaborates with authorities

It goes without saying that a notary, as the instrument of precautionary legal care and in the capacity of an individual entrusted with sovereign functions by the State, must also collaborate with the State in diverse ways, also providing the State with support when it comes to governmental/administrative functions. This can be done in various ways, including – for example – declaration obligations.

Accordingly, the German notary has to declare each contract for the purchase of plots of land to the tax office competent for the collection of land tax, after which the tax office will use the declaration as the basis for assessment of land purchase tax payable by the parties, normally the purchaser.[12] In the case of gifting agreements, the notary will send a copy of the agreement to the tax office responsible for collection of inheritance tax and gift tax.[13]

And of course the notary has to work hand-in-hand with land registries on a day-to-day basis. The notary is the individual who presents all documents to the land registry, who monitors the completion of processing of documents at the land registry, who resolves any problems regarding completion of the land registry and who receives the final notice of confirmation of entry at the land registry. Consequently the notary's position as defined in law empowers him to make applications for entries on behalf of the persons who are party to the notarial procedures in relation to the land registry.[14] To the extent that any given transaction requires approval – such as upon the sale of agricultural land over the limit of 2 hectares within three years – the notary secures the required forms of approval and declares the corresponding transaction to the competent official authorities. This is another function which the notary is legally authorised to conduct.[15]

Because there are no currency or export restrictions in Germany, it will only be within the scope of money-laundering regulations established in pursuance of an EU directive that a German notary has to monitor foreign parties' investments in transactions. If he does find anything suspicious, then he will report it to the appropriate governmental offices. In Germany, it is not inherently the notary's function to monitor the question of whether urban development and environmental protection standards are adhered to; those issues are covered by the governmental offices responsible for awarding construction permits. Consequently the notary will not be directly involved in the process. However, it would certainly be possible to conceive of solutions whereby the notary came to be more extensively involved. It would be a prerequisite, though, that there should be examination of regulations which must be objectively adhered to and monitored.

[12] Refer §18 Land purchase tax regulations.
[13] Refer §34 Inheritance tax and gift tax regulations.
[14] Refer §15, paragraph 2, Land register regulations.
[15] Refer §3, paragraph 2, clause 2, Property trade regulations.

III. Notarial record

III. 1. Its nature, scope and effects

The notary places the result of his activity on record in the form of notarial documents. These are "public" documents that carry particular privileges. For example, they provide direct access to the land registry. They also bear additional significance in civil procedure, because the content of the notarial document is assumed to be correct[16]. Anyone disputing this must provide their proof. The notarial record is also the basis of and the title for enforcement measures, in which context it has the effect of a Court verdict and enables direct access to a debtor's assets.[17]

III. 2. Distinction between public and private records

A public record is any documentary record which is produced by a governmental or governmentally appointed source, or by the notary himself. Private records are all records that are produced and signed by the parties without the involvement of the notary, whereby the parties' signatures must at least have been certified, i.e. confirmed.

III. 3. Public record as element of form in contracts. Its effect

The public record that is created by the notary is primarily an instrument for the preservation of the form prescribed by law for certain transactions.
These regulations of form have multiple significance: their aim is in particular to prevent excessive haste, to ensure that the parties' declarations of intent are correctly and completely reproduced, to ensure that the boundaries of law are adhered to and that the parties have been briefed, at the stage of enshrinement of the record, as to the legal consequences of the transaction. Accordingly, the preservation of form is a prerequisite for the application of the notary's function which extends to the coverage of the content of the record.

III. 4. Public document as instrument of evidence at national and international level

At national level, the public record has an evidentiary effect by virtue of the appropriate regulations of form in the German code of civil procedure.

Accordingly, the German code of civil procedure is the subject of its own dedicated chapter covering the matter of proof by records. In the first paragraph of the code, §415 ZPO, it is ruled that the public record, and therefore also the notarial record, "establishes full evidence for the procedure recorded by the officiating person".

[16] Refer §415 German code of civil procedure.
[17] Refer §794, paragraph 1, clause 5, German code of civil procedure.

This is supplemented by §416 ZPO, governing the evidentiary effect of private records, and rules that if they have been signed by the parties or if they have been signed by way of notarial certification, then they prove only that "the declarations enshrined therein were issued by the parties designated as having issued them".

The extent to which notarial records can also be utilised in other countries will firstly depend on the regulations applicable in the respective host country.
In Germany, § 438 ZPO makes it the province of the Court to decide that "it is required to determine in line with the circumstances of the case" whether a foreign record can be directly regarded as genuine and viable for application in the host country, whereby the normal outcome is that it is indeed viable, at least in respect of documents from European Union territory.[18]

In line with §438, paragraph 2 ZPO, adequate proof for the authenticity of a documentary record is established by authentication of a German consul in the foreign country. And there are further governmental agreements in this area, such as the Hague agreement regarding seals and stamps, whereby confirmation can be issued by way of formalised, supreme confirmation by designated persons (in Germany: the chairman of the regional Court): confirmation to the effect that a record has been established in this country by the person competent to do so.

III. 5. Their effect in enforcement procedures

In line with the rules of the ZPO (German code of civil procedure), enforcement primarily takes place in pursuance of Court verdicts.

However, §794 ZPO mentions further enforcement orders, and further on, in clause 5, it primarily refers to German notaries' notarial documents that are incorporated by the notaries – as far as is permitted according to the limits of their official powers – in the prescribed form. "To the extent that the record is produced in respect of a claim which is accessible to a negotiated settlement, that the record is not directed towards the issuance of a statement of intent and that it does not relate to the content of a residential rental agreement, and to the extent that the debtor in the original record has placed himself subject to immediate enforcement in connection with the above designated claim."

Accordingly it is necessary that an express declaration as to subordination to immediate enforcement is incorporated into the record, because then it can be used as an enforcement order, i.e. all possible enforcement measures can be applied, be it attachment of real property or enforcement on freehold.

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[18] Refer *Kohler* and *Buschbaum*, IPRax 2010,313.
Mansel/Thorn/Wagner, IPRax 2011,1,4.

III. 6. Free circulation of records

The rule is that notarial records have freedom of circulation in all areas of law, i.e. they can be used wherever their application is required.

III. 7. Public record as instrument of monitoring for legitimacy and for validity of a contract

It follows from the above-mentioned evidentiary effect and the effect of a public record in enforcement that it has a particular significance in respect of the certified transaction and the legitimacy and validity of the same.

III. 8. Electronic notarial documents; Legal security

In Germany, electronic notarial documents are currently used only in the form in which they are to be submitted to commercial registers. For this purpose, they are scanned in and encrypted using a particular computer program. The notary then digitally signs them. This is done by means of a signature card which is issued by various offices, for example the Federal chamber of notaries. This card is connected to the computer by way of a card reader, and authenticates the notary who is using the process. Furthermore, the notary has to enter a PIN code of at least six digits, known only to the notary, in order to produce an electronic signature. Only then can the records be transmitted to the commercial register.[19] It can be expected that in the not too distant future it will also be possible to transmit documents to land registries electronically. In this connection, the corresponding experts believe that adequate legal security is achieved by the above described use of the signature card, PIN code and transmission of documents in encrypted form.

III. 9. Security of documents; Security of register

From the foregoing it is clear that if documents are transmitted in a reliably signed manner and using secure transmission paths, then the same registers can also be operated securely.

IV. Right of ownership

IV. 1. Concept and characteristics of right of ownership

The right of ownership is the independent right of every citizen, which is expressly enshrined in the constitution. §903 BGB (German civil code) establishes an owner's powers very extensively. Accordingly, the owner of an item "may dispose of the item at his discretion, provided that this is

[19] In this connection, refer Regulations governing boundary conditions for electronic signatures (SigG – signature regulations) of 16-05-2001, German civil code l. (=Federal Law Gazette) I, clause 876.

not counter-indicated by law or by third parties' rights, and may exclude other parties from any intervention."

IV. 2. How is property covered in the constitution of the country in which it is located? Distinction between private property and public property.

The right of ownership is guaranteed in Article 14 of German Basic Law (under the German Constitution). There, however, it is established that ownership is subject to social constraints. It goes without saying that this social aspect to property is the subject of legal dispute. Firstly it must be stated that a private owner's right of ownership is guaranteed. However, his right of ownership may be curtailed, particularly if this is necessary in the public interest.

In Germany, for example, there is a limit on increases in rent. Rent may be increased by no more than 20% (twenty percent) within a given three-year period unless there are particular circumstances, such as renovation works, in the property. This limit upon rent increases is regarded as arising from the social aspect of property ownership. Accordingly, this social aspect gives the State the option of making regulatory intervention with the application to which property is put, including real estate property. For many decades, German legal precedent has been concerned with arriving at the definition of where the boundaries of this intervention lie, i.e. where State intervention exhibits an expropriating function and where its effect is for social good. In Germany, such issues are resolved by a special Constitutional Court which is recurrently called upon to deal with this topic.

Property is primarily "public" if the corresponding land is not claimed by any private owner, which practically never happens in such a densely populated country as Germany. Accordingly, publicly owned areas are those which were previously the property of the Nobility, and which became State property upon the introduction of the Republic of Germany in 1918. However, the State also acquires property or sells property. The acquisition of property frequently arises, in particular, in connection with the fulfilment of public functions such as the construction of roads or railways.

IV.3. What are the prime laws governing property?

Further to the above-mentioned guarantee of ownership, as enshrined in Article 14 of basic law, property is primarily governed in German civil code. German civil code comprises five volumes. Volume IV deals with the "law of property" or "law on ownership". Here, the distinction is drawn between ownership of movable items and that of immovable items.

German civil code §903 governs not only the basic principle of free disposal of ownership, as already mentioned, but primarily the acquisition and sale of property.

Furthermore, there are some particular laws which deal directly or indirectly with the acquisition of property, such as the land register regulations, i.e. regulations governing the operation of land registers.

IV. 4. Which types of real estate ownership are governed by law?

German law correctly recognises real estate ownership without drawing any distinction between a range of different types. The only differentiation in real estate ownership hinges on the question of who is the owner. Under German law, the principle of unity of land ownership and ownership of the building is applicable. Accordingly there is fundamentally no difference between the owner of a plot of land and the owner of the building constructed upon it, unless the building consists only of minor units that can be removed at any time, such as a shed, summerhouse etc.

Consequently, under German law the sale of a plot of land also automatically entails the sale of the building as being a substantial constituent of the plot[20] . Essentially there is no separation of ownership between the plot of land and the building. The only exception to this is the "law on building leases", also referred to in Spanish-speaking countries as "Fideicomiso". This is the right over a building (as distinct from the plot of land), which can, however, only be acquired for a designated period. It goes without saying that – when it comes to building leases – a relatively long period is often opted for. For commercial buildings the period will be 20 to 30 years, whilst for residential buildings it is mostly 99 years.

A contract for the establishment of a building lease will require notarial certification. Following the establishment of this "building" lease, the rights over the building will be the subject of a page in the land register as distinct from the page for the plot of land itself; and the page for the building lease will primarily stipulate the duration of the lease. The building lease will be entered as a charge in the land register entry for the plot of land. The beneficiary for the building lease, i.e. the user of the building, is accordingly required, normally, to pay ground rent (i.e. a form of lease payment) to the owner of the land, to be settled either annually or monthly. The advantage of this system to the owner is that he can derive income from the land without directly having to construct a building.

The advantage to the leaseholders is that they can make profit from the building without having had to acquire and maintain the land themselves. Accordingly, the prime function of leaseholding regulations is to promote the construction of small residences and to combat land speculation. The leaseholder has saved the cost of purchasing the land but is nevertheless the owner of the building that can be sold and inherited under the building lease.[21]

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[20] Refer §94 German civil code

[21] Refer *Bassenge* in Palandt, 71st Edition, 2012, Section on leaseholding regulations, Clause 1.

IV. 5. Restrictions on public or private rights of ownership

On the one hand, the right of ownership is essentially unrestricted in pursuance of §903 German civil code, but on the other hand it is in fact subject to various legal restrictions. For example, one of the main restrictions is that a building cannot be constructed freely and at the whim of the owner of the land. This is an area where public authorities are empowered to establish building plans, such that a building can be constructed only within the framework of such planning. If no such planning exists, then construction is possible only where commensurate with the scale of surrounding buildings, and if there are no surrounding buildings then essentially a permit to build will not be issued. Agricultural projects will be the only exceptions to this rule.

In the private sphere, restrictions upon the utilisation of the right of ownership may arise from general principles of the law concerning neighbours. For example, the spacing requirements for the construction of buildings will normally be three metres from the property boundary, or more in the case of higher buildings. Plants over and above a certain height are permitted only with a certain spacing to the property boundary. Neighbourhood restrictions may also arise in connection with contractually established servitudes. Within the framework of such servitudes it may be negotiated that a plot of land should not be used in a certain way, i.e. it may be negotiated, for example, that it should be kept free of buildings.[22]

IV. 6. Possibilities for acquisition of property

As described above, the possibilities for acquisition of property are described in Volume III of German civil code under "property law". In this connection, the distinction is drawn between movable property and immovable property. Movable property is essentially transferred by agreement as to the transfer of ownership and the transfer of possession. In real estate ownership, it is also necessary to reach agreement as to the transfer of ownership together with the consequent entry on the property register, i.e. the land register.[23]

In this connection, German law is characterised by the "abstraction principle". Accordingly, a distinction is drawn between the promissory contract governing the obligation to convey ownership on the one hand and – on the other hand – the actual procurement of ownership.[24] In this connection, the promissory contract establishes the obligation to transfer ownership – normally in return for payment of the purchase price designated in the contract – or otherwise as a gift. On the basis of this obligation, the act of transfer as such is conducted by the parties' declaration for the transfer of ownership and the entry of such transfer on the land register.

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[22] Refer *Bassenge* in Palandt, op. cit., §903, German civil code, clause 11 ff.
[23] Refer §§ 873, 925, German civil code.
[24] Refer § 311 b, German civil code, on the one hand, §925, German civil code, on the other.

This principle of abstraction is a substantial distinction from the Roman system of contract in which the transfer of ownership takes place upon signature of the corresponding purchase agreement. In this connection, the German principle of abstraction confers disproportionately greater scope for protecting the parties upon the processing of a purchase contract. Accordingly, the purchase contract can be negotiated, with the incorporation of the obligation to make payment of the purchase price and the obligation to transfer ownership once such purchase price has been paid.

For confirmation of the purchaser's priority on the property register, there is the instrument of the priority notice of conveyance, i.e. the preliminary entry or reservation of entry of the purchaser on the land register.[25] Once this has been completed and once the cancellation of any charges on the land register has been confirmed, then the purchaser can – at the notary's direction – pay the purchase price. Once the vendor has received payment of the purchase price, he fulfils his obligation to declare transfer of ownership, whereupon the purchaser can enter the corresponding declaration of ownership on the land register. In practice, the vendor will already have issued such a declaration for the transfer of ownership within the purchase contract, and the notary will be instructed to submit the declaration to the land registry, for entry, only once the vendor has confirmed that the purchase price has been paid.

Under the German system, then, it is not necessary that the purchaser should appear before the notary with bank-confirmed cheques - or even cash - and hand over the cash or the cheque upon signature of the purchase agreement. Under the German system, the notary can control – by way of notifying the purchaser of the status of payability of the purchase price – how and when the purchase price is paid and simultaneously assure that any charges entered on the land register are cancelled no later than at the stage of transfer of ownership to the purchaser.[26] Moreover, it is possible for the purchase price payment to be processed by a notarial trust account from which the notary makes payments only once the abovementioned requirements have been fulfilled.[27]

IV. 7. Shared ownership; Owner occupation; Timesharing and other property variants

Under the German property system, it is not a problem if one property is owned by several individuals. Several individuals may acquire properties in whatever proportions of ownership are desired, and, essentially, make free disposal of such portions in the property.[28] The *community of heirs* is one natural form of shared ownership. In this situation, if one of the owners of a plot of land dies and is succeeded by several individuals, they will automatically become co-owners to the property according to their corresponding shares.

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[25] Refer §883 German civil code.
[26] Refer *Schöner/Stöber*, Land register law, 14th Issue, 2008 Clause 3152 a.
[27] Refer *Schöner/Stöber* op. cit., clause 3152 b.
[28] Refer provisions governing joint ownership; §§741 FF German civil code.

They then constitute a community of heirs and will be entered on the land register as such, i.e. as a community, and without registration of their co-ownership shares. Ownership can also be acquired jointly, by partnerships. Shared ownership is an institution that was founded as long ago as the 1950s by the establishment of *WEG*, the German Condominium Act.[29] Shared ownership is composed of a co-ownership share in the overall plot, combined with separate ownership of designated premises. These premises will have to be designated on a notarial document which is required for the division of ownership, and designated on the situation plan for the building (which has to be attached) by the appropriate reference numbers, such that they can be identified immediately by any third party without the need to refer to any other sources.[30]

A notarial declaration of division, and the corresponding entry on the land register, will be the prerequisites for the setting-up of shared residential ownership. Upon entry on the land register, a separate register page will be set up for each individual ownership share. Under this system, an item of shared property can be handled separately, i.e. it can be sold, bequeathed and made the subject of legal charge in separation from the other units. Timesharing is a legal institution which is not very widespread in German law, but which tends to arise more in the sought-after southern European holiday areas. In German law, it will normally arise either as shared ownership or in the form of a company. Under the corporate solution, then, the company becomes the owner of the freehold. In this situation, the individual user does not acquire a share of ownership in the plot of land, but rather a share in the company which is the plot owner. Such company share will also carry entitlement for use of the property for a specifically designated annual time slot. By way of implementation of a corresponding EU Directive, consumer protection regulations have now been incorporated into German civil code, and are applicable independent of the legal institution of time-sharing, and they include – in particular – a right of withdrawal for the consumer (within 14 days after negotiation of contract).[31]

VI. 8. Accessory mortgage: Establishment, entry and execution

German law draws the essential distinction between the accessory mortgage and the "land charge".[32] The blanket concept for both of these institutions is the lien. Under a lien, the freehold is pledged to the creditor, normally a bank. However, the creditor may also be an individual person or company. The main distinction between the accessory mortgage and the land charge is that the accessory mortgage is an accessory security, i.e. its existence is tied to the existence of the underlying claim in tort law, i.e. the loan agreement. The land charge, on the other hand, is an abstract security, i.e. its existence is independent of that of any underlying claim.[33]

[29] Condominium act of 15-03-1951, Federal Law Gazette I, paragraph 175.
[30] Refer §§1& 2, Condominium Act.
[31] Refer §485 German civil code.
[32] Refer §§1113 ff. in conjunction with 1191 ff., German civil code.
[33] Refer §1192 German civil code.

The advantage of the land charge is that it can be used recurrently as a security for a range of claims, i.e. various credits can be used without any change having to be entered in the land register. In this situation, the land register will merely enter the amount of the land charge and the maximum interest that can be charged. The essential disadvantage of a land charge is that, under a land charge, action can be taken against the owner of the plot of land independent of proof of the existence of a claim. It may even be the situation that, for example, a creditor who has released credit is a beneficiary under the land charge and may assign his claims arising from the release of credit to a given party and may assign the land charge to a different party, so that theoretically the situation could arise where the debtor, i.e. the owner of the plot of land, would have to pay twice over.[34]

This theoretical possibility does not arise in practice, at least not where the land charge is appointed – as is the usual practice – on behalf of a bank. The bank would lay itself open to compensation claims if it were to implement such a duplicated assignment. And in any case, this situation has been allowed for by the legislator, primarily by introducing §1192, paragraph 1 a. Accordingly it is possible for "objections against the land charge which are the entitlement of the owner in pursuance of the security agreement with the creditors to date, or which arise from the security agreement, also to be substantiated against any acquirer of the land charge." In other words, a further agreement, the above-mentioned security agreement, will be necessary in order to derive the connection between the land charge which has been entered on behalf of the bank, and the claim which it effectively secures.

This is negotiated in addition to the land charge and in addition to the credit agreement between the bank and the debtor, and it determines the claims on the basis of which the bank may lay claim against the owner of the plot of land in pursuance of the land charge. Such instruments will usually be worded to quite a detailed extent, such that, for example, the bank may pursue the debtor for all claims which the bank holds against the debtor under their business connection. However, this declaration of purpose may be restricted – in dealings with the bank – to certain predefined debtor relationships. Because of the tremendous practicality of use of the land charge, with particular reference to its re-usability, the institution of the land charge has almost entirely replaced the accessory mortgage in day-to-day legal transactions in Germany. In other words, recourse is now had almost entirely to land charges, with virtually no accessory mortgages now being established.[35]As a further protection for the party appointing a land charge, in 2008 the legislator went on to introduce a mandatory six-month period of notice for cancellation before the value of the land charge can fall due for payment, and as such before any enforcement can be pursued in pursuance of the land charge.[36]

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[34] Refer *Schöner/Stöber* op. cit., clause 2311
[35] Refer *Schöner/Stöber*, op. cit., paragraph 2310.
[36] Refer § 1193, paragraph 2, Clause 2, German civil code.

And the possible applications of a German land charge are so wide-ranging that a land charge does not automatically have to be appointed for a given bank. And the owner may also designate the land charge for himself. In that situation, what we refer to is an "owner's land charge". At the owner's request, a land charge certificate – whose function is similar to that of a draft – can be produced in respect of the land charge. If the land charge certificate is passed on, then the land charge is assigned and the holder of the land charge certificate stands as the authorised creditor for the land charge. The main point, here, is that it produces advantages for businessmen who recurrently intend to take up credits from various banks at short notice. In order to secure the credit, the land charge certificate can be passed on to the bank, the bank then handing the land charge certificate back to the owner after the credit has been repaid, whereby the owner can then, in turn, take out fresh credit with the same bank or with any other bank by handing the certificate on. This is a practical method for financing, enabling cash to be obtained relatively simply and at short notice in order to cover deficits, and comprising the means to offer security to the bank.

Two further steps are required to produce either the land charge or the (now more or less non-existent) accessory mortgage. And this gives rise to a further application for the abstraction principle already mentioned above. Firstly the owner has to negotiate with the creditor for the appointment of the land charge; next, the land charge has to be entered on the property register (in a specific section of the land register) as a charge on the freehold. It only comes into being once it has been entered.[37] If there are any difficulties in payment following the entry of the land charge on the register, then the beneficiary, following a six-month period of notice, may take action against the owner directly in pursuance of the land charge, by applying for enforcement of ownership or receivership. Under enforcement of ownership, which is the prevailing case to arise in practice, ownership is auctioned by way of a public auction procedure authorised by the Local Court that is competent in the district in which the plot of land is located. The creditors' claims are met from the proceeds of the auction according to the order of priority of the entry of land charges on the property register.

V. System of registration of property ownership

V. 1. Property register system; Principles and characteristics

In Germany, the property register is essentially operated in book form. Book form has been incorporated into electronic form for the electronic register.

For each plot of land and – under shared ownership – for each owner-occupied flat, a separate page in the land register will be created, and assigned a page number within its respective local sub district.

[37] Refer §873 German civil code.

The register page itself consists of four sections. At the beginning of the register page, the plot (or plots if there are several ones) will be entered in the "schedule of properties". Plots within one and the same local sub district are designated by the indication of a corresponding subplot number and – typically – the indication of street and building number. However, the subplot number is key to the location of the plot of land. This brings us to an important principle in the German land register system. The subplot number is always consistent with a corresponding number in the cadastral register. Under this system, subplot numbers featured in the land register can always be traced in the cadastral register with the same designation on the situation plan. And vice versa, of course. Each plot of land scheduled in the cadastral register is also entered (i.e. designated) on the land register.

Accordingly, the cadastral register has to be amended first – such as upon the sale of portions of a plot of land, for example – before the new plot can be entered on the land register. Thus, upon the sale of portions of a plot of land, it is essential to consult the State survey office, or a State-appointed surveyor, to define and designate the new boundary physically on the property, for example by the setting of new boundary markers or other means of designation. The cadastral plan will then be amended and the new plot will be entered on the cadastral register, together with a new subplot number. The plot can go on to be entered on the land register together with its new reference number only once this new subplot number has been issued. Under German land law, then, it is not adequate – as it would be adequate in many other countries – to include in the land register no more than a verbal description of partial areas. And there is good reason for this stringency, because after a few years it may be virtually impossible to follow through on verbal descriptions, for example because neighbouring plots may have changed, new buildings may have been constructed, new roads laid etc.

In Germany, this principle of consistency between the cadastral register and the land register is very highly esteemed and strictly applied. The name of the owner(s) will be entered on the next following section of the land register page. If it is a case of shared ownership, the shared ownership shares will be stated. If the owners are a community of heirs, then all that will be entered is the title of the community of heirs together with the heirs' names, but not including their portions, similar to the situation for a civil partnership. The second section of the land register will feature all charges on the plot with the exception of accessory mortgages and land charges. Here, for example, all forms of servitudes, rights of usufruct, residential rights and similar servitudes will be found.

Land charges and accessory mortgages will be entered in the third section of the land register, together with the amount of the respective land charge or – where applicable – accessory mortgage amount and the interest negotiated according to the case.

It is only for reasons of ease of overview that the charges are entered separately in sections II and III of the land register. And the intention was to achieve a system for laying out most of the charges that could give rise to payment claims in a section that was separate from the section for servitudes and similar charges, in the interests of greater clarity. One of the key principles in land law is to be found in §892, German civil code, which includes the rule that any party shall be entitled to rely on the correctness of content of the land register unless he is actually aware of any incorrectness. This is one of the most important principles giving rise to legal security in land trade.[38] No records of previous purchases or any other matters may be presented or investigated. The sale of any plot of land has to start with an examination of the land register. A sale or the gifting of a plot of land will then be conducted on the basis of these land register details. Accordingly, no "title research" or "title insurance" will be required. The impressive legal security and reliability of land trading in Germany has been achieved thanks to all of the above.

V. 2. Land register in Germany

In Germany, the land register is managed in the lowest instance of Courts, i.e. at Local Courts. These Courts have special sections that deal with the land register and its management. Within the Local Courts, land registers are organised according to the various local sub districts, i.e. according to municipalities or portions of municipalities and – within those local sub districts – according to page numbers. The chairman of a land registry is always a magistrate. Land registry officials operating under the magistrate's authority are specially trained Local Court employees who are referred to in the English-speaking countries as *paralegals*.

Judiciary administration is organised, under Federal laws, as the responsibility of the respective Federal regions, thus including the management of the land register, but its execution is governed by a Federal law: the land register regulations. Where there are any objections against the land registry's decisions, these are initially processed by the same Local Court. The instance for any further objections will then be the competent Senior Regional Appeal Court. Accordingly, the land register is managed on a de-centralised basis and will be located in the geographical vicinity of the affected premises in each case.

V. 3. Documents for entry

Processes in the land registry itself are governed by their own law: land register regulations. §29 of these regulations requires that only public documents – i.e. documents that are certified by a notary or documents where the signature of the party/parties will have been notarially certified – can be entered. In addition to notarial documents, only Court documents can be entered, such as in the case of application for enforcement of a judgement lien, and ordered by the Local Court in its capacity as the Court of execution, or if a Court verdict leads to a change in ownership because – for example – of one party's decision to transfer ownership to another.

[38] Refer *Gursky* in Staudinger's commentary on German civil code, 2008, § 892, paragraph 9.

In no case can private contractual documents be entered. This is an important filter for access to the land registry, which is a necessary prerequisite for the land registry to be able to work smoothly and continuously. The notary prepares the documents as appropriate and presents the applications for entry with the land registry such that – in the normal case – the direct result will be the entry of registration. This is necessary in order to adhere to the high standard maintained in the land register, and that high standard is necessary in turn in order to assure the above-mentioned public trust in the land register.

V. 4. Provisional entries

Because German property law is subject to the above-mentioned principle of abstraction - the principle whereby ownership does not transfer until entry of registration of the new owner on the land register by virtue of a previously negotiated promissory contract - it was necessary to create an instrument for the provisional securing (on the land register) of future acquisition of ownership. This instrument is the priority notice enshrined in §883 German civil code, i.e. a provisional entry for the securing of the claim for the definitive entry of registration in the future.

This priority notice can be entered not only for future acquisition of ownership but also for the future entry of registration of such rights – such as in the case of servitudes. For practical purposes, it has little or no function, because servitudes and other charges are generally registered immediately in section II of the land register. If they are appointed subject to a condition, then they may also be entered immediately as a contingent right. The main area of practical application for a priority notice is in the field of land purchase agreements, where in the first instance the purchaser is secured by the entry of a priority notice, and whereby it is only in the wake of such entry (and any clearance of the freehold in respect of charges) that he has to pay the purchase price.

In this context, the priority notice must – in common with all such entries of registration – be applied for and approved by the previous owner of the land.[39] The notary will then pass this application on to the land registry, which will then enter the appropriate priority notice on the land register. The priority notice does not represent any block or barrier on the land register; in other words it does not prevent subsequent entries. In line with §888, German civil code, however, it gives the beneficiary under the priority notice, whose name will be entered on the records, the right to require that entries of lower priority in the land register (for the beneficiary under the next lower entry in priority) should be cancelled.

In the event of insolvency, the priority notice will give rise to a priority right of separation. In that event, the priority beneficiary can request the trustee in insolvency to transfer the land directly to the beneficiary before any other creditors in insolvency can gain access to it.[40]

[39] Refer §19, Land register regulations.
[40] Refer §106, Insolvency regulations.

There is no theoretical limit to the effectiveness and hence to the scope of protection of a priority notice. It will remain in force for as long as its underlying claim remains in force. Once it expires, the owner of the land will hold a claim against the priority beneficiary for cancellation of the priority notice. Once the new owner is definitively registered, the priority notice will once again be cancelled because by then it will have lost any purpose. All entries on the land register are made only at the parties' request, which the notary will pass on to the land registry. In line with §15, Land register regulations, furthermore, the notary himself is always entitled to submit requests for entry.

V. 5. Technological progress in registration system

A few years ago, the process of converting land registers to electronic form in Germany was set in hand. During the conversion phase, land registers available only in book form were scanned in and their operation continued on computers. By now, all new land register pages will be directly created and managed in the computer. In connection with the Federal system in Germany – and the above-mentioned fact that the organisation of the judiciary system and of land registries are the responsibility of the respective regions – the 16 Federal regions in Germany went over to electronic land registration at various times. They also used a variety of computer systems that may not necessarily be compatible with each other.

V. 6. Notary's electronic access to property information

For electronically managed land registers, each notary has his own password-protected point of access. Due to the variety of systems within each Federal region, they all have a different mode of access. In practice, this represents a considerable complication upon activities, with particular reference to notarial firms which conduct large numbers of certifications outside of their own respective Federal regions. Accordingly, separate access has to be requested within each of the other Federal regions, with the issuance of the right of access together with a code number and the corresponding entry of registration for the corresponding notary. And access to the land register entails considerable costs. Accordingly, there is a minimum fee of €10.00 for each extraction of information from the land register. In line with applicable fees regulations, though, the notary can pass these costs on to his client.

In addition to electronic access to land registries, there is a separate mode of access to the cadastral register over the Internet which anyone can use. You can then be sent an e-mail for the requested extract from the cadastral plan. There is no means of direct access to the figures concerning plots of land. Under the German system, figures for plots of land are not kept on any register. Only, tax offices hold land value figures, although these will be based on valuation guidelines originating from the 1930s. These are still used, but mainly only for land tax; subject – of course – to an appropriate multiplication factor. There is no means of electronic access to examine this information.

The main rules regarding environmental protection are derived from laws accessible for the general public to examine. Other restrictions may arise here, in connection with building law. Here, too, there is no means of electronic access to examine information. Restrictions upon ownership are theoretically entered on the land register and can be perused as such in the form of electronic register extracts.

VI. Property market

VI.1. Significance to notarial profession and region

In Germany, the property market is of great importance both to the notarial profession and to the region and its development. In Germany, all contracts that involve the transfer of property, referring both to purchase contracts and gifting agreements, require notarial certification.[41] This is the case irrespective of who is involved in the respective contract or agreement. For example, even if a State or a municipal authority should buy or sell plots of land, the corresponding contract will require certification by a notary. The same will apply, for example, if the State makes a sale to a municipal authority.

So it is readily understandable that the property transaction business is one of the foundation stones of the notarial profession. There can hardly be a notarial firm in Germany, I would estimate, whose volume of business from property transactions is less than 50% to 60% of its total turnover. And the property market is extremely important to the region and to its development. The fact is that for any given region a reasonable extent of economic development can only be assured, for all levels of the population, if there is a secure and well-organised marketplace for the selling of land and property which is based on reliable registers and on a reliable, freelance, impartial notarial profession and hence the secure processing of property transactions. This is the only way to make it possible to invest in plots of land with no risks other than those of general developments in value on the property marketplace, to establish factories, to open places of business in Germany and to take part in the life of the economy in any realistic way. And by this means, furthermore, it can be made certain that credit can be released in a regular and well-organised manner by banks and secured by the entry of appropriate mortgage deeds in respect of plots of land and properties.

VI. 2. Benefits and drawbacks in Germany

We have already given an adequate outline of the benefits of the property marketplace in Germany, with extensive discussion – in particular – of the Roman-model notarial system. Without wishing to paint an excessively glossy picture, it would be hard to point out any drawbacks since

[41] Refer §311 b, German civil code.

the property marketplace in Germany can genuinely be described as well-organised and in a satisfactory state of operation.
Appointments can be made at relatively short notice to have certification procedures set in hand by notaries, subject to the legally required waiting times[42]; entries can usually be made promptly on German property registers and – if the documents have been duly produced by a notary – with no complications. All in all it is possible to state that the system in Germany is operating rapidly, smoothly and effectively for the country's citizens and businesses, characterised by a smoothness of operation that is also available for the benefit of foreign investors.

VI. 3. Repercussions on social stability and a country's economy

A satisfactorily operating property marketplace is more than merely an essential, fundamental prerequisite for a country's economy and its economic development; it is also crucial to the achievement of social stability in any country. The economy can operate and flourish only if there is a duly secured property market to ensure that properties can be bought and sold without undue complications. It is clear from examples in many countries that problems in economic development can be traced back to the lack of a satisfactorily operating property market possessing the facility, for example, of a reliable registration system providing for the coverage (in register records) of the majority of the country. And this will always exert direct consequences on any country's social stability.

Firstly, a correctly functioning economy with factories installed on land that belongs to the respective companies will produce the jobs that are needed in order to provide families with their income and livelihood. Secondly, there will be the assurance for those of the country's population that work in agriculture that the land which they are working actually belongs to them. This represents more than merely a crucial guarantee of ownership: it also provides the basis for the continued economic development of agricultural businesses, primarily by providing the facilities for mortgages by the appointment, for example, of mortgage deeds. Accordingly a farmer will be able to give guarantees to a bank and/or to his creditors and thus secure credits for further investments in his land and in his business.

VI.4. Notarial profession's contribution to property market; Appreciation in value thanks to work of notaries

The notarial system on the Roman pattern is – as we have already discussed in various instances – one of the cornerstones of a well-secured property market. Only where a notary has been retained in advance of establishing entries on registers can the records be protected from inundation with documents drafted by inexperienced members of the public. The inclusion of a notary in the

[42] Consumer agreements for property are subject – in line with §17, paragraph 2a, clause 2, Certification regulations - to a statutory 2-week waiting time for consumer protection.

drafting of the purchase contract or of the gifting agreement for the freehold is the only way to protect the parties from going too far and going too quickly.
The involvement of the notary will guarantee that the parties' intentions are correctly enshrined in law. Furthermore, where the notary is included in the process, the parties will be protected from the financial disadvantages that could arise as the result of the vendor losing his ownership before he has received payment of the purchase price; or as the result of the purchaser paying the purchase price before his acquisition of ownership, free of burdens or charges, has been effectively secured. Accordingly, the parties' legal position is improved, but – more than that – the inclusion of the notarial firm brings added benefit in financial terms. As long as a notary is on board, there is no need to worry about errors in the drafting of contracts or agreements due to one's own inexperience or lack of skill in such procedures, and no need to bring in lawyers and other legal advisers; in any case, their fees are much higher than those for notarial certification.

This means that the notarial system provides savings on transactions and subsequent legal procedure costs as well. It provides these savings and thus releases amounts of cash that may be more usefully spent on investments in financial development, and so it makes a direct contribution to any country's beneficial development. This gives the lie to all of the dismissive views that may in particular be expressed from English-speaking legal circles and statements such as those made by the World Bank to the effect that the notarial system on the Roman pattern is a cost-expanding factor.[43]

Impartial economic investigations show that this is specifically not the case but rather – as we have shown, above – that the notarial profession contributes to the saving of costs. Not only does it obviate the need for such numbers of legal specialists to be retained, but also the need for insurances such as the "title insurance" from the English-speaking area. Our conclusion, here, may not be pleasing to many decision-makers in the English-speaking areas of law, particularly the multinational firms of lawyers that operate in that area, but we stand to be proven right by relevant investigations.

VI. 5. Does a reliable and purposeful legal system of regulation exist for the property market?

I believe that we have already succeeded in providing an adequate and extensive description of the reliable, purposeful system of regulation for the property market in Germany. As we have already indicated, this system is based on the foundations of a notarial profession operating satisfactorily on the Roman pattern, together with a healthy cadastral and surveying system plus a land register system that works as it should. For the benefit of market players from this country as

[43] Refer World Bank's annual "Doing business" reports.

well as those from abroad, the interaction of all three of the above-mentioned institutions assures security and reliability on the German property market.

VI. 6. What instruments of property market regulation currently apply in this country?

These instruments are as described above. All of the above-mentioned institutions are governed by appropriate laws with particular reference to the German civil code and the land register regulations.

VI. 7. Is it necessary for new instruments of regulation to be introduced for the property market in this country?

Given my description, above, of the ways in which the property market operates, I believe that the answer to that question has to be "no". Nor are any new instruments being planned or even discussed.

VII. Summary

To sum up, we can conclude that the legal security of the property market in Germany is guaranteed and assured to the highest level.

All necessary instruments of regulation are in place and operational. The process begins with the logging of all plots of land on cadastral registers by means of State surveying offices or by State-appointed surveyors. It continues on the principle of consistency between the cadastral register and the land register, such that each plot of land that is entered on the land register can also be traced in the cadastral register within the same local sub district and down to the same subplot number. There is electronic access both to the land register and to the cadastral register.

In all cases – with the sole exception of the handing-down of Court verdicts -- amendments to the land register require the collaboration of the notary; and the sale of partial areas of property will also entail the collaboration of survey offices and a corresponding amendment to the cadastral register. Entries on the land register – irrespective of changes of ownership in respect of plots of land – can in all cases be applied only on the basis of public documents of certification, i.e. those that have been certified by a notary or where at least the signatures have been accredited by the notary (which is normally only the case in respect of the entry of servitudes etc., or where rights are deleted from the property register).

The mode of operation of the marketplace for land in Germany can also stand as an example of how the only way for a property marketplace to operate satisfactorily is if the above-mentioned legal checks and balances have been set up and are duly operating as they should.

In the case of the notarial system on the Roman pattern, this presupposes not only the foundation of the notarial profession but also the corresponding supervision of how notaries are fulfilling their duties: a monitoring process best conducted by impartial institutions such as the judiciary system. Such vetting should be processed not merely in a documentary form but also by actual investigations of how a notary is doing his work; and this procedure should be conducted at intervals of no less than between four and five years.

Without any doubt, a problem that may arise in many countries is how to complete the first stage – i.e. the complete coverage of a country by the cadastral register system. This is inevitably complicated when it comes to countries with a large area of territory and countries that do not have an extensive tradition of survey. It goes without saying that Europe has an advantage, here, inasmuch as the areas involved are smaller and the countries are more densely populated, with the result that the need for coverage of a district in cadastral registers will have arisen at an early stage. In any case, it was the State that provided the corresponding impetus, in the 19th century. Perhaps I should explain that the main source of revenue for European countries at that time was not income tax or corporation tax – as is the case today – but rather land tax.

In the interests of more efficient collection of land tax, an early start was made with the creation of maps, the surveying of plots of land and the logging of corresponding entries on the cadastral register. The eventual development of the land register system rests on these cadastral records. And land registers in Germany only came into being upon the entry into force of the German civil code on 01-01-1900.

In such countries, then, it is important that plots of land should be logged on surveys as soon as possible. It goes without saying that this can now be achieved by better land surveying methods than those historically available. As we would expect, this is already going ahead in some countries with the benefit of modern technical media such as satellite photography.

All that the notarial system on the Roman pattern will have to do is to avoid the creation of too many "legal titles" with the associated risk of tending excessively towards the typical English title system; or otherwise – if the titling system is to be adopted – then its connection with the register system should be ensured.

This symbiosis between the establishment of secure legal titles and their entry on public registers is indeed the "trademark" of the notarial system on the Roman pattern; one that constitutes a trademark that should be made the policy for the international legal marketplace.