

QUESTIONNAIRE

SECURITY RIGHTS IN IMMOVABLE PROPERTY IN EUROPEAN PRIVATE LAW

SECTION I

Please provide an overview of the basic features of the law in your country as it relates to security rights over immovable assets. Your overview should contain an outline of the following features of your system:

- i) The range of immovable assets which may be subjected to security rights
- ii) The range of types of security which may be held over immovable assets
- iii) The range of methods by which security rights are created and the role of registration.
- iv) The extent to which the major form of security right is accessory to the loan it secures (nature and degree of *accessority*) and the extent to which the major form of security right is specific to the immovable assets over which it is held (nature and degree of specificity)
- v) Basic duties of the parties prior to enforcement (eg. does the owner/borrower have to keep the immovable asset in good repair) and during enforcement (eg. does the security holder have to keep the immovable asset in good repair on taking possession?)
- vi) The range of methods of enforcement
- vii) The process of payment (redemption/discharge) including the scheme for paying successive security holders (eg first, second, third mortgagees.)
- viii) Significant practical implications arising from the fact (where possible in your country) that the security holder or owner is a trustee or corporation.

Your overview must not exceed five A4 pages of single spaced text at pts. 14 font. You should focus on what commonly occurs in practice. You should not deal with general security rights taken over the entirety of a debtor's business assets.

The following terminology should be used throughout:

“Security right” or “security” indicates the right (eg. mortgage/hypothec) held over the immovable asset.

“Immovable asset” or “immovable property” or “land” indicates the interest in land (eg. freehold/lease) over which the security right is held.

“The Holder” indicates the holder of the security right/security.

“The Owner” indicates the owner of the immovable asset/immovable property/land over which the security right is held.

“The Loan” indicates the contract of indebtedness which is secured by the “security right”.

This section is intended to promote mutual understanding between editors and contributors and to streamline the research and publication processes. The overviews supplied by national reporters, according to the general agreement with the publisher, will not be published in the book, but the editors may use the overviews as a basis for in-depth discussion with the reporters and for the comparative introduction to the book.

SECTION II

Section III details the methodological approach to be adopted when writing your response to the cases listed in this section. Having familiarised yourself with the required methodology please employ it to describe solutions to the following cases according to the law of your country.

Your discussion of the cases should not exceed 10 000 words.

Case 1

Martin is the holder of a time limited right in Blackacre and of a co-ownership share in Whiteacre. He approaches bank B for a 15 year loan. Bank B makes the loan and takes security over Martin's assets on 15 May 2001. After 3 years

Martin runs into financial difficulties and fails to repay instalments of the loan for a period of four months. Bank B enforces the security and Martin claims that the bank's security is invalid.

Case 2

On the 1st September 2000, bank B agrees to grant Paul an overdraft of 10,000 Euro in return for a security over Paul's house. The security is duly created on the same day.

On the 1st September 2001, bank B extends the limit of Paul's overdraft by a further 10,000 Euros to 20,000 Euro.

By 25th October 2004 the total debt owed to the bank under the overdraft has risen to 25,000 Euro.

Bank B now relies on a clause in the overdraft agreement to notify Paul that repayment of the entire debt must be made by a fixed date. When Paul fails to repay the debt on this date, bank B begins proceedings to enforce its security to recover the 25,000 Euro.

Paul is now insolvent. Julia, one of his creditors, claims that the bank is not entitled to pay off more than 10,000 Euro under the security.

Case 3

Alessandro and Maria live together in a house which is co-owned by them. Without consulting Maria, Alessandro grants a security over the house to bank B in return for a loan granted by the bank to Alessandro for the purpose of financing his business. When Alessandro fails to keep up with the loan repayments, bank B enforces its security.

3.1 Maria claims: a) that the security is invalid; b) that the security does not extend to her share; c) that she should at least be allowed to stay in the house.

3.2. Answer all parts of 3.1 above, but on the assumption that Alessandro and Maria hold the house jointly and without distinct shares so that each is entitled to the whole of the house, subject to the interest of the other.

Eliminato: ¶

Eliminato: 3.1.1 Are there any differences if they get married at any stage?¶

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3.1.2 If they are unmarried, does the nature of their cohabitation (eg. filial, fraternal, sexual) affect the legal treatment of Maria?¶

Case 4

Alpha Company runs into financial difficulties and borrows money from bank Beta. In return, Alpha Company grants a security over its immovable property to bank Beta. Alpha Company fails to repay the loan on the due date and bank Beta

omits to demand repayment of the loan. Despite sufficient time having passed to bar bank Beta's contractual claim for repayment of the loan, bank Beta nevertheless commences an action to enforce its security. Alpha Company seeks to have the action set aside on the ground that the contractual claim is time-barred.

Case 5

Bank B agrees to grant a bank guarantee (personal security) to Mr Parker in favour of finance company C for money advanced by C to Mr Parker to enable him to continue his (Mr Parker's) business. In return for the bank guarantee, bank B obtains a security over Mr Parker's immovable property to secure the bank's right to be indemnified by Mr Parker should the bank guarantee be realized by the finance company C.

Can such a security be enforced in your country?

Case 6

Bank B has secured a loan granted to Alfred by the registration of a security over Alfred's land, Blackacre. Some time after the security was granted, bank B assigns the security over Blackacre to Mary, who is Alfred's unsecured creditor. After the debt to Bank B becomes due, Mary seeks to enforce the security over Blackacre. Alfred seeks to have Mary's claim set aside.

Can Alfred succeed?

Case 7

Bank B holds a security right over Alicia's land Goldenwood, which acts as security for a loan granted by Bank B to Alicia. Some time after creation of the secured right, bank B sets up a securitization business under which it transfers hundreds of secured loans, including Alicia's, to a SPV (Special Purpose Vehicle). The SPV manages the pool of secured loans and sells mortgage-backed securities (MBS) to investors. The MBS are backed by the pool of secured loans. The investors have, by means of the MBS, a secured right to income from the pool of secured loans. The security is exercisable if there is default in payment of the income. After some time such a default occurs and the investors enforce their rights (as MBS holders) against the SPV; against the pool itself; against bank B (as originator of the secured loans); and against the owners (including Alicia) of the underlying immovable property.

Alicia receives notice of the enforcement over Goldenwood. She brings an action to avoid enforcement on the ground that she has never defaulted on repayment of the instalments on her loan.

Case 8

Bank B has secured a loan granted to Mark by the creation of a security over Mark's land Greenwood.

Some time after the secured loan was created, bank B issues bonds which are covered by an undifferentiated pool of securities (one of which is the security of Greenwood). The pool of securities is retained by bank B. The bonds are bought by investors, who have a preferential claim against the pool of securities.

Several months later, bank B becomes insolvent and the covered bonds investors want to enforce their rights against the pool, against bank B and against Mark.

Case 9

Ruth is Gregor's grandmother. Gregor wants to obtain a loan from bank B in order to buy a little farm and start his own business. Gregor persuades Ruth to grant a security over her house – which is the only asset she has – to bank B, as security for Gregor's loan from the bank. Unfortunately, Gregor's business is unsuccessful and he becomes insolvent. Bank B enforces its security against Ruth.

Ruth claims, in her defence, that she was not fully informed of the risks to which she would be exposed by granting the security.

Case 10

Tom has granted bank B a security over his farm Blackacre in consideration for a loan. After the security has been constituted, the farmhouse is severely damaged in a storm and it comes to the knowledge of bank B that Tom has not kept the huge sheds on the farm in a good state of repair.

The bank gives notice to Tom to repay the loan with immediate effect. Tom had never failed to repay installments on the loan and therefore claims that it would be unfair for the bank to be allowed to enforce its security.

Can the court, in alternative to the immediate repayment of the loan, issue an order to keep the property in good repair? Can the court issue an order to give additional security?

Case 11

Doris owns a field called Greenacre which she intends to divide into Blueacre and Yellowacre. However, Greenacre is subject to a 200,000 Euro security right. The current value of Greenacre is 500,000 Euro but when Blueacre and Yellowacre are registered with distinct titles they will be worth 300,000 Euro each.

The current outstanding debt under the security on Greenacre is 30,000 Euro. Doris wants to have the security limited to Yellowacre and reduced to 30,000 Euro.

Case 12

12.1 Faith owns two plots of land, field X and field Y; each worth 50,000 Euro. Bank B makes a loan of 40,000 Euro to Faith. This loan is secured by registration of a security over both fields in favor of bank B. Later, bank C makes a loan of 30,000 Euro to Faith and secures this by registration of a security over field X. Faith now defaults on her loan from bank B and the bank commences an action to enforce its security over field X. Bank C now objects that bank B should have chosen to enforce its security over field Y instead of field X.

12.1.1. Does it make a difference if the loan by Bank B amounts to 60,000 Euro?

12.2 Faith owns two plots of land, field X and field Y; each worth 50,000 Euro. Bank B makes two loans of 40,000 Euro to Faith. Each loan is secured by registration of a security over one of the fields. Planning permission to build is granted in respect of field X and refused in respect of field Y. Field X is now worth 200,000 Euro and field Y is worth only 20,000 Euro. Faith wants to pay off the loan on field X. Can Bank B require her to pay off the loan on field Y?

Case 13

William is the owner of a house. The house is encumbered with a security for a loan in favor of bank B. When the debt becomes due, William fails to pay back the loan and bank B looks to enforce the security. Shortly after enforcement proceedings have commenced, William acquires sufficient funds to pay back the arrears of the loan, plus interest and costs and hopes to retain possession of his house. However, bank B refuses to halt the enforcement proceedings and will not consent to the redemption of the house.

Case 14

Maria's farm Blackacre is worth 500,000 Euro. She grants a first security of 300,000 Euro over Blackacre to Bank A in January 2003, a time-limited interest to Ronald in September 2003, a second security of 150,000 Euro to Bank B in January 2004 and a third security of 50,000 Euro to Bank C in January 2005.

14.1 What effect would the repayment of her debt to Bank A have on the ranking (priority) of the other securities?

14.2 Would the ranking (priority) of the securities be affected if the third security had been granted to Bank A instead of Bank C?

14.3 What would the position be if Maria defaults on her payments to Bank B without defaulting on the other securities?

14.4 Maria defaults on every security in 2007. Is each Bank entitled to realise its security? What is Ronald's position in such a case?

Case 15

Arthur owns a retail business. In order to improve the business, he negotiates a loan of 100,000 Euros with Bank B and secures the loan by granting a security over the retail premises. Later, Arthur becomes insolvent. His unpaid creditors include the government (for unpaid taxes), an insurance company for premiums on the insurance policy of his motor car and his life, employees of the retail business, several unpaid suppliers to the retail business and the local building contractor who has renovated the retail premises.

Case 16

Daniel granted bank B a security over his house for a loan. Five years later Daniel defaults on the loan. The bank wants to enforce its security by availing itself of a clause of the security agreement whereby, if Daniel defaults, bank B automatically becomes absolute owner of the house. Daniel claims that such a clause is invalid and unenforceable.

SECTION III

METHOD OF THE RESEARCH

The general purpose of this study is to investigate the legal rules which govern real security over immovables in European countries by analysing certain factual situations. Consequently, this research is based on a questionnaire presenting factual situations.

In what follows we try to explain the general methodological framework we would like you to use in responding to the questionnaire.

a) The preliminary aim is to obtain comparable answers to the questions we have posed. We would like you to respond to identical questions understood and interpreted as far as possible in the same way. Moreover, the answers have to be sufficient in themselves in two ways. First, they have to be complete answers without additional explanations being required. The level of specificity that is expected, therefore, is to be on a par with the most detailed rules. Secondly, the answers have to be authoritative which means that they can be accepted at “face value.”

In this way we aim to another important objective. Indeed in order to have complete knowledge of a country’s law, legal scholars cannot be trusted without qualification, for there may be a wide gap between rules commonly stated and rules operative in practice.

A list of all the reasons given for decisions arrived at by the courts does not represent the entire law. Neither do statutes give us a complete picture of the law. The same is true of scholarly analysis of legal rules by academics. In order to know the law, it is necessary to analyze the complex relationship between the so called “legal formants” of a system, i.e. all those formative elements that contribute to a given legal rule amongst statutes, general concepts, principles [definitions], reasons for decisions, particular decisions [holdings], and so forth¹. All these formative elements are not necessarily coherently linked in a particular legal system even though domestic lawyers usually assume such coherence.

All this, however, may still not be sufficient to understand the law of a particular jurisdiction. Provisions in statutes or Codes of one jurisdiction may be identical with provisions in the statutes or Codes of other jurisdictions but may still produce different results when applied in practice to identical factual

¹ See R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 *Am. J. Comp. Law* 1991, p. 1 ff.

situations. The reverse may also be true. Statutory provisions or general principles of two jurisdictions may differ though when applied in practice may produce the same results.

A proper knowledge of the legal formants and how they relate to each other help us to determine the factors that affect solutions and indicate the role played by accepted interpretative practices based on academic literature, legal debates stimulated by court decisions etc. in moulding actual outcomes in practice.

b) As a general guideline, we have drafted our questionnaire with a sufficient degree of specificity so as to require the national reporters to address all the factors in his or her system which might impact on the practical application of the applicable rules. Rules formulated in an identical way (for example by an identical provision in two Codes) but which produce different results when applied in practice or even give rise to radically different doctrinal conceptualizations cannot be regarded as identical. Consequently, the structure of the judicial process and the peculiar “style” of the legal system cannot be neglected if we were to obtain accurate results.

We ask each national reporter to provide his/her answers on three levels namely I. “Operative rules”, II. “Descriptive Formants” and (if relevant) III. “Metalegal Formants”. We would like every reporter to maintain this division in each of his/her answers by indicating each level in a separate paragraph marked I, II and III.

The level dealing with “Operative Rules” is designed to be a concise summary. The national reporters are asked to summarize the basic rules applicable to the factual situation in their jurisdiction and to indicate the answers to the questions by application of these rules. Reporters are also asked to state whether the reasoning and result reached are clear and undisputed or unclear and problematic.

The level called “Descriptive Formants” has a twofold goal. The first aim is to indicate the reasons which lawyers feel obliged to advance in support of the ‘operative rules’ and the extent to which the various solutions are consistent either with specific and general legislative provisions, or with traditional or emerging general principles. The reporter is therefore asked to investigate whether the way in which the hypothetical case has been solved by case law in their legal system corresponds with the solution given by the other legal formants. He or she must indicate whether all the legal formants are in agreement. The source of disagreement may be minority doctrines, including dissenting opinions in leading cases and criticisms raised in academic literature or the emergence of new principles which generate solutions differing from the

traditional ones. The reporter must also indicate whether the solution is considered to be a question of fact or a question of law. This factor may determine the degree to which the solution can be enforced by supreme courts against lower courts, as well as the impact of judicial precedent on the solution. The second aim is to investigate whether the solution depends solely on the rules of private law and / or also on rules and institutions outside private law, such as procedural rules (including rules of evidence) and administrative or constitutional provisions.

Finally, the level called “Metalegal Formants” asks the reporter to provide any other information that she considers relevant and that affect the operative and descriptive levels, such as policy considerations, economic factors, social context and values, reform proposals, as well as the structure of the legal process (organization of courts, administrative structure and practice, etc.) when it is relevant for the solution of a given problem.

INSTRUCTIONS ON HOW TO ANSWER THE QUESTIONNAIRE

General directions

Please explain whether the solution in each case will be different in your system if

- (a) The security debtor and/or the security creditor are/is a business entity or a private person;
- (b) The encumbered property is commercial or residential property.

Level I. Operative Rules

Please indicate:

- 1) How the case would be solved by the case law of your legal system;
- 2) Whether this solution corresponds with the solution adopted by other legal formants (prima facie interpretation of statutory law, legal scholarship, legal customs);
- 3) Whether there is significant disagreement inside the different formants, resulting from minority doctrines (dissenting opinions in leading cases, dissensions among legal scholars, etc.), or from the divergence between more recent solutions and the traditional ones;
- 4) whether the solution is considered to be a decision on the facts [question of fact] or a decision on legal principle [a question of law] - this is in order to determine the degree to which the solution can be enforced by supreme courts

against lower courts, as well as the impact of judicial precedent on the matters implied by the solution.

Level II. Descriptive Formants.

Please indicate the reasons for which lawyers feel obliged to give the solution(s) mentioned in Level I, and where appropriate, the arguments proposed in support of the various opinions. Some relevant points may be:

- 1) the consistency/inconsistency of the solution with specific and general legislative provisions, with general principles (traditional as well as emerging ones), and with constitutional provisions directly affecting the subject. Is the solution considered a historical accident?
- 2) Whether the solution is dependent on legal rules and/or institutions outside private law, such as procedural institutions (including rules of evidence), administrative and constitutional (different than those at point 1) provisions;
- 3) How the solution is dogmatically explained; how lawyers justify that solution in light of their taxonomies and conceptual tools.

Level III. Metalegal Formants.

Indicate other relevant elements affecting the solution(s) mentioned at Level I, such as policy considerations, economic and/or social factors, social context and values, reform proposals, the structure of legal process (organization of courts, administrative structure, etc.).