Facilitating cross-border real estate transactions in Europe

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An Exploration

Katja Zimmermann

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DISSERTATION

To obtain the degree of Doctor
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on the authority of the Rector Magnificus,
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in accordance with the decision of the Board of Deans,
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by

Katja Zimmermann

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"[S]ed vita activa secundum quam aliquis praedicando et docendo contemplata aliis tradit, est perfectior quam vita quae solum contemplator."

St. Thomas Aquinas, OP
Summa Theologiae, III, Q. 40, A. 1, Ad 2

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"לֵב אָדָם יְחַשֵּׁב דַּרְכּוֹ וַיהוָה יָכִין צַעֲדוֹ:"

Proverbs 16:9

Every exploration starts with a single step and I am blessed that I have met so many people along the way, who walked the path together with me and shaped me. And more than ever, this path was not only walked symbolically, but also quite literally, leading me 900km through Spain and ten days through the Sahara Desert.

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[1] P. Mendes-Flohr, *Martin Buber: A Life of Faith and Dissent*, New Haven/London: Yale University Press, 2019, p. 41.

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Table of Content

List of Abbreviations

A.D.	Anno Domini
AISBL	Association internationale sans but lucratif (International non-profit organisation (under Belgian law))
ALKIS	Amtliches Liegenschaftskataster-Informationssystem ((German) Official Cadastral Register –Information System)
ANI	attendering op niet-inschrijving ((Dutch) alert of non-registration)
ASBL	Association sans but lucratif (Non-profit organisation (under Belgian law))
B.C.	Before Christ
BeurkG	Beurkundungsgesetz ((German) Notarization Act)
BGB	Bürgerliches Gesetzbuch (BGB) in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. BGBL Jahr 2002 I Seite 42, ber. S. BGBL Jahr 2002 I Seite 2909 und 2003 I S. BGBL Jahr 2002 I Seite 738) (FNA 400-2), zuletzt geändert durch Art. 7 G zur Förderung der Freizügigkeit von EU-Bürgerinnen und -Bürgern sowie zur Neuregelung verschiedener Aspekte des Internationalen Adoptionsrechts vom 31.1.2019 (BGBl. I S. BGBL Jahr 2019 I Seite 54) (German Civil Code)
BNotK	Bundesnotarkammer ((German) National Association of Notaries)
BNotO	Bundesnotarordnung (BNotO) in der Fassung der Bekanntmachung vom 24. Februar 1961 (BGBl. I S. BGBL Jahr 1961 I Seite 97) (BGBl. III/FNA 303-1), zuletzt geändert durch Art. 4 G zur Neuregelung des Schutzes von Geheimnissen bei der Mitwirkung Dritter an der Berufsausübung schweigepflichtiger Personen vom 30.10.2017 (BGBl. I S. BGBL Jahr 2017 I Seite 3618) ((German) Federal Regulation of Notaries)
BVI	bewijs van inschrijving ((Dutch) proof of registration)
BW	Burgerlijk Wetboek, *Stb*. 1969, 257 (Dutch Civil Code)
B2B	Business-to-business
B2C	Business-to-Consumer
CCBE	The European Lawyers
CCRF	Crossborder Conveyancing Reference Framework
CIRCABC	Communication and Information Resource Centre for Administrations, Businesses and Citizens

CLC	The Council for Licensed Conveyancers
CLGE	Council of European Geodetic Surveyors
CNUE	Council of the Notariats of the European Union
CROBECO	Cross Border Electronic Conveyancing
C2C	Consumer-to-Consumer
DDR	Deutsche Demokratische Republik (German Democratic Republic)
DIY	Do-It-Yourself
DNotI	Deutsches Notarinstitut (German Institute of Notaries)
DONot	Dienstordnung für Notarinnen und Notare (bundeseinheitliches Landesrecht) ((German) Official Regulation of Notaries (nationally standardized state law))
ECHR	European Convention on Human Rights
e-CODEX	e-Justice Communication via Online Data Exchange
ECtHR	European Court of Human Rights
E.G.	Exempli gratia
EHHA	European Holiday Home Assocation
EJN	European Judicial Network in Civil and Commercial Matters
ELO	European Land Owners' Organization
ELRA	European Land Registry Association
ELRD	European Land Registry Document
ELRN	European Land Registry Network
ENN	European Notarial Network
ERVGBG	Gesetz zur Einführung des elektronischen Rechtsverkehrs und der elektronischen Akte im Grundbuchverfahren sowie zur Änderung weiterer grundbuch-, register- und kostenrechtlicher Vorschriften (ERVGBG) vom 11. August 2009 (BGBl. I S. 2713)
EU	European Union
EULIS	European Land Information Service
European Succession Regulation	Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107–134.
FAO	Food and Agriculture Organization of the United Nations
FIG	International Federation of Surveyors
GDPR	General Data Protection Regulation
HM	Her Majesty's
IATE	InterActive Terminology for Europe
I.e.	Id est
IMOLA	Interoperability Model for Land Registers
IPRA-CINDER	International Property Registries Association and International

	Centre of Registration Law
ISO	International Organisation for Standardisation
ITEM	Institute for Transnational and Euregional cross border cooperation and Mobility
Kadasterregeling 1994	Kadasterregeling 1994, *Stcrt*. 1994, 81
Kaderwet zelfstandige bestuursorganen	Wet van 2 november 2006, houdende regels betreffende zelfstandige bestuursorganen (Kaderwet zelfstandige bestuursorganen), *Stb*. 2006, 587
Kadw	Kadasterwet, *Stb*. 1989, 186 ((Dutch) Land Registry Act)
KIK	Ketenintegratie Inschrijving Kadaster (Dutch system for the automated registration of deeds)
KNB	Koninklijke Notariële Beroepsorganisatie ((Dutch) Royal Chamber of Notaries)
LADM	Land Administration Domain Model
LandVoc	Linked Land Governance Thesaurus
LGAF	Land Governance Assessment Framework
LPA 1925	Law of Property Act 1925
LRA 1925	Land Registration Act 1925
LRA 2002	Land Registration Act 2002
LRI	Land registers interconnection project
LRR 2003	Land Registration Rules 2003
M	Meter
MM	Millimeter
N/A	Not applicable
NLIS	National Land Information Service
ONPI	Permanent Notarial Office of International Exchange
P	Page
Para	Paragraph
PCC	Permanent Committee on Cadastre in the European Union
PIL	Private international law
PLAN	Property Legal Advice Network
R	Rule
RPflG	Rechtspflegergesetz ((German) Judicial Officers Act)
S	Section
SDT	Solicitors Disciplinary Tribunal
SRA	Solicitors Regulation Authority
STDM	Social Tenure Domain Model
TCN	Third country national
TEU	Consolidated version of the Treaty on European Union (TEU) (OJ C 326, 26.10.2012, p. 13–390)
TFEU	Consolidated version of the Treaty on the Functioning of the

	European Union (TFEU) (OJ C 326, 26.10.2012, p. 47–390)
UINL	International Union of Notaries
UIPI	International Union of Property Owners
UN	United Nations
UNECE	United Nations' Food and Agriculture Organisation and the United Nations Economic Commission for Europe
VKG	Voorlopige kadastrale grenzen ((Dutch) preliminary cadastral boundaries)
VTV	Verzoek tot verbetering ((Dutch) request for correction)
Wna	Wet op het notarisambt, *Stb*. 1999, 190 ((Dutch) Act on the Notarial Profession)
WPLA	Working Party on Land Administration
ZPO	Zivilprozessordnung ((German) Code of Civil Procedure)

Tables & Figures

TABLES

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1 Introduction

Everyone who has at least once been involved in the process of acquiring a plot of land can attest the complexity of such an undertaking. When European citizens acquire a plot of land in a different Member State or from a foreign seller, another level of complexity is ultimately added to this process. After all, significant differences exist between the national property laws, land registration systems, and the role of legal professionals across the EU Member States. Although reliable, up-to-date, and freely accessible statistics on the frequency of such cross-border real estate transactions in Europe could not be discovered, available statistics on intra-EU migration flows indicate that the frequency of such transactions will significantly increase in the near future. After all, the freedom of establishment in the EU paired with the free movement of persons and capital entail the freedom to acquire real estate in a different Member State. However, it must be acknowledged that cross-border real estate transactions do not only occur with the aim of acquiring a new primary place of residence, but can also be targeted on the acquisition of a secondary residence (e.g. a vacation house) or a buy-to-let investment. Nevertheless, independent of type of cross-border transaction and the exact nature and intensity of the challenges inherent in these transactions, at the end of the day it must be acknowledged that the mere existence of such challenges poses difficulties to the execution of such transactions, leading them to be more cost intensive and time consuming than a real estate transaction that occurs solely within the territory of a single state. Therefore, the existence of these challenges ultimately distorts the proper functioning of the EU internal market. For these reasons, it is argued that cross-border real estate transactions demand facilitation. The purpose of this thesis is to analyse how such a facilitation can be realized. To this end, in a first step, it is vital to gain an in-depth understand of the broad variety of European land registration systems and how they approach real estate transactions both in theory and practice. Afterwards, it will be determined why cross-border real estate transactions are exposed to more (intense) challenges than comparable national transactions and what the current state of affairs is when it comes to the facilitation of cross-border real estate transactions. Once this information has been gathered and analyzed it remains to be assessed how European cross-border real estate transactions can be further facilitated. However, before we immerse ourselves in the analysis of these questions, we shall first turn our attention to the methodological framework that underlies this thesis.

2 Methodology

If a study is silent about its underlying methodology, the readers are left in a position in which they are unable to assess the validity and reliability of the study's outcomes. In other words, they do not have a choice other but to blindly trust on the author's research and analysing skills. Therefore, the reader shall be acquainted with the used methodology. In an attempt to conduct this study in a manner that is as systematic as possible, the empirical research cycle is adhered to.[2]

2.1 Research Question

This study attempts to provide an answer to the following "design-oriented" research question[3]:

"How can cross-border real estate transactions involving residential property in Europe be facilitated?"

Before we can move on to the sub-research questions, some of the terms used in the main research question need further clarification.

"Cross-Border"

To begin with, the term "cross-border" refers to the situation in which a real estate transaction contains one or more foreign elements. This element can be linked to the nationality of the parties involved, their place of residence, or the location of the real estate. A cross-border element is thus evidently present in a case where for example a buyer living in Germany acquires Spanish real estate from a seller living in Spain or the Netherlands. It is also present in a case in which an English national living in Germany sells their real estate located in Germany to an English or Portuguese national, who resides in Germany. And to provide a third and last example for a cross-border case, imagine the situation in which both seller and buyer have Dutch nationality and reside in the Netherlands while the real estate is located in Sweden.

[2] F.L. Leeuw & H. Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators*, Cheltenham; Northampton: Edward Elgar Publishing, 2016, p. 15.
[3] F.L. Leeuw & H. Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators*, Cheltenham; Northampton: Edward Elgar Publishing, 2016, p. 48.

"Transactions"

The second term that needs to be defined is "transactions". Transactions involving real estate are numerous; they can entail the creation and extinction of a property right on an immovable property, a transfer of entitlement to and a burdening of such a right. While the case studies take account of this variety of transactions to the greatest extent possible, the main focus of this study is laid on transfers of the so-called primary property rights, which concern the right of ownership in civil law countries and the freehold in common law countries.[4] To be more specific, it focusses on transfers that are the product of party autonomy in opposite to transfers that occur by operation of the law or as a result of inheritance.

"Europe"

Third, the term "Europe" is restricted to the Member States of the European Union. At the moment of completion of this thesis, the United Kingdom was still an EU Member State.

"Facilitate"

Last, the term "facilitate" shall be clarified. As shall be explained in Chapter 4, cross-border real estate transactions are subject to a number of problems and difficulties. A facilitation of such transactions is to express a reduction of the number of these obstacles.

SUB-RESEARCH QUESTIONS

In order to answer the main research question, a number of sub-research questions have to be asked and answered. The following sub-research questions were construed:

1 How do real estate transactions occur across the different European countries?

- What is the constitution of land registration?
- What is the role of the legal practitioner?
- What is the role of the land registrar?
- What is the relationship between the legal practitioner and the land registrar?
- Which information can be entered in the land register?
- Is the information that is entered in the land register publicly available?

[4] S. van Erp & B. Akkermans (eds.), *Cases, Materials and Text on Property Law*, Oxford/Portland, Hart Publishing, 2012, p. 53.

- What is the legal value of the information that is entered in the land register?
- How does the process of transferring a plot of land in a purely national case look like?
- What exactly is the object of a real estate transaction and how are boundaries defined?
- To what extent is land registration digitalized?
- How are cross-border real estate transactions approached?

2 Why are cross-border real estate transactions more challenging than purely national real estate transactions?

- Which problems arise in cross-border real estate transactions that do not arise in purely national real estate transactions?
- Is it desirable to combat these problems?

3 What is the current state of affairs when it comes to the facilitation of European cross-border real estate transactions?

- Are there European private initiatives in the field that were created by the European legal practitioners, land registrars or other interest groups?
- Are there international initiatives in the field that facilitate cross-border real estate transactions in Europe?
- Do these initiatives fully address the problems that are inherent in cross-border real estate transactions?

4 In view of the current state of affairs, how can European cross-border real estate transactions be facilitated even further?

- Which are the problems that remain to be solved?
- How can these problems be solved?

2.2 Hypotheses

Hypotheses are nothing more than preliminary answers to research questions.[5] They are simply predictions, based on the already existing expertise in the field, whose correctness will be tested in the course of this study. For the purpose of this study, the following hypotheses were formulated.

[5] L. Epstein & A.D. Martin, *An Introduction to Empirical Legal Research*, Oxford: Oxford University Press, 2014, p. 30-31.

MAIN RESEARCH QUESTION

How can cross-border real estate transactions in Europe be facilitated?

Cross-border real estate transactions can be facilitated by (i) introducing standardized multilingual templates for deeds of transfer and land registration output, (ii) creating a legal basis for the registration of such deeds in the land register, (iii) providing a secure platform for the exchange of information, (iv) creating a central and transparent database which contains all relevant information for practitioners, and (v) introducing a greater flexibility in the national land laws regarding the choice of applicable law to the contract of sale.

SUB-RESEARCH QUESTIONS

1 How do real estate transactions occur across the different European countries?

Within Europe, different transfer and registration systems exist that can be combined in more than one way. Nevertheless, it is expected that the continental land registration systems will, as a result of their Napoleonic inheritance, be more similar to each other than to the land registration system of England, where the legal interests on a parcel instead of the parcel as such constitute the organizing unit of the land register.

What is the constitution of land registration?

Different models of organizing land registration must be distinguished. In some countries, the judicial registration of rights in land is bestowed on a different organization than the cadastral and topographical registration of the land. In other countries, these tasks are entrusted on the same organization.

What is the role of the legal practitioner?

The role of a Latin notary, who acts for both parties, is different from the role of a common law practitioner (conveyancer/solicitor), who represents the interests of only one party to the real estate transfer. Nevertheless, even within the Latin notariat it is expected to see – at least to some extent – differences in the role of the notary, i.e. depending on whether a notarial deed is prescribed to effectuate the transfer of real estate in a given country.

What is the role of the land registrar?

The role of the registrars depends on whether the respective national legislator has conferred upon them the duty to control both formal and material registration requirements or whether they must restrict their control to formal registration requirements.

What is the relationship between the legal practitioner and the land registrar?

The relationship between the legal practitioners and the land registrars depends on a multitude of factors. The spectrum of possible relationships can principally reach from closed communication channels between these two professions to a regular and mutually beneficial exchange of information and the approval of binding agreements. However, it is expected that a working relationship between these professions can be found in all European countries.

Which information can be entered in the land register?

As a point of departure, it is expected that there is a common standard set of property rights on land that can be entered in the different national land registers. In addition to this common set, there will be (property) rights that can only be registered in the land registers in some countries or even only in a single country. Furthermore, it is imaginable that this common standard set of property rights, while constituting registrable rights, cannot in its entirety be entered in the land register as such but is partly entered in different registers that are kept either by the land registry itself or by other (governmental) institutions.

Is the information that is entered in the land register publicly available?

The information entered in the land registers of all European countries is in principle publicly available. However, it may not unconditionally be accessed by all members of the public, but access might depend on the existence of a legitimate interest. It is expected that a wide scale of varieties exist, ranging from systems where land register information is disclosed unconditionally to anybody who is willing to pay a small fee for access to that information to systems that grant access to all its land register information only upon demonstration of a legitimate interest.

What is the legal value of the information that is entered in the land register?

While in some countries the information entered in the land register can be legally relied upon, in other countries this is not the case so that for a person who tries to identify the owner of a particular parcel of land the assessment of the underlying deeds and documents forms a *conditio*

sine qua non.

How does the process of transferring a plot of land in a purely national case look like?

The process of transferring a plot of land in a purely national case depends on a multitude of variables such as the transfer system (abstract vs causal; consensual vs tradition), the registration system (negative vs positive; deed vs title), and the mandatory intervention of a civil law notary or common law practitioners.

What exactly is the subject of a real estate transaction and how are boundaries defined?

The first go-to answer might be the cadastral map. At the end, the cadastral map visualizes the location of the different parcels within a given territory against the location of its surrounding parcels. Although the survey techniques have significantly improved in the course of the last decades when it comes to preciseness, one must realize that even with the most modern GPS survey technique one cannot determine the exact run of the boundary, due to the fact that one must always include a potential discrepancy between the run of the boundary in the territory and the surveyed boundary.[6]

To what extent is land registration digitalized?

Digitalization has not found its way to all European land registries to the same extent. While the work process in the land registries of some European countries still is heavily paper-based, other countries are more digitally advanced so that paper transactions nowadays rather constitute a dying breed.

How are cross-border real estate transactions approached?

It is a central principle of European private international law that the transfer of a plot of land is governed by the lex rei sitae.[7] In the absence of bilateral treaties or European law, it is therefore

[6] For a real-life illustration of this divergence, access: Website GEOPORTAL.DGU.HR (Croatia) (https://geoportal.dgu.hr/), as consulted on 29.05.2019 and Website MAPKA.GKU.SK (Slovakia) (http://mapka.gku.sk/mapovyportal/), as consulted on 11.06.2019.

[7] Only few European PIL rules exist that apply to real estate transactions. See article 1 (2)(l) Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, 27.7.2012, p. 107–134). With regard to the contractual obligations arising out of a real estate transaction, a choice of law is possible on the basis of article 4 (1)(c) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6–

expected that national legislations reflect a rather hesitant approach towards the possibility of entering a deed in the land register that has been drawn up by a notary who practices in a different country. Moreover, it is not possible in all European countries to register bi- or multilingual deeds.

2 Why are cross-border real estate transactions more challenging than purely national real estate transactions?

Purely national real estate transactions are complex undertakings. If such a transaction includes one or more cross-border elements, then these cross-border elements come with an additional load of obstacles that need to be solved.

Which problems arise in cross-border real estate transactions that do not arise in purely national real estate transactions?

Problems that are exclusive to cross-border real estate transactions can be of an administrative (e.g. translation and travel costs), cultural (e.g. avoiding cultural misperceptions), legal (e.g. the application of a foreign law) or technological nature (e.g. the possibility to submit digital deeds for registration in the land register).

Is it desirable to combat these problems?

The differences between the national land registration systems, especially regarding the applicable law, the role of the involved professionals, the accessibility of land registration information, and the ability to register foreign notarial deeds pose obstacles to cross-border real estate transactions. Considering that the number of cross-border immovable transactions is growing, a facilitation of these transactions by removing these problems to the extent possible is thus desirable.

3 What is the current state of affairs when it comes to the facilitation of European cross-border real estate transactions?

The European and international state of affairs in this field is still in one's infancy and rather carefully and slowly evolving. While a handful of fascinating projects have been brought into being in the last two decades, there still remain several obstacles that hamper cross-border real estate

16). Also see Chapter 5.2.3.2. Also see S. van Erp & B. Akkermans (eds.), *Cases, Materials and Text on Property Law*, Oxford/Portland, Hart Publishing, 2012, p. 1017.

transactions.

Are there European private initiatives in the field that were created by the European notaries, land registrars or other interest groups?

European initiatives exist and focus either on the strengthening of collaboration between professionals in different countries or on the exchange of information, both within the legal frameworks of their respective systems.

Are there international initiatives in the field that facilitate cross-border real estate transactions in Europe?

There are some international initiatives that can help to facilitate cross-border real estate transactions in Europe by providing information about a given country's land registration system. However, the information given is expected to be of a rather broad nature and does not include the technicalities that underlie the systems. Therefore, when intending to acquire real estate in a foreign European country, these initiatives cannot replace expert advice, such as those of a civil law notary or respectively a common law practitioner.

Do these initiatives fully address the problems that are inherent in cross-border real estate transactions?

The already existing initiatives do not yet fully remedy the problems that arise in a cross-border real estate transaction.

4 In view of the current state of affairs, how can European cross-border real estate transactions be facilitated even further?

It is expected that the current state of affairs does not sufficiently enhance European cross-border real estate transactions so that other measures should be developed.

Which are the problems that still need to be solved?

The already existing initiatives focus on the enhancement of access to necessary information. Therefore, it is expected that all problems that are not connected to information access are left to be solved.

How can these problems be solved?

Although this study is not restricted to EU territory, taking into account the principles of subsidiarity and proportionality, it is expected that an advancement of the coordination and cooperation of the different actors involved in the registration process, light integration measures or the creation of a flexible model code, can find political consensus more easily than a unification of European land registration systems. To enable mutual understanding of each other's systems, it is necessary that the professionals involved are not only experts of their own national law but also have a solid background in comparative and EU law as well as in private international law.

2.3 Research Review

Generally speaking, there has not been much academic research been done in this field. When it comes to in-depth literature on comparative land registration law and the European status quo in the field, it had to be concluded that only few such sources exist.[8] However, especially when it comes to the existing projects that have been set up by different European stakeholders such as CNUE, ELRA and EULIS, detailed insight information about their in's and out's dealing with for example their historical background, the exact practical procedures and implications for the parties involved could only be found to a limited extent. Furthermore, official audits of these projects could not be found. Taking the foregoing into consideration we quickly discover that the air is even thinner when it comes to existing literature, when we leave the comfort zone of describing and comparing national land registration systems and the already existing European projects in this field and we instead work round to a future vision for the facilitation of cross-border real estate transactions in Europe. In fact, the last such future vision that could be found dates 2006 and is the "EuroTitle".[9]

2.4 Research Design

In order to formulate a response to the main research question use will be made of case study designs.

[8] For an overview of the available literature, see Chapter 5.6.
[9] For more information about this proposal, see Chapter 5.6.1.

1 How do real estate transactions occur across the different European countries?

To answer this question, case studies are conducted, in which the set-up of the land registration system and the process of transferring land are compared. As the understanding of the national property law regimes is the foundation upon which the remaining parts of this study are built, it is essential that a systematic study be conducted. The outcome of this approach is a thorough analysis of the chosen national systems. It is for this reason that the case studies are conducted first.

An analysis of the (immovable) property law and registration regimes of all European countries cannot be reconciled with the limitations of this study. Therefore, a selection needed to be made. The three legal systems that were chosen are the Netherlands, Germany, and England & Wales. This selection was the product of the application of five considerations. Firstly, the outcome of this selection procedure is to guarantee that the major property law traditions are represented.[10] Second, it was decided to include representatives of a common law system and a civil law system.[11] This is due to the fact that the (fragmented) common law approach to the notion of ownership (of land) greatly differs from the (unitary) civil law approach of ownership. Third, the two main types of registration systems (negative and positive systems) shall be represented. Fourth, the position of the country in the discussion surrounding the cross-border transfer of land influenced the choice of the legal system. Hereby, countries that are actively involved in the discussion were put in the focus. Within this group, it was ensured that the selection contained countries that demonstrate a more open approach to European integration in this field as well as countries that are more reserved. Fifth and last, language skills had a minor influence on the selection of the legal systems. The underlying assumption is that one can only conduct an in-depth case study of a particular legal system, if one is able to read and comprehend the legislation and the doctrine in the native language of that system. This was considered crucial as on the one hand high-quality translations of national case law (especially of lower courts) and the relevant legal acts are often non-existent and as on the other hand the involvement of a qualified translator would be too cost-intensive.

[10] S. van Erp, 'Can European Property Law be Codified? Towards the Development of Property Notions', in: L. Chen & C.H. van Rhee, *Towards a Chinese Civil Code: Compara.tive and Historical Perspectives*, Leiden: Brill, 2012, p. 156.
[11] M. Oderkerk, 'The Need for a Methodological Framework for Compara.tive Legal Research – Sense and Nonsense of "Methodological Pluralism" in Compara.tive Law', *The Rabel Journal of Compara.tive and International Private Law* 79/3 (2015), p. 605-606.

2 Why are cross-border real estate transactions more challenging than purely national real estate transactions?

The first sub-question is approached by a case study design. Based on a fictious cross-border transaction case, it is determined which obstacles are faced by the parties involved (buyer, seller, legal practitioner, and land registrar). After having catalogued these obstacles, it is analysed whether these obstacles exclusively occur in cross-border transactions or whether they also affect purely national transactions. In a last step, the desirability to address these obstacles will be scrutinized.

3 What is the current state of affairs when it comes to the facilitation of European cross-border real estate transactions?

In order to provide a comprehensive overview of the existing private European, EU, and international initiatives and to assess in how far these undertakings succeed in addressing the problems that are faced in cross-border real estate transactions, use will again be made of a case study design.

4 In view of the current state of affairs, how can European cross-border real estate transactions be facilitated even further?

After having identified how real estate transactions occur in the chosen European countries and having inventoried the already existing European and international initiatives in the field, the most challenging (but also the most interesting) mental exercise of this study lies before us, namely the formulation of possible solution statements for the remaining obstacles.

2.5 Data Collection

The research was conducted in German, Dutch, and English so that the collected data primarily comes forth from sources that are available in either of these languages.

1 How do real estate transactions occur across the different European countries?

In order to facilitate the comparison and contrasting of the different case studies, they adhere to a common template that orients itself on the sub-sub-questions that were formulated for this sub-question. These questions were primarily answered through desktop research. Once the case studies are completed, they are compared and contrasted with each other. The different "existing jurisdictions are [then] treated as laboratories for dealing with conflicting normative positions" to allow the discovering of the advantages and disadvantages of particular legal rules in a given legal setting.[12] It can then also be analysed whether any common thought patterns can be found. To validate the theoretical knowledge gained through this exercise and to find answers to the last open questions, contact was sought with several practitioners and academics in the three chosen jurisdictions.

2 Why are cross-border real estate transactions more challenging than purely national real estate transactions?

Desktop research was done into possible challenges connected to cross-border real estate transactions and the desirability to remove them. These findings were complemented by the findings from the cases studies and the practical work experiences gained in this field.

3 What is the current state of affairs when it comes to the facilitation of European cross-border real estate transactions?

The case studies were realized through desktop research. Only materials that were publicly accessible were used to complete this chapter.

4 In view of the current state of affairs, how can European cross-border real estate transactions be facilitated even further?

Considering that this sub-question builds on the preceding sub-questions, it does not come as a surprise that the data that is necessary to answer this sub-question comes forth from the research conducted within the ambit of the foregoing sub-questions.

[12] J.M. Smits, *The Mind and Method of the Legal Academic*, UK: Edward Elgar Publishing Ltd, 2012, p. 76-77.

2.6 Limitations of this Study

Cross-border real estate transactions can be analysed from different angles. This study's approach is restricted to a legal analysis of the different procedures that lead to the transfer of rights in real estate and to the consideration on how these procedures can be facilitated. Although the problem of acquiring (cross-border) financing to realize such transactions through mortgages is closely related to this topic, it could not be explored in the course of this study in order to ensure the manageability of its scope. The same holds true for a discussion of economic or tax implications of cross-border real estate transactions.

2.7 Specification of Terminology

When describing a national legal system in a foreign language and when comparing such systems with each other, it is of utmost importance to prevent Babylonian confusions. For this reasons, it might prove helpful for the reader to be informed about the linguistic choices that were made. An overview of these choices can be found below:

Table 1 – Specification of Terminology

Adverse Possession & Prescription	In comparative literature, the term used to describe the acquisition of a right of ownership with regard to a specific parcel of land through passing of a set limitation period is commonly referred to as "prescription". While this term does justice to do chosen civil law systems, it does not fit the English system. This is due to the fact that the "prescription" has a narrower meaning as it applies only to secondary property rights. The corresponding English term that refers to the acquisition of a primary property right is "adverse possession".[13] This distinction is applied in the case studies; to indicate the acquisition of a primary property right through the run of the limitation period, the term "prescription" is used for the civil law system, while the term

[13] S. van Erp & B. Akkermans (eds.), *Cases, Materials and Text on Property Law*, Oxford/Portland, Hart Publishing, 2012, p. 734.

	"adverse possession" is used for the English system.
cadastre	The FIG definition of the term 'cadastre' has been used, as referred to also in the Multilingual thesaurus on land tenure: "A cadastre is normally a parcel based and up-to-date land information system containing a record of interests in land (i.e. rights, restrictions and responsibilities). It usually includes a geometric description of land parcels linked to other records describing the nature of the interests, and ownership or control of those interests, and often the value of the parcel and its improvements. It may be established for fiscal purposes (e.g. valuation and equitable taxation), legal purposes (conveyancing), to assist in the management of land and land use (e.g. for planning and other administrative purposes), and enables sustainable development and environmental protection".[14]
Cadastral Organization	The organization upon whom the task is conferred to keep and maintain the cadastre shall be referred to as the "Cadastral Organization". This organization is often simply referred to as the "Cadastre". It turned out that the use of this term can at times lead to confusion, as the reader might not be able to distinguish whether the organization or the information system is being referred to. In the interest of greater specificity, the choice has thus been made to use the term "cadastre" solely in reference to the information system (in line with the FIG definition) and to refer to the organization as the "Cadastral Organization".
Interest in land & Estate in land	The definitions of "interests" and "estates" as employed in s2 (a) LRA 2002 will be adhered to.

[14] G. Ciparisse (eds.), *Multilingual thesaurus on land tenure*, Rome: FAO, 2003, p. 85. Also see Website FIG, 'FIG Statement on the Cadastre (FIG Publication No. 11)' (http://www.fig.net/resources/publications/figpub/pub11/figpub11.asp), as consulted on 25.04.2019.

Land administration	The term 'land administration' is used as an umbrella term for the registration of rights and legal facts on a parcel of land (in the land register) and the registration of topographical information with regard to the same parcel of land (in the cadastre).[15]
Land register	The term 'land register' is used to refer to "the definitive record of all registered properties, [which] comprises the registered details for each property".[16]
Notary	The term notary exclusively refers to a member of the Latin notariat and does not include the so-called notary public.
Foreign/Dutch/ German notary	The terms "foreign/ Dutch/ German notary" do not refer to the nationality of the notary, but to the country in which they may exercise their notarial function. The same holds true for the "foreign/ Dutch/ German/ English legal practitioner/ legal professional/land registrar".
Legal practitioner	In the civilian systems discussed, real estate transactions foresee in the mandatory intervention of a notary. This is not the case in England, where dealings in real estate can be effectuated without the assistance of a lawyer. A common law counterpart of the Latin notary therefore does not exist. Instead, parties can ask assistance of members of different professions (such as licensed conveyancers and solicitors). To embrace the variety of these professions, the umbrella term "practitioner" will be used.
Legal professional	This category includes both legal practitioners and land registrars.
Negative vs. positive	Within the field of land (registration) law in general but especially

[15] C. Lemmen, *A Domain Model for Land Administration*, Delft: Publications on Geodesy 78, 2012, p. 8-9.
[16] G. Ciparisse (eds.), *Multilingual thesaurus on land tenure*, Rome: FAO, 2003, p. 89.

registration systems

in the Dutch context, national registration systems are often classified as either negative, semi-negative/positive, or positive registration systems, though not necessarily with consistent conotations.[17] For the purpose of this thesis, a positive registration system, as it is in place in Germany and England & Wales, is a registration system, in which the land registry can be held liable if the content of the land register proves to be incorrect or incomplete.[18] Hence, the land registrar fulfils a more active role in determining when the land register can be updated on the basis of the information contained in the many deeds that reach the land registry on a daily basis.[19] Contrariwise, a negative registration system, as is in place in the Netherlands, is a registration system in which the land register cannot be held liable if the content of the land register proves to be incorrect or incomplete.[20] As a result, the land registrar's role in the registration process is more passive in the sense that all deeds that fulfil the registration requirements must be registered even if the land registrar has a justified suspicision or even possesses knowledge that the content of a deed is incorrect.[21]

Additionally, in order to facilitate the comparison of the chosen jurisdictions, it proved necessary to use English pivot terms to refer to the corresponding national terms under Dutch, German, and English law. In Chapter 3.4, the considerations that underlay this coupling exercise are further elucidated. The following key pivot terms were used:

[17] For a more extensive discussion of this distinction, see: J. Zevenbergen, *Systems of Land Registration: Aspects and Effects*, Delft: Nederlandse Commissie voor Geodesie, 2002, p. 63-64.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Ibid.

Table 2 – Use of English Pivot Terms

	THE NETHERLANDS	GERMANY	ENGLAND & WALES
Land Registry	Kadaster	Grundbuchamt	HM Land Registry
Land register	Openbare registers	Grundbuch	Register of title
Folio	N/A[22]	Grundbuchblatt	Individual register
Cadastral Organisation	Kadaster	Katasteramt	N/A
Cadastre	Basisregistratie kadaster	Liegenschaftskataster	N/A
Cadastral map	Kadastrale kaart	Liegenschaftskarte	N/A
Cadastral register	Kadastrale registratie	Liegenschaftsbuch	N/A
Parcel	Perceel	Flurstück	N/A
Plot	Erf	Grundstück	Land
Land registrar	Bewaarder	Rechtspfleger	Chief Land Registrar
Legal practitioner	Notaris	Notar	Solicitor/ Licensed conveyancer

[22] In the Netherlands, a technical term does not exist for the digital land register folio anymore.

2.8 Gender-Neutral Language

In pursuance of preventing gender-based discrimination, gender-neutral language has been used wherever possible. When providing examples, especially in the course of the case studies, this has proven challenging. Singular pronouns in the third person could not in all cases be replaced by other techniques such as the use of plural or "s/he" constructions to avoid gender-bias as this would have significantly sacrificed the readability of the text. Also, the replacement of singular pronouns by a plural pronoun seems to not have found universal acceptance yet; according to the English Oxford Living Dictionaries, it is "a matter of opinion" whether the use of a plural pronoun in these cases is in alignment with the grammatical rules although it cannot be disregarded that it is used more regularly in literature.[23]

2.9 Impartiality

This research project could not have been realized without the generous financial support of the Institute for Transnational and Euregional cross border cooperation and Mobility ("ITEM") and the Cadastre, Land Registry and Mapping Agency of the Netherlands ("Kadaster"). By the same token, this meant that the protection of the impartiality of the research has been an important point of awareness from the very beginning. Neither ITEM nor the Kadaster have formulated conditions on the design, execution, or outcome of this project and these elements have not been pre-decided with these institutions. Any decisions regarding the employed methodology or the content of this study are therefore the sole result of the author's own discretion.

2.10 Impact Statement

Real estate transactions are complex legal transactions. When European citizens acquire a plot of land in a foreign European country or from a seller, who resides in a different EU Member State, these real estate transactions constitute cross-border transactions, which considerably surmount the complexity that is already inherent in real estate transactions that occur within the boundaries of a single Member State. Statistics indicate that the frequency with which cross-border real estate

[23] Website English Oxford Living Dictionary, 'Using `They' and `Them' in the Singular' (https://en.oxforddictionaries.com/grammar/using-they-and-them-in-the-singular), as consulted on 19.01.2018.

transactions occur, will keep increasing in the future. After all, it must be realized that EU citizens do not only acquire real estate as primary residences when exercising their free movement rights to establish themselves in a different Member State, but also as secondary residences (e.g. holiday homes) or buy-to-let investments. It is against this background that this doctoral thesis presents different strategies to reduce the complexity of cross-border real estate transactions, thereby facilitating the exercise of free movement rights of EU citizens and consequently contributing to the proper functioning of the EU internal market.

The development of such strategies is the result of a four-step procedure. For the purpose of gaining an in-depth understanding of the divergences and commonalities underlying national land registration systems, the first step consisted of the description and comparison of the land registration systems of the Netherlands, Germany, and England. Hereby, careful attention was not only accorded to the discussion of the applicable theoretical legal frameworks but also to the understanding of how these theoretical frameworks unfold in day-to-day legal practice. Based on this analysis, the challenges that European citizens and legal professionals find themselves confronted with in the context of cross-border real estate transactions were distilled, described, and divided into the categories of administrative, cultural, legal, and technological challenges. In a third step, it remained to be assessed whether these challenges have already been addressed by existing initiatives. To this end, an inventory of all relevant European and international projects, which have the potential to contribute to the reduction of the number or intensity of these challenges, was taken. After having analyzed these projects, it could be determined which of these challenges have already been (partly) addressed and which challenges still need attention. Based on this analysis, strategies for the further reduction of these challenges were developed to effectuate a decrease in complexity inherent to cross-border real estate transactions.

The impact of the formulation of these strategies, constituting the final product of this dissertation, as well as of the underlying body of research depends on the specific interest group. From an academic perspective, it is intriguing that despite the high interest in facilitating cross-border real estate transactions, academic studies that systematically approach this topic are still rare. This doctoral thesis intends to help fill this void by aiming to expressly provide relevant insights for the various policy and decision-makers active in the field. In some instances, European or international projects aiming to facilitate cross-border real estate transactions are set up without realizing that another organization has already conducted valuable work in the same area. As a result, and this is

one of the main findings of this dissertation, there is a noticeable tendency on both European and international level to re-invent the wheel when setting up new projects. The reduplication of efforts is not only inefficient and financially disadvantageous but can in turn – almost paradoxically – even add another level of complexity. To provide just one example, it can be observed that several organizations have independently worked on thesauri in the field of comparative land (registration) law. In the absence of cooperation among those institutions, these thesauri will not be compatible with each other and if two or more of them are linked to a central database, such as the e-Justice Portal, difficulties are preprogrammed. The systematic account of the existing initiatives in the field in combination with the identification of challenges that are inherent in cross-border real estate transactions helps decision-makers to identify in which areas the phenomenon of re-inventing the wheel occurs and creates an invitation to foster a spirit of increased cooperation between the individual organizations. In addition, it also highlights those challenges that have not yet been (sufficiently) addressed and suggests strategies for further action. On national level, knowledge about foreign land registration systems can benefit cadastres, land registries, notarial occupation groups, and other stakeholders in various ways. For instance, when deciding on new national policy questions, valuable lessons can be learned from foreign experience. But even in day-to-day legal practice, legal practitioners are already confronted with cross-border cases, such as in the areas of succession and insolvency law, whereby a solid understanding of a foreign land registration system can navigate the practitioner like a GPS system. Yet oftentimes, descriptions of land registration systems are often either available only in the official language of the *lex registrationis*, which necessarily limits their accessibility by foreigners, or are limited to merely one or more aspects of the land registration system. Therefore, legal practitioners as well as the corresponding head organizations can greatly benefit from descriptions of foreign land registration systems that are both extensive and drafted in a language that is widely understood in Europe. Last but not least, on a micro level, European citizens, who are involved in future cross-border real estate transactions, will be able to indirectly benefit from this research if this doctoral thesis succeeds in making a contribution to the facilitation of cross-border real estate transactions.

2.11 Conclusion of the Research Stage

The research stage of this thesis was concluded on 22 July 2019. After this date, revisions were made to Chapters 5 and 6 until 14 September 2020 to ensure the currentness of this thesis. The small case studies contained in Chapter 5 that were conducted on 13 November 2018, ("European

Directory of Notaries"), 10 December 2018 ("CNUE real estate checklists"), and on 21 January 2019 ("ELRN factsheets") were however not reproduced.

3 The Registration of Property Rights on Land

The history of the European land registration systems is often linked to Napoleon Bonaparte. Yet, to restrict its history to the 18th century would only produce a distorted image of these institutions. Although it is true that the cadastres as we know them in Europe today were established in the course of the 19th century and thus constitute a relatively new institution when measured on the axis of time, it must be realized that forerunners of the cadastral maps (maps that were engraved on clay tablets) were already used as early as 3000 B.C. by the Egyptians as a source of evidence to solve border disputes when the Nile river annually overflowed.[24] But apart from developments on the African continent, attention also needs to be given to the fact that large parts of Europe have been subject to surveyancing long before Napoleon appeared on the screen of world history. Most prominently, an order to survey the Roman Empire and to set up a cadastral registry was issued for taxation purposes by Emperor Diocletian in the third century A.D.[25] Simultaneously, the creation of a cadastre fulfilled another main function: it served the purpose of allocating rights to specific plots of land.[26] The cadastre is however not the only institution that predates Napoleon. The same holds true for land registers. A more primitive form of land registers had not only been familiar to the Egyptians at the time of the Roman Empire but even to Ancient Greece.[27] Interestingly, the concept of a land register was alien to Roman law due to the fact that a distinction was not made between movables and immovables.[28] Rome is however the cardinal point to which the roots of the Latin notarial profession can be traced back when in the early 4th century Constantine the Great enacted two pieces of legislation which prescribed the notarization of both donations and contracts of

[24] H.A.L. Dekker, *Kadaster*, Leiden: Nederlandsche Uitgeversmij. (NUMIJ) B.V., 1987, p. 1. Also see H.J. Rijtma, *Het kadaster*, Deventer: Kluwer, 1966, p. 2-3. Also see W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 8.
[25] H.A.L. Dekker, *Kadaster*, Leiden: Nederlandsche Uitgeversmij. (NUMIJ) B.V., 1987, p. 1.
[26] Ibid.
[27] W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 1. Also see D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 7 and H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 2-3.
[28] Ibid. Also see M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 115 and H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 107.

sale.[29] Contracts, deeds, and last wills were drawn up by the Roman "*tabellio*", who in opposite to the modern notaries were not public officials but freelancers so that the deeds and other documents that were produced by this profession lacked official authority.[30] This only changed when the decision was taken to closely regulate this profession after the number of "*tabellio*" dramatically increased.[31] Obviously, it would go beyond the scope of this chapter to provide a comprehensive historic account of the development of the cadastre, land register, and Latin notariat in Europe until the present. Nevertheless, in the beginning of each case study, the development of the constitution of land registration in the respective country shall be sketched to allow a better understanding of the current land registration system.

3.1 The Netherlands

3.1.1 The Constitution of Land Registration

The Dutch cadastre as known today was born in France and raised in the Netherlands. When King Louis of Holland involuntarily abdicated on 1 July 1810, the Kingdom of Holland was incorporated into France eight days later by his own brother – Napoleon Bonaparte.[32] Consequently, the operation of the law of France was, most prominently through the introduction of the French Code Civil on 1 January 1811, extended to the territory of the former Kingdom of Holland.[33] Amongst other, the Code Civil provided for the levy of land tax ("*grondbelasting*").[34] After all, due to the expenses of his conquering expedition, Napoleon was in serious need of financial resources.[35] Needless to state, the levy of such a tax was only possible after the ownership structure regarding land was mapped.[36] Yet, the role of the cadastre in the prevention of disputes and as means to proof

[29] W. Böhringer, `Die geschichtlichen Wurzeln des Notariats in Deutschland von der Antike bis zur Neuzeit', *BWNotZ* 1989, 25.
[30] N. Baunach, *Der Notar in der modernen Gesellschaft*, Göttingen: Verlag Otto Schwartz, 1974, p. 12.
[31] Ibid.
[32] C.H.E. de Wit, 'De Noordelijke Nederlanden in de Bataase en de Franse Tijd 1795-1813', in: D.P. Blok et al. (eds.), *Algemene Geschiedenis der Nederlanden 11 (Nieuwste Tijd)*, Bussum: Unieboek BV, 1983, p. 185. Also see A.M.J.A. Berkvens, J. Hallebeek & A.J.B. Sirks (eds.), *Het Franse Nederland: de inlijving 1810-1813: De juridische en bestuurlijke gevolgen van de 'Réunion' met Frankrijk*, Hilversum: Uitgeverij Verloren, 2012, p. 176.
[33] Ibid.
[34] H.J. Rijtma, *Het kadaster*, Deventer: Kluwer, 1966, p. 3.
[35] S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, p. 461.
[36] Interestingly, the boundaries back then were often surveyed without prior consultation of the plots' owners. See W. van Riessen, *Het Kadaster: Historische ontwikkeling in de eerste helft van de 20e eeuw*,

ownership of land was also expressly acknowledged.[37] Thus, in 1811, a cadastre with a uniform administration was set up in the newly acceded territory.[38] The surveying of the land as such began in 1812.[39] In addition, per 1 March 1811, nationwide every district was equipped with a land registry, which would become the successor of the centuries-old tradition according to which the protocols were kept by the courts and notaries themselves.[40] To put this into perspective, one must realize that notarial activities in the Netherlands can be traced back to the middle of the 13th century.[41]

What promised to be a good start was put to a stop a short two years later in 1813, when Napoleon was sent into exile on Elba.[42] Yet, in 1815, when the Kingdom of the Netherlands saw the light of day under the rule of King William I, the process of setting up a cadastre was restarted.[43] Again, the ulterior motive was of a financial nature.[44] In 1823, the nation witnessed the first topographical map ("*Choro-Topographische Kaart van de Noordelijke Provinciën*") that covered the entire nation's territory, which was produced by the topographical agency of the Ministry of War.[45] On 1 October

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Nederland: Dienst voor het kadaster en de openbare registers, 2004, p. 11. Also see O.K. Brahn & W.H.M. Reehuis, *Zwaartepunten van het vermogensrecht*, Deventer: Kluwer, 2015, p. 44.

[37] Article 1142-1143 Recueil Méthodique des lois, décrets, règlements, instructions et decisions sur le cadastre de la France. Also see S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, p. 462.

[38] I.C. Koeman, 'Bijdragen van het Kadaster aan de kartografie van Nederland', in: Ministerie van Volkshuisvesting en Ruimtelijke Ordening en Dienst van het Kadaster en de Openbare Registers, *Op Goede Gronden: Een Bundel opstellen ter Gelegensheid van het 150-jarig bestaan van de Dienst van het Kadaster en de Openbare Registers*, Den Haag: Staatsuitgeverij, 1982, p. 104-105.

[39] H.J. Rijtma, *Het kadaster*, Deventer: Kluwer, 1966, p. 3.

[40] S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, p. 459. Also see I.C. Koeman, 'Bijdragen van het Kadaster aan de kartografie van Nederland', in: Ministerie van Volkshuisvesting en Ruimtelijke Ordening en Dienst van het Kadaster en de Openbare Registers, *Op Goede Gronden: Een Bundel opstellen ter Gelegensheid van het 150-jarig bestaan van de Dienst van het Kadaster en de Openbare Registers*, Den Haag: Staatsuitgeverij, 1982, p. 105.

[41] A. Pitlo & A.F. Gehlen, *De zeventiende en achttiende eeuwse notarisboeken: Een verhandeling over Notarisboeken, Notarisambt en Notarieel Recht onder de Republiek der Verenigde Nederlanden*, Deventer: Kluwer, 2004, p. 3.

[42] Website Kadaster, 'Mijlpalen in de geschiedenis van het Kadaster' (http://www.kadaster.nl/web/Themas/Themapaginas/dossier/Kadaster-in-vogelvlucht.htm), consulted on 10.01.2016.

[43]Cadastre Restarted

[44] Website Stichting Oud Zoeterwoude, 'Kadasterkaarten', (http://www.oudzoeterwoude.nl/collecties/kadasterkaarten/), consulted on 10.01.2016. Also see Website Kadaster, 'Van Franse komaf' (http://www.kadaster.nl/web/Over-het-Kadaster-1/Geschiedenis/Van-Franse-komaf.htm), consulted on 10.01.2016.

[45] N. Bakker et al. (eds.), *200 jaar kaarten maken in beeld: 1815-2015*, Landsmeer: Uitgeverij 12 Provinciën/Kadaster, 2015, p. 6, 10-11.

1832, the cadastre was finally launched as a part of the Ministry of Finance and 54 cadastre offices were spread across the nation.[46] Yet, in the province of Limburg, the cadastre was introduced only in 1842.[47]

Four years later, in 1838, the French Code Civil was replaced by the Dutch Civil Code.[48] The new Code confirmed the merger of the cadastre and the land registry into the Agency of the Cadastre and the Land Register ("*Dienst van het Kadaster en de Openbare Registers*"; hereafter: "*Kadaster*"), which had already been announced in Royal Decree of 22 August 1838, and which was eventually realized by 1 April 1839.[49] Thus, at that point, the modern *Kadaster* saw light. The cadastre, which is governed by public law, and the land register, that is governed by private law, could be regarded as the *Kadaster*'s Yin and Yang; though they are distinct and independent registers with different spheres of activities, they are at the same time interdependent, as one could not function properly without the other.[50] After all, without the cadastre as search entry, research in the land register would be extremely time-consuming, as one would have to scan through an unbearable pile of deeds before the right one is found.[51] Similarly, the cadastre depends on the land register for the provision of data through which the actuality of the data in the cadastre is achieved.[52] Further, this newly enacted Code introduced a novel feature that is nowadays taken for granted when speaking of the transfer of immovable property - the mandatory registration of transfer and mortgage deeds.[53] In addition, the cadastral identification numbers and the cadastral size had to be used

[46] H.A.L. Dekker, *Kadaster*, Leiden: Nederlandsche Uitgeversmij. (NUMIJ) B.V., 1987, p. 14.
[47] Bijblad van de Nederlandsche Staats-Courant, 1858-1859, II (Tweede Kamer), Bijlagen. 128ste vel., Wijziging van het belastingstelsel en van eenige bepalingen der gemeentewet, rakende de gemeentebelastingen (Voorlopig Verslag der Commissie van Rapporteurs), p. 509.
[48] H. Ankum, 'Römisches Recht im neuen niederländischen Bürgerlichen Gesetzbuch', in: R. Zimmermann, R. Knütel & J.P. Meincke (eds.), *Rechtsgeschichte und Privatrechtsdogmatik*, Heidelberg: C.F. Müller Verlag, 1999, p. 102.
[49] W.H.M. Reehuis & E.E. Slob, *Parlementaire Geschiedenis van het Nieuwe Burgerlijke Wetboek: Invoering Boeken 3,5 en 6: Kadasterwet*, Deventer: Kluwer, 1990, p. 4. Also see W.G.M. van der Heijden, *Noord-Brabant in de negentiende eeuw: een institutionele handleiding*, Hilversum: Uitgeverij Verloren & Rijksarchief in Noord-Brabant, 1993, p. 89 and H.A.L. Dekker, *Kadaster*, Leiden: Nederlandsche Uitgeversmij. (NUMIJ) B.V., 1987, p. 17.
[50] W.H.M. Reehuis & A.H.T. Heisterkamp, *PITLO Deel 3: Goederenrecht*, Deventer: Kluwer, 2012, p. 26-27. Also see W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman and L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 833.
[51] W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman and L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 833. Also see A. Berlee, 'Meer aandacht voor privacy in de openbare registers?', *NJB* 2015/1091.
[52] Ibid.
[53] A. van der Meer, *Gemeentegrenzen in Nederland: Een juridisch, technisch en kadastraal onderzoek*, Haveka: Alblasserdam, 2007, p. 51. Also see I.C. Koeman, 'Bijdragen van het Kadaster aan de kartografie van

mandatorily to identify a particular plot of land in a deed or other document that was to be registered in the land registry.[54] In 1970 then, the *Kadaster* was separated from the Tax Authorities.[55] Three years later, in 1973, the *Kadaster* was brought under the scope of the Ministry of Housing and Environmental Planning ("*Ministerie van Volkshuisvesting en Ruimtelijke Ordening*") until 26 October 2017 when this responsibility was conferred upon the Ministry of Internal Affairs and Kingdom Relations ("*Ministerie van Binnenlandse Zaken en Koninkrijksrelaties*").[56]

Since 1 May 1994, the *Kadaster* has been a self-financing independent administrative body ("*zelfstandig bestuursorgaan*").[57] This entails that the *Kadaster* is a legal person governed by public law ("*publiekrechtelijke rechtspersoon*") which can carry out the tasks that are conferred to them by law independently.[58] Yet, the Minister of Internal Affairs and Kingdom Relations, who is responsible for the *Kadaster*, monitors its activities. In this function, they may demand any information that he deems necessary for the completion of their tasks.[59] Even stronger, important powers are conferred upon him.[60] By means of example, the Minister has to approve the tariffs and the budget, and may even abolish any decision ("*besluiten*") taken by the *Kadaster*.[61]

Nederland', in: Ministerie van Volkshuisvesting en Ruimtelijke Ordening en Dienst van het Kadaster en de Openbare Registers, *Op Goede Gronden: Een Bundel opstellen ter Gelegenheid van het 150-jarig Bestaan van de Dienst van het Kadaster en de Openbare Registers*, Den Haag: Staatsuitgeverij, 1982, p. 105.

[54] P. De Haan, 'De plaats van het Kadaster in het onroerend goed-recht', in: Ministerie van Volkshuisvesting en Ruimtelijke Ordening en Dienst van het Kadaster en de Openbare Registers, *Op Goede Gronden: Een Bundel opstellen ter Gelegenheid van het 150-jarig Bestaan van de Dienst van het Kadaster en de Openbare Registers*, Den Haag: Staatsuitgeverij, 1982, p. 18.

[55] W.H.M. Reehuis & E.E. Slob, *Parlementaire Geschiedenis van het Nieuwe Burgerlijke Wetboek: Invoering Boeken 3,5 en 6: Kadasterwet*, Deventer: Kluwer, 1990, p. 5.

[56] Besluit van 4 juni 1973, houdende de overgang van de dienst van het Kadaster en de Openbare Registers van het Ministerie van Financiën naar het Ministerie van Volkshuisvesting en Ruimtelijke Ordening, *Stb.* 1973, 272. Also see Regeling van de Minister van Binnenlandse Zaken en Koninkrijksrelaties van 10 november 2017, nr. 2017-0000541638, houdende tijdelijke verlening van mandaat, volmacht en machtiging op het terrein van de ruimtelijke ontwikkeling, ruimtelijke ordening, de Omgevingswet en het Kadaster (Tijdelijke regeling mandaat, volmacht en machtiging ruimtelijke ontwikkeling, ruimtelijke ordening, de Omgevingswet en het Kadaster), *Stcrt.* 2017, 65175.

[57] Wet van 14 februari 1994, houdende verzelfstandiging van de Rijksdienst van het Kadaster en de Openbare Registers (Organisatiewet Kadaster) , *Stb*. 1994, 125. Also see Kaderwet zelfstandige bestuursorganen.

[58] Article 2 (1) Organisatiewet Kadaster, *Stb*. 1994, 125.

[59] Article 20 (1) Kaderwet zelfstandige bestuursorganen.

[60] Article 11, 12, 17 (1), 20 (1), 21, 22, 23, 29 Kaderwet zelfstandige bestuursorganen.

[61] Article 17 paragraph 1, 22 paragraph 1, 29 Kaderwet zelfstandige bestuursorganen.

Because of the development of the organization, the *Kadaster* has steadily reduced the number of offices in the past years.[62] Nowadays, the *Kadaster* has eight offices spread across the nation (Amsterdam, Arnhem, Eindhoven, Groningen, Zwolle, Apeldoorn "De Grift, and Apeldoorn "De Brug"), with Apeldoorn "De Grift" being the head office.[63] While with the exception of Apeldoorn as head office, notarial deeds and other documents can be submitted to all *Kadaster* offices for registration on working days between 9.00 and 15.00 o'clock, certain tasks are exclusively entrusted to specific offices.[64] For example, the registration of vessels and aircraft is conferred upon the Rotterdam office while the registration of tutelage is entrusted to the office in Arnhem.[65] In 2004, the *Kadaster* was merged with the Agency for Topography ("*Topografische Dienst*").[66] On 12 June 2006, the administrative districts of the land register were abolished and one integrated land register was realized.[67]

In 2016, the *Kadaster* serves four main purposes: the promotion of legal certainty with regard to the registered property (also by fulfilling the principle of specificity by means of cadastral identification numbers ("*kadastrale aanduidingen*")) as well as of a purposeful geo-information infrastructure, the establishment of a practicable governmental supply of information to support the administrative bodies in the execution of their tasks, and the support and promotion of economic activities.[68] To satisfy these purposes, the *Kadaster* has a variety of tasks.[69] The principle tasks include the keeping of the land register, the maintenance of the coordination point net ("*net coördinaatpunten*"), as well as the keeping and maintaining of the cadastre ("*basisregistratie*

[62] Wijziging Organisatieregeling Kadaster 2008, *Stcrt.* 2008, 183. Also see Wijziging Organisatieregeling Kadaster 2008, *Stcrt.* 2009, 48 and Wijziging regeling tot wijziging van de Organisatieregeling Kadaster 2008, *Stcrt.* 2009, 13674.
[63] Article 2 (1) Organisatiewet Kadaster, *Stb*. 1994, 125. Article 1 Organisatieregeling Kadaster 2008, *Stcrt*. 2008, 58. Also see Wijziging Organisatieregeling Kadaster 2008, *Stcrt.* 2009, nr. 17276.
[64] Article 2 Organisatieregeling Kadaster 2008, *Stcrt*. 2008, 58. If deeds are submitted after 15:00 o'clock, the point of time at which they are offered for registration, will be 9:00 o'clock on the following day. See L.C.A Verstappen, 'Inschrijving in de openbare registers', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 786.
[65] Article 2-3 Organisatieregeling Kadaster 2008, *Stcrt*. 2008, 58.
[66] A. van der Meer, *Gemeentegrenzen in Nederland: Een juridisch, technisch en kadastraal onderzoek*, Haveka: Alblasserdam, 2007, p. 4. Also see M. Jellema, *De informatiearchipel: Dynamiek tussen overheidsorganisaties en geo-informatievoorziening*, Amsterdam: IOS Press BV, 2013, p. 190.
[67] Organisatieregeling Kadaster 2006, *Stcrt.* 2006, 85.
[68] Article 2a Kadw. Also see W.H.M. Reehuis and E.E. Slob, *Parlementaire Geschiedenis van het Nieuwe Burgerlijke Wetboek: Invoering Boeken 3,5 en 6: Kadasterwet*, Deventer: Kluwer, 1990, p. 4.
[69] Article 3 Kadw. Also see Article 2 (3) Organisatiewet Kadaster, *Stb*. 1994, 125.

kadaster"), the vessel registry ("*registratie voor schepen*"), the aircraft registry ("*registratie voor luchtvaartuigen*"), and the key registry topography ("*basisregistratie topography*").[70]

3.1.2 The Role of the Legal Practitioner

In the Netherlands, conveyancing is conducted by a notary ("*notaris*").[71] It follows from article 3:31 Civil Code ("*Burgerlijk Wetboek*"; hereafter: "BW") that where the law prescribes a notarial deed or a notarial declaration, a deed or declaration of a Dutch notary is required.[72] Hereby, the wording "Dutch notary" does not refer to the nationality of the notary but instead stipulates that the notary must be established in the Netherlands.[73]

3.1.2.1 Requirements for Appointment

The requirements for the appointment as a notary are to be found in article 6 Act on the Notarial Function ("*Wet op het notarisambt*"; hereafter: "Wna"). To begin with, candidate notaries ("*kandidaat-notaris*") must have the nationality of a Member State of the European Union, of a party of the European Economic Area, or Switzerland.[74] In addition, they must possess the relevant academic qualifications.[75] To fulfil this condition, candidates must have followed academic education in the field of law at a university or the Open University which was concluded with a Bachelor and Master degree in law, or have completed a law study at a university or at the Open University, which entitled them to bear the academic title "*meester*", or possess a recognition of professional qualifications as referred to in article 5 General Act on the Recognition of EC

[70] Article 3 (1) (a)-(f) Kadw.
[71] Article 3:89 (1) BW and article 3:31 BW. Articles 1 (1) (a) and 2 Wet op het notarisambt.
[72] Yet, a foreign notary may submit a notarial deed for registration if a legal instrument (such as the European Succession Regulation) provides for this possibility: see Regelen met betrekking tot de openbare registers voor registergoederen, alsmede met betrekking tot het kadaster (Kadasterwet), *Kamerstukken II* 1981/82 17 496, nr. 5, p. 57.
[73] Article 6 Wet op het notarisambt. Also see J.W.A. Biemans, 'De Europese Unie en de Nederlandse studie notarieel recht', *WPNR* 2014/7028.
[74] Article 6 (1) Wet op het notarisambt. Also see Cases C-50/08 *European Commission v French Republic* ECLI:EU:C:2011:335, C-51/08 *European Commission v Grand Duchy of Luxembourg* ECLI:EU:C:2011:336, C-53/08 *European Commission v Republic of Austria* ECLI:EU:C:2011:338, C-54/08 *European Commission v Germany* ECLI:EU:C:2011:339, C-61/08 *European Commission v Hellenic Republic* ECLI:EU:C:2011:340, C-157/09 *European Commission v Kingdom of the Netherlands* ECLI:EU:C:2011:794, C-151/14 European Commission v Republic of Latvia ECLI:EU:C:2015:577.
[75] Article 6 (2) (a) Wet op het notarisambt.

professional qualifications ("*Algemene wet erkenning EG-beroepskwalificaties*").[76] In addition to an academic qualification, candidates must have also completed their vocational training.[77] This vocational training consists of an internship at the office of a Dutch notary that lasted for a minimum period of six years, and a passed exam at the end of the three year training program that is organized by the Royal Chamber of Notaries ("*Koninklijke Notariële Beroepsorganisatie*"; hereafter: "KNB") for candidate notaries, complementing the internship.[78] Moreover, candidates must demonstrate that they have spent two out of the three years prior to the filing of an appointment request, either working under the responsibility of a notary or substitute notary ("*waarnemer*"), or having substituted the notarial function, or having filled in the notarial function as a notary in the Kingdom in Europe.[79] In addition, they must have prepared a business plan, be in possession of a certificate of good conduct, and demonstrate that they master the Dutch language well enough to be able to practice as a notary.[80]

To be classified as a notary, one must be appointed by royal decree and sworn in.[81] Immediately afterwards, the notaries have to deposit their signature and initials at the district court.[82] Although notaries must conduct their business at the place that is mentioned in their royal decree of appointment ("*plaats van vestiging*"), they are permitted to perform official activities in other places

[76] Article 6 (2)(a) Wet op het notarisambt. Also see articles 2-3 Besluit op het notarisambt, *Stb*. 2012, 45. For more specific information about the recognition of a professional recognition obtained in a different Member State of the EU, see: Regeling erkenning EG-beroepskwalificaties kandidaat-notaris, *Stcrt*. 2008, 250.
[77] Article 6 (2)(b) Wet op het notarisambt. For detailed information on the content of the vocation training see Reglement van 18 juli 2001, inw. tr. 1 augustus 2001, gewijzigd bij besluit van het bestuur van de KNB van 9 januari 2002, inw. tr. 15 januari 2002, gewijzigd bij besluit van het bestuur van de KNB 16 oktober 2002, inw. tr. 23 januari 2002 en gewijzigd bij besluit van het bestuur van de KNB 8 augustus 2012, inw.tr. 8 augustus 2012 (Onderwijs- en examenreglement opleiding kandidaat-notarissen) and Reglement van 18 juli 2001. Bij besluit van het bestuur van de KNB van 18 juli 2001 is de datum van inwerking treding van het Reglement stage 1 januari 2002, gewijzigd bij besluit van het bestuur van de KNB 28 november 2012, inw.tr. 1 januari 2013 (Reglement stage) and Reglement van 18 juli 2001, inw. tr. 1 augustus 2001, gewijzigd bij besluit van het bestuur van de KNB van 9 januari 2002, inw. tr. 15 januari 2002 (Vrijstellingenreglement opleiding kandidaat-notarissen).
[78] Article 6 (2)(b), 31 (1), 33 (1) Wet op het notarisambt. For detailed information about the internship see: Verordening van de KNB van 21 juni 2000, *Stcrt*. 2000, 182, goedgekeurd door de Staatssecretaris van Justitie bij brief d.d. 13 september 2000, nr. 5047950/00/06, inw. tr. 1 oktober 2000 en gewijzigd bij Verordening tot wijziging van de Stageverordening (Verordening Zij-instroom) van 28 september 2011 Stcrt. 2012,24617, goedgekeurd door de minister van Veiligheid en Justitie bij brief van 6 maart 2012, inw. tr. 1 januari 2013 (Stageverordening).
[79] Article 6 (2)(b) and (3) Wet op het notarisambt.
[80] Article 6 (2)(b) and (4)(c)-(d), and 7 Wet op het notarisambt. Also see Besluit van 9 april 1999, houdende nadere regels inzake het ondernemingsplan en de samenstelling en de werkwijze van de Commissie van deskundigen in verband met de vestiging van een notaris (Besluit ondernemingsplan notaris).
[81] Article 2 (2) and 3 (1)-(2) Wet op het notarisambt.
[82] Article 4 Wet op het notarisambt.

in the Netherlands.[83] Yet, they may not introduce hearing days or maintain additional offices outside their place of professional establishment.[84]

Further, (candidate) notaries must not be suspended or resigned and cannot simultaneously fulfil the function of a land registrar ("*bewaarder*"), practicing lawyer ("*advocaat*"), or bailiff ("*gerechtsdeurwaarder*").[85] In addition, they may not form part of the judiciary though, as an exception to this main rule, they may act as a deputy judge ("*kantonrechter-plaatsvervanger*"/ "*rechter-plaatvervanger*"/"*raadsheer-plaatsvervanger*").[86]

3.1.2.2 The Different Types of Notaries

There are two different types of notaries: the notary who is both entrepreneur and public official ("*notaris-ondernemer*") and the notary who is a public official but not an entrepreneur ("*toegevoegde notaris*").[87] In essence, the latter is employed by the former, but has for the rest the same competences than a *notaris-ondernemer*.[88] Yet, they are obliged to follow the instructions of their employer and are subject to their supervision.[89] Furthermore, they do not keep their own protocol, as all deeds that are issued by a "*toegevoegde notaris*" are included in the protocol of their employer.[90] In this context, the term protocol refers to the collection of all deeds and additional documents that are in the professional deposit of a notary.[91]

Notaries, who either follow the notarial training course or who finished that course but have not been appointed as "*notaris-ondernemer*" or "*toegevoegde notaris*", are called candidate notaries ("*kandidaat-notarissen*"). Both the "*notaris-ondernemer*" and the "*toegevoegde notaris*", and under

[83] Articles 3 (1), 12, 13 Wet op het notarisambt.
[84] Article 13 Wet op het notarisambt. With regard to the hearing days, an exception is made for the West Frisian Islands in the situation if a notary is not established there.
[85] Article 2 (2) and 9 Wet op het notarisambt. For the exception see article 125 Wet op het notarisambt.
[86] Article 9 Wet op het notarisambt.
[87] Article 1 (1) (a) and 30b Wet op het notarisambt. With regard to the extent of their qualification as a public official, see: article 1 and 2 (1) Ambtenarenwet, *Stb*. 1929, 530. Also see B.C.M. Waaijer, 'Verleiden om te verlijden: Het onmogelijke tweespan van notarieel ambtenaar en vrij ondernemer', *WPNR* 2013/6990.
[88] Article 30b-30d Wet op het notarisambt. Also see E.I. Kortlang, 'De toegevoegd notaris', *JBN* 2011/05.
[89] J.W.A. Biemans, M.M.G.B. van Drunen & E.R. Helder, 'Toegevoegd notaris en waarneming', *WPNR* 2014/7001.
[90] Ibid.
[91] Article 1 (1)(f) Wet op het notarisambt.

certain conditions the candidate notary, can be appointed as a substitute notary.[92] A substitute notary substitutes a colleague if the latter is absent, hindered, too diseased to officiate, suspended, removed from office, established in a different district, or deceased.[93]

All notaries ("*notaris-ondernemer*", "*toegevoegde notaris*", and "*kandidaat-notaris*") are registered in the register of notaries ("*register voor het notariaat*").[94] The register is kept by the KNB and accessible for the public.[95] To illustrate, as per 1 January 2019, there were 1264 notaries and 150 *toegevoegde notarissen* in the Netherlands.[96] In addition, there were 1900 candidate notaries.[97] In 2015, the Netherlands counted 17.282.753 inhabitants.[98] In mathematic terms, there is thus one notary per 13.673 inhabitants.[99] All (candidate) notaries are members of KNB.[100] The KNB promotes and guards the professionalism and competence of its members and sees to the honour and prestige of the notarial occupation group.[101]

3.1.2.3 Notarial Competences

Notaries have two main competences. First, upon instruction of the law, or if a party so requests, they may draw up authentic deeds, which can either take the form of a party deed ("*partij-akte*") or of a notarial record ("*process-verbaal-akte*").[102] Second, they are competent to perform any other activities that are set out by law.[103] In principle, the notary is compelled to perform these activities.[104] However, this main rule is subject to three exceptions. First of all, notaries must refuse their service if they can offer a well-founded reason.[105] The existence of such a reason can be

[92] Article 29 Wet op het notarisambt. The conditions for the appointment of a candidate notary as substitute notary are laid down in the same article.
[93] Article 28 Wet op het notarisambt.
[94] Article 5 (1)-(2) Wet op notarisambt. Also see articles 8-11 Besluit op het notarisambt, *Stb*. 2012, 459.
[95] Article 5 (1), (3) Wet op notarisambt.
[96] Website KNB, 'Factsheet notariaat' (http://www.knb.nl/website/factsheets-notariaat), consulted on 12.06.2019.
[97] Ibid.
[98] Website Centraal Bureau voor de Statistiek, 'Bevolkingsontwikkeling; maand en jaar' (https://opendata.cbs.nl/statline/#/CBS/nl/dataset/83474ned/table?ts=1560329931389) consulted on 12.06.2019.
[99] This figure excludes the *toegevoegde notarissen* and the candidate notaries.
[100] Article 60 Wet op het notarisambt.
[101] Article 61 (1) Wet op het notarisambt.
[102] Article 2 (1) and article 37 Wet op het notarisambt.
[103] Article 2 (1) Wet op het notarisambt.
[104] Article 21 (1) Wet op het notarisambt.
[105] Article 21 (2) Wet op het notarisambt. Also see articles 4-6 Verordening van de KNB van 22 juni 2011, goedgekeurd door de Minister van Veiligheid en Justitie bij brief van 15 september 2011, inw.tr. 10 oktober 2011, gewijzigd bij Verordening tot wijziging van de Verordening Beroeps- en gedragsregels 2011

particularly established if the notary has a substantial conviction or presumption that the activities will be in conflict with the law or the public order, if they serve an illegal aim, or will end in illegal consequences.[106] Other situations that fall within this scope occur if they do not permit the notary to duly represent the parties' interests, or if they either assume or are reasonably convinced that one of the parties abuses the ignorance of law of the other party, or if the deed's content does not reflect the truth, as well as in the situation in which they are asked to establish facts that they are unable to control or if the establishment of these facts cannot be reconciled with the exercise of their office.[107] Second, notaries may refer a party request to a different notary within their own organization respectively within the cooperation ("*samenwerkingsverband*") to which they are a party.[108] Notaries may form a cooperation with practitioners from different professions as long as the two main pillars of the notarial activity, independency and elaborateness, are protected.[109] Another central issue in a cooperation lies in the duty of confidentiality; especially if the practitioners that come from a different profession are not bound by this duty.[110] To secure the protection of this duty, so-called "Chinese walls" are set up by the cooperation contract.[111] This entails that the practitioners from a different profession are strictly prohibited from accessing any

(Verordening Beroepsaansprakelijkheidsverzekering 2012) van 26 september 2012, Stcrt. 2012, 27361, goedgekeurd door de minister van Veiligheid en Justitie bij brief van 10 december 2012, inw. tr. 6 januari 2013, gewijzigd bij Verordening tot wijziging van de Verordening Beroeps- en gedragsregels 2011 (Verordening collectief ambtsgeheim) van 25 september 2013, Stcrt. 2013, 31822, goedgekeurd door de Staatssecretaris van veiligheid en Justitie namens de Minister bij besluit van 5 november 2013, inw. tr. 1 december 2013 en gewijzigd bij Verordening tot wijziging van de Verordening beroeps- en gedragsregels 2011 van 8 april 2015, Stcrt. 2015, 20641, goedgekeurd door de minister van Veiligheid en Justitie bij besluit van 3 juli 2015, inw. tr. 31 juli 2015, en gewijzigd bij Verordening tot wijziging van de Verordening Beroeps- en gedragsregels 2011 van 3 februari 2016, Stcrt. 2016, 28028, goedgekeurd door de Minister van Veiligheid en Justitie bij besluit van 10 mei 2016, inw. tr. 1 oktober 2016, en gewijzigd bij Verordening tot wijziging van de Verordening Beroeps- en gedragsregels 2011 van 23 november 2016, Stcrt. 2017, 4812, goedgekeurd door de Minister van Veiligheid en Justitie bij besluit van 17 januari 2017, inw. tr. 1 februari 2017 (Verordening beroeps- en gedragsregels 2011).

[106] Article 21 (2) Wet op het notarisambt. Also see T.F.E. Tjong Tjin Tai, 'Meewerken aan wanprestatie of onrechtmatige daad, mede toegepast op de rol van de notaris', *WPNR* 2012/6954.

[107] Article 4 (2)-(3) and article 5-6 Verordening beroeps- en gedragsregels 2011.

[108] Article 21 (3) Wet op het notarisambt. To these cooperations, the Regulation interdisciplinary cooperation 2015 (Verordening van de KNB van 3 februari 2016, goedgekeurd door de minister van Veiligheid en Justitie bij brief van 10 mei 2016, Stcrt. 2016, 25642, inw. tr. 30 mei 2016 (Verordening interdisciplinaire samenwerking 2015)) applies.

[109] Article 18 Wet op het notarisambt. Also see article 23 Verordening beroeps- en gedragsregels. For the concrete legal framework governing these cooperations, see: Verordening interdisciplinaire samenwerking 2015. On cooperations and the independent practice of the notarial function, see: G.J.C. Lekkerkerker, 'Twee kwesties van notariële onafhankelijkheid', *JBN* 2011/09.

[110] J.C.H. Melis & B.C.M. Waaijer, *De Notariswet*, Deventer: Kluwer, 2012, p. 384.

[111] J.C.H. Melis & B.C.M. Waaijer, *De Notariswet*, Deventer: Kluwer, 2012, p. 384-385.

kind of professional information relating to the notarial office (including its administration and archives).[112]

Despite these competences, it is strictly forbidden that notaries engages in any activities of which they may reasonably expect that they might lead them to the situation in which they will not be able to live up to their financial commitments anymore.[113] Especially the following three activities fall in this category.[114] First, notaries must not enter into a loan agreement unless it is reasonably necessary for the practice of their function respectively for personal purposes.[115] Second, it is prohibited that notaries grant loans to those that are a party to a deed and to those that are otherwise concerned by a deed.[116] Third, they may not guarantee for the debts of a different person except if it is rationally necessary for the practice of their function or for personal purposes.[117] Notaries have to inform both the KNB and the Chamber of Notaries ("*Kamer voor het Notariaat*") of all additional occupations that they accept or terminate.[118] If the Chamber reaches the conclusion that a particular occupation is unsuitable, the notary has to terminate it as soon as possible.[119] Furthermore, notaries are obliged to ensure a decent administration of both their office and private assets.[120] In this regard, notaries have to provide the Bureau of Financial Supervision ("*Bureau Financieel Toezicht*") with an annual overview of their office and private assets.[121] In addition, the KNB controls the overall quality of the individual notaries by asking experts to conduct intercollegiate quality checks ("*intercollegiale kwaliteitstoetsingen*").[122]

[112] J.C.H. Melis & B.C.M. Waaijer, *De Notariswet*, Deventer: Kluwer, 2012, p. 385.
[113] Article 23 Wet op het notarisambt.
[114] Article 23 (2) Wet op het notarisambt.
[115] Article 23 (2)(a) Wet op het notarisambt.
[116] Article 23 (2)(b) Wet op het notarisambt.
[117] Article 23 (2)(c) Wet op het notarisambt.
[118] Artcile 11 (1) Wet op het notarisambt.
[119] Article 11 (2)-(6) Wet op het notarisambt.
[120] Article 24 Wet op het notarisambt. Also see Verordening van de KNB van 13 september 2000, Stcrt. 2000, 182, goedgekeurd door de Staatssecretaris van Justitie bij brief d.d. 20 september 2000, nr. 5052794/00/06, inw. tr. 16 oktober 2000 (Administratieverordening).
[121] Article 24 (4) and 110 Wet op het notarisambt. Also see article 2 Ministeriële regeling van 11 december 2012, Stcrt. 2012, 26483, inw. tr. 1 januari 2013, gewijzigd bij regeling van de Minister van Veiligheid en Justitie van 19 november 2014, Stcrt. 2014, 33807, inw. tr. 1 januari 2015 (Regeling op het notarisambt). On the role of the Bureau of Financial Supervision, see: H.J. van den Noort, 'Toezicht en Handhaving door het BFT', *WPNR* 2012/6955 and B.C.M. Waaijer, 'Het Bureau Financieel Toezicht als goede toezichthouder', *WPNR* 2012/6937.
[122] Article 61a (1) Wet op het notarisambt. Also see Verordening van de KNB van 24 september 2008, goedgekeurd door de minister van Justitie bij brief van 12 november 2008, Stcrt. 2008,240, inw. tr. 2 januari 2009 en gewijzigd bij Verordening tot wijziging van de Verordening op de kwaliteit van 20 juni 2012 Stcrt. 2012,16124, goedgekeurd door de minister van Veiligheid en Justitie bij brief van 20 juli 2012, inw. tr. 16 augustus 2012 (Verordening op de kwaliteit) and Reglement van het bestuur van de KNB van 15 oktober

3.1.2.4 Notarial Duties

In the exercise of their office, notaries have to act independently and must preserve the interests of all involved parties.[123] To ensure their independence, notaries may not draw up a deed to which they themselves, their spouse, or one of their relatives not exceeding the third degree of kinship, is a party.[124] This rule also applies if these persons are in their function as a representative of a party to the deed.[125] Further, the scope of this provision extends to the situation in which a legal person is a party to the deed provided that either the notary or their spouse is a (supervisory) director of that legal person or if the notary is aware or at least should have known that the listed persons, individually or together, hold the majority of shares in that legal person.[126] In addition, the notary may not draw up deeds, which would benefit the listed persons.[127] Last, the notary must not accept commissions.[128] Moreover, notaries are obliged to administer their duties and responsibilities with the greatest extent of elaborateness.[129] To ensure this elaborateness, notaries have to participate in educational trainings.[130] As such, within a period of two years, a minimum of 40 hours has to be invested in further education.[131]

The duty of confidentiality constitutes the third pillar of the notarial function. Everything that notaries take notice of in the course of their activities is subject to this duty.[132] It is to be underlined that this duty is eternal and thus does not expire when the notary's function terminates.[133]

2008, inw. tr. 2 januari 2009, aangevuld bij besluit van 22 juli 2009 en gewijzigd bij besluit van 11 juli 2012 (Reglement op de kwaliteit Intercollegiale kwaliteitstoetsingen).

[123] Article 17 Wet op het notarisambt. Also see M.J.A. van Mourik, *Recht met sfeer: Bloemlezing uit eigen werk*, Deventer: Kluwer, 2008, p. 363-364.

[124] Article 19 (1) Wet op het notarisambt. For the exceptions of this main rule see paragraph 2 of the same article.

[125] Ibid.

[126] Article 19 (1) Wet op het notarisambt.

[127] Article 20 (1) Wet op het notarisambt.

[128] Article 12 (2)-(3) Verordening beroeps- en gedragsregels. For more information about the scope of this prohibition in the context of market initiatives, see: P. C. van Es, 'Het provisieverbod van artikel 12, lid 2 Verordening beroeps- en gedragsregels', *JBN* 2006/06.

[129] Article 17 (1) Wet op het notarisambt.

[130] Article 1 Verordening van de KNB van 16 februari 2000, Stcrt. 2000, 182, goedgekeurd door de Staatssecretaris van Justitie d.d. 13 september 2000, nr. 5047950/00/06, inw. tr. 1 oktober 2000 (Verordening bevordering vakbekwaamheid).

[131] Article 2 (1) Verordening bevordering vakbekwaamheid. Also see Beleid vrijstelling/puntentoekenning bevordering vakbekwaamheid.

[132] Article 22 Wet op het notarisambt. According to *Van der Hoeven*, also an (external) IT company that is entrusted with the administration and archiving of the notarial protocol can rely on a derivative duty of confidentiality ("*afgeleid verschoningsrecht*"). See R. van der Hoeven, 'Poging tot omzeiling van het verschoningsrecht?', *JBN* 2013/03.

To fulfil these duties, the notary must dispose of one or more professional bank accounts ("*derdengeldrekening*") on which exclusively the moneys are stored that the notaries receive in the course of their professional activities.[134] Hereby, the notary is only entitled to administer and to dispose of this account.[135] This includes that the notary can be held liable for any shortage in the balance and is thus obliged to immediately compensate for this shortage provided that they can actually be reproached for this shortage.[136] The entitled persons hold the joined right to claim ("*vorderingsrecht*").[137] Their individual shares are calculated in proportion to the amount that is stored on this account on their behalf.[138]

Needless to state, notaries can be held liable if they do not comply with their duties. To cover the financial consequences of such a liability claim, notaries are obliged to take professional responsibility insurance ("*beroepsaansprakelijkheidsverzekering*") as well as insurance to cover any other risks that might arise either in their private or professional sphere.[139] Furthermore, if notaries infringe upon the applicable law, they are subject to disciplinary proceedings ("*tuchtrechtspraak*").[140] In first instance, notaries have to account for their actions in front of one of the four Chambers of Notaries.[141] The decision of the Chamber of Notaries can be appealed against in front of the appeal court in Amsterdam, whose decision is then final.[142]

3.1.2.5 The Termination of the Notarial Function

Notaries are removed from their office by operation of law at the beginning of the proximate month after having reached the age of 70.[143] A deposal from the office at an earlier point of time is of

[133] Article 22 (2) Wet op het notarisambt.
[134] Article 25 (1) Wet op het notarisambt. Also see HR 3 februari 1984, ECLI:NL:PHR:1984:AG4750 (*Slis-Stroom*), HR 13 juni 2003, ECLI:NL:PHR:2003:AF3413 (*ProCall*), and A.F. Salomons, 'Art. 25 Wet op het Notarisambt en de bijzondere notariële kwaliteitsrekening', *WPNR* 2001/6442.
[135] Article 25 (2) Wet op het notarisambt. Also see B.C.M. Waaijer, 'De notaris als regisseur van geldstromen', in: J. Struiksma et al. (eds.), *Vast en Goed*, Deventer: Kluwer, 2003, p. 309.
[136] Article 25 (3) Wet op het notarisambt.
[137] Ibid. Also see B.C.M. Waaijer, 'De notaris als regisseur van geldstromen', in: J. Struiksma et al. (eds.), *Vast en Goed*, Deventer: Kluwer, 2003, p. 308.
[138] Article 25 (3) Wet op het notarisambt.
[139] Article 14 Verordening beroeps- en gedragsregels.
[140] Article 93 Wet op het notarisambt. Also see articles 12-13 Besluit op het notarisambt, *Stb*. 2012, 459.
[141] Article 94 (1) Wet op het notarisambt. Also see articles 12-13 Besluit op het notarisambt, *Stb*. 2012, 459and Reglement omtrent de werkwijze van de kamers voor het notariaat (zoals bedoeld in artikel 12 lid 5 van het Besluit op het notarisambt, *Stb*. 2012, 459).
[142] Article 94 (1) Wet op het notarisambt.
[143] Article 14 (1) Wet op het notarisambt.

course possible and can be initiated either by the notaries themselves or by the Minister of Justice.[144] In addition to the removal from office and under specific circumstances, the president of the Chamber of Notaries can suspend ("*schorsen*") a notary.[145] Specifically, a suspension occurs if notaries are suspected of or sentenced for the conducting of criminal activities, if they have built up debts for which they were scourged ("*gegijzeld*"), if a judicial sentence declares them insolvent, imposes a debt restructuring measure for natural persons ("*schuldsaneringsregeling natuurlijke personen*"), respectively a suspension of payments ("*surséance van betaling*"), or if notaries are, due to their mental or physical condition, unable to properly perform their duties any longer.[146]

If a notarial establishment becomes vacant, either because of the death of the former notary, their resignation from office or departure to a different district without taking their protocol, a different notary will be assigned by the Minister of Justice to take over the predecessor's protocol.[147]

3.1.3 The Role of the Land Registrar

The land registrar in the Netherlands is the "*bewaarder van het kadaster en de openbare registers*".[148] Land registrars are appointed by the board of directors of the *Kadaster*.[149]

3.1.3.1 Requirements for Appointment

To be considered as a land registrar, one must possess the relevant professional qualification.[150] Candidates must have acquired the right to bear the academic title "*meester*" as a result of completing a law study at a university or the Open University to which the Higher Education and

[144] Article 1(j), 14 (2)-(4) Wet op het notarisambt.
[145] Article 26 Wet op het notarisambt.
[146] Article 26 (1) and 27 Wet op het notarisambt.
[147] Article 15, 1 (1)(f), and 38 Wet op het notarisambt. For detailed information about the taking over of a protocol see: Verordening van de KNB van 21 juni 2000, Stcrt. 2000, 182, goedgekeurd door de Staatssecretaris van Justitie bij brief d.d. 15 september 2000, nr. 5052258/00/06, inw. tr. 1 oktober 2000 (zie voor de totstandkoming Nieuwsbrief Notariaat april, juni en augustus 2000) gewijzigd bij Verordening tot wijziging van de Verordening ledenraad en de Verordening overdracht protocol (Verordening Kamers voor het notariaat) van 28 september 2011, Stcrt. 14 december 2012, 24618, goedgekeurd door de minister van Veiligheid en Justitie bij brief van 6 maart 2012, inw. tr. 1 januari 2013 en gewijzigd bij Verordening tot wijziging van de Verordening overdracht protocol van 8 april 2015, Stcrt. 21 juli 2015, 20642, goedgekeurd door de minister van Veiligheid en Justitie bij brief van 3 juli 2015, inw. tr. 31 juli 2015 (Verordening overdracht protocol).
[148] Articles 1 (1) and 6 (1) Kadw.
[149] Article 6 (1) Kadw.
[150] Article 6 (2) Kadw.

Academic Research Act ("*Wet op het hoger onderwijs en wetenschappelijk onderzoek*") relates, or a qualification which the board of directors of the *Kadaster* declares to be of equivalent nature, or a recognition of professional qualifications as referred to in article 5 General Act on the Recognition of EC professional qualifications ("*Algemene wet erkenning EG-beroepskwalificaties*").[151] Article 5 deals with the recognition of the professional qualifications of migrant workers. A migrant worker is further defined in article 1 as – amongst others - a citizen of a concerned state ("*betrokken staat*"). A concerned state in turn is defined as a Member State of the European Union, a party to the European Economic Area, and Switzerland.[152] This layer of provisions read together thus leads to the conclusion that it is not required that registrars possess the Dutch nationality.

A vocational training program, as is required for candidate notaries, is as such not requested by the legislator. Yet, this does not entail that candidate registrars are absent. Instead, the question of whether a future registrar is to follow an internal vocational training program depends on that person's individual background.

3.1.3.2 Mandate and Authorization

As follows from article 6 paragraph 1 Land Registry Act ("*Kadasterwet*"; hereafter: "Kadw"), there have to be at least two land registrars. When there are more than two land registrars, the board of directors of the *Kadaster* nominates one of them as chief land registrar ("*hoofdbewaarder*").[153] Currently, the Netherlands counts nine land registrars. Especially when comparing it to other legal systems, this figure might cause some perplexity on first glance. Yet, this perplexity can be explained quite easily. In opposite to other legal systems, the Dutch land registrars may bestow a mandate ("*mandaat*") or authorization ("*machtiging*") upon other members of the *Kadaster* staff to administer the competences and duties that were vested in them by law.[154] Depending on the nature of the mandate or authorization, this might in turn include the power to mandate or

[151] Ibid.
[152] Article 1 Regeling erkenning EG-beroepskwalificaties kandidaat-notaris, *Stcrt*. 2008, 250.
[153] Article 7 (3) Kadw.
[154] Article 7 (2) Kadw. Articles 1(f), 2, 5 (1) Besluit bewaarders van het kadaster en de openbare registers tot verlening van mandaat en machtiging ten aanzien van het bijwerken van de basisregistratie kadaster. For more information on the specific content that such a mandate may have, see articles 3 and 4 Besluit bewaarders van het kadaster en de openbare registers tot verlening van mandaat en machtiging ten aanzien van het bijwerken van de basisregistratie kadaster.

authorize members of the *Kadaster* staff.[155] The freedom of action of mandated or authorized staff is limited in so far as they must stay within the competences that were vested in them by means of the mandate or authorization.[156] Further, they must comply with the relevant legal provisions (which include the Mandate and Authorization Decrees and adhere to the land registrars' instructions.[157] This also entails that whenever the mandated or authorized staff is in doubt, they have to consult the registrars for advice.[158] Mandated staff is registered in a public mandate and authorization register ("*mandaat en machtigingregister*") that is kept by the chief land registrar.[159]

3.1.3.3 Duties and Competences

Land registrars are public officials ("*ambtenaren*").[160] As such, they are entrusted with the registrations and annotations ("*aantekeningen*") in the land register as well as with the updating of the cadastre, the register for vessels, and the register for aircraft.[161] With regard to the fulfilment of these tasks, the board of directors of the *Kadaster* may supply their land registrars with instructions and guidelines.[162] In the completion of their tasks, the land registrars are passive ("*lijdelijk*"), as they may only reject an application for registration if the submitted documents do not comply with the formal registration requirements.[163] Thus, they do not examine the deeds' substance.[164] In this

[155] Article 5 (2) Besluit bewaarders van het kadaster en de openbare registers tot verlening van mandaat en machtiging ten aanzien van het bijwerken van de basisregistratie kadaster.
[156] Article 6 (1) Besluit bewaarders van het kadaster en de openbare registers tot verlening van mandaat en machtiging ten aanzien van het bijwerken van de basisregistratie kadaster.
[157] Article 6 (2) Besluit bewaarders van het kadaster en de openbare registers tot verlening van mandaat en machtiging ten aanzien van het bijwerken van de basisregistratie kadaster. Also see Besluit bewaarders van het kadaster en de openbare registers tot verlening van mandaat en machtiging ten aanzien van het behandelen van klachten en bezwaarschriften aan de senioren van het BKK team. Also see Besluit bewaarders van het kadaster en de openbare registers tot verlening van mandaat en machtiging ten aanzien van de bijwerking van de registratie voor schepen en luchtvaartuigen. Also see Besluit bewaarders van het kadaster en de openbare registers tot verlening van mandaat en machtiging ten aanzien van het behandelen van klachten en bezwaarschriften aan de medewerkers van het BKK team.
[158] Article 6 (3)-(4) Besluit bewaarders van het kadaster en de openbare registers tot verlening van mandaat en machtiging ten aanzien van het bijwerken van de basisregistratie kadaster.
[159] Article 7 Besluit bewaarders van het kadaster en de openbare registers tot verlening van mandaat en machtiging ten aanzien van het bijwerken van de basisregistratie kadaster.
[160] Regelen met betrekking tot de openbare registers voor registergoederen, alsmede met betrekking tot het kadaster (Kadasterwet), *Kamerstukken II* 1981/82 17 496, nr. 5, p. 27. Also see Article 18 (1) Organisatiewet Kadaster, *Stb*. 1994, 125.
[161] Article 7 (1) Kadw.
[162] Article 7 (4) Kadw.
[163] A.S. Hartkamp, *Compendium van het vermogensrecht voor de rechtspraktijk*, Deventer: Kluwer, 2005, p. 52-53. Also see RvS 1 december 2010, ECLI:NL:RVS:2010:BO5723, para.. 2.5; Rb. Haarlem, 12 november 2010, ECLI:NL:RBHAA:2010:BO4764, para.. 2.5-2.6; RvS 9 mei 2012, ECLI:NL:RVS:2012:BW5288, para.. 2.4.1; RvS

regard, it is to mention that once a fact is registered, it is not possible anymore to challenge the validity of its registration on the basis that formal registration requirements were not met.[165] It is to be pointed out that the land registrar is passive only with regard to the registration of deeds in the land register but not with regard to the updating of the cadastre.[166]

3.1.4 The Relationship between Notary and Land Registrar

The relationship between notary and land registrar is balanced. To begin with, the required level of academic training to enter either profession is the same. With regard to the vocational training program, it appears at first sight that the legislator imposes this prerequisite for appointment solely upon the notaries. Yet it needs to be taken into consideration that it is not unlikely that land registrars have a notarial background and thus have also followed (parts of) the said training program. Second, the legislator has positioned notaries and land registrars in such a way that a checks-and-balances situation is provided for. Considering that the role of the land registrar is a passive one, these checks-and-balances however are restrained essentially to formal registration requirements. Third, it can be observed that notaries and land registrars demonstrate actual cooperation. Regular meetings of the *Kadaster* and the KNB provide an important forum for the discussion of new developments and problems that are faced in practice as well as for the formation of new policies.[167] An example of a new development for which the necessary policies were formulated in the course of these meetings was the introduction of the possibility to offer digital deeds for registration.[168] On a lower hierarchical level, the *Kadaster* provides practical support to notaries through the land registrars' phone ("*bewaarderstelefoon*").[169] Notaries can call

16 maart 2011, ECLI:NL:RVS:2011:BP7779, para.. 2.4; RvS 2 mei 2012, ECLI:NL:RVS:2012:BW4507, para.. 2.3.1;

[164] J.C. van Straaten, *Kadaster, openbare registers en derdenbescherming*, Deventer: Kluwer, 1992, p. 52. Nevertheless, land registrars are authorized to warn parties in particular situations (article 3:19 paragraph 4 BW). See Chapter 3.1.8.4.

[165] Article 3:22 BW.

[166] RvS 3 februari 2016, ECLI:NL:RVS:2016:210, para.. 4.1.

[167] H.E. Bröring & W. Louwman, 'Huidige en toekomstige plaats en rol van de bewaarder bij de overdracht van onroerende zaken', *WPNR* 2011/6875.

[168] W. Louwman, 'Inschrijving in de openbare registers van in elektronische vorm aangeleverde stukken', *JBN* 2003/01. Also see A.A. van Velten, 'De verhouding tussen notaris en bewaarder uit het oogpunt van eerstgenoemde', *WPNR* 2011/6875.

[169] H.E. Bröring & W. Louwman, 'Huidige en toekomstige plaats en rol van de bewaarder bij de overdracht van onroerende zaken', *WPNR* 2011/6875.

the land registrars' phone on working days between 9.00 and 17.00 o'clock to discuss complicated questions of law related to the registration of deeds and other documents in the land register.[170]

Based on the foregoing considerations, it can be safely concluded that notaries and land registrars not only meet each other at eye level but that they also use their individual capacities to find solutions to common problems. By the same token, it must not be forgotten that this conclusion is the reflection of a snap-shot and that it remains to be seen to what extent the advancing digitalization and automating of the registration system will influence this relationship.[171]

3.1.5 The Content of the Land Register

As follows from article 3:16 BW, facts which are relevant for the legal status of registered property can be registered in the land register. Whether a fact can be registered depends on whether it can be founded on a legal basis. The most comprehensive legal basis is article 3:17 BW. This provision provides an overview of the different categories of facts that are registrable in the land register. In broad terms, those are facts that are relevant for the legal situation of the registered property.[172] This overview is however not conclusive so that also other facts that are not enumerated in this provision can be registered in the land register if a legal basis for registration has been provided by the legislator.[173] Even personal rights can be registered if a legal basis can be found.[174] One is thus not to be misled that only property rights can be entered in the land register.

3.1.5.1 The Constitutive Nature of Registration

After having established which rights can be registered, the focus shall now be laid on the underlying reason for registration. Is the registration of constitutive or declaratory nature? As stated, property rights as well as personal rights can be registered in the land register provided that

[170] Website Kadaster, 'Bewaarderstelefoon' (http://www.kadaster.nl/web/artikel/klantenserviceartikel/Bewaarderstelefoon.htm), consulted on 24.02.2016.
[171] For a description of the relationship between notaries and land registrars in the course of the last centuries, see: A.A. van Velten, 'De verhouding tussen notaris en bewaarder uit het oogpunt van eerstgenoemde', *WPNR* 2011/6875.
[172] Article 8 (1) Kadw.
[173] Article 3:17 (1) BW.
[174] Article 3:17 (2) BW.

a legal basis can be found. With regard to property rights, registration is constitutive.[175] In order to transfer the right of ownership of immovable property or to create or transfer a limited property right, three requirements have to be fulfilled: legal competence ("*beschikkingsbevoegdheid*"), a valid legal title ("*geldige titel*"), and delivery ("*levering*").[176] As follows from article 3:89 (1) BW, immovable property is delivered through the registration of the notarial deed in the land register. Thus, without registration of the deed, the transfer of the immovable property does not pass ("*boekingsprincipe*").[177]

With regard to personal rights, one might think at first instance that registration is merely declaratory. That this is not always the case can be illustrated on the basis of qualitative duties ("*kwalitatieve verplichtingen*"). A qualitative duty is a personal duty (though one with *droit de suite*).[178] To create such a duty, it is required that the agreement of creation be poured in the form of a notarial deed and registered in the land register.[179] Another example of a personal right is a right of retention ("*retentierecht*"), which can be registered in the land register although registration is not a requirement for their creation.[180] In these cases, the registration is of mere declaratory nature. Summarizing, it has become evident that for the creation and transfer of the vast majority of rights, registration in the land register is constitutive.

3.1.5.2 The Sources of the Land Register and Cadastre

The information in the land register has one source – the registered deeds. After all, the land register as such is a mere collection of registered deeds. The information in the cadastre on the other hand, through which the land register is made accessible, is a compilation of information that originates from different sources. Primarily, the information is of course taken over from the registered deeds. Yet, after having implemented a system of key registers ("*Stelsel van Basisregistraties*"), administrative bodies ("*bestuursorganen*") (such as the *Kadaster* and the notaries) have to make use of the data that is stored in all relevant key registers ("*basisregistraties*")

[175] Article 3:10 and 3:89 (1) BW.
[176] Article 3:84 (1) BW. As follows from article 3:98 BW, this provision is also applicable with regard to the creation and transfer of limited property rights.
[177] J.C. van Straaten, *Kadaster, openbare registers en derdenbescherming*, Deventer: Kluwer, 1992, p. 49.
[178] Article 6:252 (2) BW. Also see O.K. Brahn & W.H.M. Reehuis, *Zwaartepunten van het vermogensrecht*, Deventer: Kluwer, 2015, p. 37.
[179] Article 6:252 (2) BW.
[180] Article 3:290 BW. Also see Rb. Rotterdam 16 april 2015, ECLI:NL:RBROT:2015:2503.

when they fulfil tasks that are subject to public law.[181] The system of key registers describes in essence the interconnection of 12 individual key registers.[182] Examples of key registers are the cadastre ("*Basisregistratie Kadaster*"), the Key Register Addresses and Buildings ("*Basisregistratie Adressen en Gebouwen*"), the Commercial Register ("*Handelsregister*"), and the Key Register Persons ("*Basisregistratie Personen*").[183]

From a legal perspective, key registers are registers that are characterized by three main features. First, these registers were authorized as key registers by the Dutch State.[184] Second, the data contained in the key registers has to be re-used by other administrative bodies.[185] To be specific, all key registers contain authentic data, non-authentic data, and data that was taken over from a different key register, which qualifies as authentic data in that other key register.[186] Only data that falls within the first category must be re-used by all other administrative bodies.[187] Thus, by means of example, the name of an organization has to be taken over from the Commercial Register, the date of birth from the Key Register Persons, and the cadastral size of a plot of land from the cadastre.[188] To differentiate authentic data from the data that falls in the remaining two categories, it is provided with an identifying mark.[189] The same method is applied to identify data that was taken over from a different key register.[190] Third, administrative bodies do not have to investigate whether the data that they re-use is correct.[191] Consequently, the data has to meet high standards in respect of correctness. This is why the keeper of the key register is responsible for the quality of the

[181] E.E. Minkjan, 'Notaris bestuursorgaan', *WPNR* 2002/6506.
[182] N.C. van Oostrom-Streep, 'Basisregistratie Kadaster en de notariële vastgoedpraktijk', *WPNR* 2011, 6875. Note that at the time of writing this chapter, not all connections were yet realized.
[183] Article 1a and 7f Kadw.
[184] Wijziging van de Kadw, de Organisatiewet Kadaster en enige andere wetten in verband met de aanwijzing van de kadastrale registratie, de kadastrale kaart en het geografisch bestand tot basisregistraties en enkele andere wijzigingen (Wet basisregistraties kadaster en topografie), *Kamerstukken II* 2005/06, 30 554, nr. 3.
[185] Article 7k (1) Kadw. The exception to this rule can be found in paragraphs 2-4 of the same article. Also see W. Louwman, 'De invoering van de basisregistratie Kadaster', *JBN* 2008/04.
[186] N.C. van Oostrom-Streep, 'Basisregistratie Kadaster en de notariële vastgoedpraktijk', *WPNR* 2011, 6875.
[187] Ibid. Also see Wijziging van de Kadasterwet, de Organisatiewet Kadaster en enige andere wetten in verband met de aanwijzing van de kadastrale registratie, de kadastrale kaart en het geografisch bestand tot basisregistraties en enkele andere wijzigingen (Wet basisregistraties kadaster en topografie), *Kamerstukken II* 2005/06, 30 554, nr. 3.
[188] Article 7f (2) and article 48 (2)(d) Kadw. Also see Article 9(b) and article15 Handelsregisterwet 2007, *Stb*. 2007, 153 Also see Article 2.7 (1)(a)(1) Wet basisregistratie personen, *Stb*. 2013, 315 and article 2 Besluit basisregistratie personen, *Stb*. 2013, 493 and bijlage 1 Besluit basisregistratie personen.
[189] Article 7h (1) Kadw.
[190] Article 7h (2) Kadw.
[191] N.C. van Oostrom-Streep, 'Basisregistratie Kadaster en de notariële vastgoedpraktijk', *WPNR* 2011, 6875.

data.[192] Therein key register keepers are supported by the administrative bodies that use their data as well as by the involved parties in general as they are under the duty to report any (alleged) incorrect data.[193] The profits of such a system of key register are manifold. Both citizens and governmental bodies benefit from the interconnection; citizens, as they must only provide their data once and governmental bodies as it increases their efficiency.[194] While 12 key register have been introduced in the past years, the cadastre, the Key Register Persons and the Commercial Register are to be identified as the most relevant key registers for the notary.[195]

3.1.6 Publicity of Land Registry Information

As stated before, interested parties can search the land register through the cadastre. In addition, with respect to the transfer of immovable property, the parties can request identical copies of documents ("*voor eensluidend gewaarmerkte kopieën*") that are registered in either register, information as to whether a registration in the 4D register exists as well as information about the coordination point net ("*net van coördinaatpunten*").[196] Both the cadastral code of the immovable property and the plot's address, as well as the name of the owner of said property, respectively the name of the holder of a limited property right, not being a servitude ("*erfdienstbaarheid*"), can serve as a search entrance.[197] The information in the land register and the cadastre are public; a legitimate interest does not need to be shown.[198] Thus, everybody who wishes to consult the land register or the cadastre may do so. This means that the party, who demands documents from the *Kadaster*, receives quite some (personal) information about a person.[199] Depending on which document the party asks for, they might not only receive the address of the owners of the plot, but also their date of birth, their civil status at the time the notarial deed was signed, the purchase price, and the amount for which they created a mortgage.[200]

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[192] Article 7j and 7u Kadw.
[193] Article 7m (1) and 7n (1) and 7t (1) Kadw.
[194] Wetenschappelijke Raad voor het Regeringsbeleid, *iOverheid*, Den Haag/ Amsterdam: Amsterdam University Press, 2011, p. 117-118.
[195] N.C. van Oostrom-Streep, 'Basisregistratie Kadaster en de notariële vastgoedpraktijk', *WPNR* 2011, 6875.
[196] Article 99 Kadw.
[197] Article 48 (1) Kadw. Also see article 22 (5) Kadasterregeling 1994.
[198] Article 99 -100 Kadw.
[199] Article 39-40 Wet op het notarisambt. For an example of an ownership report provided by the Kadaster (``*Kadastraal bericht eigendom*") see: Website Kadaster, 'Eigendomsinformatie' (http://www.kadaster.nl/web/artikel/producten/Eigendomsinformatie.htm#Voorbeeld), consulted on 25.01.2016.
[200] For a critical response to the openness of the Dutch system see: A. Berlee, *Access to personal data in public land registers: Balancing publicity of property rights with the rights to privacy and data protection*, The Hague:

One exception exists with respect to this rule. The *Kadaster* does not distribute information for commercial or caricatural purposes.[201] Nevertheless, with such an open system, it can never be fully excluded that some applicants abuse this possibility for unethical purposes. Yet, in addition to this exception, one 'threshold' exists; the registers cannot be consulted for free. The entitlement of the *Kadaster* to couple the distribution of information to interested parties with a tariff follows from articles 108-110 Kadw. In 2019, the *Kadaster* asks: €2,60 (for automated delivery of the land register and cadastral information which can be viewed and downloaded online), €15,90 (for delivery of such information via e-mail), €17,90 (for delivery of information via regular mail), and €32,20 (when the information is demanded at the reception desk).[202] Considering that the tariffs for the consultation of the registers are relatively low, it can be discussed to what extent the demand of a tariff indeed forms a real threshold.[203]

As a closing remark, it deserves mentioning that a legal basis for the creation of a general administrative measure ("*algemene maatregel van bestuur*") providing for the shielding of personal information from the cadastre is expressly provided for in article 107b Kadw.[204] In November 2018, this general administrative measure was passed.[205] From 1 July 2019 onwards, the *Kadaster* is under a legal obligation to shield personal information for a select group of people, whose security is guarded for by the police under the Police Act 2012 ("*Politiewet 2012*").[206] This measurement is temporary; the personal information of these persons is initially shielded for a period of five-years but can be extended in five-year intervals. It must be acknowledged however that this prohibition cannot be completely made watertight due to the fact that a select group of professionals (notaries, bailiffs, and administrative bodies) must be able to access the personal information for professional purposes.

Eleven International Publishing, 2018, p. 374-375. Also see A. Berlee, 'Meer aandacht voor privacy in de openbare registers?', *NJB* 2015/1091. Also see A. Berlee, 'Access to Personal Data in Public Land Registers', *WPNR* 2018(7217). Also see A. Berlee, 'Volledige openbaarheid: het doel voorbij', *WPNR* 2017(7169). Also see W. Louwman, 'De Basis Registratie Kadaster: een knecht van twee meesters ?', *WPNR* 2018(7209).

[201] Article 3a (2) Kadw.

[202] Tarieven Kadaster per 1 januari 2019 conform the Tarievenregeling Kadaster, to be consulted on: Website Kadaster, 'Tarieven' (https://zakelijk.kadaster.nl/tarieven), as consulted on 06.05.2019. The tariff for requesting an extract of the cadastral map in 2019 is slightly lower: €1,60 (automated delivery), €14,90 (e-mail), €16,90 (mail), and €31,20 (reception desk).

[203] Also see A. Berlee, 'Meer aandacht voor privacy in de openbare registers?', *NJB* 2015/1091.

[204] I.J. Kloek-Tromp, Kadaster en privacy in praktijk, *WPNR* 2017(7169).

[205] Besluit van 20 november 2018 tot wijziging van het Kadasterbesluit (afscherming persoonsgegevens), *Stb*. 2018, 456.

[206] Article 37a Kadasterbesluit, *Stb*. 1991, 571 .

3.1.7 The Legal Value of Land Register Information

The Netherlands have a negative registration system.[207] As such, the *Kadaster* does not guarantee that the information contained in the land register is correct and complete.[208] This goes hand in hand with the passiveness of the land registrars who may solely control the formal registration requirements and who must refrain from checking the deed substantively. Yet, this circumstance does not lead to the conclusion that buyers may refrain from checking the land register. Namely, if buyers are confronted with information that they would have been familiar with if they had consulted the land register, they cannot call upon the principle of good faith.[209] According to legal doctrine, it is generally accepted that also the information from the cadastre falls under the ambit of this provision seeing that cadastre is the entrance to the land register information and that consequently the latter information cannot be consulted without learning about the corresponding cadastral information.[210] It is to be stressed in this regard that the consultation of the cadastral map is excluded from the scope of article 3:23 BW.[211] Research based on the cadastral map is only required in the situation in which one is or should be questioning whether the physical boundary corresponds to the cadastral boundary.[212]

[207] O.K. Brahn & W.H.M. Reehuis, *Zwaartepunten van het vermogensrecht*, Deventer: Kluwer, 2015, p. 114. For proposals to make the negative registration system more positive, see: W.G. Huijgen, 'Naar een meer positief stelsel van grondboekhouding?', *WPNR* 2003/6532. On the possibility to create a more positive system with regard to "KIK", see: R.J.L. Timmer, 'Naar een meer positief stelsel van openbare registers en Basisregistratie Kadaster?', *WPNR* 2011/6875. Some authors describe the Dutch registration system – due to the third party protection mechanism – as a semi-positive registration system. See: S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, p. 467-468. Also see J. Vos and B.H.J. Roes, 'Onduidelijkheden rondom inschrijving en registratie', *WPNR* 2018(7180).

[208] As an plenum to the fact that a guarantee for the correctness of the land registry information cannot be given, it deserves mentioning that one exception exist; these are so-called declarations of entitlement ("*verklaringen voor recht*") ex article 3:27 BW. See J.C. van Straaten, *Kadaster, openbare registers en derdenbescherming*, Deventer: Kluwer, 1992, p. 49.

[209] Article 3:23 and article 3:11 BW. Also see J.C. van Straaten, *Kadaster, openbare registers en derdenbescherming*, Deventer: Kluwer, 1992, p. 179-184.

[210] J.C. van Straaten, *Kadaster, openbare registers en derdenbescherming*, Deventer: Kluwer, 1992, p. 19. Also see W.H.M. Reehuis & A.H.T. Heisterkamp, *PITLO Deel 3: Goederenrecht*, Deventer: Kluwer, 2012, p. 45.

[211] W.H.M. Reehuis & A.H.T. Heisterkamp, *PITLO Deel 3: Goederenrecht*, Deventer: Kluwer, 2012, p. 45. Also see S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, p. 501-504.

[212] W.H.M. Reehuis & A.H.T. Heisterkamp, PITLO Deel 3: Goederenrecht, Deventer: Kluwer, 2012, p. 45.

3.1.7.1 The Third Party Protection Mechanism

If buyers consult the land register, they can invoke third party protection rules against the incompleteness and incorrectness of the land register.[213] To provide just one example in which the land register is incorrect, concerns the situation in which heirs inherit the testator's house. As long as the heirs do not engage a notary to register the certificate of succession in the land register, the house will still be registered on the testator's name.[214]

The third party protection rules are laid down in articles 3:24-26 BW. Article 3:24 BW protects those who consult the land register against its incompleteness. When another fact that could have been registered with regard to the same registered property but was not registered at the point of time at which the registration of the legal act occurred, then this fact cannot be invoked against the buyer.[215] Naturally, this is not the case if the consulting party was aware of this fact.[216] This protection cannot be invoked against all possible facts but is subject to a number of exceptions.[217] For instance, this provision does not offer protection against a prescription case even if it could have been entered in the land register. Articles 3:25 BW and 3:26 BW both grant protection against the incorrectness of the land register information. However, their scopes differ. In comparison, the scope of protection offered by article 3:25 BW is rather narrow as it is limited to a protection against incorrect facts that must fulfil four conditions: (i) they were established with authenticity (ii) by a public official (such as a notary), (iii) recorded in an authentic deed (iv) that was registered in the land register.[218] Examples of facts that can be brought within the scope of this article are the names of the parties, their dates of birth, or the date on which the deed was executed.[219] Article 3:26 BW takes a different approach and provides that an incorrect fact cannot be pleaded against a buyer by the party, who could have reasonably rectified that incorrectness but failed to do so for whatever reason.[220] The protection offered by both these articles is subject to a number of

[213] Article 3:24-3:26 BW.
[214] Article 4:188 BW. Also see Article 27 Kadw. Also see J.C. van Straaten, *Kadaster, openbare registers en derdenbescherming*, Deventer: Kluwer, 1992, p. 48.
[215] Article 3:24 (1) BW.
[216] Ibid.
[217] These exceptions are laid down in article 3:24 (2)-(3) BW.
[218] Article 156 (2) and 157 (1) Rv. Also see W.H.M. Reehuis & A.H.T. Heisterkamp, *PITLO Deel 3: Het Nederlands burgerlijk recht: Goederenrecht*, Deventer: Kluwer, 2012, p. 50, 177.
[219] Articles 39-40 Wet op het notarisambt.
[220] For illustrations of the protection granted by this article, especially with regard to prescription and the relation to article 3:24 BW see W.H.M. Reehuis & & A.H.T. Heisterkamp,*PITLO Deel 3: Het Nederlands*

conditions. It is required that the incorrect fact was registered when the registration of said legal act occurred, the buyer's entitlement was transferred to him under special title, that the buyers were not aware of the incorrectness, and that they could not have been aware of this possibility through consultation of the land register. Last, article 3:36 BW protects third parties who on the basis of another person's declaration or behaviour assumed that a legal relation either arose, exists, or ends, acted in reasonable confidence that their assumption was correct.[221] That other person cannot appeal the third party's action on the ground that it was based on an incorrect assumption.[222]

It is important to notice that the third party protection rules are only applicable to the land register and not to the cadastre.[223] To avoid unlucky surprises, it is thus important to compare the deed in the register with the information in the cadastre. This does not take away that the *Kadaster* can be held liable if a registration request is unlawfully accepted or rejected, if a mistake, default, delay or a different irregularity occurs in the course of maintaining the cadastre and land register or while issuing information in the form of copies and testimonies.[224] Although the *Kadaster* can be held liable, it is to be stressed that the decision of a notary to trust the information provided by the cadastre and to not consult the land register, qualifies as professional misconduct.[225] As a result, it is then also the notary who can be held liable.[226] Further, liability can be accorded to the State when a person loses their right through the application of the third party protection rules (articles 3:24, 3:25, and 3:27 BW), provided that the circumstances that lead to this situation cannot be accounted to that person when applying the principles of rationality and righteousness.[227]

burgerlijk recht: Goederenrecht, Deventer: Kluwer, 2012, p. 50, 177. Also see W. Louwman, 'Misverstanden inzake registerverklaringen', *JBN* 1996(9) 81.

[221] A.A. van Velten, 'Bescherming bij overdrach van onroerende zaken', in: J. de Jong et al., *Naar een meer positief stelsel van grondboekhouding?: Preadviezen 2003 uitgebracht voor de Vereniging voor Burgerlijk Recht*, Deventer: Kluwer, 2003, p. 32.

[222] Article 3:36 BW.

[223] Article 3:24-3:26 BW. Also see Hof Amsterdam, 20 oktober 2015, ECLI:NL:GHAMS:2015:4327. Also see W.M. Kleyn, 'De positie van degene die afgaat op de gegevens van de openbare registers', *JBN* 2006/06 and R.J.L. Timmer, 'Naar een meer positief stelsel van openbare registers en Basisregistratie Kadaster?', *WPNR* 2011/6875.

[224] Article 117 (1)-(4) Kadw. For an example, see: Rb. Noord-Nederland 15 januari 2013, ECLI:NL:RBNNE:2013:CA2649 and Hof Amsterdam 20 oktober 2015, ECLI:NL:GHAMS:2015:4327, para.. 3.4.

[225] Hof Amsterdam 20 oktober 2015, ECLI:NL:GHAMS:2015:4327, para.. 3.4.

[226] Hof Amsterdam 20 oktober 2015, ECLI:NL:GHAMS:2015:4327, para.. 3.5.

[227] Article 3:30 BW.

Furthermore, as enshrined in article 3:88 BW, the Dutch system foresees in the protection of the buyer against the seller's lack of power of disposal.[228] The application of this protection is subject to several conditions. First, the buyer has to be in good faith ex. article 3:11 BW.[229] Second, the seller did not possess the power of disposal to transfer the plot of land to the buyer.[230] Third, this lack of the seller's power of disposal must result from the invalidity of an earlier transfer.[231] Fourth, the invalidity of this earlier transfer must not be caused by the lack of the power of disposal of the previous seller.[232]

The protection that is provided by article 3:88 BW is thus able to counterbalance the effects inherent in the causal transfer system to which the Netherlands adheres.[233] To illustrate, the following example shall be provided: "A" transfers a plot of land to "B". "B" in turn transfers the very plot to "C". Initially, both transfers comply with the requirements set out in article 3:84 (1) BW. At a later stage however, the contract of sale as concluded between "A" and "B" is invalidated. In a sterile causal system without third party protection rules, this would entail that "A" retroactively becomes the owner of the plot of land again.[234] "B" on the other hand is deemed to never have become the owner of the land, so that he could not transfer the land to "C".[235] However, through the application of article 3:88 BW, the position of "C" as owner of the plot is protected.[236]

3.1.8 The Process of Transferring a Plot of Land in a Purely National Case

The process of transferring the ownership of a plot of land begins with a person looking for a new domicile in the form of a house. Once a suitable estate is found, that person will contact the seller or – if the seller does not sell the house himself – the real estate agent who was engaged by the seller.

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[228] J.C. van Straaten, *Kadaster, openbare registers en derdenbescherming*, Deventer: Kluwer, 1992, p. 49.
[229] Article 3:88 (1) BW. Also see J.C. van Straaten, *Kadaster, openbare registers en derdenbescherming*, Deventer: Kluwer, 1992, p. 210.
[230] Article 3:88 (1) BW.
[231] Ibid.
[232] Ibid.
[233] T.O. Lau, *Einführung in das niederländische Mobiliarsachenrecht: Eigentumsübertragung, Eigentumserwerb und Sicherungsrechte*, Münster: Waxmann Verlag, 1999, p. 58.
[234] S. van Erp & B. Akkermans (eds.), *Cases, Materials and Text on Property Law*, Oxford/Portland, Hart Publishing, 2012, p. 835.
[235] S. van Erp & B. Akkermans (eds.), *Cases, Materials and Text on Property Law*, Oxford/Portland, Hart Publishing, 2012, p. 830, 835.
[236] A.A. van Velten, 'Bescherming bij overdracht an onroerende zaken', in: J. de Jong et al., *Naar een meer positief stelsel van grondboekhouding?: Preadviezen 2003 uitgebracht voor de Vereniging voor Burgerlijk Recht*, Deventer: Kluwer, 2003, p. 21-23.

Both the potential buyer and the seller respectively the real estate agent will enter into negotiations to settle the details such as the definite purchase price. Once an agreement has been reached, the buyer will contact financial institutions to secure his financial obligations.

3.1.8.1 The Contract of Sale

In all cases in which "the buyer is a natural person not acting in the exercise of a profession or business" the purchase of immovable property that is meant for habitation has to be put into writing and must be signed by the parties.[237] The law neither requires that the contract of sale is drawn up by a Dutch notary, real estate agent or another qualified third party nor prohibits that it is drawn up by a foreign legal practitioner.[238] If a real estate agent is involved, in practice, the sales contract will then be likely drafted by and signed in front of the real estate agent.[239] Naturally, it is possible for either party to consult a notary before they sign the contract that was prepared by the real estate agent. Alternatively, parties may decide to mandate a notary instead of their real estate agent to draft the sales contract.[240] It is yet assumed that – with the exception of the (surroundings of) Amsterdam - most sales contract are drafted by real estate agent.[241] If a real estate agent is not involved, a notary will draft the sales contract. An example of a notarial sales contract can be found on the website of the KNB.[242]

[237] Article 7:2 (1) BW. Also see article 156 (1) Rv. Also see W.G. Huijgen, 'De strekking van artikel 7:2 lid 1 BW (het schriftelijkheidsvereiste)', *JBN* 2012/04 and W.G. Huijgen, 'Het schriftelijkheidsvereiste van artikel 7:2, lid 1 BW', *JBN* 2004/11. The quoted English translation was obtained from S. Hardt & N. Kornet (eds.), *The Maastricht Collection: Volume IV: Compara.tive Private Law*, Groningen: Europa Law Publishing, 2017. For an exception to this general rule see: article 7:2 (5) BW. See J.W.A. Hockx, *Koop en levering van vastgoed*, Den Haag: Sdu Uitgevers bv, 2006, p. 73. The court of first instance in Limburg has recently ruled that a signature of a contract of sale cannot be substituted for a WhatsApp message, see: Rb. Limburg, 19 april 2018, ECLI:NL:RBLIM:2018:3816.

[238] W.G. Huijgen, 'Aanvulling Boek 7 nieuw BW met koop en huurkoop van onroerende zaken en aanneming van werk', *BR* 2002, p. 1004.

[239] On the possibility of signing a contract of sale digitally, see: G.J.C. Lekkerkerker, 'Een digitaal getekende koopovereenkomst', *JBN* 2014/09 and G.J.C. Lekkerkerker, 'Geen notariële, maar wél een elektronische koopakte?', *JBN* 2008/10.

[240] Website notaris.nl (KNB), 'Hoe kom ik aan een koopcontract als ik een woning wil kopen?' (http://www.notaris.nl/zo-zorgt-u-voor-een-goed-koopcontract), consulted on 11.01.2016.

[241] A.L.M. Keirse et al., 'Wet Koop onroerende zaken: de evaluatie', WODC & Molengraaff instituut voor privaatrecht, 2009, p. 144 as published on the Website of the WODC (https://www.wodc.nl/binaries/volledige-tekst_tcm28-70171.pdf), as consulted on 14.06.2019.

[242] Website KNB, 'Notariële Koopakte' (http://www.knb.nl/document/notarielekoopakte), consulted on 11.01.2016. Also see Model koopovereenkomst voor een bestaande eengezinswoning (model 2018).

In (the surroundings of) Amsterdam the tradition of having a notary draft the sales contract has been established more than 80 years ago.[243] Interestingly, as follows from the evaluation of the Act on the purchase of immovable goods ("*Wet koop onroerende zaken*"[244]), conducted by the Scientific Research and Documentation Centre of the Ministry of Justice ("*Wetenschappelijk Onderzoek- en Documentatiecentrum*") together with the Molengraaf Institute of Private Law ("*Molengraaf instituut voor privaatrecht*"), it was not possible to pinpoint what the trigger of this tradition was.[245] In the same report, the authors conclude that the intervention of a notary especially with regard to the combat of real estate fraud in the drafting of a sales contract is desirable.[246] This conclusion is supported by the notary's expertise and independence as well as by the fact that the notary is responsible for the drafting of the deed of transfer.[247] The evaluation of the Act on the purchase of immovable goods was promised to the Dutch parliament and was conducted five years after it had entered into force.[248] The authors' proposal to require the drafting of the sales contract by a notary was yet rejected by Minister (of Justice) *Opstelten*, who while acknowledging the positive impact of notarial intervention in the drafting of the sales contract, had doubts whether the proposed change would have the impact on the combat of real estate fraud that was predicted by the authors.[249] In addition, he pointed out that the proposed change would burden the buyers with additional costs and would form a more time-consuming process, which would contradict the parliamentary endeavour of reducing rules and regulations.[250]

[243] A.L.M. Keirse et al., 'Wet Koop onroerende zaken: de evaluatie', WODC & Molengraaff instituut voor privaatrecht, WODC & Molengraaff instituut voor privaatrecht, 2009, p. 144 as published on the Website of the WODC (https://www.wodc.nl/binaries/volledige-tekst_tcm28-70171.pdf), as consulted on 14.06.2019.
[244] Wet van 5 juni 2003 tot aanvulling van titel 7.1 (Koop en ruil) van het nieuwe Burgerlijk Wetboek met bepalingen inzake de koop van onroerende zaken alsmede vaststelling en invoering van titel 7.12 (Aanneming van werk).
[245] A.L.M. Keirse et al., 'Wet Koop onroerende zaken: de evaluatie', WODC & Molengraaff instituut voor privaatrecht, 2009, p. 144 as published on the Website of the WODC (https://www.wodc.nl/binaries/volledige-tekst_tcm28-70171.pdf), as consulted on 14.06.2019.
[246] A.L.M. Keirse et al., 'Wet Koop onroerende zaken: de evaluatie', WODC & Molengraaff instituut voor privaatrecht, 2009, p. 149 as published on the Website of the WODC (https://www.wodc.nl/binaries/volledige-tekst_tcm28-70171.pdf), as consulted on 14.06.2019.
[247] Ibid.
[248] A.L.M. Keirse et al., 'Wet Koop onroerende zaken: de evaluatie', WODC & Molengraaff instituut voor privaatrecht, 2009, p. 1 as published on the Website of the WODC (https://www.wodc.nl/binaries/volledige-tekst_tcm28-70171.pdf), as consulted on 14.06.2019.
[249] Evaluatie van de Wet aanvulling van titel 7.1 (Koop en ruil) van het nieuwe Burgerlijk Wetboek met bepalingen inzake de koop van onroerende zaken alsmede vaststelling en invoering van titel 7.12 (Aanneming van werk), *Kamerstukken II* 2011/12, 32320 nr. 2.
[250] Ibid.

In order to reduce disputes about the extent of the object of transfer, the contract of sale will often be topped with a list of objects that specifies which parts and accessories of plot (i.e. the kitchen, the coffee machine, or the plants in the garden) will be included in the transfer and which are excluded from it.[251] When it comes to the specification of the size of the plot in the contract of sale, the situation is less clear as the law provides that it merely qualifies as an indication of the actual size.[252] A similar potential pitfall arises in the context of defects that undermine the normal use of the plot, whereby the point of departure is that the buyer will have to accept all defects of the plot if they were either aware of their existence or at least could have been aware of them, even if these defects rule out the use of the plot.[253] In other words, the buyer must carefully investigate the plot before signing the contract of sale. On the other side of the coin, sellers are not obliged to inform buyers about all defects of the plot; they can restrict themselves to those defects that are crucial to the buyers.

After the contract of sale has been signed by the involved parties, the buyer will receive a copy of this document.[254] The point of time at which he receives the sales contract is important for the determination of the consideration period. From the day after having received the contract onwards, the buyer will have three working days to determine for himself whether he would like to be bound by the sales contract or not.[255] As it can occur that one of these three days may fall on an official holiday or a Saturday or Sunday, the consideration period may - in practice - turn out to be a bit longer than three days.[256] The consideration period must not be contractually excluded and however the buyer decides, he is not obliged to motivate his decision.[257] The legislator introduced

[251] Toelichting op de koopovereenkomst voor de consument (article 1).
[252] Article 7:17 (6) BW.
[253] Article 6.3 Model koopovereenkomst voor een bestaande eengezinswoning (model 2018). Also see Toelichting op de koopovereenkomst voor de consument (article 6).
[254] Article 7:2 (2) BW.
[255] Ibid. Also see H.N. Schelhaas, A.J. Verheij & B. Wessels (eds.), *Bijzondere overeenkomsten*, Deventer: Kluwer, 2016, p. 57 and T.F.H. Reijnen, 'Het schriftelijkheidsvereiste en de bedenktijd bij de koopakte', *JBN* 2010/11.
[256] Article 2 Algemene termijnenwet, *Stb*. 1964, 314. Also see H.N. Schelhaas, A.J. Verheij & B. Wessels (eds.), *Bijzondere overeenkomsten*, Deventer: Kluwer, 2016, p. 57-58 and T.F.H. Reijnen, 'Het schriftelijkheidsvereiste en de bedenktijd bij de koopakte', *JBN* 2010/11.
[257] Article 7:2 (4) BW. Also see A.L.M. Keirse et al., Wet Koop onroerende zaken: de evaluatie, WODC & Molengraaff instituut voor privaatrecht, 2009, p. 58 as published on the Website of the WODC (https://www.wodc.nl/binaries/volledige-tekst_tcm28-70171.pdf), as consulted on 14.06.2019.

the consideration period for two reasons; not only does it grant the buyers a possibility to consult an expert but also to revoke their decision in the event that it was taken precipitately.[258]

If the buyer accepts the sales contract, he has a contractual right against the seller. In order to acquire a property right (in this case ownership), the transfer of the plot has to be registered in the land register.[259] However, before the registration in the land register can occur, it needs to be certain that the sales contract holds up. As shall be explained in the following, the sales contract usually contains a number of important clauses to protect both seller and buyer. If these are called upon, the sales contract does not materialize after all. These concern resolutive conditions ("*ontbindende voorwaarden*"), whose inclusion in the contract of sale can be requested to cover different situations, but the one situation that is typically secured through such a condition, concerns the financing of the house.[260] If the buyer needs to make financial arrangements with a bank to fulfil his obligation to pay the purchase price, he can seek an agreement with the seller to include such a condition.[261] If the buyer is not able to secure the financing of the property, he then does not have to fulfil his contractual duty towards the seller by invoking the resolutive condition.[262] This does not take away that the buyer has to do a serious attempt in securing financing.[263] Other examples, in which use can be made of this technique to safeguard the buyer's position, include the situation in which he plans a change of the building's purpose or a substantial renovation of the house, which require permits from the municipality.[264] Naturally, this instrument can also be employed to protect the position of the seller, if for example the seller needs the approval of a third party before he may transfer the plot of land to the buyer.[265] In all of these situations, it is advisable to couple resolutive conditions with a deadline to prevent that the period of time in which the buyer can opt-out of the sales contract becomes unreasonably long.[266] A technique to safeguard the situation of the seller is to demand from the buyer a bank guarantee or

[258] A.L.M. Keirse et al., Wet Koop onroerende zaken: de evaluatie, WODC & Molengraaff instituut voor privaatrecht, 2009, p. 58-59 as published on the Website of the WODC (https://www.wodc.nl/binaries/volledige-tekst_tcm28-70171.pdf), as consulted on 14.06.2019.
[259] Article 3:89 (1) BW.
[260] Article 3:38 (1) BW. Also see J.W.A. Hockx, *Koop en levering van vastgoed*, Den Haag: Sdu Uitgevers bv, 2006, p. 257, 260.
[261] J.W.A. Hockx, Koop en levering van vastgoed, Den Haag: Sdu Uitgevers bv, 2006, p. 260.
[262] Article 6:22 BW.
[263] For a more detailed analysis, see: M.R. Ruygvoorn, *Afgebroken onderhandelingen en het gebruik van voorbehouden*, Deventer: Kluwer, 2009, p. 220-222.
[264] J.W.A. Hockx, *Koop en levering van vastgoed*, Den Haag: Sdu Uitgevers bv, 2006, p. 266-268.
[265] J.W.A. Hockx, *Koop en levering van vastgoed*, Den Haag: Sdu Uitgevers bv, 2006, p. 264-265.
[266] See for example article 16 Model koopovereenkomst voor een bestaande eengezinswoning (model 2018). Also see J.W.A. Hockx, *Koop en levering van vastgoed*, Den Haag: Sdu Uitgevers bv, 2006, p. 263.

deposit ("*waarborgsom*") usually constituting an amount of ten percent of the purchase price.[267] If the buyer does not fulfil his obligations towards the seller after the consideration period has passed and he is not able to excuse this by invoking a resolutive condition, he will have to pay a penalty, which will be paid from the deposit.[268] The deposit will be stored on the notary's professional bank account.[269] For the sellers, a deposit is slightly more beneficial than a bank guarantee as the notary can then directly transfer the sum of money to them, while in case of a bank guarantee, the notary will first have to contact the respective bank to have the sum transferred to his professional bank account.[270] One needs to take into account that the provision of such a safeguard does not constitute a legal requirement for the transfer of the plot. Therefore, even if the buyer does not provide a bank guarantee or deposit, the notary may execute the deed. In practise however, this scenario is rather likely to be a seldom phenomenon. This is because the buyer is under a contractual obligation to provide such a guarantee, as specified in the contract of sale.[271] Therefore, if the buyer does not fulfil their obligation, the seller can send them a notice of default. If the buyer still does not comply with his contractual obligations, the contract can be dissolved.[272]

3.1.8.2 The Drawing up of the Notarial Deed

To effectuate the transfer of ownership, a notary is required.[273] Under the previous Dutch Civil Code, a transfer of land did not require a notarial deed until article 671a (old) BW entered into force in mid-1956.[274] A private deed ("*onderhandse akte*"), which is drawn up without the involvement or intervention of a notary, was sufficient.[275] In practice, these deeds were yet

[267] Article 7:26 (4) BW. Also see J.W.A. Hockx, *Koop en levering van vastgoed*, Den Haag: Sdu Uitgevers bv, 2006, p. 248.
[268] J.W.A. Hockx, *Koop en levering van vastgoed*, Den Haag: Sdu Uitgevers bv, 2006, p. 248.
[269] Article 7:26 (4) BW.
[270] Article 5.1 and 11.5 Model koopovereenkomst voor een bestaande eengezinswoning (model 2018).
[271] Article 5.1 Model koopovereenkomst voor een bestaande eengezinswoning (model 2018). Also see Toelichting op de koopovereenkomst voor de consument (artikel 5).
[272] Article 11.1 Model koopovereenkomst voor een bestaande eengezinswoning (model 2018).
[273] For a detailed enumeration of all notarial tasks, see: B. Baarsma & P. Risseeuw, Waarvan akte?: Economisch perspectief op de verplichte inschakeling van de notaris in de obligatoire fase, Amsterdam: seo economisch onderzoek, 2010, p. 65-73.
[274] S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, p. 274.
[275] O.K. Brahn & W.H.M. Reehuis, *Zwaartepunten van het vermogensrecht*, Deventer: Kluwer, 2015, p. 109. Also see S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, p. 274.

considered a source of insecurity so that a loan from a bank could often only be acquired if a notary had drawn up the deed.[276]

Normally, it is the buyer who may choose the notary.[277] The contract of sale will specify the party that selected the notary and state which notarial office has been chosen to this end.[278] Due to the fact that in the Netherlands free notarial tariffs with regard to real estate transactions were introduced on 1 October 1999 and fully realized by 1 July 2003, most buyers will ask for offers from several notaries before they make a choice.[279] Independently from the request for an offer stands the duty of the notary to inform their clients about the costs that are attached to their services as well as about the point of time at which these costs are due.[280] There are further no restrictions imposed on the choice of notaries.[281] It is thus possible to choose a notary from Maastricht to draft a sales contract for a house that is located in Groningen. If a notary was already involved in the sale of the plot, they often also takes care of the registration of the transfer in the land register. If a real estate agent has drafted the sales contract, they will forward that contract to the notary.[282]

[276] S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, p. 274.
[277] R.J. Lucassen, J.J. van Loenen-de Wild & J. Tamminga (eds.), *Jaarboekje: Onroerende Zaken*, Apeldoorn/Antwerpen: Maklu, 2010, p. 32.
[278] Article 4.1 Model koopovereenkomst voor een bestaande eengezinswoning (model 2018). Also see Toelichting op de koopovereenkomst voor de consument (artikel 4).
[279] Article 114 Wna. Rules regarding the determination of the maximum tariff are to be found in article 56 Wna. Also see Wettelijke regeling van het notarisambt, mede ter vervanging van de Wet van 9 juli 1842, Stb. 20, op het Notarisambt en de Wet van 31 maart 1847, Stb. 12, houdende vaststelling van het tarief betreffende het honorarium der notarisse en verschotten (Wet op het notarisambt), *Kamerstukken II* 1993/94, 23 706, nr. 3, p. 10-11 and W. Arts, R. Batenburg & P. Groenewegen (eds.), *Een Kwestie van Vertrouwen: Over veranderingen op de markt voor professionele diensten en in de organisatie van vrije beroepen*, Amsterdam: Amsterdam University Press, 2001, p. 137-138. Also see B. Baarsma en K. Janssen, *Een blik op de toekomst van het notariaat na tien jaar marktwerking*, Amsterdam: SEO, 2009, p. 1. Also see M. ter Voert & M. van Ewijk, *Eerste Trendrapportage Notariaat: Toegankelijkheid, continuiteit, kwaliteit en integriteit van het notariaat*, 2004, Den Haag: WODC, p. 23. On the introduction of free tariffs in the context of the notaries' function as civil servant and entrepreneur see B.C.M. Waaijer, 'Verleiden om te verlijden: Het onmogelijke tweespan van notarieel ambtenaar en vrij ondernemer', *WPNR* 2013/6990.
[280] Article 10 (2) Verordening beroeps- en gedragsregels 2011.
[281] Article 13 Wna.
[282] Notariskantoor Bijdorp Barendrecht, 'Wat doet de notaris bij de aankoop van een huis?' (http://www.notariskantoorbijdorpbarendrecht.nl/pdf/wat-doet-de-notaris-bij-de-aankoop-van-een-huis.pdf), consulted on 06.01.2016.

Amongst the first questions that the notary will pose to the buyer is about the registration of the contract of sale in the land register ("*Vormerkung*").[283] If the contract of sale is registered, the legal position of the buyer is protected against a multitude of legal actions that can potentially arise between the conclusion of the contract of sale and the registration of the notarial deed of transfer. Most importantly, the *Vormerkung* protects the buyer in the situations in which the seller sells the house to a different buyer or in which he creates a security right on the plot of land after he has sold it.[284] In addition, the buyer enjoys protection against rental agreements ("*verhuring*" and "*verpachting*"), qualitative conditions, seizures ("*conservatoir beslag*" and "*executorial beslag*"), guardianship ("*onderbewindstelling*"), as well as the insolvency ("*faillissement*") and the suspension of payments ("*surséance van betaling*") of the seller provided that the *Vormerkung* was registered first and that the buyer was unaware of their existence.[285] The *Vormerkung* is thus a powerful instrument. Yet, it needs to be taken into account that the protection is granted for a limited period only as the *Vormerkung* loses its protection retroactively after six months if the plot of land has not been transferred to the buyer in the meantime.[286] It also entails that after the lapse of the six-month period, it is deemed that the *Vormerkung* is not identifiable when inspecting the land register.[287] Furthermore, considering the additional costs connected to the registration of a *Vormerkung*, it can be observed that it is not standard practice to use this instrument.

Once the contract of sale is definite, the notary will request the mortgage documents from the bank that grants the mortgage.[288] Further, the notary will have to conduct his first investigation ("*eerste recherche*") by consulting both cadastre and land register as well as the Central Insolvency Register ("*Centraal Insolventie Register*").[289] The notary's own digital working system is often connected to the *Kadaster*'s web shop so that they are able to request information through their own interface without having to separately log in to the *Kadaster*'s system for every investigation. With regard to the request of information from the *Kadaster*, it is interesting to note that the real estate agent will

[283] Article 7:3 BW. It is also possible to register the sales contract before the consideration period has expired under the condition that a Dutch notary has drawn up and signed the sales contract. See article 7:3 (2) BW.
[284] Article 7:3 (3) BW.
[285] Ibid.
[286] Article 7:3 (4) BW.
[287] Ibid.
[288] Notariskantoor Bijdorp Barendrecht, 'Wat doet de notaris bij de aankoop van een huis?' (http://www.notariskantoorbijdorpbarendrecht.nl/pdf/wat-doet-de-notaris-bij-de-aankoop-van-een-huis.pdf), consulted on 06.01.2016.
[289] Article 17 (1) Wna. Also see M.B. Koetser and S. Pront-van Bommel, *Inleiding Bestuursrecht voor de Notariële Praktijk*, Deventer: Kluwer, 2009, p. 2 and article 3 Verordening beroeps- en gedragsregels 2011. Also see Article 1-3 Reglement van het bestuur van de KNB van 14 juli 2010, inw. tr. 1 oktober 2010, en aangepast op 25 januari 2012 (Reglement rechercheren registergoederen).

have already collected this information. A copy of the requested documents (extracts from the cadastre and the cadastral map as well as a copy of the previous deed) is then ideally attached to the contract of sale that is sent to the notary. If this is the case, the notary, when investigating, will request the information from the cadastre (which might have changed in the meantime) but will not have to request a new copy of the deed. Another situation, in which the request for a copy of the underlying deed is redundant, is when it was drawn up and executed in their own notarial office. Depending on whether his clients are natural persons or legal persons, the notary also has to consult the Guardianship Register ("*Curateleregister*") respectively the Commercial Register ("*Handelsregister*") at this stage.[290] Then, he will draft both a draft deed of transfer as well as a draft mortgage deed.[291] After having prepared the draft deeds, the notary sends them to the parties, which are soon followed by the invoice ("*nota van afrekening*").[292] Further, the notary contacts the bank to communicate the day on which the mortgage deed will be signed and to ask for the transmission of the purchase price to his professional bank account.[293] Naturally, he also verifies that the purchase sum was received in good order. On the same day on which the parties are to sign the deeds, the notary conducts his second investigation ("*herrecherche*") to ensure that no incidents have occurred in the meantime that would hamper the transfer of ownership.[294] Again, the notary has to consult the cadastre and land register, the Central Insolvency Register, the Guardianship Register, and the Commercial Register.[295] If applicable, the notary additionally consults the Matrimonial Property Register ("*Huwelijksgoederenregister*") to check whether a request for divorce as referred to in article 1:99 (1) BW was registered.[296]

[290] Article 2-3 Reglement rechercheren registergoederen.
[291] The requirements for the text of the deed are laid down in article 41 Wna. In addition, as follows from article 46 Wna, the notary has to include the purchase price in the deed. Interestingly, the *Kadasterwet* does not require the inclusion of the purchase price so that the registrar will have to register a deed that does not comply with article 46 Wna.
[292] Article 43 (1) Wna.
[293] Notariskantoor Bijdorp Barendrecht, 'Wat doet de notaris bij de aankoop van een huis?' (http://www.notariskantoorbijdorpbarendrecht.nl/pdf/wat-doet-de-notaris-bij-de-aankoop-van-een-huis.pdf), consulted on 06.01.2016.
[294] A.L.M. Keirse et al., 'Wet Koop onroerende zaken: de evaluatie', WODC & Molengraaff instituut voor privaatrecht, 2009, p. 143 as published on the Website of the WODC (https://www.wodc.nl/binaries/volledige-tekst_tcm28-70171.pdf), as consulted on 14.06.2019.
[295] Article 17 (1) Wna. Also see M.B. Koetser and S. Pront-van Bommel, *Inleiding Bestuursrecht voor de Notariële Praktijk*, Deventer: Kluwer, 2009, p. 2 and article 3 Verordening beroeps- en gedragsregels 2011. Also see Article 1-3 Reglement rechercheren registergoederen.
[296] W.H. van Heuvel, 'De notariële rechercheplicht in verband met artikel 1:99 lid 1 BW', *JBN* 2012/04.

If everything is still in order, the parties can sign the deeds.[297] Interestingly, the date on which the deed is executed in the notary's office is set as one of the conditions in the contract of sale.[298] Despite the fact that the parties agree on that date in the absence of the notary, the latter is bound by that date, which can only be altered by the parties cumulatively. Before the deeds are signed, the notary must determine the parties' identities.[299] If the notary deems it necessary, he may also require the presence of two witnesses.[300] Furthermore, he has to inform his clients about the consequences that are attached to the signature of the deeds.[301] Related herewith, the notary will also read out the deed in front of the parties.[302] If the parties agree that they have already acquainted themselves with the deed's content, the notary may suffice by reading out his first and surname, his seat, the date and place where the deed is issued, the data of the parties to the deed as well as of the persons that appeared, and the end of the deed.[303] Yet, if the deed is issued in front of witnesses, the deed has to be completely read.[304] Instantly upon the reading, the parties have to sign the deed.[305] Immediately afterwards the deed is signed by the notary.[306] If the requirements regarding the reading and signature of the deed are not complied with, the deed lacks authenticity and will not be regarded as a notarial deed.[307] It must be pointed out that through the signing of the deed of transfer, the ownership of the plot has not yet passed to the buyer; after all, the transfer of ownership of an immovable requires the registration of the deed in the land register. Nevertheless, the parties will already execute the factual delivery of the plot.[308] This means that the buyer already receives the keys and may thus make use of the plot.[309]

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[297] A.L.M. Keirse et al., 'Wet Koop onroerende zaken: de evaluatie', WODC & Molengraaff instituut voor privaatrecht, 2009, p. 143 as published on the Website of the WODC (https://www.wodc.nl/binaries/volledige-tekst_tcm28-70171.pdf), as consulted on 14.06.2019.
[298] Article 4.1 Model koopovereenkomst voor een bestaande eengezinswoning (model 2018).
[299] Article 39 (1) Wna.
[300] Article 39 (2) Wna.
[301] Article 43 (1) Wna. Also see article 4 (1) Verordening beroeps- en gedragsregels 2011. For more information about the scope of this duty, see: J.I. Driessen-Kleijn, 'Hoe ver gaat de informatieplicht van de notaris?', *JBN* 2008/01 and P. Blokland, 'De zorg- en informatieplicht van de notaris in het digitale tijdperk', *WPNR* 2015/7073.
[302] Article 43 (1)-(2) Wna. On the possibility to draw up the deed by using formulations that can be more easily understood, see: E. van den Brink-Baggerman, 'Begrijpelijke taal in notariële akten, kan dat? Onbegrijpelijke taal in notariële akten, mag dat?', *WPNR* 2014/7029.
[303] Article 43 (1) Wna.
[304] Article 43 (2) Wna.
[305] Article 43 (4) Wna.
[306] Ibid.
[307] Article 43 (6) Wna.
[308] Article 7 and 10.1 Model koopovereenkomst voor een bestaande eengezinswoning (model 2018). Also see Toelichting op de koopovereenkomst voor de consument (article 4 and 7).
[309] Ibid.

The notary sends a copy of the deed of transfer to both seller and buyer and to the tax authorities.[310] A copy of the mortgage deed is sent to the bank and to the buyer.[311] Most importantly, the notary will send the deed either digitally or by regular mail to the land registry.[312] To be precise, the notary will always send copies of the deeds to the land registry, as he keeps the original deeds. For that reason it is required that the notary declares that the submitted copies are identical copies of the original deeds. To that purpose, the notary has to include a statement of equivalence ("*equivalentieverklaring*") when the deed is submitted digitally, and a declaration of conformity ("*verklaring van eensluidendheid*") when the deed is submitted by regular mail.[313] Either declaration is placed at the end of the deed.[314] As a result, if it appears at a later stage that the submitted copy is not identical to the original deed after all, the *Kadaster* cannot be held liable.[315]

When a deed is submitted by regular mail, the notary has to send a copy of the original deed together with a copy of that copy to the *Kadaster*.[316] The latter document has to be provided with a declaration of conformity.[317] This is the copy that the *Kadaster* registers.[318] The copy of the original

[310] Article 7-7a Registratiewet 1970, *Stb*. 1970, 610and Wet elektronische registratie notariële akten, *Stb*. 2012, 648. Also see article 49 (1)(a) and 50 Wna and B.M. van der Sar, 'Het gebruik van de (digitale) notariële akte door de Belastingdienst', *WPNR* 2015, 7071.
[311] Article 49 (1)(a) and 50 Wna.
[312] Article 10b, 11-11c Kadw. As follows from article 3:89 (1) BW, both seller and buyer may offer the deed for registration. In reality however, it is the notary who takes care of the deed's registration. See A.A. van Velten, 'Bescherming bij overdracht an onroerende zaken', in: J. de Jong et al., *Naar een meer positief stelsel van grondboekhouding?: Preadviezen 2003 uitgebracht voor de Vereniging voor Burgerlijk Recht*, Deventer: Kluwer, 2003, p. 15. For detailed information on digital submission of notarial deeds to the Kadaster see: W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 838-846. Also see S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, p. 495.
[313] Article 11 (1) and 11b (1) Kadw. Also see W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 841.
[314] Article 3 (1), 4 Uitvoeringsregeling Kadasterwet 1994. An example of a statement of equivalence (as well as a non-authentic English translation) can be found on: Website Kadaster, 'Submission of a European Certificate of Succession for registration' (https://www.kadaster.nl/web/Themas/Themapaginas/dossier/Submission-of-a-European-Certificate-of-Succession-for-registration.htm), consulted on 22.02.2016.
[315] Article 11 (2) Kadw.
[316] Article 11 (1) Kadw. Also see W. Louwman, 'Nieuwe regels voor inschrijving in de openbare registers', *JBN* 2005/09. Also see S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, p. 496.
[317] Ibid.
[318] S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, p. 496.

deed is returned to the notary after registration has taken place.[319] Nowadays, notarial deeds are rarely submitted by regular mail.[320] Instead, notaries make use of the Web-ELAN software that was developed by the *Kadaster*, to submit their deeds digitally.[321] Digital deeds have to be offered for registration together with a request for registration ("*verzoek tot inschrijving*").[322] Although the deeds are submitted digitally, both the notary (who has to copy the data from the *Kadaster* when drawing up the deed) and the *Kadaster* (who has to copy the data contained in the deed to update the Cadastre), are still confronted with a typing exercise which is not only time consuming but also constitutes a fertile soil for mistakes.[323] In addition to the "regular" digital submission of deeds, the *Kadaster* has thus developed a system ("*Ketenintegratie Inschrijving Kadaster*"; hereafter: "KIK") that leads to the automated registration of a deed in the land register.[324] The automated registration is realized by a division of the deed into a stylesheet part and a free text part and by combining it with the exchange of digital information (both from the *Kadaster* to the notary and vice versa).[325] The exercise of typing over digital information thus becomes obsolete. While KIK cannot be used to register all types of deeds, it can be used to effectuate the registration of deeds of transfer and deeds of mortgage.[326]

3.1.8.3 The Submission of the Deed to the Land Registry

Upon receipt, the land registry sends a notification to the notary to confirm the receipt of the deed ("*bewijs van ontvangst*").[327] As the Netherlands adhere to a negative registration system, the land

[319] Article 13 (1) Kadw.
[320] Compared to the registration of a digitally submitted deed of transfer (2019: €137,50), the costs of registering a deed that was submitted on paper are also higher (2019: €163,50). To submit a deed of transfer via KIK is even more favourable (2019: €78,50). See Besluit van het bestuur van de Dienst voor het kadaster en de openbare registers, houdende vaststelling van de kadastrale tarieven (Tarievenregeling Kadaster), *Stcrt.* 2015, 40606.
[321] W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrech*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 838.
[322] Article 11a (1) Kadw.
[323] W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrech*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 844-846.
[324] J. Vos, 'Het KIK-denken en het KIK-stotteren; stylesheets voor 'dummies'', *JBN* 2011/01. Also see W. Louwman & J. Vos, 'Automatisering van de afdoening van notariële akten door het Kadaster', *JBN*2009/03.
[325] W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrech*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 845-846. Also see J. Vos, 'Het KIK-denken en het KIK-stotteren; stylesheets voor 'dummies'', *JBN* 2011/01. Also see W. Louwman & J. Vos, 'Automatisering van de afdoening van notariële akten door het Kadaster', *JBN*2009/03.
[326] W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrech*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 844.
[327] Article 3:18 BW. Also see article 17 Kadw.

registrar may only check the formal registration requirements.[328] What these requirements are depends on the type of deed that is offered for registration.[329] If these requirements are not met, the land registrar has to decline the registration request.[330] In practice, the land registrar will then first call the respective notary to inform them of the situation.[331] This oral communication is ultimately followed by a written reaction ("*attendering op niet-inschrijving*"; hereafter: "ANI"), which in turn is followed by a proof of non-registration ("*bewijs van niet-inschrijving*").[332] In the meantime, the deed will be signalled in the land register as being in the process of treatment.[333] Two scenarios are now possible. In the first situation, the notary decides within one day to withdraw the deed. [334] If the notary disagrees with the decision of the land registrar and thus decides not to withdraw the deed, then the deed, together with an annotation of the registrar's concern, will be registered in the register of preliminary annotations ("*register van voorlopige aantekeningen*" / "*register 4D*").[335] The notary then receives a proof of non-registration ("*bewijs van niet-inschrijving*").[336] The legislator has hereby included an appeal mechanism against the land registrar's decision. Namely, upon request of the concerned party (which may be the notary), the issue will be referred to an independent third party, being the judge in expedited proceedings ("*voorzieningenrechter*"), who will decide on this matter.[337] If the judge decides in favour of the notary, the land registrar has to register the deed immediately after being requested by the notary to do so.[338]

[328] The registration requirements are laid down in article 18-47 Kadw.
[329] The general registration requirements with regard to immovable property are laid down in article 18-20, 23 Kadw. The specific requirements for the registration of a deed of transfer can be found in article 24 Kadw.
[330] Article 3:20 (1) BW.
[331] W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrech*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 859.
[332] Article 17a (2) and article 21 Kadasterregeling 1994. W. Louwman & W.F.L. van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 859. The ANI procedure is not regulated by law but was instead agreed upon by the Kadaster and the KNB in the course of their collaboration. See: W. Louwman & W.F.L. van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 859.
[333] W. Louwman & W.F.L. van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 859.
[334] Ibid.
[335] Article 15-15a Kadw. Article 3 (2)(c) Kadasterregeling 1994. For an overview of the information that is to be registered in this register see: article 4 Kadasterregeling 1994. Also see W. Louwman & W.F.L. van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 859.
[336] Article 15b (1) Kadw. If a deed is submitted on paper, that deed will be provided with a declaration of non-registration (``*verklaring van niet-inschrijving*"). See article 15a (1) Kadw.
[337] Article 3:20 (2) BW.
[338] Article 3:20 (3) BW.

In addition, it may occur that the land registrars in principle may register the deed but that accessory circumstances nevertheless trigger a reaction from them. Two types of reactions have to be differentiated: the request for correction ("*verzoek tot verbetering*"; hereafter: "VTV") and the warning enshrined in article 3:19 (4) BW. The first type of reaction concerns the situation in which it is evident that the parties' intention cannot be applied in the Cadastre.[339] In these situations, the land registrar will first call the notary to inform him of this concern.[340] Afterwards, they will send a VTV.[341] Upon receipt of a VTV, the notary has to act relatively quickly. Within 2 days (if the notarial deed was submitted electronically) respectively 3 days (if the notarial deed was submitted as a hardcopy), the notary has to submit a deed to improve the former ("*verbeterstuk*").[342] It is to be noted that a reaction of a notary does not mean that the notary is obliged to improve his deed.[343] In some cases, it might occur that an improvement of the deed is not possible.[344] If this is the case, the notary has to communicate this to the *Kadaster*.[345] In practice, it can yet be observed that not all VTVs are lived up to.[346] If the notary chooses to not improve the deed and if he cannot justify his decision, the *Kadaster* sends a rectification request ("*rectificatieverzoek*") to the notary, who now has another two months to react.[347] Despite the fact that a rectification request was sent, the *Kadaster* will as far as possible apply the notarial deed but to warn those who consult the cadastre in the meantime, the *Kadaster* will simultaneously signal the fact that a rectification request was sent in the cadastre.[348] If the notary still does not react, the land registrars will contact him two more times in writing ("*rappelbrief*") and only if these letters are also ignored, they will inform the

[339] W. Louwman & W.F.L. van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 860.
[340] Ibid.
[341] More information about the criteria on the basis of which the registrars determine whether an ANI or VTV have to be sent, can be found in: W. Louwman & W.F.L. van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 860-865. The VTV procedure is not regulated by law but was instead agreed upon by the Kadaster and the KNB in the course of their collaboration. See: W. Louwman & W.F.L. van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 859.
[342] J. Vos, 'Het rectificatieproces bij het Kadaster', *JBN* 2013/21. The different improvement techniques are described in: B.H.J. Roes and J.Vos, 'Verbetering van in het openbare register ingeschreven stukken', *JBN* 2009/63.
[343]W. Louwman & W.F.L. van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 860.
[344] Ibid.
[345] J. Vos, 'Het rectificatieproces bij het Kadaster', *JBN* 2013/21.
[346] Ibid.
[347] Ibid.
[348] Ibid.

KNB.[349] If the notary still remains passive after this step, the land registrars have one last ace up their sleeve as they may inform the Chamber of Supervision ("*Kamer van Toezicht*").[350] The second type of reaction concerns the situation in which the registrar suspects that the characteristics that ought to be mentioned with regard to a particular registered property ("*registergoed*") do not coincide with those that are mentioned in the deed, that one of the parties was unqualified to perform the relevant legal act, or that the legal act is incompatible with a different legal act that was previously registered.[351] The land registrar then has the competence to issue a warning towards the concerned parties.[352] However, if the registration requirements are complied with, the deeds have to be registered nevertheless.[353] Hereby, the point of time at which the deed was submitted to the *Kadaster* is considered to be the point of time of registration.[354] It is only when the registration is completed that the ownership has passed.[355]

3.1.8.4 The Proof of Registration

The land registry informs the notary that registration has taken place by sending a proof of registration ("*bewijs van inschrijving*"; hereafter: "BVI")).[356] As stated above, when the notarial deeds are offered for registration on paper, the notary has to submit two copies of that deed; one that will be registered and one that will be returned to the notary. On the latter copy, the registrar will place an official statement of registration ("*relaas van inschrijving*").[357] This statement is signed by the land registrar and states the precise point of time (day, hour, minute) on which the deed was offered for registration as well as the deed identification number ("*stukidentificatienummer*").[358] This identification number consists of the abbreviation OZ (for deeds relating to immovable

[349] Ibid.
[350] Ibid.
[351] Article 3:19 (4) BW.
[352] Article 3:19 (1), (4) BW.
[353] Article 3:19 (1) BW. Article 10a Kadw.
[354] Article 3:19 (2) BW.
[355] Article 3:84, 3:83, 3:89 (1) BW. On the possibility of receiving the ownership of a plot of land (by means of extinctive prescription) when the conclusion of the contract of sale was not followed by the drawing up of a notarial deed, see: A.J.H. Pleysier, 'Koper wordt bezitter ook al is de leveringsakte nimmer gepasseerd. Dus wordt hij na twintig jaar eigenaar', *JBN* 2013/02.
[356] Article 3:19 (3) BW. Also see Reglement Rechercheren Registergoederen. Note that in case of digital submission, a proof of registration is sent in an automated manner. It is thus possible that the notary receives this proof before the actual registration has occurred. See: W. Louwman, 'Nieuwe regels voor inschrijving in de openbare registers', *JBN* 2005/09.
[357] Article 12 (1)(a) and article 13 (1) Kadw. The standard text can be found in article 19a (1) Kadasterregeling 1994.
[358] Article 13 (1) Kadw. Also see Regelen met betrekking tot de openbare registers voor registergoederen, alsmede met betrekking tot het kadaster (Kadasterwet),, *Kamerstukken II* 1981/82, 17496, nr. 5, article 13.

property), SC (for deeds relating to vessels) or LU (for deeds relating to aircrafts), followed by the number of the register in which the deed is registered and the number of the section that is reserved for the registration of that deed.[359] The requirement to indicate the number of the register is necessary as the land register consists of three sub-registers: Hypothecs 3 ("*Hypotheken 3*") in which deeds that relate to mortgages or attachments ("*inbeslagneming*") are registered, Hypothecs 4 ("*Hypotheken 4*") in which all other deeds are registered, and Hypothecs 4D ("*Hypotheken 4D*") in which preliminary annotations ("*voorlopige aantekeningen*") are registered.[360] Then in fact the returned copy is the proof of registration. When notarial deeds are digitally offered for registration, the notary will also receive a proof of registration.[361] In case of digital submission, this proof is not placed as a sticker on the digital deed. Instead, the notary receives a statement of registration ("*relaas van inschrijving*") stating that the deed was registered. Despite the different format, the digital BVI contains the same information as a manual BVI.[362]

Upon receipt of the statement of registration, the notary conducts his third and last investigation ("*narecherche*") to ensure that the transaction occurred and that it was not frustrated in the last instance by a different entry into the land register such as a deed of mortgage or a registration of an attachment.[363] This time, the notary consults the cadastre and land register, the Central Insolvency Register, the Guardianship Register, and the Matrimonial Property Register.[364] The consultation of the Commercial Register is not prescribed.[365] If this investigation was positive, the notary will transfer the purchase sum to the seller.[366] Afterwards, he archives the official documents.[367] The

[359] Article 1a, 12 Kadasterregeling 1994.
[360] Article 3:16, 3:20 (1) BW. Also see article 18 (1) Kadw. Also see article 3 (2) Kadasterregeling 1994.
[361] Article 13 (2) Kadw.
[362] Ibid.
[363] The determination of the point of time at which the notary may conduct his last investigation depends on whether a "*Vormerkung*" was registered. See explanation provided by the KNB on Reglement Rechercheren Registergoederen. Also see H.M.I.Th. Breedveld and L.W. Kelterman, 'What's in a name?', *WPNR* 2009, 6817 and article 3 Verordening beroeps- en gedragsregels 2011.
[364] Article 17 (1) Wna. Also see M.B. Koetser and S. Pront-van Bommel, *Inleiding Bestuursrecht voor de Notariële Praktijk*, Deventer: Kluwer, 2009, p. 2 and article 3 Verordening beroeps- en gedragsregels 2011. Also see Article 1-3 Reglement rechercheren registergoederen. Also see W.H. van Heuvel, 'De notariële rechercheplicht in verband met artikel 1:99 lid 1 BW', *JBN* 2012/04.
[365] Article 3 Reglement rechercheren registergoederen.
[366] Beleidsregel vastgesteld door het bestuur van de KNB, gepubliceerd op 2 juni 2006 en uitgebreid bij besluit van het bestuur van 12 december 2007, gepubliceerd op 18 december 2007 (Beleidsregel tijdstip uitbetaling van gelden). Also see article 1 Reglement van het bestuur van de KNB van 13 juli 2011, inw. tr. 1 augustus 2011, en aangepast op 25 januari 2012 (Reglement beperking uitbetaling derdengelden). Also see HR 30 januari 1981, ECLI:NL:PHR:1981:AG4140 (*Baarns beslag*).
[367] Articles 41 (2), 57-59 Wna. Also see Archiefbesluit 1995, *Stb*. 1995, 671 and Model archiefbeheersregels Ringen KNB, Ministeriële regeling van 14 september 1999, Stcrt. 1999, 181, inw. tr. 1 oktober 1999 (Regeling

period of time that passes between the signing of the contract of sale to the registration of the deed of transfer in the land register is about one month.

3.1.9 The Object of Transfer – Where is the "Boundary"?

Different terms are employed to indicate a specific piece of land. In civil law, the more generic term "*erf*" (plot) is used.[368] In the cadastre, the more specific term "*perceel*" (parcel) is employed to refer to a specific piece of land, whose extents are defined by cadastral boundaries.[369] If one cadastral plot is to be divided into two cadastral parcels, a new cadastral boundary has to be drawn to separate the two. It is a widespread erroneous belief that it is the land surveyor, who on the basis of the cadastral map decides upon the location of the new cadastral boundary. Instead, as shall be seen, it is the parties themselves, who decide on the run of the newly to be formed cadastral boundary.

3.1.9.1 The Determination of Cadastral Boundaries

The determination of the new cadastral boundary is a three-step procedure. First, the demarcation of the boundary ("*afpaling*") takes place.[370] Practically speaking, demarcation entails that the concerned parties will meet on the plot of land to mark the new boundary by putting wood pegs in the ground. Afterwards, the cadastral notification ("*aanwijs*") occurs.[371] This means that the land surveyor makes an appointment with the parties and meets them in the territory. The primary purpose of this meeting is the allocation of the boundary by the parties.[372] Although it is the parties that determine the run of the boundary, the land surveyor has to control whether the parties' boundary allocation coincides with the description of the plot that is contained in the notarial deed.[373] If this is not the case, the land surveyor has to contact the notary to ask him to consider a

overbrenging notariële archiefbescheiden naar de algemene bewaarplaats), and Ministeriële regeling van 11 oktober 1999, Stcrt. 1999, 203, inw. tr. 1 oktober 1999 (Regeling overbrenging notariële archiefbescheiden naar de rijksarchiefbewaarplaats). On the possibility to archive digitally, see: F. van der Woude & O.A. 'Sleeking, Digitaal archiveren binnen het notariaat', *WPNR* 2015/7073.

[368] The term "*erf*" is not defined by law. See D.L. Rodrigues Lopes, 'Eigendom en beperkte rechten', *R&P* nr. VG5 2017/2.3.1.

[369] Article 1 (1) Kadw.

[370] Article 14 (3) Kadasterbesluit, *Stb*. 1991, 571 .

[371] Article 57 (3) and 73 Kadw.

[372] Article 57 (3) Kadw.

[373] B. Wünsch, 'Welke kleur heeft de grens?: Op weg naar transpara.ntie op de kadastrale kaart', *Grondzaken in de Praktijk* 2014/9, p. 16.

rectification of the deed.[374] Based on the parties' allocation, the land surveyor draws up a report of results ("*relaas van bevindingen*").[375] In the third step, the cadastral survey ("*meting*") takes place. On the basis of the information gathered during the cadastral notification, the land surveyors survey the new boundary and transfers his survey data ("*meetgegevens*") to the cadastral map.[376] They will also transfer the survey data to the report of results.[377] Most boundaries are nowadays measured with GPS; in some situations however, for example if a new boundary is to run in a forest, in which the GPS signal is insufficiently strong, it becomes necessary to measure with a tachymeter ("*tachymeter*") instead.[378]

3.1.9.2 Ex Ante and Ex Post Surveying

While all of these three steps are necessary for the entering of the boundary in the cadastral map, it is not required that all of these steps are completed at the point of time at which the ownership of the plot is transferred. In essence, two different methods exist: ex ante surveying and ex post surveying.[379] In case of ex ante surveying ("*splitsen vooraf*"), all three steps are completed before the legal transfer occurs but as the completion of all three steps is quite time-consuming (18 months can lie between the registration of the deed and the allocation of the boundary by the parties in the territory), ex post surveying can serve as an attractive alternative.[380]

In case of ex post surveying, the parties have reached an agreement about the run of the new boundary but the boundary has not been surveyed yet.[381] Up until the recent past, ex post surveying entailed that notaries could transfer a part of an already existing plot without having to specify which part of the original plot was subject to transfer and thus without having to complement the

[374] Article 59 Kadw. Article 16 (2) and article 15 (2) and (4)(a)-(b) Kadasterbesluit, *Stb*. 1991, 571.
[375] Article 57 (4) and 73 Kadw. The content of the report is prescribed by law and can be found in article 22 Uitvoeringsregeling Kadasterwet 1994, *Stcrt*. 1994, 81.
[376] Artikel 57 Kadw.
[377] Article 57 (4) Kadw.
[378] Kadaster, Handleiding kadastrale metingen met GPS (file:///C:/Users/Katja/Downloads/Handleiding_Meten_GPS.pdf), 2010, p. 4.
[379] J. Vos, 'Creating boundaries: the (un)limited possibilities measured', *6th ELRA Annual Publication* 2015 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019. Also see J. Vos and B.H.J. Roes, 'Onduidelijkheden rondom inschrijving en registratie', *WPNR* 2018(7180).
[380] B. Wünsch, 'Welke kleur heeft de grens?: Op weg naar transpara.ntie op de kadastrale kaart', *Grondzaken in de Praktijk* 2014/9, p. 15-16.
[381] Ibid.

deed with a drawing.[382] It was sufficient if the notary for example described the subject of transfer as "a part of a plot as demarcated in the territory and sufficiently known to the parties".[383] As a consequence, the partial plots could not be indicated on the cadastral map.[384] To end this situation, the technique of ex post surveying underwent modifications to ensure that the partial plot could be indicated on the cadastral map even before the boundaries were surveyed.[385]

3.1.9.3 Preliminary Cadastral Boundaries and Administrative Boundaries

Ex post surveying nowadays is a collective term that unites two different techniques. The first technique that can be used are preliminary cadastral boundaries ("*voorlopige kadastrale grenzen*"; hereafter: "VKG").[386] VKG was introduced in 2009 as a pilot and made broadly accessible a short two years later in 2011.[387] By means of a special application called "*Splits*" (which translated into English literally means 'divide'), practitioners can split a parcel on the cadastral map.[388] The two plots that are created from the original plot, both receive a new cadastral code ("*kadastrale*

[382] B. Wünsch, 'Welke kleur heeft de grens?: Op weg naar transpara.ntie op de kadastrale kaart', *Grondzaken in de Praktijk* 2014/9, p. 19. Also see HR 9 december 1983, ECLI:NL:PHR:1983:AG4710 (*Van Popering/Willemse*) and C.G. Breedveld-de Voogd, 'Notariële zorgverplichtingen bij onroerendegoedtransacties', in: G.J.C. Lekkerkerker et al., *De goede notaris: Over notariële deontologie*, Den Haag: Sdu Uitgevers, 2010, p. 106. Also see J. Vos and B.H.J. Roes, 'Onduidelijkheden rondom inschrijving en registratie', *WPNR* 2018(7180).

[383] The original version reads as follows: "een gedeelte van een perceel zoals ter plaatse afgepaald en aan partijen genoegzaam bekend". See: B. Wünsch, 'Welke kleur heeft de grens?: Op weg naar transpara.ntie op de kadastrale kaart', *Grondzaken in de Praktijk* 2014/9. Also see W.M. Kleyn, 'Een nieuwe zorgplicht voor de notaris?', *JBN* 2001/07/08.

[384] B. Wünsch, 'Welke kleur heeft de grens?: Op weg naar transpara.ntie op de kadastrale kaart', *Grondzaken in de Praktijk* 2014/9, p. 16.

[385] J. Vos, 'Creating boundaries: the (un)limited possibilities measured', *6th ELRA Annual Publication* 2015 as published on the ELRA Website (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019.. There is another development that aims to further facilitate such specification in situations that concern plots of land on which a multitude of property rights are stacked. To simplify the process of specifying the parts of the object on which these different rights rest, the project Railway Zone Delft ("*Spoorzone Delft*") was used as pilot project to determine whether it is possible to realize the specification through a 3D visualization. In 2016, the first 3D visualization was successfully registered in the land register. See: J. Vos and B.H.J. Roes, 'Onduidelijkheden rondom inschrijving en registratie', *WPNR* 2018(7180). Also see J. Stoter et al., 'Eerste 3D-registratie in Nederlands Kadaster', *Geo-Info* 2016-5, p. 24-28.

[386] W. Louwman & W.F.L. Van der Bruggen, 'Bijwerking Basisregistratie Kadaster', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 813-814.

[387] Before the introduction of VKG, preliminary cadastral boundaries were also possible, though with a different technique called "*deelpercelen*" (partial plots). See B. Wünsch, 'Welke kleur heeft de grens?: Op weg naar transpara.ntie op de kadastrale kaart', *Grondzaken in de Praktijk* 2014/9, p. 15.

[388] W. Louwman & W.F.L. Van der Bruggen, 'Bijwerking Basisregistratie Kadaster', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 813.

aanduiding").[389] This code is definite and consists of the name of the municipality, followed by the section and the numbers of the plot.[390] If notaries choose to not draw the boundary on the cadastral map themselves, they can make use of the second ex post surveying technique. This entails that the notary has to submit a drawing together with the notarial deed.[391] On the basis of this drawing, an employee of the *Kadaster* will indicate the boundary on the cadastral map.[392]

It needs to be taken in mind that both the administrative boundary and the preliminary cadastral boundary that are drawn in *Splits* are preliminary.[393] They become definite only after the allocation of the boundary in the territory and the survey has occurred.[394] To identify the status of a specific boundary on the cadastral map, the boundaries are dyed in different colours. While definite cadastral boundary is black, preliminary cadastral boundaries are marked in orange-brown and administrative boundaries are indicated in blue.[395] Once preliminary cadastral boundaries and administrative boundaries are surveyed, they become definite cadastral boundaries and are then indicated as black boundaries on the cadastral map.[396] This change is communicated to the concerned parties by means of an official note ("*kennisgeving*").[397]

3.1.9.4 Comparing the Cadastral Boundary to the Legal Boundary

As has already been established, the transfer of a plot of land requires a valid legal title, which has to sufficiently describe the plot.[398] After all, it must be clear what the object of the transfer is. To this end, notaries will include a standard formulation in their deeds, which specifies the object of transfer by referring to the respective cadastral code.[399] As follows from the explanation above, this is nowadays also possible in case of ex post surveying; although the boundary that divides the two

[389] Ibid.
[390] Article 2 (1) Kadasterbesluit, *Stb*. 1991, 571
[391] Article 7 Uitvoeringsregeling Kadasterwet 1994, *Stcrt*. 1994, 81.
[392] B. Wünsch, 'Welke kleur heeft de grens?: Op weg naar transpara.ntie op de kadastrale kaart', *Grondzaken in de Praktijk* 2014/9, p. 16.
[393] B. Wünsch, 'Welke kleur heeft de grens?: Op weg naar transpara.ntie op de kadastrale kaart', *Grondzaken in de Praktijk* 2014/9, p. 17.
[394] Ibid. Hof Arnhem-Leeuwaarden 24 november 2015, ECLI:NL:GHARL:2015:8855, para.. 4.6.
[395] For an example of a cadastral map see: Website Kadaster, 'Kadastrale kaart (met omgevingskaart) voorbeeld' (http://www.kadaster.nl/web/artikel/download/Kadastrale-kaart-met-omgevingskaart-voorbeeld.htm), consulted on 17.02.2016.
[396] B. Wünsch, 'Welke kleur heeft de grens?: Op weg naar transpara.ntie op de kadastrale kaart', *Grondzaken in de Praktijk* 2014/9, p. 17.
[397] Article 58 Kadw.
[398] Article 3:84 (2) BW. Also see article 6 Kadasterbesluit, *Stb*. 1991, 571 and article 48 (2) Kadw.
[399] For the standard formulation, see: R. Roes, 'Meten is weten', *WPNR* 2008/6750.

plots is not definite yet, the newly formed parcels receive a definite cadastral code. Despite the fact that the cadastral code can nowadays be employed as means to identify the plot, it can sometimes be quite difficult to specifically establish what the object of transfer is. The reason for that is that it is not the cadastral boundary but the legal boundary that determines the size and shape of the plot.[400] After all, the cadastral map reflects the run of the boundaries in relation to one another, but it does not provide reliable measures.[401] This unreliability is a direct consequence of the aim for which the cadastre was set up.[402] After all, the purpose of the cadastre was to purely enable the collection of land taxes.[403] In this context, it is somewhat surprising that the legislator has determined that the size of the plot as laid down in the cadastre is authentic data within the system of key registers.[404]

3.1.9.5 The (Im-) Possibility of Reconstructing the Legal Boundary

The daily life is a witness of neighbour conflicts about the exact run of the boundary that divides the neighbouring plots. There is thus a need for a possibility to reconstruct the legal boundary. But is this even possible? In case of uncertainty of the location of the boundary, parties can contact the *Kadaster* to apply for a reconstruction of the boundary ("*grensreconstructie*").[405] A land surveyor will then make an appointment with the neighbours and set out the boundary in the territory.[406] To do this, they will use the report of results ("*relaas van bevindingen*") that was drawn up when the original allocation of the plot was executed.[407] Two things need to be noted here. First, it has to be

[400] Ibid. Also see HR 2 december 1988, ECLI:NL:HR:1988:AB8205 (*Dukker/Los*) and Rb. Amsterdam, 4 september 2013, ECLI:NL:RBAMS:2013:6179, para.. 4.5. Also see G.J.C. Lekkerkerker, 'De kadastrale grens valt niet altijd samen met de 'eigendomsgrens'', *JBN* 2000/12. On the interpretation of the contract of sale and the deed of transfer see: C.G. Breedveldde Voogd, 'Uitleg van een akte van levering bij de overdracht van onroerende zaken', *WPNR* 2007/6709.

[401] With regard to the determination of the cadastral size see: articles 74-76 Kadasterregeling 1994. An example of an extract of the cadastral map can be found on the website of the Kadaster. This extract clearly indicates by means of a disclaimer that the cadastral map does not provide for exact measures. See: Website Kadaster, 'Kadastrale kaart (met omgevingskaart) voorbeeld' (http://www.kadaster.nl/web/artikel/download/Kadastrale-kaart-met-omgevingskaart-voorbeeld.htm), consulted on 17.02.2016. Also see R. Roes, 'Meten is weten', *WPNR* 2008/6750.

[402] W. van Riessen, *Het Kadaster: Historische ontwikkeling in de eerste helft van de 20e eeuw*, Nederland: Dienst voor het kadaster en de openbare registers, 2004, p. 11.

[403] Ibid.

[404] Article 7f (2) and article 48 (2)(d) Kadw.

[405] W. Louwman & W.F.L. Van der Bruggen, 'Bijwerking Basisregistratie Kadaster', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 812-813.

[406] Ibid.

[407] R. Roes, 'Meten is weten', *WPNR* 2008/6750.

understood that the third protection rules contained in articles 3:23 – 3:26 BW are not applicable with regard to the cadastral map and the report of results.[408] In other words, a guarantee for its correctness and completeness is not given by the *Kadaster*. Second, it needs to be stressed that the boundary that is reconstructed by the land surveyor is in fact the cadastral boundary and thus not necessarily the legal boundary as it cannot be guaranteed that the legal boundary and the cadastral boundary coincided at the time the boundary allocated for the first time nor that they still coincide.[409]

3.1.9.6 The Role of Prescription in Defining the Object of Transfer

Even if the parties' intention as described in the notarial deed complies with the indication on the cadastral map, one can still not be completely sure that it is that very plot that will be transferred. After all, extinctive and acquisitive prescription might play a role.[410] To illustrate, imagine that a person builds a pavilion that – either by accident or on purpose – comes to stand partly on the land of his neighbour. Based on article 5:20 (1) (e) BW, the neighbour is in principle the owner of all buildings that are durably united with his plot. An exception is made for buildings that form part of an immovable good of another person. This exception applies in the case at hand, as the part of the pavilion that is built on the neighbour's property is an integral part of the pavilion that encroaches on the builder's plot. Thus, the encroaching part of the pavilion does not fall within the neighbour's estate. Instead, it is the builder who becomes the owner of that part. This is a result of the application of article 5:3 BW which states that the owner of a good is the owner of all its components. Yet, the neighbour may demand the removal of the pavilion from his plot, provided that he does not abuse his power and that his claim is not prescribed, if the builder either was in bad faith or if he was in good faith and the removal would not disadvantage him in an unreasonable severe manner compared to the neighbour handling it.[411] On the other hand, if the builder is in good faith and if the removal of the encroaching part was to disadvantage him in an unreasonable severe matter compared to the neighbour handling it, his neighbour has to either sell the part of his plot on

[408] Ibid. Also see Rb. Amsterdam 2 april 2008, ECLI:NL:RBAMS:2008:BC9317.
[409] W. Louwman & W.F.L. Van der Bruggen, 'Bijwerking Basisregistratie Kadaster', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 812.
[410] Article 3:99, 3:105, and 3:306 BW. The period of time in case of acquisitive prescription is 10 years. The period of time in case of extinctive prescription is 20 year. Also see G.J.C. Lekkerkerker, 'De kadastrale grens valt niet altijd samen met de 'eigendomsgrens'', *JBN* 2000/12.
[411] Article 5:1 BW and articles 5:54 BW, 3:13 BW, 3:306 BW, and 3:314 BW.

which the pavilion is built to the builder or create a servitude on his plot for which he will receive a remuneration from the builder.[412]

These scenarios presume that the neighbour is aware of the fact that the pavilion was partially built on this plot. If this is yet not the case or if the neighbour simply ignores this circumstance, the builder will, after the lapse of either ten years (if he was in good faith) or 20 years (if he was in bad faith), and provided that he can provide adequate proof, become the owner of the piece of the neighbouring land on which the pavilion is built by operation of law.[413] If the neighbour then sells his plot, the new owner will not be able to find out that the builder of the pavilion is entitled to a part of his plot on the basis of the contract of sale, the notarial deed of transfer, or the cadastral map.[414] In addition, the neighbour cannot invoke the third party protection rule laid down in article 3:24 BW which grants protection against the incompleteness of the register to parties in good faith. This is due to the fact that prescription is expressly excluded from the scope of this provision.[415] Nevertheless, the builder will be protected through the third party protection mechanism enshrined in article 3:26 BW.[416]

To summarize, the determination of the exact size and shape of a plot that is subject to the transfer of ownership is a difficult undertaking which to some extent resembles a Rorschach test in the sense that what can be seen on the cadastral map is not always clear and has to be interpreted while in the end it cannot be ruled out that the conclusion that one might draw on the basis of the cadastral map, the notarial deed or the contract of sale might not reflect legal reality after all.

[412] Article 5:54 BW.
[413] Articles 3:99 BW, 3:105 BW, and 3:306 BW. Also see L.C.A. Verstappen, 'Inschrijving in de openbare registers', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 802. If the builder of the pavilion was in bad faith, he will become the owner of the respective part of the neighbouring plot. However, the neighbor may sue him for damages. See HR 24 februari 2017, ECLI:NL:HR:2017:309.
[414] Rb. Leeuwaarden, 21 February 2011, ECLI:NL:RBLEE:2011:BP6266, para.. 3.6.
[415] Article 3:24 (2)(e) BW.
[416] W.H.M. Reehuis et al., *PITLO Deel 3: Het Nederlands burgerlijk recht: Goederenrecht*, Deventer: Kluwer, 2012, p. 297. Also see W. Louwman, 'Misverstanden inzake registerverklaringen', *JBN* 1996(9) 81.

3.1.10 Digitalization of Land Registration

As early as 1990, the digitalization of the cadastre ("*Automatisering van de kadastrale registratie*") became a reality.[417] In 2018, the original system was eventually replaced by "*KOERS*" ("*Kadaster Objecten- en Rechtenregistratiesysteem*"), a more modern system that was deemed necessary to not only re-align the registration system with the technological developments that had taken place in the preceding 28 years but also to facilitate a more suitable response to the changed expectations as regards the use of such a system.[418] Acknowledging that the keeping of such a digital registration system also comes with risks, the *Kadaster* is legally obliged to protect the storage of its digital information against loss and encroachment as well as against unlawful amendments, inspection, and distribution.[419]

The digitalization of the land register followed several years later and was triggered by the possibility to submit digital deeds for registration in the land register; a possibility that has existed since 1 September 2005. [420] The legal basis for such the keeping of a digital land register was established through the Revision Act of the Cadastre Act I ("*Herzieningswet Kadasterwet I*").[421] The digital submission of documents for registration in the land register is subject to two conditions.

[417] Article 22 (1) Kadasterregeling 1994. Also see W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman and L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 836. Also see Website Kadaster, 'Mijlpalen in de geschiedenis' (https://www.kadaster.nl/web/kadaster.nl/over-ons/het-kadaster/geschiedenis/mijlpalen), as consulted on 08.05.2019.
[418] I.J. Tromp and B.H.J. Roes, 'KOERS: Een vernieuwd kadastraal registratiesysteem', *JBN* 2018(9) 39.
[419] Article 3d (1) Kadw.
[420] Article 10b (1), articles 11a-b Kadw. For a detailed (technical) information about digital submission of deeds to the Kadaster, see: W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, chapter 7.6 and W. Louwman, 'Inschrijving in de openbare registers van in elektronische vorm aangeleverde stukken', *JBN* 2003/01. Also see W. Louwman, 'Nieuwe regels voor inschrijving in de openbare registers', *JBN* 2005(9) 46. Also see Wijziging van de Kadasterwet, de Invoeringswet Kadasterwet, de Organisatiewet Kadaster, de Wet op het notarisambt en het Burgerlijk Wetboek in verband met een verdergaande toepassing van informatie- en communicatietechnologie bij de aanbieding van stukken ter inschrijving in de openbare registers voor registergoederen, het houden van die registers en de verstrekking van inlichtingen daaruit, alsmede in verband met enkele noodzakelijk gebleken technische aanpassingen en het stellen van aanvullende eisen aan het gebruik van elektronische handtekeningen (Herzieningswet Kadasterwet I), Kamerstukken II, 2001/02, 28443 nr. 3.
[421] Wijziging van de Kadasterwet, de Invoeringswet Kadasterwet, de Organisatiewet Kadaster, de Wet op het notarisambt en het Burgerlijk Wetboek in verband met een verdergaande toepassing van informatie- en communicatietechnologie bij de aanbieding van stukken ter inschrijving in de openbare registers voor registergoederen, het houden van die registers en de verstrekking van inlichtingen daaruit, alsmede in verband met enkele noodzakelijk gebleken technische aanpassingen en het stellen van aanvullende eisen aan het gebruik van elektronische handtekeningen (Herzieningswet Kadasterwet I), *Stb*. 2005, 107. Also see article 9 (2) Kadw.

First of all, to enable the signature of digital deeds, notaries have to acquire a digital signature.[422] It is to be noted that digital signatures possess the same legal value as a handwritten signature if they are sufficiently trustworthy.[423] Trustworthiness is considered to be established if they are connected to the signatory in a unique manner, if they enable the identification of the signatory, if they materialize with means which the signatories can keep under their sole control, if it is attached to the digital document in such a way that it is possible to trace back any subsequent changes, if it is based on a qualified certificate as referred to in the Telecommunication Act ("*Telecommunicatiewet*"), and if it is generated through a safe means for the production of a digital signature as referred to in that Act.[424] To enable the *Kadaster* to identify them on the basis of their digital signature, notaries therefore have to provide the *Kadaster* with the relevant information about their digital signature.[425] Second, to be able to exchange documents with the *Kadaster*, notaries need a digital platform or web application.[426] This platform, which is called Web-ELAN, is provided by the *Kadaster*.[427] Before notaries can make active use of Web-ELAN, they have to register themselves at the *Kadaster* and unless the *Kadaster* disapproves the distributor of the certificate, the notary will then be able to submit digital deeds for registration.[428] Because of the digitalization, land register and cadastre information can now be distributed in an automated manner.[429]

3.1.11 The Approach to Cross-Border Transfers of Land

[422] W. Louwman, 'Nieuwe regels voor inschrijving in de openbare registers', *JBN* 2005/09. Also see article 2 Uitvoeringsregeling Kadasterwet 1994, *Stcrt*. 1994, 81.
[423] Article 7e (1) Kadw and article 3:15a (1) BW.
[424] Article 3:15a (2) BW.
[425] W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 839-840.
[426] W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 838.
[427] Ibid. It is also possible to use slightly modified platforms that are offered by some notarial software deliverers.
[428] W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 839.
[429] W. Louwman & W.F.L. Van der Bruggen, 'Elektronisch Aanleveren', in: W.D. Kolkman & L.C.A. Verstappen (eds.), *Handboek Registergoederenrecht*, Zutphen: Uitgeversmaatschappij Walburg Pers, 2014, p. 836.

3.1.11.1 The Viewpoint of the Notary

Notarial deeds do not have to be drawn up in Dutch; notaries may draw up deeds in any language other than Dutch provided that they sufficiently understand that language.[430] However, if one of the parties to the deed does not understand that language adequately, the intervention of a (preferably sworn in) translator is necessary, who will then also sign the deed.[431] With a view to practice, one could now pose the question when the notary will find out whether the services of a translator are necessary. After having received the documents from the real estate agent, the notary will contact the parties to the contract to ask them to submit any needed documents and other relevant information. It is at this stage that the parties will be likely asked about their fluency in Dutch. If one of the parties indicates that their Dutch language skills are insufficient to read the notarial deed and to follow the explanations given by the notary before the parties sign the deed at the notarial office, a sworn-in translator has to be present when the deed is executed. Depending on the wishes of the parties concerned, either the notary or they themselves will select a suitable translator. The costs for the translation services are to be paid by the party, who is in need of the translation.[432] In addition, it is in principle even possible to draw up a deed in more than one language.[433] Hereby, the different language versions of the deed follow each other subsequently.[434] Yet, it is not possible to register this deed as such in the land register due to the fact that in order to safeguard legal certainty in relation to the publicity of land register information, all registered documents have to be drawn up in Dutch.[435] Hereby, the notary is given a choice; he can either submit the Dutch language version of the deed as an extract ("*uittreksel*") or offer a deed for registration that exclusively contains the Dutch text that serves as a translation of the other language version of the original deed.[436] The advantage of this second option is that the translation will be kept by the registrar and can thus be consulted by third parties.[437]

[430] Article 42 (1) Wna.
[431] Ibid. Also see H.M.I.Th. Breedveld, 'De werking van artikel 42 lid 1 derde zin Wet op het notarisambt', *WPNR* 2000(6416).
[432] Article 2.1 Model koopovereenkomst voor een bestaande eengezinswoning (model 2018).
[433] Article 42 (2) Wna.
[434] Ibid.
[435] Article 41 Kadw. Also see W.H.M. Reehuis & E.E. Slob, *Parlementaire Geschiedenis van het Nieuwe Burgerlijke Wetboek: Invoering Boeken 3,5 en 6: Kadasterwet*, Deventer: Kluwer, 1990, p. 182 (artikel 41).
[436]Ibid. The translation requirements are laid down in article 41 (1) Kadw. These requirements are explained in Chapter 11.2.
[437] Article 41 (3) Kadw.

3.1.11.2 The Viewpoint of the Land Registrar

The registration of a cross-border notarial deed is subject to two major restrictions. First, as follows from article 3:31 BW, notarial deeds can only be registered in the land register if they are submitted by a Dutch notary.[438] The second restriction has regard to the language in which the deeds are drawn up. While in the Netherlands as a whole, Dutch is the official language, in the province of Friesland, also Frisian is recognized as an official language.[439] It is thus somewhat surprising that only deeds that are drawn up in Dutch can be registered; article 41 Kadw expressly states that deeds that are drawn up in Frisian (or in a foreign language) cannot be registered as such.[440] Instead, they have to be accompanied with a literal translation by the notary who has passed the deed (if that deed was drawn up in Frisian) or by an official translator (if the deed was drawn up in a foreign language).[441] The non-translated deed will be kept by the land registrar but it is the translation of the deed that will be registered.[442]

A challenge that is often connected to the registration of a (translated) foreign deed is the occurrence of foreign legal instrument. If this instrument does not fit in the national *numerus clausus*, it cannot be entered in the land register. In these cases, adaption occurs.[443] This entails that the foreign instrument then has to be "translated" to its closest synonym under Dutch law.[444]

3.2 Germany

3.2.1 The Constitution of Land Registration

In Germany, the cadastral authority and land registry form separate institutions. Due to this fact, their constitutions will be examined separately.

[438] For a definition of the term "Dutch notary" see Chapter 3.2.
[439] Article 2 Wet gebruik Friese taal, *Stb*. 2013, 382.
[440] Article 41 (1) Kadw.
[441] Ibid.
[442] Article 41 (3) Kadw. Regarding the database in which the original documents drawn up in the foreign language are stored, see article 3a Kadasterregeling 1994.
[443] A. Flessner, 'Choice of Law in International Property Law – New Encouragement from Europe', in: R. Westrik & J. van der Weide, *Party Autonomy in International Property Law*, Munich: Sellier. European Law Publishers, 2011, p. 24.
[444] In the context of cross-border successions, see: preamble, para.. 15-16 European Succession Regulation.

3.2.1.1 The Land Registry

The requirement to complete a special - if not solemn - procedure to acquire a plot of land has a long tradition in the German legal system. It is bequeathed that under ancient German law, the transfer of a plot constituted a ritualized process, which required that both buyer and seller – together with their witnesses – had to be physically present on the very plot of land when they executed the transfer.[445] The transfer itself consisted of two deeds: a deed in which the will to transfer the plot was declared and a second deed, which would effectuate the transfer as such.[446] Once the deeds were signed, the seller, when leaving the plot, would symbolically transfer the plot to the buyer, for example by handing over a stick.[447] Yet, when the frequency of these transfers increased, a simpler means to transfer the ownership of a plot was needed.[448] Transfers were then, even in cases where buyer and seller were in agreement over the (conditions of the) transfer, conducted in front of a court.[449]

These developments eventually led to the birth of the ancestor of the modern German land register, which was witnessed in 1135 A.D. in Cologne.[450] In its beginning, the land register was a mere collection of loose deeds, which were referred to as shrine cards ("*Schreinskarten*").[451] The

[445] W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 2. Also see M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 115.
[446] Ibid.
[447] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 8. Also see H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 4 and M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 115.
[448] W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 2. Also see D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 8.
[449] Ibid. Also see M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 116 and H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 4.
[450] *Prütting* dates this development to 1130. See: H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 100. Also see J. Wilhelm, *Sachenrecht*, Berlin/Bosten: De Gruyter, 2019, p. 340 and M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 117 and W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 4.
[451] H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 100. Also see M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher*

nomenclature is owed to the fact that these deeds were kept safe in chests (antiquated: shrines), which, interestingly, were not located in (secular) public buildings but in churches.[452] At some point, the policy of keeping loose deeds was left and replaced by the practice of binding deeds together in books ("*Schreinsbücher*").[453] With the passing of time, land registers were also founded in other regions of the German territory (most prominently in Munich and Ulm), which soon resulted in the emergence of a great plurality of land register systems.[454] In most regions, this development was again ended at the end of the 14th century through the reception of Roman law; a result from the domination of the judiciary and administration by lawyers, who had received their legal education in Italy.[455] Under Roman law, the transfer of immovables was governed by the same rules as the transfer of movables, so that the formalities that used to rule the transfer of a plot became obsolete.[456] This lack of formalism concerning plot transfer resulted in situations whereby the ownership structure of a certain plot was often far from clear, but it was not until the end of the Thirty Year's War in the 17th century, that this situation grew more acute.[457] Being confronted with a destroyed existence, the only way forward was reconstruction.[458] Reconstruction however is expensive and as a consequence of the uncertainty surrounding the entitlement to a particular plot, banks or other creditors were hesitant to provide loans.[459] It was only in this period, that the land registration systems that used to coin the transfer of land were re-introduced.[460]

Unfortunately, the land registration systems, though being revived, were still rich in diversity. Yet, shortly after the German territories were unified through the founding of the national state in the form of the German Empire ("*Deutsches Kaiserreich*") in 1871, concrete measures to realize a

Fragen, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 117 and H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 5.

[452] Ibid.

[453] H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 100.

[454] For an overview of the developments in other parts of what nowadays constitutes Germany, see: M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 117-124 and W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 5.

[455] H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 6. Also see D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 9.

[456] H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 6.

[457] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 9-10. Also see H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 7.

[458] Ibid.

[459] Ibid.

[460] Ibid.

unification of the existing legal diversity were introduced in 1873 when the competence on matters concerning a uniform civil law was conferred upon the German Empire.[461] It was in this period that the modern land registers were introduced on a larger scale.[462]

The introduction of land registries across the entire nation was achieved after the introduction of the Civil Code ("*Bürgerliches Gesetzbuch*"; hereafter: "BGB").[463] The formal law applicable to the land registers was partly laid down in the Land Register Act ("*Reichsgrundbuchordnung*") and partly provided for by federal state law.[464] Thereby, the Land Register Act was restricted to those rules that were deemed essential in ensuring that the substantive law would be applied uniformly throughout the German Empire.[465] To regulate all other matters (such as the land registry's organisation), the state governments were to pass the necessary legislation, though the Land Register Act provided a legal framework for this legislation.[466] As a result, the organization of land registration was still marked by great diversity, which eventually came to an end in 1935 when a new Land Register Act was passed, establishing standards for organizing land registries and the form of the land registers (following the Prussian system).[467] The latter was realized with the introduction of the Land Register Order ("*Grundbuchverfügung*").[468]

[461] W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 4. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 108 and H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 7-9.
[462] M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 115.
[463] In this context, the term "nationwide" refers to the German empire ("*Deutsches Reich*"). H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 99.
[464] W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 4.
[465] Ibid. Also see H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 9.
[466] W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 4-5.
[467] W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 6-7. Also see H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 10. For an overview of the developments in other parts of what nowadays constitutes Germany, see: M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 125.
[468] W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 6.

Another milestone in the history of the German land registration system was reached when Germany was divided after World War II.[469] The land registration system of the German Democratic Republic (hereafter: "DDR") was significantly restructured to conform to the imposed ideas of communism and socialism.[470] First, within this new ideology, a prominent position was given to state-owned property ("*Volkseigentum*"), which was eventually 'created' through the expropriation of private owners and which especially concerned agricultural and other economically relevant land.[471] Ultimately, state-owned property approximately comprised about half of the DDR's territory.[472] The need for a sophisticated system of land registration thus significantly decreased in value.[473] Second, in 1952, the local courts were released from their task of managing the land register.[474] This task was then first conferred on the cadastral department of the district council ("*Rat des Kreises*") and later, in 1964, upon governmental agencies ("*Liegenschaftsdiensten*") that operated under the supervision of the Ministry of the Interior.[475] From that point on, land registration was controlled by the state and could be employed as tool to realize its political agenda.[476] After the unification of Germany, these structural changes had to be reverted again.[477]

Today, the land registers are kept and operated by the land registries which constitute 'departments' of the 661 local courts ("*Amtsgerichte*"), that form part of the voluntary jurisdiction ("*Freiwillige Gerichtsbarkeit*").[478] The individual local court is responsible for the land registers that

[469] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 11.
[470] Ibid.
[471] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 11-12. Also see W. Brehm & C. Berger, *Sachenrecht*, Tübingen: Mohr Siebeck, 2014, p. 548.
[472] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 11.
[473] Ibid.
[474] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 12. Also see M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 130 and J.F. Baur & R. Stürner, *Lehrbuch des Sachenrechts*, München: C.H. Beck'sche Verlagsbuchhandlung, 1992, p. 140.
[475] Ibid.
[476] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 12.
[477] Ibid. Also see R. Weber, *Sachenrecht II: Grundstücksrecht*, Baden-Baden: Nomos, 2015, p. 95.
[478] § 1 GBO. Also see J. Schapp & W. Schur, *Sachenrecht*, München: Verlag Franz Vahlen, 2010, p. 139 and H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 267 and S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: Einleitung zum Sachenrecht: § § 854-882 (Besitz und Allgemeines Liegenschaftsrecht 1)*, Berlin: Sellier – de Gruyter, 2018, p. 345 (§ 873 (nr.7b)) and D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 13 and J.F. Baur & R. Stürner, *Sachenrecht*, München: Verlag C.H. Beck, 2009, p. 171. On 25.04.2019, a search was conducted on the Website Justizportal des Bundes und der Länder to determine the number of local courts in Germany

fall in its circuit ("*Gerichtsbezirk*").[479] Each circuit consists of different districts ("*Bezirke*").[480] In turn, each district is provided with its own land register.[481] Generally, these districts correspond to the municipal districts, though the federal state ("*Bundesland*") may provide for a different organizational structure.[482]

Up until 31 December 2017, land registries were differently organized in Baden-Württemberg.[483] Situated at the municipalities, the land registers were kept by notaries that were civil servants (in Baden they were called "*beamtete Notare*"; in Württemberg "*Bezirksnotare*").[484] A reform of the land registry system was deemed necessary to effectuate a synchronisation with the other German states so that the municipal land registries were closed and replaced by land registries that are operated by the local courts, with the result that the original 600 land registers are now kept by 13 newly established land registries.[485] As a result, the organisation of land registries is now coherent

(https://justiz.de/OrtsGerichtsverzeichnis/index.php?plz=&ort=&gerausw=AG&plz1=&ort1=&landausw=TH&suchen1=Abschicken&MD=), as consulted on 25.04.2019. The number of local courts varies between the German states: 108 in Baden-Württemberg, 75 in Bavaria, 13 in Berlin, 25 in Brandenburg, 3 in Bremen, 8 in Hamburg, 44 in Hesse, 16 in Mecklenburg-West Pomerania, 80 in Lower Saxony, 129 in North Rhine-Westphalia, 47 in Rhineland-Palatinate, 11 in Saarland, 29 in Saxony, 25 in Saxony-Anhalt, 22 in Schleswig-Holstein, and 26 in Thuringia.

[479] J. Schapp & W. Schur, *Sachenrecht*, München: Verlag Franz Vahlen, 2010, p. 139.

[480] Ibid.

[481] Ibid. Also see § 2 I GBO.

[482] § § 1 I, 149-150 GBO. Also see H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 100.

[483] § § 2 XIII, 19 I Gesetz zur Reform des Notariats- und Grundbuchwesens in Baden-Württemberg vom 29. Juli 2010(GBl. Nr. 13 vom 13.08.2010 S. 555). Also see Website Ministerium der Justiz und für Europa: Baden-Württemberg, 'Fragen zur Neuordnung des Grundbuchwesens' (http://www.notariatsreform.de/pb/,Lde/Startseite/Grundbuchamtsreform), as consulted on 17.06.2019.

[484] § § 2 XIII, 19 I Gesetz zur Reform des Notariats- und Grundbuchwesens in Baden-Württemberg vom 29. Juli 2010 (GBl. Nr. 13 vom 13.08.2010 S. 555). Also see H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 100. Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 267 and W. Brehm & C. Berger, *Sachenrecht*, Tübingen: Mohr Siebeck, 2014, p. 208 and K. Stöber, *GBO-Verfahren und Grundstückssachenrecht*, München: Verlag C.H. Beck, 1998, p. 38 and H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 109 and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 10 and D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 38. After 31 December 2017, the notaries in Baden-Württemberg will be *Nurnotare*. See: P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 3 and C. Armbrüster, N. Preuß & T. Renner (eds.), *Notarkommentar: Beurkundungsgesetz und Dienstordnung für Notarinnen und Notare*, Bonn: Deutscher Notarverlag, 2015, p. 2 and N. Baunach, *Der Notar in der modernen Gesellschaft*, Göttingen: Verlag Otto Schwartz, 1974, p. 21 and K. Lerch, 'Nurnotariat und Anwaltsnotariat: Jede Geschichte hat ein Ende', in: P. Hanau et al. (eds), *Notar als Berufung: Festschrift für Stefan Zimmermann*, Bonn: Deutscher Notarverlag, 2010, p. 211.

[485] § § 2 XIII, 19 I Gesetz zur Reform des Notariats- und Grundbuchwesens in Baden-Württemberg vom 29. Juli 2010(GBl. Nr. 13 vom 13.08.2010 S. 555). This reform was subject to a constitutional complaint. See: BVerfG, Beschluss der 1. Kammer des Zweiten Senats vom 24. Februar 2017 - 2 BvR 2524/16. Also see Website Justizportal Baden-Württemberg, 'Zuständigkeiten der grundbuchführenden Amtsgerichte ab 1.

throughout the entire Federal Republic. Yet, even if the consistency of the organisation of land registries has been achieved, a central land register that covers the entire nation's territory still does not exist.[486]

Within the land register, each plot is registered on a separate folio ("*Realfolium*").[487] In the south-western part of Germany on the other hand, some land registers exist that are organized according to the plot owners ("*Personalfolium*").[488] The folio ("*Grundbuchblatt*") itself is divided in five sections: the inscription ("*Aufschrift*"), the inventory ("*Bestandsverzeichnis*"), and three divisions ("*Abteilungen*").[489] To visualize this division, different colours are allocated to the different sections of the folio.[490] The inscription contains organizational information as it indicates the local court ("*Amtsgericht*"), the land register district ("*Grundbuchbezirk*"), as well as the number of both volume and folio.[491] Information that defines the plot of land is to be found in the inventory.[492] This part of the folio includes the consecutive number, with which the plot is identified as well as the consecutive numbers of the plots from which the given plot originated, the cadastral district ("*Gemarkung*"), the parcel(s) of which the plot consists of, its exploitation method and address, and if available, the plot's description according to the tax books.[493] Furthermore, subjective property rights ("*subjektiv-dingliche Rechte*"), to which the owner of the plot is entitled, such as the right of

April 2012' (https://justizportal.justiz-bw.de/pb/,Lde/Startseite/Themen/Neuordnung+des+Grundbuchwesens), as consulted on 06.07.2020.

[486] For an overview of the developments regarding the digitalization of the land registers, see paragraph 3.2.10.1.

[487] § 3 I GBO. Also see J. Schapp & W. Schur, *Sachenrecht*, München: Verlag Franz Vahlen, 2010, p. 139 and J. Wilhelm, *Sachenrecht*, Berlin/Bosten: De Gruyter, 2019, p. 341 and H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 27. For some categories of plots (such as those that are owned by the State), the entry on a separa.te folio is not required. See: § 3 II, IV GBO. Also see K. Stöber, *GBO-Verfahren und Grundstückssachenrecht*, München: Verlag C.H. Beck, 1998, p. 52-53 and H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 723-724.

[488] J. Schapp & W. Schur, *Sachenrecht*, München: Verlag Franz Vahlen, 2010, p. 139. Concerning the possibility to organize the land register in this way, see: § 4 I GBO. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 111.

[489] § 4 GBV.

[490] W. Brehm & C. Berger, *Sachenrecht*, Tübingen: Mohr Siebeck, 2014, p. 204.

[491] § 5 GBV. This overview is not exhaustive due to the fact that specific legal provisions provide that also other information can be registered in the inscription. An example is a notation relating to the closure of a folio ("*Schließungsvermerk*"), which must be registered in the inscription on the basis of § 36 b GBV. For more examples see: H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 113.

[492] § 6 GBV.

[493] § 6 I-IIIa GBV.

servitude, are registered in this section ("*Aktivvermerk*").[494] The first division contains information on the owner(s) and the acquisition of the plot's ownership.[495] The latter includes the basis on which registration occurred (such as the day on which the property conveyance ("*Auflassung*") occurred, a (European) certificate of succession, or a last will), the day on which the registration occurred, and a declaration on the abdication of the plot's ownership.[496] In the second division, information with regard to the burdens that rest on (a part of) the plot, potential objections and "*Vormerkungen*" that are linked to these burdens or the ownership of the plot as such, restrictions on the owner's power of disposal, and notations relating to specific proceedings such as expropriation proceedings, is registered.[497] The non-accessory mortgages ("*Grundschulden*"), mortgages and rent charges as well as the "*Vormerkungen*" and objections that are linked to them, are not being registered in the second, but in the third division.[498] The division of the folio as set out above applies to both the traditional land register that is kept on paper as well as to the digital land register.[499] Last, it is to be mentioned that a plot's folio is considered the land register within in the meaning of the German Civil Code.[500]

Next to the land register as such, a separate register ("*Grundakten*") is kept per folio, in which the deeds that underlie the entries (in the land register) are retained and ordered chronologically.[501] This register is in turn accompanied with a reproduction of the corresponding land register folios

[494] § 7 GBV. § 9 GBO. § 96 BGB. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 113 and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 270. Also see H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 812-816 and W. Brehm & C. Berger, *Sachenrecht*, Tübingen: Mohr Siebeck, 2014, p. 205 and K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 810.
[495] § 9 I GBV.
[496] Ibid.
[497] § 10 I GBV. Again, this overview is not exhaustive. Beyond the information set out above, additional legal provisions provide a legal basis for the registration of other pieces of information in the second division. For an overview see: H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 118.
[498] § § 10 I a, 11 I GBV.
[499] § 63 GBV. Also see J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 29.
[500] § 3 I GBO.
[501] § 10 I GBO and § 24 GBV. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 121 and K. Stöber, *GBO-Verfahren und Grundstückssachenrecht*, München: Verlag C.H. Beck, 1998, p. 45 and H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 2686 and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 17.

("*Handblatt*"), so that the land registrar does not have to permanently consult the land register.[502] It is therefore of utmost importance that the land registrars keep these reproductions up to date and thus in compliance with the original land register folio.[503] However, with respect to digital land registers, these reproductions have become obsolete and are thus no longer required.[504] On top, land registries are given the right to keep indexes of the owners (including those that are entitled to a right of emphyteusis ("*Erbbauberechtigter*")) the so-called "*Eigentümerverzeichnis*", which arranges the owners in alphabetical order, and indexes of the plots ("*Grundstücksverzeichnis*").[505] It is noteworthy that while land registries are entitled to keep these indexes, they are not required to guarantee their actuality and thus correctness.[506] Therefore, even if they provide incorrect information on the basis of these indexes, they cannot be held liable.[507]

3.2.1.2 The Cadastral Authority

The forerunners of the cadastral maps date back to the 16th century.[508] As was common at that time, maps then did not comprise the entire German speaking territory, but only a certain region ("*Regionalkarte*").[509] The maps were, often on behalf of the sovereign, produced by academics (interestingly not only by astronomers but amongst others also theologians).[510] Furthermore, specialized maps, to indicate rivers, streets, and mining operations, amongst others, were produced to complement the regional maps.[511] In 1523, the first German map in print saw the light of the day when *Johannes Aventin* published his map of Bavaria ("*Bayernkarte*").[512] A problem that was still faced was the comparability of the length of boundaries, which resulted from the inconsistency of

[502] § 24 IV GBV. Also see H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 2688 and K. Stöber, *GBO-Verfahren und Grundstückssachenrecht*, München: Verlag C.H. Beck, 1998, p. 45.
[503] § 24 IV GBO.
[504] § 73 GBV. Also see H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 21. s
[505] § 12a I GBO. As follows from the cited provision, land registries may in addition keep other indexes if they are granted permission from the federal-state administration of justice department. In addition to the indexes that are publicly accessible, they may also keep indexes that are purely employed for internal purposes (i.e. a register that documents at which point of time applications were received and processed ("*Eingangsliste*")). Also see U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 448-449 and K. Stöber, *GBO-Verfahren und Grundstückssachenrecht*, München: Verlag C.H. Beck, 1998, p. 45-46.
[506] § 12a I GBO.
[507] Ibid.
[508] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 39.
[509] Ibid.
[510] Ibid.
[511] Ibid.
[512] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 40.

linear measures.[513] Despite the fact that Charlemagne had attempted to solve this problem in 789 by providing the length of his own foot as standard measure, it was not until 1872 that a consistent linear measure was adhered to in the territory that today constitutes Germany.[514]

In the course of the 16th and 17th centuries and as an improvement on the regional maps, the first state maps ("*Landesaufnahmen*") were created in Saxony, Württemberg, and Bavaria.[515] Compared to the regional maps, these state maps not only included a greater territory, but they were also the product of more advanced survey methods (such as the application of triangulation) and mathematical innovations (logarithms).[516] Inspired by the work of *César-François Cassini de Thury*, who was in charge of the surveying of France by applying the triangulation method, 'southern and western German' sovereigns, all ahead Bavaria, began to order comparable maps.[517] In Prussia, by contrast, surveying delayed as a result of the Silesian Wars.[518] In addition, the Prussian King at the time was sceptical about producing more detailed maps of his territory, as he feared that these could fall into the hands of his enemies.[519] Nevertheless, he understood that a precise map of his kingdom could also benefit his own army so that their production was ultimately unhindered.[520] Last, in the northern and middle part of the 'German' territory, similar objectives were pursued, although they were significantly less influenced by Cassini's methodology.[521]

The Frenchman who had even greater influence on the cadastral development in 'Germany' was Napoleon Bonaparte, who had conquered the German territories by the late 18th century.[522] In 1806, the Code Napoleon was entered into force in the German territories.[523] Consequently, the land that a person possessed was subject to taxation ("*Grundsteuer*").[524] To realize the taxation, the surveying of the entire 'German' territory was ordered; the success of its realization however

[513] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 38, 43.
[514] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 38. Also see S. German & P. Drath, *Handbuch der SI-Einheiten: Definition, Realisierung, Bewahrung und Weitergabe der SI-Einheiten, Grundlagen der Präzisionsmeßtechnik*, Braunschweig/Wiesbaden: Friedr. Vieweg & Sohn, 1979, p. 54.
[515] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 55.
[516] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 46, 55.
[517] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 72, 75-78.
[518] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 83.
[519] Ibid.
[520] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 83-88.
[521] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 88.
[522] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 100-101.
[523] S. Tönnies, *Die Menschenrechtsidee: Ein Abendländisches Exportgut*, Wiesbaden: VS Verlag, 2011, p. 127.
[524] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 100.

revealed differences across the various territories.[525] The decision to set up cadastral agencies was taken individually by the states in the (beginning of the) 19th century.[526] However, the cadastral authorities were not organized uniformly across the German territories; most distinctively, in the southern territories, military and civil surveying were combined, while in Prussia they were kept separate.[527]

To make a great leap forward, in 1934, the starting signal was given to end the great diversity that governed surveying and mapping.[528] In the same year, the Act on the rearrangement of the surveying and mapping ("*Gesetz über die Neuordnung des Vermessungswesens*") was adopted.[529] Six years later, in 1940, the "*Reichskataster*" was introduced, which replaced the diversity of existing registers that were kept by the states ("*Flur- und Liegenschaftsbücher*") with a common system of keeping the register.[530] In addition, unlike the registers that states had primarily kept for taxation purposes ("*Grundsteuerkataster*"), the *Reichskataster* constituted a property cadastre ("*Eigentumskataster*").[531] This also marked the beginning of the interconnection of the cadastre and land register, which thenceforward were to be kept in compliance with each other ("*Zurückführung*").[532]

The *Reichskataster* was eventually replaced with the modern cadastral register ("*Liegenschaftskataster*") which today constitutes the official register for plots.[533] It consists of the

[525] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 100, 112.
[526] For example, in Prussia in 1819 ("*Godesberger Instruktion*"), in Bavaria in 1872. See: W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 169.
[527] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 168.
[528] W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 44.
[529] H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 102.
[530] S. Hügel, *GBO: Grundbuchordnung: Kommentar*, München: Verlag C.H. Beck, 2016, p. 125. Also see W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 45.
[531] W. Torge, *Geschichte der Geodäsie in Deutschland*, Berlin/New York: Walter de Gruyter, 2009, p. 273.
[532] J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 6. Also see W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 45.
[533] § 2 II GBO. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 14. Also see § 4 II Vermessungsgesetz für Baden-Württemberg (VermG) vom 1. Juli 2004 (GBl. S. 469), zuletzt geändert durch Artikel 55 der Verordnung vom 23. Februar 2017 (GBl. S. 99, 105); § 5 II Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG) vom 31. Juli 1970 (BayRS III S. 687), zuletzt geändert durch § 1 Abs. 181 der Verordnung vom 26. März 2019 (GVBl. S. 98); § 14 III Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160); § 4 II Gesetz über die Landesvermessung und das

Liegenschaftskataster (Vermessungs- und Katastergesetz) vom 16. Oktober 1990 (Brem.GBl. 1990, 313), zuletzt geändert durch Art. 4 G zur Anpassung von Vorschriften aus dem Bereich Umwelt und Bau an die europäische Datenschutz-Grundverordnung vom 18.12.2018 (Brem.GBl. S. 651); § 11 II Hamburgisches Gesetz über das Vermessungswesen (Hamburgisches Vermessungsgesetz – HmbVermG) vom 20. April 2005 (HmbGVBl. 2005, S. 135), zuletzt geändert durch Artikel 4 des Gesetzes vom 31. August 2018 (HmbGVBl. S. 282, 284); § 9 II Hessisches Gesetz über das öffentliche Vermessungs- und Geoinformationswesen (Hessisches Vermessungs- und Geoinformationsgesetz – HVGG) vom 6. September 2007 (GVBl. I S. 548), zuletzt geändert durch Artikel 29 des Gesetzes vom 3. Mai 2018 (GVBl. S. 82); § 23 I Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 16. Dezember 2010 (GVOBl. M-V 2010, S. 713), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 3 I Niedersächsisches Gesetz über das amtliche Vermessungswesen (NVermG) vom 12. Dezember 2002 (GVBl. Nr.1/2003 S.5), zuletzt geändert durch Art. 9 G zur Neuordnung des niedersächsischen Datenschutzrechts vom 16.5.2018 (Nds. GVBl. S. 66); § 11 VIII Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256); § 10 II Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § 11 II Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § 11 I Gesetz über die Landesvermessung und das Liegenschaftskataster im Freistaat Sachsen (Sächsisches Vermessungsgesetz – SächsVermG) vom 12. Mai 2003 (SächsGVBl. S. 121), zuletzt geändert durch Artikel 5 des Gesetzes vom 10. April 2007 (SächsGVBl. S. 54); § 11 III Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510); § 12 II Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG -) vom 12. Mai 2004 (GL. Nr. 219-9), zuletzt geändert (Art. 18 LVO v. 16.01.2019, GVOBl. S. 30); § 9 III Thüringer Vermessungs- und Geoinformationsgesetz (ThürVermGeoG) vom 16. Dezember 2008 (GVBl. S. 574), zuletzt geändert durch Artikel 42 des Gesetzes vom 18. Dezember 2018 (GVBl. S. 731, 760). The term “Liegenschaft“ comprises the plots and the buildings that are located on them, see: § 5 III Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG) vom 31. Juli 1970 (BayRS III S. 687), zuletzt geändert durch § 1 Abs. 181 der Verordnung vom 26. März 2019 (GVBl. S. 98); § 14 I Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160); § 8 I Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § 2 II Hamburgisches Gesetz über das Vermessungswesen (Hamburgisches Vermessungsgesetz – HmbVermG) vom 20. April 2005 (HmbGVBl. 2005, S. 135), zuletzt geändert durch Artikel 4 des Gesetzes vom 31. August 2018 (HmbGVBl. S. 282, 284); § 9 I Hessisches Gesetz über das öffentliche Vermessungs- und Geoinformationswesen (Hessisches Vermessungs- und Geoinformationsgesetz – HVGG) vom 6. September 2007 (GVBl. I S. 548)), zuletzt geändert durch Artikel 29 des Gesetzes vom 3. Mai 2018 (GVBl. S. 82); § 22 II Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 2 II Niedersächsisches Gesetz über das amtliche Vermessungswesen (NVermG) vom 12. Dezember 2002 (GVBl. Nr.1/2003 S.5), zuletzt geändert durch Art. 9 G zur Neuordnung des niedersächsischen Datenschutzrechts vom 16.5.2018 (Nds. GVBl. S. 66); § 3 II Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § 11 I Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § 11 I Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510); § 12 I Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG -) vom 12. Mai 2004 (GL. Nr. 219-9), zuletzt geändert (Art. 18 LVO v. 16.01.2019,

cadastral map ("*Liegenschaftskarte*") and the cadastral register ("*Liegenschaftsbuch*").[534] Nowadays, the entire nation's territory is surveyed and laid down in cadastral maps.[535] Each cadastral authority has its own cadastral map which comprises all parcels that are located in the territory over which it has 'jurisdiction'.[536]

The organisation of the cadastral authority ("*Katasteramt*") is governed by state law.[537] Because the cadastral systems that are organized by the German states differ from each other, a general

GVOBl. S. 30); § 9 I Thüringer Vermessungs- und Geoinformationsgesetz (ThürVermGeoG) vom 16. Dezember 2008 (GVBl. S. 574), zuletzt geändert durch Artikel 42 des Gesetzes vom 18. Dezember 2018 (GVBl. S. 731, 760).

[534] § 2 II GBO. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 14.

[535] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 14. Also see G. Teege, T. Eggendorfer & V. Eiseler (eds), *Militärische Kommunikationstechnik*, Norderstedt: Books on Demand GmbH, 2009, p. 145.

[536] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 45.

[537] § § 7-8 Vermessungsgesetz für Baden-Württemberg (VermG) vom 1. Juli 2004 (GBl. S. 469), zuletzt geändert durch Artikel 55 der Verordnung vom 23. Februar 2017 (GBl. S. 99, 105); § 12 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG) vom 31. Juli 1970 (BayRS III S. 687), zuletzt geändert durch § 1 Abs. 181 der Verordnung vom 26. März 2019 (GVBl. S. 98); § 2 I Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160); § 2 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz) vom 16. Oktober 1990 (Brem.GBl. 1990, 313), zuletzt geändert durch Art. 4 G zur Anpassung von Vorschriften aus dem Bereich Umwelt und Bau an die europäische Datenschutz-Grundverordnung vom 18.12.2018 (Brem.GBl. S. 651); § § 26-28 Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § 2 (6) Hamburgisches Gesetz über das Vermessungswesen (Hamburgisches Vermessungsgesetz – HmbVermG) vom 20. April 2005 (HmbGVBl. 2005, S. 135), zuletzt geändert durch Artikel 4 des Gesetzes vom 31. August 2018 (HmbGVBl. S. 282, 284); § § 4, 6, 8, 15 Hessisches Gesetz über das öffentliche Vermessungs- und Geoinformationswesen (Hessisches Vermessungs- und Geoinformationsgesetz – HVGG) vom 6. September 2007 (GVBl. I S. 548)), zuletzt geändert durch Artikel 29 des Gesetzes vom 3. Mai 2018 (GVBl. S. 82); § 5 Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 6 Niedersächsisches Gesetz über das amtliche Vermessungswesen (NVermG) vom 12. Dezember 2002 (GVBl. Nr.1/2003 S.5), zuletzt geändert durch Art. 9 G zur Neuordnung des niedersächsischen Datenschutzrechts vom 16.5.2018 (Nds. GVBl. S. 66); § § 2, 23-25 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256); § 2 I Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § 2 Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § 2 Gesetz über die Landesvermessung und das Liegenschaftskataster im Freistaat Sachsen (Sächsisches Vermessungsgesetz – SächsVermG) vom 12. Mai 2003 (SächsGVBl. S. 121), zuletzt geändert durch Artikel 5 des Gesetzes vom 10. April 2007 (SächsGVBl. S. 54); § 1 Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt

description cannot be given. It can however be observed that several states (Baden-Württemberg, Bavaria, Brandenburg, Hesse, Mecklenburg-West Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, and Saxony) adhere to a three-layered organization structure, at the top of which stands the competent ministry, followed by the relevant state office ("*Landesamt*"), and the survey authorities.[538] Although great diversity, the obligation to install and keep a uniform surveying mechanism is enshrined in several state laws.[539] As a closing remark, it should be mentioned that the state cadastral authorities are complemented by the Federal Agency for Cartography and Geodesy ("*Bundesamt für Kartographie und Geodäsie*") and the Geoinformation Office of the Federal Armed Forces ("*Amt für Geoinformationswesen der Bundeswehr*").[540]

3.2.1.3 Separated but Interconnected

As can be derived from § 2 II Land Register Act ("*Grundbuchordnung*"), all plots of land that are indicated in the inventory of the land register folio, must be defined by the cadastre.[541] As such, the factual information concerning a plot of land is registered in the cadastre while the plot's legal

geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510); § 2 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG -) vom 12. Mai 2004 (GL. Nr. 219-9), zuletzt geändert (Art. 18 LVO v. 16.01.2019, GVOBl. S. 30); § 4 Thüringer Vermessungs- und Geoinformationsgesetz (ThürVermGeoG) vom 16. Dezember 2008 (GVBl. S. 574), zuletzt geändert durch Artikel 42 des Gesetzes vom 18. Dezember 2018 (GVBl. S. 731, 760).
S. Hügel, GBO: Grundbuchordnung: Kommentar, München: Verlag C.H. Beck, 2016, p. 126. Also see K. Stöber, *GBO-Verfahren und Grundstückssachenrecht*, München: Verlag C.H. Beck, 1998, p. 51. As follows from the cited state laws, the exact name of the cadastral authority differs across the German states. Terms most often used include "*Katasteramt*", "*Vermessungsamt*", or a combination of the two. Due to the fact that most often, it is referred to as "*Katasteramt*", it was decided to use this term to refer to the cadastral authority.

[538] This overview is a generalized overview. Also, the tasks that are conferred upon the three authorities differ from state to the other. See footnote 91 for the legal bases in which the organization of the cadastral authorities and the division of the tasks is set out.

[539] § 1 II Vermessungsgesetz für Baden-Württemberg (VermG) vom 1. Juli 2004 (GBl. S. 469), zuletzt geändert durch Artikel 55 der Verordnung vom 23. Februar 2017 (GBl. S. 99, 105); § 5 II Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § 1 II Hamburgisches Gesetz über das Vermessungswesen (Hamburgisches Vermessungsgesetz – HmbVermG) vom 20. April 2005 (HmbGVBl. 2005, S. 135), zuletzt geändert durch Artikel 4 des Gesetzes vom 31. August 2018 (HmbGVBl. S. 282, 284); § 4 III Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 1 Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674).

[540] § 3 Gesetz über die geodätischen Referenzsysteme, -netze und geotopographischen Referenzdaten des Bundes (Bundesgeoreferenzdatengesetz - BGeoRG) vom 10.05.2012 (BGBl. I S. 1081 (Nr. 21)).

[541] H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 102.

situation is registered in the land register.[542] To ensure that the land register complies with the cadastre and vice versa, a constant connection between the land registry and the cadastral authority must be upheld.[543] For this reason, both institutions are under the legal obligation to communicate any changes that occur with respect to a given plot of land.[544] Concretely, data that is sent by the cadastral authority to the land registry in particular concerns the district ("*Gemarkung*"), the cadastral section ("*Flur*"), the parcel ("*Flurstück*"), the parcel's size, the place name ("*Lagebezeichnung*"), the actual use ("*tatsächliche Nutzung*") as well as any changes of these preceding pieces of information.[545] It shall be noted that the concept "actual use" is an exclusive cadastral concept. Its counterpart in the land register is the "economic use" ("*Wirtschaftsart*"). This difference is a terminological one. Both concepts make a statement about how a parcel is used, but with different degrees of detail; 11 types of economic uses face a far more elaborate list of different types of actual uses.[546] The reason that the land register uses the concept "economic use" is that the degree of detail attached to the concept "actual use" is not of importance for its own purposes.

[542] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 13.
[543] Ibid. Also see H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 102. Enthusiasts who are interested in the technical details that govern the data exchange shall be pointed to: Richtlinien zum Datenaustausch im Verfahren SolumSTAR für das Grundbuch- und Katasteramt (SolumSTAR-Richtlinien), AV. D. Justizministeriums v. 19.12.2007 (1512 – I.14), Datenaustausch mit den Grundbuchämtern in der Fassung vom 25. September 2012 as well as to the corresponding state laws.
[544] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 13. H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 102.
[545] State laws showed some nuances in their enumeration of information that needs to be communicated to the land registry.This enumeration includes data that must be communicated in any case. It is thus possible that the state law of a concrete state may demand a more far-going data exchange and may for example include changes of the geometric form of a parcel, or writing, surveying and drawing mistakes. See for example: Article 4.1 Gemeinsame Allgemeine Verfügung des Ministeriums für Justiz, Bundes- und Europaangelegenheiten und des Innenministeriums vom 8. Oktober 1997(Amtsbl. Schl.-H. 1997 S.493); Article 5.1 Richtlinien zur Erhaltung der Übereinstimmung zwischen Grundbuch und Liegenschaftskataster (Übereinstimmungs-Richtlinien) AV d. Justizministeriums (3850 - I. 42) und RdErl. d. Innenministeriums (32 - 51.10.02 - 8410) v. 29.10.2009; Article 3.1 Erhaltung der Übereinstimmung zwischen dem Grundbuch und dem Liegenschaftskataster vom 2. März 2009 (ABl./09, [Nr. 11], S.537), geändert durch Gemeinsame Allgemeine Verfügung des MdJ und MI vom 30. Oktober 2013 (ABl./13, [Nr. 51], S.3015); Article 4.3 Geschäftsanweisung für die Behandlung der Grundbuchsachen (GBGA), Bekanntmachung des Bayerischen Staatsministeriums der Justizvom 16. Oktober 2006 (Az.: 3851 - I - 8967/2006), zuletzt geändert durch Bekanntmachung vom 14. Mai 2012 (JMBl S. 50); Article 33 VwV Grundbuchsachen vom 27. Dezember 2005 (SächsJMBl. 2006 S. 2), die zuletzt durch die Verwaltungsvorschrift vom 8. Dezember 2015 (SächsJMBl. S. 167) geändert worden ist, zuletzt enthalten in der Verwaltungsvorschrift vom 8. Dezember 2015 (SächsABl.SDr. S. S 362);
[546] For an overview of the types of actual uses, see for example: Anlage 1 zum Liegenschaftskatastererlass NRW: Katalog der Nutzungsarten im Liegenschaftskataster und ihrer Begriffsbestimmung (Nutzungsartenkatalog NRW). For an overview of the different types of economic uses, see for example: Article 5.1 Gemeinsame Allgemeine Verfügung des Ministeriums für Justiz, Bundes- und Europaangelegenheiten und des Innenministeriums vom 8. Oktober 1997(Amtsbl. Schl.-H. 1997 S.493).

Therefore, the "actual use" must be translated to their corresponding "economic use".[547] Data that is communicated from the land registry to the cadastral authority concerns changes in the first division of a land register's folio as well as a change of the plot's description in the land register.[548] To date, the data is not only exchanged digitally but also on paper.[549] In practice, the consultation of the paper version is standard, as the owner's address details must still be added. Once the electronic land register ("*Datenbankgrundbuch*") is realized, the exchange of data between land registry and cadastral authority will be automated.[550]

3.2.2 The Role of the Legal Practitioner

In Germany, notaries ("*Notare*") fulfil the position of the legal practitioner.[551] Notaries are holders of an independent office ("*Träger eines unabhängigen Amtes*"), who operate independently from the state ("*Staat*") and as such do not fall under the Civil Service Act ("*Beamtengesetz*").[552] Therefore, they are exclusively subordinated to the law.[553] Unlike Dutch notaries, German notaries are not entrepreneurs, which means that they must not exhibit commercial behaviour and advertise their official function.[554] On 1 January 2019, Germany counted a total of 7.045 notaries, serving

[547] Automatisierte Führung des Liegenschaftsbuchs, RV d. JM vom 29. Juli 2005 (3850 – I.42), para.. 2.
[548] Again, state laws might provide a more detailed list of data that is subject to exchange. The enumeration above reflects the common denominator. See for example Article 3.1 Gemeinsame Allgemeine Verfügung des Ministeriums für Justiz, Bundes- und Europaangelegenheiten und des Innenministeriums vom 8. Oktober 1997(Amtsbl. Schl.-H. 1997 S.493). Also see article 3.1 Richtlinien zur Erhaltung der Übereinstimmung zwischen Grundbuch und Liegenschaftskataster (Übereinstimmungs-Richtlinien) AV d. Justizministeriums (3850 - I. 42) und RdErl. d. Innenministeriums (32 - 51.10.02 - 8410) v. 29.10.2009; Article 5 Erhaltung der Übereinstimmung zwischen dem Grundbuch und dem Liegenschaftskataster vom 2. März 2009 (ABl./09, [Nr. 11], S.537), geändert durch Gemeinsame Allgemeine Verfügung des MdJ und MI vom 30. Oktober 2013 (ABl./13, [Nr. 51], S.3015); Article 4.1 Geschäftsanweisung für die Behandlung der Grundbuchsachen (GBGA), Bekanntmachung des Bayerischen Staatsministeriums der Justizvom 16. Oktober 2006 (Az.: 3851 - I - 8967/2006), zuletzt geändert durch Bekanntmachung vom 14. Mai 2012 (JMBl S. 50); Article 32 VwV Grundbuchsachen vom 27. Dezember 2005 (SächsJMBl. 2006 S. 2), die zuletzt durch die Verwaltungsvorschrift vom 8. Dezember 2015 (SächsJMBl. S. 167) geändert worden ist, zuletzt enthalten in der Verwaltungsvorschrift vom 8. Dezember 2015 (SächsABl.SDr. S. S 362).
[549] See for example: Article 1.1 Richlinien zum Datenaustausch im Verfahren SolumSTAR für das Grundbuch- und Katasteramt (SolumSTAR-Richtlinien), RdErl. D. Innenministeriums v. 4.4.2005 – 36.2 – 8410.
[550] More information on the "*Datenbankgrundbuch*" can be found in Chapter 3.2.10.1.
[551] § 2 BNotO.
[552] § 1 BNotO. Also see M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 160 and W. Baumann, 'Beiträge des Notars zur Gerechtigkeit', in: W. Baumann, P. Limmer & A. Schwachtgen (eds.), *Notar und Internationalisierung: Festschrift für Helmut Fessler zum 70. Geburtstag*, Heidelberg: Carl Heymanns Verlag, 2013, p. 11.
[553] § 2 BNotO.
[554] Ibid. Also see § 29 (1)-(2) BNotO.

approximately 83 million citizens.[555] Statistically speaking, there was thus about one notary per 11.781 citizens.

The notarial profession is subject to a broader set of rules, which include both federal and state law. In particular, notaries are bound by the Federal Regulation of Notaries ("*Bundesnotarordnung*"; hereafter: "BNotO"), the Notarization Act ("*Beurkundungsgesetz*"; hereafter: "BeurkG"), the Official Regulation of Notaries ("*Dienstordnung für Notarinnen und Notare*"; hereafter: "DONot") as an instrument to harmonize the state law governing the administration of the notarial profession, the guidelines formulated by 'their' chamber of notaries ("*Richtlinien der Notarkammern*"), and a special set of rules ("*Angelegenheiten der Notarinnen und Notare*") that determine the notary's position with regard to the federal-state administration of justice department ("*Landesjustizverwaltung*").[556]

3.2.2.1 The Different Types of Notaries

Two types of notaries need to be distinguished.[557] The first are those practitioners who have a fulltime tenure position as notaries ("*Nurnotare*").[558] Second, there are those practitioners who combine their notarial function with a position as a practicing lawyer ("*Anwaltnotare*").[559] Hereby, it is not incumbent on the individual notary to decide on whether to become a "*Nurnotar*" or an "*Anwaltnotar*". This is due to the fact that the existence of either type is bound to particular geographic regions. Accordingly, the "*Anwaltnotar*" exists in the north and western part of the country (Schleswig-Holstein, Hesse, Lower Saxony, Berlin, Bremen, and parts of North Rhine-

[555] § 4 BNotO. Also see Website Bundesnotarkammer, 'Notarstatistik' (http://bnotk.de/Notar/Statistik/index.php), consulted on 16.06.2019. Also see Website Statistisches Bundesamt, 'Presse: Schätzung für 2018: Bevölkerungszahl auf 83,0 Millionen gestiegen' (https://www.destatis.de/DE/Presse/Pressemitteilungen/2019/01/PD19_029_12411.html), consulted on 16.06.2019.
[556] C. Armbrüster, N. Preuß & T. Renner (eds.), *Notarkommentar: Beurkundungsgesetz und Dienstordnung für Notarinnen und Notare*, Bonn: Deutscher Notarverlag, 2015, p. 648.
[557] Until the recent past, also a third type of notaries existed. This type was a speciality of the state Baden-Württemberg where it was possible that notaries were civil servants ("*verbeamtete Notare*") who combined their function as notary with – amongst others – the keeping of the land register; a task which in other states is conferred upon the land registrars. See: M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 160-161.
[558] § 3 (1) BNotO. Also M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 161 and P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 3.
[559] Ibid.

Westphalia), the "*Nurnotar*" in the remaining parts of the country.[560] By 1 January 2019, out of the 7.045 notaries, some 5.331 were "*Anwaltnotare*".[561]

In principle, the notarial profession is regulated uniformly across the nation.[562] Nevertheless, different rules regarding the notaries' appointment, their term of office, and the possibility of entering into a partnership are applicable to either type of notary.[563] These differences are set out in the following subchapters.

3.2.2.2 Requirements for Appointment

The notarial occupation is accessible only for those candidates, who fulfil a number of requirements. As will be seen, different routes with distinctive requirements have to be taken for an appointment as *Nurnotar* and *Anwaltnotar*. Nevertheless, there are also fundamental requirements with regard to personal and academic qualifications that are applicable to both types of notaries. For instance, all notaries have to demonstrate the qualification for a judicial office ("*Befähigung zum Richteramt*").[564] This qualification is obtained when candidates have completed their study of German law and passed the first state examination.[565] Furthermore, after having completed the required traineeship, the second state examination must be passed.[566] In principle, law studies last a period of four years and constitute a combination of mandatory courses on the one hand and the selection of a specialisation ("*Schwerpunkbereiche*") with optional courses on the other hand.[567] In addition, either a legally oriented language course or an event in the legal field that is held in a foreign language (such as an international conference) has to be attended during the course of the

[560] M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 160-161 and P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 3.
[561] Website Bundesnotarkammer, 'Notarstatistik' (http://bnotk.de/Notar/Statistik/index.php), consulted on 16.06.2019.
[562] Article 74 I (1) GG. Also see T. Diehn (eds.), *BNotO: Bundesnotarordnung: Kommentar*, Köln: Wolters Kluwer Deutschland, 2019, p. 5-6. The notariat's administration falls within the competence of the state governments. See: § 84 GG and H. Weingärtner & D. Gassen, *DONot: Dienstordnung für Notarinnen und Notare mit Praxisteil zum elektronischen Rechtsverkehr: Kommentar*, Heidelberg: Carl Heymanns Verlag, 2013, p. 1.
[563] T. Diehn (eds.), *BNotO: Bundesnotarordnung: Kommentar*, Köln: Wolters Kluwer Deutschland, 2019, p. 6.
[564] § 5 BNotO.
[565] § 5 (1) Deutsches Richtergesetz in der Fassung der Bekanntmachung vom 19. April 1972 (BGBl. I S. 713) (FNA 301-1), zuletzt geändert durch Art. 9 G zu bereichsspezifischen Regelungen der Gesichtsverhüllung und zur Änd. weiterer dienstrechtlicher Vorschriften vom 8.6.2017 (BGBl. I S. 1570).
[566] Ibid.
[567] § 5a (1)-(2) Deutsches Richtergesetz in der Fassung der Bekanntmachung vom 19. April 1972 (BGBl. I S. 713) (FNA 301-1), zuletzt geändert durch Art. 9 G zu bereichsspezifischen Regelungen der Gesichtsverhüllung und zur Änd. weiterer dienstrechtlicher Vorschriften vom 8.6.2017 (BGBl. I S. 1570).

law studies.[568] As well as being qualified for a judicial office, applicants have to demonstrate adequate achievements, a suitable personality and may, at the passing of the closing date for application, not be older than 60 if being appointed for the first time.[569] A third requirement is that applicants must prove that they have professional liability insurance or alternatively be in receipt of a provisional cover note.[570]

Notaries are restricted in their ability to accept engagements that fall outside of their notarial function. First, parallel to their notarial function notaries may not exercise a salaried position ("*besoldetes Amt*").[571] On an individual basis, the federal-state administration of the justice department may make exceptions to this rule.[572] The granting of an exception, however, means that the notary may not personally exercise this function.[573] Second, notaries may not exercise an additional profession ("*Beruf*").[574] It goes without saying that "*Anwaltnotare*" are exempted from this rule.[575] They may also exercise the profession of a patent agent ("*Patentanwalt*"), tax consultant ("*Steuerberater*"), financial auditor ("*Wirtschaftsprüfer*"), and of a sworn in accountant ("*vereidigter Buchprüfer*").[576] Third, notaries may accept certain occupations on the condition that they first receive permission from the regulating authority ("*Aufsichtsbehörde*"). These occupations comprise gainful occupations ("*Nebenbeschäftigung gegen Vergütung*"), especially if they constitute commercial occupations, but also positions such as a seat on the board of directors ("*Vorstand*"), the supervisory board ("*Aufsichtsrat*"), the administrative board ("*Verwaltungsrat*") or any other organ of a commercial enterprise.[577] Importantly, the notary's independence and impartiality, when involved in these occupations, must at all times be secured.[578] Fourth and last, a notary may act as

[568] § 5a (2) Deutsches Richtergesetz in der Fassung der Bekanntmachung vom 19. April 1972 (BGBl. I S. 713) (FNA 301-1), zuletzt geändert durch Art. 9 G zu bereichsspezifischen Regelungen der Gesichtsverhüllung und zur Änd. weiterer dienstrechtlicher Vorschriften vom 8.6.2017 (BGBl. I S. 1570).
[569] § 6 (1) BNotO. Also see P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 9-10.
[570] § 6a and § 19a BNotO.
[571] § 8 (1) BNotO.
[572] Ibid.
[573] Ibid.
[574] § 8 (2) BNotO.
[575] Ibid.
[576] Ibid.
[577] § 8 (3) BNotO.
[578] § I (2) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Landesnotarkammer Bayern vom 3. Juli 1999 (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 24. November 1999, Nr. 3, S. 1), zuletzt geändert durch Beschluss der Versammlung der Landesnotarkammer Bayern vom 30. September 2007 zur Ergänzung der Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Landesnotarkammer Bayern nach § 67 Abs. 2 BNotO (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 2007, S. 1); § I

(2) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer om 18. Juni 1999 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, vom Dezember 1999, Nr. 12, S. 478), zuletzt geändert durch Beschluss der Mitgliederversammlung der Notarkammer Baden-Württemberg (vormals Notarkammer Stuttgart) vom 5. Mai 2018 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, Juli 2018, S. 455); § I (2) Richtlinien der Notarkammer Berlin für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 10. November 1999 (Amtsblatt für Berlin vom 15. September 2000, Nr. 45, S. 3684), zuletzt geändert durch Beschluss vom 21. März 2012 (Amtsblatt für Berlin vom 11. April 2012, S. 675); § I (2) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Brandenburg vom 22. November 1999 (Justizministerialblatt für das Land Brandenburg vom 15. Januar 2000, Nr. 1, S. 15), zuletzt geändert durch Beschluss vom 1. Juni 2007 (Justizministerialblatt für das Land Brandenburg vom 15. November 2007, Nr. 11, S. 166); § I (2) Richtlinien der Notarkammer Braunschweig für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer, zuletzt geändert durch Beschluss vom 2. April 2008 (Niedersächsische Rechtsp ege vom 15. Juli 2008, Nr. 7, S. 224); § I (2) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Bremer Notarkammer vom 2. Februar 2000 (Amtsblatt der Freien Hansestadt Bremen vom 1. September 2000, Nr. 63, S. 485, und vom 18. Januar 2001, Nr. 8, S. 82), zuletzt geändert durch Beschluss vom 2. April 2008 (Amtsblatt der Freien Hansestadt Bremen vom 14. November 2008, Nr. 121, S. 929); § I (2) Richtlinien der Notarkammer Celle für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 28. April 1999 und 3. Mai 2000 (Niedersächsische Rechtspflege vom 15. Dezember 2000, Nr. 12, S. 353), zuletzt geändert durch Beschluss vom 16. Mai 2012 (Niedersächsische Rechtspflege 2012, S. 240 f.); § I (2) Berufsrichtlinien der Notarkammer Frankfurt vom 14. Juli 1999 und 24. November 1999 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2000, Nr. 2, S. 65), zuletzt geändert durch Beschluss der Kammerversammlung der Notarkammer Frankfurt am Main am 13. November 2013 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2014, Nr. 2, S. 140); § I (2) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Hamburgischen Notarkammer vom 19. November 1999 (Hamburgisches Justizverwaltungsblatt vom 31. Januar 2000, Nr. 1, S. 2), zuletzt geändert durch Beschluss vom 28.11.2007 (HmbJVBl. 2008, S. 30); § I (2) Richtlinien der Westfälischen Notarkammer gem. § 67 Abs. 2 BNotO vom 9. Juni 1999 (KammerReport vom 23.06.2000 und vom 12.12.2000), zuletzt geändert durch Beschluss vom 27. März 2019 (KammerReport der Westfälischen Notarkammer vom 15.06.2019); § I (1.2) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Kassel vom 25. August 1999 (Justiz-Ministerial-Blatt für Hessen ,Nr. 5/2008, S. 125), zuletzt geändert durch Beschluss vom 21. November 2007 (Justiz-Ministerial-Blatt für Hessen vom 15. Dezember 2000, Nr. 23/24, S. 653); § I (2) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Koblenz (Rl-NotKKO)vom 23. Oktober 1999 (Mitteilungen der Notarkammer Koblenz, Teil I, vom 22. Dezember 1999, Nr. 4/1999, S. 129), zuletzt geändert durch Satzung vom 5 Mai 2007 (Mitteilungen der Notarkammer Koblenz, Teil I Nr. 2 und 3/2007, S. 51ff.); § I (2) Berufsrichtlinien der Notarkammer Mecklenburg-Vorpommern vom 23. Juni 1999 und 9. Februar 2000 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 6. März 2000, Nr. 3, S. 248), geändert durch Satzung vom 13. Dezember 2006 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom März 2007, S. 476). zuletzt geändert durch Beschluss der Versammlung der Notarkammer Mecklenburg-Vorpommern vom 10. Juni 2009 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 23. September 2009, S. 978); § I (2) Richtlinien der Notarkammer Oldenburg für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 17. November 1999 (Niedersächsische Rechtspflege vom 15. Juni 2000, Nr. 6, S. 164), geändert durch Beschlüsse der Kammerversammlung vom 21. April 2001 (Niedersächsische Rechtspflege vom 15. August 2001, Nr. 8, S. 260) und 24. Mai 2008; § I (2) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Pfalz vom 30. Oktober 1999 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 29. November 1999, Nr. 2, S. 7), zuletzt geändert durch Satzung vom 18. November 2006 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 7. Januar 2007, Nr. 1, S. 2); § I (2) Richtlinien für die Berufsausübung Neufassung vom 8. Juni 2001 (Amtliches Mitteilungsblatt der Notarkammer Sachsen vom 19. September 2001, Nr. 2/2001, S. 2), zuletzt geändert durch Beschluss der Kammerversammlung vom 29.05.2015; § I (2) Richtlinien für die Berufsausübung der Notarkammer Sachsen-Anhalt vom 7. Mai 1999 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 11. Juni 1999, Nr. 1, S. 2), geändert durch

an executor of a will ("*Testamentsvollstrecker*"), a liquidator ("*Insolvenzverwalter*"), an arbitrator ("*Schiedsrichter*"), a guardian ("*Vormund*"), or any other comparable position that is based on an official order such as a lectureship.[579] Unlike the engagements that fall in the third category, notaries do not have to acquire permission for activities that fall in the fourth category.[580]

The federal-state administration of justice department, after having heard the Chamber of Notaries ("*Notarkammer*"), appoints notaries by conferring upon them a certificate of appointment ("*Bestallungsurkunde*"), which indicates the official district ("*Amtsbezirk*") and the official seat ("*Amtssitz*"), as well as the duration of the appointment.[581]

The appointment as notary goes hand in hand with the allocation of an official seat ("*Amtssitz*"), where they have to establish their office ("*Geschäftsstelle*").[582] Hereby, the location of their private domicile must ensure a proper exercise of their function.[583] Therefore, the regulating authority ("*Aufsichtsbehörde*") may order that the location of the private domicile coincides with the official seat.[584] With regard to the "*Anwaltsnotar*", the location of their (notarial) office has to coincide with the location of their office in which they practise as a practising lawyer ("*Kanzlei*").[585] Without permission of the regulating authority, notaries may only maintain one office and must not hold

Beschluss vom 11. Oktober 2006 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 12. Dezember 2006, Nr. 1, S. 1), zuletzt geändert durch Beschluss vom 3. Juni 2016 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 16. August 2016, Nr. 1); § I (2) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Thüringen Beschlussfassung der Kammerversammlung der Notarkammer Thüringen vom 9. Juni 1999 (Justiz-Ministerialblatt für Thüringen vom 8. September 1999, Nr. 5, S. 40), geändert durch Beschluss vom 4. Juni 2010 (Justiz-Ministerialblatt für Thüringen vom 4. November 2010, Nr. 3, S. 47); § I (2) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Rheinischen Notarkammer vom 17. Februar 2000 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, vom 10. März 2000, Nr. 1/2000, S. 1), zuletzt geändert durch Beschluss vom 6. Mai 2006 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, Nr. 1/2006); § I (2) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Saarländischen Notarkammer (RL SaarlNotK) gemäß Beschluss der Kammerversammlung vom 26. Oktober 1999 (Gemeinsames Ministerialblatt Saarland vom 9. Juni 2000, Nr. 3, S. 109), zuletzt geändert durch Beschluss vom 13. November 2014 (Amtsblatt des Saarlandes II, 2015, Nr. 1, S. 49); § I (2) Richtlinien der Schleswig-Holsteinischen Notarkammer vom 19. Mai 1999 (Schleswig-Holsteinische Anzeigen vom Dezember 1999, Nr. XII, S. 318), zuletzt geändert durch Beschluss vom 6. Juni 2007 (Schleswig-Holsteinische Anzeigen 9/2007, S. 392).

[579] § 8 (4) BNotO. Also see T. Diehn (eds.), *BNotO: Bundesnotarordnung: Kommentar*, Köln: Wolters Kluwer Deutschland, 2019, p. 173.

[580] § 8 (4) BNotO.

[581] § 12 BNotO.

[582] § 10 (1)-(2) BNotO.

[583] § 10 (2) BNotO.

[584] Ibid.

[585] Ibid.

hearing days outside their official seat.[586] After having received the certificate, notaries have to take an oath.[587] Upon appointment, they must immediately submit their signature to the president of the district court.[588]

Above all is each notary a member of one of the 21 chambers of notaries ("*Notarkammer*"), which are organized per higher regional district court district ("*Oberlandesgerichtsbezirk*").[589] In turn, the chambers of notaries form the National Association of Notaries ("*Bundesnotarkammer*"; hereafter: "BNotK").[590] Notaries are subject to control by presidents of their respective district court ("*Landgericht*") and higher regional court ("*Oberlandesgericht*") as well as by the federal-state administration of justice department.[591]

Last, it must be mentioned that the application of the Act on the Determination of the Equivalence of Professional Qualifications ("*Berufsqualifikationsfeststellungsgesetz*"[592]), which intends to facilitate the use of foreign professional qualifications in the German labour market, is explicitly excluded.[593]

3.2.2.3 Specific Requirements for the Appointment as *Nurnotar*

An appointment as a *Nurnotar* is preceded by a triennial service ("*Anwärterdienst*") as candidate notary ("*Notarassessor*").[594] This service must be completed in the German state in which they apply for an appointment as notary.[595] The candidate notary is subject to the same (official) duties as a notary.[596] As an exception to this rule, candidate notaries are not obliged to maintain professional liability insurance.[597] In addition, they have a special employment relationship with the State, which

[586] § 10 (4) Bundsnotarordnung.
[587] § 13 BNotO.
[588] § 1 DONot. This provision is identical in all German states.
[589] § 65 I BNotO. Also see P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 24-25.
[590] § 76 (1) BNotO.
[591] § 92 BNotO.
[592] Berufsqualifikationsfeststellungsgesetz vom 6. Dezember 2011 (BGBl. I S. 2515), das zuletzt durch Artikel 1 des Gesetzes vom 22. Dezember 2015 (BGBl. I S. 2572) geändert worden ist.
[593] § 5 BNotO. Also see § 1 Berufsqualifikationsfeststellungsgesetz vom 6. Dezember 2011 (BGBl. I S. 2515), das zuletzt durch Artikel 1 des Gesetzes vom 22. Dezember 2015 (BGBl. I S. 2572) geändert worden ist.
[594] § 7 (1) BNotO.
[595] Ibid.
[596] § 7 (4) BNotO.
[597] Ibid. Also see § 19a BNotO.

is governed by public law ("*öffentlich-rechtliches Dienstverhältnis*").[598] The service as candidate notary is terminated if the candidate notary is either appointed as a notary or removed from office.[599] A removal from office occurs upon application by the candidate notary.[600] The application will be honoured if one of the following three situations occurs. First, if it appears that they are unsuited for the appointment as notary.[601] Second, the candidate notary refrains from taking office within the time limit set out by the regional administration of justice without being able to provide a valid motivation.[602] Third, the application will be honoured if the candidate notary decides against applying for a notarial position that was offered to them by the federal-state administration of justice department, which after being previously advertised could not be filled in with a suitable candidate, provided that the candidate cannot substantiate that decision with adequate reasons.[603]

3.2.2.4 Specific Requirements for the Appointment as *Anwaltnotar*

A function as *Anwaltnotar* is exclusively accessible for practising lawyers ("*Rechtsanwälte*").[604] It is for this reason that the exercise of their function is conditional upon their membership in the bar association that is competent for the circuit in which the *Anwaltnotar* is established.[605] Before practising lawyers can be appointed as notaries, candidates must have gained extensive working experience as a practising lawyer for a minimum period of five years.[606] Hereby, the candidate has to have continuously practiced in the aimed district for at least three years.[607] In addition to the required working experience as a practising lawyer, the candidate has to pass the notarial professional examination.[608] Moreover, the candidate is obliged to invest some 15 hours per year on further notary-specific trainings, which are provided by the chambers of notaries and the professional organizations ("*Berufsorganisationen*").[609] Last, to secure the acquaintance with legal practise, candidates have to complete 160 hours of training on the job at a notarial office.[610]

[598] § 7 (4) BNotO.
[599] § 7 (6) BNotO.
[600] § 7 (7) BNotO.
[601] § 7 (7) sub (1)BNotO.
[602] § 7 (7) sub (2)BNotO.
[603] § 7 (7) sub (3)BNotO.
[604] § 3 (2) BNotO.
[605] Ibid.
[606] § 6 (2) sub (1)BNotO.
[607] § 6 (2) sub (2) and § 10a (1) BNotO.
[608] § 6 (2) sub (3) and § 7a-7i BNotO.
[609] § 6 (2) sub(4) BNotO.
[610] § 6 (2) BNotO.

3.2.2.5 Notarial Competences

Notaries have two main competences: notarial acts ("*Beurkundungen*") and legalisations ("*Beglaubigungen*").[611] In particular but not conclusively, notarial acts relate to the certification of facts that notaries perceived in the course of their official function, the certification of assembly decisions, and the conduction of lottery drawings.[612] Legalisation on the other hand relates to signatures, hand signals, and transcripts.[613] In addition to notarial acts and legalisation, §§ 20-24 BNotO enumerate a variety of additional competences. In the context of the transfer of immovable property, those are the acceptance of property conveyances ("*Auflassungen*"), the issuing of certificates regarding partial mortgages ("*Teilhypotheken*") and partial non-accessory mortgages ("*Teilgrundschuld*"), as well as the execution of voluntary public sales.[614] Further, the notary has to attend to the concerned parties with regard to the preventive administration of justice, which especially includes the preparation of draft deeds and giving advice to the parties.[615]

In principle, notaries must restrict the performance of authentication services ("*Urkundstätigkeit*") to their operational area of jurisdiction ("*Amtsbereich*"), which equals the district of the local court.[616] This maxim may only be neglected in exceptional situations in which an eminent legitimate

[611] § 20 (1) BNotO.
[612] Ibid.
[613] Ibid.
[614] § 20 (2)-(3) BNotO.
[615] § 24 (1) BNotO.
[616] § 10a BNotO. Also see T. Diehn (eds.), *BNotO: Bundesnotarordnung: Kommentar*, Köln: Wolters Kluwer Deutschland, 2019, p. 213. Also see § § IX (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Landesnotarkammer Bayern vom 3. Juli 1999 (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 24. November 1999, Nr. 3, S. 1), zuletzt geändert durch Beschluss der Versammlung der Landesnotarkammer Bayern vom 30. September 2007 zur Ergänzung der Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Landesnotarkammer Bayern nach § 67 Abs. 2 BNotO (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 2007, S. 1); § IX (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Notare (§ 3 Abs. 1 und 2 BNotO) vom 18. Juni 1999 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, vom Dezember 1999, Nr. 12, S. 478), zuletzt geändert durch Beschluss der Mitgliederversammlung der Notarkammer Baden-Württemberg (vormals Notarkammer Stuttgart) vom 5. Mai 2018 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, Juli 2018, S. 455); § IX Richtlinien der Notarkammer Berlin für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 10. November 1999 (Amtsblatt für Berlin vom 15. September 2000, Nr. 45, S. 3684), zuletzt geändert durch Beschluss vom 21. März 2012 (Amtsblatt für Berlin vom 11. April 2012, S. 675); § IX (1.1) Richtlinien für die Amtspflichten und sonstigen P-flichten der Mitglieder der Notarkammer Brandenburg vom 22. November 1999 (Justizministerialblatt für das Land Brandenburg vom 15. Januar 2000, Nr. 1, S. 15), zuletzt geändert durch Beschluss vom 1. Juni 2007 (Justizministerialblatt für das Land Brandenburg vom 15. November 2007, Nr. 11, S. 166); § IX (1) Richtlinien der Notarkammer Braunschweig für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer, zuletzt geändert durch Beschluss vom 2. April 2008 (Niedersächsische Rechtspflege vom 15.

Juli 2008, Nr. 7, S. 224); § IX Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Bremer Notarkammer vom 2. Februar 2000 (Amtsblatt der Freien Hansestadt Bremen vom 1. September 2000, Nr. 63, S. 485, und vom 18. Januar 2001, Nr. 8, S. 82), zuletzt geändert durch Beschluss vom 2. April 2008 (Amtsblatt der Freien Hansestadt Bremen vom 14. November 2008, Nr. 121, S. 929); § IX (1) Richtlinien der Notarkammer Celle für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 28. April 1999 und 3. Mai 2000 (Niedersächsische Rechtspflege vom 15. Dezember 2000, Nr. 12, S. 353), zuletzt geändert durch Beschluss vom 16. Mai 2012 (Niedersächsische Rechtspflege 2012, S. 240 f.); § IX (1) Berufsrichtlinien der Notarkammer Frankfurt vom 14. Juli 1999 und 24. November 1999 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2000, Nr. 2, S. 65), zuletzt geändert durch Beschluss der Kammerversammlung der Notarkammer Frankfurt am Main am 13. November 2013 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2014, Nr. 2, S. 140); § IX (1) Richtlinien der Westfälischen Notarkammer gem. § 67 Abs. 2 BNotO vom 9. Juni 1999 (KammerReport vom 23.06.2000 und vom 12.12.2000), zuletzt geändert durch Beschluss vom 27. März 2019 (KammerReport der Westfälischen Notarkammer vom 15.06.2019); § IX (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Kassel vom 25. August 1999 (Justiz-Ministerial-Blatt für Hessen ,Nr. 5/2008, S. 125), zuletzt geändert durch Beschluss vom 21. November 2007 (Justiz-Ministerial-Blatt für Hessen vom 15. Dezember 2000, Nr. 23/24, S. 653); § IX (1) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Koblenz (Rl-NotKKO)vom 23. Oktober 1999 (Mitteilungen der Notarkammer Koblenz, Teil I, vom 22. Dezember 1999, Nr. 4/1999, S. 129), zuletzt geändert durch Satzung vom 5 Mai 2007 (Mitteilungen der Notarkammer Koblenz, Teil I Nr. 2 und 3/2007, S. 51ff.); § IX (1.1) Berufsrichtlinien der Notarkammer Mecklenburg-Vorpommern vom 23. Juni 1999 und 9. Februar 2000 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 6. März 2000, Nr. 3, S. 248), zuletzt geändert durch Beschluss der Versammlung der Notarkammer Mecklenburg-Vorpommern vom 10. Juni 2009 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 23. September 2009, S. 978); § IX (1) Richtlinien der Notarkammer Oldenburg für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 17. November 1999 (Niedersächsische Rechtspflege vom 15. Juni 2000, Nr. 6, S. 164), geändert durch Beschlüsse der Kammerversammlung vom 21. April 2001 (Niedersächsische Rechtspflege vom 15. August 2001, Nr. 8, S. 260) und 24. Mai 2008; § IX (1) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Pfalz vom 30. Oktober 1999 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 29. November 1999, Nr. 2, S. 7), zuletzt geändert durch Satzung vom 18. November 2006 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 7. Januar 2007, Nr. 1, S. 2); § IX (1) Richtlinien für die Berufsausübung der Notarkammer Sachsen-Anhalt vom 7. Mai 1999 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 11. Juni 1999, Nr. 1, S. 2), zuletzt geändert durch Beschluss vom 3. Juni 2016 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 16. August 2016, Nr. 1); § IX (1.1) Richtlinien für die Berufsausübung Neufassung vom 8. Juni 2001 (Amtliches Mitteilungsblatt der Notarkammer Sachsen vom 19. September 2001, Nr. 2/2001, S. 2), zuletzt geändert durch Beschluss der Kammerversammlung vom 29.05.2015, genehmigt durch das Sächsische Staatsministerium der Justiz am 15.07.2015 und am 11.08.2015 bekannt gemacht; § IX (1.1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Thüringen Beschlussfassung der Kammerversammlung der Notarkammer Thüringen vom 9. Juni 1999 (Justiz-Ministerialblatt für Thüringen vom 8. September 1999, Nr. 5, S. 40), geändert durch Beschluss vom 4. Juni 2010 (Justiz-Ministerialblatt für Thüringen vom 4. November 2010, Nr. 3, S. 47); § IX (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Rheinischen Notarkammer vom 17. Februar 2000 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, vom 10. März 2000, Nr. 1/2000, S. 1), zuletzt geändert durch Beschluss vom 6. Mai 2006 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, Nr. 1/2006); § IX (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Saarländischen Notarkammer (RL SaarlNotK) gemäß Beschluss der Kammerversammlung vom 26. Oktober 1999 (Gemeinsames Ministerialblatt Saarland vom 9. Juni 2000, Nr. 3, S. 109), zuletzt geändert durch Beschluss vom 13. November 2014 (Amtsblatt des Saarlandes II, 2015, Nr. 1, S. 49); § IX (1) Richtlinien der Schleswig-Holsteinischen Notarkammer vom 19. Mai 1999 (Schleswig-Holsteinische Anzeigen vom Dezember 1999, Nr. XII, S. 318), zuletzt geändert durch Beschluss vom 6. Juni 2007 (Schleswig-Holsteinische Anzeigen 9/2007, S. 392).

interest on the side of the litigants ("*Rechtsuchenden*") justifies the exception.[617] The existence of such a situation has been accepted in cases of imminent danger, which for example can be

[617] § 10a II BNotO. Also see § IX (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Landesnotarkammer Bayern vom 3. Juli 1999 (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 24. November 1999, Nr. 3, S. 1), zuletzt geändert durch Beschluss der Versammlung der Landesnotarkammer Bayern vom 30. September 2007 (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 2007, S. 1); § IX (2) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer om 18. Juni 1999 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, vom Dezember 1999, Nr. 12, S. 478), zuletzt geändert durch Beschluss der Mitgliederversammlung der Notarkammer Baden-Württemberg (vormals Notarkammer Stuttgart) vom 5. Mai 2018 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, Juli 2018, S. 455); § IX (1.1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Brandenburg vom 22. November 1999 (Justizministerialblatt für das Land Brandenburg vom 15. Januar 2000, Nr. 1, S. 15), zuletzt geändert durch Beschluss vom 1. Juni 2007 (Justizministerialblatt für das Land Brandenburg vom 15. November 2007, Nr. 11, S. 166); § IX (1.1) Richtlinien der Notarkammer Braunschweig für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer, zuletzt geändert durch Beschluss vom 2. April 2008 (Niedersächsische Rechtspflege vom 15. Juli 2008, Nr. 7, S. 224); § IX (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Bremer Notarkammer vom 2. Februar 2000 (Amtsblatt der Freien Hansestadt Bremen vom 1. September 2000, Nr. 63, S. 485, und vom 18. Januar 2001, Nr. 8, S. 82), zuletzt geändert durch Beschluss vom 2. April 2008 (Amtsblatt der Freien Hansestadt Bremen vom 14. November 2008, Nr. 121, S. 929); § IX (1) Richtlinien der Notarkammer Celle für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 28. April 1999 und 3. Mai 2000 (Niedersächsische Rechtspflege vom 15. Dezember 2000, Nr. 12, S. 353), zuletzt geändert durch Beschluss vom 16. Mai 2012 (Niedersächsische Rechtspflege 2012, S. 240 f.); § IX (1) Berufsrichtlinien der Notarkammer Frankfurt vom 14. Juli 1999 und 24. November 1999 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2000, Nr. 2, S. 65), zuletzt geändert durch Beschluss der Kammerversammlung der Notarkammer Frankfurt am Main am 13. November 2013 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2014, Nr. 2, S. 140); § IX (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Hamburgischen Notarkammer vom 19. November 1999 (Hamburgisches Justizverwaltungsblatt vom 31. Januar 2000, Nr. 1, S. 2), zuletzt geändert durch Beschluss vom 28.11.2007, HmbJVBl. 2008, S. 30); § IX (1) Richtlinien der Westfälischen Notarkammer gem. § 67 Abs. 2 BNotO vom 9. Juni 1999 (KammerReport vom 23.06.2000 und vom 12.12.2000), zuletzt geändert durch Beschluss vom 27. März 2019 (KammerReport der Westfälischen Notarkammer vom 15.06.2019); § IX (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Kassel vom 25. August 1999 (Justiz-Ministerial-Blatt für Hessen ,Nr. 5/2008, S. 125), zuletzt geändert durch Beschluss vom 21. November 2007 (Justiz-Ministerial-Blatt für Hessen vom 15. Dezember 2000, Nr. 23/24, S. 653); § IX (1) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Koblenz (Rl-NotKKO)vom 23. Oktober 1999 (Mitteilungen der Notarkammer Koblenz, Teil I, vom 22. Dezember 1999, Nr. 4/1999, S. 129), zuletzt geändert durch Satzung vom 5 Mai 2007 (Mitteilungen der Notarkammer Koblenz, Teil I Nr. 2 und 3/2007, S. 51ff.); § IX (1.2) Berufsrichtlinien der Notarkammer Mecklenburg-Vorpommern vom 23. Juni 1999 und 9. Februar 2000 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 6. März 2000, Nr. 3, S. 248), zuletzt geändert durch Beschluss der Versammlung der Notarkammer Mecklenburg-Vorpommern vom 10. Juni 2009 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 23. September 2009, S. 978); § IX (1) Richtlinien der Notarkammer Oldenburg für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 17. November 1999 (Niedersächsische Rechtsp ege vom 15. Juni 2000, Nr. 6, S. 164), geändert durch Beschlüsse der Kammerversammlung vom 21. April 2001 (Niedersächsische Rechtsp ege vom 15. August 2001, Nr. 8, S. 260) und 24. Mai 2008; § IX (1) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Pfalz vom 30. Oktober 1999 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 29. November 1999, Nr. 2, S. 7), zuletzt geändert durch Satzung vom 18. November 2006 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 7. Januar 2007, Nr. 1, S. 2); § IX (1) Richtlinien für die Berufsausübung der Notarkammer Sachsen-Anhalt vom 7. Mai 1999 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 11. Juni 1999, Nr. 1, S. 2),

established in acute life-threatening situations.[618] If this exception is invoked, notaries must, under specification of the reasons that motivated their decision, immediately inform the supervisory body ("*Aufsichtsbehörde*") or the competent chamber of notaries if the supervisory board so requires.[619] The legal framework is even stricter if notaries are to perform authentication services outside their administrative district ("*Amtsbezirk*"), being the district of the higher regional court ("*Oberlandesgericht*").[620] This is restricted to cases of imminent danger or upon approval by the supervisory body, which is only granted under exceptional circumstances.[621] Nevertheless, if a notary performs these services in cases that do not fall within this narrow scope, then this will not result in the invalidity of the performed service nor of the notarial act, but the notary will have to face disciplinary measures.[622]

Notaries may align with other practitioners to exercise their function or to share their business premises, provided that they ensure their individual independence, impartiality, as well as a personal and self-dependent exercise of their function.[623] Hereby, the definition of the term

zuletzt geändert durch Beschluss vom 3. Juni 2016 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 16. August 2016, Nr. 1); § IX (1.1) Richtlinien für die Berufsausübung Neufassung vom 8. Juni 2001 (Amtliches Mitteilungsblatt der Notarkammer Sachsen vom 19. September 2001, Nr. 2/2001, S. 2), zuletzt geändert durch Beschluss der Kammerversammlung vom 29.05.2015; § IX (1.1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Thüringen Beschlussfassung der Kammerversammlung der Notarkammer Thüringen vom 9. Juni 1999 (Justiz-Ministerialblatt für Thüringen vom 8. September 1999, Nr. 5, S. 40), geändert durch Beschluss vom 4. Juni 2010 (Justiz-Ministerialblatt für Thüringen vom 4. November 2010, Nr. 3, S. 47); § IX 1 Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Rheinischen Notarkammer vom 17. Februar 2000 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, vom 10. März 2000, Nr. 1/2000, S. 1), zuletzt geändert durch Beschluss vom 6. Mai 2006 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, Nr. 1/2006); § IX (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Saarländischen Notarkammer (RL SaarlNotK) gemäß Beschluss der Kammerversammlung vom 26. Oktober 1999 (Gemeinsames Ministerialblatt Saarland vom 9. Juni 2000, Nr. 3, S. 109), zuletzt geändert durch Beschluss vom 13. November 2014 (Amtsblatt des Saarlandes II, 2015, Nr. 1, S. 49); § IX (1) Richtlinien der Schleswig-Holsteinischen Notarkammer vom 19. Mai 1999 (Schleswig-Holsteinische Anzeigen vom Dezember 1999, Nr. XII, S. 318), zuletzt geändert durch Beschluss vom 6. Juni 2007 (Schleswig-Holsteinische Anzeigen 9/2007, S. 392).

[618] T. Diehn (eds.), *BNotO: Bundesnotarordnung: Kommentar*, Köln: Wolters Kluwer Deutschland, 2019, p. 214, 216. More examples can be found on: P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 18.

[619] § 10a (3) BNotO.

[620] § 11 BNotO. This rule also includes the situation in which the notary requests to offer services abroad. See: T. Diehn (eds.), *BNotO: Bundesnotarordnung: Kommentar*, Köln: Wolters Kluwer Deutschland, 2019, p. 226.

[621] § 11 BNotO. For examples of situations in which such an approval can be granted, see T. Diehn (eds.), *BNotO: Bundesnotarordnung: Kommentar*, Köln: Wolters Kluwer Deutschland, 2019, p. 223-224.

[622] Ibid. Also see § 2 BeurkG.

[623] § 9 (3) BNotO. Also see § V (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Landesnotarkammer Bayern vom 3. Juli 1999 (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 24. November 1999, Nr. 3, S. 1), zuletzt geändert durch Beschluss der Versammlung der Landesnotarkammer Bayern vom 30. September 2007 (Amtliches Mitteilungsblatt der

Landesnotarkammer Bayern und der Notarkasse vom 2007, S. 1); § V (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer om 18. Juni 1999 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, vom Dezember 1999, Nr. 12, S. 478), zuletzt geändert durch Beschluss der Mitgliederversammlung der Notarkammer Baden-Württemberg (vormals Notarkammer Stuttgart) vom 5. Mai 2018 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, Juli 2018, S. 455); § V Richtlinien der Notarkammer Berlin für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 10. November 1999 (Amtsblatt für Berlin vom 15. September 2000, Nr. 45, S. 3684), zuletzt geändert durch Beschluss vom 21. März 2012 (Amtsblatt für Berlin vom 11. April 2012, S. 675); § V (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Brandenburg vom 22. November 1999 (Justizministerialblatt für das Land Brandenburg vom 15. Januar 2000, Nr. 1, S. 15), zuletzt geändert durch Beschluss vom 1. Juni 2007 (Justizministerialblatt für das Land Brandenburg vom 15. November 2007, Nr. 11, S. 166); § V (1) Richtlinien der Notarkammer Braunschweig für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer, zuletzt geändert durch Beschluss vom 2. April 2008 (Niedersächsische Rechtspflege vom 15. Juli 2008, Nr. 7, S. 224); § V (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Bremer Notarkammer
vom 2. Februar 2000 (Amtsblatt der Freien Hansestadt Bremen vom 1. September 2000, Nr. 63, S. 485, und vom 18. Januar 2001, Nr. 8, S. 82), zuletzt geändert durch Beschluss vom 2. April 2008 (Amtsblatt der Freien Hansestadt Bremen vom 14. November 2008, Nr. 121, S. 929); § V (1) Richtlinien der Notarkammer Celle für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 28. April 1999 und 3. Mai 2000 (Niedersächsische Rechtspflege vom 15. Dezember 2000, Nr. 12, S. 353), zuletzt geändert durch Beschluss vom 16. Mai 2012 (Niedersächsische Rechtspflege 2012, S. 240 f.); § V (1) Berufsrichtlinien der Notarkammer Frankfurt vom 14. Juli 1999 und 24. November 1999 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2000, Nr. 2, S. 65), zuletzt geändert durch Beschluss der Kammerversammlung der Notarkammer Frankfurt am Main am 13. November 2013 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2014, Nr. 2, S. 140); § V (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Hamburgischen Notarkammer vom 19. November 1999 (Hamburgisches Justizverwaltungsblatt vom 31. Januar 2000, Nr. 1, S. 2), zuletzt geändert durch Beschluss vom 28.11.2007, HmbJVBl. 2008, S. 30); § V (1) Richtlinien der Westfälischen Notarkammer gem. § 67 Abs. 2 BNotO vom 9. Juni 1999 (KammerReport vom 23.06.2000 und vom 12.12.2000), zuletzt geändert durch Beschluss vom 27. März 2019 (KammerReport der Westfälischen Notarkammer vom 15.06.2019); § V (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Kassel vom 25. August 1999 (Justiz-Ministerial-Blatt für Hessen ,Nr. 5/2008, S. 125), zuletzt geändert durch Beschluss vom 21. November 2007 (Justiz-Ministerial-Blatt für Hessen vom 15. Dezember 2000, Nr. 23/24, S. 653); § V (1) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Koblenz (Rl-NotKKO)vom 23. Oktober 1999 (Mitteilungen der Notarkammer Koblenz, Teil I, vom 22. Dezember 1999, Nr. 4/1999, S. 129), zuletzt geändert durch Satzung vom 5 Mai 2007 (Mitteilungen der Notarkammer Koblenz, Teil I Nr. 2 und 3/2007, S. 51ff.); § V (1) Berufsrichtlinien der Notarkammer Mecklenburg-Vorpommern vom 23. Juni 1999 und 9. Februar 2000 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 6. März 2000, Nr. 3, S. 248), zuletzt geändert durch Beschluss der Versammlung der Notarkammer Mecklenburg-Vorpommern vom 10. Juni 2009 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 23. September 2009, S. 978); § V Richtlinien der Notarkammer Oldenburg für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 17. November 1999 (Niedersächsische Rechtsp ege vom 15. Juni 2000, Nr. 6, S. 164), geändert durch Beschlüsse der Kammerversammlung vom 21. April 2001 (Niedersächsische Rechtsp ege vom 15. August 2001, Nr. 8, S. 260) und 24. Mai 2008; § V (1) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Pfalz vom 30. Oktober 1999 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 29. November 1999, Nr. 2, S. 7), zuletzt geändert durch Satzung vom 18. November 2006 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 7. Januar 2007, Nr. 1, S. 2); § V (1) Richtlinien für die Berufsausübung Neufassung vom 8. Juni 2001 (Amtliches Mitteilungsblatt der Notarkammer Sachsen vom 19. September 2001, Nr. 2/2001, S. 2), zuletzt geändert durch Beschluss der Kammerversammlung vom 29.05.2015; § V (1) Richtlinien für die Berufsausübung der Notarkammer Sachsen-Anhalt vom 7. Mai 1999 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 11. Juni 1999, Nr. 1, S. 2), geändert durch Beschluss vom 11. Oktober 2006 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 12. Dezember 2006, Nr. 1, S. 1), zuletzt

"practitioner" depends on whether one speaks of the *Nurnotare* or the *Anwaltnotare*. *Nurnotare* may only align with other *Nurnotare*, who were assigned to the same official seat.[624] The state governments are competent to regulate this right more closely.[625] *Anwaltnotare* on the other hand may align with other *Anwaltnotare*, as well as with members of a bar association, patent agents, tax consultants, tax consultants, financial auditors, and sworn in accountants.[626] In any case, the fact that the alignment with other practitioners or the sharing of the business premises has to be announced to both the regulating authority and the Chamber of Notaries, applies to both types of notaries.[627]

3.2.2.6 Notarial Competences in the Light of Public Notarial Acts ("*Beurkundungen*") and Safekeeping ("*Verwahrungen*")

In addition to the general rules regulating the notary's competences, specific rules laid down in the BeurkG are applicable with regard to the public notarial acts and safekeeping.[628] The BeurkG has different layers; besides general rules concerning public notarial acts and safekeeping, it contains diverging sets of rules for notarial acts concerning declarations of intent on the one hand and for other notarial acts on the other hand. Considering that notarial acts regarding contracts of sales fall in the broader category of notarial acts concerning declarations of intent, the following paragraph will not examine the rules applicable to other notarial acts.

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geändert durch Beschluss vom 3. Juni 2016 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 16. August 2016, Nr. 1); § V (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Thüringen Beschlussfassung der Kammerversammlung der Notarkammer Thüringen vom 9. Juni 1999 (Justiz-Ministerialblatt für Thüringen vom 8. September 1999, Nr. 5, S. 40), geändert durch Beschluss vom 4. Juni 2010 (Justiz-Ministerialblatt für Thüringen vom 4. November 2010, Nr. 3, S. 47); § V (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Rheinischen Notarkammer vom 17. Februar 2000 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, vom 10. März 2000, Nr. 1/2000, S. 1), zuletzt geändert durch Beschluss vom 6. Mai 2006 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, Nr. 1/2006); § V (1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Saarländischen Notarkammer (RL SaarlNotK) gemäß Beschluss der Kammerversammlung vom 26. Oktober 1999 (Gemeinsames Ministerialblatt Saarland vom 9. Juni 2000, Nr. 3, S. 109), zuletzt geändert durch Beschluss vom 13. November 2014 (Amtsblatt des Saarlandes II, 2015, Nr. 1, S. 49); § V (1) Richtlinien der Schleswig-Holsteinischen Notarkammer vom 19. Mai 1999 (Schleswig-Holsteinische Anzeigen vom Dezember 1999, Nr. XII, S. 318), zuletzt geändert durch Beschluss vom 6. Juni 2007 (Schleswig-Holsteinische Anzeigen 9/2007, S. 392).

[624] § 9 (1) BNotO.

[625] Ibid.

[626] § 9 (2) BNotO.

[627] § 27 (1) BNotO.

[628] § 1 BeurkG.

To begin with, the BeurkG provides rules regarding the validity of notarial acts. As stated before, notarial acts are not invalid simply because notaries have conducted them outside of their official district or the state in which they are appointed.[629] There are however two situations in which notarial acts concerning declarations of intent face invalidity. The first situation occurs if the notaries themselves, their spouse or partner, a relative in straight line, or a representative of one of these persons is involved in the notarial act.[630] In this context, the term 'involvement' refers to the situation, in which the delivered declarations of the appeared persons are subject to notarization.[631] The second situation that leads to invalidity of notarial acts occurs when it confers a legal advantage to one of the aforementioned persons, the notary's former spouse or partner, or a person with whom the notaries either are or were related (by marriage), collaterally related to the third degree, or collaterally related by marriage to the second degree.[632]

Furthermore, the BeurkG sets out the situations in which notaries must refrain from conducting notarial acts. As such, notaries shall not take part in a notarial act if it concerns either their own affairs or affairs that can be related to them, such as the affairs of a family member or a more remote relative, a business partner, an employee, a person of whom the notary is the legal representative, or an organisation that is associated with that notary.[633] In addition, notaries must

[629] § 2 BeurkG. Also see C. Armbrüster, N. Preuß & T. Renner (eds.), *Notarkommentar: Beurkundungsgesetz und Dienstordnung für Notarinnen und Notare*, Bonn: Deutscher Notarverlag, 2015, p. 48.
[630] § 6 (1) BeurkG.
[631] § 6 (2) BeurkG.
[632] § 7 BeurkG.
[633] § 3 BeurkG. This enumeration is not conclusive as the respective rules are quite detailed. To illustrate, as follows from paragraph 1 of the cited provision, the notary may not engage in notarial acts if it concerns his own affairs, even if he is solely jointly entitled or obliged, the affairs of his spouse, former spouse or fiancé, the affairs of his partner, his former partner or fiancé for the purposes of the Civil Partnership Act ("*Lebenspartnerschaftsgesetz*"), the affairs of a person with whom he is either related (by marriage), collaterally related to the third degree or collaterally related by marriage to second degree. This prohibition further crystallizes if this concerns the affairs of an aligned practitioner with whom he exercises his function or with whom he shares his business premises, if it concerns the affairs of a person whose legal representative is the notary himself or a practitioner with whom that notary is aligned with or shares business premises, if it concerns the affairs of a person of whose organ that is authorized to present that person, the notary or a practitioner with whom that notary is aligned with or shares business premises is a member, the affairs of a person for whom the notary or a practitioner with whom that notary is aligned with or shares business premises, respectively an associated person who is associated to an organization ("*Unternehmen*") (§ 15 Stock Companies Act ("*Aktiengesetz*")), acted or acts outside their official duties in the same affairs, except if this activity was exercised on behalf of all parties that are involved in the notarial act, if it concerns the affairs of a person, who has authorised the notary for the same affairs or with whom the notary or a practitioner with whom that notary is aligned with or shares business premises has a permanent contract of employment or a compara.ble permanent business relationship, or last, if it concerns the affairs of a company ("*Gesellschaft*"), of which the notary has a share amounting to either more than five of a hundred of the voting rights or to a proportionate amount of the liability contribution of more than €2.500.

decline notarial acts if these are irreconcilable with their official duties ("*Amtspflichten*").[634] It goes without saying that this situation occurs especially when they are asked to participate in acts that pursue noticeable illegal or dishonest aims.[635]

3.2.2.7 Notarial Duties

In principle, notaries may not refuse authentication services or any other official occupations.[636] Therefore, a refusal will be tolerated only if they can sufficiently motivate their decision.[637] For instance, notaries must refuse their duties ("*Amtstätigkeit*") if that cannot be reconciled with the duties that are attached to their function.[638] That situation clearly arises in any case when they are asked to grant assistance for acts which clearly have a forbidden or dishonest aim.[639] Moreover, notaries may abstain from the exercise of their office if they are prejudiced.[640] In the event that they refuse to cooperate, their client can choose to file a complaint against them in the civil division of the district court ("*Landgericht*") that is competent for the district in which the notary has their official seat, if they are of the opinion that the notary has wrongfully refused their services.[641]

As the main point of departure, notaries have to protect the interests of all involved parties and as such have to guarantee impartiality and independence.[642] Through their behaviour they have to

[634] § 4 BeurkG.
[635] Ibid.
[636] § 15 (1)-(2) BNotO.
[637] § 15 (1) BNotO.
[638] § 14 (2) BNotO.
[639] Ibid.
[640] § 16 (2) BNotO.
[641] § 15 (2) BNotO.
[642] § 14 (1), § 28 BNotO. Also see § I (1.1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Landesnotarkammer Bayern vom 3. Juli 1999 (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 24. November 1999, Nr. 3, S. 1), zuletzt geändert durch Beschluss der Versammlung der Landesnotarkammer Bayern vom 30. September 2007 (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 2007, S. 1); § I (1.1) für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer om 18. Juni 1999 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, vom Dezember 1999, Nr. 12, S. 478), zuletzt geändert durch Beschluss der Mitgliederversammlung der Notarkammer Baden-Württemberg (vormals Notarkammer Stuttgart) vom 5. Mai 2018 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, Juli 2018, S. 455); § I (1) Richtlinien der Notarkammer Berlin für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 10. November 1999 (Amtsblatt für Berlin vom 15. September 2000, Nr. 45, S. 3684), zuletzt geändert durch Beschluss vom 21. März 2012 (Amtsblatt für Berlin vom 11. April 2012, S. 675); §I (1.1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Brandenburg vom 22. November 1999 (Justizministerialblatt für das Land Brandenburg vom 15. Januar 2000, Nr. 1, S. 15), zuletzt geändert durch Beschluss vom 15. November 2007, Nr. 11, S. 166); § I (1.1) Richtlinien der Notarkammer Braunschweig für die Amtspflichten und sonstigen Pflichten der Mitglieder der

Notarkammer, zuletzt geändert durch Beschluss vom 2. April 2008 (Niedersächsische Rechtspflege vom 15. Juli 2008, Nr. 7, S. 224); § I (1.1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Bremer Notarkammer vom 2. Februar 2000 (Amtsblatt der Freien Hansestadt Bremen vom 1. September 2000, Nr. 63, S. 485, und vom 18. Januar 2001, Nr. 8, S. 82), zuletzt geändert durch Beschluss vom 2. April 2008 (Amtsblatt der Freien Hansestadt Bremen vom 14. November 2008, Nr. 121, S. 929); § I (1.1) Richtlinien der Notarkammer Celle für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 28. April 1999 und 3. Mai 2000 (Niedersächsische Rechtspflege vom 15. Dezember 2000, Nr. 12, S. 353), zuletzt geändert durch Beschluss vom 16. Mai 2012 (Niedersächsische Rechtspflege 2012, S. 240 f.); § I (1) Berufsrichtlinien der Notarkammer Frankfurt vom 14. Juli 1999 und 24. November 1999 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2000, Nr. 2, S. 65), zuletzt geändert durch Beschluss der Kammerversammlung der Notarkammer Frankfurt am Main am 13. November 2013 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2014, Nr. 2, S. 140); § I (1.1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Hamburgischen Notarkammer vom 19. November 1999 (Hamburgisches Justizverwaltungsblatt vom 31. Januar 2000, Nr. 1, S. 2), zuletzt geändert durch Beschluss vom 28.11.2007, HmbJVBl. 2008, S. 30); § I (1.1) Richtlinien der Westfälischen Notarkammer gem. § 67 Abs. 2 BNotO vom 9. Juni 1999 (KammerReport vom 23.06.2000 und vom 12.12.2000), zuletzt geändert durch Beschluss vom 27. März 2019 (KammerReport der Westfälischen Notarkammer vom 15.06.2019); § I (1.1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Kassel vom 25. August 1999 (Justiz-Ministerial-Blatt für Hessen ,Nr. 5/2008, S. 125), zuletzt geändert durch Beschluss vom 21. November 2007 (Justiz-Ministerial-Blatt für Hessen vom 15. Dezember 2000, Nr. 23/24, S. 653); § I (1.1) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Koblenz (Rl-NotKKO)vom 23. Oktober 1999 (Mitteilungen der Notarkammer Koblenz, Teil I, vom 22. Dezember 1999, Nr. 4/1999, S. 129), zuletzt geändert durch Satzung vom 5 Mai 2007 (Mitteilungen der Notarkammer Koblenz, Teil I Nr. 2 und 3/2007, S. 51ff.); § I (1.1) Berufsrichtlinien der Notarkammer Mecklenburg-Vorpommern vom 23. Juni 1999 und 9. Februar 2000 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 6. März 2000, Nr. 3, S. 248), geändert durch Satzung vom 13. Dezember 2006 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom März 2007, S. 476). zuletzt geändert durch Beschluss der Versammlung der Notarkammer Mecklenburg-Vorpommern vom 10. Juni 2009 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 23. September 2009, S. 978); § I (1.1) Richtlinien der Notarkammer Oldenburg für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 17. November 1999 (Niedersächsische Rechtsp ege vom 15. Juni 2000, Nr. 6, S. 164), geändert durch Beschlüsse der Kammerversammlung vom 21. April 2001 (Niedersächsische Rechtsp ege vom 15. August 2001, Nr. 8, S. 260) und 24. Mai 2008; § I (1.1) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Pfalz vom 30. Oktober 1999 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 29. November 1999, Nr. 2, S. 7), zuletzt geändert durch Satzung vom 18. November 2006 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 7. Januar 2007, Nr. 1, S. 2); § I (1.1) Richtlinien für die Berufsausübung Neufassung vom 8. Juni 2001 (Amtliches Mitteilungsblatt der Notarkammer Sachsen vom 19. September 2001, Nr. 2/2001, S. 2), zuletzt geändert durch Beschluss der Kammerversammlung vom 29.05.2015; § I (1.1) Richtlinien für die Berufsausübung der Notarkammer Sachsen-Anhalt vom 7. Mai 1999 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 11. Juni 1999, Nr. 1, S. 2), geändert durch Beschluss vom 11. Oktober 2006 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 12. Dezember 2006, Nr. 1, S. 1), zuletzt geändert durch Beschluss vom 3. Juni 2016 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 16. August 2016, Nr. 1); § I (1.1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Thüringen Beschlussfassung der Kammerversammlung der Notarkammer Thüringen vom 9. Juni 1999 (Justiz-Ministerialblatt für Thüringen vom 8. September 1999, Nr. 5, S. 40), geändert durch Beschluss vom 4. Juni 2010 (Justiz-Ministerialblatt für Thüringen vom 4. November 2010, Nr. 3, S. 47); § I (1.1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Rheinischen Notarkammer vom 17. Februar 2000 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, vom 10. März 2000, Nr. 1/2000, S. 1), zuletzt geändert durch Beschluss vom 6. Mai 2006 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, Nr. 1/2006); § I (1.1) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Saarländischen Notarkammer (RL SaarlNotK) gemäß Beschluss der Kammerversammlung vom 26. Oktober 1999 (Gemeinsames Ministerialblatt Saarland vom 9. Juni 2000, Nr. 3, S. 109), zuletzt geändert durch Beschluss

demonstrate that they are worthy of the esteem and trust that form an integral characteristic of the notarial function.[643] To be precise, they have to refrain from activities that would awaken the appearance of a violation of duties that are conferred upon them by law.[644] It is noteworthy that the scope of this duty also extends to the notaries' private life.[645] Further, they may not involve themselves in the intermediation of loans, real property transactions, and performance of authentication services.[646] In addition, they may not assume a guarantee or any other warranty in the course of an official act, nor is it permitted to accept a shareholding ("*Gesellschaftsbeteiligung*") that cannot be reconciled with their official function.[647]

As a cornerstone of notarial activity, § 18 BNotO confers upon notaries a duty of confidentiality, which extends to everything that they become aware of during the exercise of their function. The duty of confidentiality is eternal and thus does not end when the function terminates.[648] At the same time, notary must not use client information to their own advantage.[649] The confidentiality

vom 13. November 2014 (Amtsblatt des Saarlandes II, 2015, Nr. 1, S. 49); § I (1.1) Richtlinien der Schleswig-Holsteinischen Notarkammer vom 19. Mai 1999 (Schleswig-Holsteinische Anzeigen vom Dezember 1999, Nr. XII, S. 318), zuletzt geändert durch Beschluss vom 6. Juni 2007 (Schleswig-Holsteinische Anzeigen 9/2007, S. 392).

[643] § 14 (3) BNotO.

[644] Ibid.

[645] Ibid.

[646] § 14 (4) BNotO.

[647] § 14 (4)-(5) BNotO.

[648] § 18 (4) BNotO.

[649] § III (3) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Landesnotarkammer Bayern vom 3. Juli 1999 (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 24. November 1999, Nr. 3, S. 1), zuletzt geändert durch Beschluss der Versammlung der Landesnotarkammer Bayern vom 30. September 2007 (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 2007, S. 1); § III (3) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer om 18. Juni 1999 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, vom Dezember 1999, Nr. 12, S. 478), zuletzt geändert durch Beschluss der Mitgliederversammlung der Notarkammer Baden-Württemberg (vormals Notarkammer Stuttgart) vom 5. Mai 2018 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, Juli 2018, S. 455); § III (3) Richtlinien der Notarkammer Berlin für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 10. November 1999 (Amtsblatt für Berlin vom 15. September 2000, Nr. 45, S. 3684), zuletzt geändert durch Beschluss vom 21. März 2012 (Amtsblatt für Berlin vom 11. April 2012, S. 675); § III (2) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Brandenburg vom 22. November 1999 (Justizministerialblatt für das Land Brandenburg vom 15. Januar 2000, Nr. 1, S. 15), zuletzt geändert durch Beschluss vom 15. November 2007, Nr. 11, S. 166); § III (3) Richtlinien der Notarkammer Braunschweig für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer, zuletzt geändert durch Beschluss vom 2. April 2008 (Niedersächsische Rechtspflege vom 15. Juli 2008, Nr. 7, S. 224); § III (3) Richtlinien der Notarkammer Celle für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 28. April 1999 und 3. Mai 2000 (Niedersächsische Rechtspflege vom 15. Dezember 2000, Nr. 12, S. 353), zuletzt geändert durch Beschluss vom 16. Mai 2012 (Niedersächsische Rechtspflege 2012, S. 240 f.); § III (3) Berufsrichtlinien der Notarkammer Frankfurt vom 14. Juli 1999 und 24. November 1999 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2000, Nr. 2, S. 65), zuletzt geändert durch

principle is subject to essentially two exceptions. First, it does not apply to facts that are either obvious or considered to be so insignificant that they do not require confidentiality.[650] Second, the

Beschluss der Kammerversammlung der Notarkammer Frankfurt am Main am 13. November 2013 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2014, Nr. 2, S. 140); § III (3) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Hamburgischen Notarkammer vom 19. November 1999 (Hamburgisches Justizverwaltungsblatt vom 31. Januar 2000, Nr. 1, S. 2), zuletzt geändert durch Beschluss vom 28.11.2007, HmbJVBl. 2008, S. 30); § II (4) Richtlinien der Westfälischen Notarkammer gem. § 67 Abs. 2 BNotO vom 9. Juni 1999 (KammerReport vom 23.06.2000 und vom 12.12.2000), zuletzt geändert durch Beschluss vom 27. März 2019 (KammerReport der Westfälischen Notarkammer vom 15.06.2019)vom 02.04.2008(KammerReport vom 11.06.2008); § III (3) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Kassel vom 25. August 1999 (Justiz-Ministerial-Blatt für Hessen ,Nr. 5/2008, S. 125), zuletzt geändert durch Beschluss vom 21. November 2007 (Justiz-Ministerial-Blatt für Hessen vom 15. Dezember 2000, Nr. 23/24, S. 653); § III (3) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Koblenz (Rl-NotKKO)vom 23. Oktober 1999 (Mitteilungen der Notarkammer Koblenz, Teil I, vom 22. Dezember 1999, Nr. 4/1999, S. 129), zuletzt geändert durch Satzung vom 5 Mai 2007 (Mitteilungen der Notarkammer Koblenz, Teil I Nr. 2 und 3/2007, S. 51ff.); § III (3) Berufsrichtlinien der Notarkammer Mecklenburg-Vorpommern vom 23. Juni 1999 und 9. Februar 2000 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 6. März 2000, Nr. 3, S. 248), geändert durch Satzung vom 13. Dezember 2006 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom März 2007, S. 476). zuletzt geändert durch Beschluss der Versammlung der Notarkammer Mecklenburg-Vorpommern vom 10. Juni 2009 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 23. September 2009, S. 978); § III (3) Richtlinien der Notarkammer Oldenburg für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 17. November 1999 (Niedersächsische Rechtspflege vom 15. Juni 2000, Nr. 6, S. 164), geändert durch Beschlüsse der Kammerversammlung vom 21. April 2001 (Niedersächsische Rechtspflege vom 15. August 2001, Nr. 8, S. 260) und 24. Mai 2008; § III (3) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Pfalz vom 30. Oktober 1999 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 29. November 1999, Nr. 2, S. 7), zuletzt geändert durch Satzung vom 18. November 2006 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 7. Januar 2007, Nr. 1, S. 2); § III (3) Richtlinien für die Berufsausübung der Notarkammer Sachsen-Anhalt vom 7. Mai 1999 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 11. Juni 1999, Nr. 1, S. 2), geändert durch Beschluss vom 11. Oktober 2006 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 12. Dezember 2006, Nr. 1, S. 1), zuletzt geändert durch Beschluss vom 3. Juni 2016 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 16. August 2016, Nr. 1); § III (2) Richtlinien für die Berufsausübung Neufassung vom 8. Juni 2001 (Amtliches Mitteilungsblatt der Notarkammer Sachsen vom 19. September 2001, Nr. 2/2001, S. 2), zuletzt geändert durch Beschluss der Kammerversammlung vom 29.05.2015; § III (2) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Thüringen Beschlussfassung der Kammerversammlung der Notarkammer Thüringen vom 9. Juni 1999 (Justiz-Ministerialblatt für Thüringen vom 8. September 1999, Nr. 5, S. 40), geändert durch Beschluss vom 4. Juni 2010 (Justiz-Ministerialblatt für Thüringen vom 4. November 2010, Nr. 3, S. 47); § III (3) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Rheinischen Notarkammer vom 17. Februar 2000 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, vom 10. März 2000, Nr. 1/2000, S. 1), zuletzt geändert durch Beschluss vom 6. Mai 2006 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, Nr. 1/2006); § III (3) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Saarländischen Notarkammer (RL SaarlNotK) gemäß Beschluss der Kammerversammlung vom 26. Oktober 1999 (Gemeinsames Ministerialblatt Saarland vom 9. Juni 2000, Nr. 3, S. 109), zuletzt geändert durch Beschluss vom 13. November 2014 (Amtsblatt des Saarlandes II, 2015, Nr. 1, S. 49); § III (3) Richtlinien der Schleswig-Holsteinischen Notarkammer vom 19. Mai 1999 (Schleswig-Holsteinische Anzeigen vom Dezember 1999, Nr. XII, S. 318), zuletzt geändert durch Beschluss vom 6. Juni 2007 (Schleswig-Holsteinische Anzeigen 9/2007, S. 392).

[650] § 18 (1) BNotO.

concerned parties can choose to absolve notaries from the confidentiality duty.[651] If in a specific case, notaries are in doubt over the duty of confidentiality, they can consult the regulating authority ("*Aufsichtsbehörde*").[652] If the regulating authority concludes that the notary is not bound by the duty of confidentiality in that specific situation, then the notary cannot be held liable for not adhering to this duty.[653]

In addition, it is rather obvious that a positive obligation is imposed on notaries so as to participate in further education.[654] What is however somewhat more surprising is the fact that even the notarial duty to act like a good colleague is expressly enshrined in the law:

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[651] § 18 (2) BNotO.
[652] § 18 (3) BNotO.
[653] Ibid.
[654] § 14 (6) BNotO. Also see § X Richtlinien für die Amtspflichten und sonstigen Pflichten der Notare (§ 3 Abs. 1 und 2 BNotO) vom 18. Juni 1999 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, vom Dezember 1999, Nr. 12, S. 478), zuletzt geändert durch Beschluss der Mitgliederversammlung der Notarkammer Baden-Württemberg (vormals Notarkammer Stuttgart); § X Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Landesnotarkammer Bayern vom 3. Juli 1999 (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 24. November 1999, Nr. 3, S. 1), zuletzt geändert durch Beschluss der Versammlung der Landesnotarkammer Bayern vom 30. September 2007 (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 2007, S. 1); § X Richtlinien der Notarkammer Berlin für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 10. November 1999 (Amtsblatt für Berlin vom 15. September 2000, Nr. 45, S. 3684), zuletzt geändert durch Beschluss vom 21. März 2012 (Amtsblatt für Berlin vom 11. April 2012, S. 675); § X Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Brandenburg vom 22. November 1999 (Justizministerialblatt für das Land Brandenburg vom 15. Januar 2000, Nr. 1, S. 15), zuletzt geändert durch Beschluss vom 15. November 2007, Nr. 11, S. 166); § X Richtlinien der Notarkammer Braunschweig für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer, zuletzt geändert durch Beschluss vom 2. April 2008 (Niedersächsische Rechtspflege vom 15. Juli 2008, Nr. 7, S. 224); § X Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Bremer Notarkammer vom 2. Februar 2000 (Amtsblatt der Freien Hansestadt Bremen vom 1. September 2000, Nr. 63, S. 485, und vom 18. Januar 2001, Nr. 8, S. 82)), zuletzt geändert durch Beschluss vom 2. April 2008 (Amtsblatt der Freien Hansestadt Bremen vom 14. November 2008, Nr. 121, S. 929); § X Richtlinien der Notarkammer Celle für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 28. April 1999 und 3. Mai 2000 (Niedersächsische Rechtspflege vom 15. Dezember 2000, Nr. 12, S. 353), zuletzt geändert durch Beschluss vom 16. Mai 2012 (Niedersächsische Rechtspflege 2012, S. 240 f.); § X Berufsrichtlinien der Notarkammer Frankfurt vom 14. Juli 1999 und 24. November 1999 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2000, Nr. 2, S. 65), zuletzt geändert durch Beschluss der Kammerversammlung der Notarkammer Frankfurt am Main am 13. November 2013 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2014, Nr. 2, S. 140); § X Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Hamburgischen Notarkammer vom 19. November 1999 (Hamburgisches Justizverwaltungsblatt vom 31. Januar 2000, Nr. 1, S. 2), zuletzt geändert durch Beschluss vom 28.11.2007, HmbJVBl. 2008, S. 30); § X Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Kassel vom 25. August 1999 (Justiz-Ministerial-Blatt für Hessen ,Nr. 5/2008, S. 125), zuletzt geändert durch Beschluss vom 21. November 2007 (Justiz-Ministerial-Blatt für Hessen vom 15. Dezember 2000, Nr. 23/24, S. 653); § X Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Koblenz (Rl-NotKKO)vom 23. Oktober 1999 (Mitteilungen der Notarkammer Koblenz, Teil I, vom 22. Dezember 1999, Nr. 4/1999, S. 129), zuletzt geändert durch Satzung vom 5 Mai 2007 (Mitteilungen der Notarkammer Koblenz, Teil I Nr. 2 und

> *"Der Notar hat sich gegenüber Kollegen, Gerichten, Behörden, Rechtsanwälten und anderen Beratern seiner Auftraggeber in der seinem Amt entsprechenden Weise zu verhalten."*[655]

If notaries violate their official duties either intentionally or negligently, they can be held liable by the parties, who consequently suffer a loss.[656] For this reason, notaries must take out professional liability insurance ("*Berufshaftpflichtversicherung*"), which must provide coverage for damages that arise out of all professional activities for which they can be held liable.[657]

3/2007, S. 51ff.); § X Berufsrichtlinien der Notarkammer Mecklenburg-Vorpommern vom 23. Juni 1999 und 9. Februar 2000 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 6. März 2000, Nr. 3, S. 248), geändert durch Satzung vom 13. Dezember 2006 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom März 2007, S. 476). zuletzt geändert durch Beschluss der Versammlung der Notarkammer Mecklenburg-Vorpommern vom 10. Juni 2009 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 23. September 2009, S. 978); § X Richtlinien der Notarkammer Oldenburg für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 17. November 1999 (Niedersächsische Rechtsp ege vom 15. Juni 2000, Nr. 6, S. 164), geändert durch Beschlüsse der Kammerversammlung vom 21. April 2001 (Niedersächsische Rechtsp ege vom 15. August 2001, Nr. 8, S. 260) und 24. Mai 2008; § X Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Pfalz vom 30. Oktober 1999 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 29. November 1999, Nr. 2, S. 7), zuletzt geändert durch Satzung vom 18. November 2006 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 7. Januar 2007, Nr. 1, S. 2); § X Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Rheinischen Notarkammer vom 17. Februar 2000 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, vom 10. März 2000, Nr. 1/2000, S. 1), zuletzt geändert durch Beschluss vom 6. Mai 2006 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, Nr. 1/2006); § X Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Saarländischen Notarkammer (RL SaarlNotK) gemäß Beschluss der Kammerversammlung vom 26. Oktober 1999 (Gemeinsames Ministerialblatt Saarland vom 9. Juni 2000, Nr. 3, S. 109), zuletzt geändert durch Beschluss vom 13. November 2014 (Amtsblatt des Saarlandes II, 2015, Nr. 1, S. 49); § X Richtlinien für die Berufsausübung Neufassung vom 8. Juni 2001 (Amtliches Mitteilungsblatt der Notarkammer Sachsen vom 19. September 2001, Nr. 2/2001, S. 2), zuletzt geändert durch Beschluss der Kammerversammlung vom 29.05.2015; § X Richtlinien für die Berufsausübung der Notarkammer Sachsen-Anhalt vom 7. Mai 1999 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 11. Juni 1999, Nr. 1, S. 2), geändert durch Beschluss vom 11. Oktober 2006 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 12. Dezember 2006, Nr. 1, S. 1), zuletzt geändert durch Beschluss vom 3. Juni 2016 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 16. August 2016, Nr. 1); § X Richtlinien der Schleswig-Holsteinischen Notarkammer vom 19. Mai 1999 (Schleswig-Holsteinische Anzeigen vom Dezember 1999, Nr. XII, S. 318), zuletzt geändert durch Beschluss vom 6. Juni 2007 (Schleswig-Holsteinische Anzeigen 9/2007, S. 392); § X Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Thüringen Beschlussfassung der Kammerversammlung der Notarkammer Thüringen vom 9. Juni 1999 (Justiz-Ministerialblatt für Thüringen vom 8. September 1999, Nr. 5, S. 40), geändert durch Beschluss vom 4. Juni 2010 (Justiz-Ministerialblatt für Thüringen vom 4. November 2010, Nr. 3, S. 47); § X Richtlinien der Westfälischen Notarkammer gem. § 67 Abs. 2 BNotO vom 9. Juni 1999 (KammerReport vom 23.06.2000 und vom 12.12.2000), zuletzt geändert durch Beschluss vom 27. März 2019 (KammerReport der Westfälischen Notarkammer vom 15.06.2019).

[655] § 31 BnotO. The scope of this duty is quite broad and includes for example the obligations to refrain from personal criticism and to mutually assist each other if being confronted with cases of defamation. See: U. Bracker, *Bundesnotarordnung: Kommentar*, München: Verlag Franz Vahlen, 2011, BNotO § 31 [Verhalten des Notars].

[656] § 19 (1) BNotO. For detailed rules, see: § 19 (2)-(3) BNotO.

[657] § 19a (1) BNotO. For detailed rules, see: § 19a (2)-(7) BNotO.

3.2.2.8 The Termination of the Notarial Function

The notarial function terminates if one of the following eight occurrences crystallizes.[658] First, as the most natural and obvious cause, the death of the notary is to be mentioned.[659] Second, the function terminates automatically at the end of the month in which the notary turns 70.[660] Third, the notaries themselves may at any given point ask for the termination of this function ("*Entlassung*").[661] Such a petition has to be put in writing and filed with the regional administration of justice.[662] Fourth, termination occurs if the notary is convicted by a criminal court.[663] Fifth, the notary may be subject to deposition ("*Amtsenthebung*"), which occurs if the notary's qualification for a judicial office ("*Befähigung zum Richteramt*") ceases to exist respectively if this qualification was wrongly presumed to be present, if a prerequisite exists under which the appointment of a public official of the federal state justice department must be declared void, terminated, or revoked, if the notary refuses to take the official oath, accepts a salaried function, if they exercise an additional profession contrary to § 8 (2) BNotO or a function, whose acceptance is subject to approval by the federal-state administration of justice department, or if they either align with other practitioners or share their business premises with them.[664] Moreover, notaries face deposition if they are confronted with a financial collapse ("*Vermögensverfall*"), which is assumed to exist when the notary's assets are subject to an insolvency proceeding, when the notary is registered in the register kept by the court that is competent for the execution of civil judgments ("*Vollstreckungsgericht*"), if they are temporarily incapable of properly exercising their function due to their medical condition, if their economic means, economic management style, or the execution of custody transactions ("*Verwahrungsgeschäft*") endanger the interests of those who seek justice ("*Rechtssuchende*"), if they repeatedly grossly violate the prohibitions to co-operate laid down in §3 (1) BeurkG or his duties enshrined in § 17 (2) BeurkG, or if they do not have the prescribed professional liability insurance.[665] Sixth, the notarial function can be terminated by a disciplinary court judgment.[666] Seventh, the notary may temporarily resign.[667] Such a temporary resignation is

[658] § 47 BNotO.
[659] § 47 sub (1) BNotO.
[660] Ibid. Also see § 48a BNotO.
[661] § 47 sub (2), § 48 BNotO.
[662] § 48 BNotO.
[663] § 47 sub (4), § 49 BNotO.
[664] § 47 sub (5), § 50 BNotO.
[665] § 50 (1) sub (6)-(10) BNotO.
[666] § 47 sub (6) , § 97 BNotO.
[667] § 47 sub (7), § 48b, § 48c BNotO.

permissible if they either have at least one child that is younger than 18 years or if they take care of a care-needing relative.[668] The eighth and last occurrence is specific for the *Anwaltnotar*; if their membership in the competent bar association is ended, the notarial function consequently also terminates.[669]

3.2.3 The Role of the Land Registrar

In Germany, the tasks of a land registrar are conferred upon the so-called *Rechtspfleger*.[670] A *Rechtspfleger* is a judicial officer in the upper grade of the civil service ("*gehobener Dienst*"), who can be entrusted with a multitude of different tasks, such as compulsory auction procedures, matters concerning presumptions of death, and certain association matters.[671] In other words, this profession is not limited to the function of a land registrar. The land registrar is solely bound by the law and can thus in fact act independently.[672] Their profession is governed by the Judicial Officers Act ("*Rechtspflegergesetz*"; hereafter: "RPflG").

3.2.3.1 Requirements for Appointment

Officials of the judicial services ("*Beamter des Justizdienstes*") can be appointed as land registrars provided that they meet the requirements set out by the RPflG.[673] In essence, two main requirements are to be met: a three year preparatory service ("*Vorbereitungsdienst*") and a passed judicial officer examination ("*Rechtspflegerprüfung*").[674] To enter the preparatory service, permission is needed from the president of the respective higher regional court or in the case of the Saarland, from the Ministry of Justice.[675] The preparatory service consists of studies at a college of

[668] § 48b I BNotO.
[669] § 47 III BNotO.
[670] § 1, § 3 I (h), § 4 I RPflG.
[671] § 3 RPflG. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 110.
[672] § 9 RPflG. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 110.
[673] § 2 RPflG.
[674] § 2 I RPflG.
[675] § 2 II Verordnung des Justizministeriums über die Ausbildung und Prüfung der Rechtspflegerinnen und Rechtspfleger (APrORpfl) vom 27. Juli 2011 (GBl. 2011, 429), zuletzt geändert durch Verordnung vom 8. Mai 2019 (GBl. S. 224); § 25 Zulassungs-, Ausbildungs- und Prüfungsordnung für den Justizwachtmeister-, Justizfachwirte-, Gerichtsvollzieher- und Rechtspflegerdienst (Ausbildungsordnung Justiz – ZAPO-J) vom 16. Juni 2016 (GVBl. S. 123), zuletzt geändert durch § 1 Abs. 111 der Verordnung vom 26. März 2019 (GVBl. S. 98); §2 II Verordnung über die Ausbildung und Prüfung von Rechtspflegern (APORPfl) vom 14. Juni 2006

higher education ("*Fachhochschule*") of at least one and a half years and a practise-oriented training of at least one year.[676] To access the preparatory service, applicants must possess a university's entrance diploma or a comparable degree.[677] In addition, suitable officials of the middle grade judicial services ("*Beamter des mittleren Justizdienstes*") can be admitted to the judicial officer

(GVBl. 2006, 618), zuletzt geändert durch Artikel X Nr. 19 des Gesetzes vom 19.03.2009 (GVBl. S. 70); § 3 II Verordnung über die Ausbildung und Prüfung der Rechtspfleger des Landes Brandenburg (Brandenburgische Rechtspflegerausbildungsordnung - BbgRpflAO) vom 3. Februar 1994 (GVBl.II/94, [Nr. 11], S.74), zuletzt geändert durch Artikel 1 der Verordnung vom 7. August 2006
(GVBl.II/06, [Nr. 19], S.306); § 2 II Verordnung über den Vorbereitungsdienst für den Zugang zum ersten Einstiegsamt der Laufbahngruppe 2 in der Fachrichtung Justiz zur Verwendung im Laufbahnzweig Rechtspflegerdienst (Ausbildungs- und Prüfungsordnung Rechtspflegerdienst - APO-RpflD) vom 5. Juli 2011 (HmbGVBl. 2011, S. 279, 295), zuletzt geändert durch Verordnung vom 20. August 2013 (HmbGVBl. S. 364); § 2 I Ausbildungs- und Prüfungsordnung für den Laufbahnzweig des Rechtspflegerdienstes im gehobenen Justizdienst (APORpflD) vom 27. Juni 2017 (GVBl . S . 218, 508), zuletzt geändert durch Gesetz vom 5 . Februar 2016 (GVBl . S . 30); § 3 II Verordnung über die Ausbildung und Prüfung der Rechtspfleger des Landes Mecklenburg-Vorpommern (Rechtspflegerausbildungs- und Prüfungsordnung - Rpfl APO M-V) vom 17. Juni 1994 (GVOBl. M-V S. 786), zuletzt geändert durch Art. 3 Abs. 1 G zur Anpassung des LandesR an das PersonenstandsrechtsreformG vom 1. 12. 2008 (GVOBl. M-V S. 461); § 3 II Verordnung über die Ausbildung und Prüfung der Rechtspflegerinnen und Rechtspfleger des Landes Nordrhein-Westfalen (Rechtspflegerausbildungsordnung - RpflAO) (NRW) vom 19.05.2003 (GV. NRW. S. 294), zuletzt geändert durch Gesetz vom 2. Juli 2002 (GV. NRW. S. 242); § 2 II Rechtspfleger-Ausbildungs- und Prüfungsordnung (RAPO) vom 12. August 2011 (GVBl. 2011, 333), zuletzt geändert durch Verordnung vom 29.06.2012 (GVBl. S. 237); § 2 I Verordnung über die Ausbildung und Prüfung der Beamtinnen und Beamten des gehobenen Justizdienstes - Rechtspflegerausbildungsordnung (RpflAO) vom 2. August 2011 (Amtsbl. 2011, S. 266), zuletzt geändert durch Art. 2 der Verordnung vom 23. April 2018 (Amtsbl. I S. 249); § 3 Verordnung des Sächsischen Staatsministeriums der Justiz über die Ausbildung und Prüfung im Vorbereitungsdienst für die zweite Einstiegsebene der Laufbahngruppe 1 der Fachrichtung Justiz mit dem fachlichen Schwerpunkt Justizdienst
(Sächsische Ausbildungs- und Prüfungsordnung Justizfachwirte – SächsAPOJFW) vom 29. März 2018 (SächsGVBl. S. 135); § 3 I Ausbildungs-, Prüfungs- und Aufstiegsverordnung für die Laufbahn des Rechtspfleger- und Justizverwaltungsdienstes (APVO RPflJV) vom 23. September 2002 (GVBl. LSA 2002, 394), zuletzt geändert durch Verordnung vom 23. September 2013 (GVBl. LSA S. 484); § 4 I Landesverordnung über die Laufbahn, Ausbildung und Prüfung der Rechtspflegerinnen und Rechtspfleger für die Laufbahn der Fachrichtung Justiz - Laufbahngruppe 2, erstes Einstiegsamt - (Rechtspfleger-LAPO) vom 5. September 2013 (GVOBl. 2013 367); § 4 II Thüringer Verordnung über die Ausbildung und Prüfung für den Laufbahnzweig des Rechtspflegerdienstes im gehobenen Justizdienst (Thüringer Rechtspflegerausbildungs- und -prüfungsordnung -ThürRAPO -) vom 19. November 2018 (GVBl. 2018, 712). In the case of Bremen, a recent version of the Verordnung über die Ausbildung und Prüfung der Rechtspflegerinnen und Rechtspfleger des Landes Bremen (Rechtspflegerausbildungsverordnung) that is still in force could not be found. In the case of Lower Saxony, the Verordnung über die Ausbildung und Prüfung für den Rechtspflegerdienst in der Laufbahn der Laufbahngruppe 2 der Fachrichtung Justiz (APVO-Justiz-RpflD) Vom 20. November 2012 does not specify the competent authority. In both cases, the websites of the Higher Regional Courts contained the information that they are the competent authority: Website Hanseatisches Oberlandesgericht, 'Informationen über den Beruf der Dipl.-Rechtspflegerin und des Dipl.-Rechtspflegers (gehobener Justizdienst)' (https://www.oberlandesgericht.bremen.de/informationen/berufe_ausbildung_praktika/dipl__rechtspfleger-1589), as consulted on 18.04.2019 and Website Oberlandesgericht Oldenburg, 'Bewerberinformationen Diplom-Rechtspflegerin / Diplom-Rechtspfleger' (https://www.oberlandesgericht-oldenburg.niedersachsen.de/informationen/bewerberinformationen/rechtspflegerin_rechtspfleger/bewerberinformationen-diplom-rechtspflegerin--diplom-rechtspfleger-80010.html), as consulted on 18.04.2019.

[676] § 2 (1) RPflG.

[677] § 2 (2) RPflG.

training if they spend a minimum of three years in the middle grade judicial services after the career development examination ("*Laufbahnprüfung*").[678] As a matter of completeness, it shall be said that the tasks of a judicial officer can be temporarily conferred upon a trainee lawyer and can, on own request, also be carried out by persons holding the qualification for a judicial office ("*Befähigung zum Richteramt*").[679]

As is the case for notaries, the Act on the Determination of the Equivalence of Professional Qualification ("*Berufsqualifikationsfeststellungsgesetz*") is not applicable.[680] The requirements for appointment are more closely regulated by state law.[681]

3.2.3.2 Duties and Competences

Land registrars may take all measures that are necessary for the completion of the tasks that are conferred upon them.[682] In certain situations however, they are obliged to submit the case to the land register judge ("*Grundbuchrichter*").[683] In particular, land registrars may not administer an oath or order an administration thereof, nor may they threaten with or order imprisonment.[684] In three other situations, it is required to submit the case to the land register judge.[685] First, if the situation arises that a decision of the Federal Constitutional Court or of a state court that is competent for constitutional disputes in accordance with article 100 of the Basic Law ("*Grundgesetz*") is required.[686] Second, if a close connection exists between the case that is to be submitted to the judge and a case that is administrated by the judge so that it would not be pertinent to treat the cases separately.[687] Third, the case may be submitted to the judge if it is

[678] Ibid.
[679] § 2 (3)-(5) RPflG. For an explanation of this qualification see Chapter 2.2 (notaries).
[680] Berufsqualifikationsfeststellungsgesetz vom 6. Dezember 2011 (BGBl. I S. 2515), das zuletzt durch Artikel 1 des Gesetzes vom 22. Dezember 2015 (BGBl. I S. 2572) geändert worden ist. Also see § 2 (7) RPflG.
[681] § 2 (6) RPflG.
[682] § 3 and § 4 (1) RPflG. Also see H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 11.-12.
[683] S. Hügel (eds.), *BeckOK GBO*, München: Beck, 2019, para.. 19-21.
[684] § 4 (2)-(3) RPflG. Three specific exceptions exist with regard to the second exception. These can be found in § 4 (2) sub (2) RPflG.
[685] H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer Verlag, 2007, p. 267.
[686] § 5 (1) sub (1) RPflG. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 110.
[687] § 5 (1) sub (2) and § 6 RPflG. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 110.

possible that foreign law is to be applied.[688] In cases in which it is unclear whether a particular case needs to be dealt with by a judicial officer or by a judge, it is the latter, who has to decide on the competence question.[689] Once the case is submitted to a judge, they treat the case to the extent that they deem necessary.[690] This entails, that they may return the case to the land registrars, who then are bound by the legal opinion that is communicated to them by the judge.[691]

3.2.4 The Relationship between Notary and Land Registrar

A prominent diverging factor in the positioning of notaries towards land registrars lies in their academic and professional education. As stated above, the appointment as notary requires the qualification for a judicial office combined with extensive professional experience. Moreover, the legal framework prescribes that not only their professional competence but also that their (private) social behaviour must meet a high bar. In comparison, land registrars study at a college of higher education, which entails that their academic education is more practise-related when compared to a more theoretical law study at a university. Furthermore, the prescribed period that has to be invested into academic or professional education is considerably shorter than the program that notaries must pass through. Nevertheless, when portrayed in the context of transferring the ownership of a plot of land, it is to be observed that their duties and competences are modelled in such a way that ensures the realization of an effective checks-and-balances framework. Yet, it is unclear whether and if so to what extent (the professional organizations of) the land registrars and notaries actively cooperate in the making of policy decisions and in the broader development of the land registration system as can be observed in the Netherlands.[692]

3.2.5 The Content of the Land Register

The main maxim that governs the land register's content is that rights and facts that are offered for registration in the land register can only be registered if they are registrable

[688] § 5 (2) RPflG. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 110.
[689] § 7 RPflG.
[690] § 5 (3) RPflG.
[691] Ibid.
[692] To compare the relationship between notaries and land registrars in the Netherlands, see paragraph 3.1.4.

("*eintragungsfähig*").[693] To this end, two categories of registrable rights and facts must be distinguished.[694] For the rights and facts that are grouped under the first category, registration forms a mandatory requirement ("*Buchungszwang*"/ "*Eintragungsbedürftigkeit*"), as the desired legal effect will only be effectuated when all transfer requirements including the registration of the deed in the land register are fulfilled.[695] In other words, registration has a constitutive effect. A buyer of a plot of land for example will only become its owner on the basis of § 873 BGB when the transfer is registered in the land register. By contrast, the second category comprises rights and facts that can be registered in the land register, but whose registration is declaratory and often intends to rule out a call on the principle of public faith.[696] For instance, certain inabilities to dispose of the property ("*Verfügungsbeschränkungen*") fall in this category.[697]

Unlike in the Dutch legal system, German law does not offer a comprehensive legal basis that enumerates the main types of information that can be registered in the land register.[698] Instead, a decentralized method is followed, which entails that a variety of different laws provide for legal bases for the registration of a right or fact.[699] As a point of departure, it proves to be quite helpful that the entirety of German property rights are registrable in the land register, i.e. (a transfer of) ownership of a plot of land[700], a charge on a plot of land[701], including a transfer or burdening of such a charge[702], a "*Vormerkung*"[703], the group of real property rights ("*subjektiv-dingliche Rechte*")[704], a right of usufruct[705].[706] Furthermore, an objection[707], a restriction on the power of disposal

[693] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 135.
[694] U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 13-14. Also see J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 47-48 and W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 82.
[695] Ibid.
[696] Ibid.
[697] J. Schapp & W. Schur, *Sachenrecht*, München: Verlag Franz Vahlen, 2010, p. 176.
[698] U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 13.
[699] Ibid. For an overview of the main registrable rights, see: W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 79-80. Also see An overview of all registrable restrictions on the power of disposal can be found in: H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, para. 22-28.
[700] § 873 (1) BGB.
[701] Ibid.
[702] § 873 (1) BGB.
[703] § 84 (3) GBO.
[704] §9 GBO. A comprehensive list of all registrable real property rights can be found in: S. Hügel (eds.), *BeckOK GBO*, München: C.H. Beck Verlag, 2020, §9 para. 2.
[705] § 1030, § 873 BGB, § 29 GBO.

("*Verfügungsbeschränkung*") such as the opening of insolvency proceedings[708], and certain notations ("Vermerke") such as a notation of expropriation ("*Enteignungsvermerk*")[709] are registrable.[710] It should be stressed that this list is inexhaustive and simply provides an overview of the most common registrable rights and facts.[711] In addition, there is a second category of registrable information that includes facts that can be registered in the land registry despite the absence of an explicit legal basis.[712] These facts have in common that their (non-) registration will produce legal effect.[713] Examples hereof are certain limitations on the power of disposal ("*Verfügungsbeeinträchtigungen*").[714]

3.2.6 The Legal Value of Land Register Information

Germany adheres to a positive registration system. As a result, the correctness of the land register can be relied upon.[715] This is rendered possible through the high threshold that must be met before a deed can be registered in the land register, which is especially accounted for by the system's figurehead in the form of an active land registrar.[716] It is further facilitated by the fact that Germany

[706] U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht,* Bonn: Deutscher Notarverlag, 2019, p. 13-14. Also see An overview of registrable restrictions on the power of disposal can be found in: H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, para. 23.
[707] § 84 (3) GBO.
[708] Ibid. An overview of (un-)registrable restrictions on the power of disposal can be found in: H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, para. 24-25, 27.
[709] Ibid. An overview of all (un-)registrable notations can be found in: H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, para. 26-27.
[710] U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht,* Bonn: Deutscher Notarverlag, 2019, p. 13-14. Also see An overview of all registrable restrictions on the power of disposal can be found in: H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, para. 23.
[711] For a more detailled enumeration see: H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 6-7.
[712] U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 13.
[713] Ibid.
[714] U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 13, 18.
[715] § 892 BGB. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 291 (§ 891 (nr. 1)). The "*Grundakten*", "*Handblätter*", and indexes are excluded from the notion of public faith. See: § 12a (1) GBO. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 121 and T. Hofmann & W. Sauter, *Das Grundbuch im Kreditgeschäft*, Wiesbaden: Springer, 1989, p. 182. Exceptions exist with regard to some specific rights that existed in the former DDR. See: Article 233 § § 4-5 Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB) in der Fassung der Bekanntmachung vom 21. September 1994 (BGBl. I S. BGBL Jahr 1994 I Seite 2494, ber. 1997 I S. 1061) (FNA 400-1), zuletzt geändert durch Art. 2 MietrechtsanpassungsG vom 18.12.2018 (BGBl. I S. BGBL Jahr 2018 I Seite 2648). Also see R. Weber, *Sachenrecht II: Grundstücksrecht*, Baden-Baden: Nomos, 2015, p. 173.
[716] J. Schapp & W. Schur, *Sachenrecht*, München: Verlag Franz Vahlen, 2010, p. 175.

adheres to an abstract transfer system so that a title, which becomes defective after the transfer has occurred, will not negatively influence the successful transfer of ownership of a plot of land.[717] However, this does not mean that a defective contract can never directly lead to the invalidity of the transfer. In cases of erroneous identity ("*Fehleridentität*"), which for instance occurs in case of minority of a contracting party, or absence of intent, the defect (if present during the conclusion of the contract and the execution of the transfer) will cause the invalidity of both the contract and the transfer.[718]

According to the prevailing opinion however, the fact that one can rely on the correctness of the land register does not mean that a guarantee for the completeness of the land register is given.[719] Instead, § 891 BGB reflects a two-layered legal presumption that applies to the rights that are registered in the land register in accordance with the applicable rules.[720] If a right is registered in the land register to the benefit of a particular person, it is to be assumed that this person is indeed entitled to that right.[721] Conversely, if a right is deleted in the land register, the non-existence of this right is to be assumed.[722] The main categories of information that do not fall within the ambit of this

[717] § 873 BGB. Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 12.
[718] §119, 142 BGB. Also see C. Armbrüster et al (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 1: §§ 1-240 BGB, AllgPersönlR, ProstG, AGG*, München: Verlag C.H. Beck, 2018, para. 115. Also see S. van Erp & B. Akkermans (eds.), *Cases, Materials and Text on Property Law*, Oxford/Portland, Hart Publishing, 2012, p. 837.
[719] H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 294. Also see S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 889-902 (Publizität des Grundbuchs, Grundbuchberichtigung, Widerspruch, Ersitzung),* Berlin: Sellier – de Gruyter, 2019, p. 59 (§ 891 (nr. 46)) and R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 297 (§ 891 (nr. 18)). For a contrary opinion, which is mainly based on the substantive publicity principle, see: H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 164-165 and W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 21 and K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 825 and K. Vieweg & A. Werner, *Sachenrecht*, München: Verlag Franz Vahlen, 2018, p. 455.
[720] R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 291 (§ 891 (nr. 4)). Also see S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 889-902 (Publizität des Grundbuchs, Grundbuchberichtigung, Widerspruch, Ersitzung)*, Berlin: Sellier – de Gruyter, 2019, p. 51, 58 (§ 891 (nr. 25, 43)).
[721] § 891 I BGB. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 182. Also see S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 889-902 (Publizität des Grundbuchs, Grundbuchberichtigung, Widerspruch, Ersitzung)*, Berlin: Sellier – de Gruyter, 2019, p. 51 (§ 891 (nr. 25)).
[722] § 891 II BGB. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 183. Also see S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3:*

provision include legal relationships governed by public law, registered facts, objections, and restrictions of the owner's disposal as well as rights and legal relationships that are not registrable.[723] In this context, § 891 BGB must be seen as a procedural tool to allocate the burden of proof on those, who request the rectification of incorrect land register information.[724] In other words, the enshrined legal presumption can be proven wrong.[725]

Accompanying the legal presumption laid down in § 891 BGB, § 892 BGB sets out the public faith of the land register, which entails that the land register is presumed to be correct. Registered facts, legal relationships, such as burdens and restrictions that are governed by public law, objections, rights that are not registrable, and burdens are yet excluded from the operation of this provision.[726] The acquirer of a right may thus only rely on the correctness of the rights that are registered in the

Sachenrecht: § § 889-902 (Publizität des Grundbuchs, Grundbuchberichtigung, Widerspruch, Ersitzung), Berlin: Sellier – de Gruyter, 2019, p. 58 (§ 891 (nr. 43)).

[723] As shall be seen in Chapter 3.2.9, this exclusion does not concern the description of the run of the boundary. Also see: R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG – ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 291-294, 297 (§ 891 (nr. 4-11)§ 892 (nr. 17)). Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 294. For a detailed overview see S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 889-902 (Publizität des Grundbuchs, Grundbuchberichtigung, Widerspruch, Ersitzung)*, Berlin: Sellier – de Gruyter, 2019, p. 43-44, 47 (§ 891 (nr. 6, 8, 15)) and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 166.

[724] H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 294. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 291 (§ 891 (nr. 1)).

[725] Ibid. Also see § 292 Zivilprozessordnung (ZPO) in der Fassung der Bekanntmachung vom 5. Dezember 2005 (BGBl. I S. BGBL Jahr 2005 I Seite 3202, ber. 2006 I S. 431 und 2007 I S. 1781) (FNA 310-4), zuletzt geändert durch Art. 5 Abs. 26 G zur Einführung einer Karte für Unionsbürger und Angehörige des Europäischen Wirtschaftsraums mit Funktion zum elektronischen Identitätsnachweis sowie zur Änd. des PersonalausweisG und weiterer Vorschriften vom 21.6.2019 (BGBl. I S. BGBL Jahr 2019 I Seite 846). Also see S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 889-902 (Publizität des Grundbuchs, Grundbuchberichtigung, Widerspruch, Ersitzung)*, Berlin: Sellier – de Gruyter, 2019, p. 41 (§ 891 (nr. 1)) and R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 295-296 (§ 891 (nr. 14)).

[726] H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 294 . Also see J. Schapp & W. Schur, *Sachenrecht*, München: Verlag Franz Vahlen, 2010, p. 176-177 and J.F. Baur & R. Stürner, *Sachenrecht*, München: Verlag C.H. Beck, 2009, p. 295-296. Also see J. Eckert, *Sachenrecht*, Baden-Baden: Nomos, 2005, p. 207. Again, the description of the run of the boundary is excluded from the exclusion. Also see: R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG – ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 304 (§ 892 (nr. 14)). For a complete overview see: S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 889-902 (Publizität des Grundbuchs, Grundbuchberichtigung, Widerspruch, Ersitzung)*, Berlin: Sellier – de Gruyter, 2019, p. 129-132 (§ 892 (nr.64-71)) and D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 6.

land register in accordance with the law.[727] This circumstance has two vital implications: unlike § 891 BGB, it affects the legal situation of a good faith acquirer from a substantive law perspective and, connected therewith, it provides a powerful exception to the *nemo plus* principle.[728]

Nonetheless, three conditions are attached to a successful call on the principle of public faith. First, the acquirer must have acquired the right by means of a legal transaction ("*Rechtsgeschäft*").[729] Second, an acquirer is barred from invoking § 892 BGB if an objection is registered in the land register that challenges the correctness of the respective entry, or if third, the acquirer was aware of the incorrectness.[730] Investigations on the side of the acquirers are thus not necessary and they may even call upon the public faith of the land register if they seriously doubt that the respective entry is correct.[731]

Besides the general rule on public faith, § 892 BGB explicitly regulates the situation in which the person, who is entitled to a registered right, has a limited power of disposal.[732] It is noteworthy that this provision exclusively refers to a relative inability to dispose of the property ("*relative Verfügungsbeschränkung*"), rather than to an absolute inability to dispose of the property ("*absolute Verfügungsbeschränkung*") considering that the latter, generally speaking, can even be invoked against an acquirer in good faith despite the fact that it cannot be registered in the land register.[733]

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[727] R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG – ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 302 (§ 892 (nr. 10)). For an overview of situations in which rights are not registered in accordance witht the law, see S. Herrler (eds.), J. *von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 889-902 (Publizität des Grundbuchs, Grundbuchberichtigung, Widerspruch, Ersitzung)*, Berlin: Sellier – de Gruyter, 2019, p. 93-98 (§ 892 (nr.16-22)).

[728] R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG – ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 299 (§ 892 (nr. 1)). Also see S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 889-902 (Publizität des Grundbuchs, Grundbuchberichtigung, Widerspruch, Ersitzung)*, Berlin: Sellier – de Gruyter, 2019, p. 85 (§ 892 (nr.1)).

[729] § 892 I BGB. The acquisition of rights by a different means, such as through the operation of law (i.e. succession), are thus expressly excluded from the scope of § 892 BGB. See H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 294 and J. Schapp & W. Schur, *Sachenrecht*, München: Verlag Franz Vahlen, 2010, p. 178 and H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 88.

[730] § 892 I BGB. The point of time at which the acquirer must have been aware of the incorrectness is to be determined on the basis of § 892 II BGB. Also see As shall be seen in Chapter 3.2.9, this exclusion does not concern the description of the run of the boundary. Also see: R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG – ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 315 (§ 892 (nr. 44).

[731] H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 297-298.

[732] § 892 I BGB.

[733] R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 320-321 (§ 892 (nr. 59-60)).

By contrast, relative inabilities can only be invoked against the acquirer of that right if he either was aware of its existence or could have been aware of it if he had consulted the land register.[734] A concrete example concerns the withdrawal of the power of disposal within the context of an insolvency proceeding.[735] If it is not registered despite the fact that § 32 Insolvency Code ("*Insolvenzordnung*") provides a legal basis for registration, severe consequences can follow.[736] After all, if the plot's owner, who lacks the power of disposal, transfers the plot of land, the buyer can call upon the public faith of the land register as enshrined in § 892 I BGB under the condition that he was not aware of the seller's inability to dispose of the plot.[737] Consequently, the plot will then leave the insolvency estate of the seller and become part of the buyer's property.[738]

An extension of the scope of § 892 BGB is achieved through the application of § 893 BGB.[739] First, this extension intends to protect those who render services to a person, whose entitlement to these services is based on a right that is registered in the land register.[740] Second, it determines that those legal acts (such as modifications of the content of a right and the annulment of a right), that are not included in the wording of § 892 BGB, are to be brought under its scope.[741]

[734] § 892 I BGB. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 320-321 (§ 892 (nr. 59)).
[735] J. Wilhelm, *Sachenrecht*, Berlin/Bosten: De Gruyter, 2019, p. 346.
[736] U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 13, 19.
[737] § 81 I Insolvenzordnung. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG – ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 321 (§ 892 (nr. 60)) and S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 889-902 (Publizität des Grundbuchs, Grundbuchberichtigung, Widerspruch, Ersitzung)*, Berlin: Sellier – de Gruyter, 2019, p. 211 (§ 892 (nr.238)). Also see J. Wilhelm, *Sachenrecht*, Berlin/Bosten: De Gruyter, 2019, p. 349.
[738] It is however possible to contest the transfer on the basis that it puts the creditors to a disadvantage. See: S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 889-902 (Publizität des Grundbuchs, Grundbuchberichtigung, Widerspruch, Ersitzung)*, Berlin: Sellier – de Gruyter, 2019, p. 211-212 (§ 892 (nr.239)).
[739] R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 327 (§ 893 (nr. 1)). Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 297.
[740] § 893 BGB. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 327 (§ 893 (nr. 1)).
[741] § 893 BGB. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 327, 329 (§ 893 (nr. 1, 9)) and S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 889-902 (Publizität des Grundbuchs, Grundbuchberichtigung, Widerspruch, Ersitzung)*, Berlin: Sellier – de Gruyter, 2019, p. 243, 245 (§ 893 (nr.23, 25)). Also see J. Schapp & W. Schur, *Sachenrecht*, München: Verlag Franz Vahlen, 2010, p. 178.

The last question that remains concerns the liability in case land registrars breach one of their official duties, which then in turn lead to the incorrectness of an entry in the land register.[742] As a matter of principle, the German state will then be held liable.[743] Nonetheless, if land registrars have committed this breach either intentionally or grossly negligently, the State has a right of recourse against them.[744]

3.2.7 Publicity of Land Register Information

"*Das Grundbuch ist keine Bürgerauskunft für interessante Dinge, sondern ein Instrument des Rechtsverkehrs*."[745]

Having established that the land register is governed by the principle of public faith and that its content (with some exceptions) is considered to be correct and thus reliable, the following paragraph explains to whom this information is made accessible.[746]

Access to the land register (including the applications for registration which have not yet been processed and the register of deeds ("*Grundakten*")) is granted to those who can demonstrate a legitimate interest ("*berechtigtes Interesse*").[747] It is in line therewith that even notaries must not

[742] For a comprehensive overview of cases in which the breach of duty on the side of the land registry has (not) been accepted, see: J. Hager (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 2: Recht der Schuldverhältnisse: § § 839, 839a (Unerlaubte Handlungen 4 – Amtshaftungsrecht)*, Berlin: Sellier – de Gruyter, 2013, p. 349-351 (§ (nr. 680-682)).
[743]Article 34 Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 (BGBl. S. BGBL Jahr 1949 Seite 1) (BGBl. III/FNA 100-1), zuletzt geändert durch Art. 1 ÄndG (Art. 104b, 104c, 104d, 125c, 143e) vom 28.3.2019 (BGBl. I S. BGBL Jahr 2019 I Seite 404). Also see H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 14-15 and M. Habersack, (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 5: Schuldrecht – Besonderer Teil III: § § 705-853: Partnerschaftsgesellschaftsgesetz – Produkthaftungsgesetz*, München: Verlag C.H. Beck, 2017, p. 2290-2291 (§ 839 (nr.1-4)).
[744] Article 34 Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 (BGBl. S. BGBL Jahr 1949 Seite 1) (BGBl. III/FNA 100-1), zuletzt geändert durch Art. 1 ÄndG (Art. 104b, 104c, 104d, 125c, 143e) vom 28.3.2019 (BGBl. I S. BGBL Jahr 2019 I Seite 404) and § 839 BGB. Also see H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 14-15 and H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 100.
[745] U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 439. Non-official English translation: "The land register is not a disclosure of interesting things, but an instrument for legal transactions."
[746] Also see H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 839 and K. Stöber, *GBO-Verfahren und Grundstückssachenrecht*, München: Verlag C.H. Beck, 1998, p. 47 and J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 36 and U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 441-445.
[747] § 12 I-II GBO and § 46 I GBV. The consultation of the unprocessed applications for registration is necessary on the basis of § 17 GBO. The index of proprietors in the meaning of § 12a GBO cannot be accessed. Also see H.

inform parties about the content of the land register if they fail to demonstrate such an interest.[748] The underlying aim of this limitation is to ensure the privacy of those, who are registered in the land register.[749] In the absence of a legal definition, an interest is considered to be legitimate if it can be justified by the state of affairs.[750] Thus, the interest does not have to equal a legal interest but can also be of an economic, factual, or academic nature.[751] If applicants can establish that they have a legitimate interest, they may also choose to authorize a third person to access the land register on their behalf.[752]

It does not suffice for applicants, who seeks access to the land register, to simply declare that they have a legitimate interest and that this alone justifies access to the desired information. Instead, their request must be adequately supported with facts to ensure that the land registry (concrete, the recording official ("*Urkundsbeamter*")) is in the position to control whether a legitimate interest

Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 246, 253 and H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 840.

[748] § 133a GBO. Also see S. Hügel (eds.), *BeckOK GBO*, München: C.H. Beck Verlag, 2019, § 133a GBO, Rn. 12-14.

[749] H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 245, 247. Also see H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 840 and U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 438.

[750] H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 841. Also see H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 246-247. For an overview of situations in which a legitimate interest can or cannot be established, see: H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 248-253 and H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 842-843, 845-851 and J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 40-42 and U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 439, 441-445. In addition, *Berlee* has conducted a comprehensive analysis of the available case law to determine under which conditions a legitimate interest is considered to be present. See: A. Berlee, *Access to personal data in public land registers: Balancing publicity of property rights with the rights to privacy and data protection*, The Hague: Eleven International Publishing, 2011, p. 309-334.

[751] H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 247. Also see W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 86 and H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 841 and U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 439. For what concerns an academic interest, see for example: § 10 IV Geschäftliche Behandlung der Grundbuchsachen (Grundbuchgeschäftsanweisung - GBGA -) AV d. JM vom 28. August 2007 (3850 - I. 58) (JMBl. NRW S. 217); § 34 Geschäftliche Behandlung der Grundbuchsachen (Grundbuchgeschäftsanweisung des Landes Brandenburg - BrandGBGA) vom 22. Juli 1993 (JMBl/93, [Nr. 8], S.128); § 8 Geschäftliche Behandlung der Grundbuchsachen (Grundbuchgeschäftsanweisung -GBGA) AV des MdJ Nr. 3/04 vom 16. Januar 2004 (3851–2); § 3.4.3.2 Geschäftsanweisung für die Behandlung der Grundbuchsachen (GBGA) vom 16. Oktober 2006 (Az.: 3851 - I - 8967/2006), Änderung vom 14. Mai 2012 (JMBl S. 50).

[752] H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 253. Also see: U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 442, 446.

is indeed present ("*Darlegungspflicht*").[753] Interestingly, it is not possible to formally appeal against this decision, though it is possible to refer the decision of the recording official to a higher instance; it is however unclear from doctrine whether this decision must be referred to the land registrar or the land register judge.[754] In any case, it is only against their decision, that a formal appeal ("*Beschwerde*") can be filed.[755]

Two exceptions exist to the general rule that access to the land register is conditional upon the demonstration of a legitimate interest. The first exception is provided by § 43 GBV, which authorizes the following persons to access land registry information without having to demonstrate a legitimate interest: notaries, practicing lawyers, under the condition that a notary has verifiably ordered them to access the information, publicly appointed land surveyors, authorized representatives of a German public authority, and the owners of a plot of land (including the owner of a right of emphyteusis).[756] For this group as described in § 43 GBV, an exception is also made regarding access to the register of deeds.[757] Yet, this does not mean that a request from a notary, a lawyer, a land surveyor or an authorized representative of a German public authority cannot be rejected.[758] Such requests will be rejected when the land registrar is aware of the fact that the request is not based on a legitimate interest.[759] The second exception is provided by § 43 II GBV and entails that access to the land register is also possible on the basis of an authorization ("*Vollmacht*")

[753] § 12c I (1) GBO. Also see H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 843, 856 and U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 453 and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 13.

[754] § 12c IV GBO. According to U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 458, the land registrar (and not the land register judge) is the competent authority. This argument is based on § 3 I (h) RPflG. It is argued further, that § 12c IV GBO has not been adapted after the land register judge's competences were transferred to the registrar. The following sources support this argumentation: H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 123 and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 244. Other sources however indicate that decisions must be referred to land register judge: H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 856 and J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 45.

[755] § 12c IV GBO. Also see H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 856 and J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 45.

[756] § 43 GBV, § 21 BeurkG, § 24 I BnotO. Also see H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 245, 252 and K. Stöber, *GBO-Verfahren und Grundstückssachenrecht*, München: Verlag C.H. Beck, 1998, p. 47.

[757] § 46 II GBV.

[758] J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 43. Also see U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 440.

[759] J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 43.

provided by the owner. The demonstration of a legitimate interest is then obsolete.[760] This exception is of special interest when the buyer and seller negotiate over the sale of a particular plot of land, as the buyer will not just yet be able to demonstrate a legitimate interest in this phase.[761]

If the land register has already been digitalized and the technical requirements are met, it is even possible to access the land register in an automated manner.[762] Considering the high threshold that an applicant must meet to be granted access to land register information, it is almost redundant to express that this possibility is stringently linked to a number of conditions.[763] Most importantly, permission from the federal-state administration of justice department is required, which will only be granted to the following categories of applicants: (i) notaries, courts, public authorities ("*Behörden*"), publicly appointed land surveyors and (ii) those who are entitled to a property right on the plot of land concerned as well as the persons and authorities to whom they grant authority.[764] By contrast, financial institutions, even if they are governed by public law, are expressly prohibited from receiving permission.[765] The mentioned categories of applicants are distinguished by the extent of the access rights that are conferred upon them. Applicants that fall under the first category are granted unlimited access to the land register.[766] Applicants that fall under the second category have limited access in the sense that they must have a legitimate interest or the authority of the plot's owner to access a particular piece of registered information.[767] In addition, they will only be able to access the information that concerns 'their' plot.[768] Although permission will usually entitle the applicants to access the information kept by one particular land

[760] § 43 II GBV.
[761] H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 247. A legitimate interest of the buyer is considered to be present once the contract of sale is concluded. See: U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 443.
[762] § 133 GBO. For the technical details, see: H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 2454-2462 and U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 1219.
[763] § 133 I-II GBO.
[764] § 133 II GBO. As a side remark, it is to be explained that § 133 II GBO also enumerates the State Bank Berlin as an applicant to whom permission in principle can be granted. Considering that this institution no longer exists, it has been decided to not include it in the enumeration. See: H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 2456.
[765] Ibid.
[766] H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 2458. Also see U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 1214-1215.
[767] Ibid.
[768] U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 1215.

registry, it is possible to extend this permission to all land registries of one particular German state.[769]

The direct consequence of the automated access to the land register is the significant decrease in control that the land registry can execute.[770] The conclusion that those who are granted access are not subject to any control however constitutes an erroneous belief, due to the fact that the system always demands the entering of a justification for the access of a particular piece of information and secondly because all access is recorded in a protocol which enables the land registry to (retrospectively) analyse whether the person in question has violated the terms of the permission underlying the automated access.[771]

Having established the criteria by which an applicant can successfully pursue access to the land register, it is necessary to determine which search entrance the applicant must choose to receive the desired information. Hereby, it should be noted that the unit according to which the land registers are organized are the plot numbers and not the owners.[772] Therefore, the applicant in principle must have the plot number available. If this is not the case, the plot number can be retrieved by consulting the index of owners, provided that such an index is kept by the land registry in question and that it is publicly accessible.[773] Access to those indexes is restricted to German notaries, courts, and authorities.[774] Others must file an information request, which will only be honoured if the requirements set out in § 12 GBO are fulfilled.[775] Moreover, the requested information must be essential for access to the land register or for the filing of a request to receive a transcript of a folio, or it must enable the retrieval of a particular folio.[776]

[769]H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 2460.
[770] U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 1217.
[771] U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 1218-1219. Also see S. Hügel, *GBO: Grundbuchordnung: Kommentar*, München: Verlag C.H. Beck, 2016, p. 1177-1178.
[772] J. Schapp & W. Schur, *Sachenrecht*, München: Verlag Franz Vahlen, 2010, p. 139.
[773] § 12a I GBO. Also see U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 448-449.
[774] § 12a I GBO. Also see H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 862.
[775] § 12a I GBO. Also see U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 448-449 and H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 861.
[776] § 12a I GBO.

It now remains to be determined to what extent information will be disclosed to applicants.[777] The disclosure of all information that is registered in a particular folio cannot be reconciled with the principle of proportionality ("*Verhältnismäßigkeitsgrundsatz*").[778] Therefore, the applicant's legitimate interest will be used as a measuring unit to determine the degree of disclosure.[779] It is thus quite possible that the applicant will not be granted access to all five sections of the folio.[780] Further, it is to be mentioned that the right to access the land register is coupled with the right to demand a transcript, or in cases in which the land register is digitalized, a print-out.[781] While the access to the land register is free of charge (unless the notary accesses the land register on the parties' behalf), €5 is charged for the production of a non-certified electronic transcript, €10 for the production of a non-certified paper transcript or of a certified electronic transcript, and €20 for the production of a certified paper transcript.[782] Transcripts can be requested via e-mail, fax, regular mail and in person and are certified if the applicant so requests.[783] Every access or issue of a transcript of the land register (including the register of deeds) is recorded in a protocol that is specifically kept for this purpose.[784] The owner of a plot of land as well as those persons that are entitled to a similar right on land may request information on who accessed the land register with respect to their plot of land.[785]

It has become clear by now that a relatively high threshold must be met before access to land register information is granted through which (personal) data protection is accommodated. In the absence of a legal basis, it is however not possible to apply for the shielding of one's personal

[777] J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 43.
[778] Ibid.
[779] Ibid.
[780] Ibid. Also see: U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 446.
[781] § § 46 III, 139 I GBV. The applicant may also ask for a transcript that covers only a certain part of the folio. This is possible on the basis of § 45 I GBV. It is then required that the transcript is certified (§ 45 I GBV).
[782] Gesetz über Kosten der freiwilligen Gerichtsbarkeit für Gerichte und Notare (Gerichts- und Notarkostengesetz – GNotKG) vom 23. Juli 2013 (BGBl. I S. BGBL Jahr 2013 I Seite 2586) (FNA 361-6), zuletzt geändert durch Art. 7 G zum Internationalen Güterrecht und zur Änd. von Vorschriften des Internationalen Privatrechts vom 17.12.2018 (BGBl. I S. BGBL Jahr 2018 I Seite 2573), (Anlage 1: Kostenverzeichnis, nr. 17000-17003) vom 23. Juli 2013 (BGBl. I S. 2586), zuletzt geändert durch Artikel 7 des Gesetzes vom 17. Dezember 2018 (BGBl. I S. 2573). Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 123.
[783] § 44 I GBV.
[784] § 12 IV GBO and § 46a I, VI GBV. Entries are preserved until the end of the second calendar year that follows the entry's creation date. See: § 46a IV GBV.
[785] § 12 IV GBO and § 46a II GBV. Under certain conditions, set out in § 46a III-IIIa GBV, such a request will not be honoured. This for example includes the situation in which the law enforcement agency has accessed the land register and the revelation of this circumstance could frustrate the criminal prosecution (§ 46a III GBV, § 12 IV GBO).

information in the land register. In opposite to land register information, cadastral information can be easily accessed. All that is needed is the plot number, the address of the plot, the owner's name, or the name of the holder of a limited property right. Information can be requested via e-mail, fax, regular mail, phone, and in person. In principle, requests for cadastral information are honoured unless this would be detrimental to the public good.[786] An exception to this broad accessibility of cadastral information is made for personal information; applicants must demonstrate a legitimate interest before they are given access to this type of sensitive data.[787] The tariffs charged for accessing cadastral information are determined by state law.[788]

[786] § 11 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG) vom 31. Juli 1970 (BayRS III S. 687), zuletzt geändert durch § 1 Abs. 181 der Verordnung vom 26. März 2019 (GVBl. S. 98); § 17 Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160); § 10 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz) vom 16. Oktober 1990 (Brem.GBl. 1990, 313), zuletzt geändert durch Art. 4 G zur Anpassung von Vorschriften aus dem Bereich Umwelt und Bau an die europäische Datenschutz-Grundverordnung vom 18.12.2018 (Brem.GBl. S. 651); § 10 I Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § § 10, 13 Hamburgisches Gesetz über das Vermessungswesen (Hamburgisches Vermessungsgesetz – HmbVermG) vom 20. April 2005 (HmbGVBl. 2005, S. 135), zuletzt geändert durch Artikel 4 des Gesetzes vom 31. August 2018 (HmbGVBl. S. 282, 284); § 16 Hessisches Gesetz über das öffentliche Vermessungs- und Geoinformationswesen (Hessisches Vermessungs- und Geoinformationsgesetz – HVGG) vom 6. September 2007 (GVBl. I S. 548)), zuletzt geändert durch Artikel 29 des Gesetzes vom 3. Mai 2018 (GVBl. S. 82); § § 14-15, 33 Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 5 Niedersächsisches Gesetz über das amtliche Vermessungswesen (NVermG) vom 12. Dezember 2002 (GVBl. Nr.1/2003 S.5), zuletzt geändert durch Art. 9 G zur Neuordnung des niedersächsischen Datenschutzrechts vom 16.5.2018 (Nds. GVBl. S. 66); § 14 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256); § 13 Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § § 10, 16 Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § § 10, 14 Gesetz über die Landesvermessung und das Liegenschaftskataster im Freistaat Sachsen (Sächsisches Vermessungsgesetz – SächsVermG) vom 12. Mai 2003 (SächsGVBl. S. 121), zuletzt geändert durch Artikel 5 des Gesetzes vom 10. April 2007 (SächsGVBl. S. 54); § § 10, 13 Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510); § § 11, 13 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG -) vom 12. Mai 2004 (GL. Nr. 219-9), zuletzt geändert (Art. 18 LVO v. 16.01.2019, GVOBl. S. 30); § 18 Thüringer Vermessungs- und Geoinformationsgesetz (ThürVermGeoG) vom 16. Dezember 2008 (GVBl. S. 574), zuletzt geändert durch Artikel 42 des Gesetzes vom 18. Dezember 2018 (GVBl. S. 731, 760).

[787] § 11 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG) vom 31. Juli 1970 (BayRS III S. 687), zuletzt geändert durch § 1 Abs. 181 der Verordnung vom 26. März 2019 (GVBl. S. 98); § 17 Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160); § 10 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz) vom 16.

Oktober 1990 (Brem.GBl. 1990, 313), zuletzt geändert durch Art. 4 G zur Anpassung von Vorschriften aus dem Bereich Umwelt und Bau an die europäische Datenschutz-Grundverordnung vom 18.12.2018 (Brem.GBl. S. 651); § 10 I Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § § 10, 13 Hamburgisches Gesetz über das Vermessungswesen (Hamburgisches Vermessungsgesetz – HmbVermG) vom 20. April 2005 (HmbGVBl. 2005, S. 135), zuletzt geändert durch Artikel 4 des Gesetzes vom 31. August 2018 (HmbGVBl. S. 282, 284); § 16 Hessisches Gesetz über das öffentliche Vermessungs- und Geoinformationswesen (Hessisches Vermessungs- und Geoinformationsgesetz – HVGG) vom 6. September 2007 (GVBl. I S. 548)), zuletzt geändert durch Artikel 29 des Gesetzes vom 3. Mai 2018 (GVBl. S. 82); § § 14-15, 33 Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 5 Niedersächsisches Gesetz über das amtliche Vermessungswesen (NVermG) vom 12. Dezember 2002 (GVBl. Nr.1/2003 S.5), zuletzt geändert durch Art. 9 G zur Neuordnung des niedersächsischen Datenschutzrechts vom 16.5.2018 (Nds. GVBl. S. 66); § 14 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256); § 13 Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § § 10, 16 Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § § 10, 14 Gesetz über die Landesvermessung und das Liegenschaftskataster im Freistaat Sachsen (Sächsisches Vermessungsgesetz – SächsVermG) vom 12. Mai 2003 (SächsGVBl. S. 121), zuletzt geändert durch Artikel 5 des Gesetzes vom 10. April 2007 (SächsGVBl. S. 54); § § 10, 13 Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510); § § 11, 13 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG -) vom 12. Mai 2004 (GL. Nr. 219-9), zuletzt geändert (Art. 18 LVO v. 16.01.2019, GVOBl. S. 30); § 18 Thüringer Vermessungs- und Geoinformationsgesetz (ThürVermGeoG) vom 16. Dezember 2008 (GVBl. S. 574), zuletzt geändert durch Artikel 42 des Gesetzes vom 18. Dezember 2018 (GVBl. S. 731, 760).

[788] Anlage A (30.4.2 and 30.4.3.3) Verordnung des Ministeriums für Ländlichen Raum und Verbraucherschutz über die Festsetzung der Gebührensätze für öffentliche Leistungen der staatlichen Behörden in seinem Geschäftsbereich (Gebührenverordnung MLR - GebVO-MLR) vom 11. Dezember 2018 (GBl. 2018, 1577); Anlage B.5 Verordnung über die Benutzungsgebühren der unteren Vermessungsbehörden (GebOVerm) Vom 15. März 2006 (GVBl. S. 160), zuletzt geändert durch § 1 Abs. 33 der Verordnung vom 26. März 2019 (GVBl. S. 98); Anlage – Tarifstelle 2000 (and following) Verordnung über die Erhebung von Gebühren im Vermessungswesen (Vermessungsgebührenordnung - VermGebO) vom 22. August 2005 (GVBl. 2005, 449), zuletzt geändert durch Verordnung vom 04.03.2008 (GVBl. S. 62, 92); Tarifstelle 1 Anlage Gebührenordnung für das amtliche Vermessungswesen im Land Brandenburg (Vermessungsgebührenordnung - VermGebO) vom 16. September 2011 (GVBl.II/11, [Nr. 55]), zuletzt geändert durch Verordnung vom 10. Mai 2017 (GVBl.II/17, [Nr. 28]); Anlage 1 – Tarifziffer 13-14 Kostenverordnung für das amtliche Vermessungswesen und die Gutachterausschüsse für Grundstückswerte nach dem Baugesetzbuch (VermWertKostV) vom 25. November 2014 (Brem.GBl. 2014, 739), zuletzt geändert durch Verordnung vom 2. Oktober 2018 (Brem.GBl. S. 572); § 3 (4)(3) and Anlage Abschnitt 1 – Nr. 3 Gebührenordnung für das amtliche Vermessungswesen und den Gutachterausschuss für Grundstückswerte in Hamburg (GebOVerm) (HmbGVBl. 2006, S. 580), zuletzt geändert durch Artikel 2 der Verordnung vom 4. Dezember 2018 (HmbGVBl. S. 418); Anhang Nr.712-713 Verwaltungskostenordnung für den Geschäftsbereich des Ministeriums für Wirtschaft, Energie, Verkehr und Landesentwicklung (VwKostO-MWEVL) (GVBl. S. 484, ber. 2013 S. 44), zuletzt geändert durch Art. 1 Sechste ÄndVO vom 10.9.2018 (GVBl. S. 604); Anlage – Tarifstelle 1,2,4 Kostenverordnung für Amtshandlungen im amtlichen Vermessungswesen (Vermessungskostenverordnung - VermKostVO M-V) vom 20. Februar 2018 (GVOBl. M-V 2018, S. 66); Anlage 1 – Nr. 1, 2 Kostenordnung für das amtliche Vermessungswesen (KOVerm) vom 25. März 2017 (Nds. GVBl. 2017, 68, 162), zuletzt geändert durch Verordnung vom 25.02.2019 (Nds. GVBl. S. 57); Anlage Gebührentarif – 1.2, 2-3 Gebührenordnung für das amtliche Vermessungswesen und die

3.2.8 The Process of Transferring a Plot of Land in a Purely National Case

In the following, the process of transferring a plot of land in Germany will be illustrated. As was the case in the Dutch case study, this depiction will begin with the potential buyer, who, after having found a suitable plot of land, will enter into negotiations with the plot's owner respectively their real estate agent. Once the details are settled, the formal contract of sale will be concluded.

3.2.8.1 The Contract of Sale

As can be derived from § 311b BGB, the contract of sale must be notarized ("*beurkundet*") as a whole.[789] If this requirement is not fulfilled, the contract is void.[790] Yet, the lack of notarization does not stand in the way of a successful transfer of the plot; § 311b II GBO explicitly provides that such a contract will become valid when the requirements for a transfer as laid down in § 873 BGB are

amtliche Grundstückswertermittlung in Nordrhein-Westfalen (Vermessungs- und Wertermittlungsgebührenordnung - VermWertGebO NRW) (GV. NRW. S. 390), zuletzt geändert durch Artikel 21 des Gesetzes vom 8. Dezember 2009 (GV. NRW. S. 765); Anlage Besonderes Gebührenverzeichnis für die Vermessungs- und Katasterbehörden und die Gutachterausschüsse Nr. 3-6 Zweite Landesverordnung zur Änderung der Landesverordnung über die Gebühren der Vermessungs- und Katasterbehörden und der Gutachterausschüsse und der Landesverordnung über die Gebühren der allgemeinen und inneren Verwaltung einschließlich der Polizeiverwaltung (Besondere Gebührenverzeichnisse) vom 10. September 2018 (GVBl. S. 317); Nr. 2 Besonderes Gebührenverzeichnis des Landesamtes für Vermessung, Geoinformation und Landentwicklung (LVGL) und der öffentlich bestellten Vermessungsingenieurinnen und –Ingenieure (ÖbVI) des Saarlandes, Erlass des Besonderen Gebührenverzeichnisses über Gebühren und Auslagen des Landesamtes für Vermessung, Geoinformation und Landentwicklung und der Öffentlich bestellten Vermessungsingenieurinnen und -ingenieure des Saarlandes vom 20. Juni 2012 (Amtsbl. 2018, S. 599), zuletzt geändert durch Artikel 3 Absatz 2 des Gesetzes vom 15. Februar 2006 (Amtsbl. S. 474, 530); Anlage 2 Sächsische Vermessungskostenverordnung vom 29. Juni 2019 (SächsGVBl. S. 551); Anlage 1 – Teil B Kostenverordnung für das amtliche Vermessungs- und Geoinformationswesen (VermKostVO) vom 15. Dezember 1997; Anlage Gebührentarif - Tarifstelle 1-2 Landesverordnung über Gebühren des Landesamtes für Vermessung und Geoinformation Schleswig-Holstein (VermGebVO) vom 15. November 2017 (GVOBl. 2017 515), zuletzt geändert durch Art. 1 LVO v. 28.05.2019 (GVOBl. S. 151); Anlage – Nr. 2 Thüringer Verwaltungskostenordnung für das amtliche Vermessungswesen (ThürVwKostOVerm) vom 29. Januar 2010 (GVBl. 2010, 1), zuletzt geändert durch Verordnung vom 28. November 2016 (GVBl. S. 564).

[789] § 925a BGB. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 54. An exception to this rule is provided by § 127a BGB, according to which it can be replaced by a court settlement. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 39. Also see K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 768 and J.F. Baur & R. Stürner, *Sachenrecht*, München: Verlag C.H. Beck, 2009, p. 287. For a sample of a contract of sale, see: P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 511-519.

[790] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 47.

validly fulfilled.[791] What follows from the notarization requirement is that the parties will – already in this stage – be in need of a notary. In this venture, they enjoy a freedom of choice, whereby they are not under an obligation to consult a local notary.[792] Also, considering that notarial activities are governed by fixed tariffs, the choice of a particular notary cannot be influenced by financial considerations.[793] Unlike in other countries, such as the Netherlands, it is thus not possible to search for the notary, who offers the most competitive cost-performance ratio. The notarial tariffs are governed by the Law on judicial and notarial costs ("*Gerichts- und Notarkostengesetz*").[794] Decisive factors that could play a role instead however are for example the quality of the work and personal acquaintance.[795]

Notarization ("*Beurkundung*") implies that the parties' declarations of intent are recorded by the notary in a notarial recording ("*Niederschrift*").[796] Before this recording can be drawn up, the notary must consult the land register.[797] In this context, the term "before" refers to a relatively broad period of time. As follows from case law, this period of time can span six weeks as long as the notary is unaware of any concrete circumstances that would necessitate a more recent transcript of the land register.[798] An exception to the consultation duty is only possible when the involved parties,

[791] For a discussion of these requirements, see Chapter 3.2.8.2. This rule is also applicable to all other lacks of form. See: H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 48.
[792] C. Armbrüster, N. Preuß & T. Renner (eds.), *Notarkommentar: Beurkundungsgesetz und Dienstordnung für Notarinnen und Notare*, Bonn: Deutscher Notarverlag, 2015, p. 44.
[793] § 17 BNotO. Also see § 1 Gesetz über Kosten der freiwilligen Gerichtsbarkeit für Gerichte und Notare (Gerichts- und Notarkostengesetz – GNotKG) vom 23. Juli 2013 (BGBl. I S. BGBL Jahr 2013 I Seite 2586) (FNA 361-6), zuletzt geändert durch Art. 7 G zum Internationalen Güterrecht und zur Änd. von Vorschriften des Internationalen Privatrechts vom 17.12.2018 (BGBl. I S. BGBL Jahr 2018 I Seite 2573).
[794] § 1 Gesetz über Kosten der freiwilligen Gerichtsbarkeit für Gerichte und Notare (Gerichts- und Notarkostengesetz – GNotKG) vom 23. Juli 2013 (BGBl. I S. BGBL Jahr 2013 I Seite 2586) (FNA 361-6), zuletzt geändert durch Art. 7 G zum Internationalen Güterrecht und zur Änd. von Vorschriften des Internationalen Privatrechts vom 17.12.2018 (BGBl. I S. BGBL Jahr 2018 I Seite 2573).
[795] Also see Cases C-50/08 *European Commission v French Republic* ECLI:EU:C:2011:335, para. 99; C-51/08 *European Commission v Grand Duchy of Luxembourg* ECLI:EU:C:2011:336, para. 116; C-53/08 *European Commission v Republic of Austria* ECLI:EU:C:2011:338, para.. 112; C-54/08 *European Commission v Germany* ECLI:EU:C:2011:339, para. 110; C-61/08 *European Commission v Hellenic Republic* ECLI:EU:C:2011:340, para. 106; C-151/14 *European Commission v Republic of Latvia* ECLI:EU:C:2015:577, para. 36.
[796] § 8 BeurkG. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 43.
[797] § 21 I BeurkG. Also see H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 17. This duty does not include the consultation of the registry of deeds ("*Grundakten*"). See: H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 254 and P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 524.
[798] H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 17.Also see P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 525.

after being informed about the connected dangers, insist on an immediate notarial act.[799] When this exception is invoked, it must be included in the recording.[800] Furthermore, the notary has to ascertain the parties' intentions, discuss the merits of the case, and direct the parties as to the legal consequences of the transaction.[801] Special protection rules are applicable if an involved party cannot sufficiently hear, talk, see, or write.[802] The notary's explanations are then also included in the recording.[803] The aforementioned entails that the notary must discuss any doubts concerning the conformity of the legal transaction with the law or the true intentions of the parties, with the latter.[804] The notarial recording includes the identification of the notary and the involved parties, the declarations of these parties, as well as the place and the day on which the hearing took place.[805] Moreover, it is required that one can clearly identify the parties involved on the basis of the record and that it states how the notary has acquired the necessary certainty about their identification.[806] Usually, the identity of a person is proven by means of an ID card.[807] Further, the notary has to examine whether all involved parties possess legal capacity, with the consequence that if one or more involved parties do not possess this capacity, the notarial act must be refused.[808] Connected herewith, if an involved party is critically ill, this circumstance has to be included in the recording together with the notary's diagnosis regarding that person's legal capacity.[809] The notary and the parties must sign the recording after it was read out in their presence and provided that it was approved by the latter.[810] If an involved party, either according to their own statement or the notary's conviction, does not possess the necessary linguistic skills of the language in which the notarial recording is drawn up, then this circumstance has to be stated in the recording as well.[811] In this case, the recording must not be read out to that person, but instead has to be translated.[812] If

[799] § 21 I BeurkG.
[800] Ibid.
[801] § 17 I BeurkG.
[802] § 22-26 BeurkG.
[803] § 17 I BeurkG.
[804] § 17 II BeurkG.
[805] § 9 BeurkG. Also see K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 791.
[806] § 10 BeurkG.
[807] K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 791.
[808] § 11 I BeurkG. Also see K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 792.
[809] § 11 II BeurkG.
[810] § 13 I BeurkG. The BeurkG contains detailed rules about the (partial) reading of the record as well as about taking notice of attachments and documents that are referred to in the respective notarial record. These can be found in § 13-14 BeurkG.
[811] § 16 I BeurkG.
[812] § 16 II BeurkG.

notaries do not translate the recording themselves for whatever reason, the services of a translator must be requested.[813] Upon demand of the party in need, the translation has to be put in writing.[814]

When comparing the German system to the Dutch or English system, one could ask why a *Beurkundung* of the contract of sale is actually required. The underlying rationale is as follows: the transfer of a plot of land still is one of the most incisive contracts that buyer and seller will ever conclude.[815] Often, the parties are to be qualified as legal layman so that it is almost impossible for them to assess the legal consequences that are attached to the conclusion of this contract.[816] The requirement of the *Beurkundung* and thus the intervention of the notary in this critical phase are to warrant not only the protection of the parties by guarding them from hasty and unconsidered decisions to acquire a plot, but to also provide explicit proof of the transaction and to guarantee its validity.[817]

The protection of the parties also becomes apparent in the imposition of a consideration period in the case of a B2C contract ("*Verbrauchervertrag*").[818] In the context of the transfer of land, the notary should normally submit the draft contract to the consumer two weeks prior to the day when the notarization shall be performed.[819] Shorter consideration periods are possible, but must be motivated in the recording.[820] In case of C2C or B2B contracts, it is also common that the parties to the contract receive a draft version before the notarization. The only difference is that the submission of the draft is not bound by the two week period set out in § 17 IIa (2) BeurkG.[821] Furthermore, the contract of sale can be made subject to conditions.[822]

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[813] § 16 III BeurkG.
[814] § 16 II BeurkG.
[815] W. Krüger (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 2: Schuldrecht – Allgemeiner Teil: § § 241-432*, München: Verlag C.H. Beck, 2016, p. 1682 (§ 311b (nr. 1)). Also see M. Löwisch (eds), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 2: Recht der Schuldverhältnisse: § § 311b, 311c (Verträge über Grundstücke, das Vermögen und den Nachlass)*, Berlin: Sellier – de Gruyter, 2012, p. 19 (§ 311b (nr. 3)) and H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 40-41.
[816] Ibid.
[817] Ibid. Also see K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 768-769.
[818] § 17 IIa (2) BeurkG. For a legal definition of the term "*Verbrauchervertrag*", see: § § 13-14, 310 III BGB.
[819] § 17 IIa (2) BeurkG.
[820] Ibid. For example, situations in which a shorter period of time is possible are those in which the buyer is not a legal layman. See: P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 528-529.
[821] P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 530.
[822] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 54.

Upon conclusion of the contract of sale, the buyer has not yet become the owner of the plot, but the seller now has a contractual obligation to transfer the plot to him.[823] Furthermore, the plot must not be subject to material defects or defects of title.[824] The obligations that are imposed on the buyer in return are the payment of the purchase price and the acceptance of the plot.[825]As a closing remark it is to be highlighted that as a consequence of the principle of separation ("*Trennungsprinzip*") and the principle of abstraction ("*Abstraktionsprinzip*"), the validity of this contract is not required for a successful transfer of ownership.[826]

In the context of the levy of the real property acquisition tax ("*Grunderwerbsteuer*"), the notary has the duty to inform the tax authorities about the sale of the plot.[827] Furthermore, the committee of valuation experts ("*Gutachterausschuss*") must be informed to put them in the position to assess the value of comparable plots.[828]

3.2.8.2 The Drawing up of the Notarial Deed of Transfer ("*Auflassung*")

To effectuate the transfer of ownership, a separate contract in the meaning of § 873 I BGB ("*Einigung*") is required.[829] Due to the fact that the *Einigung* is connected to the contract of sale, the notary must not notarize the former in the absence of the latter.[830] The *Einigung*, which is not only required in cases which the ownership of a plot is transferred but also in all cases that are enumerated in § 873 I BGB (such as the burdening of a plot), is in principle not subject to formal

[823] § 433 I BGB. Ownership passes only when the transaction is recorded in the land register. See § 873 BGB. Also see J. Wilhelm, *Sachenrecht*, Berlin/Bosten: De Gruyter, 2019, p. 436.
[824] § 433 I BGB. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 69-71.
[825] § 433 II BGB.
[826] J. Wilhelm, *Sachenrecht*, Berlin/Bosten: De Gruyter, 2019, p. 524-525. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 119 (§ 873 (nr. 50)) and K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 881. Yet, as follows from § 925a BGB, the "*Auflassung*" that forms a requirement for the transfer of the plot depends on the existence of a contract of sale.
[827] H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 165.
[828] H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 166.
[829] § 873 I BGB. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 118 (§ 873 (nr. 49)) and H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 55. For a sample, see: P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 519.
[830] § 925a BGB. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 54.

requirements.[831] However, with regard to the transfer of ownership of a plot, formal requirements do exist.[832] As follows from § 925 I BGB, the contract has to be concluded between seller and buyer in front of a German notary or another competent authority (such as a consular officer if the *Auflassung* is to be concluded abroad) while both seller and buyer are contemporaneously present.[833] The process that is referred to as "*Auflassung*", implies that the contract has to testify that the seller has the will to sell the plot and that the buyer likewise has the will to buy the plot.[834] For this reason, it is not possible to notarize offer and acceptance separately.[835] Nevertheless, in legal practice, the required contemporaneous presence of the parties can be fulfilled either by the parties being personally present or by them authorizing a third party to represent them.[836]

Once the *Auflassung* is declared, the parties are bound by it.[837] Importantly, the contract has to be validly concluded.[838] In order to not become void, the contract must not be made subject to

[831] R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 107 (§ 873 (nr. 3)). Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 10.
[832] § 925 I BGB, § § 19, 29 GBO. Also see S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: Einleitung zum Sachenrecht: § § 854-882 (Besitz und Allgemeines Liegenschaftsrecht 1)*, Berlin: Sellier – de Gruyter, 2018, p. 351 (§ 873 (nr. 20)) and J. Wilhelm, *Sachenrecht*, Berlin/Bosten: De Gruyter, 2019, p. 326 and H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 51 and H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 56, 144-145.
[833] § 925 I BGB. § § 12I, 19 Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (Konsulargesetz) vom 11. September 1974 (BGBl. I S. 2317) (FNA 27-5), zuletzt geändert durch Art. 1 Erstes ÄndG vom 18.4.2018 (BGBl. I S. 478). Also see J. Wilhelm, *Sachenrecht*, Berlin/Bosten: De Gruyter, 2019, p. 490-491 and H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 51-52 and K. Stöber, *GBO-Verfahren und Grundstückssachenrecht*, München: Verlag C.H. Beck, 1998, p. 86-88 and H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 113-114. Two exceptions to this general rule are laid down in § 925 I BGB. Accordingly, the "*Auflassung*" can also emanate from an insolvency plan that is legally binding or from a court settlement. According to legal doctrine, it is unclear whether the conclusion of the contract has to be put in writing or whether an oral contract will suffice as § 925 BGB merely states that the agreement has to be 'declared'. Considering that notarization is required on the basis of § 29 GBO, this discussion seems to be of a more doctrinal nature. See: K. Vieweg & A. Werner, *Sachenrecht*, München: Verlag Franz Vahlen, 2018, p. 445.
[834] § 925 I BGB. Also see W. Wiegand (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 925-984; Anhang zu § § 929 ff: Eigentum 2 – Erwerb und Verlust des Eigentums*, Berlin: Selier – de Gruyter, 2017, p. 43 (§ 925 (nr. 41a)).
[835] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 45, 52.
[836] Ibid. It is even possible that buyer and seller authorize the same third person to represent them. See: J. Wilhelm, *Sachenrecht*, Berlin/Bosten: De Gruyter, 2019, p. 491 and K. Schellhammer, *Sachenrecht nach Anspruchsgrundlagen samt Wohnungseigentums- und Grundbuchrecht*, Heidelberg: C.F. Müller, 2017, p. 133 and J.F. Baur & R. Stürner, *Sachenrecht*, München: Verlag C.H. Beck, 2009, p. 285.
[837] § 873 II BGB. Also see J. Wilhelm, *Sachenrecht*, Berlin/Bosten: De Gruyter, 2019, p. 492.

conditions or time specifications.[839] Also, it is noteworthy, that for the substantive validity of the *Auflassung*, the notarization is not needed; following § 29 GBO, it does however constitute a formal requirement for the registration in the land register.[840] To be registrable, the *Auflassung* has to fulfil the requirements set out in the BeurkG.[841] This also means that the notary has to consult the land register once again before the *Auflassung* is concluded.[842] To maximize cost efficiency, the contract of sale and the *Auflassung* are often notarized consecutively in notarial practice and can even be integrated in one deed.[843]

Before the application to register the buyer as the plot's new owner is sent to the land registry, the transfer of the purchase price to the seller has to occur ("*Einreichungs- und Ausfertigungssperre*").[844] Through this mechanism, the buyer advances to a more vulnerable position; in the end, he has fulfilled his contractual obligation without having become the owner of the plot yet. Neither will he receive a guarantee from the notary implying that he will become the owner and that he will not face a financial loss when the seller does not fulfil his contractual obligation in the end.[845] Therefore, it is essential to ensure the protection of his entitlement to the plot.[846] Various

[838] W. Wiegand (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 925-984; Anhang zu § § 929 ff: Eigentum 2 – Erwerb und Verlust des Eigentums*, Berlin: Selier – de Gruyter, 2017, p. 95 (§ 925 (nr.106)).
[839] § 925 II BGB. For illustrations, see: W. Wiegand (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 925-984; Anhang zu § § 929 ff: Eigentum 2 – Erwerb und Verlust des Eigentums*, Berlin: Selier – de Gruyter, 2017, p. 85-86 (§ 925 (nr. 94)) and H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 53. Due to the fact that conditions are not allowed, other techniques had to be developed to secure the position of the seller. For illustrations, see: H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 53, 84-86.
[840] § 29 GBO. Also see R. Weber, *Sachenrecht II: Grundstücksrecht*, Baden-Baden: Nomos, 2015, p. 144 and K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 777 and K. Vieweg & A. Werner, *Sachenrecht*, München: Verlag Franz Vahlen, 2018, p. 445 and K. Schellhammer, *Sachenrecht nach Anspruchsgrundlagen samt Wohnungseigentums- und Grundbuchrecht*, Heidelberg: C.F. Müller, 2017, p. 134 and H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 115 and P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 480.
[841] H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 115.
[842] § 21 BeurkG. Also see S. Herrler (eds), *Münchner Vertragshandbuch*, München: Verlag C.H. Beck, 2016, VIII.4 Auflassung (nach vorausgegangenem schuldrechtlichen Vertrag).
[843] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 53. Also see K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 777.
[844] H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 38. Also see H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 84-85 and K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 777.
[845] H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 40.
[846] Ibid.

techniques exist to achieve the buyer's protection.[847] A common means to secure the position of the buyer is the "*(Eigentums-)* V*ormerkung*".[848] With this instrument at his back, the buyer is prepared for a potential insolvency of the seller and for any dispositions ("*Verfügungen*") that the seller may arrange, such as the sale of the plot to another party or a levy of execution ("*Zwangsvollstreckungsmaßnahme*").[849] In the end, the *Vormerkung* does not lead to a limitation of the seller's power of disposal, neither does it cause a prohibition of recording in the land register ("*Grundbuchsperre*").[850] However, this circumstance does not lead to grave consequences for the buyer as he may demand the third party's approval for the deletion of the entry that is interfering with the realization of his entitlement to the plot.[851] As a prerequisite to register a *Vormerkung*, the seller might request the buyer to make a deposit, the sum of which can either be directly transferred to the seller or to the notary's professional bank account ("*Anderkonto*").[852]

As a further means to safeguard the buyer's position next to the *Vormerkung*, the transfer of the purchase price in principle only occurs after the plot has been cleared from any burdens such as mortgages, which the buyer is not willing to accept ("*Lastenfreistellung*") and after all necessary permissions to remove these burdens are at hand.[853] To clear the plot from these burdens, the

[847] A description of a number of examples can be found in: H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 86-88.
[848] § § 883-888 BGB. Also see H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 41.
[849] §§ 883 II, 888 BGB; § 106 I Insolvenzordnung (InsO) vom 5. Oktober 1994 (BGBl. I S. BGBL Jahr 1994 I Seite 2866) (FNA 311-13), zuletzt geändert durch Art. 24 Abs. 3 Zweites Finanzmarktnovellierungs vom 23.6.2017 (BGBl. I S. BGBL Jahr 2017 I Seite 1693). Also see (for an overview of situations against which this instrument does not offer protection: H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 105.
[850] H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 105. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 219, 231 and H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 76 and K. Stöber, *GBO-Verfahren und Grundstückssachenrecht*, München: Verlag C.H. Beck, 1998, p. 17.
[851] § 888 I BGB. Also see H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 105.
[852] H. Heckschen et al. (eds), *Beck´sches Notar-Handbuch*, München: C.H. Beck, 2015, p. 9-11, 41. Other reasons why a deposit might be requested include the desire to transfer the possession of the plot to the buyer before the entire sum of the purchase price has been paid. For an overview of these reasons, see: H. Heckschen et al. (eds), *Beck´sches Notar-Handbuch*, München: C.H. Beck, 2015, p. 62-63.
[853] H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 42-50, 58-61. Also see C. Bönker & M. Lailach, *Praxisleitfaden Immobilienrecht: Erwerb: Finanzierung: Bebauung und Nutzung*, München: Verlag C.H. Beck, 2006, p. 65.

notary acts as a 'trustee' ("*Treuhänder*").[854] Being authorized by the seller, he will first request the necessary documents from those parties to the benefit of which the plot has been charged with a burden.[855] Furthermore, the parties will have to inform the notary under which conditions they agree with the deletion of their right in the land register, while the buyer will in the meantime receive the seller's request to first satisfy the claims of the seller's creditors before transferring the remainder of the purchase price (if existent) to the seller himself.[856] Also the seller will (have to) grant assistance to the registration of a security right to the benefit of the buyer's bank, as the bank, understandably, will often only agree to transfer the purchase price if their claim on the buyer is sufficiently secured.[857] Once all required documents are available and if the notary can ascertain that the purchase price suffices to satisfy the creditors' claims, he will ask the bank, which finances the purchase price on behalf of the buyer, by means of a notification of the due date ("*Fälligkeitsmitteilung*") to transfer the purchase price to the seller's creditors and any remainder to the seller himself.[858] Once the seller's creditors have received their share, they will release the notary from his duties as a "*Treuhänder*".[859]

As can be seen, in opposite to the Dutch legal system, the notary's professional bank account is not the standard means to execute the payment of the purchase price although it enjoys certain popularity in the northern part of Germany.[860] The underlying reason is § 57 II under (1) BeurkG, which allows the storage of a sum of money on this account only under a limited number of circumstances and under strict conditions. The first condition is that an application for depositing ("*Verwahrungsantrag*") together with a depositing instruction ("*Verwahrungsanweisung*") is

[854] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 86, 89. Also see C. Bönker & M. Lailach, *Praxisleitfaden Immobilienrecht: Erwerb: Finanzierung: Bebauung und Nutzung*, München: Verlag C.H. Beck, 2006, p. 66.
[855] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 86.
[856] Ibid.
[857] H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 1242-1243. Also see C. Bönker & M. Lailach, *Praxisleitfaden Immobilienrecht: Erwerb: Finanzierung: Bebauung und Nutzung*, München: Verlag C.H. Beck, 2006, p. 67 and W. Brehm & C. Berger, *Sachenrecht*, Tübingen: Mohr Siebeck, 2014, p. 241.
[858] H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 40. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 86, 90 and P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 561.
[859] P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 568.
[860] The possibility to employ the notary's professional bank account to effectuate the transfer of the purchase price is also laid down in § 23 BNotO. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 90 and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 1237.

submitted to the notary and that the notary has accepted them.[861] Both documents must be included in the contract of sale.[862] Second, the establishment of a legitimate security interest ("*berechtigtes Sicherungsinteresse*") on the side of those that are involved in the depositing arrangement ("*Verwahrungsgeschäft*") must be established.[863] Whether such an interest can be established in a particular case must be determined on the basis of objective criteria but it can be derived from doctrine that a plea for the presence of this type of interest will only be successful in exceptional situations.[864] Last, as a standard rule, the transfer of the purchase price via the notary's professional bank account will be conducted by means of cashless payments although payments in cash or by cheque are possible when the justifiable interests of the seller so demand.[865]

The professional bank account must be set up at a German bank.[866] The management of the moneys on any other account or even on the account of a third party is explicitly prohibited.[867] It is to be mentioned that for each depositing unit ("*Verwahrungsmasse*"), a separate account has to be kept.[868] In specific circumstances, a depositing of moneys can be kept on more than one account.[869] Only the notaries themselves, their officially appointed representative or the notarial administrator ("*Notariatsverwalter*") may dispose of these accounts.[870]

Last, to effectuate the transfer of the plot, the buyer has to be registered as the (new) owner in the land register ("*Eintragung*").[871] To this end, the following documents must be sent to the land registry ("*Antragsgrundsatz*"): the application for registration ("*Eintragungsantrag*"), the

[861] § 57 II (2)-(3) BeurkG. For requirements concerning the content of the "*Verwahrungsanweisung*", see: § 57 II (2) BeurkG. For example, an allocation of the costs that result from the depositing and an order when the purchase price is to be transferred to the seller must be included. See: H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 90 and H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 40.
[862] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 90.
[863] § 57(1) BeurkG.
[864] H. Heckschen et al (eds.), *Beck'sches Notar-Handbuch*, München: Verlag C.H. Beck, 2015, p. 220-221. The cited source also provides a brief overview of situations in which it will be unlikely that a legitimate security interest can be established. Also see H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 1237.
[865] § 58 III BeurkG.
[866] § 58 II BeurkG.
[867] § 58 I BeurkG.
[868] § 58 II BeurkG.
[869] § 58 IV BeurkG.
[870] § 58 III BeurkG. This provision further states that the state governments are authorized to entitle other authorized notaries to dispose of these accounts.
[871] § 873 I BGB. Also see J. Wilhelm, *Sachenrecht*, Berlin/Bosten: De Gruyter, 2019, p. 436.

permission to register ("*Eintragungsbewilligung*") of all registered concerned parties ("*Betroffene*"), which in this context accords to the seller and his potential creditors, in the form of an official deed ("*öffentliche Urkunde*"), and a proof of the "*Auflassung*" ("*Auflassungserklärung*"), which is submitted in the form of an official deed ("*öffentliche Urkunde*").[872] Importantly, the application for registration must be in compliance with the permission to register.[873] The original deeds ("*Urschriften*") are kept by the notary.[874] Above all, the registration must be valid and in compliance with the *Auflassung*.[875]

Generally, these documents can be submitted by all parties concerned.[876] In this context, this includes not only the buyer and the seller but also by all other parties, who are either positively or negatively affected by the intended entry in the land register (such as the banks that finance the purchase price).[877] It is even possible that the application is submitted by more than one party.[878]

[872] § § 13, 19, 20, 29, 39 GBO. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 135 (§ 873 (nr.101)). Although the seller's permission is required ("*formelles Konsensprinzip*" or "*Bewilligungsgrundsatz*"), it is to be noted that it is not necessary to explicitly declare the permission to register (although it facilitates the registration process within the land registry). The concerned parties may also authorize the notary to declare the permission to register on their behalf. See: S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: Einleitung zum Sachenrecht: § § 854-882 (Besitz und Allgemeines Liegenschaftsrecht 1)*, Berlin: Sellier – de Gruyter, 2018, p. 471-478 (§ 873 (nr.249-259)). For a more critical approach, see: D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 87-90. On the formal requirements in general, see H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 5. Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 274. In specific situations, additional documents may be needed. For an overview, see: W. Wiegand (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 925-984; Anhang zu § § 929 ff: Eigentum 2 – Erwerb und Verlust des Eigentums*, Berlin: Selier – de Gruyter, 2017, p. 89-90 (§ 925 (nr.100)) and H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 133 and K. Stöber, *GBO-Verfahren und Grundstückssachenrecht*, München: Verlag C.H. Beck, 1998, p. 115.

[873] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 73.

[874] § 45 I BeurkG. The exception to this rule is laid down in § 45 II BeurkG. According to this provision, the original deed can be handed out if it is to be used in a foreign country and provided that all parties, who can demand an official copy, agree. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 127.

[875] § 873 I BGB. Also see W. Wiegand (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 925-984; Anhang zu § § 929 ff: Eigentum 2 – Erwerb und Verlust des Eigentums*, Berlin: Selier – de Gruyter, 2017, p. 95, 100(§ 925 (nr.106, 114)) and K. Schellhammer, *Sachenrecht nach Anspruchsgrundlagen samt Wohnungseigentums- und Grundbuchrecht*, Heidelberg: C.F. Müller, 2017, p. 136.

[876] § 13 I GBO.

[877] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 128. D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 76-77.

Furthermore, the notary will, on behalf of the parties, submit the application to the land registry, except if the parties decide otherwise.[879] Depending on whether the relevant state law has provided for a legal framework that allows digital submission of documents to the land register, the notary will either submit these documents analogously or digitally.[880]

3.2.8.3 The Submission of the Deed to the Land Registry

To record the exact point of time (day, hour, minute) at which the application was received by the land registry and the number of annexes, the application will be furnished with a receipt stamp ("*Präsentat*") and a signature of the person who received the application.[881] It is the receipt of the application by that particular person that marks the arrival of the application.[882] Thus, if the application is factually present in the building of the court, but has not been received by the responsible person yet, the application is considered to not have been received.[883] Afterwards, the application must be (digitally) recorded.[884] All deeds that form part of the *Grundakten* receive a reference number ("*Geschäftsnummer*"), which constitutes a combination of a file number ("*Aktenzeichen*") that consists of the plot's cadastral district(s) ("*Gemarkung*") and folio, and a serial number ("*Ordnungsnummer*").[885] Within the land registry, this task is conferred upon a land registrar or upon a particular civil servant ("*Präsentatsbeamter*").[886] Upon request, the notary will

[878] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 128.
[879] § 15 II GBO. § 59 BeurkG. Due to the legal assumption of authority on the side of the notary, it is not required that the parties consent to the submission of the documents by the notary. See: H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 898, 902-903 and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 80-84 and D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 80.
[880] See Chapter 3.2.10.1.
[881] § 13 II GBO. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 110-111 and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 16.
[882] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 83. Also see S. Hügel, *GBO: Grundbuchordnung: Kommentar*, München: Verlag C.H. Beck, 2016, p. 282.
[883] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 83.
[884] H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 17.
[885] H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 19.
[886] § 13 III GBO. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 110 and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 16 and D. Eickmann & R. Böttcher,

receive a notice of receipt.[887] To prepare the entry of the deed in the land register and to support the land registrar, a civil servant of the intermediate judicial services is entrusted with the incurring administrative tasks (the so-called "*Grundbuchführer*"). As such they prepare the preliminary entries by creating an electronic module that is entered in the land register and are in charge of the distribution of the formal notifications.[888]

The land registrar will then examine whether the formal registration requirements ("*Eintragungsvoraussetzungen*") have been fulfilled ("*Legalitätsprinzip*").[889] On the contrary, an examination of the fulfilment of the requirements for the transfer of the plot that follow from substantive property law is not carried out.[890] To illustrate, the land registrar must thus refrain from examining the substantive validity of the *Auflassung*.[891] This is only different if concrete

Grundbuchverfahrensrecht, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 39 and K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 813.

[887] H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 17. See for example: § 16 II Geschäftliche Behandlung der Grundbuchsachen (Grundbuchgeschäftsanweisung - GBGA -), AV d. JM vom 28. August 2007 (3850 - I. 58) (JMBl. NRW S. 217) and § 30 II Geschäftliche Behandlung der Grundbuchsachen (Grundbuchgeschäftsanweisung des Landes Brandenburg - BrandGBGA) vom 22. Juli 1993 (JMBl/93, [Nr. 8], S.128).

[888] For more details regarding the electronic module and the digital land register, see Chapter 3.2.10.1.

[889] W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 105. For a "checklist", see: H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 148-149 and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 94-95. Also see S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: Einleitung zum Sachenrecht: § § 854-882 (Besitz und Allgemeines Liegenschaftsrecht 1)*, Berlin: Sellier – de Gruyter, 2018, p. 313-314 (Vorbem zu § § 873-902 (nr.46)) and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 6 and D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 66-67 and J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 62-63 and K. Stöber, *GBO-Verfahren und Grundstückssachenrecht*, München: Verlag C.H. Beck, 1998, p. 147 and W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 145-146 and J.F. Baur & R. Stürner, *Sachenrecht*, München: Verlag C.H. Beck, 2009, p. 189.

[890] S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: Einleitung zum Sachenrecht: § § 854-882 (Besitz und Allgemeines Liegenschaftsrecht 1)*, Berlin: Sellier – de Gruyter, 2018, p. 313-314 (Vorbem zu § § 873-902 (nr.46)). Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 128 and W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 105, 145 and J.F. Baur & R. Stürner, *Sachenrecht*, München: Verlag C.H. Beck, 2009, p. 189.

[891] S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: Einleitung zum Sachenrecht: § § 854-882 (Besitz und Allgemeines Liegenschaftsrecht 1)*, Berlin: Sellier – de Gruyter, 2018, p. 313-314, 476 (Vorbem zu § § 873-902 (nr.46), §

doubts concerning the validity arise.[892] However, land registrars may not grant aid to the falsification of the land register.[893] Therefore, if they are certain that the land register would be falsified if they permitted the registration of a transfer of land, they must, on the basis of the legality principle, reject the application even if the formal registration requirements are fulfilled.[894] But what are the registration requirements that are checked? The answer to the question depends on the application filed, though the following five requirements must be met by all applications.[895] First of all, the application for registration must be on hand and filed by an eligible person, which (in this context) can be both the buyer and the seller.[896] The application is not subject to formal requirements but its content must be clear and may not be conditional.[897] Second, the application must have been filed at the competent land registry.[898] Third, the application has to be capable of registration ("*Eintragungsfähigkeit*").[899] Fourth, the seller's permission to register must be submitted.[900] To be valid, the permission must be submitted in the form of a (certified) official deed.[901] Fifth, it is examined whether the seller is entitled to transfer the plot.[902] Hereby, the registrar may rely on § 891 BGB and therefore must only examine whether the seller is registered as the plot's owner in the land register.[903] In case of a transfer, the land registrar must further check the proof of the *Auflassung*, which must also be poured in the form of a (certified) official deed.[904] Last, it must be inspected whether the application for registration is subject to conditions.[905] If this

873 (nr.256)). For an opposing view, see: D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 228.

[892] Ibid.

[893] K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 834. Also see M. Wellenhofer, *Sachenrecht*, München: Verlag C.H. Beck, 2018, p. 258-259.

[894] Ibid.

[895] S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: Einleitung zum Sachenrecht: § § 854-882 (Besitz und Allgemeines Liegenschaftsrecht 1)*, Berlin: Sellier – de Gruyter, 2018, p. 470 (§ 873 (nr. 247)).

[896] § 13 GBO. Also see H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 106.

[897] § 16 GBO. Also see H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 106.

[898] § 1 GBO.

[899] S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: Einleitung zum Sachenrecht: § § 854-882 (Besitz und Allgemeines Liegenschaftsrecht 1)*, Berlin: Sellier – de Gruyter, 2018, p. 470 (§ 873 (nr. 247)). The cited source also contains an overview of the registration requirements that apply in the various specific circumstances.

[900] § 19 GBO. Also see H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 107.

[901] § 29 GBO.

[902] § 39 I GBO.

[903] J.F. Baur & R. Stürner, *Sachenrecht*, München: Verlag C.H. Beck, 2009, p. 190.

[904] § § 20, 29 GBO.

[905]§ 16 I GBO. Also see S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: Einleitung zum Sachenrecht: § § 854-882 (Besitz und Allgemeines Liegenschaftsrecht 1)*, Berlin: Sellier – de Gruyter, 2018, p. 471 (§ 873 (nr. 249)).

is the case, the application must be rejected.[906] One is not to be mistaken that what sounds like a relatively speedy procedure on paper, can consume several months in practice, depending on the workload of the land registry and the complexity of the individual case.[907]

If the registration requirements are all met and the application is thus in order, the land registrar will clear the electronic module that was prepared by the *Grundbuchführer* and thereby initiate its registration.[908] If this is not the case, two different scenarios are possible; either the land registrars will grant the notary the possibility to rectify the shortcoming(s) ("*Zwischenverfügung*") or they will reject the application ("*Zurückweisung*").[909] The rectification belongs to the possibilities when the shortcoming can be easily 'repaired'.[910] It has to be completed within a given period of time that is to be determined by the land registry.[911] If the notaries fail to complete their task on time, the rejection of the application will follow.[912] The land registrar's decision to make the application dependent on the rectification of the shortcomings or to reject an application can be appealed against at the competent Higher Regional Court ("*Oberlandesgericht*").[913]

3.2.8.4 The Proof of Registration

If the application is successful, the land registry will inform the notary who filed the application, the requester, the registered owner of the plot, all other parties that appear from the land register and who are either positively or negatively affected by the new entry, as well as the cadastral authority

[906] § 16 I GBO.
[907] H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 146.
[908] S. Herrler (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: Einleitung zum Sachenrecht: § § 854-882 (Besitz und Allgemeines Liegenschaftsrecht 1)*, Berlin: Sellier – de Gruyter, 2018, p. 314 (§ 873ff (nr. 47)). Also see W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 133.
[909] § 18 I GBO. Also see J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 189-190 and W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 133 and K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 836-837.
[910] J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 189. For an overview of situations in which a rectification is out of scope, see: W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 134-141.
[911] § 18 I GBO. Also see K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 837.
[912] Ibid.
[913] § 71 I, 72 GBO.

that registration has occurred.[914] In practise it can be observed that it is often not the land registry that informs the parties directly; instead they receive the proof of registration from the hands of the notary.[915] Last, the notary must archive the deed and the corresponding documents in accordance with the respective Documentation Order ("*Aktenordnung*") and the DONot.[916]

3.2.9 The Object of Transfer – Where is the "Boundary"?

Before attention shall be given to the geographical definition of the plot, it must be understood, that different concepts are used under the civil law and by the cadastre to indicate a specific section of the world's surface.[917] The concept that is adhered to in German civil law ("*Grundstück*") refers to the numerical description of the plot as contained in the inventory (column 1) of the land register.[918] The concept that is adhered to by the cadastre ("*Flurstück*") refers to a section of the world's surface that is employed as the recording unit ("*Buchungseinheit*") by the cadastre and is as such indicated by a unique number.[919] To distinguish these two concepts, the cadastral 'plot' will in

[914] § 55 I, III GBO. Also see H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 86 and D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 260.
[915] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 130.
[916] § 45 I BeurkG.
[917] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 46-47.
[918] Ibid. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 113-114 and K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 5.
[919] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 14. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 46. Also see § 5 III Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG) vom 31. Juli 1970 (BayRS III S. 687), zuletzt geändert durch § 1 Abs. 181 der Verordnung vom 26. März 2019 (GVBl. S. 98); § 15 II Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160); § 4 I (1) Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz) vom 16. Oktober 1990 (Brem.GBl. 1990, 313), zuletzt geändert durch Art. 4 G zur Anpassung von Vorschriften aus dem Bereich Umwelt und Bau an die europäische Datenschutz-Grundverordnung vom 18.12.2018 (Brem.GBl. S. 651); § 8 III Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § 2 (3) Hamburgisches Gesetz über das Vermessungswesen (Hamburgisches Vermessungsgesetz – HmbVermG) vom 20. April 2005 (HmbGVBl. 2005, S. 135), zuletzt geändert durch Artikel 4 des Gesetzes vom 31. August 2018 (HmbGVBl. S. 282, 284); § 10 I Hessisches Gesetz über das öffentliche Vermessungs- und Geoinformationswesen (Hessisches Vermessungs- und Geoinformationsgesetz – HVGG) vom 6. September 2007 (GVBl. I S. 548)), zuletzt geändert durch Artikel 29 des Gesetzes vom 3. Mai 2018 (GVBl. S. 82); § 22 II Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), zuletzt geändert durch Artikel 7

the following be referred to as 'parcel'. Importantly, each parcel corresponds to one specific plot.[920] Each plot on the other hand can consist of one ("*Idealgrundstück*") or more parcels ("*zusammengesetztes Grundstück*").[921]

As will be explained in Chapter 4.1.3, a plot of land can be defined by a multitude of distinctive boundary indications. If these indications differ, it is to be determined which boundary indication is given priority to. First of all, it must be pointed out that in opposite to other legal systems, the run of the boundary ("*Grenzverlauf*") can be legally relied upon in the German legal system as it falls under the legal presumption as laid down in § 891 BGB and the notion of public faith as enshrined in § 892 BGB.[922] Other information that describes a particular plot of land, such as its size, location,

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des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 2 II Niedersächsisches Gesetz über das amtliche Vermessungswesen (NVermG) vom 12. Dezember 2002 (GVBl. Nr.1/2003 S.5), zuletzt geändert durch Art. 9 G zur Neuordnung des niedersächsischen Datenschutzrechts vom 16.5.2018 (Nds. GVBl. S. 66); § 11 II Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256); § 3 II Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § 11 I Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § 11 II Gesetz über die Landesvermessung und das Liegenschaftskataster im Freistaat Sachsen (Sächsisches Vermessungsgesetz – SächsVermG) vom 12. Mai 2003 (SächsGVBl. S. 121), zuletzt geändert durch Artikel 5 des Gesetzes vom 10. April 2007 (SächsGVBl. S. 54); § 11 I Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510); § 12 III Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG -) vom 12. Mai 2004 (GL. Nr. 219-9), zuletzt geändert (Art. 18 LVO v. 16.01.2019, GVOBl. S. 30); § 9 II Thüringer Vermessungs- und Geoinformationsgesetz (ThürVermGeoG) vom 16. Dezember 2008 (GVBl. S. 574), zuletzt geändert durch Artikel 42 des Gesetzes vom 18. Dezember 2018 (GVBl. S. 731, 760).

[920] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 47.

[921] S. Hügel, *GBO: Grundbuchordnung: Kommentar*, München: Verlag C.H. Beck, 2016, p. 128. Also see D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 46-47.

[922] This is a consequence of § 2 II and III GBO. See M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 295. Further, a call on § § 891 and 892 BGB cannot be honored when the cadastral boundary is indicated as disputed. See M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 324. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 292 (§ 891 (nr. 6)) and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 165. It is important to notice that the run of the boundary only falls under § 891 BGB as long as it coincides with the boundary that is accepted and marked in the territory by means of boundary stones by the owners of the bordering plots. See K-H. Gursky (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3 – Sachenrecht: § § 903-924 (Eigentum 1 – Privates Nachbarrecht)*, Berlin: Sellier-de Gruyter, 2016, p. 455 (§ 919, nr. 18).

or exploitation in principle do not fall under the legal presumption nor under the notion of public faith considering that they merely describe facts and not rights.[923]

The cadastral map is indicative for the run of the boundaries.[924] The cadastral boundary indication finds its way to the land register, as the cadastral map is divided into parcels whose numbers ("*Flurstücksnummern*") again are referred to in the inventories (column 3b) of the land register's folios.[925] This is important as the cadastre and the land register have to comply with each other as they are interlinked.[926] Thus, when a specific plot is transferred, the plot as indicated in the land

[923] RG, Urteil vom 12. Februar 1910 - V 72/09. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht*, München: Verlag C.H. Beck, 2015, p. 179 and R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 292 (§ 891 (nr. 6)). As follows from the aforementioned source, the run of the boundary and in some instances also information regarding size and location of the plot enjoy the status of a right.

[924] R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 292 (§ 891 (nr. 6)).

[925] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 14, 114. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 292 (§ 891 (nr. 6)) and K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 4-5.

[926] § 2 II and III GBO. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 13 and S. Hügel, *GBO: Grundbuchordnung: Kommentar*, München: Verlag C.H. Beck, 2016, p. 126. Also see § 4 III (2) Vermessungsgesetz für Baden-Württemberg (VermG) vom 1. Juli 2004 (GBl. S. 469), zuletzt geändert durch Artikel 55 der Verordnung vom 23. Februar 2017 (GBl. S. 99, 105); § 6 I Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG) vom 31. Juli 1970 (BayRS III S. 687), zuletzt geändert durch § 1 Abs. 181 der Verordnung vom 26. März 2019 (GVBl. S. 98); § 16 I Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160); § 5 III Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz) vom 16. Oktober 1990 (Brem.GBl. 1990, 313), zuletzt geändert durch Art. 4 G zur Anpassung von Vorschriften aus dem Bereich Umwelt und Bau an die europäische Datenschutz-Grundverordnung vom 18.12.2018 (Brem.GBl. S. 651); § 8 II Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § 23 I Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 11 V, VIII Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256); § 10 II Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § 13 I Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § § 11 I, 13 II Gesetz über die Landesvermessung und das Liegenschaftskataster im Freistaat Sachsen (Sächsisches Vermessungsgesetz – SächsVermG) vom 12. Mai 2003 (SächsGVBl. S. 121), zuletzt geändert durch Artikel 5 des Gesetzes vom 10. April 2007 (SächsGVBl. S. 54), § 9 VII Thüringer Vermessungs- und Geoinformationsgesetz (ThürVermGeoG) vom 16. Dezember 2008 (GVBl. S. 574), zuletzt geändert durch Artikel 42 des Gesetzes vom 18. Dezember 2018 (GVBl. S. 731, 760).

register is subject to transfer.[927] This even entails that when the parcel number does not only refer to the intended plot but also to a part of a neighbouring plot, the buyer will also become the owner of the latter part.[928] An exception to this general rule is only possible in the situation in which both seller and buyer agree that the intended plot shall be made subject of transfer.[929] As stated above, not all plots of land must be registered in the land register. If a plot that falls in this category has not been registered yet, but is to be transferred, then it is only logical that the object of transfer cannot be defined by the consecutive number of the plot in the land register. Instead, the cadastral parcel will be resorted to in order to define the object of transfer.[930]

In practice, it can be observed that the formulations that are employed in the notarial deed to describe the subject of transfer often suggest that it is the physical boundary and not the cadastral boundary that is indicative for defining the size and the shape of the plot.[931] If cadastral and physical boundaries coincide, this formulation obviously will not have any detrimental effect. However, in the situation in which this is not the case, this entails that the buyer is entitled to the plot as defined by its physical boundaries.[932] Thus, if the physical boundaries indicate a larger plot than the cadastral boundary, the seller will in not be able to fulfil his contractual obligations unless he also owns the respective neighbouring plot.[933]

3.2.9.1 The Determination of Cadastral Boundaries

A frequent situation in which new cadastral boundaries have to be determined occurs when a plot of land, which consists of only one parcel, is to be divided into two or more plots ("*Teilung*").[934] In

[927] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 14. Also see W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 29.
[928] R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 305 (§ 892 (nr. 17)).
[929] Ibid.
[930] W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 29.
[931] An example of such a formulation is: "as inspected in the territory" ("*wie es an Ort und Stelle besichtigt wurde*"). See: M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 148.
[932] M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 149.
[933] Ibid. Also see § 433 I BGB.
[934] On the contrary, a division of plot that only comes down to the division of its parcels but not of the division of the plot as such is referred to as "*Zerlegung*". See: U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn:

order to effectuate the division of the plot, the parcel has to be divided as each plot has to consist of at least one parcel.[935] As follows from § 28 GBO, it is impossible to transfer either parcel before the division of the plot has been finalized.[936] However, a contract of sale, in which either parcel forms the subject of transfer can already be concluded under the condition that the parties agree on the size, shape and location of the part of the plot that is to be transferred.[937] In practise, this can be achieved by complementing the contract of sale with a drawing of the plot that indicates which part of the plot is intended to be the subject of transfer. This requirement is to accommodate the principle of specificity ("*Spezialitätsprinzip*"), which, if it is not fulfilled, renders the contract of sale void.[938] To this end, in practice, a graphic indication of the plot in the form of a (certified) map or drawing is often attached to the contract of sale.[939] By the same token, it is viable to conclude the *Auflassung* at this stage.[940] The benefit of notarizing the *Auflassung* together with the contract of sale lies in cost efficiency.[941] The crux of the matter is only that the *Auflassung* cannot be registered

Deutscher Notarverlag, 2019, p. 411-412 and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 306. Noteworthy, the BGB does not contain rules regarding the division of plots. See: K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 9. Also see D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 52. Important to notice is that an explicit legal framework that governs the division of the plot is absent and that the owner's entitlement to divide his plot is deemed to be contained in § 903 BGB. See W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 100 and K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 820.

[935] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 52. The following explanation is a description of the division process that occurs on the basis of an application ("*Antragsverfahren*"). (Partly) different rules govern a division on the basis of an administrative procedure ("*Amtsverfahren*"). See: J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 15-16.

[936] K. Schellhammer, *Sachenrecht nach Anspruchsgrundlagen samt Wohnungseigentums- und Grundbuchrecht*, Heidelberg: C.F. Müller, 2017, p. 137.

[937] Ibid. Also see BGH, Urteil vom 18. Januar 2008 - V ZR 174/06 (para. 23) and M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 149-150.

[938] M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 150-151.

[939] Ibid.

[940] BGH, Urteil vom 18. Januar 2008 - V ZR 174/06 (para. 23).

[941] If the contract of sale and the Auflassung are not notarized consecutively, the costs that the notary may bring to account are higher. See: Gesetz über Kosten der freiwilligen Gerichtsbarkeit für Gerichte und Notare (Gerichts- und Notarkostengesetz – GNotKG) vom 23. Juli 2013 (BGBl. I S. BGBL Jahr 2013 I Seite 2586) (FNA 361-6), zuletzt geändert durch Art. 7 G zum Internationalen Güterrecht und zur Änd. von Vorschriften des Internationalen Privatrechts vom 17.12.2018 (BGBl. I S. BGBL Jahr 2018 I Seite 2573) and H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 53.

before the newly to be formed plots have become visible in (column 1 of the inventory of) the land register.[942]

The division of a plot begins with a request from the plot's owner.[943] The applicant may choose whether he assigns this task to a publicly appointed and self-employed land surveyor ("*beliehener Vermessungsingenieur*") or by the land surveying and cadastral office ("*Vermessungs- und Katasteramt*").[944] However, in practise, this task is generally entrusted to the former. For this reason, the following description shall reflect the situation in which a publicly appointed and self-employed land surveyor is instructed. To illustrate where the plot has to be divided, the applicant has to include a map ("*Abzeichung der Flurkarte*") that indicates the intended run of the new

[942] BGH, Urteil vom 18. Januar 2008 - V ZR 174/06 (para. 23).
[943] The owner's entitlement to request such a division follows from § 903 BGB and § 13 I GBO. Also see H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 305 and H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 16.
[944] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 16. Also see § § 9 I, 11 I Vermessungsgesetz für Baden-Württemberg (VermG) vom 1. Juli 2004 (GBl. S. 469), zuletzt geändert durch Artikel 55 der Verordnung vom 23. Februar 2017 (GBl. S. 99, 105); § 2 II Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160); § 2 V Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz) vom 16. Oktober 1990 (Brem.GBl. 1990, 313), zuletzt geändert durch Art. 4 G zur Anpassung von Vorschriften aus dem Bereich Umwelt und Bau an die europäische Datenschutz-Grundverordnung vom 18.12.2018 (Brem.GBl. S. 651); § 26 III Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § 16 I Hamburgisches Gesetz über das Vermessungswesen (Hamburgisches Vermessungsgesetz – HmbVermG) vom 20. April 2005 (HmbGVBl. 2005, S. 135), zuletzt geändert durch Artikel 4 des Gesetzes vom 31. August 2018 (HmbGVBl. S. 282, 284); § 5 II (4) Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 6 II Niedersächsisches Gesetz über das amtliche Vermessungswesen (NVermG) vom 12. Dezember 2002 (GVBl. Nr.1/2003 S.5) zuletzt geändert durch Art. 9 G zur Neuordnung des niedersächsischen Datenschutzrechts vom 16.5.2018 (Nds. GVBl. S. 66); § 2 II Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256); § § 2 II, 2a I Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § § 3 I, 20 I Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § § 2 II (4), 19 I Gesetz über die Landesvermessung und das Liegenschaftskataster im Freistaat Sachsen (Sächsisches Vermessungsgesetz – SächsVermG) vom 12. Mai 2003 (SächsGVBl. S. 121), zuletzt geändert durch Artikel 5 des Gesetzes vom 10. April 2007 (SächsGVBl. S. 54); § 1 II Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510).

boundary.[945] As a first step, the land surveyor will additionally have to collect the needed information at the cadastre. Once the necessary information is collected, the plot is surveyed with the help of modern survey techniques (such as GPS or polar survey ("*Polaraufnahme*").[946] In principle, the new boundary will be marked (usually by means of boundary stones) in the territory ("*Abmarkung*").[947] In the course of a meeting with the parties ("*Grenztermin*") that takes place after

[945] O. Kriegel, *Grundstücksteilungen: Die Buchungsvorgänge im Kataster und im Grundbuch*, Hamburg: Hanseatische Verlagsanstalt GmbH, 1958, p. 15. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 16.

[946] In specific circumstances, a survey is not necessary. This is the case when new boundary can be determined on the basis of two already established points on the parcel's boundary or when the new boundary already exists both on the cadastral map (which occurs under the specific circumstance in which the parcel that is to be divided does not consist of one integral part but in fact is the sum of two distinct parts) and in the territory ("*Sonderung*") or within the context of new building projects (again, only under special circumstances). See M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 196-197 and § § 3 VI, 15 Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448) and § 17 II (2) Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches VVermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674) and § 12 I Gesetz über die Landesvermessung und das Liegenschaftskataster im Freistaat Sachsen (Sächsisches Vermessungsgesetz – SächsVermG) vom 12. Mai 2003 (SächsGVBl. S. 121), zuletzt geändert durch Artikel 5 des Gesetzes vom 10. April 2007 (SächsGVBl. S. 54). Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 16.

[947] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 16. Also see § 6 I Vermessungsgesetz für Baden-Württemberg (VermG) vom 1. Juli 2004 (GBl. S. 469), zuletzt geändert durch Artikel 55 der Verordnung vom 23. Februar 2017 (GBl. S. 99, 105); § 22 II Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160); § 15 I-II Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz) vom 16. Oktober 1990 (Brem.GBl. 1990, 313), zuletzt geändert durch Art. 4 G zur Anpassung von Vorschriften aus dem Bereich Umwelt und Bau an die europäische Datenschutz-Grundverordnung vom 18.12.2018 (Brem.GBl. S. 651); § 15 I Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § 14 I Hessisches Gesetz über das öffentliche Vermessungs- und Geoinformationswesen (Hessisches Vermessungs- und Geoinformationsgesetz – HVGG) vom 6. September 2007 (GVBl. I S. 548)), zuletzt geändert durch Artikel 29 des Gesetzes vom 3. Mai 2018 (GVBl. S. 82); § 30 I Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 4 I Niedersächsisches Gesetz über das amtliche Vermessungswesen (NVermG) vom 12. Dezember 2002 (GVBl. Nr.1/2003 S.5), zuletzt geändert durch Art. 9 G zur Neuordnung des niedersächsischen Datenschutzrechts vom 16.5.2018 (Nds. GVBl. S. 66); § 20 I Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256); § 16 I Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § 18 Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § 16 Gesetz über die Landesvermessung und das Liegenschaftskataster im Freistaat Sachsen (Sächsisches Vermessungsgesetz – SächsVermG) vom 12.

the new boundary has been surveyed, the surveyor will inform the parties about the run of the boundary in the territory, who in turn will declare that they recognize it.[948] Yet, the absence of a

Mai 2003 (SächsGVBl. S. 121), zuletzt geändert durch Artikel 5 des Gesetzes vom 10. April 2007 (SächsGVBl. S. 54); § 16 II Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510); § 18 I-II Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG -) vom 12. Mai 2004 (GL. Nr. 219-9), zuletzt geändert (Art. 18 LVO v. 16.01.2019, GVOBl. S. 30); § 14 I Thüringer Vermessungs- und Geoinformationsgesetz (ThürVermGeoG) vom 16. Dezember 2008 (GVBl. S. 574), zuletzt geändert durch Artikel 42 des Gesetzes vom 18. Dezember 2018 (GVBl. S. 731, 760).. In certain specific situations, an "*Abmarkung*" is not necessary. See: § 6 III Vermessungsgesetz für Baden-Württemberg (VermG) vom 1. Juli 2004 (GBl. S. 469), zuletzt geändert durch Artikel 55 der Verordnung vom 23. Februar 2017 (GBl. S. 99, 105); § 15 I Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § 30 II-IV Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 20 II Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256); § 16 I Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § 18 Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § 16 II Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510); § 18 II Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG -) vom 12. Mai 2004 (GL. Nr. 219-9), zuletzt geändert (Art. 18 LVO v. 16.01.2019, GVOBl. S. 30).

[948] § 21 II Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160); § 16 Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § 3 V Hamburgisches Gesetz über das Vermessungswesen (Hamburgisches Vermessungsgesetz – HmbVermG) vom 20. April 2005 (HmbGVBl. 2005, S. 135), zuletzt geändert durch Artikel 4 des Gesetzes vom 31. August 2018 (HmbGVBl. S. 282, 284); § 13 II Hessisches Gesetz über das öffentliche Vermessungs- und Geoinformationswesen (Hessisches Vermessungs- und Geoinformationsgesetz – HVGG) vom 6. September 2007(GVBl. I S. 548)), zuletzt geändert durch Artikel 29 des Gesetzes vom 3. Mai 2018 (GVBl. S. 82); § 31 II Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 21 II-III Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256); § 17 I Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § 19 I Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § 15 III Gesetz über die Landesvermessung und das Liegenschaftskataster im Freistaat Sachsen (Sächsisches Vermessungsgesetz – SächsVermG) vom 12. Mai 2003 (SächsGVBl. S. 121), zuletzt geändert durch Artikel 5 des Gesetzes vom 10. April 2007 (SächsGVBl. S. 54); § 17 I Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510); § 19 II Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG -) vom 12. Mai 2004 (GL. Nr. 219-9), zuletzt geändert (Art. 18 LVO v. 16.01.2019, GVOBl. S. 30).

party does not necessarily frustrate the establishment of a new boundary.[949] The findings of this meeting will be laid down in a protocol ("*Grenzniederschrift*") and a written notification ("*Grenzfeststellungsbescheid*") will be sent to the parties.[950] The surveyors will then submit the protocol and their calculations together with the point data ("*NAS Daten*") to the cadastral authority.[951] On the basis of this information, the cadastre will be updated.[952] For internal purposes,

[949] The surveyor must inform the parties about this circumstance in the invitation to the "*Grenztermin*". See: § 16 II Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § 3 V Hamburgisches Gesetz über das Vermessungswesen (Hamburgisches Vermessungsgesetz – HmbVermG) vom 20. April 2005 (HmbGVBl. 2005, S. 135), zuletzt geändert durch Artikel 4 des Gesetzes vom 31. August 2018 (HmbGVBl. S. 282, 284); § 31 II Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 21 III Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256); § 15 III Gesetz über die Landesvermessung und das Liegenschaftskataster im Freistaat Sachsen (Sächsisches Vermessungsgesetz – SächsVermG) vom 12. Mai 2003 (SächsGVBl. S. 121), zuletzt geändert durch Artikel 5 des Gesetzes vom 10. April 2007 (SächsGVBl. S. 54); § 17 I Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510).

[950] § 21 II-III Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160); § § 16 III, 17 I Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § 3 V Hamburgisches Gesetz über das Vermessungswesen (Hamburgisches Vermessungsgesetz – HmbVermG) vom 20. April 2005 (HmbGVBl. 2005, S. 135), zuletzt geändert durch Artikel 4 des Gesetzes vom 31. August 2018 (HmbGVBl. S. 282, 284); § § 10 IV, 13 II Hessisches Gesetz über das öffentliche Vermessungs- und Geoinformationswesen (Hessisches Vermessungs- und Geoinformationsgesetz – HVGG) vom 6. September 2007(GVBl. I S. 548)), zuletzt geändert durch Artikel 29 des Gesetzes vom 3. Mai 2018 (GVBl. S. 82), § 31 IV Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), Änderung zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § 21 IV Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256); § 17 II Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § 19 II-III Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § 17 II Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510); § 19 III Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG -) vom 12. Mai 2004 (GL. Nr. 219-9), zuletzt geändert (Art. 18 LVO v. 16.01.2019, GVOBl. S. 30); § 10 III-IV Thüringer Vermessungs- und Geoinformationsgesetz (ThürVermGeoG) vom 16. Dezember 2008 (GVBl. S. 574), zuletzt geändert durch Artikel 42 des Gesetzes vom 18. Dezember 2018 (GVBl. S. 731, 760).

[951] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 16. Also see § 9 I Vermessungsgesetz für Baden-Württemberg (VermG) vom 1. Juli 2004 (GBl. S. 469), zuletzt geändert durch Artikel 55 der Verordnung vom 23. Februar 2017 (GBl. S. 99, 105); § § 4, 23 Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160); § § 2

this update will be recorded in a written document that indicates both the old and new parcel number ("*Fortführungsnachweis*"). To effectuate the formation of the new plots under the civil law, the cadastral division has to be communicated by the cadastral authority to the land registry through the so-called notice of continuation ("*Mitteilung über die Fortführung*"), which constitutes the counterpart of the *Fortführungsnachweis*.[953] Additionally, the submission of a certified map of the respective area might form an additional requirement on the basis of federal state.[954] Furthermore, the cadastral authority will send a notice of continuation to the tax authority and a notice indicating the old and new parcel numbers and containing the cadastral map

VII, 19-20 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz) vom 16. Oktober 1990 (Brem.GBl. 1990, 313), zuletzt geändert durch Art. 4 G zur Anpassung von Vorschriften aus dem Bereich Umwelt und Bau an die europäische Datenschutz-Grundverordnung vom 18.12.2018 (Brem.GBl. S. 651); § 22 I Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § 14 III Hessisches Gesetz über das öffentliche Vermessungs- und Geoinformationswesen (Hessisches Vermessungs- und Geoinformationsgesetz – HVGG) vom 6. September 2007(GVBl. I S. 548)), zuletzt geändert durch Artikel 29 des Gesetzes vom 3. Mai 2018 (GVBl. S. 82); § 31 Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 22. Juli 2002 (GVOBl. M-V S. 524), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204); § § 4 I, 21 Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256); § § 4 I, 17 Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § 19 Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), Änderung zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § § 3 I, 17 Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510); § 5 I Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG -) vom 12. Mai 2004 (GL. Nr. 219-9), zuletzt geändert (Art. 18 LVO v. 16.01.2019, GVOBl. S. 30).

[952] H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 17. Also see K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 10.

[953] O. Kriegel, *Grundstücksteilungen: Die Buchungsvorgänge im Kataster und im Grundbuch*, Hamburg: Hanseatische Verlagsanstalt GmbH, 1958, p. 27. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 17 and W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 53. Also see § 3 I Hamburgisches Gesetz über das Vermessungswesen (Hamburgisches Vermessungsgesetz – HmbVermG) vom 20. April 2005 (HmbGVBl. 2005, S. 135), zuletzt geändert durch Artikel 4 des Gesetzes vom 31. August 2018 (HmbGVBl. S. 282, 284); § 17 IV Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]); § 12 IV Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510).

[954] H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 308.

("*Auflassungsschrift*") to the land surveyor.[955] Provided that the land registry has received the permission of the plot's owner together with the corresponding application, the parcels that were formed in the process of division will then each be indicated by a unique number in the folio's inventory (column 1).[956] The plot's owner will be informed over the division both by cadastral authority ("*Kenntnisnahme*") and the land registry.[957] The notice that is sent to the owner by the former has the same content than the notice that is sent to the land surveyor ("*Auflassungsschrift*") but also contains information on the available legal remedies. In a last step, the cadastral authority will archive all documents. Finally, to close the circle, once the newly formed plot is transferred to the buyer, the land registry will once more inform the cadastral authority, so that the compliance of land register and cadastre can be assured.

To visualize a fixed undisputed cadastral boundary that is identified in the field, § 919 BGB provides a legal basis for each plot owner to request their neighbour(s) to participate in the positioning of permanent boundary stones.[958] This entitlement also extends to the re-establishment of boundary stones if they were moved or cannot be recognized anymore.[959] It is important in this context to indicate that while the allocation of boundary stones accounts for an important source of evidence, it does not influence the ownership structure due to the fact that a constitutive effect cannot be attributed to this allocation.[960] Yet, despite the legal obligation to place boundary stones, there are situations in which the run of the boundary is disputed or simply unclear. As shall be explained in the following, these can be grouped in three main categories. The first category targets the situation

[955] Information on who requests such a "*Auflassungsschrift*" is announced on the protocol ("*Grenzniederschrift*"). Usually, it is the land surveyor who receives the notice, but it is possible that also the notary receives this notice. In the end, he is not able to transfer the ownership of the plot without being notified that the plot has been divided.
[956] § § 2 III, 13, 30 and 29 GBO. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 17 and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 307-308. Also see O. Kriegel, *Grundstücksteilungen: Die Buchungsvorgänge im Kataster und im Grundbuch*, Hamburg: Hanseatische Verlagsanstalt GmbH, 1958, p. 27-28 and U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 412, 419 and K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 821.
[957] § 55 GBO. Also see O. Kriegel, *Grundstücksteilungen: Die Buchungsvorgänge im Kataster und im Grundbuch*, Hamburg: Hanseatische Verlagsanstalt GmbH, 1958, p. 28.
[958] K-H. Gursky (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3 – Sachenrecht: § § 903-924 (Eigentum 1 – Privates Nachbarrecht)*, Berlin: Sellier-de Gruyter, 2016, p. 450 (§ 919, nr. 1).
[959] § 919 I BGB.
[960] K-H. Gursky (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3 – Sachenrecht: § § 903-924 (Eigentum 1 – Privates Nachbarrecht)*, Berlin: Sellier-de Gruyter, 2016, p. 455 (§ 919, nr. 16).

in which a dispute arises on the entitlement to a part of a particular plot whereby the party, who claims the ownership of the disputed part, is positive that he is able to prove his claim.[961] In this case, two different routes can be followed: the respective party can either initiate an action for a declaratory judgment with regard to ownership recognition ("*Eigentumsfeststellungsklage*") on the basis of § 256 I Code of Civil Procedure ("*Zivilprozessordnung*") or an action for the recognition of ownership ("*Eigentumsklage*") as provided for by § 985 BGB.[962] The second category applies to the situation in which the determination of the run of the boundary between two neighbouring plots is impossible ("*Grenzverwirrung*") so that neither neighbour is able to prove the run of the boundary on the basis of objective benchmarks.[963] The methods of surveying that are employed nowadays ensure however that this situation is not likely to occur.[964] If these cases occur, then they are referred to the court.[965] If possible, the court will then determine the run of the boundary on the basis of the status of possession ("*Besitzstand*").[966] If this is not possible, the disputed part will be split in two so that both neighbours will receive an equal share.[967] Alternatively, parties may decide to solve the problem by means of a contract in which the run of the boundary is determined ("*Grenzfeststellungsvertrag*").[968] Both the judgment of the court and the contract concluded by the

[961] R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 947 (§ 920 (nr. 1)).
[962] Ibid.
[963] M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 323. Also see K-H. Gursky (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3 – Sachenrecht: § § 903-924 (Eigentum 1 – Privates Nachbarrecht)*, Berlin: Sellier-de Gruyter, 2016, p. 458, 460 (§ 920, nr. 1, 6).
[964] K-H. Gursky (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3 – Sachenrecht: § § 903-924 (Eigentum 1 – Privates Nachbarrecht)*, Berlin: Sellier-de Gruyter, 2016, p. 459 (§ 920, nr. 1).
[965] In principle, both local courts ("*Amtsgericht*") and district courts ("*Landgericht*") are competent to give a ruling in these cases. The decision to which court such a case has to be referred to in a specific case is decided on the basis of the value of the claim. See K-H. Gursky (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3 – Sachenrecht: § § 903-924 (Eigentum 1 – Privates Nachbarrecht)*, Berlin: Sellier-de Gruyter, 2016, p. 461 (§ 920, nr. 9).
[966] § 920 I BGB.
[967] Ibid.
[968] R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 948-949 (§ 920 (nr. 8)). Also see § 13 III Hessisches Gesetz über das öffentliche Vermessungs- und Geoinformationswesen (Hessisches Vermessungs- und Geoinformationsgesetz – HVGG) vom 6. September 2007 (GVBl. I S. 548)), zuletzt geändert durch Artikel 29 des Gesetzes vom 3. Mai 2018 (GVBl. S. 82) and § 4 II Niedersächsisches Gesetz über das amtliche Vermessungswesen (NVermG) vom 12. Dezember 2002 (GVBl. Nr.1/2003 S.5), zuletzt geändert durch Art. 9 G zur Neuordnung des niedersächsischen Datenschutzrechts vom 16.5.2018 (Nds. GVBl. S. 66) and § 15 III Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448).

parties are constitutive.[969] In the third category, the run of the boundary is unclear, but its recognition is possible. The parties can then simply turn to a surveyor to visualize the boundary in the territory ("*Grenzwiederherstellung*").[970]

As a closing remark, it shall be pointed out that in addition to the horizontal dimension of the plot, the vertical dimension of the plot needs to be considered. As follows from § 905 BGB, the right of ownership includes both the space that is located above and under the plot.[971] Yet, the same provision also provides for a limitation of the owner's discretionary powers with respect to this area, as the owners are obliged to tolerate any impacts when they do not have an interest in their elimination.[972] This is the case when impacts occur in a certain height or depth.[973]

3.2.9.2 The Role of Prescription in defining the Object of Transfer

In the Dutch case study it was shown that the cadastral boundary does not reflect the acquisition of land through extinctive or acquisitive prescription, which is one of the reasons why there can be no guarantee that the cadastral boundary matches the legal boundary. Considering that the cadastral boundary can be legally relied upon in Germany, it will be discussed whether prescription will lead to a similar effect in Germany than in the Netherlands. For this purpose, the same pavilion scenario will be taken as a point of departure.[974]

To begin with, as is laid down in § 903 BGB, ownership is an absolute right so that the neighbour, as the owner of the plot, unless otherwise provided by law or the rights of a third party, has the power of control over his good and, therefore, may exclude others. As such, the neighbour is entitled to demand the elimination of that part of the part that encroaches on his plot ("*Überbau*"), on the basis

[969] R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 948-949 (§ 920 (nr. 7-8)).
[970] This possibility is provided for by state law. See for example § 14 Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz - BbgVermG), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32]).
[971] Note that the ownership of soil resources is regulated in the Federal Mining Act ("Bundesberggesetz (BBergG) vom 13. August 1980 (BGBl. I S. 1310) (FNA 750-15) zuletzt geändert durch Art. 2 Abs. 4 G zur Modernisierung des Rechts der Umweltverträglichkeitsprüfung8 vom 20.7.2017 (BGBl. I S. 2808)"). Also see: H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 344, 387.
[972] § 905 BGB. Also see K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 34, 39.
[973] § 905 BGB.
[974] See Chapter 3.1.9.6.

of § 1004 I BGB and the release of the concerned part of his plot in accordance with § 985 BGB.[975] Alternatively, and if possible, he can decide to make use of the part of the encroaching part, as he has now become its owner through vertical accession.[976] The builder, conversely, does not even have a right of possession with regard to this part of the building.[977] If the latter option is chosen, the builder ("*Überbauende*") is still entitled to remove the encroaching part of the building.[978] It deserves attention however that an action on the basis of § 1004 BGB is subject to a prescription period of three years.[979] The passing of the prescription period does not change the fact that the neighbour is the owner of the encroaching part, but it does mean that the neighbour cannot force the builder anymore to remove the encroaching part of the pavilion.[980] Therefore, if the neighbour does not want to use this part of the building, two options are possible: first, the builder himself might want to invoke his right to remove the part of the building on the basis of § 997 BGB or second, the neighbour may choose to remove it himself.[981] Both of the neighbour's options (an invocation of § 1004 BGB or the use of the encroaching part of the building) apply to all situations in which it was erected intentionally, grossly negligently, or despite the neighbour's objection ("*unentschuldigter Überbau*") so that it was built in the absence of a valid excuse that would force the neighbour to tolerate the interference of his right of ownership..[982]

There are however situations in which this interference can be waived ("*entschuldiger Überbau*").[983] According to § 912 BGB, the neighbour must tolerate the enchroaching part of the pavilion if the following two conditions are met: first, the enchroaching part of the building must have been erected on the neighbour's plot unintentionally or at least in the absence of gross negligence, and second, the neighbour must not have raised an objection either before or immediately after its erection.[984] Importantly, the circumstance that the neighbour could not raise such an objection

[975] H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 345. Also see K. Vieweg & A. Werner, *Sachenrecht*, München: Verlag Franz Vahlen, 2018, p. 290.
[976] § § 946, 94 I, 903 BGB. Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 346 and J.F. Baur & R. Stürner, *Sachenrecht*, München: Verlag C.H. Beck, 2009, p. 317. Also see M. Wellenhofer, *Sachenrecht*, München: Verlag C.H. Beck, 2018, p. 428.
[977] BGH, Urteil vom 28. Januar 2011 - V ZR 147/10, para. II (A) (cc). Also see BGH, Urteil vom 1. Oktober 1957 - VI ZR 215/56 and M. Wellenhofer, Sachenrecht, München: Verlag C.H. Beck, 2018, p. 428.
[978] § 997 BGB. Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 346.
[979] § 195 BGB. Also see BGH, Urteil vom 28. Januar 2011 - V ZR 147/10, para. II (A) (aa).
[980] BGH, Urteil vom 28. Januar 2011 - V ZR 147/10, para. II (A) (cc).
[981] Ibid.
[982] § 912 I BGB. Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 346.
[983] § 912 BGB.
[984] Ibid. Also see R. Weber, *Sachenrecht II: Grundstücksrecht*, Baden-Baden: Nomos, 2015, p. 86 and K. Vieweg & A. Werner, *Sachenrecht*, München: Verlag Franz Vahlen, 2018, p. 291.

because he was unaware that the building was partly built on his plot is not relevant in this context.[985] Last, § 912 BGB can only be successfully invoked if it was the owner of the plot (including persons entitled to a right of emphyteusis and limited heirs ("*Vorerben*")), who partly built the pavilion on the plot of his neighbour.[986] Thus, if the encroachment is to be accounted to another party, such as a tenant, who did not act on the owner's behalf, it cannot be excused.[987] The underlying rationale is that all other parties cannot burden the plot with a duty to pay financial compensation to the neighbour.[988] Nevertheless, if the owner of the plot concurs with the encroachment in this situation, § 912 BGB can be relied upon.[989]

If the builder of the pavilion can invoke § 912 BGB, the neighbour is effectively prevented from demanding the removal of the encroaching part of the pavilion.[990] Furthermore, it means that vertical accession of the encroaching part of the building does not take place, so that the builder becomes the owner of the entire building.[991] This does not take away that the neighbour remains owner of the part of the plot of land on which the overreaching building is erected and that he is entitled to annual financial compensation.[992] Alternatively, he may at any time request that the builder buys the part of his plot on which the encroaching part has been built.[993]

Does prescription with regard to the acquisition of the right of ownership play a role in German land law? As a general starting point, § 902 I BGB provides that prescription is excluded for

[985] H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 138. Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 346.
[986] § 11 Gesetz über das Erbbaurecht (Erbbaurechtsgesetz - ErbbauRG) vom 15. Januar 1919 (RGBl.S. 72, ber. S. 122) (BGBl. III/FNA 403-6), zuletzt geändert durch Art. 4 Abs. 7 G zur Einführung eines Datenbankgrundbuchs vom 1.10.2013 (BGBl. I S. 3719). Also see K. Vieweg & A. Werner, *Sachenrecht*, München: Verlag Franz Vahlen, 2018, p. 291.
[987] K. Vieweg & A. Werner, *Sachenrecht*, München: Verlag Franz Vahlen, 2018, p. 291-292.
[988] Ibid.
[989] Ibid.
[990] § 1004 II BGB. Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 346 and R. Weber, *Sachenrecht II: Grundstücksrecht*, Baden-Baden: Nomos, 2015, p. 86.
[991] M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 229. Also see H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 139. Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 347 and K. Schellhammer, *Sachenrecht nach Anspruchsgrundlagen samt Wohnungseigentums- und Grundbuchrecht*, Heidelberg: C.F. Müller, 2017, p. 155.
[992] § 912 II BGB. Also see H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 139 and H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 347 and K. Vieweg & A. Werner, *Sachenrecht*, München: Verlag Franz Vahlen, 2018, p. 294 and K. Schellhammer, *Sachenrecht nach Anspruchsgrundlagen samt Wohnungseigentums- und Grundbuchrecht*, Heidelberg: C.F. Müller, 2017, p. 153-154.
[993] § 915 BGB. Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 347 and R. Weber, *Sachenrecht II: Grundstücksrecht*, Baden-Baden: Nomos, 2015, p. 86-87.

registered property rights.[994] Nevertheless, the answer to the question is affirmative, although to a more limited extent than in Dutch land law. The rationale behind it lies in the reconciliation of the registered status with the actual legal status.[995] Prescription comes in two forms that need to be distinguished. The first form of prescription ("*Tabularersitzung*" or "*Buchersitzung*") refers to the situation in which persons are registered in the land register as owners of a plot of land despite the fact that they have never acquired the ownership of that very plot.[996] If two requirements are met, the right of ownership will be conferred upon them: firstly, the registration must have existed for a period of 30 years (as after this period any demand from the original owner formulated in the direction of the possessor to release the plot on the basis of § 985 BGB will be prescribed through the application of §§ 194 and 197 I BGB) and secondly, they must have possessed the plot in their own right ("*Eigenbesitz*").[997] Hereby, it is not required that the persons who are registered as owners are in good faith.[998]

The second form of prescription ("*Ersitzung contra tabulas*") targets the situation in which persons have been in possession of a plot of land (in the meaning of § 872 BGB) for a period of 30 years while they are not registered as the owner in the land register.[999] If this is the case, they may then start special proceedings ("*Aufgebotsverfahren*") in front of the local court to effectuate a registration as owner in the land register.[1000] Although it is not necessary that possessor is in good faith, it is to be underlined that the success of these proceedings is tied to a number of additional requirements.[1001] This is the case when another person is registered as the owner of the respective plot in the land register at the moment in which the possessor files the proceedings.[1002] The

[994] H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 98.
[995] Ibid. Also see W. Wiegand (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 925-984; Anhang zu § § 929 ff: Eigentum 2 – Erwerb und Verlust des Eigentums*, Berlin: Selier – de Gruyter, 2017, p. 138 (§ 927 (nr. 1)).
[996] § 900 I BGB. Also see H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 361.
[997] § 900 I BGB. The 30 year period is calculated on the basis of § § 938-944 BGB. In addition, § 900 I BGB states that this period is stunted if a protest against the correctness of this entry is registered in the land register. See H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 4, 304, 361.
[998] H.J. Wieling, *Sachenrecht*, Berlin/Heidelberg: Springer-Verlag, 2007, p. 304.
[999] § 927 BGB. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 981 (§ 927 (nr. 1-2)).
[1000] W. Wiegand (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Buch 3: Sachenrecht: § § 925-984; Anhang zu § § 929 ff: Eigentum 2 – Erwerb und Verlust des Eigentums*, Berlin: Selier – de Gruyter, 2017, p. 141 (§ 927 (nr. 8)).
[1001] R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 981-982 (§ 927 (nr. 2, 4)).
[1002] M. Bengel & F. Simmerding, *Grundbuch: Grundstück: Grenze: Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*, Neuwied/Kriftel/Berlin: Lucherhand, 1995, p. 323. Also see R.

admissibility of the proceedings is then dependant on the fulfilment of one of the following two requirements: first, the death of the registered owner, or second, the presumption of death ("*Verschollenheit*") of the registered owner combined with the absence of any transactions in the land register, for which the consent of the owner would have formed a necessity, over a period of the past 30 years.[1003] Yet, it is also possible that the plot in question is excluded from the duty of registration ("*Buchungszwang*") and thus has not been registered so far.[1004] Further, it is possible that an owner has not been registered with regard to a certain plot so far.[1005] In all of these situations, it is sufficient that the possessor provides evidence for his possession of the plot in the course of the past 30 years.[1006] The aforementioned four situations have in common that the ownership of the plot will be acquired by the possessor upon registration as owner in the land register.[1007]

To conclude, it has been shown that prescription with regard to land does exist in the German legal system. However, considering the high legal thresholds that must be passed before a prescription case can be successfully invoked, it is not astonishing that prescription does not really occur in practice.[1008] If it were to exist, it has to be noted that unlike in the Dutch legal system, it would not result in a discrepancy of the legal boundary with regard to the cadastral as it is a whole plot of land that is subject to prescription and not only a part of a plot. The object of transfer, in a geographical sense, will thus remain the same.

3.2.10 Digitalization of Land Registration

Before explaining whether the content of the land register and the cadastre are digitalized and whether it is possible to digitally submit documents to the institutions that keep these registers,

Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 981 (§ 927 (nr. 4)).

[1003] § 927 I BGB. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 981-982 (§ 927 (nr. 4)).

[1004] This concerns for example plots that are owned by the Federal Republic of Germany or land that is owned by the church. For an overview see: § 3 II GBO. Also see R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 981 (§ 927 (nr. 4)) and H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 111.

[1005] R. Gaier (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 6: Sachenrecht: § § 854-1296: WEG/ErbbauRG*, München: Verlag C.H. Beck, 2017, p. 981 (§ 927 (nr. 4)).

[1006] Ibid.

[1007] § 927 II BGB.

[1008] H. Prütting, *Sachenrecht*, München: Verlag C.H. Beck, 2017, p. 99.

attention shall first be paid to the exchange of information between the land registry and the cadastral authority. As has been established in the very beginning of this chapter, the land registry and the cadastral authority are separate but interlinked institutions; a circumstance which necessitates a constant exchange of information to ensure their mutual compliance. On the basis of § 127 GBO, this exchange can be executed in an automated manner in so far as state governments provide the necessary legal framework.[1009] This collaboration could even be portrayed as a preliminary form of integration of these institutions.[1010] State governments are free to authorize only particular land registries to enjoy such a framework.[1011] Likewise, the cadastral authority and land registry are authorized to make use of each other's digital indexes (such as the index of owners which is kept by the latter).[1012] As a side remark, it should be noted that notaries are still legally obliged to keep and maintain their records and indexes in paper format.[1013] Digitalization is allowed, but only in conjunction and must not substitute the paper version.[1014]

3.2.10.1 The Land Registry

The headstone for the introduction of a digitalized ("*maschinell geführt*") land register (which is to be kept as an automated file) was laid in 1993 when the Act on the simplification and acceleration of register-related and other procedures ("*Gesetz zur Vereinfachung und Beschleunigung registerrechtlicher und anderer Verfahren ("Registerverfahrenbeschleunigungsgesetz"*") was adopted.[1015] The decision whether and if so to what extent a particular land register (including its indexes) ("*Loseblattgrundbuch*") becomes digitalized, is taken by the state governments.[1016] To date,

[1009] U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 1197. Also see S. Hügel, *GBO: Grundbuchordnung: Kommentar*, München: Verlag C.H. Beck, 2016, p. 1162.
[1010] H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 2812.
[1011] § 127 I GBO.
[1012] § 126 II GBO. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 124.
[1013] § 6 I DONot. This provision is identical in all "*Bundesländern*".
[1014] Ibid.
[1015] U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 1186. Also see J. Holzer & A. Kramer, *Grundbuchrecht*, München: Verlag C.H. Beck, 2004, p. 18. The definition of the term "*maschinell geführtes Grundbuch*" can be found in § 62 GBV. Also see S. Hügel, GBO: Grundbuchordnung: Kommentar, München: Verlag C.H. Beck, 2016, p. 1158 and K. Schreiber (eds.), *Handbuch Immobilienrecht*, Berlin: Erich Schmidt Verlag, 2011, p. 809.
[1016] § 126 II GBO. Also see H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 19 and J.F. Baur & R. Stürner, *Sachenrecht*, München: Verlag C.H. Beck, 2009, p. 185.

all German states have taken a decision in favour of digitalization.[1017] With the exception of Baden-Württemberg and Schleswig-Holstein, who decided in favour of the software "FOLIA/EGB", all other states made use of a software called "SolumSTAR" to realize the digital land register.[1018] After the decision had been taken to digitalize the land register, all land register folios were scanned.[1019] The digital land register thus constitutes a collection of pictures. When an entry in the land register needs to be amended (for example if the ownership of a plot is transferred), the underlying technology allows the land registrar to conduct this change by entering an electronic module on the scan.[1020] Therefore, the digital SolumSTAR land register in fact constitutes a hybrid form, which still reflects the layout and structure of the paper-based land register.[1021] It is for this reason that it has also been described as 'electronified paper-based land register' ("*elektronifiziertes Papiergrundbuch*").[1022] A more far-going degree of digitalization however is not excluded. Quite the opposite is the case, as the states may initiate the introduction of an electronic database land register ("*Datenbankgrundbuch*") on the basis of § 126 GBO. This entails that it is kept in a certain structure to facilitate a simpler means of registration, that its content is linked in a consequential manner, and that it is possible to retrieve individual (categories of) data that has been registered in the land register.[1023] The introduction of the electronic database land register is scheduled for 2020.

In addition to the land register as such, digitalization can also find its way into the register of underlying deeds ("*Grundakten*") if the state governments adopt the necessary regulations.[1024] In this regard, state governments may opt to gradually digitalize the register of deeds, which primarily means that they are not forced to reorganize all registers simultaneously.[1025] The second benefit of

[1017] F. Göttlinger, 'Notariat und Grundbuchamt im elektronischen Zeitalter', *DNotZ* 2002, 743. Also see F. Wiggers, 'Das Gesetz zur Einführung eines Datenbankgrundbuchs und seine Auswirkungen für die Praxis', *FGPrax* 2013, 235.
[1018] F. Wiggers, 'Das Gesetz zur Einführung eines Datenbankgrundbuchs und seine Auswirkungen für die Praxis', *FGPrax* 2013, 235.
[1019] Ibid. Also see W. Bredl, 'SOLUM-STAR - Das maschinell geführte Grundbuch', *MittBayNot* 1997, 72.
[1020] F. Wiggers, 'Das Gesetz zur Einführung eines Datenbankgrundbuchs und seine Auswirkungen für die Praxis', *FGPrax* 2013, 235.
[1021] Ibid.
[1022] Ibid.
[1023] § 126 I GBO. Also see Act on the Introduction of a Database Land Register ("Gesetz zur Einführung eines Datenbankgrundbuchs (DaBaGG) vom 1. Oktober 2013 (BGBl. I S. 3719), zuletzt geändert durch Art. 19 EU-KontopfändungsV-DurchführungsG vom 21. 11. 2016 (BGBl. I S. 2591)) and H. Schöner & K. Stöber, *Handbuch der Rechtspraxis: Grundbuchrecht*, München: Verlag C.H. Beck, 2012, p. 24 and S. Hügel, *GBO: Grundbuchordnung: Kommentar*, München: Verlag C.H. Beck, 2016, p. 1159 and H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 125.
[1024] § 135 II GBO.
[1025] Ibid.

a gradual introduction is that the intended transformation does not have to embrace the entire register from its very beginning.[1026]

In 2009 (and thus 16 years after the digital land register was introduced), a legal framework for the submission of digital deeds and other documents to the land registry followed.[1027] As a result, § 135 GBO now provides a general legal basis for the digital submission of information to the land registry. The enacting of the specific rules that regulate digital submission (concerning for example the file formats) is however incumbent on the state governments.[1028] This emphatically includes the authority to decide on the starting date on which these possibilities are introduced.[1029] In this context, state governments are also entitled to decide that this introduction be conducted gradually in a sense that not all land registries within a given state need be reorganized simultaneously.[1030] The question that rises against this background is whether notaries are also obliged to digitally submit their deeds once the possibility has been created. Again, it is the state governments that have to rule on this matter, but generally they are entitled to indeed introduce such an obligation, albeit that this duty can be subject to certain limitations.[1031] In particular, the state governments may decide to confine the scope of this duty to certain land registries, types of applications, or categories of deeds.[1032] So far, the possibility to submit digital documents to the land registry has not been realized in most German states.[1033]

[1026] Ibid.
[1027] Act on the introduction of digital legal transactions and the digital deed in the land register proceedings as well as on the adaptations of other land register-, register- and cost-related rules (Gesetz zur Einführung des elektronischen Rechtsverkehrs und der elektronischen Akte im Grundbuchverfahren sowie zur Änderung weiterer grundbuch-, register- und kostenrechtlicher Vorschriften (ERVGBG) vom 11. August 2009 (BGBl. I S. 2713)).
[1028] § 135 I GBO. Regarding the file formats, it can be seen in Practice that although state governments formally can determine the applicable file formats themselves, they opt for the standard ("XJustiz") that is proposed by the explanatory statement of the ERVGBG. See: U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 1231.
[1029] § 135 I (1) GBO.
[1030] Ibid. Also see U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 1230.
[1031] § 135 I (4) GBO.
[1032] Ibid. In practice, it can be observed that the state governments so far have decided against the possibility to limit the scope with respect to the application types. See: U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 1132.
[1033] P. Becker, 'Der elektronische Rechtsverkehr in Grundbuchsachen in Baden-Württemberg', *BWNotZ* 2016, 165. Contrarywise, in Baden-Württemberg and Saxony for instance, state law provides for this opportunity. See: Verordnung des Justizministeriums zur Einführung des elektronischen Rechtsverkehrs und der elektronischen Akte im Grundbuchverfahren (ERGA-VO) (GBl. 2012 S. 11), zuletzt geändert durch Art. 1 VO zur Änd. von Verordnungen zum elektronischen Rechtsverkehr vom 6.12.2018 (GBl. S. 1577). Also see Sächsische E-Justizverordnung (SächsGVBl. S. 291), zuletzt geändert durch Neunte Änderungsverordnung

3.2.10.2 The Cadastral Authority

The digitalization of the cadastre was put on the agenda in the early 1970s.[1034] The concept that finally emerged from this endeavour in 1972 was the Official Cadastral Register –Information System ("*Amtliches Liegenschaftskataster-Informationssystem*"; hereafter: "ALKIS"), which combines the automated cadastral maps ("*automatisierte Liegenschaftskarte*") and the automated cadastral books ("*automatisiertes Liegenschaftsbuch*").[1035] Despite the fact that ALKIS has not been implemented simultaneously in all German states, its nationwide implementation was eventually achieved by the end of 2015.[1036]

vom 11.6.2018 (SächsGVBl. S. 413). Also see U. Keller & J. Munzig (eds.), *KEHE: Grundbuchrecht*, Bonn: Deutscher Notarverlag, 2019, p. 1230.

[1034] P. Kohlstock, *Topographie: Methoden und Modelle der Landesaufnahme*, Berlin/New York: De Gruyter, 2011, p. 175.

[1035] Ibid. Also see H-A. Weirich & M. Ivo, *Grundstücksrecht: Systematik und Praxis des materiellen und formellen Grundstücksrechts*, München: Verlag C.H. Beck, 2015, p. 14 and O. Blumenstein et al., *Grundlagen der Geoökologie: Erscheinungen und Prozesse in unserer Umwelt*, Berlin/Heidelberg: Springer, 2000, p. 195. Also see § 15 I Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160); § 6 I Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz) vom 16. Oktober 1990 (Brem.GBl. 1990, 313), zuletzt geändert durch Art. 4 G zur Anpassung von Vorschriften aus dem Bereich Umwelt und Bau an die europäische Datenschutz-Grundverordnung vom 18.12.2018 (Brem.GBl. S. 651); § 10 I Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448); § 12 I Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674); § 11 I Gesetz über die Landesvermessung und das Liegenschaftskataster im Freistaat Sachsen (Sächsisches Vermessungsgesetz – SächsVermG) vom 12. Mai 2003 (SächsGVBl. S. 121), zuletzt geändert durch Artikel 5 des Gesetzes vom 10. April 2007 (SächsGVBl. S. 54); § 11 I Vermessungs- und Geoinformationsgesetz Sachsen-Anhalt (VermGeoG LSA) vom 15. September 2004 (GVBl. LSA S. 716), zuletzt geändert durch Gesetz vom 18. Oktober 2012 (GVBl. LSA S. 510).

[1036] Website Arbeitsgemeinschaft der Vermessungsverwaltungen der Länder der Bundesrepublik Deutschland, 'Amtliches Liegenschaftskatasterinformationssystem (ALKIS®)' (http://www.adv-online.de/AAA-Modell/ALKIS/), as consulted on 25.06.2019. Also see H. Berstelmeyer et al., *Meikel: GBO: Grundbuchordnung*, Köln/München: Carl Heymanns Verlag, 2009, p. 2812. Also see O. Blumenstein et al., *Grundlagen der Geoökologie: Erscheinungen und Prozesse in unserer Umwelt*, Berlin/Heidelberg: Springer, 2000, p. 195. Also see N. de Lange, *Geoinformatik: In Theorie und Praxis*, Berlin/Heidelberg: Springer Verlag, 2013, p. 206.

3.2.11 The Approach to Cross-Border Transfers of Land

3.2.11.1 The Viewpoint of the Notary

As follows from § 11a BNotO, German notaries may grant their support to a foreign notary on the condition that the latter has requested this support. Provided that the applicable foreign law assents, they are also permitted to adjourn to the foreign country.[1037] However, it does not mean that the notaries are then released from their duties that arise under German law; instead they are even obliged to inform their foreign colleague about these duties.[1038] Because of the fact that they

[1037] § 11a BNotO.

[1038] Ibid. This obligation also applies when a notary request the support from a foreign colleague. See: § XI (4) Richtlinien der Westfälischen Notarkammer gem. § 67 Abs. 2 BNotO vom 9. Juni 1999 (KammerReport vom 23.06.2000 und vom 12.12.2000), zuletzt geändert durch Beschluss vom 27. März 2019 (KammerReport der Westfälischen Notarkammer vom 15.06.2019); § XI (4) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Landesnotarkammer Bayern vom 3. Juli 1999 (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 24. November 1999, Nr. 3, S. 1), zuletzt geändert durch Beschluss der Versammlung der Landesnotarkammer Bayern vom 30. September 2007 zur Ergänzung der Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Landesnotarkammer Bayern nach § 67 Abs. 2 BNotO (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 2007, S. 1); § XI (4) Richtlinien der Notarkammer Berlin für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 10. November 1999 (Amtsblatt für Berlin vom 15. September 2000, Nr. 45, S. 3684), zuletzt geändert durch Beschluss vom 21. März 2012 (Amtsblatt für Berlin vom 11. April 2012, S. 675); § XI (4) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Brandenburg vom 22. November 1999 (Justizministerialblatt für das Land Brandenburg vom 15. Januar 2000, Nr. 1, S. 15), zuletzt geändert durch Beschluss vom 1. Juni 2007 (Justizministerialblatt für das Land Brandenburg vom 15. November 2007, Nr. 11, S. 166); § XI (4) Richtlinien der Notarkammer Braunschweig für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer, zuletzt geändert durch Beschluss vom 2. April 2008 (Niedersächsische Rechtspflege vom 15. Juli 2008, Nr. 7, S. 224); § XI (4) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Bremer Notarkammer vom 2. Februar 2000 (Amtsblatt der Freien Hansestadt Bremen vom 1. September 2000, Nr. 63, S. 485, und vom 18. Januar 2001, Nr. 8, S. 82), zuletzt geändert durch Beschluss vom 2. April 2008 (Amtsblatt der Freien Hansestadt Bremen vom 14. November 2008, Nr. 121, S. 929); § XI (4) Richtlinien der Notarkammer Celle für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 28. April 1999 und 3. Mai 2000 (Niedersächsische Rechtspflege vom 15. Dezember 2000, Nr. 12, S. 353), zuletzt geändert durch Beschluss vom 16. Mai 2012 (Niedersächsische Rechtspflege 2012, S. 240 f.); § XI (4) Berufsrichtlinien der Notarkammer Frankfurt vom 14. Juli 1999 und 24. November 1999 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2000, Nr. 2, S. 65), zuletzt geändert durch Beschluss der Kammerversammlung der Notarkammer Frankfurt am Main am 13. November 2013 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2014, Nr. 2, S. 140); § XI (4) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Hamburgischen Notarkammer vom 19. November 1999 (Hamburgisches Justizverwaltungsblatt vom 31. Januar 2000, Nr. 1, S. 2), Änderung vom 28.11.2007, HmbJVBl. 2008, S. 30) zuletzt geändert durch Beschluss vom 28.11.2007 (HmbJVBl. 2008, S. 30); § XI (4) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Kassel vom 25. August 1999 (Justiz-Ministerial-Blatt für Hessen ,Nr. 5/2008, S. 125), zuletzt geändert durch Beschluss vom 21. November 2007 (Justiz-Ministerial-Blatt für Hessen vom 15. Dezember 2000, Nr. 23/24, S. 653); § XI (4) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Koblenz (Rl-NotKKO)vom 23. Oktober 1999 (Mitteilungen der Notarkammer Koblenz, Teil I, vom 22. Dezember 1999, Nr. 4/1999, S. 129), zuletzt geändert durch Satzung

must not draw up deeds whilst abroad, as this would contradict the territoriality principle, their support is ultimately confined to the provision of advice.[1039] In return, German notaries are under the same conditions entitled to request the support of a foreign notary.[1040] The duties that govern the notary's professional activities then also apply to the foreign notary.[1041]

As a point of departure, notarial deeds are drawn up in German.[1042] If notaries possess the relevant language skills, they may - upon request - draw up a notarial deed in a foreign language.[1043] It is even possible to draw up a bilingual deed in which the different language versions are separated in different columns, if it is indicated whether it is the German or the foreign language version that is

vom 5 Mai 2007 (Mitteilungen der Notarkammer Koblenz, Teil I Nr. 2 und 3/2007, S. 51ff.); § XI (4) Berufsrichtlinien der Notarkammer Mecklenburg-Vorpommern vom 23. Juni 1999 und 9. Februar 2000 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 6. März 2000, Nr. 3, S. 248), geändert durch Satzung vom 13. Dezember 2006 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom März 2007, S. 476). zuletzt geändert durch Beschluss der Versammlung der Notarkammer Mecklenburg-Vorpommern vom 10. Juni 2009 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 23. September 2009, S. 978); § XI (4) Richtlinien der Notarkammer Oldenburg für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 17. November 1999 (Niedersächsische Rechtsp ege vom 15. Juni 2000, Nr. 6, S. 164), geändert durch Beschlüsse der Kammerversammlung vom 21. April 2001 (Niedersächsische Rechtsp ege vom 15. August 2001, Nr. 8, S. 260) und 24. Mai 2008; § XI (4) Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Pfalz vom 30. Oktober 1999 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 29. November 1999, Nr. 2, S. 7), zuletzt geändert durch Satzung vom 18. November 2006 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 7. Januar 2007, Nr. 1, S. 2); § XI (4) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Rheinischen Notarkammer vom 17. Februar 2000 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, vom 10. März 2000, Nr. 1/2000, S. 1), zuletzt geändert durch Beschluss vom 6. Mai 2006 (Rheinische Notarkammer, Mitteilungen, Amtlicher Teil, Nr. 1/2006); § XI (4) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Saarländischen Notarkammer (RL SaarlNotK) gemäß Beschluss der Kammerversammlung vom 26. Oktober 1999 (Gemeinsames Ministerialblatt Saarland vom 9. Juni 2000, Nr. 3, S. 109), zuletzt geändert durch Beschluss vom 13. November 2014 (Amtsblatt des Saarlandes II, 2015, Nr. 1, S. 49); § XI (4) Richtlinien für die Berufsausübung Neufassung vom 8. Juni 2001 (Amtliches Mitteilungsblatt der Notarkammer Sachsen vom 19. September 2001, Nr. 2/2001, S. 2), zuletzt geändert durch Beschluss der Kammerversammlung vom 29.05.2015; § XI 4 Richtlinien für die Berufsausübung der Notarkammer Sachsen-Anhalt vom 7. Mai 1999 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 11. Juni 1999, Nr. 1, S. 2), Änderung vom 25. November 2009 (Amtliches Mitteilungsblatt der Notarkammer Sachsen-Anhalt vom 18. Dezember 2009, Nr. 1); § XI (4) Richtlinien der Schleswig-Holsteinischen Notarkammer vom 19. Mai 1999 (Schleswig-Holsteinische Anzeigen vom Dezember 1999, Nr. XII, S. 318), zuletzt geändert durch Beschluss vom 6. Juni 2007 (Schleswig-Holsteinische Anzeigen 9/2007, S. 392); § XI (4) Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Thüringen Beschlussfassung der Kammerversammlung der Notarkammer Thüringen vom 9. Juni 1999 (Justiz-Ministerialblatt für Thüringen vom 8. September 1999, Nr. 5, S. 40), geändert durch Beschluss vom 4. Juni 2010 (Justiz-Ministerialblatt für Thüringen vom 4. November 2010, Nr. 3, S. 47).

[1039] P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 20. Also see C. Armbrüster, N. Preuß & T. Renner (eds.), *Notarkommentar: Beurkundungsgesetz und Dienstordnung für Notarinnen und Notare*, Bonn: Deutscher Notarverlag, 2015, p. 48-49.

[1040] § 11a BNotO.

[1041] Ibid.

[1042] § 5 I BeurkG.

[1043] § 5 II BeurkG.

decisive.[1044] However, they are not compelled to draw up deeds in foreign language.[1045] It is in this context important to understand that this requirement does not extend to the language in which the notaries communicate with their clients; it is thus not required that the client understands the language in which the deed is drawn up.[1046] To safeguard the client's position, the deed will then be translated.[1047]

If foreign law is applicable to the transaction or if there are doubts about the application of foreign law, notaries must inform the parties accordingly and include it in the notarial record.[1048] Yet, they are not obliged to instruct the parties as regard the content of that foreign law.[1049]

3.2.11.2 The Viewpoint of the Land Registrar

If the land registrar receives an application for registration of a deed whereby it is possible that foreign law must be applied, the case may be submitted to the land register judge.[1050] Furthermore, deeds ("*Grundbucherklärungen*") are only registrable if they are drawn up in German.[1051] Deeds that are drawn up in a foreign language are under all conditions, even if they are translated, insufficient.[1052] The situation is only different when a foreign deed is to serve as evidence to prove a relevant fact.[1053]

[1044] P. Limmer et al. (eds.), *Würzburger Notarhandbuch*, Heidelberg: Carl heymanns Verlag, 2018, p. 3061.
[1045] § 15 I BNotO.
[1046] H. Brunner, 'Der Notar als Dolmetscher: Übersetzer in die deutsche Sprache', in: W. Baumann, P. Limmer & A. Schwachtgen, *Notar und Internationalisierung: Festschrift für Helmut Fessler zum 70. Geburtstag*, Heidelberg: Carl Heymanns Verlag, 2013, p. 75.
[1047] Ibid.
[1048] § 17 III BeurkG.
[1049] Ibid.
[1050] § 5 II RPflG.
[1051] § 184 Gesetz vom 12. Dezember 2001 zur Regelung des Grundverkehrs (Grundverkehrsgesetz 2001 - GVG 2001) (StF: LGBl Nr 9/2002 (Blg LT 12. GP: RV 81, AB 222, jeweils 4. Sess)). § 2 Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 2008 – EGVG (StF: BGBl. I Nr. 87/2008 (WV)). Also see W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 62.
[1052] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 31. Also see DNotI, 'GBO § § 29, 44 Abs. 2; FGG § § 8, 9; GVG § 184; BGB § 874; BeurkG § § 5, 50 Abs. 2, - Grundbuchbewilligung in fremdsprachiger Urkunde mit deutscher Übersetzung', DNotI-Report 20/2005, p.161 (https://www.dnoti.de/fileadmin/user_upload/dnoti-reports/DNotI-Report-2005-20.pdf), as consulted on 19.07.2019.
[1053] D. Eickmann & R. Böttcher, *Grundbuchverfahrensrecht*, Bielefeld: Verlag Ernst und Werner Gieseking, 2011, p. 31. Also see W. Löscher, *Grundbuchrecht: Lehrbuch des formellen Grundstücksrechts (GBO) mit den zum Verständnis notwendigen materiell-rechtlichen Anmerkungen*, Flensburg: Verlag Kurt Gross, 1974, p. 62.

The prevailing opinion makes clear that a deed drawn up by a foreign notary will not be accepted for registration in the land register.[1054] The legal literature is however divided over the question whether the contract of sale can be drawn up by a foreign notary.[1055] Taking this division into account, the Munich Commentary of the BGB ("*Münchener Kommentar zum BGB*") seems to suggest that it is not possible.

3.3 England

3.3.1 The Constitution of Land Registration

> *"In the Middle Ages the land law, because it was the most important branch of English law, was the most highly developed and the most technical part of the common law".*[1056]

The fundament of English land law was cast in the Middle Ages.[1057] Already back then land was transferred with the help of conveyancers.[1058] However, when we speak of conveyancers at that time, it is important to realize that their transformation into a professional occupational group had not yet occurred. Instead, "[t]here were many learned amateurs in the monasteries who drew conveyances according to the pattern approved of by the monastery".[1059] A step towards professionalism was finally taken during the 16th and 18th century when conveyancing in particular and the legal system in general became so complex that the need for a group of specialized practitioners arose.[1060] The achievements that can be entered in their books have proven to be key for the developments of modern land law; not only did this profession formulate rules that were to govern the (transfer of) ownership of land, they also established common conveyancing forms

[1054] B. Gsell et al. (eds.), *beck-online.Grosskommentar: Rome I-VO*, München: C.H. Beck Verlag, 2019, Art. 11, Rn. 106. Also see H.G. Bamberger et al. (eds.), *BeckOK BGB: Verordnung über vertragliche Schuldverhältnisse (Rom I) - VO (EG) 593/2008*, München: C.H. Beck, 2019, Art. 11, Rn. 70-71.
[1055] J. von Hein (eds.), *Münchener Kommentar zum BGB: Band 11: Internationales Privatrecht I: Europäisches Kollisionsrecht: Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-26)*, München: C.H. Beck Verlag, 2018, Artikel 11, Rn. 86, 87.
[1056] W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 300.
[1057] W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 110.
[1058] Ibid.
[1059] W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 111.
[1060] W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 299.

which were respected even by the courts.[1061] Ever since the early 18th century "the practice and opinions of these conveyancers have been appealed to as the best evidence of the existing state of the law upon many questions connected with the land law".[1062] As a result, they were of enormous value for the codification of land law in the Conveyancing and Settled Land Acts.[1063]

How was a freehold transferred in the Middle Ages? Broadly speaking, two different conveyancing procedures were available to the proprietor of a freehold.[1064] In short, their distinguishing factor was whether intervention of a court was necessary to effectuate the transfer.[1065] Usually, court intervention was not required so that the transfer was instead executed by feoffment and the livery of seisin.[1066] For the latter requirement to be fulfilled the seller had not only to deliver the possession of the land to the buyer but he also had to abandon it.[1067] Unlike in many other countries where it was possible to transfer the possession of the land through symbolical acts or through the transfer of a document that acknowledged the livery of seisin, under English law, seisin had to be factually livered.[1068] Why a livery of seisin and not a delivery through a deed? We must remember that illiteracy was widely spread in these times, so that a livery by far simply proved to be the more pragmatic solution.[1069] Yet, in the course of time, a deed in which the intention underlying the seisin was expressed became increasingly accepted.[1070] This was not the least in the interest of the proprietor who no longer had to travel to each parcel of land he wished to transfer to another person.[1071] Especially in the event that a legal dispute arose about the transfer of the freehold, the existence of such a deed had the advantage that it could serve as (written) evidence of the intent.[1072] Around the end of the Middle Ages these deeds were anchored in the conveyancing

[1061] W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 110-111.
[1062] W. Holdsworth, *An Historical Introduction to the Land Law, New Jersey*: The Lawbook Exchange, 2004, p. 299.
[1063] W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 300.
[1064] W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 111-112, 288.
[1065] Ibid.
[1066] Ibid.
[1067] Ibid.
[1068] Ibid. An example of a symbolical delivery of possession has been described in the German case study in Chapter 3.2.1.
[1069] P. Sparkes, *A New Land Law*, Oxford/Portland: Hart Publishing, 2003, p. 98.
[1070] W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 113.
[1071] P. Sparkes, *A New Land Law*, Oxford/Portland: Hart Publishing, 2003, p. 98.
[1072] W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 114.

process.[1073] Eventually, this process in which a growing importance was attached to the deeds, lead to the abolishment of the original requirement to liver the seisin.[1074] As explained above, the second type of conveyancing procedure that existed until 1833 involved the intervention of the court and was subdivided into fines (which in turn can be subdivided into different kinds of fines) and recoveries.[1075]

But already before the Middle Ages, in the time of the Romans, a nationwide register of the entitlements to land was in place in England.[1076] The underlying reason for the creation of such a register had been the facilitation of the collection of poll and land taxes.[1077] When England was eventually invaded by William I another nationwide register was set up - the "Domesday Book".[1078] As was the case of the Roman register, the driving force behind this register was also the collection of taxes.[1079] However, the Domesday Book contained a remarkable richness of information about the land.[1080] Unfortunately, it was not required to register any consecutive dealings with the land, so that its correctness expired through the lapse of time.[1081] In the feudal era, a transfer of rights on land was still effectuated simply through feoffment and "livery of seisin".[1082] Through the lack of any record of this transaction in an official register, the real estate market at that time was greatly coined by secrecy. The degree of secrecy was even intensified through the "bargain and sale" transaction method; under this method, all that was required to transfer a freehold was a contract of sale and the transfer of the purchase price.[1083] In its beginning, this transfer only resulted in the transfer of an equitable interest to the buyer, but after the passing of the Statue of Uses, the buyer was also equipped with the corresponding legal interest.[1084] In the course of the subsequent three

[1073] Ibid.
[1074] W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 116.
[1075] The practice of levying a fine was abolished in through the entering into force of the Fines and Recoveries Act 1833. Also see W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 116-117, 288.
[1076] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 15.
[1077] Ibid.
[1078] Ibid. Also see H.A.L. Dekker, *Kadaster*, Leiden: Nederlandsche Uitgeversmij. (NUMIJ) B.V., 1987, p. 2.
[1079] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 15.
[1080] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 16.
[1081] Ibid.
[1082] M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr. 1.002.
[1083] Ibid.
[1084] Ibid.

centuries (beginning in 1535), almost two long dozens attempts to amend the system of registering land had been brought to the attention of parliament, but were all foredoomed.[1085]

The development of a secretive registration system was eventually put to a hold when with the decline of the seigniorial rights up until the 16th century, King Henry VIII seized the chance to maximise his wealth by setting up a national register for transactions of freehold in land.[1086] From thereon, the deeds effectuating these transactions had to be registered "in one of the King's courts at Westminster".[1087] Naturally, registration only occurred after payment of a fee, the "feudal dues".[1088] Prior to this order, it was possible for beneficiaries to transfer 'their' land that was part of a trust asset, to other beneficiaries, thereby circumventing the duty to pay feudal dues to the King.[1089] However, a work-around was quickly found "in particular by inventive use of leases", the so-called "lease and release" method.[1090] In the course of the 17th century, it was the people themselves (or rather those among them who actually owned an interest in land) that formulated a request for the creation of a land register.[1091]

The earliest modern title register in England dates back to 1709.[1092] Yet it is interesting to note that in some areas a deed registration system had been in force before the title registration system was installed.[1093] These areas concerned Middlesex as well as Yorkshire between the 18th and the 20th century.[1094] Registration in those registers served only the securing of the priority of the transaction and not its validity as such.[1095] Furthermore, due to the lack of a suitable (cadastral) map at the time, the registers were not organized by parcels but according to the names of the proprietors.[1096] In other words, a centralized register, in which all titles in the entire country were registered, did not yet exist. A proposal for such a centralized register was brought forward nearly

[1085] P. Sparkes, *A New Land Law*, Oxford/Portland: Hart Publishing, 2003, p. 1.
[1086] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 17-18.
[1087] Ibid. Also see Statute of Enrolments.
[1088] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 17.
[1089] Ibid.
[1090] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 18. Also see M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr. 1.002.
[1091] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 18.
[1092] S. Brilliant & M. Michell, *A Practical Guide to Land Registration Proceedings*, Edinburgh/London: Lexis Nexis, 2015, p. 15.
[1093] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 6, 18.
[1094] Ibid. Also see S. Brilliant & M. Michell, *A Practical Guide to Land Registration Proceedings*, Edinburgh/London: Lexis Nexis, 2015, p. 15.
[1095] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 19.
[1096] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 20.

150 later by the "Royal Commission on Registration of Title" in 1857.[1097] As a result, the Land Registration Act 1862 was adopted which not only brought HM Land Registry into existence but also established the possibility to by choice register freeholds as well as long leases in the entire country.[1098] However, as it turned out, the English landowners did not exactly run to HM Land Register to get their titles registered.[1099] Amongst other reasons, the hesitance was caused by the high legal requirements that had to be fulfilled to prove one's title and by the fact that the system foresaw in determined boundaries.[1100] One of the biggest shortcomings of this system was that it was completely voluntary. Therefore, even if the holders of a freehold had decided to register it in the register of title, they were under no obligation whatsoever to register any forthcoming dispositions, such as the transfer of the freehold.[1101] This of course meant that the register was not meaningful and that it was rather risky to trust on the correctness of (especially older) entries. In order to straighten out this problem, the Land Transfer Act 1875 laid the foundation stone for compulsory registration, which was implemented by 1879.[1102] Yet, it did not go so far as to make registration compulsory for the entire nation. Instead, the decision whether compulsory registration would be implemented or not, was incumbent on the individual county.[1103] In the beginning, compulsory registration was first introduced in the heart of London.[1104]

In the aftermath of World War I the public demanded significant reforms of land law.[1105] This first major reform of the land registration system, has given it its modern shape.[1106] In particular, they involved the adoption of the "Law of Property Act 1925, the Land Charges Act 1925 and the Land Registration Act 1925".[1107] One of the main driving forces behind the reforms was a call for the

[1097] S. Brilliant & M. Michell, *A Practical Guide to Land Registration Proceedings*, Edinburgh/London: Lexis Nexis, 2015, p. 15. Also see M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr.1.003.
[1098] Ibid.
[1099] M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr.1.004.
[1100] Ibid.
[1101] S. Brilliant & M. Michell, *A Practical Guide to Land Registration Proceedings*, Edinburgh/London: Lexis Nexis, 2015, p. 15.
[1102] Ibid. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 21.
[1103] S. Brilliant & M. Michell, *A Practical Guide to Land Registration Proceedings*, Edinburgh/London: Lexis Nexis, 2015, p. 15.
[1104] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 21.
[1105] W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 318-319.
[1106] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 20.
[1107] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 21.

reduction of transaction costs connected to real estate transactions.[1108] Although the conveyancing process was facilitated (not the least by excluding equitable titles from the register of title), it was decided to not introduce a system of mandatory title registration.[1109] In the course of nearly one century, compulsory registration was introduced also in the other parts of the country, until the end of 1990 when it was established in the entire country.[1110] Parallel to the spreading of the geographical area in which registration became compulsory, also the number of events which triggered such registration was increased over time. The Land Registration Act 1925 provided that registration had to occur "only when it was subject of certain transactions for value".[1111] In the Land Registration Act 2002 (hereafter: "LRA 2002"), the number of triggering events has even been significantly increased and can now be found in s4 of the same Act. As a result of the spreading of compulsory registration both with regard to the geographical area and the triggering events for first registration, also the role of HM Land Registry increased.[1112] As stated by *Bogusz* and *Sexton*:

> "The Land Registry has had to be considerably expanded to meet the growth of registration of title. The registers are kept at over 20 District Registries scattered around England and Wales".[1113]

Furthermore, the LRA 2002 has introduced the possibility for the registration of land that is held by the Crown, the so-called "demesne land".[1114] As demesne land as such does not constitute a registrable interest, a legal work-around had to be created to enable its registration. After all, "the Crown, as the feudal overlord, is the one person who does not have an *estate* in land".[1115] For this reason, "Her Majesty may grant an estate in fee simple absolute in possession out of demesne land to Herself".[1116]

[1108] W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 318-319.
[1109] W. Holdsworth, *An Historical Introduction to the Land Law*, New Jersey: The Lawbook Exchange, 2004, p. 321, 324.
[1110] Registration of Title Order 1989. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 21. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 27. Also see S. Brilliant & M. Michell, *A Practical Guide to Land Registration Proceedings*, Edinburgh/London: Lexis Nexis, 2015, p. 16. Also see M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge, 2018, p. 30.
[1111] S. Brilliant & M. Michell, *A Practical Guide to Land Registration Proceedings*, Edinburgh/London: Lexis Nexis, 2015, p. 16.
[1112] Ibid.
[1113] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 21.
[1114] S79 Land Registration Act 2002. Also see E. Cooke, *Land Law*, Oxford: Oxford University Press, 2012, p. 48.
[1115] E. Cooke, *Land Law*, Oxford: Oxford University Press, 2012, p. 48.
[1116] S79 (1) Land Registration Act 2002.

Nevertheless, there are still titles that have not been registered yet; a circumstance, which prominently distinguishes the English system from the other legal systems that were previously discussed. To create an impetus to register unregistered land, HM Land Registry started a successful campaign that involves a reduction of the regular registration fee.[1117] Additionally, the LRA 2002 better protects owners of registered land when being confronted with squatters.[1118] Yet, although the amount of unregistered titles is slowly decreasing (currently about 24 million titles are registered which amounts to ~85%), it is rather unlikely that a registration of all titles will be achieved in the near future.[1119] This is due to the fact that a considerable amount of estates (especially in London) are currently owned by legal entities, trusts, the State, and clerical institutions.[1120] These owners have in common that they 'live' eternally and unless they wish to transfer (parts of) their estate or unless they are subjected to one of the other "triggering events" causing mandatory first registration of the estate in the title register, they will not be subjected to compulsory registration of their estate.[1121] For a matter of completeness, it shall not be left unmentioned though that these entities (as goes for all owners of unregistered land) may decide in favour of voluntary registration.[1122] Note though that voluntary registration of a lease is possible

[1117] R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.5 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 113. Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 8.

[1118] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 22.

[1119] Ibid. Also see R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p. 5 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 27. Also see M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge, 2018, p. 30.

[1120] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 21. Also see R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p. 5 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.

[1121] The "triggering events" can be found in s4 Land Registration Act 2002. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 21. The number of "triggering events" has been steadily increased every since compulsory registration had been introduced. This partly occurred as a response to changes in economic Practices. For example, it can be observed that commercial leases are nowadays created for a considerable shorter lifetime than only three decades ago. Without adapting the triggering events as to include also the grant of shorter leases, these leases would not have been caught by compulsory registration. See: B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 111-113.

[1122] S3 Land Registration Act 2002. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 22, 113.

only if it "was granted for a term of which more than seven years are unexpired".[1123] Voluntary registration is not only a theoretical possibility, but it is actually being made use of in practise, as can be shown by the example of Methodist Church who has chosen to follow this path.[1124] For this reason, there are still two different systems in place: (compulsory) first registration of unregistered estates and transfers of registered estates. Interesting cases also arise on the serial interfaces where the registered system clashes with the unregistered system. Imagine that a clerical institution holds a freehold on a plot of land that has not been registered yet because of the fact that it has neither been exposed to a "triggering event" nor has it been registered voluntarily. If this institution now decides to grant a profit à prendre to another party, than the profit à prendre is subject to compulsory registration, while the freehold will still remain unregistered.[1125]

It is acknowledged that there are still rights on land that enjoy protection under the system governing unregistered land.[1126] Yet, seeing that the entire country is now subject to compulsory registration and considering that the majority of all title (~80%), corresponding to approximately 87% of the land, have indeed been registered, the decision was taken to focus on the system governing registered land when describing the process of transferring a fee simple absolute in possession.[1127] Nevertheless, a brief description of the unregistered system shall be given.

The transfer of a freehold in principle begins with a contract of sale, although the prudent buyer will have consulted the local land charges register beforehand.[1128] After having concluded the contract of sale, the buyer will have to find out whether the seller is entitled to sell the land.[1129] In

[1123] S3 (3) Land Registration Act 2002. There are two more exceptions laid down in s3 (5)-(5) Land Registration Act 2002 with regard to certain types of mortgages and with regard to the situation in which an "entitlement arises under a contract to buy the land". See: C. Harpum & J. Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002*, Bristol: Jordan Publishing Limited, 2004, p. 15-16.
[1124] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 22.
[1125] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 114.
[1126] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 70-72.
[1127] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 5, 23.
[1128] E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1041. Due to the fact that the legal requirements for a valid contract of sale are largely the same no matter whether it is to effectuate the sale of registered or unregistered land, reference for an overview of such criteria will be made to Chapter 3.3.8.2. See: C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 271.
[1129] E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1041.

order to do so, he first and foremost must assure himself that the transaction chain is intact.[1130] To this end, he not only has to analyse the validity of the transaction by which the seller has become the proprietor of the estate, but he is required to analyse all dispositions going back to the "root of title".[1131] The root title "is a document which deals with the whole of the legal and equitable interest in the land, describes the property fully, and casts no doubt on the title".[1132] As prescribed by statute, it must date back minimally 15 years.[1133] One's first impression might be that 15 years is not much time. However, one must realize that this period suffices to exceed the limitation period for adverse possession of unregistered land of 12 years.[1134] That does not mean that the buyer cannot be bound by rights in rem that were created prior to the root of title. In the end, "[a]ny legal rights in the property will endure beyond a sale and so bind him; any equitable rights will bind him but only by notice".[1135] Zooming in here, we notice that as is the case with registered estates, legal interests on these estates must be distinguished from equitable interests. Legal interests on unregistered estates are rather unproblematic, due to the fact that they are rights in rem and as such have binding force against everybody.[1136] Although their existence cannot be deduced from the land register, it is or at least should be clear to a person acquiring unregistered land that any pre-existing legal interests will bind him.[1137] Nevertheless, situations do exist in which legal interests burden a piece of land and despite deliberate and accurate investigations, the buyer (or the professionals that work on his behalf such as a solicitor, conveyancer or surveyor) will not find out about them.[1138] This for example occurs if the person who is entitled to the legal estate has decided to not make use of it for considerable period of time.[1139] Despite the fact that he has not made use of it, it still exists and the new buyer will be bound by it.[1140] On the other hand, certain legal interests, such as the inheritance tax charge, can be registered in the Land Charges

[1130] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1036.
[1131] Ibid. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 21.
[1132] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 23.
[1133] S44 (1) Law of Property Act 1925 and s23 Law of Property Act 1969. Also see B. Bogusz & R. Sexton, Land *Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 21, 70-71. In the course of time, this period of time has been greatly reduced. Also see E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 23.
[1134] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 23. For more information on adverse possession in case of unregistered land, see Chapter 3.3.9.5.
[1135] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 25.
[1136] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 141, 1143. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 72.
[1137] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1143-1144.
[1138] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 72.
[1139] Ibid.
[1140] Ibid.

Register.[1141] And if a legal interest can be registered in this register, the person entitled to it is well advised to do so. Namely, as a standard rule, if these legal interests that do qualify for registration are not registered, they are not enforceable against third parties.[1142] This is even the case if that person was well aware of the existence of the legal interest.[1143] As *Bogusz* and *Sexton* remark in this regard:

> "[I]ronically, as they are registrable as land charges, they are deprived of the all-important characteristic of legal interests, which is that they bind purchasers of the land whatever the circumstances".[1144]

Is this a speciality of English law? When going back to the civil law systems discussed in the preceding chapters, it becomes apparent that in order to create or transfer rights on land, registration of that creation or transfer forms a formal requirement, without which, the disposition will not be effective. In England on the other, in case of unregistered "land" it is well possible to create a perfectly valid legal interest, with only its enforceability being dependent on the registration. Equitable interests by contrast are somewhat more complex as they are divided in three categories. The first category comprises equitable interests that can actually be registered as a land charge in the Register of Land Charges.[1145] What is the added value of registering these charges in that register? Registration of these charges "shall be deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected, as from the date of registration or other prescribed date and so long as the registration continues in force".[1146] By qualifying registration to "constitute actual notice", it *ex definitione* rules out any possibility of the buyer to other third party to qualify as equity's darling. Therefore, they will naturally be bound by that equitable interest. After having signed the sales contract, a prudent buyer (or other third party) will be well advised to send a request to HM Land Registry to run an official search in the Land Charges Register.[1147] The outcome of this search is conclusive, meaning that the third party will not be bound by any charges that are

[1141] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 87.
[1142] S199 (1) (i) Law of Property Act 1925. Also see s4 Land Charges Act 1972. Note that this is the general rule. The precise effects of non-registration are adhesive to the specific interests that are being dealt with. For a more differentiated explanation of these effects see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 87.
[1143] S199 (1) (i) Law of Property Act 1925. Also see s4 Land Charges Act 1972.
[1144] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 87.
[1145] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 141, 1145.
[1146] S198 (1) Law of Property Act 1925. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 82.
[1147] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 92.

not revealed by HM Land Registry in that regard.[1148] In other words, if such an equitable interest is against all odds not registered, the general consequence is that it will not bind the subsequent buyer of the estate.[1149] This is even the case if the subsequent buyer had notice of the land charge.[1150] In other words, the doctrine of notice does not find application in this situation.[1151] The conclusiveness of the official search however comes with a potentially build-in trap door. As stated before, the third party must 'only' investigate the title deeds from the root title onwards. Therefore, he does not have to go through any title deeds that date prior to the root title. It is however possible that there is "a land charge which is registered against a name which is only in a document behind the root title and which the purchaser has not discovered and, indeed, was not obliged to find".[1152] To the detriment of the third party, they will nevertheless be bound by that charge.[1153] It is to be remembered that in order to be able to run a successful search in the Land Charges Register, one must be aware of the "official" name of the estate holder as stated in the title deed. Therefore, even if a very careful third party was willing to investigate whether any land charges have been registered before the date of the root title he can only do so successfully if he is able to see the title deeds. He must thus pray that these documents are neither missing nor destroyed. And how about land charges that are entered by yet another party in the land charges register after the official search was conducted but before the prospective buyer even had a chance to complete the transfer of ownership? In such situations, the prospective buyer can be protected against this charge under the condition that the completion has occurred within a period of 15 business days after the official search certificate was issued.[1154] This rule does not apply if a priority notice was entered in the land charges register either on or before the day on which the official search certificate was issued.[1155] The second category contains overreaching equitable interests.[1156] Rights that fall in this category

[1148] S10 (4) Land Charges Act 1972.
[1149] S199 (1) (i) Law of Property Act 1925. Also see s4 Land Charges Act 1972. The exact requirements depend on the class to which a specific land charge belongs. See: s4 (2), (5)-(6), (8) Land Charges Act 1972. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1145. Note that this is the general rule. The precise effects of non-registration are adhesive to the specific interests that are being dealt with. For a more differentiated explanation of these effects see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 88-91.
[1150] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 83.
[1151] Hollington Brothers Ltd v Rhodes [1951] 2 All ER 578. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 83.
[1152] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 93.
[1153] S198 (1) Law of Property Act 1925.
[1154] S11 (5)-(6) Land Charges Act 1972. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 94.
[1155] S11 (5) Land Charges Act 1972. For the legal conditions regarding the registration of such a priority notice, see: s11 Land Charges Act 1972.
[1156] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 141.

are the interests of "beneficiaries of a trust of land (or old trusts such as strict settlements and trusts for sale)".[1157] Why are their rights overreaching? Essentially, if the trustees take the decision to the transfer the plot of land to a third party, then the beneficiaries are not able to enforce their beneficial interests against the new owner of the land.[1158] This even holds true in the situation in which the new owner was well aware of the existence of their interests.[1159] Instead, their interests are subject to a shift, namely from an interest in the plot of land to an interest in the purchase price that was paid by new owner.[1160] In order for this shift to occur, one condition must be fulfilled. That is that, in the absence of a trust corporation, there must be at least two trustees to receive the purchase price from the buyer.[1161] The third and last category is the minimal rest category which contains all equitable interests that neither fall in the first or the second category (i.e. proprietary estoppels).[1162] These rights "were either deliberately or accidentally left out of the land charges system, or have developed since that system came into operation".[1163] The binding force of these interests is solely determined on the basis of the doctrine of notice.[1164]

All three categories of equitable interests have in common that they have binding force against anybody except if that someone can successfully call on the so-called doctrine of notice.[1165] This doctrine entails that a buyer will only be bound by such an equitable interest if he fails to qualify as "equity's darling". In order to enjoy the status of "equity's darling", one (i) must be in good faith, (ii) acquire a legal estate as opposed to an equitable estate, (iii) provide consideration in return for the acquisition, and (iv) must not be provided with an actual, imputed, or constructive notice about the existence of the equitable interest in question.[1166] It thus follows that a person who is entitled to an

[1157] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 94.
[1158] Ibid.
[1159] S27 (1) Law of Property Act 1925.
[1160] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 94.
[1161] S27 (2) Law of Property Act 1925.
[1162] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 141, 1150, 1155. For an overview of the equitable rights that fall in this category, see: K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1155-1156. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 95-96.
[1163] M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge, 2018, p. 105.
[1164] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1144. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 72.
[1165] Ibid.
[1166] Midland Bank Trust Co Ltd v Green (No. 1) [1981] 1 AC 513. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 11151-1155. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 72.

equitable interest in principle has a weaker right if compared with a person who is entitled to a legal interest.[1167]

Does this potential insecurity constitute a significant problem in day-to-day practise? To begin with, if the buyer turns out to be bound by an undiscoverable land charge he is not completely left unprotected; even if this protection is of a rather financial nature.[1168] To protect the buyer from land charges that he cannot discover, a compensation scheme was brought into being.[1169] The practical implications of this scheme however turned out to be rather limited in practise as only a single call on this scheme has been recorded since its creation in 1969.[1170] Furthermore, if a seller's freehold is burdened with a long term (legal) interest such as a profit a prendre, it is highly likely that he will include that information in the deed that is to transfer the freehold.[1171] After all, if he does not do so, he can be held liable by the buyer. As *Smith* concludes "the system is flawed, but is nowhere close to breaking down".[1172]

It almost goes without saying that the necessity of producing the documents going to the root of title presupposes that the person attempting to proof good title to the land is indeed in possession of these documents and that they – as a result – have not been destroyed, impaired, or went missing.[1173] In the event that the title deeds cannot be found back or are demolished, will it be at possible to apply for first registration? The answer is clearly affirmative as a workaround has been installed for this situation.[1174] There is a special form (FR1) on which the application has to be

[1167] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 72.
[1168] R.J. Smith, *Property Law*, UK: Pearson Education Limited, 2017, p. 237.
[1169] S25 Law of Property Act 1969. Also see R.J. Smith, *Property Law*, UK: Pearson Education Limited, 2017, p. 237. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 297.
[1170] R.J. Smith, *Property Law*, UK: Pearson Education Limited, 2017, p. 237.
[1171] Ibid. For the practicalities of registering a profit à prendre, see: Website GOV.UK: HM Land Registry, 'Practice guide 16: profits à prendre(updated last on 24 June 2015)' (https://www.gov.uk/government/publications/profits-a-prendre--2/practice-guide-16-profits-a-prendre) as consulted on 03.01.2018.
[1172] R.J. Smith, *Property Law*, UK: Pearson Education Limited, 2017, p. 237.
[1173] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 104. Also see E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 5.
[1174] For the practicalities of this workaround, see: HM Land Registry Practice Guide 2: first registration of title if deeds are lost or destroyed, to be found at: Website GOV.UK, HM Land Registry: 'Practice Guide 2' (https://www.gov.uk/government/publications/first-registration-of-title-where-deeds-have-been-lost-or-destroyed/practice-guide-2-first-registration-of-title-if-deeds-are-lost-or-destroyed), consulted on 21.08.2017. Also see r27 Land Registration Rules 2003. Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 183. Also see F. Silverman (eds.), The *Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 22.

filed.[1175] After all, in the absence of a workaround, the plots affected by missing deeds could never be registered. This workaround entails that statutory declarations from the parties or better the conveyancer himself are required that provide information about the content of the missing deed that must be provided together with an explanation of why the deeds are missing or destroyed and proof of identity of the person who applies for first registration.[1176] A different case of missing deeds might concern ancient possession, i.e. possession that is based on an ancient grant. Often the owner (which oftentimes are ecclesiastical institutions) is not able to prove that and why the deeds are missing. The consequence of a missing deed is that the owners will be awarded a mere possessory title unless HM Land Registry is sufficiently convinced of the account provided by applicant. It is only after the passing of 12 years, that this possessory title will be transformed into an absolute title.[1177] Could the owner alternatively invoke adverse possession to manifest his entitlement to the land? This is not possible. After all, the possession could not be qualified to have been adverse.[1178]

If however the title deeds still exist, then how would one have to retrieve the title deeds in practise? A good starting point is the buyer, who will be able to inform you about the place where the title deeds are kept. That is to say, it is not evident that the buyer will keep his title deeds himself. If the parcel of land is burdened by a mortgage, the financial institution that granted the mortgage will be in possession of the title deeds as a means to secure their claim.[1179] If this is not the case, the buyer might have chosen to have his title deeds kept safe elsewhere, for example in a safe deposit box in a bank.[1180] To allow the buyer to deduce the title, the seller will provide the potential buyer with an "abstract of title" or with an "epitome of title" though the latter has proven in practise to be the

[1175] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 183.
[1176] R27 Land Registration Rules 2003. Also see Website GOV.UK: HM Land Registry, 'Practice guide 2: first registration of title if deeds are lost or destroyed' (updated last on 18 April 2016) (https://www.gov.uk/government/publications/first-registration-of-title-where-deeds-have-been-lost-or-destroyed/practice-guide-2-first-registration-of-title-if-deeds-are-lost-or-destroyed), as consulted on 15.01.2018. Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 183. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 22.
[1177] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 183.
[1178] S62 Land Registration Act 2002. Also see Parshall v Hackney: [2013] EWCA Civ 240; [2013] WLR (D) 124. For a discussion of the requirements to establish adverse possession, see Chapter 3.3.9.5. Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 183.
[1179] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 73.
[1180] Ibid.

more common means of proving title.[1181] The practise of providing an abstract of title entailed that the seller would prepare a summary of all title deeds leading back to the good root of title.[1182] As *Hewitson* explains:

> "The traditional form of the abstract was to write or type it on so-called brief paper, giving the date, stamp duty paid, parties, covenants, powers, recitals, parcels, habendum and execution, together with the certificate of title. A peculiar form of 'shorthand' was used; for example, 'conveyance' would become 'convey'".[1183]

The buyer would thus not receive the full copies of the title deeds. Judged through modern lenses, this seems rather odd. Yet, in past times, where modern techniques of producing (electronic) copies of documents were (largely) absent, this process proved to be the most efficient means to prove a good root title and an intact transaction chain without putting the seller in the need to let go of the original title deeds.[1184] The epitome of title on the other hand is a chronological overview of the transaction chain leading back to the good root of title.[1185] Together with copies of the title deeds and other related documents that are connected to the epitome of title, it will allow the buyer to investigate the title.[1186] The buyer will then compare the epitome of title with the authoritative documents that can serve as a proof of this title, for example a title deed.[1187] The term 'title deeds' hereby refers to a collection of deeds and other documents affecting the legal situation of the respective plot of land (such as conveyances and mortgages), with which "the vendor is demonstrating that he and his predecessors in title have been in control of the land for such a long time that no one could possibly dispute their claim to ownership".[1188] After having conducted this comparison, the buyer is likely to be left with some unanswered questions.[1189] He can then direct a

[1181] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 272. Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 151. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 328.
[1182] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 151.
[1183] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 141.
[1184] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 151.
[1185] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 152.
[1186] Ibid.
[1187] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 272.
[1188] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 20.
[1189] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 273.

written request for information, the so-called "requisitions on title", to the seller who will formulate a response.[1190] If the response suffices, the buyer will produce a draft conveyance search the Land Charges Register.[1191] In a final step, completion will follow, which entails that the conveyance and the title deeds are conferred upon the buyer.[1192]

When an unregistered estate is eventually transferred to another party, it becomes automatically subject to first registration. How does the process of first registration look like and who must take care of the registration – the seller or the buyer? To immediately unravel that mystery: it is the buyer who is obliged to take care of the registration of the estate.[1193] Before he will do so, he must still verify that the land is indeed unregistered and that an application for first registration has not already been filed.[1194] Provided that this is not the case, he must send an application for first registration to the Chief Land Registrar once he has acquired the legal title.[1195] Herewith, he may not take his time. As a standard rule, he must accomplish his task within a period of two months which starts on the day on which he has received the legal title, though the Chief Land Registrar may deviate from this rule and grant an extension of this period.[1196] What is the consequence, if the buyer is too late with filing an application for first registration? In the 99% of cases in which the buyer has sought legal advice from a legal practitioner this scenario should not likely occur, though it is expected that a buyer who decided in favour of DIY conveyancing is at a greater risk to overlook this obligation.[1197] This will result in the voidness of the transfer of the legal title.[1198] A bare trust comes into existence in which the legal title will revert back to the seller, acting as

[1190] Ibid. Also see Chapter 3.3.7.1.
[1191] The requirement for a written conveyance (deed) can be found in s52(1) Law of Property Act 1925 and s1 Law of Property (Miscellaneous Provisions) Act 1989. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 273. Also see J. Bray, *Key Facts: Land Law*, Abingdon/New York: Routledge, 2014, p. 26.
[1192] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 273.
[1193] S6 (1) Land Registration Act 2002. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 115. Also see M. Dowden, *Practitioner's Guide to the Land Registration Act 2002: The Unfinished Revolution*, London: Estates Gazette, 2005, p. 13.
[1194] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1037.
[1195] S6 (1) Land Registration Act 2002. Also see r23-24 Land Registration Rules 2003. On the practicalities of such application, see: Website GOV.UK: HM Land Registry, 'Practice guide 1: first registrations' (updated last on 7 February 2017) (https://www.gov.uk/government/publications/first-registrations/practice-guide-1-first-registrations), as consulted on 15.01.2018.
[1196] S6 (4) Land Registration Act 2002.
[1197] *Bogusz* and *Sexton* state that legal Practice shows that this is not only a hypothecial scenario. See B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 115.
[1198] S7 (1) Land Registration Act 2002.

trustee for the buyer who is left with an equitable title.[1199] To regain his legal title, the buyer must still take care of the registration of the interest. The more convenient approach to this end is to submit a request for late registration to the Chief Land Registrar, which will be honoured only if the Chief Land Registrar is convinced of the existence of a good cause.[1200] If this extension is granted, the legal title will revert back to the buyer once the title is registered.[1201] However, if the Chief Land Registrar refuses the grant of an extension, the conveyance will have to be repeated to effectuate the re-transfer of the legal title.[1202] Unless the buyer has opted for DIY conveyancing, he can hold his solicitor or conveyancer liable for his negligent behaviour.[1203]

From a practice-oriented viewpoint one can question whether these consequences really have an impact. In the end, the re-vesting of the legal title to the seller and eventually back to the buyer once he applied for late registration occurs silently.[1204] It is thus questionable how the seller is supposed to find out not only that the buyer has failed to timely submit the application for first registration but also that that the legal title has been re-vested in him in his new position as a trustee for the buyer?[1205] Yet, there is another consequence that the buyer will be able to perceive. HM Land Registry will namely charge him a higher registration fee.[1206] As a follow-up question: what happens if a 'smart' buyer, who 'forgets' to apply for first registration, simply transfers it to another buyer? Most likely, the second buyer's practitioner will find out about the first buyer's omission as practitioners are well advised to actively control whether the unregistered estate should have been registered before.[1207] To do so, they must investigate when compulsory registration was introduced in the respective area.[1208] When the legal practitioner finds out that the seller should have taken

[1199] S7 (1)-(2) Land Registration Act 2002. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 114-115. Also see M. Dowden, *Practitioner's Guide to the Land Registration Act 2002: The Unfinished Revolution*, London: Estates Gazette, 2005, p. 12. Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 9.
[1200] S6 (5) LRA 2002. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2014, p. 114-116. Also see M. Dowden, *Practitioner's Guide to the Land Registration Act 2002: The Unfinished Revolution*, London: Estates Gazette, 2005, p. 12.
[1201] S7 (3) LRA 2002.
[1202] S8 Land Registration Act 2002. Also see G. Hill et al., *The Land Registration Act 2002*, London: LexisNexis Butterworths, 2005, p. 62.
[1203] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 9.
[1204] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 115.
[1205] Ibid.
[1206] Ibid.
[1207] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 221.
[1208] An overview of these dates can be found in Website GOV.UK: HM Land Registry, 'Practice guide 1: first registrations' (updated last on 7 February 2017) (https://www.gov.uk/government/publications/first-registrations/practice-guide-1-first-registrations), as consulted on 15.01.2018. See also F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 221.

care of first registration, then the seller will have to take care of it before being able to transfer it to the buyer.[1209]

Once the application for first registration with all the required evidence (notably the title deeds), is received by HM Land Registry, the Chief Land Registrar will systematically assess the title before it is registered for the first time.[1210] Noticeably, this is the only point in time at which an investigation of the title occurs.[1211] In specific, the Chief Land Registrar conducts a title examination, which is followed by its verification and grading, and concluded with the guaranteeing of the title.[1212] To conduct the title examination, he can make use of three different means: first, he is entitled to run "searches and enquiries" and to notify third parties, second, he can instruct the person who filed the application for first registration to conduct such "searches and enquiries", and third, he may opt for the advertisement of the application.[1213] In addition, he may take into account the title examination that was conducted by the conveyancer before the application was filed.[1214] Based on this examination, the grade of the title will be determined which will be either an absolute, qualified, or possessory title.[1215] In case of a leasehold, the applicant's title may additionally be classified as a "good leasehold title".[1216] A freehold that is subject to first registration is as good as always given absolute title.[1217] A leasehold is often given either an absolute title or a good leasehold title.[1218]

[1209] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 221.
[1210] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 116. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 186, 189-190, 205. Applications for first registration are processed by four selected offices of HM Land Registry, the largest being the office in Swansea.
[1211] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 186.
[1212] R29-30 Land Registration Rules 2003. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 190, 195.
[1213] R30 Land Registration Rules 2003.
[1214] R29 Land Registration Rules 2003.
[1215] S9-10 Land Registration Act 2002. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 116. On the possibility to upgrade the quality of a title, see s62 Land Registration Act 2002 and r124 Land Registration Rules 2003 and Website GOV.UK: HM Land Registry, 'Practice guide 42: upgrading the class of title' (upgraded last on 25 June 2015) (https://www.gov.uk/government/publications/upgrading-the-class-of-title/practice-guide-42-upgrading-the-class-of-title) as consulted on 02.01.2018. On the consequence of such an upgrade, see s63 Land Registration Act 2002.
[1216] S10(1) Land Registration Act 2002.
[1217] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 117. On the possibility to upgrade a title, see: s62-63 Land Registration Act 2002.
[1218] Ibid.

Furthermore, the Chief Land Registrar has to identify the plot on the index map and produce the title plan.[1219]

What is the effect of first registration? It is logical that first registration cannot lead to the situation in which the buyer ends up with a better legal entitlement than he had before.[1220] Therefore, a buyer, even when receiving absolute title upon first registration, is still bound by a defined number of interests.[1221] These interests can be essentially grouped in three categories: (i) "interests which are subject of an entry in the register in relation to the estate", (ii) overriding interests mentioned in Schedule 1 of LRA 2002, and (iii) "interests acquired under the Limitation Act 1980" provided that the proprietor "has notice" of their existence.[1222] In case of a leasehold, a fourth category exists, which includes "implied and express covenants, obligations and liabilities incident to the estate".[1223] The first category includes for example a notice entered in the register of title by the Chief Land Registrar upon finding out about the existence of encumbrances, such as minor interests – this to ensure their priority.[1224] Does the first registration have an influence on the priority of the rights that exist with regard to the parcel of land in question? This is not the case; it rather "reflects priorities that have already been determined".[1225] Last, what happens if an encumbrance by chance has not found its way in the register of title? This problem can be simply rectified by means of altering the register of title.[1226]

[1219] For the practicalities regarding the (production of the) title plan, see: Website GOV.UK: HM Land Registry, 'Practice guide 40 - supplement 5: HM Land Registry plans: title plan' (updated last on 25 June 2015) (https://www.gov.uk/government/publications/land-registry-plans-title-plan/land-registry-plans-title-plan-practice-guide-40-supplement-5), as consulted on 05.01.2018.

[1220] K. Gray & S.F. Gray, *Land Law*, Oxford: Oxford University Press, 2011, p. 115.

[1221] E.H. Burn & J. Cartwright, *Cheshire and burn's Modern Law of Real Property*, Oxford: Oxford University Press, 2011, p. 1076. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 216. For the interests that can have an influence on the buyer's entitlement if a qualified or a possessory title is granted, see: s11 (6)-(7), s12 (6)-(8) Land Registration Act 2002.

[1222] S11 (3)-(4), s12 (3)-(4) Land Registration Act 2002. For a more detailed overview per quality of title see: C. Harpum & J. Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002*, Bristol: Jordan Publishing Limited, 2004, p. 47-51.

[1223] S12 (4)(a) Land Registration Act 2002.

[1224] S37 (1) Land Registration Act 2002. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 116.

[1225] C. Harpum & J. Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002*, Bristol: Jordan Publishing Limited, 2004, p. 47. It shall be pointed out though, that this principle is not applicable in the situation in which the buyer, who is to ensure the first registration, did not have knowledge of the existence of the entitlement of an adverse possessor under the Limitation Act 1980. See: s11 (4)(c) Land Registration Act 2002. Also see C. Harpum & J. Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002*, Bristol: Jordan Publishing Limited, 2004, p. 48-49.

[1226] S20-21 Land Registration Act 2002. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 162-163.

Is the system of unregistered land and first registration not very cumbersome? Portrayed through modern eyes, this is certainly the case. One must however not forget that the society at the system's hour of birth was by far less mobile so that real estate transactions must have occurred on a less frequent basis. As is stated by *Abbey* and *Richards*, the unregistered system "worked satisfactorily when land ownership was limited to a privileged few, but with the growth of home ownership (along with the population) in the nineteenth century it started to exhibit major pitfalls".[1227]

3.3.1.1 HM Land Registry

The task of keeping the registers, in which registrable interests in land are registered, is entrusted to HM Land Registry, which "is a non-ministerial government department, an executive agency and a government trading fund".[1228] As such, it can operate independently but has to be self-financing, meaning that it will not receive subsidies from the state to meet its costs.[1229] The organisational structure is fairly simple. To begin with, there is the Chief Executive, who at the same time fulfils the function of the Chief Land Registrar.[1230] They are accountable to the Minister as well as to the Secretary of State of the Department for Business, Energy and Industrial Strategy.[1231] Furthermore, they have a seat in both the Executive Board (which is concerned with the "day-to-day" business) and the Board to HM Land Registry (which is in essence a supervisory body).[1232] Nowadays, HM Land Registry counts 14 offices, with the office in Croydon being the headquarters.[1233]

[1227] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 3.
[1228] S. Brilliant & M. Michell, *A Practical Guide to Land Registration Proceedings*, Edinburgh/London: Lexis Nexis, 2015, p. 16.
[1229] Ibid. Also see J. Alder, *Constitutional and Administrative Law*, Hampshire: Palgrave Macmillan, 2013, p. 333.
[1230] S. Brilliant & M. Michell, *A Practical Guide to Land Registration Proceedings*, Edinburgh/London: Lexis Nexis, 2015, p. 16.
[1231] Website GOV.UK: HM Land Registry, 'Our governance' (https://www.gov.uk/government/organisations/land-registry/about/our-governance), consulted on 14.08.2017.
[1232] Ibid.
[1233] The offices are located in: Birkenhead, Coventry, Croydon, Durham, Fylde, Gloucester, Hull, Leicester, Nottingham, Peterborough, Plymouth, Telford, Wales, and Weymouth. See: Website GOV.UK: HM Land Registry, 'HM Land Registry: Guidance: Office addresses' published 3 October 2014 (https://www.gov.uk/government/publications/hm-land-registry-office-addresses/office-addresses), consulted on 16.05.2017. Also see S. Brilliant & M. Michell, *A Practical Guide to Land Registration Proceedings*, Edinburgh/London: Lexis Nexis, 2015, p. 16. As follows from s100 (3) LRA 2002, "[t]he Lord Chancellor may by order designate a particular office of the land registry as the proper office for the receipt of applications or a specified description of application". The opening times of HM Land Registry can be found in r216 Land Registration Rules 2003.

In 2016, HM Land Registry made the headlines when the Queen's Speech revealed the coming of the Neighbourhood Planning and Infrastructure Bill, which – if implemented – would render the privatisation of HM Land Registry possible.[1234] This proposal was embedded in the governmental plan to "seek up to £5 billion of additional corporate and financial asset sales by March 2020".[1235] It thus does not come as a surprise that the privatisation proposal was justified by financial motives. In particular, the argument was brought forward that the financial benefits that come forth of this privatisation can be employed to lower the nation's debt.[1236] In addition, it was argued that this privatisation would advance "a modern, digitally-based land registration service".[1237] It almost goes without saying that these arguments encountered substantial resistance from a number of stakeholders, who expressed their opinions in the consultation "Land Registry: moving operations to the private sector" that was opened by the government on 24 March 2016 in order to get input from the public on this topic.[1238] In the end, after the cabinet reshuffle in mid-2016, the government took the decision to cancel the privatisation plans.[1239]

For the time being this thus means business as usual. The multiple registers that are kept by HM Land Registry are still in public hands. Concretely, these are the register of title, the register of cautions against first registration, the local charges register, the land charges register, the register

[1234] Website GOV.UK, 'The Queen's Speech 2016: background briefing notes' (https://www.gov.uk/government/publications/queens-speech-2016-background-briefing-notes), as consulted on 24.01.2018. Also see L. Smith, *Briefing Paper Number 07641: Neighbourhood Planning Bill [Bill 61 of 2016-2017],* House of Commons Library, 2016, p. 3.
[1235] H. Cromarty, *Briefing Paper Number 07556: Land Registry Privatisation*, House of Commons Library, 2016, p. 15. Also see Departement for Business Innovation & Skills, 'Consultation Document: Consultation on moving Land Registry operations to the private sector', 2016, p. 4, to be found on: Website GOV.UK, 'Closed consultation: Land Registry: moving operations to the private sector' (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510987/BIS-16-165-consultation-on-moving-land-registry-operations-to-the-private-sector.pdf), as consulted on 24.01.2018.
[1236] Website GOV.UK, 'The Queen's Speech 2016: background briefing notes' (https://www.gov.uk/government/publications/queens-speech-2016-background-briefing-notes), as consulted on 24.01.2018, p. 20.
[1237] Ibid.
[1238] L. Smith, *Briefing Paper Number 07641: Neighbourhood Planning Bill [Bill 61 of 2016-2017]*, House of Commons Library, 2016, p. 3, 8-9. Also see H. Cromarty, *Briefing Paper Number 07556: Land Registry Privatisation, House of Commons Library*, 2016, p. 15, 20-25.
[1239] Neighbourhood Planning Act 2017. Also see HM Treasury, *Autumn Statement 2016*, UK: Williams Lea Group, 2016, p. 19. Also see L. Smith, *Briefing Paper Number 07641: Neighbourhood Planning Bill [Bill 61 of 2016-2017]*, House of Commons Library, 2016, p. 3.

of pending actions, the register of writs and orders affecting land, the register of deeds of arrangement, and the indices.[1240]

The Register of Title

The register of title consists of the following three components: the property register, the proprietorship register, and the charges register.[1241] Due to their labelling as "registers" the impression might arise that in order to receive the 'complete' information about a particular estate, it is necessary to consult each of them separately.[1242] This constitutes a misapprehension; each folio in the register of title is in fact divided into an A (property register), B (proprietorship register), and C (charges register) section.[1243] As a result, when consulting the register of title, one will see the totality of information registered with regard to a specific estate. In the following, these three registers shall be further described.

To begin with, the property register reveals whether the estate concerns a leasehold or a freehold.[1244] Furthermore, it contains information about the plot of land that is burdened by that estate. Most importantly, in order to identify the relevant plot, two descriptions are provided: one expressed in words and the other in the form of a drawing (the so-called title plan).[1245] The classic literal description of the plot that is often used to this end is the following: "The Freehold land shown edged with red on the plan of the above title filed at Land Registry and being (*address information of the parcel*)".[1246] Under certain conditions, this statement can be topped with

[1240] S1(1) and s19 (1) Land Registration Act 2002. Also see s34 and Schedule 5 Infrastructure Act 2015. Also see s3(1) Local Land Charges Act 1975. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 203. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 218. Also see M. Dixon, *Modern Land Law*, London/New York: Routledge, 2018, p. 120. There also still exists a register of annuities. Due to the fact that new entries may not be entered in this register, it is kept out of this overview. See s1 Schedule 1 of Land Charges Act 1972. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 91-92.
[1241] Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 109.
[1242] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 109.
[1243] Ibid. Also see r4 (2) Land Registration Rules 2003.
[1244] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 109.
[1245] Ibid. Also see r5(a) Land Registration Rules 2003. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 30. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 18.
[1246] B.Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 106.

additional information about the plot.[1247] This can for example be appropriate when parts under (think of mines) or above (the airspace) the plot are excluded from the proprietor's title. In case of a leasehold, such statements could specify on which floor the apartment is located and whether the staircase is part of the leasehold. If applicable, it also contains information about "mines and minerals", interests from which the estate benefits (i.e. an easement) though in case of dominant land it is not compulsory to register such an interest, and "exceptions [or reservations] arising on enfranchisement of formerly copyhold land".[1248] Moreover, in all situations in which the registered estate is not a freehold, the property register must contain adequate information on the basis of which the registered estate can be identified.[1249]

In the proprietorship register, the owner's personal information (name and address) is registered.[1250] If the owner is a legal person, it also includes its registered identification number.[1251] Furthermore, it contains information about the class of the owner's title.[1252] This is necessary because absolute, qualified, and possessory titles must be distinguished, which apply to freehold and leasehold alike, the only difference being that the leasehold also knows the good leasehold title.[1253] In addition, restrictions falling under the scope of s40 and 86 (4) of LRA 2002, notices and (certain alterations of) positive covenants are entered in the proprietorship register.[1254] The same holds true for the purchase price, which is registered if it is indicated in the transfer deed.[1255] After

[1247] M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr.4.003.
[1248] R5b Land Registration Rules 2003. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 109. The term "enfranchisement" refers to the "process by which copyhold might be converted into socage tenure". See: E.H. Burn & J. Cartwright, *Cheshire and Burn's Modern Law of Real Property*, Oxford: Oxford University Press, 2011, p. 45. Socage tenure in turn refers to the modern freehold. Copyhold land was the second kind of tenure that originally existed next to the socage tenure until new year's day of 1926, when the concept of copyhold land was eventually abolished and existing copyholds were turned into freeholds through the entering into force of the Law of Property Act 1922. See: C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 30-31. For a concise description of the historic origin of copyhold land, see: E.H. Burn & J. Cartwright, *Cheshire and Burn's Modern Law of Real Property*, Oxford: Oxford University Press, 2011, p. 42-46.
[1249] R6(1) and 7 Land Registration Rules 2003.
[1250] R8 (1) (b)-(c) Land Registration Rules 2003.
[1251] R8 (1) (c) Land Registration Rules 2003.
[1252] R8 (1) (a) Land Registration Rules 2003.
[1253] S9 and 10 Land Registration Act 2002.
[1254] R8(1) (d)-(h) Land Registration Rules 2003.
[1255] R8 (2)(c) Land Registration Rules 2003.

all, it is not mandatory to include the purchase price in the deed of transfer as it suffices when the deed refers to "the purchase price stated in the contract".[1256]

Last, there is the charges register in which "leases, charges and other interest" that burden the registered estate are entered.[1257] The register must contain sufficient information to allow the identification of the relevant charge.[1258] In line herewith, also the personal information of the person entitled to the charge (name and address) are registered.[1259] In case of a legal person, this also includes its registered identification number.[1260] Moreover, restrictions (s40 LRA 2002), notices (s86 (2) LRA 2002), and "other matters" that have an impact on (the priority of) a registered charge are registered in this register.[1261]

One could therefore think of the register of title as the common law response to the land register in the civil law. The fundamental difference between these registers being the recording unit on the basis of which the register is organised. As has been shown in the preceding case studies, the recording unit of civilian land registers are the plots of land. Therefore, each plot is recorded on a different folio in the land register and thus receives an individual identification number. All rights or legal facts that affect the legal situation of the plot are registered on its folio. In the common law however, it is not the plot of land but the title to the land that forms the basis for the organisation of the register.[1262] Every title is identified on the basis of an exclusive "title number".[1263] This number in turn is connected to the plot of land that is burdened with this right.[1264] In the end, what the exact content of an estate is, is determined on the basis of four variables - "length, breadth, height/depth and time".[1265] To avoid misconceptions, the individual register shall be referred to as "folio".[1266]

[1256] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 218.
[1257] R9 (a) Land Registration Rules 2003.
[1258] R9 (c) Land Registration Rules 2003.
[1259] R9 (d)-(e) Land Registration Rules 2003.
[1260] R9(d) Land Registration Rules 2003.
[1261] R9 (b), (f)-(h) Land Registration Rules 2003.
[1262] R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 160.
[1263] R4 (1) Land Registration Rules 2003. Also see M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge, 2018, p. 19.
[1264] M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge, 2018, p. 19. Also see Website GOV.UK: HM Land Registry, 'Practice guide 10: official search of the index map (updated last on 27 November 2017)'(https://www.gov.uk/government/publications/official-searches-of-the-index-map/practice-guide-10-official-search-of-the-index-map), as consulted on 05.01.2018.
[1265]R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.3

Further, it must be understood that not all titles come into consideration for an individual identification number and thus a separate folio in the land register.[1267] This is due to the fact that the system distinguishes titles that are registered on a separate folio or, in common law terminology, on an "individual register" and those that are not - the so-called "dependent estates".[1268] Rights that are (substantively) registered on an individual register are the freehold, the leasehold, rentcharges, franchises, and profits a prendre.[1269] From the perspective of a country, whose registration system is organized on the basis of the plots of land, it must be a rather exotic experience to realize that in the English system, it is very well possible that there is more than one folio in the register of title that refers to the same plot of land.[1270] For example, if on one particular plot of land, a freehold and a profits à prendre is registered, they will be entered in the register of title on two different folios considering that these rights must be substantively registered. Are these folios somehow linked? In the end, if one is to acquire a freehold, one would want to consult the register of title to find out whether the plot of land is burdened by other interests that are capable of being registered substantively, such as a longer lease. Hereby, the existence of a lease, that is capable of being registered substantively, must also be registered in the form of a notice in the lessor's freehold folio.[1271] The same holds true for the rentcharges, franchises and profits à prendre.[1272] All other rights are only registered on the individual register of the title which they burden.[1273]

(https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.

[1266] M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr.4.001.

[1267] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 196-197.

[1268] S59 Land Registration Act 2002. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 161.

[1269] S2 Land Registration Act 2002. Also see s2(2) Land Registration Rules 2003. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 160-161. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 196. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1071-1072. Note that not all leaseholds can be registered substantively. See: Chapter 3.3.6.1.

[1270] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 113.

[1271] R3 Schedule 2 of Land Registration Act 2002. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 123.

[1272] P6(2) Schedule 2 of Land Registration Act 2002.

[1273] S59 Land Registration Act 2002. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 197.

The Register of Cautions against First Registration

The register of cautions against first registration (hereafter: "register of cautions") fulfils an important role when it comes to unregistered estates in land.[1274] Anybody who "claims to be" the proprietor of a "qualifying estate" or of an interest that burdens such an estate can apply to the Chief Land Registrar to enter it in this register.[1275] A qualifying estate is defined as a "legal estate which relates to land to which the caution relates, and is" an estate in land, a rentcharge, a franchise or a profit a prendre.[1276] The person who applies for such registration is referred to as the "cautioner".[1277] Two types of proprietors are however excluded from the possibility to file an application. This concerns on the one hand the proprietor of a freehold and on the other hand the proprietor of a leasehold whose term will not expire within the next seven years.[1278] On first sight one might be surprised to learn that these proprietors are not able to register their interest in the register of cautions. The underlying rationale for the exclusion of these estates is however quite intelligibly. Namely, this provision serves as a show-stopper for proprietors of either estate who would prefer to take the easier route to safeguard their interest in the land by applying for an entry in the register of cautions instead of directly passing on to the more complex procedure that underlies the first registration of their estate.[1279] Without such a provision, the aim to achieve the completeness of the title registration would be at a more distant prospect.[1280]

The register of cautions is essentially a structured collection of cautions that are individually registered and appointed with a unique "caution title number".[1281] The individual caution register in turn consists of the "caution property register" and the "cautioner's register".[1282] Information about the legal estate that is affected by the caution and the interest are contained in the caution property register, while the personal details of the cautioners (their name, their address and in case

[1274] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 172.
[1275] S15 (1) and (4) and s19 (1) Land Registration Act 2002. Also see r42 Land Registration Rules 2003. On the practicalities of such an application, see: Website GOV.UK: HM Land Registry, 'Practice guide 3: cautions against first registration' (updated last on 24 June 2015) (https://www.gov.uk/government/publications/caution-against-first-registration/practice-guide-3-cautions-against-first-registration), as consulted on 15.01.2018.
[1276] S15 (2) Land Registration Act 2002.
[1277] R39 and 52 Land Registration Rules 2003. Also see s22 Land Registration Act 2002.
[1278] S15 (3) Land Registration Act 2002.
[1279] S15 Land Registration Act 2002 (Explanatory Notes).
[1280] Ibid.
[1281] R40 (2) and 41 (1) Land Registration Rules 2003.
[1282] R41 (2) Land Registration Rules 2003.

of legal persons also their registered identification number) and - if applicable - information about the person, who agreed to the entering of a caution, can be found in the cautioner's register.[1283]

What is the added value of having one's interest registered in the register of cautions? Two reasons can be identified. First of all, cautioners will be informed by the Chief Land Registrar as soon as an application for the first registration of the estate is filed.[1284] Second, and even stronger, they will be entitled to file an objection against such application.[1285] The cautioners must – if they so desire – file an objection within the period of time set out by the Chief Land Registrar, which will in principle comprise 15 working days though the latter has the discretion to set a longer period.[1286] A longer period of time may be granted upon a motivated request by the cautioner, thereby taking into consideration that must not exceed 30 working days.[1287] The objection period begins to run on the day after the notification was issued and it is only upon expiration of the objection period that the Chief Land Registrar may decide on an application.[1288] This is only different if he receives a notice of the cautioners that they refrain from their opportunity to file such an objection or if they have filed an objection before the objection period has officially expired.[1289] Last, it is be pointed out that a registered caution does not automatically entail that the cautioner's interest that is covered by the caution is valid nor does it affect its priority.[1290]

There are two ways to remove an entry from the register of cautions: withdrawal and cancellation. Withdrawal of a caution is reserved to the cautioners themselves.[1291] To do so, they must apply to the Chief Land Registrar.[1292] The possibility of cancellation on the other hand is granted to a limited group of people that include the proprietor of the legal estate that is affected by the caution and the

[1283] R41 (3)-(5) Land Registration Rules 2003.
[1284] S16 (1) Land Registration Act 2002. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 172.
[1285] S16 (1) Land Registration Act 2002. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 174.
[1286] S16 (2) Land Registration Act 2002. Also see r53 (1) Land Registration Rules 2003.
[1287] R53 (1)-(2) Land Registration Rules 2003. For information about the deadline for submitting such a request and the handling of the request by the Chief Land Registrar see r53 (3)-(4) Land Registration Rules 2003.
[1288] R53 (1) Land Registration Rules 2003. Also see S16 (2) Land Registration Act 2002.
[1289] S16 (2) Land Registration Act 2002.
[1290] S16 (3) Land Registration Act 2002.
[1291] S17 Land Registration Act 2002. Also see r43 Land Registration Rules 2003.
[1292] Ibid.

proprietor of a legal estate that deviates from such an estate.[1293] Furthermore, in addition to the possibilities of withdrawal and cancellation, both the court and the Chief Land Registrar are authorized by law to alter the register if such a modification is to either rectify a mistake or update the register.[1294]

The Local Land Charges Registers

A broad range of local land charges can be differentiated.[1295] Many of these charges are connected to urban planning in the wider sense and target for example the collection of monetary charges by the government to enable the maintenance of the roads, the conservation of historical building sites or the determination of the content of building permissions.[1296] In order to find out whether a specific estate is burdened by such a charge, the local land charges register must be consulted. The obligation to register local land charges in the local land charges register is applicable to both registered and unregistered land.[1297] Even if a local land charge has wrongfully not been registered in the local charges register it is still enforceable against persons who acquire the land in question.[1298] However, they may be granted compensation to cover the losses they incurred.[1299] As a general rule, charges that are registered in this registers are governed by public law as they are imposed by governmental institutions.[1300] Thereby they distinguish themselves from those land charges that are entered in the charges register within the register of title.[1301]

[1293] S18 (1) Land Registration Act 2002. Also see r45 Land Registration Rules 2003. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 174. In the event that the caution affects demesne land, the circle of people who may file an application to cancel the caution is slightly increased. See r45 (b) Land Registration Rules 2003.
[1294] S20-21 Land Registration Act 2002. For more information about the land registrar's authority to alter the register, see Chapter 3.3.3..
[1295] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 307-308.
[1296] For more examples of local land charges see: C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 308.
[1297] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 307.
[1298] S10 (1) Local Land Charges Act 1975.
[1299] Ibid.
[1300] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 306-307.
[1301] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 307.

Up until the recent past, separate local land charges registers were used to be kept by a total of 326 district councils.[1302] Within the London area, even each borough was authorized to keep their own local land charges register.[1303] As a consequence of the Infrastructure Act 2015, the local land charges registers will henceforth be kept by HM Land Registry.[1304] The implementation of this undertaking began in 2018 and pursued the merger of the individually kept registers into one centrally held digital register.[1305] Yet, this merger cannot be achieved over night considering that not all local land charges registers have been kept digitally and that they did not adhere to a common standard format.

The Land Charges Register

A search in the Land Charges Register is only necessary when a real estate transaction concerns unregistered land.[1306] The Land Charges Act 1925 has created this register with the aim to decrease the role of the doctrine of notice in the determination of the binding force of equitable rights on unregistered land.[1307] Interests that can be registered in the land charges register are divided in different classes (Class A-Class F), with for example an estate contract being classified as a Class C land charge and an (equitable) easement falling under the Class D land charges.[1308]

The organisation of this register is remarkable as the booking unit by which it is organized is neither the right nor the plot of land. Instead, it is the "name of the estate owner whose estate is intended to be affected".[1309] It almost seems to be unnecessary to point this out, but this entails that

[1302] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 306.
[1303] Ibid.
[1304] s34 and Schedule 5 Infrastructure Act 2015. Also see s3 Local Land Charges Act 1975.
[1305] Website GOV.UK: HM Land Registry, 'Guidance: Local Land Charges: Local authority pre-migration guide', 27.04.2017, (https://www.gov.uk/government/publications/local-land-charges-local-authority-pre-digitisation-and-migration-guide/local-land-charges-local-authority-pre-digitisation-and-migration-guide), last consulted on 08.12.2017. For insights from practice regarding the implementation of this project, see: A. Bradbury & N. Eccles, 'Local Land Charges - Laying the foundation of a new national digital service', Conference paper for the 2019 World Bank Conference on Land and Poverty, to be found on: Website Annual World Bank Conference on Land and Poverty: Catalyzing Innovation, 'Conference Agenda: Session 11-03: Improving interoperability of registries & open data access' (https://www.conftool.com/landandpoverty2019/index.php?page=browseSessions&form_session=842&presentations=show), as consulted on 18.06.2019.
[1306] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 281.
[1307] B.Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 82.
[1308] S2 Land Charges Act 1972.
[1309] S3 (1) Land Charges Act 1972. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 84.

in order to register a land charge, one must know the correct spelling of the estate owner's name. Without knowing the "correct" name of the estate owner, one cannot be sure that one receives the correct information from the register.[1310] What is considered to be the correct spelling of the name in this context? Somewhat surprisingly, it is not a person's official name as stated in the birth certificate or ID card, but the name as stated in the deed by which one acquired the estate.[1311] Ideally, the name stated in the deed corresponds to the official name. However, to rule out all eventualities, one is thus well-advised to also consult the title deed, which presupposes that one has access to them. In principle, all title deeds leading back to the root title are available, but if these are not accessible, one is left with only one safe solution and that is to "register against all possible alternative versions of the name".[1312]

The Register of Pending Actions

In this register, all judicial proceedings that involve a plot of land can be registered.[1313] The added value of entering such proceedings as an action that is pending before the court will ensure that the subsequent buyer(s) of the plot of land or any other third parties (such as banks) will ultimately be bound by the decision of the court once it is rendered.[1314] In practise, this can be of special interest in proceedings relating to divorce cases in which the court often has to rule on the distribution of the (immovable) property.[1315]

The Register of Writs and Orders Affecting Land

In this register, all decisions of the courts (once rendered) that are related to a plot of land can be entered.[1316]

[1310] For an exploration of the practical implications of the organisation of the land register by name, see Chapter 3.3.1.
[1311] Standard Property Investments plc v British Plastics Federation (1987) 53 P & CR 25. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 84-85.
[1312] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 84.
[1313] S5 Land Charges Act 1972. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 91.
[1314] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 91.
[1315] Ibid.
[1316] S6 Land Charges Act 1972. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 92.

The Register of Deeds of Arrangement

As its name already discloses, this register contains deeds of arrangement in so far as they also have an effect on a plot of land.[1317]

The Indices

The three indices that are kept by HM Land Registry are the 'index', the day list, and the index of proprietors' names.[1318] The index referred to in s68 LRA 2002 consists of the index map and an "index of verbal descriptions" which is related to franchises and manors.[1319] With the help of the (digital) index map, it is possible to retrieve whether a leasehold, freehold, rentcharge, profit a prendre, an affecting, a caution against first registration (franchise excluded) is registered on a particular parcel of land and whether a (caution against) first registration (franchise excluded) has been applied for and is now pending.[1320] If this is the case, the respective title number(s) will be shown.[1321] The day list is a record of all applications that fall in the scope of either the LRA 2002 or the Land Registration Rules 2003 (hereafter: "LRR 2003") and that are still pending.[1322] In order to enable the ascertainment of priority, it records the date and time of the application.[1323] The index of proprietors' names is, as its name already reveals, a record of the names of all proprietors of registered estates and charges.[1324] The index also announces the relevant title number.[1325] It is important to notice that consultation of this index is restricted.[1326]

[1317] S7 Land Charges Act 1972. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 92.
[1318] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 219-220.
[1319] R10 (1) Land Registration Rules 2003. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 219.
[1320] R10 (1) (a) Land Registration Rules 2003. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 31. Also see M. Dowden, *Practitioner's Guide to the Land Registration Act 2002: The Unfinished Revolution*, London: Estates Gazette, 2005, p. 101. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 18.
[1321] R10 (1) (a) (vii) Land Registration Rules 2003.
[1322] R12 (1) Land Registration Rules 2003.
[1323] Ibid. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 220.
[1324] R11 (1) Land Registration Rules 2003.
[1325] Ibid.
[1326] R11 (3)-(4) Land Registration Rules 2003. For more detailed information, see: Chapter 3.3.5.

3.3.1.2 The "Cadastre"

"The concept of a cadastre is so alien that few British surveyors are familiar with the term and in discussion with them it is necessary to explain what a cadastre is."[1327]

Despite the fact that the British are unfamiliar with a cadastre as defined by FIG and known in continental Europe, it is to be pointed out that England does have cadastres on which specific tasks are conferred upon – the Rural Land Register for the purpose of the Common Agricultural Policy of the European Union and the fiscal cadastres which serve the levy of taxes.[1328] Why is it that England does not have a cadastre? *Grover* provides the following explanation:

> "At the heart of its absence is a philosophy of where property rights came from and how they should be legitimized. There is no concept in land law that they derived from the state. Therefore the notion that state permission is required or change boundaries or divide or unite plots is an alien one."[1329]

Nevertheless, England has a mapping agency – Ordnance Survey.[1330] Despite the fact that Napoleon was not the catalyst of the nation's mapping agency (as had been the case in the Netherlands), the origin of the country's mapping is still connected to France, considering that the southern coastal regions of England were mapped in 1791 to prepare for an imminent invasion by the French.[1331]

[1327] R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.2 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.
[1328] R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.8-11 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.
[1329] R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.1 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.
[1330] R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.4 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.
[1331] R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.8 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.

Yet, it was only half a century later in 1841 that the mapping of the entire country really began.[1332] By the Ordnance Survey Act 1841, Ordnance Survey received an all-embracing authorization to enter all plots located in Great Britain for the purpose of surveying.[1333] Up to that point in time, maps did exist, but those were private maps.[1334] The decision to map the country was not based anymore on military motivations; instead, it was deemed essential for urban development, the construction of infrastructure, and the facilitation of the new means of transportations.[1335] This undertaking was eventually completed in 1895.[1336] 12 years later, the "general map" was produced.[1337]

In 1990, Ordnance Survey became a financially self-supporting governmental agency and as early as 1995, their maps were digitalized.[1338] Up to this moment, 59% of England has been surveyed and laid down in a map.[1339] All plans used by HM Land Registry are based on Ordnance Survey maps and are automatically updated by Ordnance Survey.[1340] As the basis for their plans, HM Land Registry makes use of the so-called 'MasterMap' which is produced and continuously updated by Ordnance Survey.[1341]

[1332] Ibid. Also see W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 19.
[1333] Article 2 Ordnance Survey Act 1841.
[1334] R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.8 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.
[1335] Ibid. J. Zevenbergen, A. Frank & E. Stubkjaer (eds.), *Real property transactions: Procedures, transaction costs and models*, Amsterdam: IOS Press, 2007, p. 251.
[1336] R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.8 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.
[1337] M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr.5.021.
[1338] R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.8 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.
[1339]R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.5 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.
[1340] Title plans are not automatically updated. See Chapter 3.3.1.1.
[1341] Website GOV.UK: HM Land Registry, 'Practice guide 40 – supplement 1: HM Land Registry plans: the basis of Land Registry plans' (updated last on 30 January 2016) (https://www.gov.uk/government/publications/land-registry-plans-the-basis-of-land-registry-applications/land-registry-plans-the-basis-of-land-registry-plans-practice-guide-40-supplement-1), as consulted on 15.01.2018. Also see D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*,

3.3.2 The Role of the Legal Practitioner

While in all chosen civil law systems, the transfer of ownership of a parcel of land requires the mandatory intervention of a legal practitioner, such a requirement is searched for nothing in England. This does not take away that in everyday practice, the parties will turn to legal practitioners in almost all cases. When referring to the legal practitioner, who delivers conveyancing services, English legal literature generally uses the term "conveyancer". It is important to notice that the scope of this term is not limited to licensed conveyancers but may also include other professions. When studying the LRR 2003, we learn that the term "conveyancer" used to include the solicitor, the licensed conveyancer, and the "fellow of the Institute of Legal Executives".[1342] This definition has been replaced by a more comprehensive description of "conveyancer".[1343] Three categories of conveyancers must now be distinguished: (i) "an authorised person entitled to carry on the relevant reserved instrument activities", (ii) "an individual or body who employs, or being a body has among its managers, at least one authorised person entitled to carry on the relevant reserved instrument activities and who will carry on or direct and supervise the carrying on of the relevant reserved instrument activities as such employee or manager", and (iii) "a person who carries on the relevant reserved instrument activities in the course of that person's duty as a public officer".[1344] The careful reader will have noticed that the term "reserved instrument activities" comes back in all categories. In essence, this term functions as a placeholder for conveyancing services so as to include for example the drafting of a deed of transfer and the application to register it in the land register.[1345] The first category comprises the so-called "authorized person[s]". Authorized persons are barristers, solicitors, licensed conveyancers,

London: Wildy, Simmonds & Hill Publishing, 2011, p. 12. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 30. Also see M. Dowden, *Practitioner's Guide to the Land Registration Act 2002: The Unfinished Revolution*, London: Estates Gazette, 2005, p. 101. Also see M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr.5.012. Also see Website GOV.UK: HM Land Registry, 'Practice guide 41 – supplement 5: Developing estates: plan requirements and surveying specification' (updated last on 25 June 2015) (https://www.gov.uk/government/publications/developing-estates-detailed-plan-requirements-and-surveying-specification/developing-estates-plan-requirements-and-surveying-specification-practice-guide-41-supplement-5), as consulted on 05.01.2018. Also see M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr.5.021.

[1342] S217 (1) Land Registration Rules 2003.

[1343] S217A Land Registration Rules 2003.

[1344] S217A (1) Land Registration Rules 2003. Also see s18-19, Schedule 3, and Schedule 5 Legal Services Act 2007. With regard to few legal provisions, the term "conveyancer" is given a narrower definition. See s217A (2) Land Registration Rules 2003.

[1345] S217A (3)(f) Land Registration Rules 2003. Also see p5 (1) (a)-(b) Schedule 2 of Legal Services Act 2007.

notaries public, patent attorneys and trade mark attorneys.[1346] Conveyancing services may also be offered by other professional parties that are engaged in real estate transfers, but it does not mean that these parties are allowed to draw up the required documents independently.[1347] Instead, they need the assistance of qualified persons; either to oversee their own work or to draw up the required documents themselves.[1348] These parties fall in the second category and include not only real estate agents and insurances, but also building societies and banks.[1349] The regulation of conveyancing activities by these parties lies with the Authorised Conveyancing Practitioners Board.[1350] The third and last category refers to "public officers", which for instance includes "a court official or a registrar".[1351]

Considering that conveyancing strictly speaking does not require the intervention of a legal practitioner, parties may choose to do their own conveyancing. Especially for those, who see a possibility in here to save tariffs that would otherwise be charged by legal practitioners, this might sound like a paradisiac condition. Yet in practice we see that DIY conveyancing concerns "less than 1 per cent of all registered transactions".[1352] This implies that in about 99% of all cases, parties voluntarily mandate an expert to assist them with the transfer process. To whom do these parties turn? Similar to the systems in continental Europe, conveyancing used to be in the hands of one sole profession – the solicitors.[1353] Although the Solicitors Act 1974 clearly states that also a limited group of other professions (most prominently barristers and notaries public) were allowed to enter the conveyancing arena, in legal practise it seemed that these groups did not make active use of this authorization.[1354] As a result, solicitors enjoyed a de-facto monopoly on conveyancing, although this

[1346] S217A (3)(a) Land Registration Rules 2003. Also see s18 Legal Services Act 2007. Also see s2, s4 (2)(b), s7(2)(c), s11, s12(2)(a), s14(5)(c), s16(5)(c) of Schedule 5 of Legal Services Act 2007.
[1347] J. Young, 'The Legal Profession and Legal Services in England and Wales', *International Legal Practitioner*, Vol. 15, Issue 2 (June 1990), p. 42.
[1348] Ibid.
[1349] Ibid.
[1350] Ibid.
[1351] N.P. Ready, *Brooke's Notary*, London: Sweet & Maxwell, 2013, p.238. Also see G. McBain, 'Modernising the law on notarisationand public notaries', *Journal of Business Law* 2016(2), footnote 108.
[1352] I. Clarke, *The Land Registration Act 2002*, London: Sweet & Maxwell, 2002, p. 25.
[1353] S22 Solicitors Act 1974. Also see M. Harwood, *Conveyancing Law & Practice*, London: Cavendish Publishing Limited, 1996, p. 32. Also see R. Huxley-Binns & J. Martin, *Unlocking the English Legal System*, Oxon: Routledge, 2014, p. 292. Also see S. Slorach et al., *Legal Systems & Skills*, Oxford: Oxford University Press, 2015, p. 167. Also see F. Cownie, A. Bradney & M. Burton, *English Legal System in Context*, US: Oxford University Press, 2013, p. 152.
[1354] S22 Solicitors Act 1974. Also see D. Keenan & S. Riches, *Business Law*, Essex: Pearson Education Limited, 2005, p. 45.

monopoly was of a purely factual and not legal nature.[1355] However, due to the rise of "growing criticisms of the level of charges and standard of service provided", more competition was deemed desirable.[1356] Therefore, the monopoly on conveyancing tumbled in 1985 when the Administration of Justice Act 1985 was adopted.[1357] Through this Act, the authorization to conduct conveyances was extended to the profession of licensed conveyancers, which was brought into being by the same Act.[1358] A short two years later, in 1987, the first licensed conveyancers were qualified.[1359] One might be inclined now to draw the picture of a fierce battle emerging between 'the licensed conveyancers' and 'the solicitors', who try to protect 'their' tariffs against this new profession trying to dispute 'their' role in the conveyancing process. In reality however, the solicitors were already in competition against each other after the fixed tariffs (the "conveyancing scale fees") were abandoned in 1972.[1360] In fact, "[t]he price competition which followed the announcement that the conveyancing monopoly would go in England & Wales reduced conveyancing fees by 30 per cent before the first licensed conveyancer had begun to practice".[1361] Fixed tariffs are also absent within the group of licensed conveyancers.[1362] To increase competition in the legal services market even more, the Legal Services Act 2007 ultimately paved the way for the introduction of so-called alternative business structures, which essentially are law firms that are co-owned by lawyers and

[1355] M. Harwood, *Conveyancing Law & Practice*, London: Cavendish Publishing Limited, 1996, p. 32. Also see S. Slorach et al., *Legal Systems & Skills*, Oxford: Oxford University Press, 2015, p. 167.
[1356] D. Keenan & S. Riches, *Business Law*, Essex: Pearson Education Limited, 2005, p. 45. Also see R. Huxley-Binns & J. Martin, *Unlocking the English Legal System*, Oxon: Routledge, 2014, p. 292.
[1357] M. Harwood, *Conveyancing Law & Practice*, London: Cavendish Publishing Limited, 1996, p. 32. Also see S. Slorach et al., *Legal Systems & Skills*, Oxford: Oxford University Press, 2015, p. 167.
[1358] M. Harwood, *Conveyancing Law & Practice*, London: Cavendish Publishing Limited, 1996, p. 32. Also see K. Malleson & R. Moules, *The Legal System*, New York: Oxford University Press, 2010, p. 182. Also see G. Slapper & D. Kelly, *English Law*, London/New-York: Routledge – Cavendish, 2010, p. 334. Also see D. Keenan and S. Riches, Business Law, Essex: Pearson Education Limited, 2005, p. 45.
[1359] R. Kerridge & G. Davis, 'Reform of the Legal Profession: An Alternative Way Ahead', *Modern Law Review*, Vol. 62, Issue 6 (November 1999), p. 810.
[1360] D. Nicolson & J. Webb, *Professional Legal Ethics: Critical Interrogations*, Oxford: Oxford University Press, 1999, p. 59. Also see R. Bowles & J. Phillips, 'Solicitors' Remuneration: A Critique of Recent Developments in Conveyancing', *Modern Law Review*, 1977, v40 n6, p. 642. Also see R.L. Abel, *The Making of the English Legal Profession: 1800-1988*, Washington: Bird Books, 1988, p. 195.Also see M. Partington, *Introduction to the English Legal System 2017-2018*, Oxford: Oxford University Press, 2017, p. 240. Also seen R. Abel, *English Lawyers between Market and State: The Politics of Professionals*, Oxford: Oxford University Press, 2003, p. 204. For guidelines on solicitors' tariffs/hour, see: Website GOV.UK, 'Solicitors' guideline hourly rates' (https://www.gov.uk/guidance/solicitors-guideline-hourly-rates), as consulted on 27.02.2018.
[1361] A. Paterson, 'Self-Regulation and the Future of the Profession', in: D. Hayton (eds), *The Law's Future(s): British Legal Developments in the 21st Century*, Oxford/Portland: Hart Publishing, 2000, p. 35-36.
[1362] M. Partington, *Introduction to the English Legal System 2017-2018*, Oxford: Oxford University Press, 2017, p. 240. Also see R. Sexton & B. Bogusz, *Complete Land Law: Text, Cases, and Materials*, Oxford: Oxford Universitz Press, 2013, p. 235. Also see M. Harwood, *Conveyancing Law & Practice*, London/ Sydney: Cavendish Publishing, 1996, p. 33. Also see P. Hardial, *All You Need to Know about Buying and Selling Your Property*, lulu.com, 2011, p. 45.

non-lawyers.[1363] In these firms lawyers work alongside non-lawyers to be able to offer their clients a one stop shop with a broader spectre of services for a competitive price.[1364] But even before it was possible for non-lawyers to co-own a law firm with lawyers in the form of an alternative business structure, business models existed where legal practitioners and real estate agents could be found under the same roof. These are the so-called "Solicitors' Property Centres" and "Conveyancing Call Centres".[1365] In Solicitors' Property Centres clients receive all services that are necessary in real estate transactions (from finding a suitable estate, to the financing thereof to the legal realization of the transaction).[1366] Another, though less far-reaching, phenomenon is the existence of "property shops" in which solicitors provide their services in the conveyancing process.[1367] These shops are coupled with real estate agencies.[1368] "Conveyancing Call Centres" offer the comfortable possibility for clients to complete the entire conveyance process over the phone, rendering a personal encounter between the legal practitioner and their customer unnecessary.[1369] If one suspects now that these developments are rather modern, is mistaken; both institutions were created as early as 1997.[1370] A rather new further advancement of these developments is the provision of conveyancing services via the internet.[1371] Although these approaches may be more efficient, they are also rather impersonal and the question that rises is how legal practitioners are able to check their clients' ID when they never encounter them in person.[1372]

In any event, it seems fair to say that persons who wish to make use of a legal practitioner to help them with the legal aspects of transferring a plot of land, in practice, would turn either to a licensed conveyancer or to a solicitor, respectively a business structure where one of these professions is

[1363] Part 5 of Legal Services Act 2007. Also see S. Wilson et al., *English Legal System: Directions*, Oxford: Oxford University Press, 2011, p. 377. Also see P. Harris, *An Introduction to Law*, Cambridge: Cambridge University Press, 2016, p. 214. Also see M. Partington, *Introduction to the English Legal System 2017-2018*, Oxford: Oxford University Press, 2017, p. 254. Also see G. Slapper & D. Kelly, *The English Legal System: 2012-2013*, London/New York: Routledge, 2012, p. 600.
[1364] S. Wilson et al., *English Legal System: Directions*, Oxford: Oxford University Press, 2011, p. 377.
[1365] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 38.
[1366] Ibid.
[1367] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 39.
[1368] Ibid.
[1369] Ibid.
[1370] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 38.
[1371]R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 39.
[1372] Ibid.

represented. It is for this reason, that the following considerations will be focused on these two professions.

3.3.2.1 Solicitors

Solicitors constitute one of the two branches of the legal profession in England & Wales.[1373] Both barristers (who constitute the second branch) and solicitors each fulfil their own role within the legal system; solicitors are often compared to the 'general practitioner' who are in direct contact with their clients and who will involve a barrister, who is usually compared to a 'specialist' (in advocacy) and is consulted if needed.[1374] In January 2019, England & Wales counted a total of 193.162 solicitors, out of which 143.187 were *de facto* practising.[1375] Solicitors are regulated by the Solicitors Regulation Authority (hereafter: "SRA").[1376]

Requirements for the Appointment

What are the requirements for an appointment as solicitor? To begin with, the candidate solicitor must have passed both the "academic stage" and the "vocational stage".[1377] The guidelines for the academic and practical training are established by the Law Society.[1378] The academic stage can be completed through three different routes. Probably the most obvious route is the obtaining of a qualifying law degree, which are essentially law degrees that are approved by the SRA and the Bar Council.[1379] An overview of the institutions that provide qualifying law degrees in England & Wales

[1373] G. Slapper & D. Kelly, *The English Legal System: 2009/2010*, Oxon/ New York: Routledge Cavendish, 2009, p. 530.
[1374] Ibid. Also see D. Keenan & S. Riches, *Business Law*, Essex: Pearson Education Limited, 2005, p. 44. Although this general distinction is not without its flawes. See: R. Huxley-Binns & J. Martin, *Unlocking the English Legal System*, Oxon/ New York, Routledge, 2010, p. 258.
[1375] Website Solicitors Regulation Authority, 'Data for population of practising solicitors, from July 2009 to December 2017' (https://www.sra.org.uk/sra/how-we-work/reports/data/population_solicitors.page), as consulted on 20.06.2019.
[1376] Website Solicitors Regulation Authority, 'Who we are and what we do' (https://www.sra.org.uk/consumers/what-sra-about.page), as consulted on 06.02.2018.
[1377] R 2.1 (a)(i) SRA Training Regulations 2014. Alternatively, an apprenticeship is possible. See: r2.1 (a)(ii) SRA Training Regulations 2014.
[1378] R2 Solicitors Act 1974.
[1379] Joint statement on the academic stage of training issued by the Law Society and the General Council of the Bar on the Completion of the Initial or Academic Stage of Training by Obtaining an Undergraduate Degree, to be found on: Website Solicitors Regulation Authority, 'Joint statement on the academic stage of training' (https://www.sra.org.uk/students/academic-stage-joint-statement-bsb-law-society.page), as consulted on 27.02.2018.

is provided by the SRA and the Bar Council.[1380] It might come as a surprise though that only a bit more than half of all solicitors fall in this category.[1381] The second route is open for graduates in a field other than law, who can top up their non-law degree with a Graduate Diploma in Law (GDL) or a Common Professional Examination (CPE).[1382] Third, it is even possible for non-graduates to pass the academic stage by following the program provided by the Chartered Institute of Legal Executives (CILEX), consisting of a study program and gaining practical experience through a three year period of mandatory legal work for an "authorized person".[1383] This third route therefore does not constitute "the easy way out", especially when realizing that qualifying as a solicitor via this route will take about twice as long as qualifying through a qualifying law degree.[1384]

After having passed the academic stage, all candidates, independent of the route taken, must pass the vocational stage. This stage consists of the completion of the Legal Practice Course (LPC), the Professional Skills Course and of a two year term of "recognized training".[1385] Besides the completion of the academic and vocational stage, candidates must have adhered to the SRA Admission Regulations.[1386] Furthermore, the Law Society must be "satisfied as to his character and his suitability to be a solicitor".[1387] Estimatedly from September 2020 onwards, candidates will also have to pass the Solicitors Qualification Examination.[1388] Barristers and foreign qualified lawyers

[1380] Website Solicitors Regulation Authority, 'Qualifying Law Degree Providers' (https://www.sra.org.uk/students/courses/Qualifying-law-degree-providers.page), as consulted on 27.02.2018. Also see Website Bar Standards Board, 'Academic Stage documents' (https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/current-requirements/academic-stage/academic-stage-documents/), as consulted on 27.02.2018.
[1381] R. Huxley-Binns & J. Martin, *Unlocking the English Legal System*, Oxon/ New York, Routledge, 2010, p. 256.
[1382] R. Ward & A. Akhtar, *Walker & Walker's English Legal System*, Oxford: Oxford University Press, 2011, p. 392.
[1383] A definition of the term "authorized person" can be found in s18 Legal Services Act 2007. Also see R. Ward & A. Akhtar, *Walker & Walker's English Legal System*, Oxford: Oxford University Press, 2011, p. 392. Also see Website The Law Society, 'Qualifying without a law degree' (https://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/qualifying-as-a-solicitor/qualifying-without-a-law-degree/), as consulted on 27.02.2018.
[1384] Website The Law Society, 'Qualifying as a solicitor' (https://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/qualifying-as-a-solicitor/), as consulted on 27.02.2018.
[1385] R4.1, 5.1-5.2 SRA Training Regulations 2014 - Qualification and Provider Regulations. Note that graduates of an exempting law degree are not obliged to follow the LPC due to the fact that the latter has been integrated in their degree. See: SRA Handbook Glossary 2012. For more information about the Legal Practice Course, see: Website Solicitors Regulation Authority, 'Legal Practice Course' (https://www.sra.org.uk/students/lpc.page), as consulted on 27.02.2018.
[1386] R2.1 (b) SRA Training Regulations 2014.
[1387] R3(1)(b) Solicitors Act 1974. Also see r2.1 (d) SRA Training Regulations 2014. Also see SRA Suitability Test 2011.
[1388] Website Solicitors Regulation Authority, 'A new route to qualification: New regulations' (https://www.sra.org.uk/sra/consultations/new-regulations.page), as consulted on 27.02.2018. Also see

wishing to qualify as solicitors in England are not required to pass through all of these steps. Instead, they can complete a reduced procedure as set out in the SRA Qualified Lawyers Transfer Scheme Regulations 2011 that consists in a multiple choice test and an "Objective Structured Clinical Examination".[1389] As a last step, in order to be allowed to practice as a solicitor, candidates must be admitted to that profession, entered on the roll and be in possession of a certificate that they receive from the Law Society.[1390] For the Law Society to be able to distribute such a certificate, the solicitor's professional activities must be covered by a professional indemnity insurance.[1391] As a side note, it deserves mentioning that the Courts and Legal Services Act 1990 conferred upon solicitors immunity from being held liable on the basis of negligence when providing litigation services:

> "62.——(1) A person—
> (a) who is not a barrister; but
> (b) who lawfully provides any legal services in relation to any proceedings,
> shall have the same immunity from liability for negligence in respect of his acts or omissions as he would have if he were a barrister lawfully providing those services.
>
> (2) No act or omission on the part of any barrister or other person which is accorded immunity from liability for negligence shall give rise to an action for breach of any contract relating to the provision by him of the legal services in question."[1392]

This immunity has been abolished through a ruling of the House of Lords in the case Arthur J S Hall v Simons [2000] 3 All ER 673 in which Lord Steyn argued the following:

> "There would be benefits to be gained from the ending of immunity. First, and most importantly, it will bring to an end an anomalous exception to the basic premise that there should be a remedy for a wrong. There is no reason to fear a flood of negligence suits against

Website Solicitors Regulation Authority, 'FAQs – Solicitors Qualification Examination' (https://www.sra.org.uk/sra/policy/training-for-tomorrow/resources/sqe-questions-answers.page), as consulted on 27.02.2018.

[1389] R. Huxley-Binns & J. Martin, *Unlocking the English Legal System*, Oxon/ New York, Routledge, 2010, p. 256. Exemptions to (parts of) this procedure may be granted. See: Website The Law Society, 'Qualifying from outside the UK' (https://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/qualifying-as-a-solicitor/qualifying-from-outside-the-uk/), as consulted on 27.02.2018.

[1390] R1, 3(1)(a), 31(1)(b) Solicitors Act 1974. Also see r9 Administration of Justice Act 1985. For the specific rules governing the entering of the solicitors' names on the roll, see: r6-8 Solicitors Act 1974. For the specific rules governing the certificates issued by the Law Society, see: r9-18 Solicitors Act 1974.

[1391] S37 Solicitors Act 1974. Also see R. Huxley-Binns & J. Martin, *Unlocking the English Legal System*, Oxon/ New York, Routledge, 2010, p. 264. Also see SRA Indemnity Insurance Rules 2013.

[1392] S62 Courts and Legal Services Act 1990 has been repealed by s. 1(1) of Statute Law (Repeals) Act 2004 (c. 14). Also see R. Huxley-Binns & J. Martin, *Unlocking the English Legal System*, Oxon/ New York, Routledge, 2010, p. 270.

> barristers. The mere doing of his duty to the court by the advocate to the detriment of his client could never be called negligent. Indeed if the advocate's conduct was bona fide dictated by his perception of his duty to the court there would be no possibility of the court holding him to be negligent. Moreover, when such claims are made courts will take into account the difficult decisions faced daily by barristers working in demanding situations to tight timetables." [1393]

Competences of Solicitors

The sphere of professional activities of a solicitor can be wide. It follows from the Legal Services Act 2007 that solicitors may carry out a number of different activities:

> "(2)Those activities are—
> (a)the exercise of a right of audience before every court in relation to all proceedings;
> (b)the conduct of litigation in relation to every court and all proceedings;
> (c)reserved instrument activities;
> (d)probate activities;
> (e)the administration of oaths."[1394]

In the execution of their function, solicitors are subject to the SRA Code of Conduct 2011.[1395] In opposite to Latin notaries, solicitors are free to determine the location from which they offer their services, provided that they inform the Law Society about changes of location in due time.[1396]

The Termination of the Appointment

If solicitors or any other "regulated person" fail to comply with the rules governing professional conduct, they can be sanctioned through different channels.[1397] To begin with, the SRA can directly intervene if a regulated person has failed to adhere to the SRA Principles.[1398] An intervention of the

[1393] Also see R. Huxley-Binns & J. Martin, *Unlocking the English Legal System*, Oxon/ New York, Routledge, 2010, p. 257. Also see V. Dunn (eds), *Professional Negligence Litigation in Practice*, Oxford/New York: Oxford University Press, 2010, p. 35.
[1394] R7 (2) of Schedule 5 of Legal Services Act 2007.
[1395] The most recent version of the SRA Code of Conduct 2011 can be found on the Website of the Solicitors Regulation Authority. See: Website Solicitors Regulation Authority, 'SRA Handbook' (https://www.sra.org.uk/solicitors/handbook/code/content.page), as consulted on 01.02.2018. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 24.
[1396] R84 Solicitors Act 1974.
[1397] The term "regulated person" is defined in s21 (3) Legal Services Act 2007.
[1398] Website Solicitors Regulation Authority, 'Reporting an Individual or a Firm' (http://sra.org.uk/consumers/problems/report-solicitor.page#when-report-sra) as consulted on

SRA may either take the form of a reprehension or of a fine with a maximum amount of £2,000.[1399] It is on the Law Society to decide whether the award of such a penalty is made public.[1400] Solicitors are able to appeal against any of these decisions of the Law Society in front of the Solicitors Disciplinary Tribunal (hereafter: "SDT").[1401] A decision of the Tribunal may in turn be appealed in the High Court.[1402] In addition to a direct intervention of the SRA, a case of alleged malpractice may be referred to the SDT.[1403] Proceedings in front of the SDT can be initiated by any member of the public or by the Solicitors Regulation Authority; although in practice it is often the latter who takes the necessary action.[1404] Compared to an intervention of the SRA, a sentence of the SDT can have far more serious consequences for the solicitor in question, due to the fact that the SDT does not only have the power to impose a penalty, but also to prohibit solicitors from carrying out their function for a period of time (with or without indicating an end date) and – even more drastic - to remove solicitors from the roll altogether.[1405] If any party to a given case disagrees with the Tribunal's final decision, they can appeal against that decision in the High Court.[1406] Although it is in principle possible for the public to start proceedings against a regulated person before the SDT, the normal course of action would entail to either turn to the SRA, if the regulated person has committed a breach of the SRA Principles or, if the regulated person has delivered low-quality services, to the Legal Ombudsman.[1407] The only condition for turning to the Legal Ombudsman is that the aggrieved

27.02.2018. The SRA Principles can be found on: Website Solicitors Regulation Authority, 'How we regulate' (http://sra.org.uk/consumers/sra-regulate/sra-regulate.page#principles), as consulted on 27.02.2018.

[1399] R44D, 87 (1) Solicitors Act 1974. Also see para. 14B of Schedule 2 Administration of Justice Act 1985. Also see r. 2.1 SRA Disciplinary Procedure Rules 2011.

[1400] R44D (3),(6) Solicitors Act 1974.

[1401] R44E (1), r46 (1) Solicitors Act 1974.

[1402] R44E (6), r49(1) Solicitors Act 1974. For an exception, see r49A Solicitors Act 1974.

[1403] R46(1) Solicitors Act 1974. Also see Solicitors (Disciplinary Proceedings) Rules 2007 [S.I.2007/3588].

[1404] R10 SRA Disciplinary Procedure Rules 2011. Also see R. Huxley-Binns & J. Martin, *Unlocking the English Legal System*, Oxon/ New York, Routledge, 2010, p. 263. Also see Website Solicitors Regulation Authority, 'Prosecution before the Solicitors Disciplinary Tribunal' (http://www.sra.org.uk/solicitors/enforcement/intervention-tribunal/disciplinary-tribunal.page), as consulted on 21.02.2018.

[1405] R47 (2) Solicitors Act 1974. With regard to the possiblity to remove a solicitor from the roll, also see r54 Solicitors Act 1974.

[1406] R49 (1) Solicitors Act 1974.

[1407] R125 Legal Services Act 2007. Also see Website Solicitors Regulation Authority, 'Reporting an Individual or a Firm' (http://sra.org.uk/consumers/problems/report-solicitor.page#when-report-sra) as consulted on 27.02.2018. Nevertheless, the SRA and the Legal Ombudsman cooperate with each other. See: Memorandum of Understanding between the Solicitors Regulation Authority and the Legal Ombudsman as published on: Website Solicitors Regulation Authority, 'Memoranda of understanding' (https://www.sra.org.uk/sra/how-we-work/memorandum-understanding.page), as consulted on 16.07.2019. For assistance on filing a complaint to the Legal Ombudsman, see: Website Legal Ombudsman, 'Legal guides and factsheets for the public' (http://www.legalombudsman.org.uk/helping-the-public/legal/legal-guides-factsheets-public/), as consulted on 27.02.2018.

party has filed a complaint to the solicitor in question first.[1408] Provided that the complaint is grounded, the Legal Ombudsman can order the solicitor to offer an excuse, to pay compensation, or to rectify the problem through a different suitable means.[1409]

3.3.2.2 Licensed Conveyancers

Licensed conveyancers are property law experts and can be turned to for professional assistance when selling or acquiring immovable property.[1410] Additionally, they are entitled to engage in administrations of oaths.[1411] Compared to solicitors, licensed conveyancers are a relatively small profession, with about 1,300 licensed conveyancers practising in England & Wales.[1412] They are regulated by The Council for Licensed Conveyancers (hereafter: "CLC").[1413]

The training course to become a licensed conveyancer combines theoretical and practical education. For the theory part, a Level 4 and Level 6 Diploma in Conveyancing Law and Practice have to be earned.[1414] The Level 4 Diploma contains courses in "The English Legal System", contract law, land law, "Standard Conveyancing Transactions", and "Understanding Accounting Procedures for Conveyancing Transactions", the completion of which will approximately take 1,5-2 years.[1415] The Level 6 Diploma contains the following courses: "Landlord and Tenant", "Conveyancing Law and Practice", "Managing Client and Office Accounts (Conveyancing)".[1416] The completion of this diploma takes approximately 21-30 months.[1417] There are five institutes which offer these

[1408] Website Legal Ombudsman, 'Helping the Public' (http://www.legalombudsman.org.uk/helping-the-public/), as consulted on 27.02.2018.
[1409] Ibid.
[1410] R11(3)(a) of Schedule 5 of Legal Services Act 2007. Also see S. Wilson et al, *English Legal System*, Oxford: Oxford University Press, 2016, p. 328.
[1411] R11(3)(b) of Schedule 5 of Legal Services Act 2007.
[1412] Website CLC, 'CLC Publications: CLC Fact Sheet 1: About the CLC' (https://www.clc-uk.org/about/clc-publications/), as consulted on 20.06.2019. Also see B. Pickup & W. Derbyshire, *Home Truths: A Practical Guide to Buying, Selling and Investing in Property*, London: Spiramus Press, 2010, p. 88.
[1413] S. Wilson et al, *English Legal System*, Oxford: Oxford University Press, 2016, p. 328. The applicable Code of Conduct can be found on the CLC Website: Website CLC, 'Code of Conduct' (https://www.clc-uk.org/handbook/consumer/#Code%20of%20Conduct), as consulted on 06.02.2018.
[1414] Website CLC, 'Licensed Conveyancer' (http://www.clc-uk.org/trainees/become-a-clc-lawyer/licensed-conveyancer/), as consulted on 06.02.2018.
[1415] Website CLC, 'Conveyancing Diplomas' (http://www.clc-uk.org/trainees/conveyancing-diplomas/), as consulted on 06.02.2018.
[1416] Ibid.
[1417] Ibid.

diplomas.[1418] Furthermore, candidates can choose whether they prefer to enrol full or part time and whether they want to opt for distance learning. In that sense, the program is quite flexible.[1419] For the practical education, candidates have to spend a minimum of 1200 hours working in the field of conveyancing.[1420] The mere fact that the applicant has earned the Level 4 and 6 Diplomas and has completed the required practical experience on itself does not suffice to be able to enter the profession as licensed conveyancer; they will also need the respective license, issued by the CLC. [1421] In order to determine whether a license should be granted to a particular applicant, the CLC will conduct a risk assessment.[1422] In order to assert themselves against possible risks, it is thus possible that the CLC makes the license subject to certain conditions.[1423] However, even if the CLC decides in favour of granting a license (under conditions), licensed conveyancers will remain under constant monitoring and supervision by the CLC to ensure the compliance with their Code of Conduct.[1424]

The rules and regulations governing this profession are not laid down by law but in a multitude of codes drafted by CLC.[1425] At the heart of these codes lies the Code of Conduct with its six "Overriding Principles", with which licensed conveyancers must ensure compliance in their daily work: "(1) Act with independence and integrity; (2) Maintain high standards of work; (3) Act in the best interests of your Clients; (4) Comply with your duty to the court; (5) Deal with regulators and ombudsmen in an open and co-operative way; (6) Promote equality of access and service".[1426] All other duties and obligations are derived from these principles. Most prominently, this means that professional indemnity insurance is mandatory for the exercise of their function and that financial transactions must be processed through a client account.[1427]

If licensed conveyancers do not properly fulfil their duties, they can be subject to different measures. To begin with, as is the case for a complaint against a solicitor, members of the public

[1418] Website CLC, 'How to enrol' (http://www.clc-uk.org/trainees/how-to-enrol/), as consulted on 06.02.2018.
[1419] Ibid.
[1420] Website CLC, 'Practical Experience for Conveyancing' (http://www.clc-uk.org/trainees/become-a-clc-lawyer/licensed-conveyancer/practical-experience-for-conveyancing/), as consulted on 06.02.2018.
[1421] CLC Regulation and Enforcement Policy, para. 3.
[1422] CLC Regulation and Enforcement Policy, para. 3.1.
[1423] CLC Regulation and Enforcement Policy, para. 3.1.2.
[1424] CLC Regulation and Enforcement Policy, para. 3.2-3.3.
[1425] These Codes are consolidated in the CLC Handbook, which can be found on: Website CLC, 'Handbook' (http://www.clc-uk.org/handbook/the-handbook/#Introduction), as consulted on 07.02.2018.
[1426] CLC Code of Conduct.
[1427] CLC Professional Indemnity Insurance Code, para. 4. Also see CLC Account Code, para. 10.1.

may file a complaint against a licensed conveyancer to the Legal Ombudsman.[1428] In addition, if it turns out that licensed conveyancers do not comply with the Code of Conduct, they can be subjected by the CLC to a number of enforcement measures that amongst others include the payment of a penalty and the suspension of a license.[1429] In the event that the licensed conveyancer disagrees with a decision of the CLC in this regard, they can first refer the matter to the Adjudication Panel with the possibility to initiate an appeal in the First Tier Tribunal.[1430] A decision of the latter institution can be appealed in the Upper Chamber.[1431] All disciplinary measures taken by the Adjudication Panel are accessible to the public as they are published on the CLC Website for the duration of the disciplinary measure but in any case for a period of at least two years.[1432] To deal with more serious cases, such as the situation in which the license conveyancer has committed "a criminal offence which renders him unfit to practise as a licensed conveyancer" the CLC set up an Investigating Committee which is to minister to the licensed conveyancer in question.[1433] In principle, the Committee may attend to the case itself.[1434] In some cases however, it must refer the matter to the Discipline and Appeals Committee, which is in turn established by the CLC.[1435] In any event, already in the phase in which the investigation is pending, the Committee may decide to rescind the license.[1436] If the Investigating Committee hears the case itself and finds that the allegations are grounded, a penalty may be imposed on the licensed conveyancer.[1437] Appeals against such decision are possible and must be brought to the attention of the Discipline and Appeals Committee.[1438] If cases are being heard by the Discipline and Appeals Committee and they find that the allegations are grounded, they may revoke or suspend the license, require the temporary or permanent disqualification of the licensed conveyancer, declare that the licensed conveyancer may keep their license but only under certain conditions, impose a penalty, or rebuke

[1428] Website Legal Ombudsman, 'Helping the Public' (http://www.legalombudsman.org.uk/helping-the-public/), as consulted on 27.02.2018.
[1429] For a comprehensive overview, see: CLC Regulation and Enforcement Policy, para. 6.3.1.
[1430] CLC Regulation and Enforcement Policy, para. 5.7, 6.3.1. Also see the Adjudication Panel Rules.
[1431] Ibid.
[1432] CLC Regulation and Enforcement Policy, para. 8.2-8.3. Also see Website CLC, 'Findings on the Adjudication Panel' (http://www.clc-uk.org/reporting/findings-of-the-adjudication-panel/), as consulted on 07.02.2018.
[1433] S24 (1) Administration of Justice Act 1985. For a complete list of situations in which the Investigating Committee becomes active see: s24(1)(a) Administration of Justice Act 1985.
[1434] S24 (1A) Administration of Justice Act 1985.
[1435] S24 (1A) (4A) Administration of Justice Act 1985.
[1436] S24 (5) Administration of Justice Act 1985. Appeal against such a decision is possible in front of the Discipline and Appeals Committee. See: s24 (8) Administration of Justice Act 1985.
[1437] S24A(1), (4) Administration of Justice Act 1985.
[1438] S24A (6) Administration of Justice Act 1985.

the licensed conveyancer.[1439] A decision of the Discipline and Appeals Committee may in turn be appealed against in front of the First-tier Tribunal.[1440]

3.3.3 The Role of the Land Registrar

Registration is taken care of by the Chief Land Registrar, who is appointed by the Lord Chancellor, and his staff.[1441] Astonishingly, it is no longer required that the Chief Land Registrar is a lawyer and it is a fact that this position has not been held by a lawyer since 1990. This constitutes a striking differences with the other legal systems discussed in the ambit of this study.

S126 (2) LRA 1925

> "A person shall not be qualified to be appointed Chief Land Registrar unless he is a barrister of not less than ten years' standing, and a person shall not be qualified to be appointed a registrar or an assistant registrar unless he is either a barrister or solicitor of not less than five years' standing."

S126 (6A) LRA 1925

> "The fact that the Chief Land Registrar and other officers of the Land Registry are not required to be legally qualified is not to be taken as preventing the making of regulations under this section which provide for certain acts to be done by an officer who is legally qualified."[1442]

Both provisions have been repealed.[1443] From a strict reading of the LRA 2002 it thus follows that it is not required that HM Land Registry employs a single lawyer! When taking a close look at the *de facto* organization of HM Land Registry however it becomes clear quite quickly, that lawyers do form part of the Chief Land Registrar's staff. First of all there are currently nine local land registrars who are responsible for the different offices. They are the most senior lawyers in the business. In addition, there are about 80 assistant land registrars who assist the caseworkers with solving difficult legal questions. The caseworkers in turn are in the front line when it comes to the registration of titles. It is not required that the caseworkers have a law degree. Instead, they receive

[1439] S26 (1)-(2), 27-28 Administration of Justice Act 1985.
[1440] S24A (8), 26 (7) Administration of Justice Act 1985.
[1441] S99 (2)-(3) and s1 (1) Land Registration Act 2002. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 203.
[1442] This paragraph was added by s125 (2) and s2 of Schedule 17 Courts and Legal Services Act 1990.
[1443] S126 paragraph2 Land Registration Act 1925 by Schedule 2 of the Administration of Justice Act 1956 and s126 paragraph 6A by Schedule 13 Land Registration Act 2002.

internal training to enable them to complete their function. With the exception of random audits, the caseworkers 'work is not systematically controlled, for example by a peer-caseworker. This puts high pressure on the quality of the internal training considering that the information once put on the registered is guaranteed to be correct.

3.3.3.1 Requirements for Appointment

The Chief Land Registrar and his staff are public officials.[1444] The use of the possessive pronoun "his" does not only mean to express that the land registry staff works for the Chief Land Registrar but also encompasses the fact that the Chief Land Registrar can control the composition of his staff. This is due to the fact that he is authorized to appoint new staff members on his own discretion. It is only that the Minister for the Civil Service must approve the "terms and conditions of [such] appointments". Connected herewith, the remunerations and other compensations of the Chief Land Registrar are determined by the Lord Chancellor.[1445] The function of the Chief Land Registrar terminates either upon own (written) request addressed to the Lord Chancellor or upon the decision of the latter if he finds that the Chief Land Registrar "is unable or unfit to discharge" his function.[1446]

3.3.3.2 Duties and Competence

The primary task of the Chief Land Registrar is to keep the land register, the register of cautions against first registration, the local land charges register, and the indices.[1447] The land registrar has an active role. In the situations specified by statute, he may for instance alter the land register on his own motion.[1448] For instance, if the Chief Land Registrar constitutes that an originally valid title

[1444] Department for Business Innovation & Skills, 'Consultation Document: Introduction of a Land Registry service delivery company', 2014, p.21 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/274493/bis-14-510-introduction-of-a-land-registry-service-delivery-company-consultation.pdf), as consulted on 16.07.2019.
[1445] S2 Schedule 7 of Land Registration Act 2002.
[1446] S1 (1)-(2) Schedule 7 of Land Registration Act 2002.
[1447] S1(1) and s19 (1) and 132 (1) Land Registration Act 2002. Also see Part 2 Land Registration Rules 2003. Also see s3(1) Local Land Charges Act 1975. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 203. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 218.
[1448] S64-65 Land Registration Act 2002. Also see Schedule 4 Land Registration Act 2002. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 510.

has become defective, he may register this circumstance in the register.[1449] Furthermore, he is authorized to initiate alterations in order to rectify mistakes, to update the register, to effectuate "any estate, right or interest excepted from the effect of registration", and to eliminate unnecessary entries.[1450] Also, with regard to register of cautions against first registration, the Chief Land Registrar is authorized to conduct independent updates and to rectify existing errors.[1451] If he deems it necessary, he may grant compensation to parties who suffered a loss as a result of the alteration.[1452] Connected herewith, if the Chief Land Registrar is of the opinion that a registered estate is burdened with an unregistered interest, he is authorized to make this interest visible in the register by registering a notice.[1453] Yet, this authorization does not apply to all unregistered interests but is limited to those that are mentioned in Schedule 1 of the LRA 2002 and which are not caught by the exclusion laid down in s33 of LRA 2002.[1454] If the Chief Land Registrar makes use of this authorization, he must inform "such persons as rules may provide".[1455] Furthermore, under certain conditions, he may independently register restrictions.[1456]

Provided that it can be justified by "legitimate public interest", the Chief Land Registrar is entitled to decide that information concerning land may be published.[1457] Hereby, one can think of the periodic disclosure of real estate prices.[1458] Moreover, he may launch services to advice and consult on matters concerning land registration.[1459] To realize these services, the Chief Land Register may set up a company, collaborate in its setting-up, buy a company, or decide to invest in one.[1460] These entitlements are not restricted to the realization of the services but are also available with regard to the fulfilment of other specified tasks and competences that concern the distribution of historical information of titles that have been registered, the arrangement of an electronic "land registry network" and of an electronic transaction settlement as well as the arrangement of instructions

[1449] S64 Land Registration Act 2002. For examples in which the title becomes defective, see: s64 Land Registration Act 2002 (Explanatory Notes).
[1450] S5 of Schedule 4 Land Registration Act 2002. There are some (potential) limitations to this authorization. See Chapter 3.3.7.
[1451] S21(1) Land Registration Act 2002. Also see r49 Land Registration Rules 2003.
[1452] S21(3) Land Registration Act 2002.
[1453] S37(1) Land Registration Act 2002.
[1454] Ibid.
[1455] S37 (2) Land Registration Act 2002. The group of persons who must be notified are defined in r89 Land Registration Rules 2003. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1089.
[1456] S42 Land Registration Act 2002.
[1457] S104 Land Registration Act 2002.
[1458] S104 Land Registration Act 2002 (Explanatory Notes).
[1459] S105 Land Registration Act 2002.
[1460] S106(1) Land Registration Act 2002.

concerning the operation and handling of this network.[1461] Annually, the Chief Land Registrar provides the Lord Chancellor with a business report.[1462] The latter is in turn under the obligation to bring the report to the attention of Parliament.[1463]

3.3.3.3 Authorization

Naturally, the Chief Land Registrar does not have to fulfil the entirety of his functions by himself as he may authorize members of his staff to support him in this endeavour.[1464] In the event that staff members cause damage in the exercise of their function, they cannot be held personally liable unless they were in bad faith.[1465]

3.3.4 The Relationship between Legal Practitioners and Land Registrars

It has not been possible to determine the exact relationship between the legal practitioners and the land registrars. In particular, it is unclear whether any form of cooperation exists in the implementation of new policies that affect both professional groups.

3.3.5 Publicity of Land Registry Information

In the course of the last 30 years, the approach to accessibility of land registry information has gradually and significantly changed.[1466] Pursuing to increase the transparency of the real estate market, the closed system in which access to the register of title was restricted to the "registered proprietor or an authorised person" was left and transformed into a system of open access of land register information when the Land Registration Act 1988 was adopted and enforced from 3 December 1990 onwards.[1467]

[1461] S106(1) Land Registration Act 2002.
[1462] S101(1) Land Registration Act 2002.
[1463] S101 (3) Land Registration Act 2002.
[1464] S100(1) Land Registration Act 2002.
[1465] S4 Schedule 7 of Land Registration Act 2002.
[1466] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 147-148.Also see C. Harpum & J. Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002*, Bristol: Jordan Publishing Limited, 2004, p. 239.
[1467] S1 Land Registration Act 1988. Article 2 The Land Registration Act 1988 (Commencement Order) 1990. In opposite to the register of title, the index was open to the public. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 203. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 135. Also see G. Hill et al., *The Land Registration*

From a general point of departure, all information registered in the register of title and the register of cautions against first registration can be accessed unrestrictedly by the public.[1468] This maxim also includes documents to which an entry in the land register makes reference to and those that are related to an application submitted to the land registrar.[1469] Furthermore, the register of local land charges, the register of land charges, the register of pending actions, the register of writs and orders affecting land and the register of deeds of arrangement affecting land as well as the index map and the index of verbal descriptions relating to franchises and manors are openly accessible.[1470] In this context, open access means that it is possible to consult and copy the registered information and the kept documents without having to first demonstrate a legitimate interest.[1471] Furthermore, official searches with(out) priority and official copies can be requested.[1472] The advantage of an official copy is that it is reliable.[1473] Therefore, it grants

Act 2002, London: LexisNexis Butterworths, 2005, p. 28. Also see C. Harpum & J. Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002*, Bristol: Jordan Publishing Limited, 2004, p. 239.

[1468] S66 (1) (a) Land Registration Act 2002. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 203. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1073. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 223.

[1469] S66 (1) (b)-(d) Land Registration Act 2002. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1073.

[1470] S9 Land Charges Act 1972. Also see s8 Local Land Charges Act 1975. With regard to the index map and the index of verbal descriptions relating to franchises and manors only official searches are possible. See r145-146 Land Registration Rules 2003. In other words, the public may not conduct its own searches in these indices. For practical guidance on searching those registers that are kept in accordance with the Land Charges Act 1972 see: Website GOV.UK: HM Land Registry, 'Practice guide 63: Land Charges-applications for registration, official search, office copy and cancellation' (updated last on 13 April 2016) (https://www.gov.uk/government/publications/land-charges-applications-for-registration-official-search-office-copy-and-cancellation/practice-guide-63-land-charges-applications-for-registration-official-search-office-copy-and-cancellation#official-searches), as consulted on 13.12.2017. For the practicalities concerning the searching of the index map, see: Website GOV.UK: HM Land Registry, 'Practice guide 10: official search of the index map' (updated last on 27 November 2017)(https://www.gov.uk/government/publications/official-searches-of-the-index-map/practice-guide-10-official-search-of-the-index-map), as consulted on 05.01.2018.

[1471] S66 Land Registration Act 2002. Also see r133 Land Registration Rules 2003.

[1472] S67, 70 Land Registration Act 2002. Also see r134-135, 147-156 Land Registration Rules 2003. Also see s10 Land Charges Act 1972. Also see s9 Local Land Charges Act 1975. Also see Website GOV.UK: HM Land Registry, 'Practice guide 63: Land Charges-applications for registration, official search, office copy and cancellation' (updated last on 13 April 2016) (https://www.gov.uk/government/publications/land-charges-applications-for-registration-official-search-office-copy-and-cancellation/practice-guide-63-land-charges-applications-for-registration-official-search-office-copy-and-cancellation#official-searches), as consulted on 13.12.2017. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 224. For the practicalities of official searches and copies, see: Website GOV.UK: HM Land Registry, 'Practice guide 11: inspection and application for official copies' (updated last on 26 June 2017) (https://www.gov.uk/government/publications/inspection-and-application-for-official-copies/practice-guide-11-inspection-and-application-for-official-copies) as consulted on 03.01.2018 and Website GOV.UK: HM Land Registry, 'Practice guide 12: official searches and outline applications' (last updated on 2 October 2017) (https://www.gov.uk/government/publications/official-searches-and-outline-applications/practice-guide-12-official-searches-and-outline-applications#types-of-official-search), as

protection in the form of financial compensation to a person, who either suffers damage or is held liable because of an error contained in this copy.[1474] These services are however not free of charge.[1475] Inspections, official searches, and (official) copies are £7 if requested by mail or in person and £3 if requested online via the Business Gateway portal.[1476] A search of the index of proprietor's forms an exception as it can only be requested by mail and costs £11.[1477] Interestingly, if the requested documents are available online, interested parties can pay by credit card, but if the documents are not available online, only a cheque payment is possible. To access land register information, the name of the local authority, the title number (or information about the respective estate), and the address (or a different means of identifying the property) have to be provided.[1478]

Yet, three exceptions to the openness of the abovementioned registers exist.[1479] The first exception concerns the Index of Proprietors' Names which can only be accessed with the permission of the land registrar.[1480] This permission will be given only if applicants apply for information that is registered about themselves, or if they can demonstrate that they are "interested generally (for instance as trustee in bankruptcy or personal representative)".[1481] A second exemption concerns

consulted on 03.01.2018. The land registrar does not have to communicate his findings in writing if the application for an official search was not put forward in writing but orally presented. See: r157 Land Registration Rules 2003.

[1473] S67 (1)-(2) Land Registration Act 2002. Also see G. Hill et al., *The Land Registration Act 2002*, London: LexisNexis Butterworths, 2005, p. 30.

[1474] S67 (1)-(2) Land Registration Act 2002. Also see r1 (1) (d) Schedule 8 of Land Registration Act 2002.

[1475] S66 (2)(b) and s67 (3)(d) Land Registration Act 2002. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 203.

[1476] Website GOV.UK: HM Land Registry, 'Land Registry: Information Services fees' (https://www.gov.uk/guidance/land-registry-information-services-fees), consulted on 20.06.2019.

[1477] Ibid.

[1478] Website GOV.UK: HM Land Registry, 'Form: Personal inspection: registration (PIC)' (https://www.gov.uk/government/publications/personal-inspection-registration-pic), as consulted on 06.05.2019.

[1479] Additionally, a limited number of specific forms and documents are excluded from the scope of s66-67 Land Registration Act 2002. These can be found in r133(2)(b)-(f) and r135 (2)(b)-(f) Land Registration Rules 2003.

[1480] R11 (3)-(4) Land Registration Rules 2003. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 203. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 220. Also see C. Harpum & J. Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002*, Bristol: Jordan Publishing Limited, 2004, p. 218. Also see Website GOV.UK: HM Land Registry, 'Practice guide 74: searches of the index of proprietors' names' (updated last on 24 June 2015) (https://www.gov.uk/government/publications/searches-of-the-index-of-proprietors-names/practice-guide-74-searches-of-the-index-of-proprietors-names), as consulted on 03.01.2018. For more information about the Index of Proprietors' Names, see Chapter 3.3.1.1.

[1481] R11 (3) and r140 Land Registration Rules 2003. Also see s40 Freedom of Information Act 2000. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 203. Also see Website GOV.UK: HM Land Registry, 'Practice guide 74: searches of the index of proprietors' names' (updated last on 24 June 2015) (https://www.gov.uk/government/publications/searches-of-the-index-of-proprietors-

the consultation of the day list which must have regard "to a specified title number during the currency of a relevant notice given under Schedule 2, and subject to and in accordance with the limitations contained in the notice".[1482] The third exemption to the principle of open access of land register information concerns the "exempt information documents".[1483] These are essentially documents that comprise prejudicial information.[1484] To receive the status of "exempt information documents", an application must be filed to the land registrar.[1485] Nevertheless, applications may always be filed to receive an official copy these documents.[1486] If this occurs, the land registrars must, except if they are of the opinion that it would be "unnecessary or impracticable", inform the person who applied for the exempt information status.[1487] An application will be granted in two situations: first, if the requested document does not include prejudicial information (in which case the land registrar will have to remove its status of being an "exempt information document"), and second, if the grant of access can be justified on the basis of public interest.[1488] Moreover, an application will be granted if it is filed by a person listed in Schedule 5 of LRR 2003 provided that this application is related to a "court proceedings, insolvency and tax liability".[1489]

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names/practice-guide-74-searches-of-the-index-of-proprietors-names), as consulted on 03.01.2018. According to Practice Guide 74, access will also be granted if the search entry concerns the name of a legal person without having to proof interest to the registrar. This possibility could not be found back in r11 Land Registration Rules 2003.

[1482] R141 Land Registration Rules 2003.

[1483] R133 (2)(a) Land Registration Rules 2003. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 204. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1073.

[1484] R136 Land Registration Rules 2003. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1073. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 224.For examples of information that can be exempted see: Website GOV.UK: HM Land Registry, 'Practice guide 57: exempting documents from the general right to inspect and copy' (updated last on 16 January 2017) (https://www.gov.uk/government/publications/exempting-documents-from-the-general-right-to-inspect-and-copy/practice-guide-57-exempting-documents-from-the-general-right-to-inspect-and-copy), as consulted on 02.01.2018.

[1485] R136 (1) Land Registration Rules 2003. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 28.

[1486] R137 (1) Land Registration Rules 2003. Such a request is filed by submitting LR form EX2.

[1487] R137 (3) Land Registration Rules 2003.

[1488] R137 (4)-(5) Land Registration Rules 2003. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 224.

[1489] R140 Land Registration Rules 2003. Also see Website GOV.UK: HM Land Registry, 'Practice guide 57: exempting documents from the general right to inspect and copy' (updated last on 16 January 2017) (https://www.gov.uk/government/publications/exempting-documents-from-the-general-right-to-inspect-and-copy/practice-guide-57-exempting-documents-from-the-general-right-to-inspect-and-copy), as consulted on 02.01.2018.

In addition to these exceptions to the openness of the system, are there possibilities to apply for the total exclusion of information (such as one's address) that is already on the register from this publicity for example in cases of stalking? This is not the case. However, if victims move elsewhere, there are a few possibilities to hide their new address from the stalker. A practical though somewhat cumbersome work-around is to either set up a company or a trust for oneself and to have the company/trust registered as owner. In order to find out whether the victim has acquired new real estate, the stalker must file a petition to the land registrar to consult the index of proprietorship. That already forms the first hurdle. In the following, if stalkers are unaware of the details or even existence of the company/trust construction, the consultation of the index of proprietorship – if granted – will leave them empty-handed. A second possibility is for victims to apply for the relevant LR forms which are handed in to HM Land Registry to effectuate the transfer, by which they acquired their new domicile, to be recognized as an "exempt information document".[1490] As stated in HM Land Registry's Practice Guide 57, the situation in which "[a]n address revealed in correspondence where the individual concerned fears for their safety if that address were to be revealed" could in principle be recognized as a legitimate justification for the granting of such a request.

3.3.6 The Content of the Land Register

The central legal provision which provides an overview of the categories of rights that can be entered in the land register is s2 LRA 2002. Three categories of registrable rights can be distinguished: legal estates, interests that "are created by a disposition of an interest", and interests and charges that enjoy protection only after registration.[1491] When these categories are compared to the categories that exist with regard to unregistered land, it becomes apparent that the doctrine of notice, which continues to a play a (minor) role in unregistered land, has been abandoned as a means to assess whether a person can be bound by an equitable right under the regime of registered land.[1492] Registration then also has constitutive effect.[1493] These categories are

[1490] Website GOV.UK: HM Land Registry, 'Practice guide 57: exempting documents from the general right to inspect and copy' (updated last on 16 January 2017) (https://www.gov.uk/government/publications/exempting-documents-from-the-general-right-to-inspect-and-copy/practice-guide-57-exempting-documents-from-the-general-right-to-inspect-and-copy), as consulted on 02.01.2018.
[1491] S2 (a) (v) Land Registration Act 2002.
[1492] M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge, 2018, p. 40-41. Also see E. Cooke, *Land Law*, Oxford: Oxford University Press, 2012, p. 37.

complemented by the category of overriding interests, which bind third party despite the fact that they cannot be entered in the land register.[1494]

3.3.6.1 Legal Estates

The first category of rights that can be registered concern "unregistered legal estates".[1495] Although one might expect differently, the term "legal estate" is not restricted to the group of estates in land but also comprises legal interests and charges.[1496] All of the rights that fall in this category have in common that they are registered substantively, which means that an individual register is created for each of these rights.[1497] The first group of rights that fall in this category are the estates in land.[1498] These are the freehold and the leasehold.[1499] With regard to the leasehold, one restriction must not be left unmentioned; only leaseholds, whose run-time accounts for "more than seven years" at the point of time at which registration occurs, can be entered in the land register.[1500] The registration of both freehold and leasehold is in principle mandatory.[1501] In addition to estates in land, rentcharges, franchises and profits à prendre in gross are registrable.[1502] Noticeably, the registration of these three rights is optional.[1503]

[1493] B. McFarlane, N. Hopkins & S. Nield, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2018, p. 306.
[1494] M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge, 2018, p. 50.
[1495] S2 (a) Land Registration Act 2002.
[1496] S132 Land Registration Act 2002. Also see s1 (4) Law of Property Act 1925.
[1497] E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1072. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 196.
[1498] s2 (a) (i) Land Registration Act 2002.
[1499] s1(1) Law of Property Act 1925. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 41.
[1500] s3 (3), s4 (1) (c) (i), s4 (2) (b) Land Registration Act 2002. Also see E. Cooke, *The New Law of Land Registration*, Oregon: Hart Publishing, 2003, p. 36, 71.
[1501] For the precise circumstances under which registration is compulsory, see: s4 Land Registration Act 2002.
[1502] s2 (a) (ii)-(iv) Land Registration Act 2002.
[1503] s4 Land Registration Act 2002. On the basis of s5 Land Registration Act 2002, the Secretary of State is entitled to bring these rights under the hemisphere of s4 Land Registration Act 2002 if he so desires. Also see E. Cooke, *The New Law of Land Registration*, Oregon: Hart Publishing, 2003, p. 38 The possibility to register manors has now been excluded. See: s119 Land Registration Act 2002. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1072. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 152.

3.3.6.2 Interests and Charges that enjoy Protection only after Registration ("Minor Interests")[1504]

Furthermore, "any other interest or charge which subsists for the benefit of, or is a charge on, an interest the title to which is registered" can be recorded in the register of title.[1505] As a rule of thumb, one can remember that these interests are often equitable.[1506] A prominent representative of this category is the easement.[1507] In order to fill in this sub-category with specific interests and charges, s1 (2) of the Law of Property Act 1925 (hereafter: "LPA 1925") and s2 Land Charges Act 1972 must be consulted.[1508] The recording of these interests and charges is in principle optional but if they are not recorded, they are not enforceable against third parties.[1509] This also holds true if the third party was actually aware of its existence despite the fact that it was not recorded.[1510] The only exception to this general rule that interests and charges only enjoy protection after recordation crystallizes if the interest or charge in question constitutes an overriding interest.[1511] This is possible because the categories "registrable interests" and "overriding interests" are not mutually exclusive.[1512] For minor interests to be made visible in the land register, a notice or restriction is registered in the individual register of the registered estate or charge concerned.[1513]

Notices

[1504] In literature, the latter category is sometimes referred to as "minor interests". The term "minor interests" stems from the Land Registration Act 1925 but was not taken over by the Land Registration Act 2002. See: M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge-Cavendish, 2018, p. 43 and E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 141. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 110. Nevertheless, it can be seen that also modern textbooks on land law keep using this terminology.

[1505] s2 (a) (v) Land Registration Act 2002.

[1506] E. Cooke, *The New Law of Land Registration*, Oregon: Hart Publishing, 2003, p. 35

[1507] s1 (2) (a) Law of Property Act 1925.

[1508] Note that the interests listed in s1(2)(a), (b) and (e) Law of Property Act 1925 fall in the third category of registrable rights. See: s27 (2) (d)-(e) Land Registration Act 2002. Also see E. Cooke, *The New Law of Land Registration*, Oregon: Hart Publishing, 2003, p. 38. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 52.

[1509] S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 57-58.

[1510] Ibid. This possibility has been abolished by the entering into force of the Land Registration Act 2002.

[1511] Also see S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 57-58.

[1512] Williams & Glyn's Bank Ltd v Boland [1981] AC 487 (HL). Also see S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 57.

[1513] s32, 40 Land Registration Act 2002. Under the Land Registration Act 1925 it was also possible to register cautions against dealings and inhibitions. Although this possibility has been abolished in the Land Registration Act 2002, it is thus still possible to be confronted with them when consulting the land register. See: C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 190.

The purpose of a notice is to protect an interest that burdens a registered estate.[1514] In particular, the registration of a notice safeguards the interest's priority rank though it does not guarantee its legal validity.[1515] It is even possible that the interest is non-existent altogether.[1516] Notices can be registered for all interests that do not fall in the scope of s33 LRA 2002, as these interests cannot be protected by a notice.[1517] Within an individual register, notices are registered in the charges register.[1518]

Two types of notices can be distinguished: agreed notices and unilateral notices.[1519] In principle, the applicant is free to choose either type of notice although in certain cases an agreed notice may be prescribed.[1520] Does the registration of a notice proof the validity of the interest? This is not the case. As s32 (3) LRA 2002 states:

> "The fact that an interest is the subject of a notice does not necessarily mean that the interest is valid, but does mean that the priority of the interest, if valid, is protected for the purposes of sections 29 and 30."

The category of persons who may file an application for the registration of such a notice is quite restricted and is comprised of "a person who claims to be entitled to the benefit of [the] interest",

[1514] S32 (1) Land Registration Act 2002. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 190.
[1515] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 190. Also see Website GOV.UK: HM Land Registry, 'Practice guide 19: notices, restrictions and the protection of third party interests in the register' (updated last on 27 October 2017) (https://www.gov.uk/government/publications/notices-restrictions-and-the-protection-of-third-party-interests-in-the-register/practice-guide-19-notices-restrictions-and-the-protection-of-third-party-interests-in-the-register) as consulted on 03.01.2018.
[1516] Website GOV.UK: HM Land Registry, 'Practice guide 19: notices, restrictions and the protection of third party interests in the register' (updated last on 27 October 2017) (https://www.gov.uk/government/publications/notices-restrictions-and-the-protection-of-third-party-interests-in-the-register/practice-guide-19-notices-restrictions-and-the-protection-of-third-party-interests-in-the-register) as consulted on 03.01.2018.
[1517] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 191. For the specific practicalities of entering a notice in the register of title, see: Website GOV.UK: HM Land Registry, 'Practice guide 19: notices, restrictions and the protection of third party interests in the register' (updated last on 27 October 2017) (https://www.gov.uk/government/publications/notices-restrictions-and-the-protection-of-third-party-interests-in-the-register/practice-guide-19-notices-restrictions-and-the-protection-of-third-party-interests-in-the-register) as consulted on 03.01.2018.
[1518] R84 (1) Land Registration Rules 2003.
[1519] S34 (2) Land Registration Act 2002. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 192.
[1520] S42 (2) Land Registration Act 2002. Also see s80 Land Registration Rules 2003. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 193.

the "registered proprietor, or a person entitled to be registered as such proprietor".[1521] Moreover, in certain situations, the land registrar can or at times even is obliged to enter a notice autonomously.[1522]

An application for the registration of a notice will be honoured only if the "registered proprietor, or a person entitled to be registered as such proprietor" agrees to the registration or, alternatively, if the land registrar is sufficiently convinced that the claim that is expressed in the application is valid.[1523] In the case of a unilateral notice, these conditions do not have to be fulfilled. Yet, the land registrar has to inform the registered proprietor about the registration of the notice, who in turn is able to apply for the cancellation of the registered notice.[1524]

Restrictions

A registered restriction sets a framework to determine under which conditions further dispositions can be entered in the land register with regard to a specific registered estate or charge.[1525] This framework can take different degrees of severity.[1526] On the one hand, the category of dispositions that are affected by the restriction can be restricted.[1527] On the other hand, the period of time during which the restriction is effective, can be specified.[1528] These limitations are however not mandatory, so that it is in principle possible to register a restriction, which is created for eternity and which covers the registration of all possible dispositions. Restrictions can be registered by the land registrar's own initiative, due an order of the court, or upon an application of a person, who can show "sufficient interest" in the registration of the restriction.[1529] This is definitely the case

[1521] S34 (1), (3) Land Registration Act 2002.
[1522] S37-38 Land Registration Act 2002. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 192.
[1523] S34 (3) Land Registration Act 2002. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 192-193.
[1524] S35 (1) (a), s36 Land Registration Act 2002. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 194.
[1525] S40 (1), s41 (1) Land Registration Act 2002. For situations in which the restriction may be set aside by the land registrar, see s41 (2) Land Registration Act 2002 and C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 196.
[1526] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 195.
[1527] S40 (2) (a) Land Registration Act 2002.
[1528] S40 (2) (b), s3 Land Registration Act 2002.
[1529] S42-43 Land Registration Act 2002. Also see r92-93 Land Registration Rules 2003. For the specific practicalities of entering a restriction in the register of title, see: Website GOV.UK: HM Land Registry, 'Practice

when the applicant is the "registered proprietor, or a person entitled to be registered as such proprietor".[1530] Alternatively, any other person may file an application if the (entitled) proprietor agrees to the registration.[1531] In three situations, the land registrars may register a restriction on their own initiative under the condition that they inform the relevant proprietor.[1532] The land registrar may find the registration of a restriction indispensable or advisable to (i) avoid "invalidity or unlawfulness in relation to dispositions" of the respective registered estate or charge, (ii) assure the overreaching of certain interests that are able to overreach dispositions regarding registered estates or charges, and (iii) safeguard rights and claims that relate to the registered estate or charge.[1533] In specific situations, they are even under the obligation to register restrictions on own initiative.[1534] To illustrate, such a mandatory registration occurs if more than one proprietor is registered on a specific estate.[1535] Last, the registration of a restriction may be prescribed by the court if they find that it is essential or commendable in order to safeguard a right or claim that relates to a particular registered estate or charge.[1536] Restrictions can be withdrawn provided that the registration was not compulsory.[1537] A classic motivation for the entering of a restriction is to make the existence of a trust visible.[1538] Anybody who consults the register will then be aware of its existence, although the entry will not reveal any specific information about the particular trust as these are deemed to only concern the parties to the trust ("curtain principle").[1539]

guide 19: notices, restrictions and the protection of third party interests in the register' (updated last on 27 October 2017) (https://www.gov.uk/government/publications/notices-restrictions-and-the-protection-of-third-party-interests-in-the-register/practice-guide-19-notices-restrictions-and-the-protection-of-third-party-interests-in-the-register) as consulted on 03.01.2018.

[1530] S43 (1) (a) Land Registration Act 2002.

[1531] S43 (1) (b) Land Registration Act 2002.

[1532] S42 (1), (3) Land Registration Act 2002.

[1533] S42 (1) Land Registration Act 2002. For illustrations of these situations, see: C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 196-197.

[1534] r95 Land Registration Rules 2003. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 198. Also see Website GOV.UK: HM Land Registry, 'Practice guide 19: notices, restrictions and the protection of third party interests in the register' (updated last on 27 October 2017) (https://www.gov.uk/government/publications/notices-restrictions-and-the-protection-of-third-party-interests-in-the-register/practice-guide-19-notices-restrictions-and-the-protection-of-third-party-interests-in-the-register) as consulted on 03.01.2018.

[1535] S44 (1) Land Registration Act 2002. This only constitutes one example. For an overview of the different situations, see: C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 198-199.

[1536] S46 Land Registration Rules 2002.

[1537] S47 Land Registration Act 2002. Also see r98 (3) Land Registration Rules 2003. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 200.

[1538] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 105.

[1539] Ibid.

3.3.6.3 Interests that "are created by a disposition of an interest"

The third category of registrable rights concerns "interests capable of subsisting at law which are created by a disposition of an interest the title to which is registered".[1540] Dispositions with regard to land that must be registered are listed in s27 (2) LRA 2002 and concern transfers, certain types of leaseholds, "express grant(s) of an interest" falling within the scope of s1(2)(a), (b) and (e) LPA 1925, and "grant(s) of a legal charges".[1541] The registration of these dispositions, in accordance with the required formal registration requirements, is mandatory.[1542] If these requirements are not met, the legal title of the interest will not pass so that the buyer will only acquire an equitable interest.[1543] The legal interest will then be held by the seller who will act as bare trustee for the buyer.[1544]

3.3.6.4 Unregistered Interests which override First Registration/Registered Dispositions ("Overriding Interests")[1545]

Overriding interests are often equitable, but though binding on the purchaser, they do not make an appearance on the register of title.[1546] Therefore, their existence prejudices the register's mirror principle.[1547] Prominently, short leases and local land charges fall in this category.[1548] A complete

[1540] S2 (b) Land Registration Act 2002.
[1541] S27 (2) Land Registration Act 2002. For the conditions under which a leasehold can be registered, see s27 (2) (b)-(c) Land Registration Act 2002. With regard to the interests set out in s1 (2) (a) Law of Property Act, it must be pointed out that those that are registrable „under the Commons Registration Act 1965" are excluded. See s27 (2) (d) Land Registration Act 2002.
[1542] S27 (1)-(2) Land Registration Act 2002.
[1543] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 122.
[1544] Ibid.
[1545] As holds true for the term "minor interests", the "term overriding interests" stems from the Land Registration Act 1925 but was not taken over by the Land Registration Act 2002. See: B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 110. Nevertheless, it can be seen that also modern textbooks on land law keep using this terminology.
[1546] E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 140. Also see M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge, 2018, p. 49-50. Also see Website GOV.UK: HM Land Registry, 'Practice guide 15: overriding interests and their disclosure' (updated last on 26 June 2017) (https://www.gov.uk/government/publications/overriding-interests-and-their-disclosure/practice-guide-15-overriding-interests-and-their-disclosure), as consulted on 03.01.2018. To qualify as overriding interest, equitable interests must be combined with "actual occupation". See: R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 53-54.
[1547] M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge, 2018, p. 50.
[1548] Schedule 3, s1 and s6 Land Registration Act 2002. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1105, 1141. Also see S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 56.

overview of these interests can be found in Schedule 1 LRA 2002 for "unregistered interests which override first registration" and Schedule 3 LRA 2002 for "unregistered interests which override registered dispositions".[1549] The latter provides for a rather broadly formulated category of overriding interests in paragraph 2, which states that also "an interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation" qualifies as overriding interest. One must realize that due to the fact that actual occupation will do, it opens the door for basically all proprietary rights to be recognized as overriding interests.[1550] By the same token, it is evident that legislative measures have been taken – not at least through the entering into force of the LRA 2002 – to decrease the amount of (the types of) overriding interests.[1551]

As stated above, if one is to acquire real estate, one can thus be bound by interests and charges that despite the fact that it would often be possible to register them, were not registered. In how far does this 'loophole' constitute a threatening problem in legal practise? As *Gardner* and *MacKenzie* state:

> "Except for a saving of the small registration fee, there is certainly no advantage in not registering them. And there is likely advantage in registering them, as cutting out all scope

[1549] Also see s90 (5) LRA 2002. Also see S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 57 and K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 198.

[1550] Williams and Glyn's Bank Ltd v Boland [1981] AC 487. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 140-143. Paragraph 2 also lists four exceptions to this rule. Also see S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 57-59.

[1551] Note that as of 12 October 2013, the interests contained in para. 10-14 of Schedules 1 and 3 of Land Registration Act 2002 (such as manorial rights and franchises) no longer qualify as overriding interests. See s117 paragraph 1 Land Registration Act 2002. Also see r2 of Land Registration Rules 2002 (Transitional Provisions) (No 2) Order 2003. Also see Website GOV.UK: HM Land Registry, 'Practice guide 66: overriding interests that lost automatic protection in 2013' (updated last on 31 May 2016) (https://www.gov.uk/government/publications/overriding-interests-losing-automatic-protection-in-2013/practice-guide-66-overriding-interests-losing-automatic-protection-in-2013), consulted on 02.01.2018. Also see Website GOV.UK: HM Land Registry, 'Practice guide 15: overriding interests and their disclosure' (updated last on 26 June 2017) (https://www.gov.uk/government/publications/overriding-interests-and-their-disclosure/practice-guide-15-overriding-interests-and-their-disclosure), as consulted on 03.01.2017. Also see Website GOV.UK: HM Land Registry, 'Practice guide 25: leases - when to register' (updated last on 3 April 2017) (https://www.gov.uk/government/publications/leases-when-to-register/practice-guide-25-leases-when-to-register), as consulted on 03.01.2018. Also see R.J. Smith, *Property Law*, UK: Pearson Education Limited, 2017, p. 278. Also see Website GOV.UK: HM Land Registry, 'Practice guide 19: notices, restrictions and the protection of third party interests in the register' (updated last on 27 October 2017) (https://www.gov.uk/government/publications/notices-restrictions-and-the-protection-of-third-party-interests-in-the-register/practice-guide-19-notices-restrictions-and-the-protection-of-third-party-interests-in-the-register) as consulted on 03.01.2018.

> for argument over such matters as whether their owner was in actual and apparent occupation at the relevant time".[1552]

Furthermore, on the basis of s71 LRA 2002, parties who sent an application to the land registry for first registration or for the registration of a registrable disposition in cases where the estate has already been registered are required to inform the Chief Land Registrar about any unregistered interest.[1553] It follows that parties are then not simply left with a choice as to whether they wish to register an unregistered interest or not. However, it must be understood that either way, whether the parties (intentionally) forget to register such an interest or whether they do comply with their duty of disclosure, (the lack of) registration of an overriding interest that occurs by means of a notice does not have consequences for the binding force of overriding interests; after all, overriding interests are by definition binding upon the outside world even if they are not displayed on the register.[1554] It is only that if they are registered, their priority is recorded.[1555] At the same time, registration terminates the interest's overriding nature.[1556]

[1552] S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 64.
[1553] S71 Land Registration Act 2002. Also see M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge, 2018, p. 50-51. Note that some overriding interests are prevented from being entered on the register of title by means of a notice. See s33 and s90 paragraph 4 Land Registration Act 2002. Also see r28 paragraph 2 and r57 paragraph 2 Land Registration Rules 2003. Also see Website GOV.UK: HM Land Registry, 'Practice guide 15: overriding interests and their disclosure' (updated last on 26 June 2017) (https://www.gov.uk/government/publications/overriding-interests-and-their-disclosure/practice-guide-15-overriding-interests-and-their-disclosure), as consulted on 03.01.2018. Also see R.J. Smith, *Property Law*, UK: Pearson Education Limited, 2017, p. 278. Also see B. McFarlane, N. Hopkins & S. Nield, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2018, p. 637.
[1554] r28 paragraph 4 and r57 paragraph 7 Land Registration Rules 2003. Also see M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge, 2018, p. 51. Also see R.J. Smith, *Property Law*, UK: Pearson Education Limited, 2017, p. 278-279. Also see B. McFarlane, N. Hopkins & S. Nield, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2018, p. 615. Also see Website GOV.UK: HM Land Registry, 'Practice Guide 41: developing estates (registration services supplement 6 - voluntary application to note overriding interests)' (updated last on 25 June 2015) (https://www.gov.uk/government/publications/developing-estates-registration-services-voluntary-application-to-note-overriding-interests/practice-guide-41-developing-estates-registration-services-supplement-6-voluntary-application-to-note-overriding-interests), as consulted on 03.01.2018.
[1555] M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge, 2018, p. 51. Also see Website GOV.UK: HM Land Registry, 'Practice guide 19: notices, restrictions and the protection of third party interests in the register' (updated last on 27 October 2017) (https://www.gov.uk/government/publications/notices-restrictions-and-the-protection-of-third-party-interests-in-the-register/practice-guide-19-notices-restrictions-and-the-protection-of-third-party-interests-in-the-register), as consulted on 03.01.2018.
[1556] M. Dixon, *Modern Land Law*, Abingdon/New York: Routledge, 2018, p. 51. Also see Website GOV.UK: HM Land Registry, 'Practice guide 15: overriding interests and their disclosure' (updated last on 26 June 2017) (https://www.gov.uk/government/publications/overriding-interests-and-their-disclosure/practice-guide-15-overriding-interests-and-their-disclosure), as consulted on 03.01.2018.

For the foregoing considerations, it can be observed that even if these rights can qualify as overriding interests, registrable interests and charges will be registered as long as the involved parties are indeed aware of the fact that they are creating or transferring a right in rem and if they are intending to do so; *Gardner* and *MacKenzie* refer to them as "organised" rights in rem.[1557] There are however also situations in which parties are not (fully) aware of the fact they are creating or transferring rights in rem; these are labelled as "disorganised" rights in rem.[1558] As a consequence, registration will most likely not occur.[1559] It is in these cases where the added value of overriding interests becomes visible. If this was not possible, parties were left with an unenforceable right and rem and thus unprotected. In this context, it shall not be left unmentioned that the Chief Land Registrar may register a notice in the land register if he becomes aware of an interest that has not yet been registered.[1560] This competence is restricted to interests that are in the ambit of Schedule 1 and that do not qualify as "excluded interest" in the meaning of s33 LRA 2002.[1561]

Much has been written about the desirability of the existence of overriding interests.[1562] On the one hand, persons consulting the land register will receive information on whose correctness they can rely. However, they cannot trust that the information that they receive is also complete.[1563] This derogates from the register's "mirror principle", which implies that the register ideally able to provide a full overview of all interests that relate to a particular plot of land.[1564] Two further remarks about the mirror principle are appropriate. First, as *Gardner* points out:

> "It was common to see the 1925 Act described as establishing, in the register, a 'mirror' of title. An image in a mirror, of course, is not the object in question itself. As we have seen, the 2002 Act aspired to make the content of the register not an image of title, but the very title".[1565]

[1557] S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 64.
[1558] Ibid.
[1559] S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 65.
[1560] S37 (1) Land Registration Act 2002. The Chief Land Register must then inform the relevant parties about the notice. See: S37 (2) Land Registration Act 2002. An outline of the parties that are deemed to be notified can be found in r89 Land Registration Rules 2003.
[1561] S37 (1) Land Registration Act 2002.
[1562] S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 62-72.
[1563] S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 62. Also see E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 69.
[1564] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 104-105.
[1565] S. Gardner, 'The Land Registration Act 2002 – the Show on the Road', *The Modern Law Review* (2014) 77(5), p. 767.

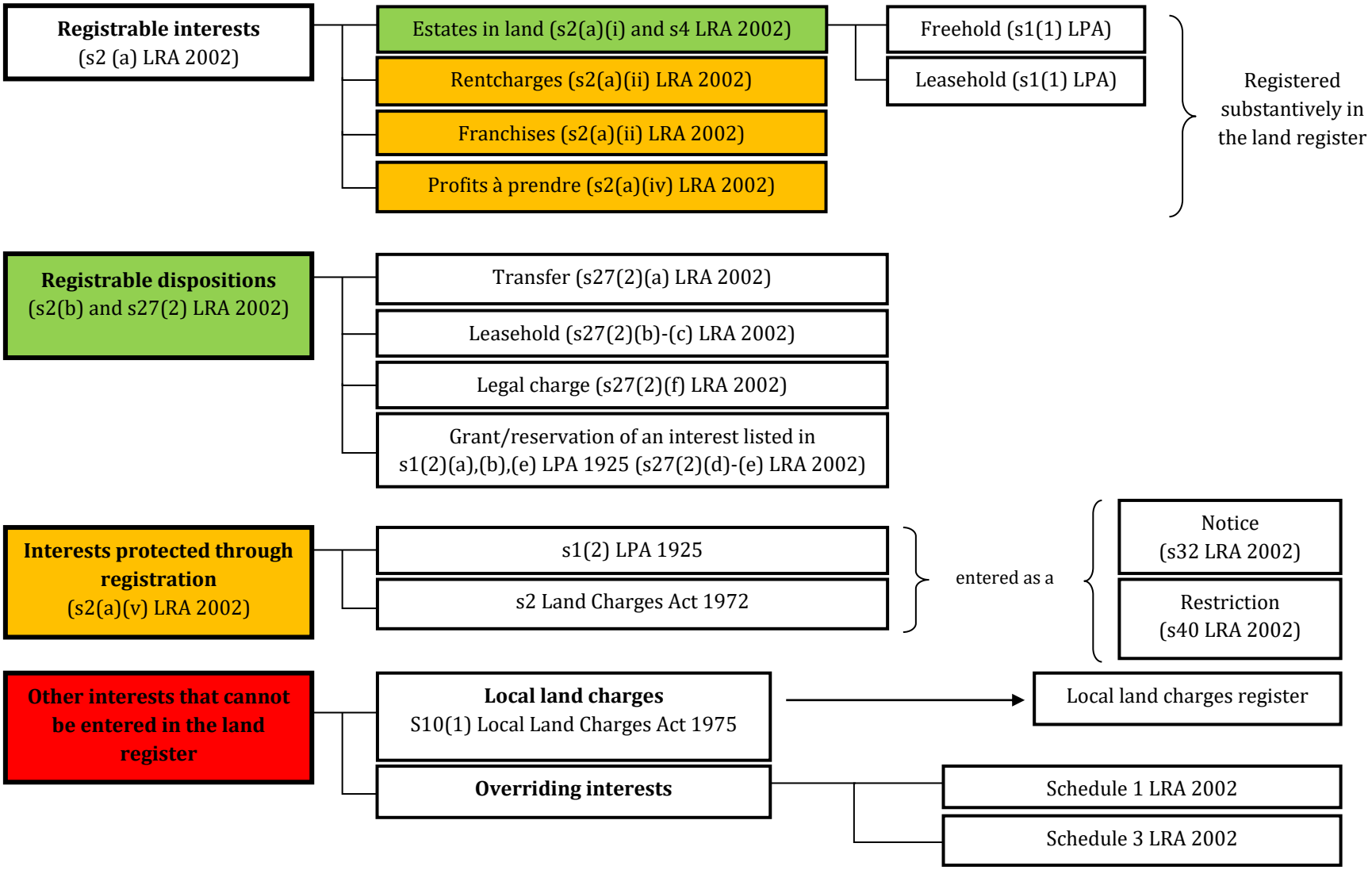
Second, "English law in reality supposes it appropriate to allow those who can to settle their own rights and to support those who fail to do so but deserve them nonetheless"; the latter by providing for the possibility of overriding interests.[1566] As a side remark it shall not be left unmentioned that while local land charges cannot be registered in the land register, registration of local land charges is the condition sine qua non for their realisation.[1567] To this end, local land charges are registered in the Local Land Charges Register, which is kept by HM Land Registry.[1568]

3.3.6.5 Historical Documents

Considering that the English system has a title registration system and not a deed registration system, does HM Land Registry possess historical documents about the titles they register and if that is the case, are these publicly accessible? It follows from s69 (1) LRA 2002 that anybody can ask the Chief Land Registrar to "provide information about the history of a registered title". It speaks for itself that if the Chief Land Registrar was not keeping this information, then this provision would be obsolete. However, it must be pointed out that, technically, he is under no obligation to do so, considering that a legal basis for such a duty is absent.[1569] Therefore, the enforcement of the right set out in s69 LRA 2002 is subject to the condition that the Chief Land Registrar disposes over the desired documents.[1570] This is the case for documents that have been digitalized.[1571]

[1566] S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 65.
[1567] S55 Land Registration Act 2002.
[1568] s34 and Schedule 5 Infrastructure Act 2015. Also see s3 Local Land Charges Act 1975. Also see Chapter 3.3.1.1.
[1569] C. Harpum & J. Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002*, Bristol: Jordan Publishing Limited, 2004, p. 252.
[1570] Ibid.
[1571] R144 LRR 2003. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 618.

Figure 1 – Interests on land and their registrability in the land register[1572]



[1572] The following color key applies: green (registration is mandatory), orange (registration is not mandatory), red (registration is not possible).

3.3.7 The Process of Transferring a Plot of Land in a Purely National Case

The following shall illustrate the process of transferring a fee simple. Due to the fact that DIY conveyancing occurs in less than 1% of all cases, it will be assumed that the buyer and seller have asked the assistance of legal practitioners. The process is not much different though. It is only that in case of DIY conveyancing, the parties will have to complete all necessary steps themselves and that they will need to have their IDs checked either by an English legal practitioner (e.g. a solicitor) or at an office of HM Land Registry.[1573] After all, the verification of the parties' identity forms a key tool to combat real estate transactions based on identity fraud so that such verification is not only required in DIY conveyancing but also in practitioner-assisted conveyancing.[1574]

3.3.7.1 The Pre-Contractual Phase

As soon as seller and buyer come to an agreement about the transfer of the fee simple, they will each immediately mandate a legal practitioner.[1575] As shall be seen, many of the actions that in the described civil law systems take place only in the contractual phase are in England already completed in the pre-contractual phase.[1576] To begin with, the seller's legal practitioner will have to

[1573] The ID check is required if the transfer of the plot requires the applicant to fill in forms ID1 or ID2. See: Website GOV.UK: HM Land Registry, 'Practice guide 67: evidence of identity; conveyancers' (updated last on 6 November 2017) (https://www.gov.uk/government/publications/evidence-of-identity-conveyancers/practice-guide-67-evidence-of-identity-conveyancers), as consulted on 02.01.2018. To provide just one example where the transfer does not require these forms: as follows from forms ID1 and ID2, the requirement to fill in these forms is obsolete if the value of the plot that is subject to transfer does not exceed the threshold of £6,000.

[1574] For an overview of these situations and the situations in which "Rule 17 identity evidence" as laid down in r17 of Land Registration Rules 2003 might apply, see: Website GOV.UK: HM Land Registry, 'Practice guide 67: evidence of identity; conveyancers' (updated last on 6 November 2017) (https://www.gov.uk/government/publications/evidence-of-identity-conveyancers/practice-guide-67-evidence-of-identity-conveyancers), as consulted on 02.01.2018. Also see HM Land Registry forms AP1, DS2, and FR1.

[1575] R. Abbey & M. Richards, *Blackstone's Guide to The Land Registration Act 2002*, New York: Oxford University Press, 2002, p. 108. Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 44. An overview of the different tasks that need to be fulfilled by the practitioner in the process of transferring a freehold/ leasehold can be found in "The Law Society Conveyancing Protocol". See: Website The Law Society, 'Conveyancing protocol' (http://www.lawsociety.org.uk/support-services/advice/articles/conveyancing-protocol/), as consulted on 15.01.2018. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 327.

[1576] If the Law Society's National Conveyancing Protocol is followed, a more active role is put away for the seller in a sense that he will have to provide the buyer with the necessary information rather than having the buyer gather this information by himself. See ChapterXX.

examine whether the seller is legally entitled to transfer the fee simple to the buyer.[1577] Further, also the buyer (or better his legal practitioner) will examine whether the seller is entitled to sell the land in question.[1578] The available literature seems to be divided as to whether the buyer must gather the necessary evidence of the correctness to the seller's title himself or whether it is the seller who must provide this information to the buyer.[1579] The Law Society's Conveyancing Protocol however confers this task upon the seller.[1580] It is then also the seller who must pay the costs for the documents.[1581] Either way, when dealings with registered land are concerned, this task can be accomplished relatively easily. The seller can simply turn to HM Land Registry to request official copies of the relevant entries in the title register together with those documents that are pointed to therein and the corresponding title plan.[1582] Requests can be filed at the LR office, by post, phone, fax, and through several digital channels (Land Registry Portal, Business Gateway, and NLIS).[1583]

As part of the investigation of title, the buyer can pose requisitions to the seller.[1584] Essentially, requisitions are written questions about the existence of potential flaws that were detected during the investigation of the title, accompanied with an order to resolve them.[1585] It is then on the seller to act on the requisitions appropriately. There are three different outcomes: (a) the seller acknowledges the flaw and resolves it, (b) the seller can clarify that the potential flaw is not a real flaw, or (c) the seller can point out "why it is a matter on which it is improper to raise a

[1577] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 144.
[1578] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1035. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 327, 465.
[1579] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 19. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1036. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 327. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 4.
[1580] The Law Society Conveyancing Protocol, point 24 to be found at: Website The Law Society, 'Conveyancing Protocol' (http://www.lawsociety.org.uk/support-services/advice/articles/conveyancing-protocol/), as consulted on 24.01.2018.
[1581] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 327.
[1582] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1036. Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 72. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 220. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 4.
[1583] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 57, 176-177. Note that not all of the digital channels might be available for the ordinary citizen who is not a registered customer.
[1584] Standard Conditions of Sale (5th edition) 4.2.1a, to be found on: Website The Law Society, 'Standard conditions of sale' (https://www.lawsociety.org.uk/support-services/advice/articles/standard-conditions-of-sale/), as consulted on 24.01.2018. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 127.
[1585] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 167.

requisition".[1586] Once the seller has received the requisitions, he is under an obligation to react in the course of four business days.[1587]

Once the seller's title to the registered land is verified, the buyer is well-advised to examine the land in the territory, especially by whom it is occupied at that time.[1588] It deserves attention that the legal practitioner is not obliged to examine the land on his own motion.[1589] Therefore, the buyer can either do this himself or expressly asks his legal practitioner to examine the land on his behalf.[1590] This is due to the fact that the interest of "a person in actual occupation" of the land can constitute an overriding interest.[1591] In addition, he will assure himself that the parcel in reality matches the description of the parcel as contained in the contract (which includes that the location of the boundaries are where they are supposed to be and that any fixtures that are promised to be on the land, are actually there).[1592] Afterwards, the buyer is well advised to control the existence of overriding interests and local land charges.[1593] Additionally, he will enquire for "standard drainage and water enquiries of the water service company" and also directly turn to the local authorities to investigate whether the parcel of land is subject to "planning and building regulations", "roads and public rights of way", or "other matters, which include nearby road schemes, traffic schemes, and contaminated land concerns".[1594] These are the standard questions that will be asked as contained in standard inquiry form "CON 29R", which has been produced by the Solicitors' Law Society to provide practical assistance to the buyer in this stage of the transaction process.[1595] In addition, the

[1586] Ibid.
[1587] Standard Condition 4.3.1. If the Standard Conditions do not apply, the seller does not have to react within four business days but must react "within a reasonable time". See: R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 169.
[1588] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1035. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p110.
[1589] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 300.
[1590] Ibid.
[1591] S2 of Schedule 3 Land Registration Act 2002. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1110.
[1592] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 300.
[1593] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1037. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 271.
[1594] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 111. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 272, 276-278.
[1595] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 111. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 274. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 98-102. Also see D.G. Barnsley & P. W. Smith, *Barnsley's Conveyancing Law and Practice*, London: Butterworths, 1982, p. 181. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford

second part of this standard form "CON 29O" allows the buyer to ask extra questions relating to a variety of matters such as "noise abatement, food safety notices, hedgerow notices and common land town and village greens".[1596] If the seller is a legal person, the buyer will also have to consult the Companies Register to verify that the company is entitled to engage in the real estate transaction.[1597] Moreover, depending on the specific characteristics and location of the parcel in question, more enquiries might be necessary (i.e. if the parcel is located in a mining area or bordering a river).[1598] It has become clear by now, that the buyer will have to consult a multitude of sources in order to get the complete picture of the property that he is willing to acquire. To facilitate this process, the National Land Information Service (hereafter: "NLIS") has been set up in the beginning of 2001.[1599] The NLIS enables the practitioner to do all necessary enquiries (including the information kept by HM Land Registry) through one interface.[1600]

Last, the buyer will need to arrange a mortgage to secure the financing of the transaction.[1601] As a prerequisite for the lending of money, financial institutions often ask for a valuation or survey of the land to reduce their risk if the mortgagor fails to pay back the loan.[1602] After all, if the granted loan excessively exceeds the true value of the land, the financial institution will be unable to set off their loss through a forced sale. At the same time, a survey will also grant protection to the buyer

University Press, 2011, p. 951. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 272.

[1596] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 112. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 274. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 98, 102-103.

[1597] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 120.

[1598] For an overview of these different enquiries see: R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 120-122 and F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 288-297.

[1599] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 127.

[1600] Ibid.

[1601] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1035. Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 44. On the practicalities of registering a mortgage, see: Website GOV.UK: HM Land Registry, 'Practice guide 29: registration of legal charges and deeds of variation of charge' (updated last on 28 November 2016) (https://www.gov.uk/government/publications/registration-of-legal-charges-and-deeds-of-variation-of-charge/practice-guide-29-registration-of-legal-charges-and-deeds-of-variation-of-charge), as consulted on 03.01.2018.

[1602] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1035. Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 44.

himself, as he is bound by the "caveat emptor rule" according to which it is the buyer who must find out about the property's flaws (such as cracks in the outside wall) himself.[1603]

The careful reader will have made four observations about the placing of these steps in the pre-contractual phase. First, and this goes almost without saying, the execution of these measures is cost and time expensive.[1604] Second, the buyer incurs these costs while he is in a vulnerable legal position. Not only is the seller bound by contractual obligations, one needs to realise that is it even unclear whether seller and buyer will reach the contractual phase at all.[1605] At the same time, any agreements made between seller and buyer about the sale of the land in this phase qualifies merely as "gentleman's agreements" and can thus not be legally enforced.[1606] Third, the buyer needs to make the costs while he does not know whether there are other potential buyers who are interested in the same estate and who could thus endanger his success of becoming the new proprietor of the estate.[1607] Indeed, the buyer faces the concrete risk that the seller ends the pre-contractual negotiations when a different potential buyer, who is willing to pay a higher purchase sum for the land, crosses his way.[1608] This practise is in principle legal and commonly referred to as "gazumping".[1609] If this overcomes the buyer, he might incur a great (financial) loss that he will not be able to recover from the seller.[1610] This is only different when seller and buyer have concluded a prior agreement that withholds the seller from accepting a different offer during an agreed period of time.[1611] Forth, it seems that the duty to collect all relevant information rests completely on the buyer while the seller is out of the woods. As a general starting point this impression can be confirmed.[1612] While the buyer must actively gather the relevant information, only a passive role is reserved for the seller who in principle has two obligations: to inform the buyer if his title is

[1603] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 86.
[1604] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1035.
[1605] Ibid.
[1606] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1040-1041. Also see S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 111.
[1607] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1035.
[1608] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1041.
[1609] Ibid. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 97 and S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 113. The Government is seeking ways to terminate the legality of this Practice. Two methods of resolution seem to be especially favourable. The first possible solution is to get inspiration from Scotland, where, once the seller has accepted the buyer's offer, both enter into a contract which is binding upon both parties. The other option is to require a deposit, whose amount would depend on the purchase size. For a more detailed discussion of these options see: R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 37-38.
[1610] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1042.
[1611] Ibid. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 97.
[1612] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1037.

defective and to truthfully respond to inquiries put to him by seller.[1613] For the rest he is under no obligation to provide the buyer with information on his own initiative ("caveat emptor").[1614] Nevertheless, the potential harshness connected to this principle should not be underestimated. Imagine you are interested in acquiring a particular house in England. As you and your solicitor are aware of the caveat emptor principle you have sent a standardized inquiry form to the seller to ask him to distribute the information that are necessary for you to make a sound decision about whether or not to acquire the property. After having received the form back, which did not include any outstanding anomalies, you decide to buy the house. After having acquired the ownership of the house, all seems well at first but only half a year later you will find out that it really was not. When watching a documentary on a national TV channel, your blood suddenly runs cold. Through this documentary you find out that in the recent past your house was the scene of a bloodcurdling murder. The owner of the house at the time had brutally murdered the 13 year old house slave and afterwards trenched the body. Some of her bodily parts were found at his work place, some in and around your house and others have not been found to date. There is a chance that these are still hidden somewhere in and around the house you are living in. Although your seller, who themselves acquired the property from the murderer's wife, were fully aware of these circumstances, they did not inform the buyer. After finding out themselves about the murder through an anonymous delivery of newspaper articles about the murder trial, they even continued to live in this house for another 18 months. But it is not only that they refrained from briefing you about the murder, they also negatively answered the question "Is there any other information which you think the buyer may have a right to know?" that was included as question 13 in the standard inquiry form. Was the seller under an obligation to inform you about the murder? Certainly, having knowledge of this murder would have influenced your decision on whether to buy the house. What reads like a script for a thriller or horror movie are in reality the facts of the case *Sykes v Taylor –Rose* which often serves as a classic textbook example to illustrate the broad coverage of the caveat emptor principle.[1615] In appeal, the court unanimously confirmed the decision of the district court and upheld that

[1613] Ibid.
[1614] Ibid. Also see D.G. Barnsley & P. W. Smith, *Barnsley's Conveyancing Law and Practice*, London: Butterworths, 1982, p. 168.Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 950.
[1615] Case Alan Ernest Sykes, Susan Sykes v. James Walker Taylor-Rose, Alison Claire Taylor-Rose [2004] EWCA Civ 299, [2004] 2 P. & C.R. 30. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 953. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1038.

the sellers were neither under an obligation to inform the buyer about the murder nor have they provided an incorrect answer to question 13.[1616] As Lord Justice *Gibson* formulates it:

> Because the caveat emptor rule can work harshly on purchasers, whose knowledge of material facts affecting the property they are purchasing is almost certain to be considerably less than that of the vendors, the practice of sending pre-contractual enquiries has become standard and the scope of the enquiries has been extended over a period of time. It is for the buyer to decide what enquiries to raise and in what form. It cannot be doubted that a more specific and less subjective question going to the value of the property or to the ability of the purchaser to enjoy the property could have been asked. Unhappily, question 13 in the Law Society's form at that time (we are told that it is no longer in use) did allow the answer to be given in a way which only required, in my view, the vendor to answer the question honestly.[1617]

By the same token, the caveat emptor principle, though still being the point of departure, has slowly become a dying breed in legal practise.[1618] The reason for this was the evolution of the Law Society's National Conveyancing Protocol in 1990, which has inverted the caveat emptor to implement the rising acceptation of a seller-buyer-relationship that is coined by trust and the acknowledgement of the fact that it is easier for the seller to distribute the essential information than for the buyer to carefully compile them.[1619] Thus, the use of this protocol foresees in a more active seller who provides the buyer with the required information that the latter otherwise would had to collect himself.[1620] Despite the fact that the use of this protocol is not mandatory, it enjoys great popularity so that it is now vastly used in real estate transactions.[1621] Under the Housing Act 2004 it has even been the case that a great part of this protocol and thus the inversion of the caveat emptor rule had been legally anchored as this Act required that the seller equips the potential buyer with the necessary information by providing him with a so-called "home information

[1616] Case Alan Ernest Sykes, Susan Sykes v. James Walker Taylor-Rose, Alison Claire Taylor-Rose [2004] EWCA Civ 299, [2004] 2 P. & C.R. 30, para.. 28-37, 47, 49-51.
[1617] Case Alan Ernest Sykes, Susan Sykes v. James Walker Taylor-Rose, Alison Claire Taylor-Rose [2004] EWCA Civ 299, [2004] 2 P. & C.R. 30, para..50.
[1618] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1038. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 952.
[1619] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1038. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 951. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 271.
[1620] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1038.
[1621] Ibid. Also see Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 271.

pack".[1622] Yet the luck was not on the home information pack's side as its mandatory distribution was abolished only a few years later by the Localism Act 2011.[1623]

3.3.7.2 The Contract of Sale

Traditionally, the privilege of formulating the contract is conferred upon the seller.[1624] Essentially, the contract of sale has to fulfil three requirements: it has to be put in writing, it must include the terms that were agreed upon by the parties to the contract, and it requires the signatures of the parties.[1625] A legal condition to involve a legal practitioner at this stage does not exist. It is therefore in principle possible to turn to a foreign legal practitioner to draw up the contract of sale. In order to prevent that the written communications exchanged between the parties(' legal practitioners) that are still subject to negotiations are already recognized as the contract of sale, these communications will indicate that they are "subject to contract" to avoid them from getting legal effect.[1626] It is interesting to note that the foregoing does not take away that a buyer who merely concludes an oral contract with the seller is not left completely unprotected. Instead, he can address the courts which may hold that he is entitled to an equitable interest in the land on the basis of proprietary estoppel.[1627]

[1622] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1039-1040. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 951.
[1623] S183(1), 240(1)(k), Schedule 25 Part 29 Localism Act 2011. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 951.
[1624] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 312.
[1625] S 2(1)-(3) Law of Property (Miscellaneous Provisions) Act 1989. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 91, 120. Also see and K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1045 and S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 113. Before the entering into force of the Law of Property (Miscellaneous Provisions) Act 1989, it was possible to conclude oral contracts for the sale of land. However, as is inherent in the nature of oral contracts, in order to be enforceable, they had to be put in writing. See: Law of Property Act 1925, s40 and K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1049.
[1626] S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 114. However, it is to be noted that according to s2 Law of Property (Miscellaneous Provisions) Act 1989, a sales contract for immovable property will not be valid in the absence of the signatures of the parties. See: F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 213.
[1627] S 2 (5)Law of Property (Miscellaneous Provisions) Act 1989. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1048. For a critical assessment of the application of proprietary estoppels in these cases, see S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 114, 156-159.

Sales contracts can be either 'open' or 'closed'.[1628] Simply put, these two types of contracts can be distinguished by the inclusion of conditions: while 'closed' contracts do contain conditions, 'open' contracts suffice without and merely include information on the contracting parties, the plot of land that is to be transferred and the purchase price.[1629] A great variety of conditions exist, though they have in common that they as such have to be sufficiently specific and precise for them to be valid.[1630] Not all conditions qualify as standard conditions but those who do are contained in a special compilation called "the Standard Conditions of Sale" which in legal practise is fallen back on when drafting the contract of sale.[1631] For instance, the buyer can request to include conditions that relate to the receipt of a bank loan to secure the payment of the purchase price or to the obtaining of a building permit.[1632] Furthermore, he might want to conclude the contract of sale under the condition that he is able to sell the land that he currently owns.[1633] To protect the seller, another standard condition in real estate sale contracts entails that the buyer must deposit a certain portion of the purchase price (usually 10%) at the moment in which the contracts are exchanged.[1634] In the event that the buyer will frustrate the fulfilment of the contractual obligations, he will lose the deposit to the seller.[1635]

The contract must explicitly define the plot that is to be sold. In most cases, it suffices to state the title number in combination with its address.[1636] In other cases, it might prove helpful to include a plan on which the plot in question is edged with a red line.[1637]

Once the contract is successfully negotiated, it remains to be signed by the parties. To this end, the contract is to be exchanged and the parties need to determine when completion will take place.[1638]

[1628] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1044.
[1629] Ibid.
[1630] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1066.
[1631] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 271.
[1632] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1066.
[1633] Ibid.
[1634] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1053-1054. Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 56. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 334. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 5.
[1635] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 5.
[1636] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 59.
[1637] Ibid.
[1638] S2 Law of Property (Miscellaneous Provisions) Act 1989. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1051-1052. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p5.

The form of exchanging itself is to be determined by the parties. It is possible that the parties physically exchange the contracts while sitting at the same table, but it is also valid if the contracts are exchanged by regular mail or even via the phone.[1639] In practice, the latter proves to the most popular means amongst legal practitioners.[1640] The exchange of contracts through other media, such as fax or e-mail is not permitted.[1641]

In the normal course of events, the signing of the contracts heralds the buyer's obligation to pay part of the purchase price (10%) as a deposit.[1642] In practice, the deposit will be paid from the legal practitioner's professional bank account and not by the buyer directly.[1643] If the buyer afterwards does not fulfil his obligations that arise under the contract to such an extent that the transfer does not occur after all, the seller may keep the deposit.[1644] Though not being a standard course of actions, it is most interesting to note that it is possible to record an estate contract in the land register due to the fact that it is considered to be a right in rem by itself.[1645] The estate contract can be entered in the register of title by means of a notice.[1646]

Once the contract is concluded, both seller and buyer will be equipped with a personal right against each other.[1647] The seller is thus entitled to the payment of the purchase price while the buyer is entitled to the transfer of ownership. But these are not all legal consequences that arise upon conclusion of the contract. In opposite to the civil law, the conclusion of the contract namely also

[1639] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1052-1053. Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 193-194. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 5.
[1640] The possibility to exchange contracts on the phone was acknowledged in Domb v Isoz [1980] Ch 548. Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 194. For a detailed explanation of the different scripts involving exchange on the phone, see: R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 194-196.
[1641] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 196. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 453.
[1642] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1053.
[1643] Standard Conditions of Sale (5th edition) 2.2.4. Also see para. 13.2 SRA Accounts Rules 2011. Also see r32 Solicitors Act 1974. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 339.
[1644] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1054.
[1645] S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 115. There is some recent discussion on whether the estate contract constitutes a right of rem. See: S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 119.
[1646] S32-33 Land Registration Act 2002. Also see E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 72.
[1647] R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 44.

triggers the transfer of the equitable property from the seller to the buyer.[1648] This is due to the "equitable doctrine of conversion".[1649] These equitable rights are referred to as "estate contract".[1650] To this end, a trust comes into existence.[1651] It is crucial to understand that the equitable property is not transferred instantaneously but it is rather "that the trust relationship between vendor and purchaser under a specifically enforceable contract gathers in intensity as the relationship progresses".[1652] Once the contract is concluded, a special constructive trust comes into existence, in which the seller acts as a sort trustee to the benefit of the buyer who becomes a sort beneficiary.[1653] This trust owes its speciality to the fact that the beneficiary is not entitled to the full equitable interest at that point. Instead, the equitable interest is, as it were, split in two and divided amongst both seller and buyer, with the consequence that the seller will retain a certain portion of the equitable interest together with legal interest.[1654] Once the buyer pays the purchase price, he is entitled to the equitable interest as a whole.[1655] In other words, the special trust arrangement is upgraded to a proper trust with the buyer becoming a proper beneficiary and the seller becoming a proper trustee.[1656] In short, the foregoing elaboration shows that "an analysis of the nature of the vendor-purchaser relationship at different stages of a transaction of sale reveals a sophisticated, but constantly changing, trust relationship between the parties, corresponding to the gradual transmission of equitable property from one party to the other".[1657]

A practitioner might now want to pose the question what the consequences of this trust are for both seller and buyer in practice. Without intending to provide a conclusive answer to this

[1648] Walsh v Lonsdale (1882) 21 Ch D 9, M & B p. 30. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 44. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 92, 120 and K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1057-1059.
[1649] The coming into existence of the estate contract is a remainder of ancient English law. As common law stood before the 15th century (also before the rise of equity), the buyer was not equipped with any other means to enforce performance of the contract of a seller who was not willing to do so. According to modern English law, he could just base his claim on "non-performance of the contract". See: S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 116-117.
[1650] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 14-15, 52-53. On the use of the term "estate contract" in cases where rights in rem other than a freehold are transferred, see: S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 116.
[1651] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1059.
[1652] For a detailed analysis of this relationship between seller and buyer, see: K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1059-1065.
[1653] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1060.
[1654] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1060-1061.
[1655] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1063.
[1656] Ibid.
[1657] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1059.

question, in essence, it can be said that the seller must take good care of the land (and the house on top of it) in order to conserve its status quo (and thus its value) at the time of the conclusion of the contract.[1658] Thus, he may for example not conduct any construction projects without the buyer's permission.[1659] At the same time, a great arsenal of rights is still available to him.[1660] For the purpose of illustration, one can think of the possession of the land, the ability to create a right of mortgage on the land and the entitlement to collect any profits that flow from the land.[1661] For the buyer on the other hand, the trust also provides a protection mechanism in the event that the land is later sold and transferred to a different person behind the back of the original buyer or if the seller changes his mind and does not want to transfer the land to him after all.[1662] His equitable interest then equips the buyer with a claim for specific performance.[1663] This entails that the buyer can enforce the contract through a court order and the seller will then have no choice but to transfer the piece of land.[1664] The alternative route of paying monetary compensation for non-performance is only accepted in exceptional circumstances.[1665] Yet, this is possible only if the estate contract was registered in the land register or alternatively if it can qualify as overriding interest in the sense of paragraph 2 of Schedule 3, in the case of which the first buyer will have to demonstrate actual occupation of the land. In order to invoke special performance, a number of conditions need to be met.[1666] To begin with, the sales contract has to be a "contract for value".[1667] Second, the

[1658] Englewood Properties Ltd v Patel [2005] EWHC 128 (Ch). Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1061. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 52-58.
[1659] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 56.
[1660] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1062.
[1661] See (also for more examples): K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1062.
[1662] Yet, this is possible only if the estate contract was registered in the land register or alternatively if it can qualify as overriding interest in the sense of paragraph 2 of Schedule 3, in the case of which the first buyer will have to demonstrate actual occupation of the land. See: S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 119, 121. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1055, 1061.
[1663] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1055. Also see S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 117. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 52, 54.
[1664] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1055.
[1665] Ibid. Also see S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 116-117. The question why specific performance is considered to be the standard remedy in these cases does not seem to be completely resolved. *Bogusz* and *Sexton* trace it back to the individuality that each plot has in the sense that it is not possible to merely replace one plot with another. *Gardner* and *MacKenzie* on the other hand consider that the reason might be that "being vested with the land at common law gave the buyer advantages of status", which could not be recognized by awarding damages. See B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 52 and S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 117.
[1666] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1055.

formal requirements of a sales contract, as laid down in s2 Law of Property (Miscellaneous Provisions) Act 1989 must be met and third, the buyer must have "clean hands".[1668] Notably, it is rather difficult to prove that this condition has not been met; in fact, such a proof will only be successful in rather severe situations.[1669] Last, it may not frustrate third party rights or lead to "excessive hardship".[1670]

In addition to the possibility to inspect the land register himself, the buyer may and even should instruct the land registry staff to conduct an "official search".[1671] Once the search has been conducted, the land registry will provide the buyer with an "official search certificate" which will protect the buyer against any other entries that are entered on the land register for a period of 30 business days which starts to run with the application's enterance on the day list.[1672] From a comparative viewpoint one might want to compare its effect with those of a Vormerkung as known under German and Dutch law.

3.3.7.3 The Drawing up of the Deed of Transfer

Upon conclusion of the contract (the so-called "post-contract stage") the buyer may pose requisitions to the seller provided that he was not aware of requisition's subject matter before the exchange of contracts occurred.[1673] Also, he will once more conduct the necessary searches in the

[1667] Ibid.
[1668] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1056.
[1669] Ibid.
[1670] Ibid.
[1671] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 135.
[1672] R131 Land Registration Rules 2003. Also see Website GOV.UK: HM Land Registry, 'Practice guide 12: official searches and outline applications' (updated last on 2 October 2017) (https://www.gov.uk/government/publications/official-searches-and-outline-applications/practice-guide-12-official-searches-and-outline-applications), as consulted on 24.01.2018. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 135.
[1673] Standard Conditions of Sale (5th edition) 4.3.1/4.2.2, to be found on: Website The Law Society, 'Standard conditions of sale' (https://www.lawsociety.org.uk/support-services/advice/articles/standard-conditions-of-sale/), as consulted on 24.01.2018. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 489. Also see The Law Society's Form TA13 completion information and undertakings (2nd edition), to be found on: Website The Law Society, 'TA form specimens' (https://www.lawsociety.org.uk/support-services/advice/articles/ta-form-specimens/), as consulted on 24.01.2018. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 5.

diverse registers.[1674] This time however, the buyer will for sure have to gather all information himself.[1675]

If the buyer finances the purchase by means of a charge on land, his legal practitioner must also take the appropriate measures to realize the mortgage.[1676] This includes the drafting of the deed of creation of the charge, ensure that the buyer is not insolvent, and "advise the lender that the legal title is in order".[1677] If the chargee is represented by a legal practitioner other than the buyer's legal practitioner, than their legal practitioner will examine the title himself.[1678] Alternatively, he can ask for a "Certificate of Title" to be produced by the legal practitioner acting on behalf of the buyer.[1679]

The transfer of a legal estate requires a deed.[1680] As a general rule, the drafting of the deed of transfer is the privilege of the buyer, though parties are free to enter into a different arrangement.[1681] To this end, he will make use of HM Land Registry's TR1 form.[1682] Nevertheless, the deed is subject to approval of the seller.[1683] Also, when a registered estate is transferred, the respective standard form supplied by HM Land Registry has to be employed to this end.[1684] Once approved by both parties, the parties sign the conveyance deed and move onto completion.[1685] The

[1674] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 45. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 508.
[1675] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 538.
[1676] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 5.
[1677] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 6.
[1678] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 144.
[1679] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 145.
[1680] S52 (1) Law of Property Act 1925. S52 (2) LPA 1925 contain the exceptions to this general rule. Also see S1 (2)-(3) Law of Property (Miscellaneous Provisions) Act 1989. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 49-50. Equitable interests do not demand a deed for their creation. For an explanation of the different possibilities see: B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 47-49
[1681] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 493. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 5.
[1682] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 123.
[1683] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 5.
[1684] R58 Land Registration Rules 2003. For an overview of the standard forms that are available for the different transactions, see: Website GOV.UK: HM Land Registry, 'Practice guide 8: execution of deeds' (updated last on 13 November 2017) (https://www.gov.uk/government/publications/execution-of-deeds/practice-guide-8-execution-of-deeds), as consulted on 15.01.2018. Also see r59-60, 90-92, 103, 206, 210 Land Registration Rules 2003. For an exception see r209 Land Registration Rules 2003.
[1685] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 45. In principle, the parties can ask an attorney to sign the deed on their behalf. In that case, a statement regarding the power of attorney must be included. See r61-63 Land Registration Rules 2003. Also see Website GOV.UK: HM Land Registry, 'Practice guide 9: powers of attorney and registered land' (updated last on 16 October 2017) (https://www.gov.uk/government/publications/powers-of-attorney-and-registered-

signatures of the parties must be witnessed, whereby – in principle - anybody can act as a witness.[1686] The contract will determine when completion will occur.[1687] To this end, the solicitors of both seller and buyer will schedule a meeting in person, though completion via post is also a valid option.[1688] Essentially, completion entails the buyer transfers the purchase price to the seller while the latter hands over the deed of transfer to the buyer.[1689]

> "Standard Condition 6.7 provides that the buyer is to pay the money due on completion by a direct transfer of cleared funds from an account held in the name of a conveyancer at a clearing and, if appropriate, by an unconditional release of a deposit held by a stakeholder".[1690]

Parties are however free to decide otherwise but are to define the payment method in the contract.[1691]

What is the legal consequence of the performance of completion? It triggers the "doctrine of merger".[1692] From the moment that completion has been performed, the sales contract and the deed of transfer merge so that, "to the extent that merger operates, any action for damages against the seller by the buyer must be under the covenants for title implied into the purchase deed and the buyer cannot sue on the contract".[1693] It almost goes without saying that this doctrine only applies

land/practice-guide-9-powers-of-attorney-and-registered-land), as consulted on 15.01.2018 and s7 Powers of Attorney Act 1971. For the practicalities regarding the signature, see: Website GOV.UK: HM Land Registry, 'Practice guide 8: execution of deeds' (updated last on 13 November 2017) (https://www.gov.uk/government/publications/execution-of-deeds/practice-guide-8-execution-of-deeds), as consulted on 15.01.2018.

[1686] S1 (3) Law of Property (Miscellaneous Provisions) Act 1989. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 47. There are few exceptions to this general rule. For example, one person cannot as a witness for both parties to the same transaction. Furthermore, HM Land Registry suggests that the witness be of full age. For the practicalities surrounding the witness, see: Website GOV.UK: HM Land Registry, 'Practice guide 8: execution of deeds' (updated last on 13 November 2017) (https://www.gov.uk/government/publications/execution-of-deeds/practice-guide-8-execution-of-deeds), as consulted on 15.01.2018.

[1687] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 572.

[1688] Ibid. To regulate completion via post, the Law Society has developed a set of rules ("Code of Completion by Post"). This Code can be found on: The Website The Law Society, 'Code of Completion by Post' (https://www.lawsociety.org.uk/support-services/advice/articles/code-for-completion-by-post/) consulted on 24.08.2017. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 192-193.

[1689] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 45. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 6.

[1690] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 566-567.

[1691] Ibid.

[1692] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 193.

[1693] Ibid.

to matters that fall in the scope of both documents; it does not apply to matters that are only contained in the sales contract but not in the deed of transfer.[1694]

After completion, the "post-completion" phase is entered.[1695] In this phase, if the land is burdened with a charge, the purchase price will be (partially) utilized to discharge that charge.[1696] It is on the seller's legal practitioner to ensure that there will be sufficient financial funds to do so.[1697] The purchase price must be indicated in the transfer deed only if the transfer is for value.[1698] If that is the case, it is not required that the exact value is mentioned. It must simply put HM Land Registry in the position to calculate the correct registration fee. Connected herewith, if a charge is to created, the value of the charge does not need to be disclosed. This is only different if a separate application is submitted to HM Land Registry for the registration of the charge and is then to enable HM Land Registry to calculate the registration fee. Also, provided that the parcel of land exceeds a certain monetary threshold (residential property: £125.000; other: £150.000), the Stamp Duty Land Tax has to be paid by the buyer.[1699] If this is the case, in the absence of a certificate proving that this tax has been paid, HM Land Registry will have to reject the application to register the deed of transfer.[1700] Also, the buyer's legal practitioner will offer the deed to HM Land Register for registration.[1701]

[1694] Ibid.
[1695] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 6.
[1696] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 575.
[1697] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 6.
[1698] For the practicalities see: Website GOV.UK: HM Land Registry, 'Practice guide 7: entry of price paid or value stated data in the register' (updated last 4 July 2016) (https://www.gov.uk/government/publications/price-paid-or-value-information-registration-procedures/practice-guide-7-entry-of-price-paid-or-value-stated-data-in-the-register), as consulted on 15.01.2018.
[1699] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 45. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 93. Also see Website GOV.UK, 'Stamp Duty Land Tax' (https://www.gov.uk/stamp-duty-land-tax/overview), consulted on 21.08.2017. The different tax rate scales can be found on the cited website.
[1700] S79 Finance Act 2003. Also see Website GOV.UK: HM Land Registry, 'Practice guide 49: Return and rejection of applications for registration' (updated last on 18 January 2016) (https://www.gov.uk/government/publications/return-and-rejection-of-applications-for-registration/return-and-rejection-of-applications-for-registration-practice-guide-49), as consulted on 24.01.2018. Also see Website GOV.UK: HM Land Registry, 'Practice guide 50: requisition and cancellation procedures' (updated last on 20 March 2017) (https://www.gov.uk/government/publications/requisition-and-cancellation-procedures/practice-guide-50-requisition-and-cancellation-procedures), as consulted on 24.01.2018. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 119.
[1701] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 585.

3.3.7.4 The Submission of the Deed to the Land Registry

The deed is then offered for registration to HM Land Registry.[1702] How will the applicant know that the application was received? In the electronic system in which the application is uploaded, the day list can be viewed. The system also allows live monitoring. Therefore, paper notifications of receipt are not as such distributed. This is different only if the application concerns a time-consuming case.

The Chief Land Registrar will then examine the application. If the applicant fulfils all legal requirements, the title may be registered on the name of the buyer. If the application is not in order, the Chief Land Registrar must take further action. Depending on the exact circumstances, by which is meant the severity of the flaw, he will either request requisitions or have to reject the application.[1703] As a general point of departure, all applications that do not fulfil the requirements for registration can be made subject to such requisitions as the Chief Land Registrar considers appropriate.[1704] A classic example in which requisitions will be requested is when the applicant did not (accurately) fill in the appropriate form.[1705] The Chief Land Registrar will also determine the period of time in which these requisitions must have been implemented.[1706] If implementation has not occurred within the set period of time, the Chief Land Registrar has two options: he can grant an extension (usually ten working days) or he can cancel the application.[1707] An exception to this general route that has just been described is made for applications that are "substantially defective".[1708] Applications falling in this category are either immediately rejected by the Chief Land Registrar or subject to cancellation at a later stage.[1709] It is noteworthy that the term "substantially defective" is not further defined.[1710] In practice, this authority is used cautiously.[1711] As is outlined in *Ruoff & Roper*:

[1702] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 45.
[1703] R16 Land Registration Rules 2003. Also see M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr.49.001.
[1704] R16 (1) Land Registration Rules 2003.
[1705] M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr. 49.015.
[1706] R16 (1) Land Registration Rules 2003.
[1707] R16 (2) Land Registration Rules 2003. Also see M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr. 49.015.
[1708] R16 (3) Land Registration Rules 2003.
[1709] Ibid.
[1710] M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr. 49.002.
[1711] Ibid.

> "The Land Registry has also announced its intention to reject only those applications with no prospect of success, or which, having been previously lodged and cancelled, have been re-lodged without the application addressing those cancellation points".[1712]

This situation will for example occur if a lease is offered for registration, whose term is shorter than 7 years or if the application is accompanied with a plan that does not fulfil the requirements set out by HM Land Registry.[1713] According to *Sparkes*, "[s]ome 50% of applications contain a substantial defect".[1714] In the event that an application is rejected, the applicant receives all submitted documents back together with a motivation of the registrar's decision.[1715] A rejection does not have financial consequences for the applicant as HM Land Registry will not retain the fee that was due when the application was filed.[1716]

When the application is submitted to HM Land Registry for registration, anybody is permitted to file an objection against this application.[1717] This objection needs to be addressed to the Chief Land Registrar.[1718] The consequence of an objection is twofold: on the one hand, the Chief Land Registrar is under the duty to inform the person that has submitted the application that he received an objection against his application, and on the other hand, the Chief Land Registrar has to wait for the objection to be resolved before he is allowed to decide on the application.[1719] However, this is not the case if the Chief Land Registrar finds that the objection is unfounded.[1720] In the situation in which the objection cannot be resolved by the parties themselves, the Chief Land Registrar has to bring the case to the attention of the First-tier Tribunal (Property Chamber – Land Registration

[1712] Ibid.
[1713] For an overview of situations in which an application will be rejected by HM Land Registry, see: Website GOV.UK: HM Land Registry, 'Practice guide 49: Return and rejection of applications for registration' (updated last on 18 January 2017) (https://www.gov.uk/government/publications/return-and-rejection-of-applications-for-registration/return-and-rejection-of-applications-for-registration-practice-guide-49), as consulted on 02.01.2018. Also see M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr. 49.004, 49. 009.
[1714] P. Sparkes, *A New Land Law*, Oxford/Portland: Hart Publishing, 2003, p. 130.
[1715] Website GOV.UK: HM Land Registry, 'Practice guide 49: Return and rejection of applications for registration' (updated last on 18 January 2017) (https://www.gov.uk/government/publications/return-and-rejection-of-applications-for-registration/return-and-rejection-of-applications-for-registration-practice-guide-49), as consulted on 02.01.2018.
[1716] Ibid.
[1717] S73 (1) Land Registration Act 2002. Also see r19 Land Registration Rules 2003. If the application concerns sections 18 or 36, the group of persons who are permitted to file such an objection is limited: see s73 (2)-(3) Land Registration Act 2002.
[1718] S73 (1) Land Registration Act 2002.
[1719] S73 (5) Land Registration Act 2002.
[1720] S73 (6) Land Registration Act 2002.

Division).[1721] Prior to mid-2013 this task was conferred upon the Adjudicator to HM Land Registry whose function has since then been dissolved.[1722]

Furthermore, provided that he has registered himself with it, the seller will receive a notification via Property Alert. Property Alert is a relatively young system that was introduced by HM Land Registry in 2014 with the purpose to increase the information flow to the registered proprietors; whenever their title is subject to modifications, they will receive a warning.[1723] This enables them to immediately react if this modification is not justly (i.e. in fraud cases).[1724] The enjoyment of this service is without charge and participation is voluntary, so that interested proprietors of registered interests must register themselves with the system.[1725]

How much time does it cost HM Land Registry to process a request for the transfer of title of a plot of land? If a whole title is transferred, the service standard is five working days. If a subdivision of the title is necessary, the service standard is 25 working days though in practice this standard is sometimes exceeded.

[1721] S73 (7) Land Registration Act 2002. S4 (1) The Transfer of Tribunal Functions Order 2013. Also see D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 140. Also see S. Brilliant & M. Michell, *A Practical Guide to Land Registration Proceedings*, Edinburgh/London: Lexis Nexis, 2015, p. 1-3, 7. For the practical details, see Website GOV.UK: HM Land Registry, 'Practice guide 37: Objections and disputes, a guide to Land Registry practice and procedures' (updated last on 11 January 2016) (https://www.gov.uk/government/publications/objections-and-disputes-a-guide-to-land-registry-practice-and-procedures/practice-guide-37-objections-and-disputes-a-guide-to-land-registry-practice-and-procedures), as consulted on 03.01.2018 and Website GOV.UK: HM Land Registry, 'Practice guide 38: costs' (updated last on 3 April 2017) (https://www.gov.uk/government/publications/costs/practice-guide-38-costs), as consulted on 03.01.2018.
[1722] S4 (2) The Transfer of Tribunal Functions Order 2013. Cases that fall in the transitional period are however still decided (though now by the First-tier Tribunal) on the basis of the Adjudicator to HM Land Registry (Practice and Procedure) Rules 2003. Also see See: S. Brilliant & M. Michell, *A Practical Guide to Land Registration Proceedings*, Edinburgh/London: Lexis Nexis, 2015, p. 1, 6. Also see E. Cooke, 'A View of Land Registration Litigation from South of the Border', in: A.J.M. Steven, R.G. Anderson & J. MacLeod, *Nothing so Practical as a Good Theory: Festschrift for George L Gretton*, Edinburgh: Avizandum Publishing Ltd, 2017, p. 157. Also see Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper*, Consultation Paper 227, 2016, p. 434-439.
[1723] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 21.
[1724] Ibid.
[1725] Ibid.

3.3.7.5 The Proof of Registration

The consequence of the registration is that the buyer will be finally entitled to the legal interest.[1726] In other words, completion of the transfer has now occurred.[1727] The equitable interest which has already been in the hands of the buyer since the payment of the purchase price will then seize to an end.[1728] The day on which legal title is vested on the buyer is considered to the day on which the application to register the deed was filed.[1729] To inform the applicant that registration has occurred, HM Land Registry will provide him with a "Title Information Document".[1730] This document includes a cover letter and a copy of the register of title; a copy of the title plan is included only if the plan itself has been modified or if a new plan had to be made as a consequence of the application.[1731] The proof of registration is sent to the applicant electronically. A paper document is only sent if an electronic address is not registered.

3.3.8 The Legal Value of Land Registry Information

> *"Land registration has subtly changed the concept of ownership of real estate from the common law position of being the person with the best claim to possession towards an absolute claim of ownership by virtue of entry in the land register."*[1732]

3.3.8.1 First Registration

The time at which the application for first registration was made, marks the point of time from which onwards the entry has effect.[1733] Yet, it is not so that all titles that originate from first registrations are fully guaranteed by the land registry.[1734] It is rather that the degree of the intensity

[1726] S27 (1), s58 (1) Land Registration Act 2002. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1064.
[1727] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 14.
[1728] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 52.
[1729] S74 Land Registration Act 2002.
[1730] R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 6.
[1731] Ibid.
[1732] R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.7 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.
[1733] S74 Land Registration Rules 2003. For the specific technical rules see r15 Land Registration Rules 2003.
[1734] E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1077-1078.

of the guarantee depends on the type of title that is to be registered.[1735] While an absolute title is fully guaranteed, merely a slimmed guarantee is given for good leasehold titles, qualified titles and possessory titles.[1736] As a consequence of a fully guaranteed absolute title, a person who has such a title is vested with both the legal and the equitable estate.[1737]

3.3.8.2 Registered Estate

A guarantee of correctness of the land register is achieved through the application of the principle of conclusiveness.[1738] This means that each person who is registered as the owner of a legal estate is entitled to that legal estate even if their title is defective, that is to say their title is guaranteed.[1739] This is possible because "the defect is cured by registration".[1740] The only condition to this conclusiveness is that all registration requirements are fulfilled.[1741] Nevertheless, the legal consequences of this principle are far-going as the LRA 2002 accords every person that is registered as the owner in the register of title so-called "owner's powers".[1742] In other words, they can dispose of the estate as they wish as long as they comply with what is allowed under the legal framework.[1743] There is only one exception and that is that they may not "effect certain forms of mortgage".[1744] Furthermore, the application of the principle of conclusiveness is restricted to legal titles.[1745] Equitable titles contrariwise are excluded from its scope.[1746] Putting this information into

[1735] Ibid. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 161.
[1736] S11 and 12 Land Registration Act 2002. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 162, 168-170.
[1737] S11, 12, 58 Land Registration Act 2002.
[1738] S58 Land Registration Act 2002. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1079.
[1739] Ibid. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 222. As a matter of completeness, it is to be pointed out that this maxim does not apply to a deceased person. See: E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 54.
[1740] E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1079.
[1741] S58 (2) Land Registration Act 2002. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 222.
[1742] S23-24 Land Registration Act 2002. Also see E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 55-56.
[1743] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 56.
[1744] Ibid.
[1745] S58 Land Registration Act 2002. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 54.
[1746] Ibid. Also see E. Cooke, *Land Law*, Oxford: Oxford University Press, 2012, p. 37. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1080.

a practical context, this means that the worth of HM Land Registry guarantee is valued to exceed £4 trillion.[1747]

How does the principle of conclusiveness play out in legal reality? Imagine you are the registered owner of a freehold that is properly entered in the register of title. While you are reading this, a mysterious person draws up a fake power of attorney or simply steals your ID which eventually enables him to transfer your freehold behind your back and without your knowledge to a third party. Considering that both parties have clean hands, which party must be protected by the law; you, because the transfer was the result of forgery, or the third party who was unaware of the committed forgery and claims that their defective title has been cured through registration on the basis of s58 LRA 2002?[1748] It follows from *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd and Other* (decided under the LRA 1925) and *Fitzwilliam v Richall Holdings Services Ltd* (decided under the LRA 2002, but following the decision taken in Malory), that in these cases, the transfer of the estate to the third party constitutes a valid transfer.[1749] However, the third party solely holds the legal title while you are still the owner under equity.[1750] Put differently, the third party acts as a trustee for you, the beneficiary.[1751] Is it now possible for the third party to invoke s20 LRA 1925, "which gave the registered proprietor a defence against any pre-existing property rights that are neither noted on the register nor overriding"?[1752] Unfortunate for the third party, this is not the case. To begin with, s20 LRA 1925 requires that the transfer of the freehold to the third party qualifies as a disposition.[1753] The Court held however that a transfer based on fraud cannot fulfil

[1747] Website GOV.UK: HM Land Registry, 'About us', (https://www.gov.uk/government/organisations/land-registry/about), consulted on 04.04.2017.
[1748] For an elaborate discussion of this question, see: A. Goymour, 'Mistaken Registrations of Land: Exploding the Myth of "Title by Registration"', *Cambridge Law Journal*, 72(3), 2013, pp. 617-650.
[1749] Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 86 (Ch); [2013] 1 P. & C.R. 19. Also see Malory Enterprises Ltd v Cheshire Homes (UK) Ltd and Others [2002] EWCA Civ 151; [2002] Ch. 216. For a discussion of Malory, see: Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper*, Consultation Paper 227, 2016, p. 254-260.
[1750] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 55. This point has been subject to discussion. See: C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 220-221. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1080. Also see E. Lees, 'Richall Holdings v Fitzwilliam: Malory v Cheshire Homes and the LRA 2002', *The Modern Law Review* (2013) 76(5), p. 925.
[1751] S. Gardner, 'The Land Registration Act 2002 – the Show on the Road', *The Modern Law Review* (2014) 77(5), p. 772.
[1752] B. McFarlane, N. Hopkins & S. Nield, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2015, p. 78.
[1753] B. McFarlane, N. Hopkins & S. Nield, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2015, p. 78-79.

this requirement due to the fact that it "could not in law be of any effect in itself".[1754] But even if the transfer was to qualify as a disposition, the third party would still be bound by your equitable interest because you were in actual occupation; therefore, your interest constitutes an overriding interest.[1755] As a result, you are able to effectuate the alteration of the register of title to accomplish that you are again registered as the registered owner of the estate.[1756] The third party on the other hand is left completely empty-handed; not only did he loose the interest in the land but on top he is excluded from any compensation from HM Land Registry considering that an alteration of the register does not entitle him to an indemnity, due to the fact that in this case, the register of title is merely updated.[1757] The *Malory* decision has been subject to widespread criticism and was eventually overruled in *Swift 1 Ltd v Chief Land Registrar*.[1758] A deviation from the earlier decision was possible after the Court of Appeal in *Swift 1* held that the Malory decision was *per incuriam*.[1759] The Court concluded that the third party held both legal and equitable title and that he was entitled to indemnity under r1(2)(b) of Schedule 8 of LRA 2002.[1760] After all, this provision clearly states that indemnity is available to:

> "the proprietor of a registered estate or charge claiming in good faith under a forged disposition (…), where the register is rectified, to be regarded as having suffered loss by reason of such rectification as if the disposition had not been forged".[1761]

[1754] Malory Enterprises Ltd v Cheshire Homes (UK) Ltd and Others [2002] EWCA Civ 151; [2002] Ch. 216, para.. 65.
[1755] Malory Enterprises Ltd v Cheshire Homes (UK) Ltd and Others [2002] EWCA Civ 151; [2002] Ch. 216, para.. 70. Also see B. McFarlane, N. Hopkins & S. Nield, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2018, p. 81.
[1756] Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 86 (Ch); [2013] 1 P. & C.R. 19.
[1757] Re Chowood's Registered Land [1933] Ch 583. Also see R1 of Schedule 4 and r1 of Schedule 8 of Land Registration Act 2002. Also see M.P. Thompson & M. George, *Thompson's Modern Land Law*, Oxford: Oxford University Press, 2017, p. 175, 187. Also see B. McFarlane, N. Hopkins & S. Nield, L*and Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2018, p. 781
[1758] Swift 1st Ltd v Chief Land Registrar [2015] EWCA Civ 330; [2015] Ch. 602. Also see S. Clarke & S. Greer, *Land Law: Directions*, Oxford: Oxford University Press, 2016, p. 112. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 220-221. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1080. Also see E. Lees, 'Richall Holdings v Fitzwilliam: Malory v Cheshire Homes and the LRA 2002', *The Modern Law Review* (2013) 76(5), p. 925.
[1759] S. Clarke & S. Greer, *Land Law: Directions*, Oxford: Oxford University Press, 2016, p. 112. Also see M.P. Thompson & M. George, *Thompson's Modern Land Law*, Oxford: Oxford University Press, 2017, p. 165. Also see B. McFarlane, N. Hopkins & S. Nield, *Land Law*, Oxford: Oxford University Press, 2017, p. 116. Also see M. Davis, *Land Law*, London: Palgrave, 2017, p. 69.
[1760] S. Clarke & S. Greer, *Land Law: Directions*, Oxford: Oxford University Press, 2016, p. 112. Also see M.P. Thompson & M. George, *Thompson's Modern Land Law*, Oxford: Oxford University Press, 2017, p. 165. Also see B. McFarlane, N. Hopkins & S. Nield, *Land Law*, Oxford: Oxford University Press, 2017, p. 116.
[1761] M.P. Thompson & M. George, *Thompson's Modern Land Law*, Oxford: Oxford University Press, 2017, p. 165.

The second encroachment of the conclusiveness of the register of title is the existence of overriding interests.[1762] As stated in Chapter 3.3.6.4, "actual occupation" suffices to establish an overriding interest; even in those cases in which the person entitled to an overriding interest could easily have his entitlement entered in the register of title.[1763] The third impairment of the conclusiveness of the register of title lies in the pure fact that the register can be altered.[1764] As stated by *Gardner*, "a conclusive registration regime logically has no space for the idea that the register might be wrong".[1765] Alterations can occur when the information entered in the register of title proves to be incorrect. The register may then be altered – either by means of a court order or directly by the Chief Land Registrar.[1766] Situations in which this might likely occur concern cases involving fraud or forgery or in which the seller transferred the same estate successively to two different buyers ("double conveyancing") or cases in which persons are mistakenly entered as the owner in the land register despite the fact that they are not legally entitled to the estate.[1767] Before alterations can be realized, the proprietor whose title will be affected by the alteration must agree to the alteration. This is only different if "he has by fraud or lack of proper care caused or substantially contributed to the mistake" respectively if it is not justifiable to not alter the register.[1768]

If the land registrar alters the register, any person who suffers damage due to the rectification or due to the fact that the narrow legal framework does not allow for rectification despite the fact that the land register contains a mistake, is eligible for indemnities.[1769] By the same token, if the

[1762] B. McFarlane, N. Hopkins & S. Nield, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2018, p. 717.
[1763] Ibid.
[1764] S. Gardner, The Land Registration Act 2002 – the Show on the Road', *Modern Law Review* (2014) 77(5), p. 771. Also see B. McFarlane, N. Hopkins & S. Nield, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2018, p. 702.
[1765] S. Gardner, The Land Registration Act 2002 – the Show on the Road', *Modern Law Review* (2014) 77(5), p. 773.
[1766] S(2) and s(5) of Schedule 4 Land Registration Act 2002. For the practical details, see Website GOV.UK: HM Land Registry, 'Practice guide 39: rectification and indemnity' (updated last on 15 May 2017) (https://www.gov.uk/government/publications/rectification-and-indemnity/practice-guide-39-rectification-and-indemnity), as consulted on 03.01.2017.
[1767] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 511.
[1768] S3(2) and s6(2) of Schedule 4 Land Registration Act 2002. On the (lack of a) definition of the term "mistake", see: S. Gardner, 'The Land Registration Act 2002 – the Show on the Road', Modern Law Review (2014) 77(5), p. 771. Also see Baxter v Mannion [2011] EWCA Civ 120, [2011] 2 All ER 574. Also see B. McFarlane, N. Hopkins & S. Nield, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2018, p. 702-712.
[1769]S1 (1)(a)-(b) Schedule 8 Land Registration Act 2002. S103 Land Registration Act 2002. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 523-525. For the practical details, see Website GOV.UK: HM Land Registry, 'Practice guide 39: rectification and indemnity' (updated last on 15 May 2017) (https://www.gov.uk/government/publications/rectification-and-

information registered in the land register or provided by the land registry (such as official copies) turns out to be incorrect or if the Chief Land Registrar loses or destroys "a document lodged at the registry for inspection or safe custody", HM Land Registry can be held liable ("insurance principle").[1770] To be eligible for indemnity in either situation, one must fulfil three conditions: first, there must be a loss, second, this loss must be "by reason of" one the eight incidents (i.e. mistakes in the register) that are enumerated in s1 (1) Schedule 8 of LRA 2002, and third, the loss must not be the consequence of "lack of proper care" or (at least partly) of one's own fraudulent behaviour.[1771] At the same time, if one's damage is only partially accountable to "lack of proper care", one will be at least partially entitled to indemnities.[1772] Changes of a registered title that occur as a consequence of an overriding interest do not constitute a valid reason for a claim of indemnity.[1773] This is due to the fact that a loss cannot be established as the overriding interest had at all times been burdening the legal estate.[1774] To cover liability claims, HM Land Registry disposes over an indemnity fund.[1775] HM Land Registry can be held liable for a variety of reasons. If the registered owner's name contains a spelling mistake the owner's solicitor has to notify HM Land Registry, who in turn has to reimburse the solicitor for the costs connected to the drafting and sending of the notification letter. These are relative small matters of expense. In other situations, the costs can be significantly higher. The biggest matter of expense concerns fraud and forgery. As stated on HM Land Registry's blog: "Over the last 10 years around £55 million has been paid out under the indemnity scheme because of forgeries".[1776]

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indemnity/practice-guide-39-rectification-and-indemnity), as consulted on 03.01.2017. An alteration, not being a rectification does not suffice for an indemnity claim to be successful. See: r1 of Schedule 8 and r1 of Schedule 4 of Land Registration Act 2002. Also see M.P. Thompson & M. George, *Thompson's Modern Land Law*, Oxford: Oxford University Press, 2017, p. 175, 187.

[1770] S1 (1) (c)-(g) Schedule 8 of Land Registration Act 2002. S103 Land Registration Act 2002. As a last reason for indemnity, though not linked to the legal value of land register information, s1 (1) (h) names the situation in which the Chief Land Registrar does not live up to his duty enshrined in s50 Land Registration Act 2002.

[1771] S1 and s5 Schedule 8 of Land Registration Act 2002. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1082-1083. When selling the real estate, the solicitor is bound by the SRA Property Selling Rules 2011 in addition to all other professional rules of conduct. See: F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 24.

[1772] S5 (2) Schedule 8 of Land Registration Act 2002.

[1773] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 209-210.

[1774] Ibid.

[1775] R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.6 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.

[1776] J. Pownall, 'How we recover indemnity payments in fraud cases', *HM Land Registry Blog*, 06.02.2017 (https://hmlandregistry.blog.gov.uk/2017/2/6/recovering-indemnity-payments/), as consulted on

Rather often, such fraud occurs because of an ID theft. The thief steals the ID of the registered owner and sells or mortgages his property. This of course is much easier if it concerns rental property rather than the owner's family home. Once the transaction is completed, the thieves will cash the cheque that they receive from either the bank respectively the buyer and disappear quickly to a tropical island. In these situations, HM Land Registry is held liable and must pay indemnity even though they have not committed a mistake themselves. A second substantial matter of expense concerns the situation in which easements are not indicated on the burdened land.

3.3.9 The Object of Transfer – Where is the "Boundary"?

If you are interested in a particular plot of land, one of the first and most important questions that comes up in your mind is what you will exactly acquire when you decide to buy that plot. An answer to this question can be found in s62 (1)-(2) LPA 1925:

> (1)A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.
>
> (2)A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

Although this enumeration is quite detailed, it leaves us with the following question: what is "land", or even more sharply formulated, what is its extent? Again, it is the LPA 1925 that helps us to partially solve this problem by explaining that the partition of a parcel of land can be "horizontal, vertical or made in any other way".[1777] As stated above, the horizontal partition of land in England is

08.12.2017. For an annual overview, 2005-2015, see: Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper*, Consultation Paper 227, 2016, p. 298.

[1777] S205 (1) (ix) Law of Property Act 1925.

not taken care of by a 'classic' cadastre, but instead by Ordnance Survey.[1778] The maps produced by Ordnance Survey and used by HM Land Registry show so-called "general boundaries", which do "not determine the exact line of the boundary" but merely indicate the run and location of the parcel's boundary.[1779] That means that these boundaries can coincide with the legal boundaries, but they do not necessarily have to.[1780] It is noteworthy in this context that the establishment of general boundaries is the product of a step backwards that was taken through the adoption of the Land Transfer Act 1875.[1781] Prior to this change, the law required an exact description of the run of the boundaries:

> "The identity of the lands with the parcels or descriptions contained in the title deeds shall be fully established; and the registrar shall have power by such inquiries as he shall think fit to ascertain the accuracy of the description and the quantities and boundaries of the lands; and, except in the case of incorporeal hereditaments, a map or plan shall be made and deposited as part of the description."[1782]

This adaption of the standard of definition was deemed necessary as the higher standard dating prior 1875 was considered to be "inconvenient in practise".[1783] But how precise are these general boundaries? According to HM Land Registry, they can be fairly exact, with a small possible error margin.[1784] According to *Agnew* and *Morris* "[t]he 1:2500 scale of Ordnance Survey plans (in rural

[1778] Website PCC, 'Coordination Clause: United Kingdom' (http://www.eurocadastre.org/eng/coordinationclausuk.html), as consulted on 30.03.2016. For more information, see Chapter 3.3.1.2.
[1779] S60 (1)-(2) Land Registration Act 2002. Also see D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 3. Also see R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p.4 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.
[1780] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 12.
[1781] S83 (5) Land Transfer Act 1875, which states that "[r]egistered land shall be described in such manner as the registrar thinks best calculated to accure accuracy, but such description shall not be conclusive as to the boundaries or the extent of the registered land". Also see T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 25.
[1782] S10 Land Registry Act 1862. Also see T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 25.
[1783] T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 25. Also see M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr.1.004. For an overview of the transition from determined to general boundaries, see: M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr.5.009-5.011.
[1784] Website GOV.UK: HM Land Registry, 'Practice guide 40 – supplement 1: HM Land Registry plans: the basis of Land Registry plans' (updated last on 30 January 2016)

areas and 1:1250 scale in urban areas) can lead to the features on them being inaccurate by over 2 meters".[1785] How to confront this potential uncertainty? First of all, neighbours have the option to decide on the run of the boundary together, to put it in writing and offer the boundary agreement for registration to HM Land Registry.[1786] The potential disadvantage of such an agreement is that its binding force is limited to the original parties.[1787] Thus, if one of the neighbours decides to move away and sell their house, the subsequent buyer will not be bound by the boundary agreement, despite the fact that it is registered. An alternative that provides more protection to the parties involved lies in the possibility to turn general boundaries into determined boundaries, which reflect the "exact line of the boundary of a registered estate".[1788] That is to say that in opposite to general boundaries, determined boundaries are reliable and can therefore help to prevent or even solve boundary disputes.[1789] At the same time, they can be beneficial for owners of a registered plot of land, who needs to defend their title against an adverse possessor.[1790] Although this sounds like a great advantage, reality shows that this possibility is not that popular among landowners.[1791] Two

(https://www.gov.uk/government/publications/land-registry-plans-the-basis-of-land-registry-applications/land-registry-plans-the-basis-of-land-registry-plans-practice-guide-40-supplement-1), as consulted on 05.02.2018. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 109.

[1785] Lee v Barrey [1957] Ch 251. Also see D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 12. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 8. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 109. Also see T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 25. The accuracy of a plan depends on several variables. For an overview of these variables and the respective levels of accuracy, see: Website GOV.UK: HM Land Registry, 'Practice guide 40 – supplement 1: HM Land Registry plans: the basis of Land Registry plans' (updated last on 30 January 2016) (https://www.gov.uk/government/publications/land-registry-plans-the-basis-of-land-registry-applications/land-registry-plans-the-basis-of-land-registry-plans-practice-guide-40-supplement-1), as consulted last on 15.01.2018.

[1786] T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 27. For the practicalities surrounding the (registration of a) boundary agreement, see: Website GOV.UK: HM Land Registry, 'Practice guide 40 – supplement 3: HM Land Registry plans: boundaries' (updated last on 25 June 2015) (https://www.gov.uk/government/publications/land-registry-plans-boundaries/land-registry-plans-boundaries-practice-guide-40-supplement-3), as consulted on 15.01.2018.

[1787] T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 27.

[1788] S60 (3) Land Registration Act 2002. Also see r118 Land Registration Rules 2003.

[1789] T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 26. Also see M. Dowden, *Practitioner's Guide to the Land Registration Act 2002: The Unfinished Revolution*, London: Estates Gazette, 2005, p. 110, 113.

[1790] S60 (3) Land Registration Act 2002. Noticeably, as follows from HM Land Registry's Practice guide 40 – supplement 4, the term "exact" is not further operationalized in the Land Registration Act 2002. The same practice guide also describes the practicalities of determining a boundary. See: Website GOV.UK: HM Land Registry, 'Practice guide 40 – supplement 4: Boundary agreements and determined boundaries' (updated last on 29 April 2019) (https://www.gov.uk/government/publications/boundary-agreements-and-determined-boundaries), as consulted on 16.07.2019.

[1791] C. Harpum & J. Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002*, Bristol: Jordan Publishing Limited, 2004, p. 227.

explanations for this lack of popularity can be thought of. The first explanation is of financial nature and relates to the price tag that is attached to the process of determining the boundary, the second explanation relates to the relationship with your neighbour, who must necessarily be involved when determining the common boundary.[1792] If the location of the boundary has not led to any conflicts so far, there is a risk that these conflicts will just arise once the exact location of the boundary is to be determined.[1793] In other words, the paradox situation might occur that a devise that is to settle boundary disputes might actually become the peg on which to hang this dispute.

How are determined boundaries established? Every owner of a registered estate is able to turn to the Chief Land Registrar to create determined boundaries.[1794] It goes without saying that in addition to the necessary evidence to proof the run of the to be determined boundary, the application has to include a plan "identifying the exact line of the boundary claimed and showing sufficient surrounding physical features to allow the general position of the boundary to be drawn on the Ordnance Survey map".[1795] HM Land Registry will not conduct its own survey of the boundary provided that the parties provide a "certificate of accuracy" that is drawn up from the expert (usually a surveyor or Ordnance Survey itself), who surveyed the boundary.[1796] For a determined boundary, an accuracy of 10 mm is prescribed.[1797] If the application complies with all set out requirements, the Chief Land Registrar has to inform those who are entitled to the adjoining properties in order to allow them to file an objection against the determination of the boundary.[1798] In the event that an objection is filed, which cannot be solved by the parties themselves, the matter must be brought to the attention of the First-tier Tribunal (Property Chamber – Land Registration Division).[1799] The scope of the jurisdiction of the First-tier Tribunal with regard to general boundaries has been recently discussed in the cases *Murdoch v Amesbury* and *Bean v Katz*[1800].[1801] In the latter – more recent - case, *Cooke*, in her judicial function, concluded as follows:

[1792] Ibid.
[1793] Ibid.
[1794] R118 (1) LRR 2003.
[1795] R118 (2) LRR 2003.
[1796] M. Dowden, *Practitioner's Guide to the Land Registration Act 2002: The Unfinished Revolution*, London: Estates Gazette, 2005, p. 110-111.
[1797] Ibid.
[1798] R119 Land Registration Rules 2003.
[1799] S73 (7) Land Registration Act 2002.
[1800] Melvyn Roy Bean and Penelope Jane Saxton v Howard Katz and Benjamin Katz [2016] UKUT 168 (TCC).
[1801] Murdoch v Amesbury [2016] UKUT 3 (TCC). Also see Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper*, Consultation Paper 227, 2016, p. 440-442.

> "Furthermore, I think it is important that I make clear that the First-tier Tribunal has jurisdiction to dispose of determined boundary references, such as the one in this appeal, where the objection is not to the quality of the plan but to what the plan says about the boundary and where therefore it is necessary to look at the title to the properties concerned.
>
> If that were not so, then the First-tier Tribunal would be unable to follow the scheme of the Rules, which require a determined boundary application to be assessed not only on the accuracy of the plan (Rule 119(1)(a)) but also on whether the line on the plan is in fact the boundary (Rules 119(1)(b)). The latter is a question about title (to the land on either side of a claimed line)."[1802]

If the application is successful, the determined boundaries are indicated on the title plan and the MasterMap but not on the index map, considering that it merely indicates whether a plot is registered or unregistered.

3.3.9.1 Determining New General Boundaries

Plots are not always sold as a whole. Especially in cases of development areas, one large plot is divided into several smaller plots, with the aim of selling them individually to different buyers. How are new general boundaries then determined? If one is to split a plot to sell one part of it, it is of utmost importance to carefully define this part of the plot to avoid misunderstandings between seller and buyer.[1803] To this end, the newly to be formed plot has to be surveyed and the results of that survey have to be made visible in a plan before the newly formed plot can be transferred.[1804] Accordingly, the parties will indicate the boundaries of the respective part with a red line in a plan with a 1:1250 (for plots in the city) respectively a 1:2500 (for plots in the countryside) scale.[1805] It

[1802] Melvyn Roy Bean and Penelope Jane Saxton v Howard Katz and Benjamin Katz [2016] UKUT 168 (TCC), para.. 20-21.
[1803] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 347.
[1804] R213 Land Registration Rules 2003. Also see Form TP1, to be found on: Website GOV.UK: HM Land Registry, 'Form Registered title(s): part transfer (TP1)' (updated last on 27 May 2016) (https://www.gov.uk/government/publications/registered-titles-part-transfer-tp1), as consulted on 05.01.2018. Also see Website GOV.UK: HM Land Registry,' Practice guide 41: developing estates - registration services' (updated last on 25 June 2015) (https://www.gov.uk/government/publications/developing-estates-registration-services/practice-guide-41-developing-estates-registration-services), as consulted on 05.01.2018. Also see Website GOV.UK: HM Land Registry, 'Practice guide 41 – supplement 5: Developing estates: plan requirements and surveying specification' (updated last on 25 June 2015) (https://www.gov.uk/government/publications/developing-estates-detailed-plan-requirements-and-surveying-specification/developing-estates-plan-requirements-and-surveying-specification-practice-guide-41-supplement-5), as consulted on 05.01.2018. For more practicalities, consult the supplements to Practice guide 41 as published on HM Land Registry's website.
[1805] r213 Land Registration Rules 2003. Higher scales are needed if the parcel is divided into apartments. See: F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 378, 663.

is not required that a plan or a map produced by Ordnance Survey is used as a basis for this plan.[1806] However, if the plot is split in the course of a development project and if the developer has sought HM Land Registry's approval of his estate plan, then the estate plan has to be employed as the basis for that plan.[1807] Estate plans are produced for development areas in order to identify the run of the boundaries of the newly to be formed smaller estates within the larger original estate as surveyed by a land surveyor as well as the location of the planned buildings on top of these estates.[1808] After all, in the absence of such a plan, the developer would be unable to indicate the dimension of such a smaller estate to prospective buyers. To facilitate the realization of developing estates, HM Land Registry provides gratuitous assistance, amongst which the approval of the estate boundaries and the subsequent estate plan.[1809]

Also see R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 347. For more practical details regarding the production of a suitable plan, see: Website GOV.UK, HM Land Registry, 'Practice guide 10: official search of the index map' (updated last on 27 November 2017) (https://www.gov.uk/government/publications/official-searches-of-the-index-map/practice-guide-10-official-search-of-the-index-map), as consulted on 05.01.2018. Also see Website GOV.UK: HM Land Registry, 'Practice guide 40 – supplement 2: Preparing plans for HM Land Registry applications' (updated last on 20 January 2017) (https://www.gov.uk/government/publications/preparing-plans-for-land-registry-applications/guidance-for-preparing-plans-for-land-registry-applications#guidelines-for-preparing-plans-for-land-registry-applications), as consulted on 05.01.2018. Also see Website GOV.UK: HM Land Registry, 'Practice guide 41 – supplement 3: Developing estates: registration services - approval of draft transfers and leases' (updated last on 25 June 2015) (https://www.gov.uk/government/publications/developing-estates-registration-services-approval-of-draft-transfers-and-leases/developing-estates-registration-services-approval-of-draft-transfers-and-leases-practice-guide-41-supplement-3), as consulted on 05.01.2018. The production of a new plan is not required if the part of the plot that the parties wish to transfer can be precisely identified on the already existing title plan of the original plot. See Website GOV.UK: HM Land Registry, 'Practice guide 40 – supplement 2: Preparing plans for HM Land Registry applications' (updated last on 20 January 2017) (https://www.gov.uk/government/publications/preparing-plans-for-land-registry-applications/guidance-for-preparing-plans-for-land-registry-applications#guidelines-for-preparing-plans-for-land-registry-applications), as consulted on 05.01.2018.

[1806] Website GOV.UK: HM Land Registry, 'Practice guide 40 – supplement 2: Preparing plans for HM Land Registry applications' (updated last on 20 January 2017) (https://www.gov.uk/government/publications/preparing-plans-for-land-registry-applications/guidance-for-preparing-plans-for-land-registry-applications#guidelines-for-preparing-plans-for-land-registry-applications), as consulted on 05.01.2018.

[1807] Ibid.

[1808] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2017, p. 352.

[1809] Website GOV.UK: HM Land Registry, 'Practice guide 41: developing estates - registration services' (updated last on 25 June 2015) (https://www.gov.uk/government/publications/developing-estates-registration-services/practice-guide-41-developing-estates-registration-services), as consulted on 05.01.2018. Also see Website GOV.UK: HM Land Registry, 'Practice guide 41 – supplement 1: Developing estates: registration services. Estate boundary approval' (updated last on 25 June 2015) (https://www.gov.uk/government/publications/developing-estates-estate-boundary-approval/developing-estates-registration-services-estate-boundary-approval-practice-guide-41-supplement-1), as consulted on 05.01.2018. Also see Website GOV.UK: HM Land Registry, 'Practice guide 41 – supplement 2: Developing estates: registration services: estate plan approval' (updated last on 18 January 2016) (https://www.gov.uk/government/publications/developing-estates-estate-plan-approval/developing-

In order to let the plan have priority over the verbal description of the part in the contract/deed, the latter documents will literally state that the part is "more particularly described on the plan".[1810] How precise is the indication on the plan? According to HM Land Registry's Guidelines, plans which show "edgings of a thickness that obscures any other detail or that makes the extent any way ambiguous" run the risk of facing rejection.[1811] Much therefore depends on the thickness of the red line, which ideally is as thin as possible. It must be realised that, departing from a 1:1250 scale, a line with a thickness of 1 mm translates to a 1,25 m thick boundary in the actual territory – 1,25 m of possible uncertainty that could serve as a potential cause for a bloody boundary dispute. In the end, it can be debatable where the actual boundary has to run; in the middle of the 1,25 m thick boundary, on its right side, or on its left side? As a general rule, these maps indicate that the general boundaries run through the middle of the hedge, fence or other physical feature that serves as the physical boundary between two plots.[1812]

These considerations provoke the question from which source the plan originates that the parties submit to HM Land Registry, considering the absence of a cadastral map in England. The truth is that there are no pre-defined sources for the plans.[1813] It is 'merely' required that the plan complies with the plan requirements as set out by HM Land Registry.[1814] These requirements are necessary

estates-registration-services-estate-plan-approval-practice-guide-41-supplement-2), as consulted on 05.01.2017.

[1810] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 347. Plans that are offered for registration "for identification only" or that contain disclaimers under the Property Misdescriptions Act 1991 will be rejected. See: Website GOV.UK: HM Land Registry, 'Practice Guide 41, supplement 5: Developing estates: plan requirements and surveying specification' (https://www.gov.uk/government/publications/developing-estates-detailed-plan-requirements-and-surveying-specification/developing-estates-plan-requirements-and-surveying-specification-practice-guide-41-supplement-5), as consulted on 05.01.2018. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 32. Also see F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 382.

[1811] Website GOV.UK: HM Land Registry, 'Practice guide 40 – supplement 2: Preparing plans for HM Land Registry applications' (updated last on 20 January 2017) (https://www.gov.uk/government/publications/preparing-plans-for-land-registry-applications/guidance-for-preparing-plans-for-land-registry-applications#guidelines-for-preparing-plans-for-land-registry-applications), as consulted on 05.01.2018. Also see Website GOV.UK, HM Land Registry, 'Practice guide 10: official search of the index map' (updated last on 27 November 2017) (https://www.gov.uk/government/publications/official-searches-of-the-index-map/practice-guide-10-official-search-of-the-index-map), as consulted on 05.01.2018.

[1812] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 13. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 9, 33. Also see M. Dixon et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, London: Thomson Reuters (Professional), 2017, nr.5.012.

[1813] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 379.

[1814] These requirements are set out in Website GOV.UK: HM Land Registry, 'Practice guide 40: guide overview of Land Registry plans' (updated last on 25 June 2015) (https://www.gov.uk/government/publications/land-

as HM Land Registry must be able to relate the plot in the plan to the corresponding parcel on their MasterMap.[1815] In any event, practise shows that often "copies of Ordnance Survey maps (...) or copy estate layout plans approved by the Land Registry" are used for this purpose.[1816]

3.3.9.2 Comparing the General Boundary to the Legal Boundary

It follows from the foregoing that in the vast majority of cases, one has to deal with general boundaries. Although the map can then be used as a point of departure, the application of common law for the determination of the legal boundary is inevitable.[1817] The map of England that is provided by Ordnance Survey does not indicate the legal boundary as they simply lack the authorization to do so.[1818] The underlying reason for the divergence of the cadastral and legal boundary is that it is not the size and the shape that form the foundation of land registration but the estates of persons.[1819]

How are legal boundaries established? As a rule of thumb it can be said that the legal boundary is first and foremost determined on the basis of the conveyance deed, especially though not exclusively in its "parcels clause".[1820] Similar to the determination of a good title under the

registry-plans-guide-overview/practice-guide-40-guide-overview-of-land-registry-plans), as consulted on 15.01.2018.

[1815] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 379. Also see R. Hewitson, *Property Law and Practice*, Newcastle: Northumbria Law Press, 2014, p. 18.

[1816] F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 379.

[1817] R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p. 4 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.

[1818] Ibid.

[1819] R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p. 3 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019. For more information about the estates, see: Chapter 3.3.6.1.

[1820] Alan Wibberley Building Ltd v. Insley [1999] 2 All ER 897. Also see W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 2-3. Also see T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 3. Also see K. Kennedy, *Neighbour Disputes: Law and Practice*, London: The Law Society, 2009, p. 2, 5, 7. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 1. About the difficulty to establish the exact boundary between two parcels on the basis of the description in the deed, see Chapter 3.3.9.3 and S. Jourdan & O. Radley-Gardner, *Adverse Possession*, West Sussex: Bloomsbury Professional, 2011, p. 633-636. Also see Website GOV.UK: HM Land Registry, 'Practice guide 40 – supplement 3: HM Land Registry plans: boundaries' (updated last on 25 June 2015) (https://www.gov.uk/government/publications/land-registry-plans-boundaries/land-registry-plans-boundaries-practice-guide-40-supplement-3), as consulted on 15.01.2018.

unregistered system, legal practitioners must not restrict their analysis to the most recent deed, but instead also have to scrutinize its preceding deeds.[1821] In the case of a boundary determination, this is not the "root title" but ideally the "original conveyance from the common owner of the two pieces of land to a separate owner of at least one part – the conveyance that originally divided the land".[1822] It is not unusual but rather standard that the description in the deed will contain both a literal description of the physical boundary and a quantification of the plot by adding figures, such as size and length of boundaries or simply by adding a map.[1823] As long as all of these descriptions add up, there is no problem. However, if the description of the physical boundaries deviates from its quantification, the question rises which description must be prioritised. In these cases, the former description will in principle be the leading description ("*falsa demonstratio non nocet*").[1824] This is different though if the deed states that the estate is "more particularly described/ delineated on the plan" or if the literal description is unsuitable to allow for a determination of the boundary.[1825] If the parties do not dispose of the required title deeds themselves due to the fact that they are in the hands of third parties, then these third parties are obliged to provide the parties with the deeds if they are asked to give evidence in a civil proceeding.[1826]

3.3.9.3 The (Im-) Possibility of Reconstructing the Legal Boundary

The endeavour of reconstructing the exact legal boundary literally borders impossibility.[1827] As has been explained above, the determination of the legal boundary occurs on the basis of the plot's description in the conveyance deed. The downfall of this procedure is that these deeds often do not

[1821] W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 2. Also see D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 13.
[1822] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 5.
[1823] J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 8.
[1824] W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 4. Also see T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 4.
[1825] W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 6. Also see T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 9. Also see D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 14-15. Also see D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 7. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 8.
[1826] S16 1)(b) Civil Evidence Act 1968. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 17.
[1827] M. Dowden, *Practitioner's Guide to the Land Registration Act 2002: The Unfinished Revolution*, London: Estates Gazette, 2005, p. 105.

exist anymore in case of registered land, as they are simply not needed once the title is registered (and guaranteed by the State). In these cases, we are left with the description of the plots in the property register. But before hopes get up too high, we must realize that a common description of the parcel in the property register is the following: "The Freehold land shown edged with red on the plan of the above title filed at Land Registry and being (*address information of the parcel*)".[1828] In the worst case scenario, this constitutes all the information that is available. Quite sobering, isn't it? Especially when we realize once more that the plan – in the vast majority of cases – only reflects a general boundary. Yet, the situation is not as hopeless as it seems at first glance. This is because there are a number of presumptions that can assist in determining the location of the legal boundary.[1829] A popular presumption is the so-called "hedge and ditch presumption", which applies when two adjacent plots are separated from each other through a hedge and a ditch.[1830] According to this presumption, "the boundary is presumed to lie along the edge of the ditch on the far side from the hedge".[1831]

3.3.9.4 Boundary Dispute Resolution Mechanisms

"When it comes to back gardens – or front gardens for that matter –every inch is fought over with a ferocity that would not embarrass a First World War general."[1832]

Are there also peaceful means to resolve boundary disputes? There are multiple ways to address this problem.[1833] First, the parties try to end the dispute with the help of their solicitors, who will

[1828] B.Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 106. Also see S. Jourdan & O. Radley-Gardner, *Adverse Possession*, West Sussex: Bloomsbury Professional, 2011, p. 633.
[1829] For an overview of these presumptions, see: M. Dowden, *Practitioner's Guide to the Land Registration Act 2002: The Unfinished Revolution*, London: Estates Gazette, 2005, p. 108-110 and F. Silverman (eds.), *The Law Society's Conveyancing Handbook*, London: The Law Society, 2015, p. 424-425 and Website GOV.UK: HM Land Registry, 'Practice guide 40 – supplement 3: HM Land Registry plans: boundaries' (updated last on 25 June 2015) (https://www.gov.uk/government/publications/land-registry-plans-boundaries/land-registry-plans-boundaries-practice-guide-40-supplement-3), as consulted on 15.01.2018.
[1830] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 9.
[1831] Alan Wibberley Building Ltd v Insley [1999] 2 EGLR 89. Also see M. Dowden, *Practitioner's Guide to the Land Registration Act 2002: The Unfinished Revolution*, London: Estates Gazette, 2005, p. 108-109. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 9.
[1832] D. Powell, *Anstey's Boundary Disputes and how to resolve them!*, Coventry: RICS, 2009, p. vii.
[1833] Although the parties are in principle free to pick-and-choose a way that seems to be most suitable for them to find a solution of the problem, picking one means over another might have consequences at a later stage of the proceedings, especially when it comes to the distribution of costs. See: D. Agnew & A.Morris,

try to end the dispute without having to engage in other forms of dispute resolution.[1834] If that does not succeed, the parties can submit their dispute to an experienced and - most importantly - neutral surveyor with a great expertise in boundaries.[1835] Before the surveyor begins with his work and draws a conclusion, the parties must come to an understanding with each other that the surveyor's conclusion will have binding force.[1836] When compared to a court proceeding, this option has the clear advantage that it will be cheaper and less time consuming for both parties involved.[1837] If this option is chosen, the surveyor will measure the boundary in the territory and analyse whether that boundary corresponds to the boundary deduced from the deeds and the plans.[1838] In the event that these boundaries do not coincide, the surveyor will need additional information, such as (aerial) photos, evidence produced by objective witnesses, the "conveyancing file", and the "Seller's Property Information Form" in order to come to an opinion.[1839] These sources might also proof helpful if another option to solve the boundary dispute is chosen.[1840] In addition to the expert advice from a surveyor, there are two more options on the more informal side of dispute resolution: mediation, for example within the framework of the Royal Institute of Chartered Surveyors' "Neighbour Disputes Service" and the parties reaching a settlement.[1841] These options are accompanied by a more formal possibility that lies in an arbitration proceeding in accordance with

Neighbour Disputes: A Guide to the Law and Practice, London: Wildy, Simmonds & Hill Publishing, 2011, p. 22-26. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 339. Furthermore, to support the parties, the so-called "Pre-Action Protocols" are intended to give guidance to solve these disputes although there is not a specific protocol designed for boundary disputes. See J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 338-339. Also see Website Ministry of Justice (UK), 'CPR – Pre-Action Protocols', (https://www.justice.gov.uk/courts/procedure-rules/civil/protocol), as consulted on 22.01.2018.

[1834] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 11-12.

[1835] Ibid. Also see W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 87.

[1836] W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 87.

[1837] Ibid.

[1838] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 16.

[1839] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 9-11, 17. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 18-19.

[1840] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 9.

[1841] T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 42. Also see D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 23, 149.

the Arbitration Act 1996.[1842] The use of this option can be especially observed when it comes to commercial leases.[1843] Last, an even more formal option is to start court proceedings. It deserves attention however the rendered judgment of the court will have binding force merely between the parties to the dispute.[1844]

3.3.9.5 The Role of Adverse Possession in defining the Object of Transfer

A common reason that can lead to the divergence of the cadastral and the legal boundary is the application of the doctrine of adverse possession. The limitation period with regard to land is 12 years "from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person".[1845] This limitation period only applies to unregistered estates.[1846] In two situations, the passing of a much longer limitation period is required. First, the prescription period for land that belongs to the Crown or to "any spiritual or eleemosynary corporation sole" amounts to 30 years.[1847] Second, a limitation period of 60 years is handled for foreshores that belong to the Crown.[1848] A limitation period for registered estates cannot be found in the Limitation Act 1980.[1849] If registered estates are concerned, adverse possession "for however long, does not of itself extinguish the paper owner's title, nor confer any

[1842] W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 89. Also see T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 42.
[1843] W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 89.
[1844] W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 83.
[1845] S15 Limitations Act 1980. Note that in case of leases, fraud, concealment, mistake, disability, or where the estate forms part of a trust asset, the limitation period of 12 years may be deviated from. See s28, 32 Limitation Act 1980. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1125. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1481-1484. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 24-25.
[1846] S96 Land Registration Act 2002. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1176. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1160. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1456.
[1847] S10 Schedule 1 of Limitations Act 1980. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 66.
[1848] S11(1) Schedule 1 of Limitations Act 1980. Also see r13 (1) Schedule 6 of Land Registration Act 2002. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 66.
[1849] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1461. Also see D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 33. But, see: r1(1) of Schedule 6 of LRA 2002.

title on the adverse possessor".[1850] Instead, the adverse possessor must follow a certain procedure laid down in Schedule 6 of the Land Registration Act.[1851] Nevertheless, all persons, other than the owner, who have a proprietary interest on the land, can invoke their entitlement against the adverse possessor, even if he was unaware of their existence.[1852]

What are the conditions for adverse possession? First and foremost, the adverse possessor must have exclusively and uninterruptedly possessed of the land in question throughout the limitation period (*factum possessionis*).[1853] It is though not required that they have possessed the land themselves throughout the entire limitation period.[1854] Second, it must have been visible for outsiders that they intended to possess the land ("*animus possidendi*").[1855] It is hereby irrelevant whether the adverse possessors' intention is grounded on their good faith; bad faith will not stand in the way of acquiring the land through adverse possession.[1856] Yet, this does not mean that good faith and bad faith acquirers have the same chances in succeeding with their claim. It can be deduced from case law that the courts are more inclined to honour a claim for adverse possession when the acquirer is in good faith rather than in bad faith.[1857] Third, the land must have been possessed adversely, meaning that a call on adverse possession will be unsuccessful if the alleged adverse possessor either had permission from the owner or if his possession was grounded on a legal right such as a lease.[1858]

Before zooming in on the rules and procedures that govern adverse possession – depending on whether the estate in question has been registered or not – the following speciality of English law

[1850] Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1161.
[1851] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1461.
[1852] R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 83. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1159, 1174.
[1853] R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 74-75, 82. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1179.
[1854] R11 (2) Schedule 6 of Land Registration Act 2002. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 82. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1160.
[1855] R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 76. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1179. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1463 and S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 131-132.
[1856] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1184.
[1857] R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 67.
[1858] R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 78. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1463 and S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 132.

deserves attention: once the trespassers have taken possession of the land, a fee simple is conferred to them, which "is good against everyone except the person whom he has dispossessed".[1859] In case of unregistered land, this therefore means that, in principle, even before lapse of the adverse possession period, adverse possessors could ask the Chief Land Registrar to register a possessory title on their behalf.[1860] In the end, the only requirement for the registration of a possessory title is absolute possession.[1861] *Pain* explains in this regard:

> "Frequently a period of between five and eight years will be sufficient provided that the acts of possession which are relied upon are unequivocal, and in some instances a period of less than five years may be accepted. In practice, therefore, there is little to be gained by waiting for the basic period of limitation to expire because even where twelve years' adverse possession has been demonstrated the land registry may still only be able to grant possessory title."[1862]

The possibility of having a possessory title registered before the lapse of the limitation period is however subject to debate.[1863] By the same token, there is a valid reason why it might not be that wise to ask the Chief Land Registrar to register a possessory title on one's behalf before the limitation period has ended: the true but ignorant owner will be made aware of the adverse possession and is then able to take measures to end the adverse possession. Either way, 12 years after a possessory title was granted, it can be converted to an absolute title.[1864]

Adverse Possession with regard to Registered Estates

The rules on adverse possession with regard to registered estates have witnessed significant alteration as a result of *JA Pye (Oxford) Ltd v Graham*.[1865] The case facts are as follows. Mr Graham

[1859] Rosenberg v Cook (1881)j 8 QBD 162, p. 165. Also see C. Harpum & J. Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002*, Bristol: Jordan Publishing Limited, 2004, p. 48. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2017, p. 89. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1494.
[1860] A. J. Pain, *Adverse Possession: A Conveyancer's Guide*, London: Fourmat Publishing, 1992, p. 15.
[1861] S9 (5)(a) and s10 (6)(a) LRA 2002.
[1862] A. J. Pain, *Adverse Possession: A Conveyancer's Guide*, London: Fourmat Publishing, 1992, p. 15.
[1863] Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper*, Consultation Paper 227, 2016, p. 380.
[1864] S62 (4) LRA 2002.
[1865] JA Pye (Oxford) Ltd v Graham [2000] Ch 676. Also see JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419. Also see R. Grover, 'Why the United Kingdom does not have a cadastre – and does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p. 7 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.p

was entitled to let his livestock graze on a marked-off section of land owned by Pye (Oxford) Ltd (hereafter: "Pye").[1866] The agreement between Pye and Mr. Graham was terminated on the last day of 1983. Yet, Mr Graham did not terminate his activities on Pye's land and behaved as if he still was entitled to use the land which also meant that he maintained the land with great care.[1867] This situation lasted for about 14 years during which Pye did not undertake measures to evict Mr Graham even after they had rejected his application for a renewal of the agreement in 1984.[1868] His second application in 1985 was left without a reply by Pye.[1869] It was not until 1998 that Pye gained momentum, after a caution to the benefit of Mr Graham was registered in the register of title.[1870] This entry in the register eventually triggered that Pye started court proceedings.[1871]

After having lost their case in the court of first instance, then won in the Court of Appeal and ultimately lost in the House of Lords, Pye decided to start proceedings against the United Kingdom in the European Court of Human Rights (hereafter: "ECtHR"), arguing that the respective English law at the time (which protected the legal interests of Mr Graham) constituted a violation of their right to "protection of property" as enshrined in Article 1 First Protocol of the European Convention on Human Rights (hereafter: "ECHR").[1872] After all, one should not forget here what the consequences of the judgments are. In the end, the Pye claimed to have suffered a loss of £10.000.000![1873] A judgment in favour of Mr Graham thus meant that he was had acquired legal title to that estate for free and that Pye (Oxford) Ltd consequently had lost it without being entitled to any compensation.[1874] With a slight majority (4:3), the ECtHR judges ruled in favour of Pye and held that the respective English law at time amounted to a violation of Article 1 First Protocol of the

df), as consulted on 15.07.2019. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 69.Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1166-1167.

[1866] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 58.

[1867] Ibid.

[1868] Ibid.

[1869] Ibid.

[1870] Ibid.

[1871] Ibid.

[1872] It is noteworthy that this case did not fall within the scope of the Land Registration Act 2002 but under its predecessor, the Land Registration Act 1925. See: D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 59, 61-62. Also see D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 34-35.

[1873] Note however that the government concluded that the value of the estate is worth £785.000 respectively £2,5 million (depending on the time of valuation). See: *J.A. Pye (Oxford) Ltd v The United Kingdom*, ECHR (2007) 44302/02 (Grand Chamber), para. 23.

[1874] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 60.

ECHR.[1875] Yet, this is not the end of the story, as this judgment in turn was appealed against in the Grand Chamber, who in last instance overturned the prior ECtHR judgment by concluding that Pye's right to the "protection of property" was not violated.[1876] It is important to notice that the adaptation of the land registration rules did not only rectify the violation of the ECHR, but also responded to the developing critical perception of society towards adverse possession at the time in which the division line between adverse possession and theft was considered to be negligible.[1877] As a result, simply possession of the land throughout the limitation period will no longer suffice to effectuate a transfer of the entitlement to the registered estate.[1878]

To be registered as 'owner' of the land in the land register, adverse possessors must turn to the Chief Land Registrar and file an application for the registration of their entitlement.[1879] It almost goes without saying that such an application can be filed only upon completion of the prescribed period of possession, amounting to ten years.[1880] Furthermore, adverse possessors may not file such an application if the registered owners of the land is not able to prevent the loss of their entitlement to the land.[1881] This is the case if the registered owners have a physical or mental disability due to which they are unable to defend their interests with regard to the land.[1882] This is

[1875] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 61.
[1876] Ibid.
[1877] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1166.
[1878] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1169.
[1879] P1(1) Schedule 6 of Land Registration Act 2002. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 71. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1170. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1126. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1497. For an exception to the rule that one can acquire title through adverse possession, see r12 Schedule 6 of Land Registration Act 2002. Also see E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 147. On the practicalities of this application, see: r188 Land Registration Rules 2003 and Website GOV.UK: HM Land Registry, 'Practice guide 4: adverse possession of registered land' (updated last on 20 November 2017) (https://www.gov.uk/government/publications/adverse-possession-of-registered-land/practice-guide-4-adverse-possession-of-registered-land), as consulted on 15.01.2018.
[1880] P1(1) Schedule 6 of Land Registration Act 2002. For an exception to this general rule relating to the situation in which the adverse possessor is evicted from the land by its owner in the course of the last half year before completion of the prescription period, see: p 1(2)-(3) Schedule 6 of Land Registration Act 2002. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 71. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1495. Also see S. Gardner & E. MacKenzie, *An Introduction to Land Law*, Oxford – Portland: Hart Publishing, 2015, p. 130.
[1881] R8 Schedule 6 Land Registration Act 2002.
[1882] R8 (2)-(3) Schedule 6 of Land Registration Act 2002.

also the case if they can be classified as an enemy or if they are arrested in enemy's country in the meaning of the Limitation (Enemies and War Prisoners) Act 1945.[1883]

Once the Chief Land Registrar receives the application, he must notify a number of persons of the application.[1884] In any case, this includes the owner of the respective estate, the owner of a charge with which that estate is burdened, and persons, who are registered to receive such a notification.[1885] Further, if the estate concerns leasehold, the Chief Land Register must also inform any person who is entitled to a "superior registered estate".[1886] Notifications will be sent to the person's address that is registered in the land register.[1887] A guarantee that this address is still up to date and that the persons are actually living there is not given, so that it is possible that the notification will never reach them.[1888] The persons entitled to the fee simple must take care of the correctness of their address themselves. However, it is worth mentioning that the person entitled to the fee simple is given the possibility to enter a total of three addresses on the register.[1889] Out of these three addresses, two of them may be email addresses.[1890]

Any person who receives a notification may file an objection against the registration of the adverse possessor as new owner of the land within 65 business days after the land registrar's notice was issued.[1891] If the notified persons do not file an objection, the adverse possessor will be registered as the new owner of the plot of land.[1892] In the case of an objection, the adverse possessors' application may be approved if they fulfil one of the three conditions set out in r5 Schedule 6 of LRA 2002 that are to ensure the reasonability of their application.[1893] In short, the application will be crowned with success first, if the adverse possessors are convinced that they are entitled to the

[1883] R8 (1) Schedule 6 of Land Registration Act 2002.
[1884] P2 Schedule 6 of Land Registration Act 2002. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1171. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1500.
[1885] P2 Schedule 6 of Land Registration Act 2002.
[1886] P2(1)(c) Schedule 6 of Land Registration Act 2002.
[1887] R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 72.
[1888] Ibid.
[1889] R198 (4) Land Registration Rules 2003. Also see Website GOV.UK: HM Land Registry, 'Practice guide 55: address for service' (updated last on 21 November 2017) (https://www.gov.uk/government/publications/address-for-service/practice-guide-55-address-for-service), as consulted on 02.01.2018. Also see M. Dowden, *Practitioner's Guide to the Land Registration Act 2002: The Unfinished Revolution*, London: Estates Gazette, 2005, p. 23.
[1890] Ibid.
[1891] R3 Schedule 6 of Land Registration Act 2002. Also see r189-190 Land Registration Rules 2003.
[1892] P4 Schedule 6 of Land Registration Act 2002.
[1893] R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 72. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1495.

land in their possession because its true owner has, though not necessarily explicitly, planted this conviction in them and the true owner is aware of the fact that the adverse possessor relies on this conviction ("equity by estoppel"), second, if the persons claiming adverse possession are the owner's neighbour who in the absence of a fixed boundary unknowingly annexed a part of their neighbour's land reasonably thinking that it belongs to their own land, and third, if adverse possessors can base their entitlement on another legal justification.[1894] The latter situation occurs for example when a seller has received the purchase price from the buyer but has failed to transfer his entitlement to the land to the buyer.[1895] If the adverse possessors successfully completes the procedure, they will be awarded an absolute title.[1896]

If the adverse possessors do not fulfil either condition, their application must be rejected.[1897] But this does not automatically terminate the enforcement of their entitlement. The adverse possessor is given one last opportunity.[1898] Namely, if they are not evicted by the owner within two years counted from the rejection date or if their residency status is not legalized (i.e. through the creation of a tenancy), the adverse possessor may file another application to be registered as owner.[1899] In opposite to the first application, the land registrar will not inform the owners nor will the latter be able to put forward an objection against the registration of the adverse possessor as owner. In the end, they were given a fairly broad period of time during which they could have taken action and evict the adverse possessor.[1900] In other words, the application will naturally approve the registration of the adverse possessor's entitlement.[1901] The adverse possessors will then step into the shoes of the old owner in the sense that they will be entitled to the class of title that the previous owner had.[1902] This shows that as a result of the strict regime that is imposed by the LRA 2002 and justified by the indefeasible nature of registered estates, it is nowadays rather an

[1894] R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 69, 72. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1172-1174. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1162. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1502-1505.
[1895] R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 72.
[1896] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1174.
[1897] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1172.
[1898] R6 Schedule 6 of Land Registration Act 2002.
[1899] Ibid. For exceptions to this general rule, see paragraph2 of the same provision. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 73. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1172. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1495, 1505.
[1900] R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 73.
[1901] Ibid. Also see r7 Schedule 6 of Land Registration Act 2002.
[1902] R9 of Schedule 6 LRA 2002.

exception than a normality to succeed in the acquisition of land by means of adverse possession.[1903] This is only different when the registered owners agree that the new owners have acquired their land through adverse possession fail to make use of their right to object.[1904]

Adverse Possession with regard to Unregistered Estates

While adverse possession nowadays plays a rather subordinated role when it comes to registered estates, it is still fulfils an important function in unregistered estates.[1905] It is then on the freehold owner of the land to terminate the trespasser's possession before the lapse of the statutory limitation period.[1906] If they neglect to take appropriate measures on time, their right to remedy the situation will extinguish.[1907] Yet, the extinguishment of the owner's entitlement does not trigger acquisitive prescription or "parliamentary conveyance" to the benefit of the adverse possessor.[1908] Instead, the adverse possessor will be given a fresh fee simple.[1909] As a result, the adverse possessors are now equipped with a better title to the land than its original owner.[1910] Therefore, they can no longer be evicted nor can they be obliged to pay monetary compensation to the owner.[1911]

Adverse possession can also work against the owner of a leasehold.[1912] Its mechanism much resembles the mechanism that underlies the adverse possession of a freehold. Thus, also in this

[1903] R5 Schedule 6 of Land Registration Act 2002. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 66, 69. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1174. Also see C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1457.
[1904] R4 Schedule 6 of Land Registration Act 2002. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 66, 71.
[1905] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1167, 1170.
[1906] s17 Limitation Act 1980. This only holds true if the parcel neither concerns 'settled land' nor constitutes a trust asset. See: E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1143, 1149.
[1907] E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1149.
[1908] Tichborne v Weir (1892) 67 LT 735. For an exception to the general limitation period, see: s96 LRA 2002. Also see R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 71, 83. Also see E.H. Burn & J. Cartwright, *Cheshire and Burn's: Modern Law of Real Property*, New York: Oxford University Press, 2011, p. 1150.
[1909] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1488.
[1910] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1159.
[1911] R.J. Smith, *Property Law*, Essex: Pearson Education Limited, 2011, p. 83.
[1912] B. Bogusz & R. Sexton, *Complete Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 501.

case, trespassers will be given a fee simple once they start to possess the land. This right in rem however does not work against the leaseholder. If the leaseholder does not effectuate the end of this trespass before the expiration of the limitation period, the consequence will be that 'merely' a leasehold and not a freehold will be vested in the adverse possessor.[1913]

Adverse possessors can apply to HM Land Registry to have their entitlement registered. Before registration can occur, the land is usually first subject to inspection by one of Ordnance Survey's land surveyors on behalf of HM Land Registry.[1914] The Chief Land Registrar will then grant them a possessory title.[1915] Therefore, they will not be given a guarantee of ownership so that they still are vulnerable to others claiming a better title.[1916] This situation will only chance 12 years after the title has been registered when the owner can apply to upgrade the possessory title to an absolute title.[1917]

The Encroaching Pavilion

Who owns the part of the pavilion that encroaches upon the neighbour's land? Independent of whether the neighbour's land is registered or not, it is the neighbour who owns the encroaching part of the pavilion, due to the fact that the owner of a plot of land is ultimately also the owner of everything on top of it ("quicquid plantatur solo, solo cedit").[1918] On first sight the application of this principle seems to be advantageous for the neighbour. In reality however, the neighbour will have little use for a mere outer wall of a pavilion on the outer edge of his parcel. Therefore, more often than not, he would then rather want to remedy the situation instead of enjoying his ownership of a piece of outer wall. What are the options available to the neighbour? Since the owner of the pavilion

[1913] C. Harpum, S. Bridge & M. Dixon, *Megarry & Wade: The Law of Real Property*, London: Sweet & Maxwell, 2012, p. 1489.
[1914] Website GOV.UK: HM Land Registry, 'Practice guide 5: adverse possession of (1) unregistered and (2) registered land where a right to be registered was acquired before 13 October 2003' (updated last on 20 November 2017) (https://www.gov.uk/government/publications/adverse-possession-of-1-unregistered-land-and-2-registered-land/practice-guide-5-adverse-possession-of-1-unregistered-and-2-registered-land-where-a-right-to-be-registered-was-acquired-before-13-october-2003), as consulted on 15.01.2018.
[1915] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 117.
[1916] Ibid.
[1917] S62(4) LRA 2002. Also see Website GOV.UK: HM Land Registry, 'Practice guide 42: upgrading the class of title' (upgraded last on 25 June 2015) (https://www.gov.uk/government/publications/upgrading-the-class-of-title/practice-guide-42-upgrading-the-class-of-title), as consulted on 02.01.2018. Also see B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 117-118.
[1918] S62 Law of Property Act 1925. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 31.

has built his structure partly on the parcel of his neighbour, he qualifies as a trespasser.[1919] Before the neighbour is able to take any action, it would become necessary to first establish that the owner of the pavilion indeed has committed trespass.[1920] To qualify as a trespasser, the owner must fulfil four conditions. First, he must commit a trespass voluntarily.[1921] Unless it can be proven that he was forced to encroach on his neighbour's land when building the pavilion, it can be safely concluded that this condition is fulfilled. Second, the trespass must not be subject to legitimization.[1922] By means of example, such legitimization is conferred upon the police force to enable them to grant themselves access to residential property.[1923] In the case at hand, a legitimization was not granted so that this condition is also fulfilled. Third, the trespass must not be necessary. This is also the case, as the pavilion's owner could have simply erected the structure on his own parcel. Last, the trespass must be legitimate. From the perspective of this case, this is the most interesting criterion. Especially, when the boundary between the parcels is not determined or fixed but only constitutes a "general boundary", chances are high that the parties will first have to determine the run and the location of the boundary before it can be established whether this last criterion has been fulfilled.[1924] Importantly, for the classification as a trespasser it is not necessary that the owner of the pavilion realised that he was committing trespass.[1925]

In the event that the action of the pavilion owner can be qualified as trespass, the neighbour can make use of three possibilities. The first possibility is self-help. To successfully invoke the right of self-help, a number of conditions must be fulfilled. To begin with, one must invoke this right as soon as possible and not delay it unnecessarily.[1926] In fact, self-help is permitted only as long as the trespasser has not begun to possess the land.[1927] Furthermore, the case at hand must either be

[1919] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 92.
[1920] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 93.
[1921] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 94. Also see J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 159-160.
[1922] Ibid.
[1923] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 94.
[1924] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 93.
[1925] J. Pugh-Smith, G. Sinclair & W. Upton, *Neighbours and the Law*, London: Thomson Reuters, 2009, p. 158-159.
[1926] T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 43. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1274.
[1927] K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1274.

evident and straightforward or it must concern a case of need.[1928] Last, self-help must be proportionate.[1929] For these reasons, it is evident that self-help is not the most obvious or popular remedy to defend oneself against a trespasser. In addition, depending on the circumstances, the neighbour can even be held criminally liable when he decides in favour of helping himself.[1930] As a second option, the neighbour could also go to court to ask for an injunction which would oblige the owner of the pavilion to eliminate the superstructure from his neighbour's ground.[1931] However, the courts will only grant an injunction if it deems that damages (on the basis of trespass) would constitute an unsuitable remedy.[1932] Furthermore, the petition will be rejected if the applicant has taken his time to ask for an injunction ("excessive delay").[1933] This would likely occur if the applicant had quietly waited with this court action until the owner of the pavilion was finished with the construction without trying to stop him at an earlier stage (i.e. through means of an "interlocutory injunction").[1934] Third, he could claim for damages.[1935] These claims must be brought forward though within the limitation period, which amounts to six years.[1936]

[1928] Burton v Winters [1993] 1 WLR 1077. Also see Macnab and Anr v Richardson and Anr [2008] EWCA Civ 1631. Also see T. Aldridge, *Boundaries, Walls and Fences*, London: Thomson Reuter, 2009, p. 43. Also see D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 26, 47.
[1929] T. Aldridge, Boundaries, *Walls and Fences*, London: Thomson Reuter, 2009, p. 40. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1274.
[1930] S6, 12 (3)-(4) Criminal Law Act 1977. Also see K. Gray & S.F. Gray, *Elements of Land Law*, New York: Oxford University Press, 2009, p. 1275.
[1931] W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 94. On the authority of courts to grant an injunction, see: s37 Senior Courts Act 1981, s38 County Courts Act 1984 and County Court Remedies Regulations 1991 (2014 version = draft legislation). Also see W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 97.
[1932] W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 95-96. Also see D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 24-25.
[1933] W. Hanbury, *Boundary Disputes: A Practitioner's Handbook*, Welwyn Garden City: EMIS Professional Publishing, 2003, p. 96-97.
[1934] Ibid.
[1935] D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 95.
[1936] S2 Limitation Act 1980. Also see D. Agnew & A.Morris, *Neighbour Disputes: A Guide to the Law and Practice*, London: Wildy, Simmonds & Hill Publishing, 2011, p. 97.

3.4.10 Digitalization of Land Registration

From 2008 onwards the land register has been kept in a digital format. Documents that had been submitted to HM Land Registry before were first scanned and afterwards destroyed.[1937] Nowadays, the vast majority of applications are received electronically, though it still is possible to submit paper applications.[1938] If paper documents are offered for registration, they will be sent to HM Land Registry's scanning centre in Gloucester which will scan the documents and upload them on the system to ensure that all casework can be conducted electronically.[1939]

The services of HM Land Registry can be digitally accessed through different interfaces. The most important ones are the Business Gateway, which is designed for professional customers and HM Land Registry Portal, which is a simpler version of the Business Gateway and intended for smaller customers. Noticeably, the Land Registry Portal enables the customer to promptly access the land register.[1940] To what extent do customers file information requests electronically? As *Abbey* and *Richards* explain:

> "With regard to their e-services as at March 2016 the Land Registry confirmed that 99 per cent of service requests (e.g. searches, etc.), 73 per cent of registration applications, and 80 per cent of mortgage discharges are lodged electronically."[1941]

In addition to the register of title, also the land charges register and the register of local land charges have been digitalized.[1942] The same holds true for Ordnance Survey maps and all plans and maps kept and produced by HM Land Registry.[1943] The process of digitalizing HM Land Registry's

[1937] Nevertheless, HM Land Registry does not possess copies of all title deeds submitted for registration since the creation of the land register. See: F. Ramsay, 'Where are my title deeds, and do I need them?', *HM Land Registry Blog*, 19.02.2018 (https://hmlandregistry.blog.gov.uk/2018/02/19/title-deeds/), as consulted on 25.04.2019. Also see Website GOV.UK: HM Land Registry, 'HM Land Registry portal: how to request official copies' (https://www.gov.uk/guidance/land-registry-portal-how-to-request-official-copies), as consulted on 25.04.2019.
[1938] R14-15 and Schedule 2 of Land Registration Rules 2003.
[1939] Explanatory Memorandum to the Land Registration (Amendment) Rules 2018, 2018 No. 70, para.. 7.5.
[1940] R. Abbey & M. Richards, *A Practical Approach to Conveyancing*, Oxford: Oxford University Press, 2016, p. 34.
[1941] Ibid.
[1942] B. Bogusz & R. Sexton, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2017, p. 85. Also see Website GOV.UK: HM Land Registry, 'Guidance: Local Land Charges: Local authority pre-migration guide' (https://www.gov.uk/government/publications/local-land-charges-local-authority-pre-digitisation-and-migration-guide/local-land-charges-local-authority-pre-digitisation-and-migration-guide), last consulted on 08.12.2017.
[1943] M. Dowden, *Practitioner's Guide to the Land Registration Act 2002: The Unfinished Revolution*, London: Estates Gazette, 2005, p. 101. Also see R. Grover, 'Why the United Kingdom does not have a cadastre – and

maps and plans dates back to the mid-20th century and thus occurred earlier than the digitalization of the land register. [1944]

3.4.10.1 E-Conveyancing

While it is already possible to submit digital documents for registration in the digital register of title and to digitally access information kept in this register, an even bigger dream is pursued - e-conveyancing. So far, as outlined above, the creation or transfer of an estate is a three-step procedure, consisting of the execution of a deed of creation/transfer, the submission of that deed for registration in the register of title, and its registration.[1945] The disadvantage of this approach is that it creates a so-called "registration gap" between the point in time at which the deed is executed and the moment at which registration occurs.[1946] The added value of e-conveyancing lies in the dissolution of this gap, which is achieved by replacing the three-step procedure by a one-step procedure, in which the moment of creation/transfer of an interest in land (the completion) coincides with the moment of registration.[1947] In other words, a disposition would simply lack legal effect, until it is registered.[1948] However, this proposal, as published in the 2001 Law Commission Report, had to face some headwinds. Not only do technological and practical problems stand in the way of its realization, there were also several questions raised as to whether this endeavour is at all desirable when taking into its potential consequences for party autonomy in real estate dealings and the judicial approach of non-compliance cases account.[1949] It is for these reasons that Law Commission comes to the following conclusion in its 2016 Consultation Paper on "Updating the Land Registration Act 2002":

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does it matter?', FIG Commission 7, Annual Meeting 2008, Verona, 11-15 September 2008, p. 8 (https://www.fig.net/resources/proceedings/2008/verona_am_2008_comm7/papers/12_sept/7_2_grover.pdf), as consulted on 15.07.2019.

[1944] M. Dowden, *Practitioner's Guide to the Land Registration Act 2002: The Unfinished Revolution*, London: Estates Gazette, 2005, p. 101.

[1945] R.J. Smith, *Property Law*, UK: Pearson Education Limited, 2017, p. 114.

[1946] S27 Land Registration Act 2002. Also see Chapter 3.3.8.

[1947] S93 (2) and 27 Land Registration Act 2002. Also see B. McFarlane, N. Hopkins & S. Nield, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2018, p. 304-305. Also see K Gray & S.F. Gray, *Elements of Land Law*, Oxford: Oxford University Press, 2009, p. 194. Also see R.J. Smith, *Property Law*, UK: Pearson Education Limited, 2017, p. 114. Also see S. Gardner, 'The Land Registration Act 2002 – the Show on the Road', *The Modern Law Review* (2014) 77 (5), p. 770.

[1948] S93(2) Land Registration Act 2002. Also see K Gray & S.F. Gray, *Elements of Land Law*, Oxford: Oxford University Press, 2009, p. 194. Also see R.J. Smith, *Property Law*, UK: Pearson Education Limited, 2017, p. 114.

[1949] Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper*, Consultation Paper 227, 2016, p. 422-423.

> "In light of these concerns, simultaneous completion and registration does not provide a practical way forward at this time. We feel that for electronic conveyancing to become a reality it is necessary to step back from the goal. We consider that doing so opens up the avenues along which electronic conveyancing could develop."[1950]

The proposed system also entails that the register of title is automatically altered when the electronic deed is submitted by the legal practitioner.[1951] From a traditional viewpoint, this seems rather shocking and the logical question that rises is whether this new system entails that HM Land Registry is stripped from any possibility to control the legal validity of the information entered in the register of title. This is not the case as the process of transferring an interest is somewhat more complex than presented.[1952] When dealing with a transfer of a freehold, for instance, HM Land Registry must be electronically supplied with a draft of both the contract of sale and the deed of transfer before completion can occur.[1953] Thereby, it is secured that the Chief Land Registrar is able to exercise control on the information that is to be entered in the register of title. At the end of the day, HM Land Registry can be held liable if the information entered in the register turns out to be incorrect. If these controls lead to a positive outcome, the following will happen:

> "A "notional" register will then be prepared by the Registry in consultation with the parties to indicate the form that the register will take when the transaction is completed. Completion, when it occurs, will entail the simultaneous occurrence of the following events –
> (1) the execution of the transfer and any charges in electronic form and their transmission to the Registry, where they will be stored;
> (2) the registration of the dispositions so that the register conforms with the notional register previously agreed with the Registry; and
> (3) the appropriate (and automatic) movement of funds and the payment of stamp duty and Land Registry fees."[1954]

Will e-conveyancing have a detrimental effect on those persons who would like to do their own conveyance? This is not the case. The introduction of e-conveyancing neither abolishes the possibility of DIY conveyancing and nor means that these parties will have to turn to a conveyancer

[1950] Ibid.
[1951] Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, London: The Stationery Office, 2001, p. 26.
[1952] For a detailed overview, see: Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, London: The Stationery Office, 2001, p. 24-27.
[1953] Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, London: The Stationery Office, 2001, p. 25-26.
[1954] Ibid.

to effectuate the conveyance.[1955] However, to accomplish their task, they will need support from the Chief Land Registrar.[1956]

The introduction of an e-conveyancing system was first introduced in 2001 by the Law Commission.[1957] In the words of *Cooke*:

> "The hard truth is that had the substantive changes in the 2002 Act been proposed alone, and without e-conveyancing, it would not have been enacted. It would have been simply a vast piece of lawyers' law. (...) [E]-conveyancing was the magic carpet that transported the Bill through Parliament."[1958]

Despite the fact that a legal framework for electronic conveyancing has been included in the LRA 2002, it has not been fully implemented so far.[1959] In fact, in 2011 the decision was taken to put the e-conveyancing dream on ice for now.[1960] As formulated by HM Land Registry, several reasons have lead to this decision: the concurrent crisis in the property market, the anxiety that e-conveyancing could increase the likelihood of fraud in real estate transactions, and the question whether the proceeding in which the conveyancer signs the necessary electronic documents on the parties' behalf after having been authorized to do so by the parties, is legally sound.[1961]

3.4.11 The Approach to Cross-Border Transfers of Land

It is possible for foreign legal practitioners to submit deeds for registration to HM Land Registry. The only hurdle to cross is that their deed will be treated as if it were made by the parties themselves (DIY conveyancing). Therefore, HM Land Registry will not accept the foreign legal

[1955] Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, London: The Stationery Office, 2001, p. 30. Also see I. Clarke, *The Land Registration Act 2002*, London: Sweet & Maxwell, 2002, p. 25.
[1956] Para.. 7 Schedule 5 of Land Registration Act 2002. Also see I. Clarke, *The Land Registration Act 2002*, London: Sweet & Maxwell, 2002, p. 25. Also see R. Abbey & M. Richards, *Blackstone's Guide to The Land Registration Act 2002*, New York: Oxford University Press, 2002, p. 114. Also see G. Hill et al., *The Land Registration Act 2002*, London: LexisNexis Butterworths, 2005, p. 48.
[1957] Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, London: The Stationery Office, 2001. Also see R.J. Smith, *Property Law*, UK: Pearson Education Limited, 2017, p. 113.
[1958] E. Cooke, *The New Law of Land Registration*, Oxford/Portland: Hart Publishing, 2003, p. 158.
[1959] Part 8 and Schedule 5 of the Land Registration Act 2002.
[1960] R.J. Smith, *Property Law*, UK: Pearson Education Limited, 2017, p. 114. Also see B. McFarlane, N. Hopkins & S. Nield, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2018, p. 305.
[1961] B. McFarlane, N. Hopkins & S. Nield, *Land Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2015, p. 241-242.

practitioner's check of the parties' IDs.[1962] Consequently, the parties have to turn to an English legal practitioner or to one of the offices of HM Land Registry to have their identity checked.

The second question that arises concerns the possibility to register deeds in the register of title that are drafted in a foreign language. As of 1 October 2001, the template for the register of title is shown not only in English but also in Welsh.[1963] However, as a general rule, all deeds that are offered for registration have to be drawn up in English. The entry in the individual register will then be in English.[1964] One exception applies to deeds that concern estates located in Wales. In these situations the deed may be drawn up in Welsh.[1965] As a consequence, from 1 October 2001 onwards, the entry in individual register will then consequently be in Welsh.[1966] In other words, the language in which an entry will be made in the individual register will follow the language in which the deed is drawn up.

3.4 Comparative Conclusions

After having separately dissected the land registration systems of the Netherlands, Germany, and England & Wales in the preceding chapter, the time has now come to approach the comparison of these systems with each other in order to determine existing similarities and differences. Needless to say, there are different approaches to conduct such an exercise. Depending on the choice of approach, the outcome of the comparative analysis may differ. Unawareness surrounding the use of these approaches can therefore easily create confusion. For this reason, it will be specified how the individual aspects of land registration systems were compared and if necessary how the employment of a different approach leads to different outcomes.

[1962] See Chapter 3.3.7.
[1963] R5 and 21 (6) Welsh Language Act 1993 (repealed). Also see Website GOV.UK: HM Land Registry, 'Practice guide 58: HM Land Registry's Welsh language scheme, register format' (updated last on 30 January 2016) (https://www.gov.uk/government/publications/land-registrys-welsh-language-scheme/practice-guide-58-land-registrys-welsh-language-scheme-register-format), as consulted on 02.01.2018.
[1964] Website GOV.UK: HM Land Registry, 'Practice guide 58: HM Land Registry's Welsh language scheme, register format' (updated last on 30 January 2016) (https://www.gov.uk/government/publications/land-registrys-welsh-language-scheme/practice-guide-58-land-registrys-welsh-language-scheme-register-format), as consulted on 02.01.2018.
[1965] Ibid.
[1966] Ibid. Entries on an individual register that were based on a deed drawn up in Welsh before that date were entered in the register in English.

3.4.1 The Constitution of Land Registration

The purpose of this sub-chapter was to establish how the land registers and cadastral organizations are organized in the Netherlands, Germany, England & Wales and to determine what must be understood of a land register and cadastre in these jurisdictions.

The Land Registry

The organizational structure of the land registry in the Netherlands and England & Wales are similar. In both cases, the land registry is a centralized and self-financing organization, which can carry out its tasks independently. Few offices are spread across the nation, who keep one centralized land register. By contrast, the German land registry is organized quite differently. To begin with, it must be pointed out that 'a' German land registry does not exist due to the fact that a separate land registry is attached to every local court. Considering that 661 local courts exist, it can be concluded that there is a same amount of land registries in Germany, each keeping their own individual land register. They can carry out their tasks independently but do not have to be self-financing. In addition of the land registers, the land registries in the three legal systems are also responsible to keep a number of additional registers and indices.

Table 3 – The Land Registry in the Netherlands, Germany, and England & Wales

	Netherlands	Germany	England & Wales
Original term	*Kadaster*	*Grundbuchamt*	*HM Land Registry*
Organisational structure	- Independent administrative body	- Form 'departments' of the local courts	- "Non-ministerial government department, an executive agency and a government trading fund" - The 2016 privatization plans were discarded
Merged with Cadastre	Yes	No	No

Self-financing	Yes	No	Yes
Carries out tasks independently	Yes	Yes	Yes
Responsible Entity	Ministry of Internal Affairs and Kingdom Relations	The respective local court	Department for Business, Energy and Industrial Strategy
Number of offices	- Eight offices - Head office: Apeldoorn "De Grift" - Certain offices have specific tasks (Rotterdam: registration of vessels)	- 661 offices	- 14 offices - Head office: Croydon
Nationwide integrated land register	Yes	No	Yes
Organisational unit of the land register	Plots	Plots	Legal interests that are registered substantively
The land registry keeps the following registers	- Land register - Cadaster - Key registry topography - Vessel register - Aircraft register - Coordination point net	- Land register that falls in their circuit - Register of deeds ("*Grundakten*") - Reproduction of the land register folios ("*Handblatt*") (obsolete in case of digital land register) - Index of owners - Index of plots	- Register of title - Register of cautions against first registration - Local charges register - Land charges register - Register of pending actions - Register of writs and orders affecting land - Register of deeds of arrangement - Indices

The Land Register

Every land registry within the discussed legal systems, keeps two databases that keep information about the legal situation of the parcels with regard to ownership respectively freehold/leasehold:

the collection of deeds and other documents that were offered for registration and the register that reflects that information in a standardized manner. It depends on the legal system which of these databases is given legal priority in the determination of the legal situation of the parcels and hence which of these databases needs to be classified as the land register:

Table 4 - The Land Register in the Netherlands, Germany, and England & Wales

	Netherlands	Germany	England & Wales
Collection of deeds/ other documents	*Openbare registers* - *Hypotheken 3* - *Hypotheken 4*	*Grundakten*	No statutory term
Register that reflects this information in a standardized manner	*Basisregistratie Kadaster*	*Grundbuch*	Register of title

In this context, confusion often arises when this comparison is not conducted on the level of its legal function but based on the form of these two databases, which in turn leads to a different outcome:

	Netherlands	Germany	England & Wales
Collection of deeds/ other documents	*Openbare registers* - *Hypotheken 3* - *Hypotheken 4*	*Grundakten*	No statutory term
Register that reflects this information in a standardized manner	*Basisregistratie Kadaster*	*Grundbuch*	Register of title

The Cadastral Organisation

The institution of a cadastral organization only exists in the Netherlands and Germany. In the Netherlands, it is a centralized organization, merged with the centralized land registry. In Germany, the opposite is the case, where its exact name and organizational structure is determined by state law. England by contrast does not have a cadastral organization as defined for the purpose of this research, but a mapping agency ("Ordnance Survey") does exist.

Table 5 – The Cadastral Organisation in the Netherlands, Germany, and England & Wales

	Netherlands	Germany	England & Wales
Original term	*Kadaster*	The exact term depends on state law; often referred to as *Katasteramt*	N/A
Organisational structure	See above	Determined by state law	N/A
Centralized organisation	Yes	No	N/A

The Cadastre

The cadastre in the Netherlands and Germany is similarly organized. It includes a cadastral map and a cadastral register, which cover the entire nation's territory. The only difference between these systems is that in the Netherlands a centralized cadastral map and register exists, while separate cadastral maps and registers are kept by the various German cadastral organizations.

Table 6 – The Cadastre in the Netherlands, Germany, and England & Wales

	Netherlands	Germany	England & Wales
Original term	*Basisregistratie kadaster*	*Liegenschaftskataster*	N/A
Coverage of the entire nation's territory	Yes	Yes	N/A
Contains cadastral map	Yes *kadastrale kaart*	Yes *Liegenschaftskarte*	N/A
Nationwide integrated cadastral map	Yes	Yes	N/A
Contains cadastral register	Yes *kadastrale registratie*	Yes *Liegenschaftsbuch*	N/A
Nationwide integrated cadastral register	Yes	Yes	N/A

3.4.2 The Role of the Legal Practitioner

It has been reasonably foreseeable that the biggest division line concerning the role of the legal practitioner can be drawn between the civil law countries and England & Wales. While the Latin notary is the designated legal practitioner in both Germany and the Netherlands, who must represent the interests of both seller and buyer, in England & Wales, this position can be fulfilled by licensed conveyancers and virtually all lawyers, who solely plead their client's case, being either the buyer or the seller. Nevertheless, it was constituted that "the" Latin notary does not exist, as it is not possible in the Netherlands to combine the notarial function with another profession. Furthermore, the German Latin notary solely classifies as public official, while in the Netherlands a form of Latin notary exists, who is both public official and entrepreneur.

Table 7 – Different Types of Latin Notaries in the Netherlands and Germany

		Germany	Netherlands
Full-time notary	Public official	*Nurnotar*	*Toegevoegde notaris*
	Entrepreneur	X	X
	Public official + entrepreneur	X	*Notaris-ondernemer*
Notary combined with another profession	Public official	*Anwaltnotar*	X
	Entrepreneur	X	X
	Public official + entrepreneur	X	X

With regard to the requirements for their appointment and the termination of their function, as well as their competences and duties, the rules in both jurisdictions are largely congruent. The position of solicitor and licensed are among themselves only comparable in the sense that they both must comply with the duties set out by their own respective head organisations, who also decide about the appointment of new members and the termination of their function. More fundamental differences exist as regards the requirements for appointment and their competences.

Table 8 – The Legal Practitioner in the Netherlands, Germany, and England & Wales

	Netherlands	Germany	England & Wales	
Original term	*Notaris*	*Notar*	*Solicitor*	*Licensed conveyancer*
Different	- Notaris-	- Nurnotar	N/A	N/A

types of notaries	ondernemer - Toegevoegde notaris ➔ Determined by choice	- Anwaltnotar ➔ Determined by geographic region; no individual choice possible		
Original term: candidate notary	*Kandidaat-notaris*	*Notarassessor*	N/A	N/A
Civil Servant	Yes - However, the Civil Service Act only applies partially to notaries (article 2 (1) Ambtenaren-wet)	No - They are holders of an independent office - They must refrain from commercial behaviour	No	No
Number of legal practitioners	January 1, 2016 - 1285 notaries - 1752 candidate notaries - 1 notary/ 13.051 inhabitants	January 1, 2015 - 1.506 Nurnotare - 5.650 Anwaltnotare - 1 notary/ 11.383 inhabitants	December 2017 - 185.900 solicitors out of which 139.790 practising	1,000 licensed conveyancers
Head organization	*Koninklijke Notariële Beroepsorganisatie (KNB)*	*Bundesnotar-kammer (BNotK)*	*Solicitors Regulation Authority (SRA)*	*The Council for Licensed Conveyancers (CLC)*
Require-ments for Appoint-ment	- Nationality of a EU Member State, an EEA member, or Switzerland - Relevant law degree - Vocational training + exam	- Qualification for a judicial office - Demonstrate adequate achievements - Suitable personality - Must not be older than 60	- Academic stage - Vocational stage - Compliance with the SRA Admission Regulations - Suitable character	- Theoretical education (Level 4 and 6 Diploma in conveyancing Law and Practice) - Practical education (1200

	- Spent two out of the three years prior to the appointment request working under the responsibility of a (substitute) notary, that they substituted the notarial function or that they filled in the notarial function as a notary in the Netherlands - Business plan - Certificate of good conduct - Masters Dutch language	(first time appointment) - Application of the act on the Determi-nation of the Equivalence of Professional Qualifications is excluded **Additional requirements for the *Nurnotar*** - Triennial service as candidate notary **Additional requirements for the *Anwaltnotar*** - Exclusively accessible for practicing lawyers - Working experience as a practicing lawyer for a minimum period of five years - Notarial professional examination - 160h training at a notarial office	- (Solicitors Qualifica-tion Exami-nation: approx. from September 2020 onwards) - Barristers and foreign qualified lawyers follow a reduced procedure in accor-dance with the SRA Qualified Lawyers Transfer Scheme Regulations 2011 - Professio-nal indem-nity insu-rance - Admittance to the profession	relevant working hours)
Appoint-ment	- By royal decree - Must be sworn	- By the federal-state administra-	- Entered on the roll - Certificate to	- Through a license issued by the CLC

	in - Deposit of signature and initials at the district court - Must not be suspended or resigned - Must not be a registrar, practicing lawyer, bailiff, or judge (with the exception of a deputy judge)	tion of justice department - Take an oath - Submit signature to the president of the district court	practice from the Law Society	
Allocation of an official seat?	Yes	Yes	No	No
Perform official activities while not being at their official seat?	No	No - Exception: permission of the regulating authority	N/A	N/A
Compe-tences	- Draw up authentic deeds - Perform all other activities conferred upon them by the law	- Notarial acts - Legalisations - Competences enumerated in §§20-24 BnotO	- As outlined in R7 (2) of Schedule 5 of the Legal Services Act 2007	- Conveyan-cing - Administra-tion of oaths
Cooperation with other practitioners	Yes - However subject to conditions to ensure the proper execution of the notarial function	Yes - However subject to conditions to ensure the proper execution of the notarial function	Yes	Yes

Duties	- Must not refuse the provision of their services unless the law dictates an exception to this rule - Act independently - Preserve the interests of all parties - Duty of confidentiality - Conduct all tasks elaborately - Engage in mandatory further education - Must refrain from activities that could endanger their financial position - Inform the KNB and the Chamber of Notaris about acceptance or termination of additional occupations - Decent administration of professional and private assets - Professional bank account	- Must not refuse their duties unless they can base their decision on a legal exception to this rule - Independence - Impartiality - Demonstra-tion of worthiness of the esteem and trust connected to the notarial function (which includes their private life) - No involvement in the intermediatio n of loans, real property transactions and performance of authentication services - Must not assume a guarantee or any other warranty in the course of an official act - Duty of confidentiality - Participation	- Compliance with the SRA Code of Conduct 2011 - Professio-nal indemnity insurance	- Compliance with the Code of Conduct (i.e. Professional indemnity insurance, client account) + Overriding Principles - Compliance with additional CLC rules and regulation - Professional indemnity insurance - Client account

	("*derden-geldreken-ing*") - Take professional responsibility insurance + insurance to cover other risks	in further education - Professional liability insurance - Must not exercise a salaried position parallel to their notarial function (exceptions possible) - Must not exercise an additional profession (exception: *Anwaltnotar*)		
Represents the interests of …	- All parties involved (buyer and seller)	- All parties involved (buyer and seller)	- One of the parties involved (either buyer or seller)	- One of the parties involved (either buyer or seller)
Termination of their function	- By operation of law after having turned 70 - Deposal from office on request by the notary or the Minister of Justice - Suspension by the president of the Chamber of Notaries	- Death of the notary - After having turned 70 - On own request - Conviction by a criminal court - Deposition - Disciplinary court judgment - Temporary resignation on own request - *Anwaltnotar*:	- (Tempora-ry) suspension by the Solicitors Disciplinary Tribunal	- (Temporary) Suspension of the licence by the CLC

		in case of termination of the membership in the bar association		

3.4.3 The Role of the Land Registrar

One might expect to find great similarities when learning about the function of the land registrar in the different legal systems. Although it is true that they all are public officials and share their key responsibility – the keeping of the land register – many differences can be observed. Regarding the educational requirements for appointment, it is noticeable that only Dutch law requires land registrars to have earned a university law degree while in Germany, land registrars have to follow a preparatory service, which includes legal studies at a college of higher education. Most interestingly though is English law, which strictly speaking does not require the Chief Land Registrar to have any expertise in the area of law. These findings are interesting also for another reason. Considering that the land registrar in Germany and England & Wales fulfils a more active role than their counterpart in the Netherlands, who is restricted to the control of formal registration requirements, one might have expected that the educational requirements for appointment are reversed in the sense that the most active land registrar must meet the highest level of legal education. Needless to say, especially when looking at the practical division of tasks in England & Wales, it is guaranteed that the land register is kept by those who possess the necessary competence. That is to say that the Chief Land Registrar appoints their own staff, which includes local land registrars, assistant land registrars, and caseworkers. Similarly, the Dutch land registrars mandate and authorize other land registry staff to assist them. In practice, the registration activities are not completely carried out by the land registrars themselves. Even in Germany, where land registrars do not have the competence to mandate or authorize, they are assisted by other land registry staff with the preparatory work and under certain conditions they must refer the case to a land register judge. In the Netherlands and England & Wales, the (assistant/local) land registrars have an even bigger distance to the practical registration activities, as they do not work on every registration request themselves, but rather assist the caseworkers with the processing of more difficult deeds and other documents. The caseworkers themselves do not need a law degree but instead receive internal training on the job.

Regarding their appointment, it is noted that land registrars in the Netherlands are appointed by their own organization, while in Germany, England & Wales land registrars are appointed by external officials.

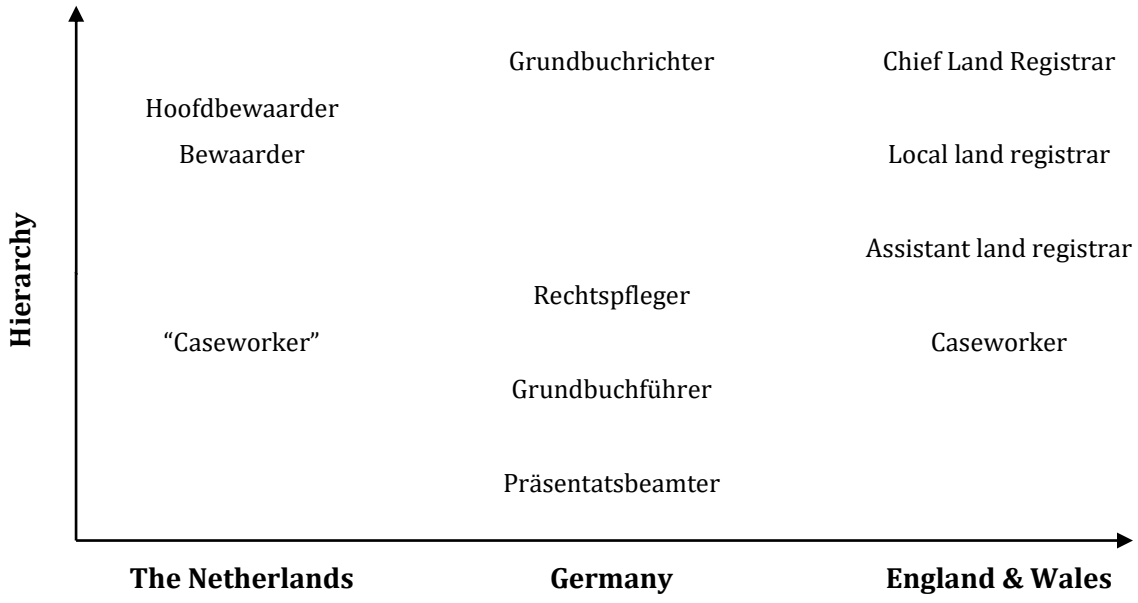
Table 9 – The Land Registrar in the Netherlands, Germany, and England & Wales

	Netherlands	Germany	England & Wales
Original terminology	*Bewaarder*	*Rechtspfleger*	*Chief Land Registrar*
Appointed by	Board of Directors (Kadaster)	- Saarland: Ministry of Justice - All other German States: President of the respective Higher Regional Court	Lord Chancellor
Requirements for appointment	- University law degree - Depending on the candidate's background, the prior appointment as candidate registrar is possible	- preparatory service (three years) and the judicial officer examination OR - qualification for a judicial office	- The law does not set out such requirements - It is not even required that the (Chief) Land Registrar is a lawyer
Mandate & Authorization	- Min. 2 land registrars, one of which is appointed as Chief Land Registrar - Currently there are 9 land registrars - They may mandate and authorize other Kadaster staff.	A possibility to mandate or authorize other land registry staff is not provided by the law.	The Chief Land Registrars appoint their own staff with approval of the Minister for the Civil Service - 9 local land registrars - 80 assistant land registrars - Caseworkers
Registration in practice	- Mandated and authorized staff - Land registrars assist with the registration of more difficult deeds, judgments, and other documents	- Rechtspfleger - The law prescribes that certain cases have to be submitted to the judge	- Caseworkers - Assistant/local land registrars provide assistance in more difficult

			cases
Duties & Competences	- Public officials - Registrations/annotations in the land register, as well as updating the register for vessels and aircrafts, and the cadastral register - Passive (restricted to the control of formal registration requirements)	- Public officials - All tasks enumerated in §3 RPflG - Active (not restricted to the control of formal registration requirements but also bound by legality principle)	- Keep the register of title, the register of cautions against first registration, the local land charges register, and the indices - Active (in some instances they are even allowed change the land register on own motion)

Due to these differences surrounding the position of the land registrar, it is sometimes perceived in practice that this comparison on the level of the function that is bestowed on them is somewhat crooked. Instead, it can be helpful to replenish this exercise with a comparison of the hierarchical structure of their function and the task division, which leads to a different outcome:

Figure 2 – Who is Who? Determining the Land Registrar's Professional Identity based on Hierarchical Structures and Task Divisions



3.4.4 The Relationship between Legal Practitioners and Land Registrar

The relationship between legal practitioners and land registrars cannot be easily conceptualized. With the exception of the Netherlands, different requirements for the legal education apply to these professional groups, which could point to a disequilibrium of authority. This hypothesis could however not been proven. By the same token, with the exception of the Netherlands, it was not possible to detect traces of active cooperation and coordination between the head organisations of these professional groups.

3.4.5 The Content of the Land Register

It is not the purpose of this overview to provide a conclusive enumeration of all rights and facts than can registered in the Dutch, German, and English land registers; such an exercise would clearly go beyond its scope and at this point be useful only to a limited extent. Instead of generating such an extensive overview, it is considered to be more helpful to find out where one has to look to find that information. Immediately, it can be noticed that both Dutch and English law contain a central legal provision, which sets out the registrable rights and facts. The Dutch provision is somewhat less comprehensive than its English counterpart, due to fact that some additional legal bases exist for the registration of rights and facts in the Dutch land register. By contrast, under German law, the endeavour to find out which rights and facts are registrable, is somewhat more difficult because such a central legal basis does not exist. Instead, in order to get a comprehensive overview, the individual legal bases have to be compiled from different pieces of German legislation.

Concerning the effect of registration, it can be recorded that registration is in principle constitutive in all three legal systems, although exceptions are made for the registration of certain right/facts, whose registration is merely declaratory.

Table 10 – The Land Register's Content in the Netherlands, Germany, and England & Wales

	Netherlands	Germany	England & Wales
Which information can be registered in the land register?	- Article 3:16 BW: facts that are relevant for the legal status of	- Maxim: only rights and facts that are registrable	- S2 LRA 2002: central legal provision

	registered property are registrable - Article 3:17 BW: provides a non-conclusive overview of registrable facts - Additional legal bases for the registration of additional rights and facts in the Civil Code and other pieces of legislation	- No comprehensive legal basis that enumerates all/most rights and facts that are registrable - Instead, legal bases are spread in the Civil code and other pieces of legislation	
Registration is ...	**Constitutive** - There are few exceptions (i.e. the right of retention).	**Constitutive** - Some rights and facts must be registered to create the desired legal effect (i.e. transfer of ownership). **Declaratory** - For other rights and facts registration is declaratory (i.e. certain inabilities to dispose of the property): the principle of public faith is then often not applicable.	**Constitutive**

3.4.6 Publicity of Land Register and Cadastral Information

Due to the fact that different legal regimes govern the access to land register and cadastral information, they shall be discussed separately.

Land register information

The information needed to access land register information slightly differs across the three chosen systems. While in Germany, in principle the plot number must be known, in the Netherlands different search entrances are possible. In England & Wales the highest amount of information must be provided to access the land register. With the exception of an oral request in Germany, access to land register information is coupled to the payment of a tariff. Depending on the legal system, the height of this tariff depends on the medium through which access is requested.

Regarding the possibility to access land register information, it can be seen that only the German system requires the demonstration of a legitimate interest, which will in turn determine which (parts of the) land register information will be disclosed to the applicant. By contrast, land register information is openly accessible to the public in the Netherlands, and England & Wales. An exemption only exists in England & Wales for the index of proprietors' names, the day list, and – as its name already stipulates - the exempt information documents. This finding is not surprising, considering the outcome of the 2018 Doing Business report "Registering Property: Using information to curb corruption":

> "In 127 of the 190 economies covered by Doing Business, the information recorded by the land registry is openly available to the public. In the remaining economies, mainly because of privacy concerns, only owners or third parties who prove legitimate interest can access the information kept in the land registry."[1967]

Connected herewith, is the question whether it is possible (especially in the open systems) to shield one's personal information from the land register. Only Dutch law offers such a possibility subject to certain conditions. In England different techniques exist to achieve a similar effect. Considering the high threshold that must be crossed before access to the German land register is granted, the need to shield personal information is considerably less urgent.

[1967] Doing Business, *Registering Property: Using information to curb corruption*, Doing Business 2018, p.53 (http://www.doingbusiness.org/en/reports/case-studies/2018/rp).

Table 11 – The Publicity of Land Register Information in the Netherlands, Germany, and England & Wales

	Netherlands	Germany	England & Wales
Access point	- Through the cadastre (see cadastral information)	- Plot number - Alternatively detour via index of owners (subject to conditions)	- Local authority, - Title number (or estate), and - Address (or other identification of the property)
How can information be accessed	- Kadaster Web shop (online) - E-mail - Regular mail - In person	- Online (not available for all land registers in all German states and only under strict conditions) - E-mail - Mail - Fax - In person	- Online - Mail - In person
Legitimate interest required?	No - The information is open to the public. - Yet, information is not distributed for commercial or caricatural purposes.	Yes - This applies to both the land register and the register of deeds. - This can be a legal, economic, factual, or academic interest. - Two exceptions: (i) professionals who fall under §43 GBV and (ii) the demonstration of an authorization of a person who can demonstrate such an interest	No - Register of title - register of cautions against first registration and their underlying documents - Register of local land charges - Register of land charges - Register of pending actions - Register of writs and orders affecting land - Index map - Index of verbal descriptions relating to franchises and

			manors Restricted access - Index of proprietors' names - Day list - Exempt information documents
Distribution of all available land register information?	Yes	No - The degree of disclosure depends on the legitimate interest.	Yes
Distribution for free?	No - The distribution of land register information is subject to tariffs.	Yes - Access of land register information is free. No - The production of transcripts is charged.	No - The distribution of land register information is subject to tariffs.
Shielding of personal information possible?	Yes - Under certain conditions	No	No - Though possible to make use of a company/trust construction to shield personal information or to apply for the relevant LR forms to be considered as exempt information documents

Cadastral Information

As stated before, cadastral information cannot be consulted in England & Wales, due to the fact that they do not have a classic cadastre and Cadastral Authority. While the German and Dutch systems show rather great differences when it comes to the distribution of land register information, one quickly notices that their systems governing the access of cadastral information largely conform with each other.

Table 12 – The Publicity of Cadastral Information in the Netherlands, Germany, and England & Wales

	Netherlands	Germany	England & Wales
Access point	- Cadastral code - Address of the plot - Owner's name - Name of the holder of a limited property right (excluding servitudes)	- Plot number - Address of the plot - Owner's name - Name of the holder of a limited property right	N/A
How can cadastral information be accessed?	- Kadaster Web shop (online) - E-mail - Regular mail - In person	- Online application - E-mail - Fax - Regular mail - Phone - In person	N/A
Legitimate interest required?	No	No - Exception: it concerns personal information - Information is not distributed if this is detrimental to the public good	N/A
Distribution for free?	No	No - Exception: information provided orally can be free of charge	N/A

3.4.7 The Legal Value of Land Register Information

All of the three legal systems grant some degree of protection to the person who consults the land register. In Germany, England & Wales a guarantee is given that the land register information is correct. Due to the application of the principle of conclusiveness, this guarantee is even a bit stronger in England than in Germany. One can easily be misled to believe that these guarantees also cover the completeness of the land register information. As has been shown, this is yet not the case. The Netherlands on the other hand does not guarantee the correctness of the land register's content, but grants protection through a third party protection mechanism. This mechanism also extents to the completeness of the land register in the sense that facts that could have registered in the land register cannot be invoked against the buyer if they were not registered.[1968]

Table 13 – The Legal Value of Land Register Information in the Netherlands, Germany, and England & Wales

	Netherlands	Germany	England & Wales
Registration system	Negative	Positive	Positive
Guarantee that land register information is correct	No - However: third party protection mechanism	Yes - §§891-892 BGB	Yes - Principle of conclusiveness - Though the intensity of the guarantee depends on the type of title
Guarantee that land register information is complete	No - However: third party protection mechanism	No - according to the prevailing opinion	No

3.4.8 The Process of Transferring a Plot of Land in a Purely National Case

When comparing the different processes of transferring a plot of land in a purely national setting that are in place in the Netherlands, Germany, and England & Wales, it can be retained that they run along common corner stones. In the end, all three jurisdictions require a written contract of sale

[1968] This rule is subject to exceptions. See chapter 3.1.7.1.

and a written deed of transfer. In accordance with the parties' wishes, the contract of sale can be made subject to a number of different conditions. Before these documents are drawn up however, the land register is to be consulted. In so far as a legal practitioner is required to draw up these documents, the parties are completely free in their choice. There is only one task which requires the mandatory assistance of a legal practitioner in all three jurisdictions; the verification of the parties' identities. Even if the parties decide in favour of DIY conveyancing, they will need to turn to a solicitor or legal conveyancer to complete this task. The legal practitioner, if involved, informs and advises the parties about the legal consequences of the transactions, ensures that the plot is discharged from all existing burdens, takes care of the creation of the new mortgage on behalf of the buyer, facilitates the transfer of the purchase price to the (bank of the) seller, and submits the relevant documents for registration to the land registry, the receipt of which is confirmed by the land registry. If the deeds do not fulfil all registration requirements, the land registrars must decide whether they grant the possibility to submit a rectification or whether the application must be rejected altogether. If the application is successful however, the land registrars will provide the applicants with a proof of registration. The legal practitioners then close the case by archiving the case files.

With respect to all other aspects of the transfer process, differences between the chosen legal systems can be observed. These differences come in different levels of gravity; they can concern details, such as the manner in which legal practitioners are informed about the receipt of the deed by the land registry but also point to more fundamental divergences in approach. One of the most evidential distinctions that fall in this category lies in the fact that the Latin notary in Germany and the Netherlands will objectively represent the interests of both parties, while the parties in England & Wales each engage their own legal practitioner to plead their case. Other explicit differences concern the role of the pre-contractual stage, which is accorded a considerably higher importance in England & Wales than in continental Europe and the execution of the transfer of the purchase price.

Table 14 – The Process of Transferring a Plot of Land in the Netherlands, Germany, and England & Wales

		Netherlands	Germany	England & Wales
Contract of	**Written contract**	Yes	Yes	Yes

sale	**required?**			
	Is a legal practitioner required at this stage?	No - Amsterdam area: notary - Rest of the country: real estate agent (but parties can opt for a notary instead)	Yes - Notary	No - In 99% of the cases however, parties retain a legal practitioner: - Conve-yancer - Solicitor ➔ Formulating the contract is the privilege of the seller
	Free choice of legal practitioner?	Yes	Yes - Fixed notarial tariffs	Yes
	Can the parties turn to foreign legal practitioners and conclude the contract in the country, where they practice?	Yes - The law does not exclude this possibility and does not require that the contract of sale is drawn up by a legal practitioner at all	Unclear - The legal literature is divided over this question. - Taking this division into account, the Münchener Kommentar zum BGB seems to suggest that it is not possible.	Yes - The law does not exclude this possibility and does not require that the contract of sale is drawn up by a legal practitioner at all
	Does the legal practitioner consult the land register before drawing up the contract of sale?	Yes	Yes	Yes

	Legal consideration period?	Consideration period for the buyer (three working days); cannot be contractually excluded	Consideration period in B2C contracts	No
	Conditions possible?	Yes	Yes	Yes
	Bank guarantee/ deposit	Standard (10%), to be stored on the notary's client account	Possible, but not a standard requirement	Deposit (10% of the purchase price)
	Right of the buyer against the seller after concluding the contract of sale	If buyer accepts: contractual right against the seller	Buyer has a contractual right against the seller	- Contractual right against the seller - Transfer of the equitable property from the seller to the buyer (estate contract)
	Vormerkung	Yes	Yes	No - However, a comparable instrument exists: the buyer requests the land registry staff to conduct an "official search" and provide an "official search certificate"
Deed of transfer	**Is a legal practitioner required at this stage?**	Yes - Usually chosen by the buyer - Free notarial tariffs since 2003 - No geographical	Yes	No - DIY conveyancing is possible, but the parties then also need to turn to a legal professional to have their identities

		limitations		checked
	Foreign legal practitioner acceptable?	No	No	Yes - However, the identity of the parties must then be controlled by an English/ Welsh legal practitioner
	Does the legal practitioner investigate the land register before drawing up the deed of transfer/mortgage?	Yes - First investigation (cadastre, land register, Central Insolvency Register, Guardianship Register/ Commercial Register) - Second investigation (day on which the parties sign the deeds) (additional check of the Matrimonial Property Register)	Yes	Yes - In addition, the buyer may pose requisitions to the seller
	Written deed required?	Yes	Yes	Yes - Drafting of deed is privilege of the buyer (use of HM Land Registry's standard form) - Approval of the seller
	The parties' identity is controlled by a	Yes	Yes	Yes

	legal practitioner			
	The legal practitioner ensures the discharging of existing burdens on the plot	Yes	Yes	Yes
	Creation of the new mortgage and transfer of purchase price	- Request mortgage documents from the bank - Contact with bank to communicate signature of mortgage deed and ask for transmission of the purchase price to his client account	- The notary acts as a Treuhänder in the process of clearing the plot from the burdens attached to it - Seller grants assistance to the registration of a security right to the benefit of the buyer's bank - Transfer of purchase price to the (creditors of the) seller before deed is sent to the land register	- Take care of the mortgage - Completion - Purchase price is directly paid by the buyer('s legal practitioner) to the seller's legal practitioner
Submission to the land	**Which documents are sent to the land**	The deed of transfer	- The request	The deed of transfer

registry	**registry (excl. the deed of mortgage and any related documents)?**		sent to the land registry (usually by the notary) contains the following documents: the applica-tion for registratio n, the permis-sion to regis-ter of all registered parties (official deed), and a proof of the "*Auflassun g*" (official deed)	
	Medium of submission	- Paper - Digital (Web-ELAN) - Digital (KIK)	- Paper - Depending on state law, digital submissio n might be possible	- Paper - Digital (electronic environment)
	Confirmation of receipt	Kadaster confirms the receipt of the deeds	The notary receives a notice of receipt	Confirmations of receipt are only sent in case of paper submissions as the electronic system allows live monitoring
	Control of documents	The land registrar checks the formal	The land registrar	The land registrar controls registration

		registration requirements	controls formal registration requirements and is bound by legality principle	requirements
	The deeds do not comply with the registration requirements	- Deed cannot be registered: ANI (rejection of application) - Other irregu-larities: VTV or art. 3:19 (4) BW warning	- If not all registratio n requireme nts are met: the notary is granted the possibility to rectify the shortco-mings or the applicatio n is rejected altogether	- Requisitions - Rejection of the application
	The deeds comply with the registration requirements	The deed is registered in the land register and the cadastre is updated	The deed is registered in the register of deeds and the land register is updated	The deed is registered and the land register is updated
	Passing of ownership to the buyer	The point of time of registration = point of time at which the deed was submitted to the Kadaster	After the transactions is entered in the land register	- The equitable interest that is already in the hands of the buyer extinguishes - The day on which the legal interest is trans-ferred is considered to be the day on which

				the application to register the deed was filed
Proof of registration	**The land registrar sends a proof of registration to the legal practitioner**	Yes	Yes	Yes
	The legal practitioner controls the land register	Yes	No	No
	The purchase price is paid to the seller	Yes	No - The purchase price has already been paid to the seller	No - The purchase price has already been paid to the seller
	The legal practitioner archives the case documents	Yes	Yes	Yes

3.4.9 The Object of Transfer – Where is the "Boundary"?

Different terminology exists to refer to a specific piece of land, each implying a unique definition. Ignorance of these differences can therefore lead to different conceptions of the object of transfer. It goes without saying that cadastral boundaries do not exist as such in England & Wales, but HM Land Registry does keep a so-called MasterMap, which reflects the boundaries that are indicated on the plans that must be submitted for registration when an existing parcel is split into two or more parcels. In the Netherlands and Germany, an important distinction must be made between the cadastral parcel and the plot as defined by civil law due to the fact that they do not necessarily coincide. The question that therefore rises is whether one can rely on a copy from the cadastral map/ MasterMap. When it comes to correctness of the boundary indication, Dutch law, in opposite to German law, provides that the correctness of the boundary as indicated on the cadastral map cannot be legally relied upon. In England & Wales, it depends on whether the boundaries are qualified as general or determined boundaries. A classic cause for a divergence between the legal

and the 'cadastral' boundary is prescription, which is known in all of the three systems. Due to the fact that prescription can only occur with regard to whole plots in Germany, prescription cases cannot provoke a distinction between the cadastral and legal boundary. In neither of the three legal systems, the exact size, location, or exploitation of a parcel can be derived from these maps. In other words, the legal and cadastral boundaries only coincide in Germany and in England & Wales in so far as it concerns determined boundaries. To determine the legal boundaries of a piece of land in the Netherlands and England & Wales (in the case of general boundaries), recourse must instead be sought to the deed of transfer. Despite the fact that the boundaries indicated on the cadastral map/ MasterMap cannot always be legally relied upon, it can be for several reasons be important for the parties to know its run in the territory. If this is unclear, parties can turn to a land surveyor to reconstruct it in the territory.

While differences exist regarding the legal value attached to 'cadastral' boundaries, the procedure of determining them in the territory, is relatively similar in the three jurisdictions. This also holds generally true for the process of transferring a (part of a) plot that is being split into two or more plots. In all of these jurisdictions, the parties can conclude a contract of sale before this division has been finalized. Only in the Netherlands however, it is also permissible to transfer that plot as long as the plot division is still in progress. Considering all of these differences regarding the definition of the object of transfer, it is predictable that the fictive case of the encroaching pavilion plays out differently in the Netherlands, Germany, and England & Wales.

Table 15 – Defining the Object of Transfer in the Netherlands, Germany, and England & Wales

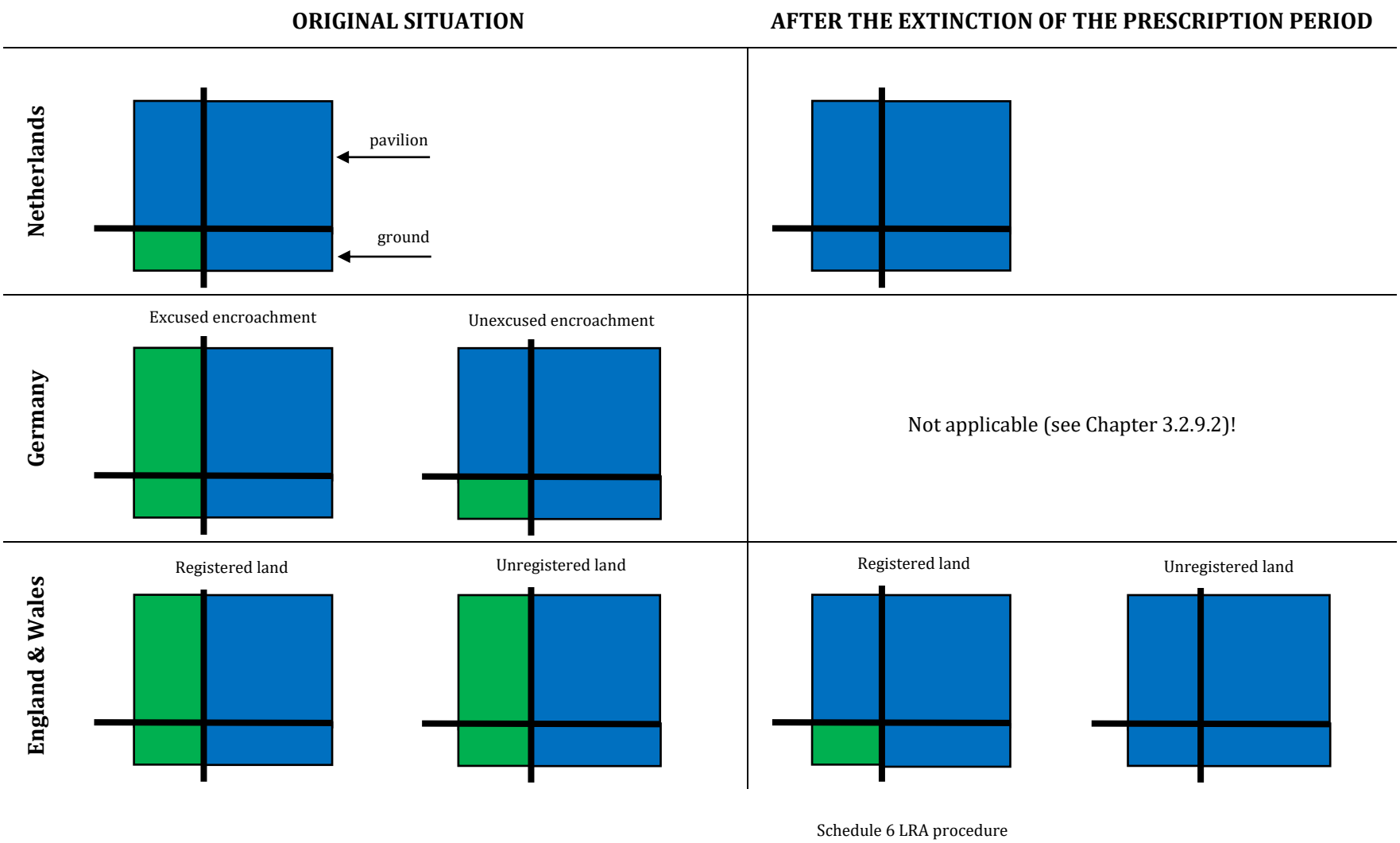
	Netherlands	Germany	England & Wales
Definition of "plot"	**Civil law** - "*erf*" (no legal definition available) **Cadastre** - "*perceel*" (as defined in article 1 paragraph 1 Cadastre Act)	**Civil law** - Numerical description of the plot in the inventory of the land register ("*Grundstück*") **Cadastre** - A section of the world's surface that is employed as the recording unit by the	**Civil law** - The rather generic term "land" is used (probably due to a different organization of the land register) **Cadastre** - N/A

		cadastre and is as such indicated by a unique number ("*Flurstück*")	
Correctness of the boundary as displayed on the cadastral map can be relied upon	No	Yes - §§891-892 BGB - Cadastral map is indicative	No - If it concerns general boundaries Yes - If it concerns determined boundaries
Correctness of the size, location or exploitation as displayed on the cadastral map can be relied upon	No	No	No
How to determine the legal boundaries of the plot?	- To determine what is the object of the transfer, the plot description in the deed of transfer is decisive	- Cadastral boundary always coincides with the legal boundary	- Determined on basis of the conveyance deed (in particular the parcels clause); analyse of all deeds leading back to the original conveyance that divided the original parcel into two or more parts - Problem: accessibility of the deeds - Legal presumptions: i.e. "hedge and ditch presumption"
Deed of transfer refers to	- Cadastral code (also in case of ex post surveying)	- Plot as referred to in the land register - Unless plot is	- Attached plan - Alternatively, the verbal

		transferred before it has been registered in the land register: then, the cadastral parcel will be referred to	description in the deed (parcels clause) can be given priority
Ex ante surveying possible	Yes	Yes	Yes
Ex post surveying possible	Yes - Preliminary cadastral boundaries, and - Administrative boundaries	No - Certain exceptions apply	No
Possibility to transfer a parcel before the plot division has been finalized	Yes	No	No
Possibility to conclude the contract of sale before the plot division has been finalized	Yes	Yes - If complemented with a drawing of the plot, which indicates the part that is the object of transfer - Under these circumstances it is also possible to conduct the "*Auflassung*"	Yes
Cadastral boundary disputed or unclear	- The boundary can be reconstructed by a surveyor ("*grensrecon-structie*"), but does then not necessarily correspond to the legal boundary	- The boundary can be reconstructed by a surveyor ("*Grenzwieder-herstellung*") - If this is not possible: court ruling to determine the boundary or contrac-tual agreement between the parties on the boundary location	- Invoke the expertise of a surveyor - Possibility to turn general boundaries into (reliable) determined boundaries - Possibility to conclude a boundary agreement
Pavilion Case	- The builder	- The owner of the land	- The owner of

	becomes owner of the encroaching part (art. 5:3 BW) - Owner of the land may demand the removal of the encroaching - Structure (prescription period!): possible exception in case of a good faith builder, who would be severely disadvantaged - Possibility for the builder to become owner of the underlying land due to prescription	may demand the elimination of the encroaching part and the release of the concerned pat of the plot (prescription period!) - Or: may use the encroaching part, as he became owner of it through vertical accession - Or: may remove the encroaching part themselves - The situation is different when the encroachment can be excused (§912 BGB)	the land becomes owner of the pavilion and can either enjoy the encroaching part or demand remedies - If the builder of the pavilion is a trespasser, three remedies are possible: self-help, an injunction, or damages ➔ Applies to both registered and unregistered land
Prescription	- Extinctive prescription (20 year period) - Acquisitive prescription (10 year period)	- The registered owner has never acquired ownership – 30 year period ("*Tabularersitzung*") - The possessor of the land is not the registered owner – 30 year period ("*Ersitzung contra tabulas*") ➔ Both forms only apply to whole plots	- Unregistered estates: 12 year limitation period (in certain situations longer limitation periods applicable, i.e. if the land belongs to the Crown) - Registered estates: Schedule 6 LRA 2002 procedure must be followed – 10 year period of possession

Figure 3 – The Pavilion Case – Who owns What?[1969]



[1969] Green: ownership is vested in the neighbour // Blue: ownership is vested in the builder of the pavilion // Bold black: official boundaries of the plot

3.4.10 Digitalization of Land Registration

Foreclosing that none of the discussed legal systems have introduced a complete e-conveyancing system at this point, different degrees of digitalization of land register information can be observed between Germany on the one hand and the Netherlands, England & Wales on the other hand. Having digitalized their land register in 2005, the Netherlands is the forerunner when it comes to adapting their land registration system to the digital age. In England & Wales, this process has started 3 years later (including the scanning of the underlying documents), while in Germany it is the competence of the *Länder* to determine whether and when they intend to move from a hybrid land register to a full-fleshed digital land register and to introduce a digital register of underlying documents. The same holds true for the submission of digital deeds to the land register. While this possibility already exists in the Netherlands and England & Wales, in Germany, it is for the individual *Bundesland* to decide whether and when they want to create this possibility. In all legal systems it is however still possible to submit paper deeds for registration. Against this background and in line with their attitude towards publicity of the land register, it does not surprise then that the broad possibility to digitally access land register information exists only in the Netherlands and England & Wales. In Germany, this option is also present but reserved for a limited group of professionals. In opposite to land register information, digitalization has more easily founds its way into cadastral information; in all three jurisdictions (with the exception of some German states), the cadastral registers and maps are digitalized.

Table 16 – The Digitalization of Land Registration in the Netherlands, Germany, and England & Wales

	Netherlands	Germany	England & Wales
The land register is digitalized	Yes (2005)	Yes - It is still a hybrid form ("electronified paper-based land register") - Possibility to introduce fully digitalized land register based on §126 GBO	Yes (2008)

		(scheduled for 2020)	
The collection of underlying deeds is digitalized	N/A	- Falls within the competence of German states - So far not yet realized in most States - Gradual digitalization possible	Yes - Scans of paper documents
Possibility to submit paper applications to the Land Registry	Yes	Yes	Yes
Possibility to submit digital applications to the Land Registry	Yes	- Falls within the competence of the German states - Possible on the basis of §135 GBO	Yes
Digital access of land register information	Yes	Yes - However, it is limited to certain professional groups such as notaries.	Yes - Business Gateway - Land Registry Portal
The cadastral register is digitalized	Yes (1990)	Yes	N/A
The cadastral maps are digitalized	Yes (1990)	Yes	Yes - Referring to Ordnance Survey maps!
E-conveyancing	No	No	No

3.4.11 The Approach to Cross-Border Transfer of Land

It can be generally observed that the legal systems' approach to cross-border transfers of land is still rather nationally oriented. With the exception of England & Wales, land registrars must refuse the registration of deeds of transfers if they were drawn up by foreign legal practitioners. In line

herewith are the similar language requirements for deeds that can be registered in the land register. Although legal practitioners are allowed to draw up (bilateral) deeds in virtually any language they sufficiently understand, the main rule is that only deeds that are drawn up in the respective official language are registrable in the land register. This maxim includes the possibility in England to register deeds in Welsh if they concern a plot of land located in Wales, but excludes the possibility in the Netherlands to register deeds that are drawn up in Frisian. Whether the land registrars may register official translations of documents that are drawn up in a foreign language, depends on the legal system.

Table 17 – Approaching Cross-Border Transfers of Land in the Netherlands, Germany, and England & Wales

	Netherlands	Germany	England & Wales
Language requirements for the drawing up of deeds	Deeds can be drawn up in any language that the notary sufficiently understands Bi-/multilateral deeds are possible	Deeds can be drawn up in any language that the notary sufficiently understands Bi-/multilateral deeds are possible	Parties make use of standard forms provided by HM Land Registry (available in English (and Welsh))
Language requirements for registering deeds in the land register	Deeds must be drawn up in Dutch (even Frisian is excluded!) Deeds drawn up in a foreign language must be translated to Dutch (translation is registered) Bi-/multilateral deeds cannot be registered, but the notary can submit an extract of such a deed to meet this requirement or submit a deed that only contains the Dutch part	Deeds must be drawn up in German Deeds drawn up in a foreign language are insufficient even if they are translated into German except if it is solely used as evidence for a relevant fact	Deeds must be drawn up in English. Exception: deeds concerning property in Wales (Welsh acceptable)
Can transfer deeds be registered if they	No	No	Yes Nevertheless, an

were drawn up by a foreign legal practitioner?			English legal practitioner needs to control the parties' identities.

4 The Challenges inherent in Cross-Border Real Estate Transactions

Probably the biggest assumption that is made about cross-border real estate transactions is that they inhibit more challenges for the parties involved than a purely national transaction. Quite often this is defended by a reference to their detrimental effect on the proper functioning of the EU internal market, This however can only qualify as an effect that follows from the existing challenges rather than a challenge as such. When it comes to the identification of challenges, only few starting points can be found in the legal literature, such as the need for translations and the mandatory application of the lex rei sitae. Before being able to think about how cross-border real estate transactions can and even should be facilitated, the first crucial question that must be answered is therefore the following: What is it that makes cross-border real estate transactions more challenging than real estate transactions that entirely play within the borders of a single country and is it true that cross-border transactions are indeed subject to more challenges? The working hypothesis is that this is indeed the case.

Let me illustrate these challenges with a case. Stephanie, a national and resident of Country-A, is the owner of a beautiful vacation house in Country-B that she intends to sell with the help of a real estate agent. She is happily surprised when Brian, who also happens to be a national and resident of Country-A, shows serious interest. Before agreeing to purchase the house, Brian wants to acquire more information about the legal situation of the vacation house; in particular, he wants certainty that Stephanie is indeed entitled to transfer it to him. He decides to request that information from the land registry in Country-B. After all, such information is unconditionally available in Country-A, provided that a small fee is paid. However, when he requests that information from the land registry in Country-B, he learns that this information is only distributed to those who have a legitimate interest. According to their legal framework, a mere intention to acquire real estate does not qualify as a legitimate interest, so that his request is rejected. It is only after having received a mandate from Stephanie, that he is entitled to access that information. Brian has the information translated, carefully analyses it, and eventually agrees to buy the vacation house. In Country-A, an oral contract is sufficient to transfer ownership of an immovable. It is for this reason that Brian, once given consent, is under the impression that he must have become the owner already. He is

surprised – once more – when Stephanie informs him that the transfer of ownership is determined on the basis of the lex rei sitae, which in this case is the law of Country-B. In Country-B, a transfer of ownership requires a written contract and deed of transfer drafted by a Latin notary and the registration of the deed in the land register. But Stephanie and Brian are not sure which notary to choose. Are there any limitations to their choice? Does it matter which notary they prefer when it comes to notarial tariffs? Are there any notaries in Country-B who speak the mother tongue of Stephanie and Brian? How would they find about whether this possibility exists? Let us presume that this possibility does not exist. All communication between the parties and the notary will have to be translated, which is not only cost intensive but also a time consuming exercise. Also, due to the fact that the land registration system in Country-B still is much paper-based, Stephanie and Brian, instead of signing the necessary documents with an electronic signature from their desk at home, have to travel to Country-B on multiple occasions to discuss and sign the contract of sale and the deed of transfer respectively. Overall, this entire transaction is rather complex and complicated. Naturally, cross-border transactions come in more flavours than in the one that serves as an example here and they are quite easy to construct. Assume for example that Stephanie and Brian are nationals and residents of different European countries, or imagine the case in which two brothers, one residing in Country-A, one in Country-B, co-own a plot of land in Country-C which they intend to transfer to a buyer, residing in Country-D. The question that imposes itself on the reader is whether there is not an easier way to frame a cross-border transaction. In order to answer this question, one must first map the challenges that are inherent in cross-border real estate transactions.

4.1 Identifying the challenges of cross-border transactions

Before looking at the concrete challenges, one more matter shall be considered. Real estate transactions, independent of whether they occur in a purely national case or in a cross-border case, confront the parties involved with certain risks. Will the buyer be able to get a loan? Will the seller find a better buyer and decide to transfer the land to the other person instead? Do buyer and seller have all information needed to make an informed decision and did they interpret the given information correctly? Why is it then that cross-border real estate transactions are more challenging than purely national transactions? First of all, cross-border transactions, to some extent, show other types of obstacles that are not inherent in purely national transactions, such as translation costs and the application of a foreign law to the contract of sale and the registration of

the deed of transfer in the land register. However, there are also types of obstacles that are common to both kinds of transactions. The sellers and buyers involved in a purely national transaction are not necessarily legal experts in their own legal system. However, it is assumed that given the familiarity with one's own language, culture and a basic understanding of one's legal system acquired by simply being exposed to it, they will have more insights into the procedure underlying a real estate transaction or they are at least able to more easily allocate somebody that they can consult for assistance. And although the challenges are the same, it is argued that the altitude of the obstacle is higher in a cross-border setting because of the fact that the possible risks in a national transaction are more familiar to the parties involved, while cross-border transactions are rather ambiguous to them which originates in a potential lack of knowledge about the foreign legal system, language, and/or culture. This can be explained through the so-called "ambiguity aversion", according to which we are inclined to give preference to a familiar risk over an ambiguity when we make decisions.[1970] One of the most famous illustrations of ambiguity aversion is the "Ellsberg Paradox" that starts with you being promised an award.[1971] The only thing you need to do to win the award is to pick a ball with the correct colour from an urn. Before you draw a ball from the urn, you have to make two decisions: first, you have to decide whether you want to pick a red or a black ball and second, whether you like to draw the ball from the left or the right urn. Does it matter which urn you pick? It certainly does: the left urn contains 100 balls – 50% red and 50% black while the right urn also contains 100 balls but the percental distribution of red and black balls is not disclosed to you. Which urn to choose? The experiment conducted by Ellsberg shows that one would rather pick the left urn, thereby giving preference to a familiar risk, even if it entails a 50% risk to pick a "wrong" ball above an ambiguity that is inherent in choosing the right urn with an unknown percental distribution of red and black balls. This theory has been tested under different conditions. However, one must keep in mind that its validity has to date not been researched within the setting of cross-border real estate transactions. However, if the Ellsberg Paradox were to apply in this context as well, it could lead to the conclusion that parties – if given a choice – would be more inclined to invest in real estate within their own country rather than abroad. Of course, this hypothesis is based on the assumption that the parties are more familiar with the necessary processes to realize real estate transactions in their own country than with those abroad. If the Ellsberg Paradox can be applied here, this would also mean that one could stimulate cross-border real estate transactions by facilitating these transactions by making them more predictable for the

[1970] B.D. Pulford & A.M. Colman, 'Size Doesn't Really Matter: Ambiguity Aversion in Ellsberg Urns with Few Balls', *Experimental Psychology* 2008; Vol. 55(1), p. 31-32.
[1971] Ibid.

parties. Yet, the implications of the exposure of parties to foreign legal systems in the context of cross-border transactions still is rather a scientific black box and thus deserves further research.

In addition, it is to be noted that some of the following obstacles presuppose that the seller and buyer are actually aware of the fact that the legal systems involved in the transaction show differences and do not subconsciously assume that the procedure underlying real estate transactions in one's home country is (nearly) identical to the corresponding procedure in another European country. Within this setting, it is then further assumed that the parties are somewhat active and interested in conducting background research. After all, if the parties are not knowledgeable about the in's and out's of land (registration) law, it is imaginable that they instead opt for a pragmatic approach by applying the 'fishing' technique, i.e. conducting a Google search and contacting one of the notaries that are shown on the first page in the hope that they will be able to help them. After a more general introduction, we shall now finally look at the different obstacles that are faced by sellers, buyers, legal practitioners, and land registrars respectively. They can be clustered in four different groups: administrative, cultural, legal, and technological challenges. An overview of these obstacles can be found in Table 18. The overview provided therein is not meant to be conclusive as they are focused on procedural problems that the parties involved can encounter rather than on specific substantial problems that can arise, such as the acquisition of real estate that forms part of a building project whereby the developer faces bankruptcy, buying a vacation house that is subject to squatting and is in fact legally owned by the squatters and not by the person who is registered as its owner in the land register, or the risk of buying a house that has been built illegally.[1972]

Table 18 - Challenges of Cross-Border Real Estate Transactions

Administrative challenges	Identification of the Roadmap
	Choice of Legal Practitioner – Linguistic Abilities
	Provision of Required Documents
	Translation Costs
	Legal Practitioner's Service Fee
	Land Registry/ Cadastral Authority Tariffs
	Travel Expenses
	Access to Land Register/ Cadastre Information

[1972] For an illustrative overview of these problems, see: D. Wallis & S. Allanson (eds.), *European Property Rights & Wrongs*, Brussels: Wallis, 2011,p. 13-17.

	Payment of Land Registry/ Cadastral Authority Tariffs
	Payment of Deposits/ Purchase Price
	Payment of the Legal Practitioner's Service Fee
	Referring Citizens to the Correct Authorities
	Duration of the Transaction Procedure
Cultural challenges	Risk of Cultural-Legal Misperceptions
Legal challenges	Necessity of a Legal Practitioner
	Choice of Legal Practitioner – Competence Questions
	Determination of the Seller's Power of Disposal
	Determination of the Extent of the Object of Transfer
	Determination of the Size of the Parcel
	Determination of the Potential Defects
	Access to Land Register/ Cadastral Information
	Comprehension of Land Register/ Cadastral Information
	Choice of Law in Real Estate Transactions
	Necessity of Preceding Approval of the Competent Authority or of a Declaration by the Buyers
	Drawing up a Deed for Registration Abroad
	Registrability of Foreign Deeds
	Adaptation of Foreign Rights in Rem
	Application of EU Law
Technological challenges	Different Stages of Technological Development

4.1.1 Administrative challenges

Identification of the Roadmap

To implement her plan to sell the parcel of land, Stephanie has two options. She either tries to find a suitable buyer alone (for example by advertising the plot on a specialized online platform) or by

turning to a real estate agent. After all, as has been seen in the national case studies, the intervention of a real estate agent does not constitute a mandatory requirement for real estate transactions. It is unclear however, to what extent sellers - in practice - are inclined to sell their house without the assistance of a real estate agent. This is because it was not possible to obtain statistics that could shed light on this topic. For this reason, both options will be analysed further. If Stephanie has found a buyer herself, she must figure out herself which steps to take, most importantly how to conclude a valid contract of sale. Is it even required that the contract of sale is laid down in writing? If she has bought the plot herself in the past, she has some orientation on the route to follow, but if Stephanie acquired the plot by means of inheritance, more research will be required on her part. If the latter option is chosen, the real estate agent can advise her on the necessary steps once a potential buyer is found.

Choice of Legal Practitioner – Linguistic Abilities

Once the parties have gathered the necessary information about the necessity and competence of the legal practitioner in Country-B, the question remains whether it is possible to find a notary who has a professional work proficiency in the parties' mother tongues.[1973] How can the parties find out whether this possibility exists?

Provision of Required Documents

The legal practitioner (or the land registry in systems that work without the mandatory intervention of a legal practitioner) will request the parties to deliver a number of documents to verify their identity and legal capacity to sell/buy real estate. How will they come to know which documents are required in their case? Is an Apostille or even a legalization of these documents necessary? Obviously, this problem is not unique to cross-border transactions but are likely to also occur in national cases and evidently, the foreign legal practitioner/land registry will specify which documents are needed. In cross-border cases (e.g. within the EUFides project), legal practitioners might even conceive it to be helpful to seek cooperation with a foreign colleague to collect the required documents. Possessing this information at an early stage allows the parties to be better prepared and to speed up the process.

[1973] P. Sparkes et al., *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Brussels: European Union, 2016, p. 168.

Translation Costs

If the parties cannot find a foreign notary who speaks their own mother tongue(s), they are inevitably confronted with translation costs. It goes without saying that translations are not only cost-intensive but also time consuming. After all, this translation necessity ultimately comprises the entire correspondence between notary and the parties as well as the documents that are drawn up by the notary and intended for registration. However, even if the quest for a notary who speaks the parties' mother tongue is successful, translation costs might occur. First, it is only an assumption that legal practitioners, who are fluent in the parties' mother tongue, are also willing to notarize documents in that language. To minimize the risk of being held professionally liable, they might prefer to make use of the services of a sworn-in translator. Second, though depending on the relevant requirements set out by national law, all documents that are produced by the notary (e.g. the contract of sale and in particular the deed of transfer) could be drawn up in the parties' mother tongue(s); in that case all parties involved will be able to read them. However, as follows from the national case studies, it is not unusual for national land registration laws to limit the language in which the deed of transfer or other documents offered for registration must be drawn up. It is therefore possible that the land registry in Country-B will refuse a deed that is (partly) drawn up in a foreign language. Therefore, the deed will then have to be translated after all. Depending on the legal system, the land registrars will either organize a translation of the documents themselves or ask the applicant to submit an official translation.

Legal Practitioner's Service Fee

Is the fee that legal practitioners charge their clients for the provision of their services set by the law or are they free? In case of free tariffs, how do the parties find the most suitable legal practitioner who offers the most attractive financial offer?

Land Registry/ Cadastral Authority Tariffs

How high is the amount of the tariff that is due to the land registry/ cadastre for the registration of a transfer of ownership?

Travel Expenses

In the absence of a secure European e-platform through which official documents can be exchanged, signed, and validated, the parties will have to travel to the office of the legal practitioner/real estate agent/bank on multiple occasions.

Access to Land Register/ Cadastral Information

Access to land register information can be valuable for the buyer for several reasons. First, the buyer might already in an early stage want to control that the seller is indeed the owner of the parcel and is thus able to transfer it.[1974] In addition to the determination of the seller's right of disposal, the buyer has a keen interest in finding out whether the property is burdened by limited property rights, whether any other forms of restrictions are registered, and whether they also acquire all objects that are connected to the ground or the building. Moreover, knowing the purchase price paid by the present owner might give him a better basis for negotiations with the seller. In addition to requesting information from the land register, accessing cadastral information at an early stage can be valuable for buyers to estimate the physical extents of the parcel. In any event, buyers will have to acquire a full picture of the property before they can make a conscious decision as to whether they wish to acquire it. How and where can they access that information? What kind of information will be provided? Can this information be accessed free of charge? Which information (i.e. the plot number or the name of the owner) is needed to search the land register/cadastre?

Payment of Land Registry/ Cadastral Authority Tariffs

In some countries, the invoice for the registration of the new owner in the land register is sent directly to the parties. In other countries, the invoice is sent to the legal practitioners, who requested registration on behalf of their clients. The registration tariff is then typically included in the fee that is charged by the legal practitioners for the provision of their services. Parties, who assume that the fee paid to the legal practitioner include the tariffs for accessing information from the land registry and cadastre as well as the tariff for the registration of the deed of transfer and the

[1974] P. Sparkes et al., *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Brussels: European Union, 2016, p. 56-59.

mortgage deed in the land register, will be negatively surprised when they receive an invoice from the land registry/ cadastre. How can they pay the land registry/ cadastre tariffs?

Payment of Deposits/Purchase Price

A similar problem occurs with regard to the payment of the deposit and the purchase price.[1975] Is it necessary at all for the buyers to make a deposit? How is the amount of the deposit calculated? At what stage and to whom do the buyers have to transfer these sums? When and under which conditions can the sellers claim them?

Payment of the Legal Practitioner's Service Fee

At which stage is the legal practitioner's service fee due? Is it to be paid at once or are certain parts of this fee due earlier than others? Especially when the land registry/cadastre send their invoices to the legal practitioner rather than to the parties, it might be necessary for the parties to pay at least a part of the fee at an early stage to prevent that the legal practitioner has to make a prepayment.

Referring Citizens to the Correct Authorities

Admittedly, it is assumed that this problem will not occur on a daily basis. Nevertheless, it cannot be ruled out that it will not occur at all. Therefore, it deserves some thought. Imagine that the parties turned to a legal practitioner in their home country to transfer real estate located in another European country. How can the legal practitioner refer the parties to the correct authorities abroad?

Duration of the Transaction Procedure

How long does the transaction procedure take from the signing of the contract of the sale to the moment when the ownership of the real estate will pass from the seller to the buyer? Several factors can have an influence on its duration, such as the possibility to register digital deeds in a digital land register in opposite to the registration of paper deeds, or the classification of the

[1975] P. Sparkes et al., *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Brussels: European Union, 2016, p. 131-133.

registration system as being positive or negative. Therefore, great differences with regard to the time consumed by these procedures can be observed across Europe.[1976]

4.1.2 Cultural challenges

Risk of Cultural-Legal Misperceptions

Parties to a real estate transfer, who are unaware of the existing differences between European land (registration) law systems, run the risk of unconsciously assuming that the foreign system in essence works similar than the system that they are most familiar with. For example, parties, who are well aware of the fact that they are able to trust on the correctness of land register information in their own system, might more likely to assume that the same holds true for the land register information from a different country. Alternatively, they might assume an English solicitor to fulfil the same role in the transaction procedure as a Latin notary which will ultimately lead to the formation of wrong expectations.

4.1.3 Legal Challenges

Necessity of a Legal Practitioner

In particular when the seller decides against employing a real estate agent, the question rises whether it is necessary to turn to a legal practitioner or whether it suffices when the parties conclude the contract of sale at the kitchen table. If a notary is not required or if the lex rei sitae is even unfamiliar with the assistance of a notary in the transaction chain, the parties, provided that they are used to a mandatory intervention of a Latin notary, will ask themselves who else takes care of the responsibilities that are normally entrusted to a Latin notary in their home country.[1977] When real estate agents are involved they can advise the parties on these matters. If a Latin notary is required, the parties might ask themselves whether they can expect the same level of professional conduct than from a Latin notary in their home country.

[1976] For a statistical overview, see: Website Doing Business, 'Registering Property' (http://www.doingbusiness.org/en/data/exploretopics/registering-property), as consulted on 26.03.2019.
[1977] P. Sparkes et al., *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Brussels: European Union, 2016, p. 151-152.

Choice of Legal Practitioner – Competence Questions

Let us assume that the parties have to turn to a notary to conclude the contract of sale and to draw up the deed of transfer. More questions arise. Are the parties free in their choice of a legal practitioner or are there any limitations? Is it for example required that a legal practitioner must be chosen, who practices in the geographical administrative unit where the parcel of land is located? Who is allowed to pick the legal practitioner – the seller or the buyer? How can the parties control whether the "legal practitioner" who advertises their services on the internet really is a legal practitioner?

Determination of the Seller's Power of Disposal

Depending on the legal system, the seller's power of disposal is mandatorily controlled by the legal practitioner in different phases of the transaction procedure, i.e. before and after the conclusion of the contract of sale. But if the lex rei sitae does not foresee in the mandatory intervention of a legal practitioner, who does then check the seller's power of disposal? Is it the buyer himself? How do they approach this? It would be an underestimation though to think that the buyer is only confronted with the latter question when a legal practitioner is not involved. After all, buyers, who prefer certainty in an early stage of the transaction procedure, could on their own motion demand an official copy of the respective land registry document to prove the seller's power of disposal, but not in all countries will their request be honoured.

Determination of the Extent of the Object of Transfer

The example of a Dutch citizen who buys a house in Germany and assumes that the kitchen will remain in the house is a classic one in this border region. While in the Netherlands it is custom that the kitchen is included in the real estate transaction, in Germany, it is not unusual that sellers like to take their kitchen with them when they move. It is therefore advisable to create clarity about objects that will remain in the house and garden when the contract of sale is concluded. In addition, buyers must ensure that they have a comprehensive overview of all encumbrances and restrictions that potentially burden the parcel of land.[1978] Depending on the applicable legal system, not all of

[1978] P. Sparkes et al., *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Brussels: European Union, 2016, p. 88-90, 116-119.

these encumbrances are registered in the land register. Especially when it comes to restrictions and encumbrances arising under public law, they might be published in a different register.[1979]

Determination of the Size of the Parcel

Another herewith-related obstacle is the determination of the size of the parcel.[1980] To this end, use can be made of different boundary indications, such as the cadastral boundary. As Figure 5 visualizes, these boundary indications do not necessarily coincide with each other. Chapter 3.4.9 has shown that each jurisdiction has determined which of these boundary indications is decisive. Due to evolving surveying techniques and equipment as well as diverging national legislation with regard to the decisiveness of a cadastral boundary, parties can or cannot rely on the cadastral map and the size of the parcel registered in the cadastral register.[1981] Thus, if the parties (unconsciously) rely on the wrong boundary indication, they are likely to experience a rough awakening. In addition, even if the parties are aware that the cadastral boundary is indicative in a given jurisdiction, it must be acknowledged that when being in the territory, it will be quite challenging for them to determine whether the cadastral boundary actually corresponds to the perceived boundary unless they call on the expertise of a qualified land surveyor.

[1979] P. Sparkes et al., *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Brussels: European Union, 2016, p. 127-129.
[1980] P. Sparkes et al., *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Brussels: European Union, 2016, p. 66-71.
[1981] As follows from the case studies, cadastral maps do not exist in all European countries. Yet, even in these countries, parcels are often visualized on a different type of map. See: HM Land Registry, 'Inventory of Land Administration Systems in Europe and North America', 2005, p. 134-137, to be found on: Website UNECE, 'Publications' (https://www.unece.org/housing/publications.html), as consulted on 31.05.2019.

Figure 4 – Dummy: Boundary Indications

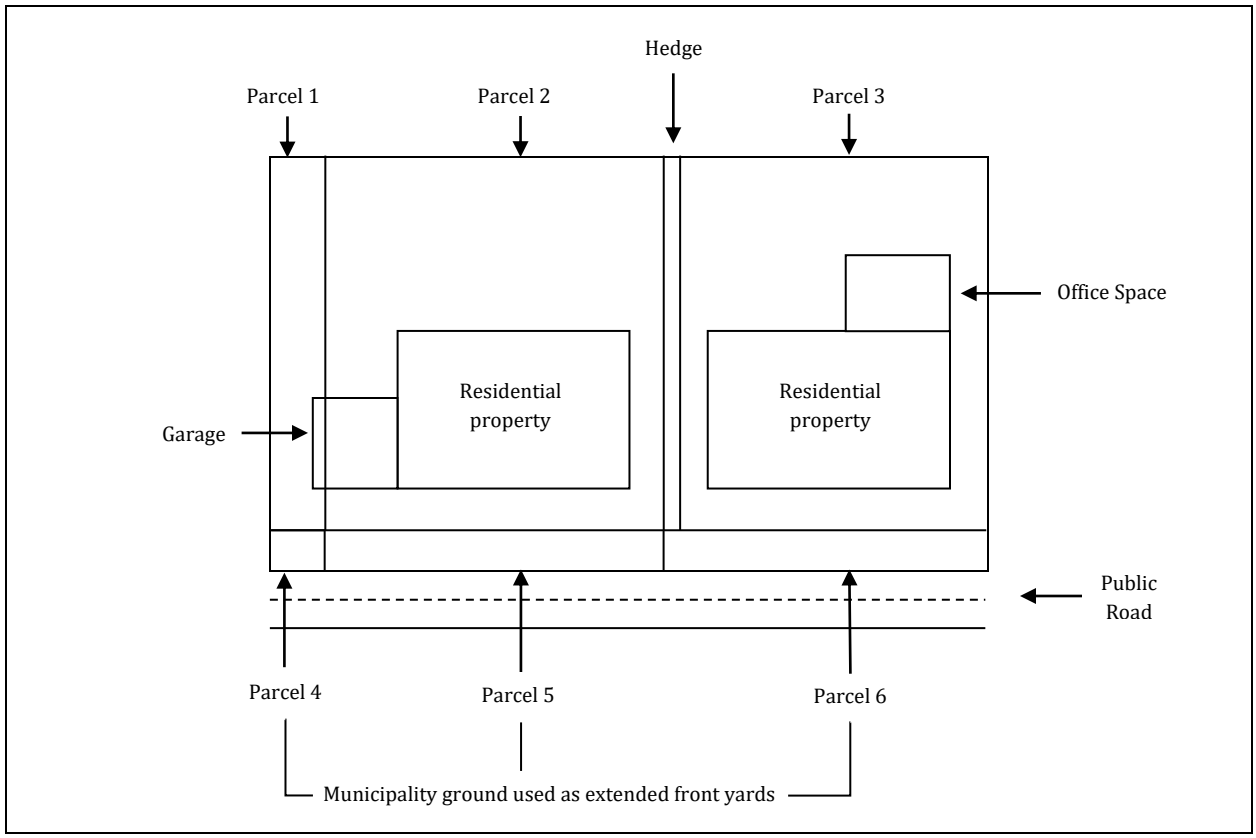
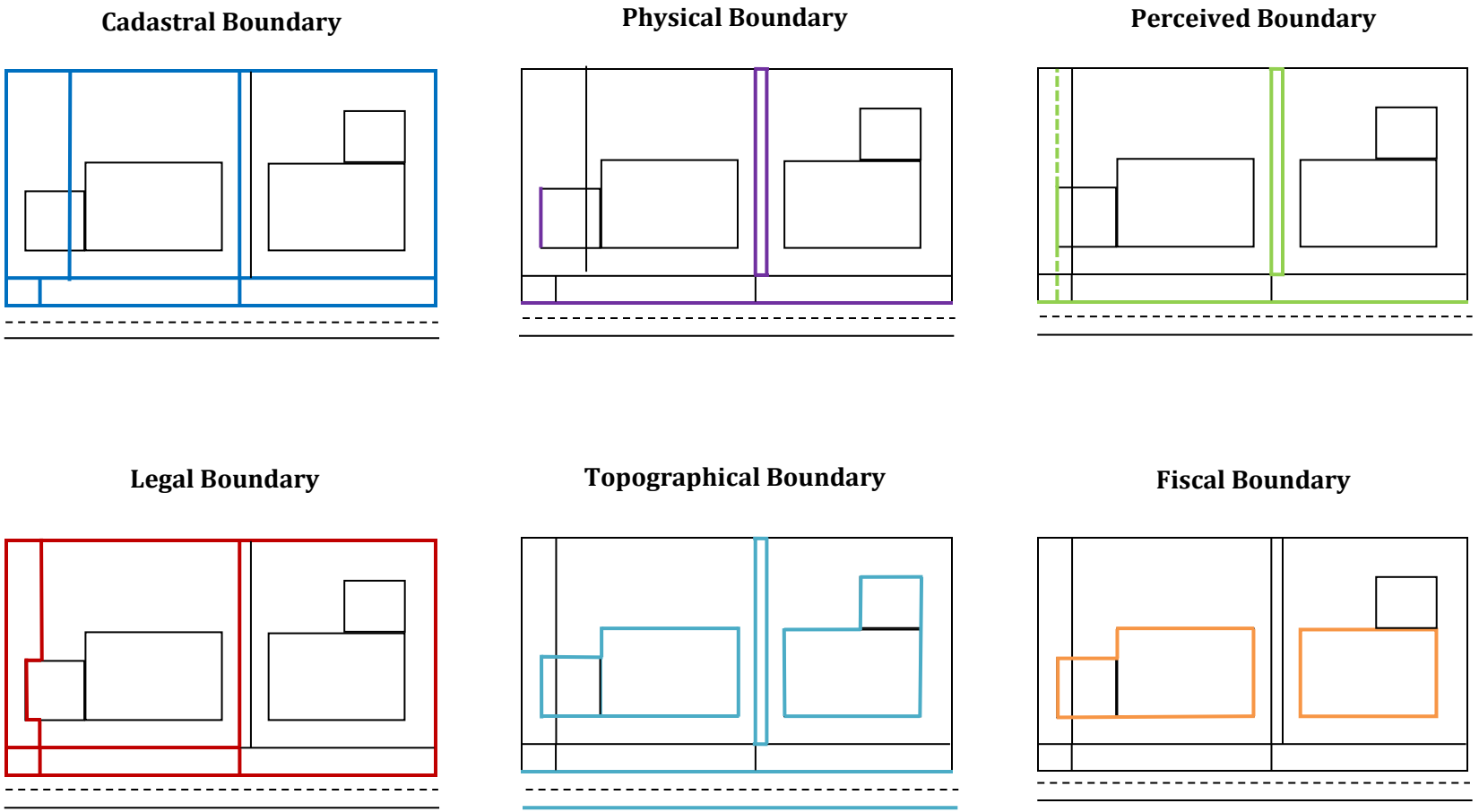


Figure 5 – Possible Divergences between Different Boundary Indications



Determination of the Potential Defects

Even a new building is not necessarily free from defects. If they occur, who is then accountable for them?[1982] Do sellers have a duty to actively inform the buyers about the defects of their houses or does instead rest a duty to carefully inspect the building on the buyers? Especially in cases where a more active role is expected from the sellers, buyers might be less inclined to commission a survey of the property before they sign the contract of sale or the deed of transfer.

Access to Land Register/ Cadastre Information

Can buyers request that information themselves and if so at which stage and under which conditions? Do they have to ask the legal practitioner or the seller to produce this document for them or can they directly turn to the land registry/ cadastre and demand a copy of the respective documents?

Comprehension of Land Register/ Cadastral Information

Once the buyers have received the requested land register/cadastral information (either through their own action or through the intervention of a legal practitioner), they must know how to interpret the documents to draw the correct conclusions. How does the information have to be read and understood? Is this information correct and complete? Do other registers have to be consulted to get the full picture about the real estate's legal state of the art? It is understood that legal practitioners are qualified to explain the provided information to their clients. The buyers only run risks when they consult the documents on their own account, especially when they gather this information before a legal practitioner is involved.

Choice of Law in Real Estate Transactions

In principle, the lex rei sitae governs the transfer of ownership of a parcel of land in its entirety. There are only two exceptions to this rule. The first concerns transfers conducted within the CROBECO framework, which foresees in the possibility to choose the law that applies to the (non-)

[1982] P. Sparkes et al., *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Brussels: European Union, 2016, p. 71-74.

contractual obligations based on the Rome I and II Regulations.[1983] The second exception relates to transfers based on succession that fall under the European Succession Regulation whereby a choice of law can be made with regard to the law governing the succession.[1984] However, neither CROBECO nor the European Succession Regulation impair the application of the lex rei sitae to the requirements that govern the registration of a deed of transfer respectively a European Certificate of Succession in the land register.[1985]

One of the arguments underlying the CROBECO project is that parties favour the application of their own national law over the application of a foreign law when it comes to cross-border real estate transactions. Critical voices argue that this is not the case. Who is right? To date, the only true answer that can be given with certainty is that we do not know the answer. So far, the argument that parties prefer to apply their own law is a hypothesis - but the counterargument is also merely a hypothesis. None of these have been subject to empirical testing so far. But there is a second aspect. The parties might want to employ specific legal arrangements that are permissible under their national law but not under the lex rei sitae. A rather classic example within the group of family transactions would be a trust construction. Due to the numerus clausus principle, the legal practitioner (if involved) will have to advise the parties on an alternative. In some situations, these alternatives will offer less legal protection.

Necessity of Preceding Approval of the Competent Authority or of a Declaration by the Buyers

Before concluding the contract of sale, sellers are well advised to find out whether the intended real estate transaction is subject to the preceding approval of the competent authority or whether national law might require buyers to declare that they will use the real estate with a specific purpose, such as their own primary residence rather than as a secondary home.[1986] These

[1983] For a description of the CROBECO project and the choice of law mechanism, see Chapter 5.2.3.2.
[1984] Article 22 European Succession Regulation.
[1985] Article 1 (2)(l) European Succession Regulation.
[1986] C-302/97 *Konle* ECLI:EU:C:1999:271. Also see C-355/97 *Beck and Bergdorf* ECLI:EU:C:1999:391. Also see C-423/98 *Albore* ECLI:EU:C:2000:401. Also see C-515/99 *Reisch and Others* ECLI:EU:C:2002:135. Also see C-519/99 *Lassacher and Schäfer* ECLI:EU:C:2002:135. Also see C-520/99 *Reutter and Dertnig* ECLI:EU:C:2002:135. Also see C-521/99 *Branka* ECLI:EU:C:2002:135. Also see C-522/99 *Neubau and Baumeister Bogensberger* ECLI:EU:C:2002:135. Also see C-523/99 *Fidelsberger* ECLI:EU:C:2002:135. Also see C-524/99 *GWP Gewerbeparkentwicklung and Lindner* ECLI:EU:C:2002:135. Also see C-526/99 *Neubau GmbH* ECLI:EU:C:2002:135. Also see C-527/99 *Riedl* ECLI:EU:C:2002:135. Also see C-528/99 *Hacker* ECLI:EU:C:2002:135. Also see C-529/99 *Eckert* ECLI:EU:C:2002:135. Also see C-530/99 *Gstöttenbauer* ECLI:EU:C:2002:135. Also see C-531/99 *Hechwarter* ECLI:EU:C:2002:135. Also see C-532/99 *Bixner*

mechanisms especially apply to transactions involving agricultural land, land relevant for military purposes, and the acquisition of second homes.[1987] If a real estate transaction is subject to such conditions, how do they find out which steps they need to take to fulfil them?

Drawing up a Deed for Registration Abroad

Land registrars of certain countries accept deeds drawn up by foreign legal practitioners, provided that certain conditions are met. Presuming that both parties reside in the same country, while the parcel is located abroad, they could then in principle choose to make use of the services offered by a legal practitioner in their own country to draw up the deed of transfer effectuating the transfer of the real estate. If the foreign land registrar accepts the deed of transfer, more questions arise: Will the drawing up of this deed that is destined to be used abroad be covered by the legal practitioner's professional indemnity insurance? Where and how must the deed be submitted? Which requirements does the deed have to meet? Will it be necessary to ask the assistance of a foreign colleague, i.e. to check the identity of the parties?

Registrability of Foreign Deeds

Is the land registrar allowed to register deeds that were drawn up by a foreign legal practitioner or the foreign parties themselves? Are deeds that are (partly) drawn up in a foreign language registrable?

Adaptation of Foreign Rights in Rem

Considering that the transfer of real estate is almost exclusively governed by the lex rei sitae, land registrars are at this point not often confronted with this task. As stated above, exceptions at this point primarily concern transactions conducted under the CROBECO framework. Another situation

ECLI:EU:C:2002:135. Also see C-533/99 *Aumüller* ECLI:EU:C:2002:135. Also see C-534/99 *Garstenauer* ECLI:EU:C:2002:135. Also see C-535/99 *Eder* ECLI:EU:C:2002:135. Also see C-536/99 *Garstenauer* ECLI:EU:C:2002:135. Also see C-537/99 *Ramsauer* ECLI:EU:C:2002:135. Also see C-538/99 *Ramsauer* ECLI:EU:C:2002:135. Also see C-539/99 *Kronberger* ECLI:EU:C:2002:135. Also see C-540/99 *Morianz* ECLI:EU:C:2002:135. Also see C-300/01 *Salzmann* ECLI:EU:C:2003:283. Also see C-452/01 *Ospelt and Schlössle Weissenberg* ECLI:EU:C:2003:493. Also see C-213/04 *Burtscher* ECLI:EU:C:2005:731. Also see C-370/05 *Festersen* ECLI:EU:C:2007:59. Also see C-541/08 *Fokus Invest* ECLI:EU:C:2010:74. Also see P. Sparkes, *European Land Law*, Oxford/Portland: Hart Publishing, 2007, p. 63-65, 71-76, 87-90.

[1987] P. Sparkes, *European Land Law*, Oxford/Portland: Hart Publishing, 2007, p. 63-79.

in which adaption on the side of the land registrar occurs when real estate is transferred to a common law trust. Which party will then be registered as the owner in the land register – the "trustee" or the "beneficiaries"? In addition to land registrars also legal practitioners can theoretically be confronted with the task of having to adapt rights in rem. Such a situation will occur when they draw up a deed of transfer that is intended for registration in a foreign land register. In that case they advise their clients but they will have to adapt the legal constructions envisioned by the parties to the legal possibilities offered under the foreign lex rei sitae. A more frequent situation in which legal practitioners have to literally translate foreign rights in rem occurs when they communicate with the parties in a foreign language. It is then also not surprising that besides land registrars and legal practitioners, the professional group that is probably engaged the most with the challenge of finding equivalents of foreign legal concepts in a different language are legal translators. Furthermore, also European citizens themselves can be exposed to the task of having to 'translate' foreign rights of rem for example when they consult a foreign land register, or simply communicate with a foreign buyer/seller about the legal situation of the real estate that is subject to a cross-border transaction.

Application of EU Law

The property law aspects governing cross-border real estate transactions are still largely governed by purely national law. Nevertheless, EU law certainly has an impact on cross-border real estate transactions in a broader sense, for example when it comes to its fiscal consequences, the processing of personal information through the GDPR, the matrimonial property regimes, and the prevention of money laundering.[1988]

[1988] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)(OJ L 119, 4.5.2016, p. 1–88). Also see Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ L 183, 8.7.2016, p. 1–29). Also see Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (OJ L 183, 8.7.2016, p. 30–56). Also see Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance) (OJ L 141, 5.6.2015, p. 73–117 OJ L 141, 5.6.2015, p. 73–117). Also see M.T. Mielgo, 'Los Notarios Europeos facilitan las Transacciones Inmobiliarias', *Escritura Pública*, No. 78, 2012, p. 37.

4.1.4 Technological Challenges

Different Stages of Technological Development

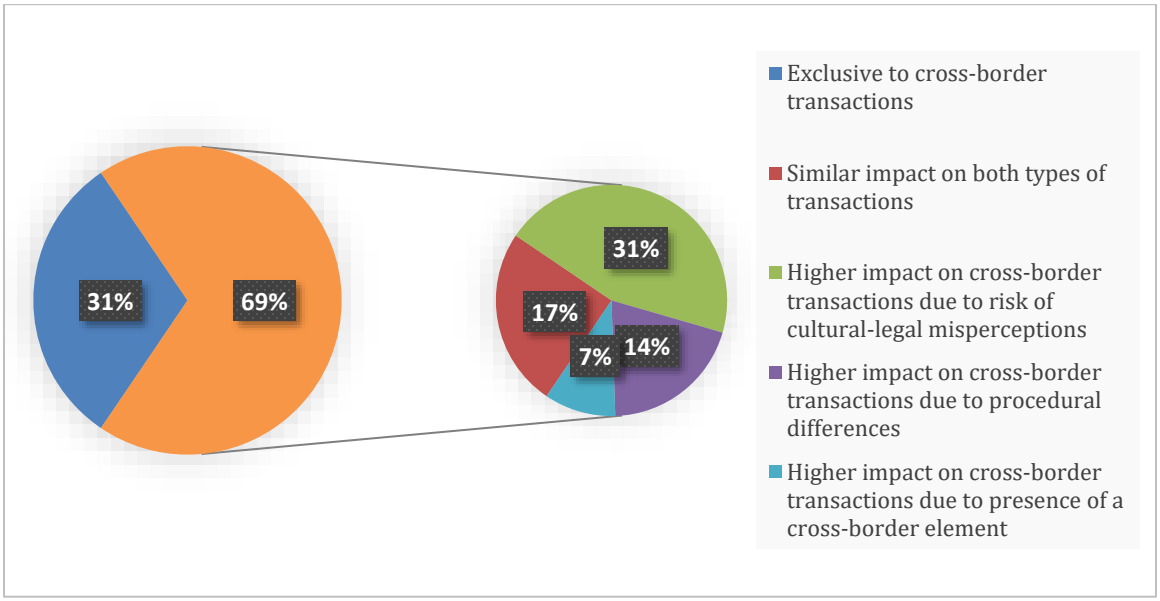
The technological standards of national land registration systems differ in part significantly across the European countries. To begin with, not all land registries work with a digital land register. Connected herewith, it is also not possible in all European countries to digitally request information from the cadastre and land register or to submit digital deeds for registration to the land registry.[1989] But even across the countries that have successfully implemented a digital register combined with a possibility to receive and submit digital documents, differences can be seen with regard to the technology used to allow for the systems to run properly. The same holds true for the exchange of (official) documents between the parties and the legal practitioner and the signature thereof. Therefore, this leads to the situation in which a seller/buyer/legal practitioner in Country-A cannot use their own technological infrastructure to submit documents to the land registry or to one of the other parties involved in Country-B if their technological systems are not compatible. As a result, they will either have to install the technological environment used in Country-B or submit their documents on paper. Both options are again cost and time intensive.

4.2 The Application of Cross-border Challenges in National and Cross-Border Transactions

After having inventoried these challenges, two questions remain to be answered. First, are these challenges exclusive to cross-border real estate transactions or do they also occur in national transactions? Second, in the event that they occur in both types of transactions, do they affect cross-border transactions more seriously than national transactions? What is the relevance of these questions? If we find that one or more of these challenges occur in cross-border transactions but not in national transactions, this means that citizens who wish to acquire real estate in a different European country are confronted with more obstacles than if they were to buy land in their home country. The same holds true for the situation in which a particular challenge has a more severe impact on cross-border transactions than on national transactions. For these reasons, the administrative, cultural, legal, and technological challenges need to be put in context. A schematic overview of this endeavour can be found in Table 19. This exercise gives us the following insights.

[1989] P. Sparkes et al., *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Brussels: European Union, 2016, p. 48-49, 51-53.

Figure 6 – The Impact of Challenges on Cross-Border and National Transactions



To begin with, we need to acknowledge that nine of the 29 challenges that were identified are exclusive to cross-border real estate transactions and thus do not occur in purely national transactions: Choice of Legal Practitioner – Linguistic Abilities, Translation Costs, Referring Citizens to the Correct Authority, Risk of Cultural-Legal Misperceptions, Choice of Law in Real Estate Transactions, Drawing up a Deed for Registration Abroad, Registrability of Foreign Deeds, Adaptation of Foreign Rights in Rem, and Different Stages of Technological Development.

All other challenges are faced in both types of transactions. Within that group, nine challenges are more gravely experienced in cross-border transactions due to their exposal to the risk of cultural-legal misperceptions. Those concern the Duration of the Transaction Procedure, Necessity of a Legal Practitioner, Determination of the Extent of the Object of Transfer, Determination of the Seller's Power of Disposal, Determination of the Size of the Parcel, Determination of the Potential Defects, Access to Land Register/ Cadastral Information (legal challenge), Comprehension of Land Register/ Cadastral Information, and Necessity of Preceding Approval of the Competent Authority or of a Declaration by the Buyers.

Another situation, in which challenges may be experienced as being more troublesome in the context of cross-border transactions, occurs when they point to procedural differences in another

European country. This potentially applies to the following four challenges: Payment of Land Registry/ Cadastral Authority Tariffs, Payment of Deposits/ Purchase Price, Payment of the Legal Practitioner's Service Fee, and Access to Land Register/ Cadastral Information (administrative challenge).

In two other cases, the presence of a cross-border element in itself arranges for an increase of the impact of that challenge. This concerns the Travel Expenses and the Application of EU Law. Closing with the remaining five challenges (Identification of the Roadmap, Provision of Required Documents, Choice of Legal Practitioner – Competence Question, Legal Practitioner's Service Fee, and Land Registry/ Cadastre Tariff) we may say that they have a similar impact on both types of transactions.

What do these figures tell us? In total, 24 out of 29 challenges (83%) more seriously affect cross-border transactions than national transactions out of which 37,5% exclusively apply to cross-border transactions. Therefore, it is defendable to conclude that cross-border real estate transactions are more intensely exposed to these challenges than their national counterparts.

Table 19 – Challenges in Cross-Border Real Estate Transactions in Context

		National Case	Cross-border Case
Administrative Challenges	Identification of the Roadmap	This obstacle applies in both a national and a cross-border setting.	This obstacle applies in both a national and a cross-border setting.
	Choice of Legal Practitioner – Linguistic Abilities	Given its nature, this obstacle is not being faced in a purely national setting.	When both seller and buyer share a common mother tongue, the easiest possibility would be to locate a foreign legal practitioner (if their assistance is required in that foreign country), who is fluent in their mother tongue in order to eradicate the need of expensive and time-consuming translations. If this is not possible or if the parties involved in the transaction do not share a common mother tongue, translations cannot be circumvented.
	Provision of Required Documents	This obstacle applies in both a national and a cross-border setting.	This obstacle applies in both a national and a cross-border setting.
	Translation Costs	Given its nature, this obstacle is not being faced in a purely national setting.	If the parties and the legal practitioner cannot communicate in the same language, translations are needed. But

			even if that is the case, translation costs might be faced. This situation occurs when the deed is drawn up in a language that the parties understand and the national legislation prohibits the registration of deed drawn up in that language in the land register.
	Legal Practitioner's Service Fee	This obstacle applies in both a national and a cross-border setting.	This obstacle applies in both a national and a cross-border setting.
	Land Registry/ Cadastral Authority Tariffs	This obstacle applies in both a national and a cross-border setting.	This obstacle applies in both a national and a cross-border setting.
	Travel Expenses	Even in a national case, travel expenses might occur – especially when buyer and seller live in different cities/regions.	Travel expenses are likely to be higher in cross-border cases, when the parties have to cross national borders to exchange, sign and validate documents. One could argue now that if persons have the financial capacities to acquire immovable property in a foreign country, that they can also bear the travel expenses. Yet, one needs to realize that cross-border transactions are not exclusively entered into by wealthy Europeans, who acquire this property as a

			financial investment or a second home serving as a holiday destination. Potential buyers are also found in the category of those who need or want to work in a different European country and who need a residence there.
	Access to Land Register/ Cadastral Information	It is presumed that it is fairly easy for buyers to find out where they can access this information in their own country in the event that they do not have this knowledge already.	As a result of different organizational structures and technological developments throughout Europe, it is arguably more challenging for buyers to find out where they can access the necessary information.
	Payment of Land Registry/ Cadastral Authority Tariffs	While land registries/ cadastres might also encounter problems to receive payments for the services provided in a national case, it is expected that this problem is faced to a lesser extent in such a setting due to the fact that the procedure of paying these tariffs might be more familiar to the parties.	Across Europe, the process of collecting land registry/ cadastral authority tariffs diverges. In some countries for example, invoices are being sent directly to the parties, while in other countries the parties will only indirectly pay the tariffs through their legal practitioner, who will receive the invoice. Therefore, parties who are used to the latter system and thus assumed that these tariffs formed part of the legal practitioner's service fee,

			will certainly be unpleasantly surprised when they receive the invoice from the land registry/ cadastre.
	Payment of Deposits/ Purchase Price	It is expected that this problem is faced to a lesser extent in a national setting due to the fact that the parties might have a better picture as to the procedures governing the payment of the deposits and the purchase price.	This problem is closely related to the payment of land registry/ cadastral authority tariffs. Diverging procedures across Europe can lead to unclarity on the side of the parties about the payment of the deposit and the purchase price.
	Payment of the Legal Practitioner's Service Fee	This obstacle applies in both a national and a cross-border setting.	This obstacle applies in both a national and a cross-border setting. Diverging procedures across Europe can lead to ambiguity on the side of the parties about the payment of the service fees.
	Referring Citizens to the Correct Authorities	Given its nature, this obstacle is unlikely being faced in a purely national setting.	If the parties to a legal practitioner in their home country in a situation in which the legal practitioners of the forum rei sitae are exclusively competent, they should be able to refer the parties to the correct foreign authorities. This endeavour might necessitate research and thought from

			the legal practitioner.
	Duration of the Transaction Procedure	This obstacle applies in both a national and a cross-border setting.	This obstacle applies in both a national and a cross-border setting. If this obstacle is coupled with a risk of cultural-legal misperceptions, it can lead to the formulation of wrong expectations. Hence, a citizen who is used to a system in which digital deeds can be registered in the land register (in an automated manner) and in which land registrars restrict their control to the formal registration requirements will probably have to have more patience when acquiring real estate in a legal system in which only paper deeds can be registered in the land register and where the land registrar also substantially controls the deed (and other related documents offered for registration).
Cultural Challenges	Risk of Cultural-Legal Misperceptions	Given its nature, this obstacle is not being faced in a purely national setting.	This obstacle is predestined for cross-border transactions. Making wrong assumptions about the foreign legal system can lead to great dangers.

			Trusting for example that a land register extract is correct and complete while the foreign law does not foresee in such a guarantee can lead to fatal consequences.
Legal Challenges	Necessity of a Legal Practitioner	The ordinary European citizen will most probably know whether the intervention of a legal practitioner forms a mandatory requirement to transfer real estate. In the event that this is not the case, it is presumed that it is easier for them to collect the necessary information within their own country, in their mother tongue, than in a foreign system.	It is likely that it will be more difficult for sellers to acquire the necessary information themselves from a different legal system; especially so when the legal system greatly diverges from the sellers' own legal system. In addition, language can form a barrier in this regard.
	Choice of Legal Practitioner – Competence Questions	This obstacle applies in both a national and a cross-border setting.	This obstacle applies in both a national and a cross-border setting.
	Determination of the Seller's Power of Disposal	It is presumed that even citizens who are not legally trained will have a reasonably good idea who is responsible to control the seller's power of disposal. At the very least, provided that they are not ignorant in that respect, it will be easier for them to	Due to the diverging European land registration systems, it is arguably more difficult for buyers in a different country to establish (who is in charge to control) the seller's power of disposal, especially against the backdrop of the risk for cultural-legal

		acquire that information as they can search for that information in their mother tongue and within a culture that is more familiar to them. It will be easy for them to locate people in their network to inquire.	misperceptions.
	Determination of the Extent of the Object of Transfer	This obstacle applies in both a national and a cross-border setting.	This obstacle applies in both a national and a cross-border setting. If this obstacle is paired with the risk of cultural-legal misperceptions however, it is likely to have a more severe impact on buyers.
	Determination of the Size of the Parcel	This obstacle applies in both a national and a cross-border setting.	This obstacle applies in both a national and a cross-border setting. If this obstacle is paired with the risk of cultural-legal misperceptions however, it is likely to have a more severe impact on buyers.
	Determination of the Potential Defects	This obstacle applies in both a national and a cross-border setting.	This obstacle applies in both a national and a cross-border setting. If this obstacle is paired with the risk of cultural-legal misperceptions however, it is likely to have a more severe impact on buyers.

	Access to Land Register/ Cadastral Information	It is presumed that it is easier for buyers in a national case to find out whether or rather at which stage they can access land register/ cadastral information. They can search for the relevant information in their mother tongue and within a culture that is more familiar to him. Furthermore, it might be easier for them to locate people in their personal networks to inquire if assistance is needed.	Due to the great divergence of approach in this matter among the different European countries, in a cross-border case, it will be more difficult for buyers to find out whether or under which conditions they may access land register and cadastral information. If buyers are used to a legal system that provides that access to land register information is subject to the demonstration of a legitimate interest, they may be unaware of the fact that they could demand such information from the land registry in the forum rei sitae, which grants access to its information regardless of whether the applicant has a legitimate interest or not. In the opposite case, where buyers are used to a legal system that foresees in free accessibility of land register information and would like to access data in the forum lex sitae, in which an application to access such data is only

			granted upon the demonstration of a legitimate interest, they might experience this difference as an obstacle, when their interest does not qualify as a legitimate interest.
	Comprehension of Land Register/ Cadastral Information	This obstacle applies in both a national and a cross-border setting.	This obstacle applies in both a national and a cross-border setting. If this obstacle is paired with the risk of cultural-legal misperceptions however, it is likely to have a more severe impact on buyers.
	Choice of Law in Real Estate Transactions	Given its nature, this obstacle is not being faced in a purely national setting.	Depending on the exact cross-border setting, the desire to choose a foreign law as the applicable law to the real estate transaction is either more or less likely. It is assumed that the likelihood that parties wish to apply a foreign law to the transaction is higher when they are from the same country and it is only the parcel of land that is located abroad than in a case where all parties and the land are located in different countries.
	Permissibility of a Foreign	Given its nature, this obstacle is not	Some European countries require

	Buyer	being faced in a purely national setting.	prior approval before land located in certain areas of the country is sold to foreign parties. In the absence of such an approval, the transfer of the parcel is not possible. This does not constitute a grave obstacle but rather an extra step that the registrar has to take when examining the offered documents to decide on whether they fulfil the registration requirements.
	Drawing up a Deed for Registration Abroad	Given its nature, this obstacle is not being faced in a purely national setting.	These practical obstacles only occur when a legal practitioner draws up a deed that is destined for registration in a foreign land register. If approached by the parties, how do legal practitioners find out whether a deed prepare by them will be accepted for registration in the forum rei sitae?
	Registrability of Foreign Deeds	Given its nature, this obstacle is not being faced in a purely national setting.	This does not constitute a grave obstacle but rather an extra step that the registrar has to take when examining the offered documents to decide on whether they fulfil the registration requirements.

	Adaptation of Foreign Rights in Rem	Given its nature, this obstacle is not being faced in a purely national setting.	In practice, land registrars are not often confronted with the adaptation of foreign rights in rem in the context of real estate transactions and primarily concerns trust constructions and CROBECO transactions. This is different when the lex rei sitae permits the registration of foreign deeds of transfer. In that case, land registrars have to adapt the foreign rights to their own national law. Legal practitioners face a higher chance to face the translation of foreign rights in rem. This occurs when they notarize in a foreign language. In line herewith, the professional group who is probably confronted with the challenge of finding suitable counterparts of foreign rights in rem in a different legal system are sworn-in translators whose services are used by the parties, the legal practitioners, or even the land registrars.
	Application of EU Law	This obstacle applies in national cases,	A higher number of EU legal

		though the number of relevant EU legal instruments is lower.	instruments, such as in the area of fiscal legislation, applies when real estate transactions possess a cross-border element.
Technological Challenges	Different Stages of Technological Development	Given its nature, this obstacle is not being faced in a purely national setting.	Unless the land registration systems of all countries involved are still fully paper-based as to what the exchange of documents and information is concerned, this obstacle will have to be faced. In the end, different countries make use of different digital standards and software so that foreign parties would first have to install that software (provided that it is freely available) and be registered in that system. Especially when that foreign party is not planning on making use of that software on a somewhat regular basis, it is rather unlikely that the monetary and time investment needed to have the system up and running will justify itself.

4.3 The Desirability to Address these Challenges

Is it desirable to address the challenges that are set out above? The answer to this question is clearly affirmative. In reality, there is without doubt a wide variety of cross-border real estate transactions. Therefore, it almost goes without saying that not all of these transactions will exhibit every challenge and that those challenges are in turn not necessarily being faced with a comparable intensity. But independently of the question of how many of these obstacles the parties are confronted with and in which degree of intensity, at the end of the day, the mere existence of obstacles complicate cross-border real estate transactions and provoke that they are more time consuming and cost intensive than a comparable national real estate transaction. Moreover, as follows from Table 20, cross-border real estate transactions do not exclusively add a layer of complexity to the work of legal practitioners, land registries, and cadastres but predominantly pose challenges to European citizens in their roles of sellers and buyers. But of course, the exact degree of difficulty and the division of cross-border challenges faced by the parties will always depend on the specifics of the individual case. For these reasons, it can be argued that the existence of such challenges have a negative impact on the well-functioning of the European real estate market and thus also on the European economy as a whole. Within the context of the EU, the existence of these obstacles specifically hamper the proper functioning of the internal market (art. 3 (3) TEU; art. 26 TFEU), especially the free movement of capital (art. 63 TFEU), the free movement of persons (art. 21 TFEU; art. 3 (2) TEU) and workers (art. 45 TFEU) and the right of establishment (art. 49 TFEU).

How significant is this impact on European economy? The report "Foreign capital and Dutch real estate: Passing hype or lasting value?" produced by ABN-AMRO provides the following insight for the timeframe 2009-2014:

> "If we look at the three most important countries in Europe for real estate investments in terms of volume, we see that the UK is the largest market for foreign investors. Of the 125 billion Euros invested, some 24 billion was by foreign parties. The German market is around 56 billion and the French 29 billion Euros, with the share of foreign investors at 21 and 11 billion Euros respectively."[1990]

[1990] ABN-AMRO, 'Foreign capital and Dutch real estate: Passing hype or lasting value?' p.6 (https://www.abnamro.com/nl/images/Documents/035_Social_Newsroom/Newsarticles/2015/Foreign_capital_and_Dutch_real_estate.pdf), as consulted on 16.07.2019.

Unfortunately, it has proven to be a challenging endeavour to find reliable and topical statistics on the occurrence of cross-border residential real estate transactions in Europe, especially when it comes to acquisitions of land by other Europeans rather than by wealthy TCNs. Even on a country basis, it was rather difficult to find solid and freely accessible statistics that shed light on this question, taking into account the situation in the entire country and not just with regard to a big city within that country.[1991] Therefore, in order to establish a need for solutions to these challenges, a switch to a different set of statistics proved necessary. Instead of looking directly into statistics that provide data as to the frequency of cross-border transactions in a given country in a specific timeframe, the focus shifted towards the question of how a population in a given country is composed of with regard to nationality and whether one can see trends as to the amount of (European) foreigners moving to a different European country. Of course, not all of these migrants will end up buying residential property; some might prefer to rent accommodation. But if an increase in migration can be established, it is safe to argue that the likelihood of cross-border real estate transactions will increase as well – though not necessarily proportionate to the increase of the migrating population. The questions is therefore what the extent of intra-European mobility is. The 2016 Annual Report on intra-EU Labour Mobility provides an answer:[1992]

> "In 2015, a little fewer than 11.3 million EU-28 citizens and 168,000 EFTA citizens of working age were residing in a Member State other than their country of citizenship, totalling some 11,434,000 people. This is an increase of 5.3% on 2014."[1993]

Out of these 11.3 million, the vast majority of these migrants (8.5 million people) fall within the category of the working population, comprising all people between 20 and 64 years of age.[1994] Another 1.4 million migrants are EU citizens that have already retired.[1995] Where do these migrants settle? According to the 2017 Annual Report on intra-EU Labour Mobility, the top destinations for

[1991] See for example: W. Wilson & C. Barton, 'Foreign Investment in UK Residential Property', House of Commons Library: Briefing Paper No. 07723, 2017 (http://researchbriefings.files.parliament.uk/documents/CBP-7723/CBP-7723.pdf), as consulted on 16.07.2019.
[1992] E. Fries-Tersch, T. Tugran & H. Bradley, '2016 annual report on intra-EU labour mobility', 2017 (2nd edition) as published on: Website Publications Office of the EU, 'EU Publications: 2016 annual report on intra-EU labour mobility' (https://publications.europa.eu/en/publication-detail/-/publication/ddaa71cc-3e9a-11e7-a08e-01aa75ed71a1/language-en), as consulted on 15.07.2019.
[1993] E. Fries-Tersch, T. Tugran & H. Bradley, '2016 annual report on intra-EU labour mobility', 2017 (2nd edition), p.10 as published on: Website Publications Office of the EU, 'EU Publications: 2016 annual report on intra-EU labour mobility' (https://publications.europa.eu/en/publication-detail/-/publication/ddaa71cc-3e9a-11e7-a08e-01aa75ed71a1/language-en), as consulted on 15.07.2019.
[1994] Ibid.
[1995] Ibid.

intra-EU migrants are Italy, Spain, Germany and the UK, whereby the latter two alone receive a combined half of all intra-EU migrants.[1996] But is the moving EU citizen a temporary trend or a long-lasting phenomenon? In 2011, EUROSTAT has published an interesting study entitled "Fewer, older and multicultural? Projections of the EU populations by foreign/national background", authored by *Giampaolo Lanzieri*.[1997] The purpose of this study is to predict how EU and non-EU migration will influence the population of the EU Member States in the future.[1998] Its temporal scope is limited to a period beginning on January 1, 2008 and ending on January 1, 2061.[1999] Based on his analysis, *Lanzieri* draws the following conclusion:

> "In the EU, the share of persons with a foreign background, as composed by first and second generations of migrants, is projected to increase by 16 percentage points in half a century, reaching over 133 million persons in 2061. However, the results are rather different by country."[2000]

This migration movement will especially affect the younger part of the population, namely the age category comprising people between 15 and 39 years of age. Within this group, it will in the future be much more common to have a foreign background; the number of people who do not have a foreign background will significantly decrease; from ~140 million to ~"50-60 million"![2001] The figures presented speak for themselves. However, one could ask whether the numbers justify the combatting of the challenges adherent to cross-border real estate transactions. One needs to recall here that these figures alone can only portray a distorted image. After all, they only focus on possible cross-border transfers that might arise as a result of intra-European migration. What we may not forget is that there are also other motivations to invest in real estate in a different European country, being buy-to-let investments and second residences (including holiday

[1996] E. Fries-Tersch et al., '2017 annual report on intra-EU labour mobility', 2018, p. 12 as published on: Website Publications Office of the EU, 'EU Publications: 2017 annual report on intra-EU labour mobility' (https://publications.europa.eu/en/publication-detail/-/publication/cd298a3c-c06d-11e8-9893-01aa75ed71a1/language-en), as consulted on 15.07.2019.
[1997] G. Lanzieri, 'Fewer, older and multicultural? Projections of the EU populations by foreign/national background', *EUROSTAT Methodologies and Working Papers*, 2011.
[1998] G. Lanzieri, 'Fewer, older and multicultural? Projections of the EU populations by foreign/national background', *EUROSTAT Methodologies and Working Papers*, 2011, p. 7, 9.
[1999] G. Lanzieri, 'Fewer, older and multicultural? Projections of the EU populations by foreign/national background', *EUROSTAT Methodologies and Working Papers*, 2011, p. 9.
[2000] G. Lanzieri, 'Fewer, older and multicultural? Projections of the EU populations by foreign/national background', *EUROSTAT Methodologies and Working Papers*, 2011, p. 17.
[2001] G. Lanzieri, 'Fewer, older and multicultural? Projections of the EU populations by foreign/national background', *EUROSTAT Methodologies and Working Papers*, 2011, p. 24. As the author indicates, an exact estimate cannot be given as the four models tested in this study did not produce the exact same results.

homes).[2002] Furthermore, these figures tell us that an increasing amount of EU citizens make use of their free movement rights, but so far we have not paid due regard to the question where they move to within the EU. There are indications that British, Germans, and Scandinavians in general prefer to move to a country with a similar culture and in which they are able to communicate in their mother tongue.[2003] Often then also the registration systems are comparable so that the parties will arguably face less cross-border obstacles (the most obvious being translation costs) than if they were to move to a very different EU Member State. Nevertheless, taking into account this blind spot, it can be concluded that it is desirable to address these problems. Therefore, to begin with it needs to be determined in how far these problems are addressed and possibly solved through already existing initiatives on European and international level.

[2002] P. Sparkes et al., *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Brussels: European Union, 2016, p. 35-41.
[2003] P. Sparkes et al., *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Brussels: European Union, 2016, p. 34.

Table 20 - Challenges of Cross-Border Real Estate Transactions per Target Group

		Seller	Buyer	Legal Practi-tioner	Land Registrar
Administrative Challenges	Identification of the Roadmap				
	Choice of Legal Practitioner – Linguistic Abilities				
	Provision of Required Documents				
	Translation Costs				
	Legal Practitioner's Service Fee				
	Land Registry/ Cadastre Tariffs				
	Travel Expenses				
	Access to Land Register/ Cadastral Information				
	Payment of Land Registry/ Cadastral Authority Tariffs				
	Payment of the Legal Practitioner's Service Fee				
	Referring Citizens to the Correct Authorities				
	Duration of the Transaction Procedure				
Cultural Challenges	Risk of Cultural-Legal Misperceptions				
Legal Challenges	Necessity of a Legal Practitioner				
	Choice of Legal Practitioner – Competence Questions				
	Determination of the Seller's Power of Disposal				
	Determination of the Extent of the Object of Transfer				
	Determination of the Size of the Parcel				

	Determination of the Potential Defects				
	Access to Land Registry/ Cadastral Information				
	Comprehension of Land Registry/ Cadastral Information				
	Legal Value of Land Register/ Cadastral Information				
	Choice of Law in Real Estate Transactions				
	Necessity of Preceding Approval of the Competent Authority or of a Declaration by the Buyers				
	Drawing up a Deed for Registration Abroad				
	Registrability of Foreign Deeds				
	Adaptation of Foreign Rights in Rem				
	Application of EU Law				
Technological Challenges	Different Stages of Technological Development				

5 The (European) State of Affairs

A wide variety of initiatives to facilitate European cross-border real estate transactions exists. It is worth noticing that the vast majority of these initiatives were realized by practitioners in the field, who have organized themselves in a number of different syndicates. Most prominently, on the part of the notaries, LEXUNION, the Council of the Notariats of the European Union, and the International Union of Notaries are to be mentioned, while land registry and cadastre staff have founded the European Land Information Service, the European Land Registry Association, the International Property Registries Association and International Centre of Registration Law, EuroGeographics, the International Federation of Surveyors, the Permanent Committee on Cadastre in the European Union, and the European Union of Rechtspfleger. In addition, these practitioners are involved in the initiatives put forward by other organizations that aim to contribute to the facilitation of these transactions, such as the EU, the United Nations' Food and Agriculture Organization, the Land Portal Foundation, or the World Bank. Therefore, the necessity arises to not limit the following description to initiatives that originate from European organizations but to also include relevant initiatives that exist on the international playing field. It goes without saying that international initiatives are not exclusively directed to EU Member States and in several of these projects EU Member States are not even participating at all. In the latter case, they therefore do not have a direct influence on the facilitation of cross-border transfers of land in Europe. Nevertheless, they aim to tackle similar obstacles especially when it comes to sharing information about their land governance systems in a common (pivot) working language. Therefore, it is highly interesting to analyse to what extent these international initiatives have tried to overcome hurdles that are similar to those that are faced in a European context.

The entirety of European and international initiatives have in common that they intend to improve land governance, it can be observed that their methods to reach that goal differ. While some initiatives focus on the design and implementation of country-specific tools and policies on the basis of the "Fit-for-purpose" model, others rather put the emphasis on the exchange and accessibility of a standardized set of information about the land governance systems of the participating countries. Another distinction can be drawn between those initiatives that focus on the improvement of topographical/cadastral registration and the facilitation of access to spatial

information and those whose objective is to ameliorate the registration of rights on land and the facilitation of access to that information. Therefore, not all of these initiatives are equally relevant to this research. As a result, not all existing initiatives were included in the following analysis but only those that focus on the legal rather than the geodetic aspects of land registration. An overview of all initiatives that will be described in greater detail can be found in Table 21. Conversely, this means that the INSPIRE Directive, the Cadastre and Land Registry Knowledge Exchange Network, the INSPIRE Knowledge Exchange Network, both realized by Eurogeographics, the European Location Framework, FIG's 1998 vision on the "Cadastre 2014", the 2011 FIG symposium "Cadastre 2.0", the Global Land Tool Network and the related Arab Land Initiative, both being facilitated by UN-HABITAT, the LAND ("Land Administration for National Development")-initiatives of the Cadastre, Land Registry and Mapping Agency of the Netherlands and the Dutch Ministry of Foreign Affairs, and the Land Parcel Identification System that was launched by the EU in the framework of agricultural subsidies, though constituting important initiatives in the broader filed of land registration, were excluded from the scope of the following analysis.[2004]

[2004] Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE) (OJ L 108, 25.4.2007, p. 1–14). Also see J. Kaufmann, D. Steudler & Working Group 1 of FIG Commission 7, 'Cadastre 2014: A Vision for a Future Cadastral System', *FIG Publications*, 1998, to be found on: Website FIG, 'Cadastre 2014' (http://www.fig.net/resources/publications/figpub/cadastre2014/index.asp), as consulted on 30.10.2018. Also see D. Steudler (eds), 'Cadastre 2014 and Beyond', *FIG Publication* No 61, 2014 (https://www.fig.net/resources/publications/figpub/pub61/Figpub61.pdf). Also see Website FIG, 'Annual Meeting 2011 and International Symposium "Cadastre 2.0" Programm' (https://sites.google.com/site/figsymposium2011/Programme-FIG-Com7-AM-2011), as consulted on 30.10.2018. The publications that came forth from this symposium can be found in: G. Schennach (eds), *Cadastre 2.0: Proceedings: International FIG Symposium & Commission 7 Annual Meeting: Innsbruck/Austria: September 2011*, Austrian Society for Surveying and Geoinformation OVG, 2011 (https://www.ovg.at/static/vgi-sonderhefte/sonderheft2011_34_final_OCR.pdf). Also see iLICONN Consortium, *Land Registers Interconnection feasibility and implementation analysis*, Luxembourg: Publications Office of the European Union, 2014, p. 25-26. Also see Website EuroGeographics, 'Cadastre and Land Registry – CLRKEN' (https://eurogeographics.org/knowledge-exchange/clrken/), as consulted on 26.02.2019. Also see Website EuroGeographics, 'INSPIRE-KEN' (https://eurogeographics.org/knowledge-exchange/inspire-ken/), as consulted on 26.02.2019. Also see C. Lemmen, J. Vos & B. Beentjes, 'Ongoing Development of Land Administration Standards: Blockchain in Transaction Management', *EPLJ* 2017; 6(3), p. 498. Also see Website Global Land Tool Network, 'About GLTN' (https://gltn.net/about-gltn/), as consulted on 30.10.2018. Also see Website Arab Land Initiative, 'The Initiative' (https://arabstates.gltn.net/the-initiative/), as consulted on 30.10.2018. Also see Website Kadaster, 'Embassies: "LAND-initiatives already yield results in Africa"' (https://www.kadaster.com/nl/embassies-land-initiatives-already-yield-results-in-africa-), as consulted on 30.10.2018. Also see European Court of Auditors, *The Land Parcel Identification System: a useful tool to determine the eligibility of agricultural land – but its management could be further improved*, Luxembourg: Publications Office of the European Union, 2016, p. 10-12. The corresponding datasets can be found here: Website European Data Portal, 'Datasets' (https://www.europeandataportal.eu/data/en/dataset?q=LPIS&sort=metadata_modified+desc&ext_geo_input=&ext_bbox=&ext_prev_extent=-154.68749999999997%2C-80.17871349622823%2C154.68749999999997%2C80.17871349622823), as consulted on 13.11.2018.

Table 21 – Chronological Overview of the Relevant European and International Initiatives

1923	International Union of Property Owners ("UIPI")
1947	UNECE Committee on Urban Development, Housing and Land Management
1948	International Union of Notaries ("UINL")
1972	International Property Registries Association and International Centre of Registration Law ("IPRA-CINDER")
	Bi-annual IPRA-CINDER International Congresses
1993	Council of the Notariats of the European Union ("CNUE")
1995	European Code of Notarial Professional Ethics
1996	Working Party on Land Administration ("WPLA") reports including glossary of terms
1998	Cadastre 2014
1999	Multilingual thesaurus on land tenure - French version
	Bi-annual Working Party on Land Administration ("WPLA") sessions
	Annual World Bank Conference on Land and Poverty
2002	Doing Business
	Land Administration Domain Model ("LADM") (development)
	European Land Information Service ("EULIS") (organization)
	European Judicial Network in Civil and Commercial Matters ("EJN")
	LEXUNION
2003	Multilingual thesaurus on land tenure - English and Spanish version
2004	European Land Registry Association ("ELRA")
	InterActive Terminology for Europe ("IATE")
	UINL Principles of notarial ethics
2005	UINL Fundamental principles of the Latin type notarial system
	UINL Principles of the notarial function
2006	EuroTitle
	European Land Information Service ("EULIS") (project)
2007	European Notarial Network ("ENN")
2009	e-Justice Portal

	Land Portal
2010	European Land Registry Network (“ELRN”)
	Cross Border Electronic Conveyancing (“CROBECO”) I
	e-Justice Communication via Online Data Exchange (“e-CODEX”)
2011	European Directory of Notaries
2012	EUFides
	Land Administration Domain Model (“LADM”) (ISO certification)
	Land Governance Assessment Framework (“LGAF”)
	World Notariat University
2013	Cross Border Electronic Conveyancing (“CROBECO”) II
	Common Vision for Cadastre and Land Registry in Europe
	Interoperability Model for Land Registers (“IMOLA”) I
	UINL Deontology and Rules of Organization for Notariats
2014	Plan 2020
	Social Tenure Domain Model (“STDM”) (publication)
2015	Buying Property in Europe
2016	Land registers interconnection project (“LRI”)
2017	Interoperability Model for Land Registers (“IMOLA”) II
	IPRA-CINDER International Review
	UINL Lexicon
2018	Dissolution of EULIS (organization + project)
2020	Interoperability Model for Land Registers (“IMOLA”) III
Unknown	Secure Notarial Seal
	EU Vocabularies
	Property Legal Advice Network (“PLAN”)

5.1 Notaries

The European notaries have proven to be one of the main catalysts to facilitate cross-border real estate transactions by essentially setting up or participating in a number of successful cooperation frameworks. These frameworks can take different forms. On a more informal level, individual notaries can ask one of their foreign colleagues for assistance in a cross-border case. Some notarial

offices, who have specialized in these international cases, even provide their clients with in-house legal expertise on foreign jurisdictions. Nevertheless, there are also more institutionalized forms of cooperation between notaries practicing in different countries. These forms of cooperation either seek to connect notaries by integrating their individual notarial offices or – on a more formal level – the countries' head organizations into a non-profit organization. An example of the former is LEXUNION, the biggest institutionalized form of cooperation between individual notarial offices that could be found in Europe. The latter cooperation form refers to the Council of the Notariats of the European Union (hereafter: "CNUE") and the International Union of Notaries (hereafter: "UINL"). In the following, it shall be analysed how these institutionalized forms of cooperation have facilitated cross-border real estate transactions in Europe.

Table 22 – Chronological Overview of Notarial Initiatives

1948	International Union of Notaries ("UINL")
1993	Council of the Notariats of the European Union ("CNUE")
1995	European Code of Notarial Professional Ethics
2002	LEXUNION
2004	UINL Principles of notarial ethics
2005	UINL Fundamental principles of the Latin type notarial system
	UINL Principles of the notarial function
2007	European Notarial Network ("ENN")
2011	European Directory of Notaries
2012	EUFides
	World Notariat University
2013	UINL Deontology and Rules of Organization for Notariats
2014	Plan 2020
2015	Buying Property in Europe
2017	UINL Lexicon
Unknown	Secure Notarial Seal

5.1.1 The International Union of Notaries ("UINL")

On an international level, the Latin notaries are organized in the UINL.[2005] Having its official seat in Buenos Aires, the NGO was founded in 1948 with the intention to worldwide advocate the position of the notariat and to represent their interests on the international playing field.[2006] In addition, it pursues aims that are more academic: conducting research into the notariat on national and international level, participating in the harmonization of laws, collecting the relevant national legislation, and stimulating the knowledge exchange through conferences. By the end of 2018, UINL counted a total of 88 member countries, including all CNUE member countries.[2007.] An organization of this size requires a solid organizational structure. Externally, UINL is represented by the president, who is appointed for a non-extendable period of three years, and who presides over all UINL bodies (General Meeting, General Council, Steering Committee) with the exception of the Financial Supervisory Council, whose function is self-explanatory.[2008] Its most important organ however is the General Meeting on which the decision-making is bestowed.[2009] In the performance of their duties, it is steered by the Steering Committee, which maximally consists of a third of all UINL members.[2010] In addition, a General Council is in place, 176 members strong, which functions as the consultatory organ.[2011] Besides the official UINL organs, a great number of working groups and committees are in place.[2012]

So far, UINL has agreed on a set of "Fundamental principles of the Latin type notarial system", dating 2005, together with more specific principles covering the function (2005) and ethics (2004) of the notariat, as well as a "Deontology and Rules of Organization for Notariats" adopted in 2013.[2013] In addition, UINL provides a number of services that especially target notaries. These include the possibility for notaries to become individual members of the organization, to request a "Secure Notarial Seal", a standardized seal that appends yet another level of security to notarial

[2005] Website UINL, 'Mission' (https://www.uinl.org/mission), as consulted on 08.01.2019.
[2006] Article 1 (2) UINL Statutes.
[2007] An overview of the member countries can be found on: Website UINL, 'Member Notariats' (https://www.uinl.org/member-notariats), as consulted on 11.01.2019.
[2008] Articles 12 (1) and (3), 27 and 30 (1) UINL Statutes.
[2009] Article 6 UINL Statutes. An enumeration of all its competences can be found in article 11 UINL Statute.
[2010] Articles 13 and 14 UINL Statutes. Also see Website UINL,'Mission' (https://www.uinl.org/mission), as consulted on 08.01.2019.
[2011] Article 16 UINL Statutes. Also see Website UINL, 'Mission' (https://www.uinl.org/mission), as consulted on 08.01.2019.
[2012] Website UINL, 'Mission' (https://www.uinl.org/mission), as consulted on 11.01.2019.
[2013] Website UINL, 'The Notarial Function' (https://www.uinl.org/organizacion-de-la-funcion), as consulted on 11.01.2019.

documents, and the annual training program referred to as the World Notariat University "Jean-Paul DECORPS", which was kicked off in 2012.[2014] Moreover, together with the CNUE and the European Institute of Research and Notarial Studies (I.R.E.N.E.), UINL has co-authored a French book on comparative succession law in Europe ("*Les Successions en Europe*"), covering an extensive number of 42 countries in Europe. Furthermore, a lexicon has been published in 2017, in which legal Pivot terms in English and French have been clearly defined according to the national laws of Scotland, England & Wales, Ireland, the Netherlands, France, Italy, Spain and Germany.[2015] Hereby, the focus is specifically laid on terms related to contract, property, and succession law. Notably, in addition to the advertisement of their own services, UINL offers information about initiatives that are carried out by other organizations but that might be of interest to their own target group. Specifically, this includes a direct link to the International Notarial Review ("RIN"), published by the Permanent Notarial Office of International Exchange as well as to the already available CNUE tools, under which the Website "Buying Property in Europe".[2016]

Table 23 – Chronological Overview of UINL Initiatives

1948	International Union of Notaries ("UINL")
2004	UINL Principles of notarial ethics
2005	UINL Fundamental principles of the Latin type notarial system
	UINL Principles of the notarial function
2012	World Notariat University
2013	UINL Deontology and Rules of Organization for Notariats
2017	UINL Lexicon

[2014] Website UINL, 'News: Opening of the registration for the 7th World Notariat University "Jean-Paul DECORPS", Rome, 2018' (https://www.uinl.org/en/-/ouverture-des-inscriptions-pour-la-7eme-universite-du-notariat-mondial-jean-paul-decorps-rome-20-1#p_73_INSTANCE_g4QgRSEIbf0Q), as consulted on 11.01.2019. Also see Website UINL, 'Services' (https://www.uinl.org/tools), as consulted on 11.01.2019. Also see Website UINL, '1st World Notariat University, Rome, Italy, 19th-23rd November 2012 (Press Release)', (https://www.uinl.org/en_GB/-/jose-marqueno-de-llano-elegido-presidente-de-la-union-internacional-del-notariado-uin-1#p_73_INSTANCE_g4QgRSEIbf0Q), as consulted on 18.01.2019.
[2015] Website UINL, 'Lexicon/Glossaire' (https://www.uinl.org/lexicon), as consulted on 11.01.2019.
[2016] Website UINL, 'Services' (https://www.uinl.org/tools), as consulted on 11.01.2019. Also see Website ONPI, 'Mission and Tasks' (http://www.onpi.org.ar:8080/app?page=Mision-y-Funciones&service=page), as consulted on 11.01.2019. The RIN could not be accessed. Thus, it could not be assessed whether it gives attention to cross-border real estate transactions. Therefore, it was not included in the overview of relevant initiatives in this field.

Unknown Secure Notarial Seal

5.1.2 The Council of the Notariats of the European Union ("CNUE")

CNUE was established in 1993 as a formal organ to represent the interests of notaries in the EU arena.[2017] Conversely, CNUE ensures that the knowledge and insights they gather in the course of this activity is shared with the notaries so that they are aware of how the EU and European legislation evolves. This includes the provision of further education in the area of EU law. Equally, CNUE has launched several projects that aim to facilitate cross-border movements of EU citizens. Correspondingly, CNUE has its headquarters in Brussels. All EU Member States in which the notarial profession exists are a CNUE member.[2018] In addition, there are four observing members: Turkey, Montenegro, Serbia and the Republic of North Macedonia.[2019] In total, CNUE thus represents approximately 40,000 notaries.[2020]

CNUE is a Belgian non-profit organization ("*AISBL*") and headed by a president who is appointed for a one-year term, with the possibility to be re-elected once. In the fulfilment of their mandate, the president is supported by the Board, which in addition of the president consists of the vice-president and five consultants.[2021] The responsible organs for the content work are the General Assembly, which comprises all heads of the participating national notarial organisations, and a number of working groups on specific topics. Last, the organizational structure is completed by the Permanent Office, which is responsible for the administration.

While CNUE has launched a great number of projects and initiatives, in the following, only those projects and initiatives that aim to facilitate cross-border real estate transactions shall be discussed in greater detail. Concretely, those are on the one hand the European Notarial Network and EUFides, both of which are designed to be used by notaries and on the other hand the European

[2017] Website CNUE, 'About Notaries of Europe' (http://www.notaries-of-europe.eu//index.php?pageID=190), as consulted on 14.11.2018.
[2018] An overview of all participating notarial organisations can be found here: Website CNUE, 'Members' (http://www.notaries-of-europe.eu//index.php?pageID=204), as consulted on 05.12.2018.
[2019] Website CNUE, 'About Notaries of Europe' (http://www.notaries-of-europe.eu//index.php?pageID=190), as consulted on 14.11.2018.
[2020] Ibid.
[2021] Website CNUE, 'CNUE Organisation' (http://www.notaries-of-europe.eu//index.php?pageID=205), as consulted on 05.12.2018.

Directory of Notaries and the initiative "Buying property in Europe" which target the broader public. In addition, CNUE has adopted a European Code of Notarial Professional Ethics in 1995.[2022]

Table 24 – Chronological Overview of CNUE Initiatives

1993	Council of the Notariats of the European Union ("CNUE")
1995	European Code of Notarial Professional Ethics
2007	European Notarial Network ("ENN")
2011	European Directory of Notaries
2012	EUFides
2014	Plan 2020
2015	Buying Property in Europe

5.1.2.1 The European Notarial Network ("ENN")

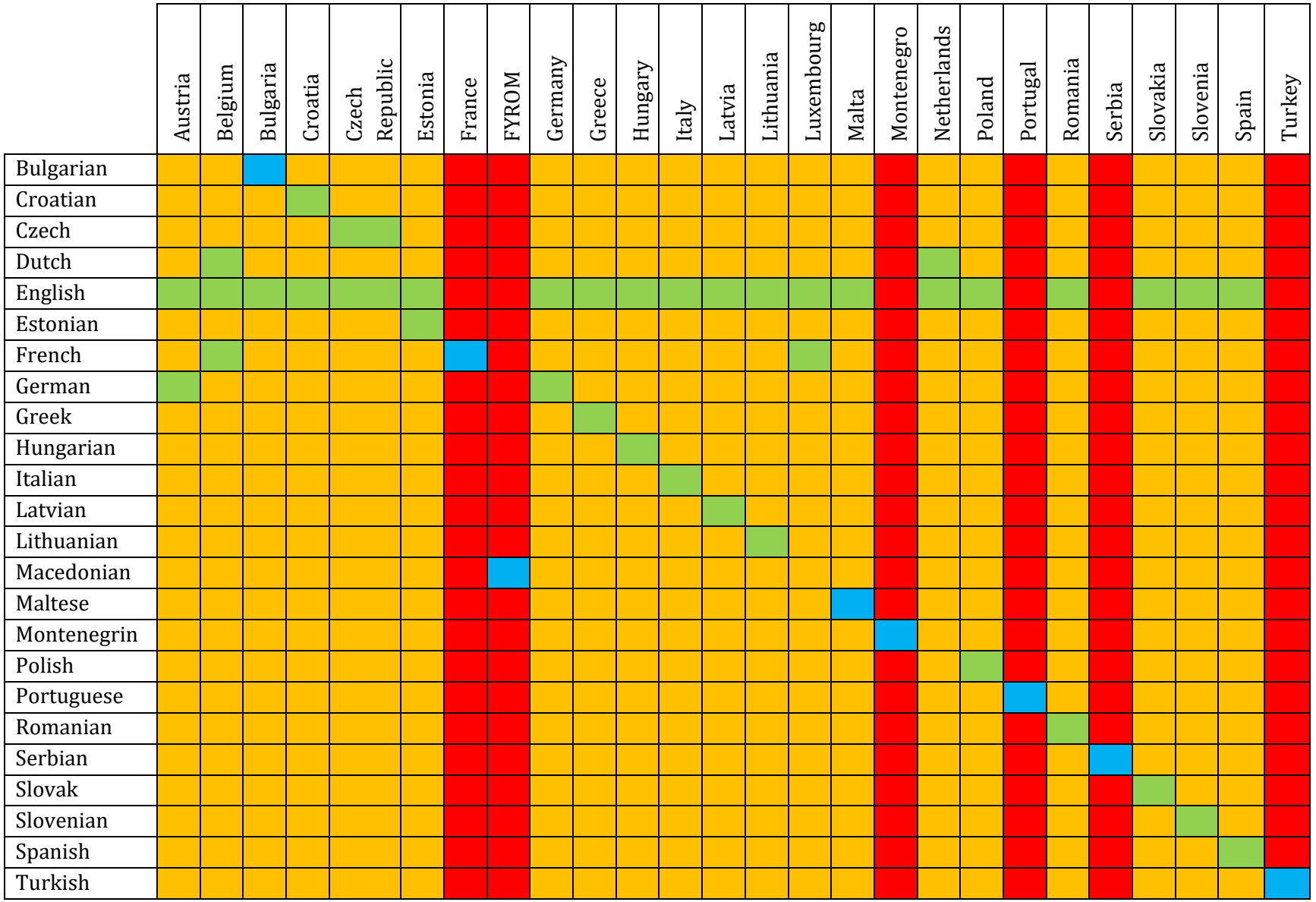
The European Notarial Network (hereafter: "ENN") is – as the name suggests – a network designed for Latin notaries who practise in any of the 22 EU Member States that know the Latin notariat.[2023] Set up in 2007, the aim of this network is to provide notaries with support when being confronted with a cross-border case.[2024] Within the ENN, support can be sought through different channels. To begin with, notaries and the public in general receive access to a legal database ("Legal Information Database"), which is filled with national checklists that indicate which documents/information are needed in that jurisdiction when dealing with a case involving company, succession, family, and real estate law.[2025] The real estate checklist contains separate sets of information related to the seller and the buyer, specifying in general terms which documents have to be presented to establish the identity of the parties, their representatives (if applicable), and the real estate that is subject to the transaction. Second, it specifies whether the recognition of these documents require an apostille or a legalisation. Furthermore, the checklist may contain information about the existence of specific

[2022] Website European Economic and Social Committee, 'Conference of Notaries in the European Union (CNUE)' (https://www.eesc.europa.eu/en/policies/policy-areas/enterprise/database-self-and-co-regulation-initiatives/61), as consulted on 25.01.2019.
[2023] Website CNUE, 'European Notarial Network' (http://www.notaries-of-europe.eu/index.php?pageID=228), as consulted on 07.12.2018.
[2024] Website CNUE, 'Creation of a 'European Notarial Network (Press Release)', 2007 (http://www.notaries-of-europe.eu//index.php?pageID=391), as consulted on 18.01.2019.
[2025] Website ENN, 'Legal Information Database' (https://www.enn-rne.eu/), as consulted on 07.12.2018.

national requirements that might apply to certain real estate transactions. As clarified by the disclaimer that is put on these checklists, the aim of these checklists is to generate a general overview of the mandatory documents so that one has to take into consideration that the provided information might not be conclusive for all cases that might arise. An aspect that must be assessed very positively is the inclusion of the date on which the checklists have been last altered. Thereby, consultants are able to estimate the actuality of the provided information. At first glance, it seems that all CNUE (observing) members have provided their individual real estate checklists. Via a drop-down menu, interested parties can select to consult the relevant checklist in one of the given 24 languages. The only question that remains is whether all real estate checklists are available in all of these languages. This question has been investigated on 10.12.2018. A schematic overview of the results can be found below in Table 25. Hereby, the following colour key applies:

Green	The Checklist is displayed in the selected language.
Orange	The Checklist is not displayed in the selected language. Instead, the English translation is shown.
Red	The Checklist is neither displayed in the selected language nor in a different language version.
Blue	The Checklist is not available in the country's official language.

Table 25 – Availability of the ENN Real Estate Checklists



The conducted study leads to the following conclusions. First, it shows that the real estate checklists are available for all CNUE members with the exception of France and Portugal. The observing members have not made these checklists available. Second, it illustrates that the checklists are available only in the official language(s) of the respective country as well as in an English language version. The only exceptions are Bulgaria and Malta whose checklist is available in English only. How should these outcomes be evaluated? In order to increase linguistic accessibility, it would of course be ideal if all checklists were available in all languages. Nevertheless, the mere existence of these checklists (in English) is already an achievement in itself as it provides practical assistance to notaries when dealing with a cross-border real estate case. In addition, if the checklist is not available in the chosen language, the English version is automatically displayed. Last, it must not be forgotten, that notaries are not always competent to deal with certain aspects of cross-border real estate transactions. After all, the national case studies have shown that national restrictions with regard to the notarial competence exist in the sense that deeds effectuating the transfer or burdening of real estate must be drawn up by a notary who is competent to act in the territory of the country in which the real estate is located. In those situations, a more limited role is reserved for foreign notaries as they might only be able to assist the notary in charge, for example with the ascertainment of the parties'identities. In these latter cases, the checklists can also prove useful for the assisting notaries, although it would seem obvious that it is in the interest of the notary in charge to carefully instruct the foreign assisting notary as to the legal requirements.

In addition to the checklists, notaries can directly contact notarial contact points in a different Member State to ask for assistance.[2026] To reduce language barriers, notaries can make use of a number of thematic forms that are drawn up in several languages. In addition to one-on-one requests, the ENN also offers the possibility to open a thread to discuss questions within a broader community of connected notaries. The ENN provides a secure platform for such exchanges. Moreover, notaries can access handbooks and factsheets on EU law in general and on more specific EU regulations that are relevant for the provision of their services, such as the European Succession

[2026] Website CNUE, 'European Notarial Network' (http://www.notaries-of-europe.eu/index.php?pageID=228), as consulted on 07.12.2018. Also see CNUE, *Position Paper concerning the European notariat's integration in the European Judicial Network in civil and commercial matters* (http://www.notaries-of-europe.eu/index.php?pageID=4482), 2006, p. 1-2. Also see Website CNUE, 'For 2020 The Notaries of Europe commit to a European justice policy that rises to the socio-economic challenges (Plan 2020)', 2014, p. 9 (http://www.notaries-of-europe.eu/plan2020/pdf/CNUE_Brochure2020_WEB_En.pdf), as consulted on 08.01.2019.

Regulation.[2027] On a more practical level, four tools are provided to assist notaries when dealing with a cross-border case. These tools allow notaries to determine the authenticity of a foreign power of attorney and to ask assistance from a foreign colleague to obtain certain information in the area of corporate, family, and succession law.[2028] The services of the ENN are only accessible to notaries who have registered themselves as a user. For the public, the ENN remains partly behind a closed curtain. Only the "Legal Information Database" and the ENN news thread are openly accessible.[2029]

5.1.2.2 The European Directory of Notaries

The idea behind the European Directory of Notaries, which went live in 2011, is to enable citizens to locate notaries in a different European country with whom they can communicate in their mother tongue.[2030] To provide a rather straightforward example, if a Polish couple intends to transfer their vacation house in Germany to their children, they might prefer to turn to a German notary who is fluent in Polish. This would not only take away the language barrier but consequently also eliminate the necessity of costly translation expenses. In order to find out whether this possibility exists, they can access the European Directory of Notaries, whose services are free of charge. Accessing this database merely requires the selection of the country in which a notary is sought.[2031] The Directory will then display a list of all appointed notaries in the country.[2032] To refine this rather long list, it is possible to restrict the search results by making additional selections with regard to linguistic abilities of the notaries, their name or the town in which they have established their notariat. When selecting a notary from the list, one is transferred to another webpage within the Directory environment on which one can find more information about the selected notary such as their contact details, a link to their own website, and the address of their notariat together with a Google Maps extract. To sum up, the Directory is a very pragmatic and accessible tool aiming to facilitate cross-border real estate transfers by assisting citizens to find a

[2027] Website ENN, 'Application of EU law' (https://www.enn-rne.eu/observer_demo/national), as consulted on 26.03.2019.
[2028] Website ENN, 'Tools for cross-border notarial practice' (https://www.enn-rne.eu/crossCheckPowersOfAttorney_demo), as consulted on 26.03.2019.
[2029] Website ENN, 'Legal Information Database' (https://www.enn-rne.eu/), as consulted on 07.12.2018.
[2030] Website CNUE, 'Find a notary who speaks your language in Europe (Press Release)', Brussels, 2011 (http://www.notaries-of-europe.eu/index.php?pageID=235), as consulted on 11.12.2018.
[2031] The European Directory of Notaries can be accessed via the following link: http://www.notaries-directory.eu/.
[2032] Website CNUE, 'Find a notary who speaks your language thanks to the European Directory of Notaries' (http://www.notaries-of-europe.eu/index.php?pageID=2217), as consulted on 11.12.2018.

notary who is fluent in their own mother tongue. The only critical remark that must be made is that an important piece of information is missing; it is not indicated on which date the Directory has been updated last. For this reason, it is not possible to assess its currentness. Theoretically, it is therefore possible that the Directory includes notaries whose term of appointment has ended or that it has not yet added newly appointed notaries.

Considering that the existence of language barriers has been identified as one of the main obstacles to cross-border real estate transfers, it would be interesting to see whether in each of the 22 CNUE members notaries are available who can communicate with foreign clients in each of the 23 official EU languages. Hence, in a study conducted on 13.11.2018, the Directory was used to generate an overview of the linguistic abilities of the European notaries, which reflects all possible combinations of CNUE members on the one hand and language options on the other hand. As a result, this initial overview did not only indicate the foreign language proficiencies of notaries in a given country, but also that there are notaries, who are fluent in (one of) the official languages of that country. Therefore, in order to clean this overview, the official language(s) of a country, given that they are an official EU language, had to be eliminated. [2033] A schematic overview of the results of this study can be found below in Figures X-Y.[2034] Once this exercise was completed, the following story was being told.

Although the availability of notaries, who are fluent in all official EU languages in all European countries that have a notariat, would be an ideal fundament, it was not expected that this would be the case in reality. The study indeed confirmed this hypothesis. Nevertheless, the coverage is by far not as hopeless as one might expect. In Romania, which came out as the front-runner, notarial services are even provided in 13 foreign languages! The German and French notariat share a second place, each offering their services in 11 foreign languages. English speakers are in the most comfortable situation as they can find notaries who are fluent in English in all countries with the exception of Lithuania. French speakers are in a similar favourable situation as they can find French-speaking notaries in 17 countries, while German, Italian and Spanish speakers can locate a notary fluent in either of these languages in 16 countries. All the same, those who are proficient in

[2033] Official EU languages are those languages that are listed as a country's official language on the Website of the EU: Website europa.eu, 'Countries' (https://europa.eu/european-union/about-eu/countries_en), as consulted on 14.01.2019.
[2034] Blue coloured boxes refer to unlogic findings: the search revealed that there is not a single notary in Bulgaria and Malta who speak the country's respective official language(s).

Greek, Portuguese, Dutch, Hungarian, or Polish have access to a notary who is fluent in their language in at least six other countries, Bulgarian, Finnish, Slovakian, Croatian, Slovenian, Romanian, and Swedish speakers in at least two other countries. At the lower end of the spectrum are Czech and Danish speakers who can rely on the provision of notarial services in their language in at least one foreign country. Still, they are better positioned than Estonian, Irish, Latvian, Lithuanian, and Maltese speakers, whose attempt to locate a notary abroad, who is fluent in their respective language, will not be crowned by success. As a closing remark, it must be pointed out that the findings presented in the following simply indicate whether the possibility to access notarial services in a given language exist in a particular country. They do not reveal the extent to which this possibility exists, i.e. whether this service is offered by 3196 notaries or by merely a single notary.[2035]

[2035] The figure 3196 refers to the number of notaries in the Netherlands who provide their services in English. This is the highest number of notaries in a given country that deliver their services in a given foreign language.

Table 26 – Results of the Study

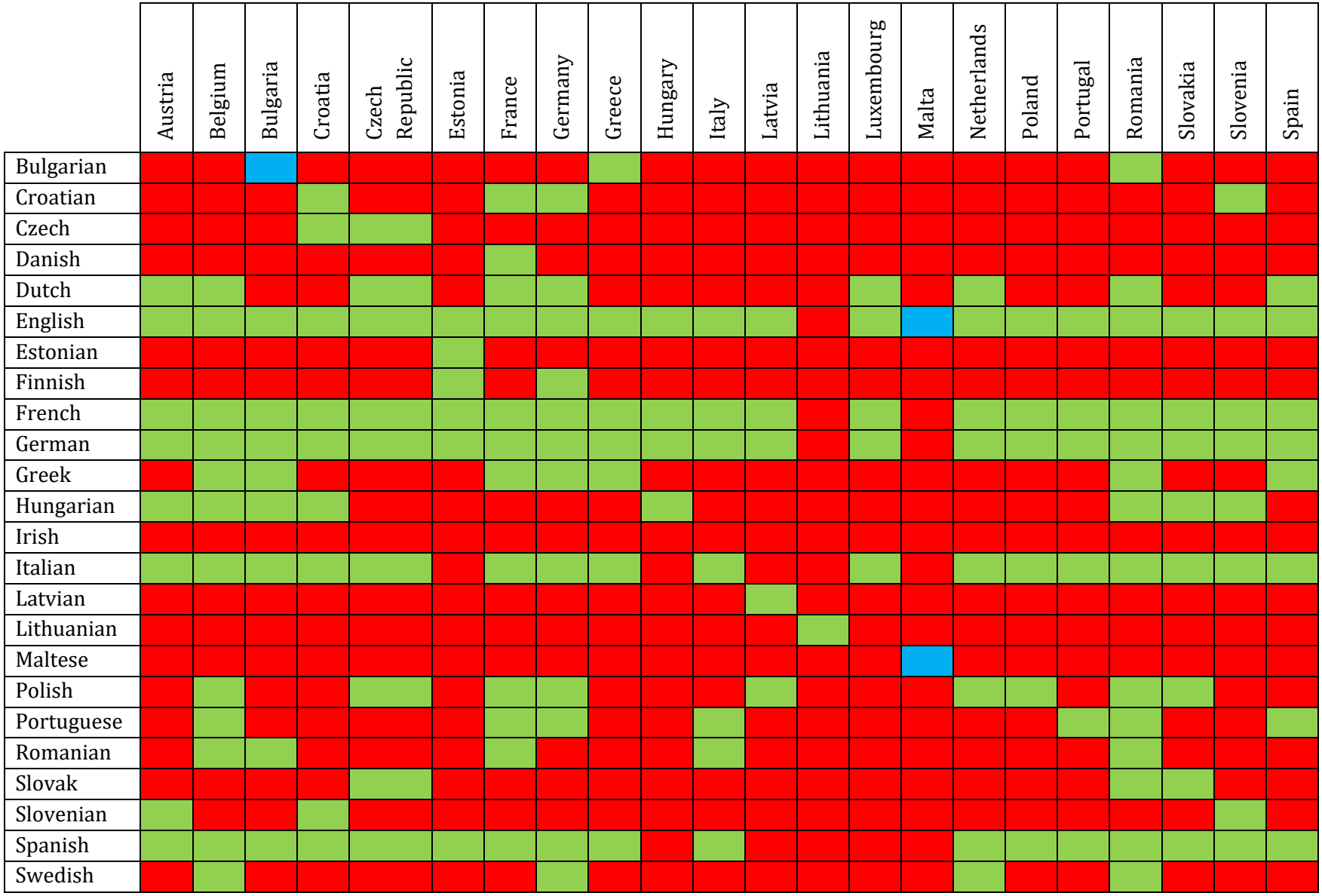


Table 27 – Results of Study after Eliminating the MS in which the Language Constitutes an Official EU Language

	Austria	Belgium	Bulgaria	Croatia	Czech Republic	Estonia	France	Germany	Greece	Hungary	Italy	Latvia	Lithuania	Luxembourg	Malta	Netherlands	Poland	Portugal	Romania	Slovakia	Slovenia	Spain
Bulgarian																						
Croatian																						
Czech																						
Danish																						
Dutch																						
English																						
Estonian																						
Finnish																						
French																						
German																						
Greek																						
Hungarian																						
Irish																						
Italian																						
Latvian																						
Lithuanian																						
Maltese																						
Polish																						
Portuguese																						
Romanian																						
Slovak																						
Slovenian																						
Spanish																						
Swedish																						

5.1.2.3 EUFides

In addition to the ENN platform, CNUE has initiated another online platform to foster notarial cross-border cooperation – EUFides, which in itself constitutes a Belgian non-profit organization ("*AISBL*").[2036] Launched in 2012, this new platform is not limited to the exchange of information (through a notarial contact point) but opens the opportunity for notaries in different CNUE member states to actively collaborate in cross-border cases in a secure digital environment, thereby accessing the same digital case file.[2037] Concretely, to initiate such an international cooperation, a notary confronted with a cross-border case would first log onto the EUFides platform and – if necessary – access the European Directory of Notaries to find a suitable foreign notary with whom they would like to collaborate.[2038] Once the foreign notary has agreed to the collaboration, the "collaboration contract" is prepared, specifying the notarial tariffs and the activities that are to be completed by each party. Afterwards, the notary generates the digital case file, uploads the relevant documents into this file and makes the file accessible to their foreign colleague, who in turn may upload documents. In the interest of efficiency, the entirety of the collaboration between the notaries for what concerns the data exchange occurs digitally through the EUFides platform.[2039] The protection of this data exchange is thus of utmost importance and it must be guaranteed that the data that is sent by one notary is identical to the data that is received by its recipient, the foreign notary. To this end, the necessary measures were taken to guard it against undesired influences so that the confidentiality of the data is secured.[2040]

At this point, not all CNUE members participate in EUFides; solely the notariats of Belgium, Germany, France, the Netherlands, Luxembourg and Spain are members of EUFides.[2041] Notaries

[2036] Website CNUE, 'EUFides' (http://www.notaries-of-europe.eu/index.php?pageID=8033), as consulted on 02.01.2019. Also see Website CNUE, 'Press Release: Launch of EUFides Project – Facilitating real estate transactions in Europe' (http://www.notaries-of-europe.eu//index.php?pageID=8050), 11.09.2012, as consulted on 02.01.2019.
[2037] Website CNUE, 'EUFides' (http://www.notaries-of-europe.eu/index.php?pageID=8033), as consulted on 02.01.2019.
[2038] Ibid.
[2039] M.T. Mielgo, 'Los Notarios Europeos facilitan las Transacciones Inmobiliarias', *Escritura Pública*, No. 78, 2012, p. 37.
[2040] Ibid. Also see P. Delgado Martín, 'EUFides, paso definitivo hacia la circulación de documentos públicos en la UE', *Escritura Pública*, No. 78, 2012, p. 39.
[2041] Website CNUE, 'CNUE Annual Report 2017', p.37 (http://www.notariesofeurope-report.eu/en/read-the-report-in-pdf/cnue-annual-report-2017-2), as consulted on 02.01.2019.

who wish to get access to EUFides must file a request to their national notarial organization.[2042] This implies that the services offered by EUFides are in principle only open to notaries who practice in one of the EUFides member countries. Nevertheless, it is possible for these notaries to employ the EUFides infrastructure to seek collaboration on a case basis with notaries who practice in a country that is a CNUE but not a EUFides member.[2043] The question that now remains is how EUFides contributes to the removal of obstacles that hinder cross-border real estate transactions. This might be illustrated best on the basis of the following example: For work-related reasons, Brian, a French national residing in Paris, is planning to move to Hamburg. A suitable family home is quickly found and Stephanie, the current owner, agrees to sell her house to Brian. Based on the principle of lex rei sitae, German law applies to the transfer of ownership. As follows from chapter 3.2.11.2, German law requires that real estate transfers are serviced by a German notary. In the absence of EUFides, this would entail for Brian that he would have to travel to Germany on multiple occasions such as to identify himself in front of the notary and to sign all relevant documents such as the contract of sale and the deed of transfer. Furthermore, if Brian is not able to speak German, translation costs will incur. The EUFides project now offers Brian to take an alternative route, enabling him to instead turn to a local notary in France, with whom he can communicate in his mother tongue and who, together with the German notary, will ensure the completion of all administrative procedures.[2044] This project has many benefits. As regards legal protection, the parties involved can profit from the advice of two legal experts, who, if they combine their knowledge, are in a better position to map out the legal effects of the real estate transfer, especially its fiscal consequences, than if they were to give that piece of advice individually.[2045] Second, on a financial level, it eliminates or at least reduces translation costs and travel expenses for the parties, although translation costs will occur if the two notaries involved do not share a common language in which they can communicate with each other. Similarly, considering that two notaries must be remunerated for the provision of their services, the notarial expenses are likely to be higher than in

[2042] Website CNUE, 'EUFides' (http://www.notaries-of-europe.eu/index.php?pageID=8033), as consulted on 02.01.2019.
[2043] Ibid.
[2044] Website CNUE, 'Launch of EUFides Project – Facilitating real estate transactions in Europe (Press Release)', Brussels, 2012 (http://www.notaries-of-europe.eu//index.php?pageID=8050), as consulted on 07.01.2019. Also see M.T. Mielgo, 'Los Notarios Europeos facilitan las Transacciones Inmobiliarias', *Escritura Pública*, No. 78, 2012, p. 36. Also see P. Delgado Martín, 'EUFides, paso definitivo hacia la circulación de documentos públicos en la UE', *Escritura Pública*, No. 78, 2012, p. 39. Also see Website CNUE, 'For 2020 The Notaries of Europe commit to a European justice policy that rises to the socio-economic challenges (Plan 2020)', 2014, p. 8 (http://www.notaries-of-europe.eu/plan2020/pdf/CNUE_Brochure2020_WEB_En.pdf), as consulted on 08.01.2019.
[2045] M.T. Mielgo, 'Los Notarios Europeos facilitan las Transacciones Inmobiliarias', *Escritura Pública*, No. 78, 2012, p. 37.

a classic case where the real estate transaction is serviced by a single notary. Needless to say, the question whether it is more cost-efficient to involve two notaries or whether it is financially favourable to follow the classic route and to accept travel and translation expenses depend on the attendant circumstances of a specific case, so that a universal answer cannot be given.

5.1.2.4 Plan 2020

In 2014, CNUE presented their strategy to "build a European justice policy that rises to the current socio-economic challenges".[2046] This strategy, commonly referred to as the Plan 2020, formulates five commitments: "Bringing new solutions for the daily lives of citizens", "Supporting business development in Europe", "Strengthening cross-border cooperation between notaries", "Making justice more efficient thanks to the authentic instrument", and "Working alongside the national administrations".[2047] Thereof, the first, third, and fourth commitment have a point of contact with the facilitation of cross-border real estate transactions. Pointedly, the first commitment, comprehends a variety of topics, ranging from the creation of PIL rules in the field of family law, the improvement of protection mechanisms for vulnerable citizens, and the encouragement of the use of mediation to resolve disputes to the furtherance of collaboration with legal practitioners outside the notariat, the simplification of concluding a mortgage in a different EU Member State, and the generation of a tool to inform citizens about the process of transferring real estate.[2048] The third commitment, focussing on international notarial cooperation, includes the launch of EUFides, the enhancement of the European Notarial Network, and the interconnection of national registers, such as the registers of wills. Additionally, an emphasis is put on the creation of possibilities for further vocational education, especially relating to the field of EU law.[2049] The fourth commitment outlines the objective to promote the free circulation of national authentic instruments within the EU, the

[2046] Website CNUE, 'CNUE News: 2020 Plan Launch – 7 October 2014', Brussels (http://www.notaries-of-europe.eu//index.php?pageID=11468), as consulted on 08.01.2019. The Plan 2020 can be downloaded on the CNUE Website: http://www.notaries-of-europe.eu/plan2020/index_en.html, as consulted on 08.01.2019.
[2047] Website CNUE, 'For 2020 The Notaries of Europe commit to a European justice policy that rises to the socio-economic challenges (Plan 2020)', 2014 (http://www.notaries-of-europe.eu/plan2020/pdf/CNUE_Brochure2020_WEB_En.pdf), as consulted on 08.01.2019.
[2048] Website CNUE, 'For 2020 The Notaries of Europe commit to a European justice policy that rises to the socio-economic challenges (Plan 2020)', 2014, p. 4-5 (http://www.notaries-of-europe.eu/plan2020/pdf/CNUE_Brochure2020_WEB_En.pdf), as consulted on 08.01.2019.
[2049] Website CNUE, 'For 2020 The Notaries of Europe commit to a European justice policy that rises to the socio-economic challenges (Plan 2020)', 2014, p. 8-9 (http://www.notaries-of-europe.eu/plan2020/pdf/CNUE_Brochure2020_WEB_En.pdf), as consulted on 08.01.2019.

advancement of European authentic instruments, and the digitalization of authentic instruments as a whole.[2050]

5.1.2.5 Buying Property in Europe

In addition to the European Directory of Notaries, CNUE has developed yet another tool for European citizen who are interested in acquiring real estate in a foreign European country. Operating since September 2015, the Website "Buying Property in Europe" offers particularly accessible information about the process of transferring real estate in each of the 22 CNUE member countries.[2051] Specifically, the Website contains answers to practical questions, which might already rise at an orientation phase before contact is sought with a notary.[2052] This tool can thus help to get a first picture of the expected transaction process. The questions are divided in three groups: "Preparation" (14 questions), "Signature of contract" (4 questions), and "Performance of contract" (13 questions).[2053] These categories are in turn divided into a small number of sub-categories. All CNUE members have in principle provided answers to all questions, though in individual cases it was noted that one or more questions were omitted from a country page. In other cases, questions were not omitted but simply listed in a different sub-category. To obtain more information, citizens can contact the national notarial head organisations, whose contact details are provided on the website or - more obvious - any notary, who practises in the respective country. All information is available in English and French and can be accessed without restrictions and free of charge.[2054] Noticeably, the Website indicates the exact date on which it was updated last, so that visitors can better assess the currentness of the presented information.

[2050] Website CNUE, 'For 2020 The Notaries of Europe commit to a European justice policy that rises to the socio-economic challenges (Plan 2020)', 2014, p. 10-11 (http://www.notaries-of-europe.eu/plan2020/pdf/CNUE_Brochure2020_WEB_En.pdf), as consulted on 08.01.2019.
[2051] Website CNUE, 'Buying Property in Europe (Press Release),' Brussels, 2015 (http://www.notaries-of-europe.eu//index.php?pageID=10609), consulted on 07.01.2019.
[2052] Ibid.
[2053] Website CNUE, 'Buying Property in Germany' (http://www.buyingmyhome.eu/Questions.aspx?c=de), as consulted on 07.01.2019.
[2054] Website Buying Property in Europe, 'Buying Property in Europe' (http://www.buyingmyhome.eu/Home.aspx), as consulted on 07.01.2019.

5.1.3 LEXUNION

LEXUNION was set up in 2002 as a non-profit organization under Belgian law to provide advice on international cases in the areas of estate planning and real estate, family and company law.[2055] To do so, the organization takes a multi-disciplinary approach, connecting lawyers, tax specialists and notaries in Europe and China. Up to this point, a total of 100+ offices have become a LEXUNION member. Looking at the European offices a bit more closely, it is however noticeable that they are all located in Western Europe (Germany, the Netherlands, Belgium, Luxembourg, Spain, France, Italy, and Switzerland) and exclusively constitute civil law jurisdictions.[2056] Therefore, LEXUNION intends to expand in Eastern Europe, China and North America. From an organizational perspective, each office has a seat in the Assembly of Delegates, whose functions are to set out the organization's strategy and to monitor the activities of the Board of Directors, which comprises eight directors and is elected every other year.[2057]

5.2 Land Registries & Cadastres

Another central driving force behind the facilitation of cross-border real estate transactions are the European land registries and cadastres. In opposite to the European notariats, they have not organized themselves in one central European head organization. Instead, two different organizations were founded in the beginning of the 2000's: the European Land Registry Association (hereafter: "ELRA") and the European Land Information Service (hereafter: "EULIS").[2058] While operating independently from each other, they concluded a Memorandum of Understanding in mid-2012 to set out their future cooperation.[2059] While ELRA still operates, EULIS was dissolved at the beginning of 2018. These European organisations are preceded by the International Property

[2055] Website LEXUNION, 'Object and values' (http://lexunion.com/objet-et-valeurs/?lang=en), as consulted on 14.01.2019. Also see Website LEXUNION, 'Areas of intervention' (http://lexunion.com/domaines-dintervention/?lang=en), as consulted on 14.01.2019.
[2056] Website LEXUNION, 'Our members' (http://lexunion.com/nos-membres/?lang=en), as consulted on 14.01.2019.
[2057] Website LEXUNION, 'Organisation' (http://lexunion.com/organisation-lexunion/?lang=en), as consulted on 14.01.2019.
[2058] The German land registrars do not participate in ELRA. Instead, their interests are represented by the European Union of Rechtspfleger (https://www.rechtspfleger.org/en/). A variety of tasks, within and outside the land registry are entrusted upon "Rechtspfleger". It appeared that the European Union of Rechtspfleger have not set up any concrete initiatives to facilitate cross-border real estate transactions. For this reason, this organisation is not further discussed.
[2059] Website ELRA, 'MoU ELRA EULIS' (https://www.elra.eu/mou-elra-eulis/), as consulted on 21.01.2019.

Registries Association and International Centre of Registration Law (hereafter: "IPRA-CINDER"), which was founded in 1972.[2060]

Table 28 – Chronological Overview of Initiatives from Land Registries and Cadastral Organisations

1972	International Property Registries Association and
	International Centre of Registration Law ("IPRA-CINDER")
	Bi-annual IPRA-CINDER International Congresses
2002	European Land Information Service ("EULIS")
	(organization)
2004	European Land Registry Association ("ELRA")
2006	European Land Information Service ("EULIS") (project)
2010	European Land Registry Network ("ELRN")
	Cross Border Electronic Conveyancing ("CROBECO") I
2013	Cross Border Electronic Conveyancing ("CROBECO") II
	Common Vision for Cadastre and Land Registry in Europe
	Interoperability Model for Land Registers ("IMOLA") I
2017	Interoperability Model for Land Registers ("IMOLA") II
	IPRA-CINDER International Review
2018	Dissolution of EULIS (organization + project)
2020	Interoperability Model for Land Registers ("IMOLA") III

5.2.1 The International Property Registries Association and International Centre of Registration Law ("IPRA-CINDER")

IPRA-CINDER was founded in Buenos Aires at the end of 1972 with the aim to create an international platform for the exchange of expertise in matters concerning land registration, especially concerning land registration law.[2061] Being currently based in Madrid, it is represented

[2060] Website IPRA-CINDER, 'About IPRA-CINDER' (http://ipra-cinder.info/en/nuestra-historia/), as consulted on 21.05.2019.
[2061] Ibid.

by the Secretary General, whose nationality remarkably determines the organization's seat.[2062] The Secretary General is elected by the General Assembly and in turn responsible for the execution of the resolutions adopted by that body.[2063] In the carrying out of their task, the Secretary General is supported by the Executive Commission.[2064] The decision-making powers are conferred upon the General Assembly, in which every member is accorded one vote.[2065] In addition to their seat in the General Assembly, the members of each continent are grouped into their own separate delegations, which are headed by a delegation president.[2066] The organizational structure of IPRA-CINDER is completed with the General Advisory Council.[2067]

Table 29 – Chronological Overview of IPRA-CINDER Initiatives

1972	International Property Registries Association and International Centre of Registration Law ("IPRA-CINDER")
	Bi-annual IPRA-CINDER International Congresses
2017	IPRA-CINDER International Review

To implement their main objective, IPRA-CINDER has taken a number of measures. One of the main activities of IPRA-CINDER is the organization of international conferences, which have been organized in a biennial rhythm ever since its foundation, whereby in single cases, a period of three years passed between two conferences.[2068] These conferences can be attended only by persons who possess either an academic or practical expertise in land registration.[2069] More recently, the IPRA-CINDER International Review was launched. So far two editions were issued (one in 2017 and the other in 2019), both of which focused on the application of blockchain technologies in land registration systems.[2070] Additionally, several members have published short papers about their

[2062] Article 10 (3)-(4) Reglamento IPRA-CINDER (2012).
[2063] Article 5 (1) and article 10 (1) Reglamento IPRA-CINDER (2012).
[2064] Article 10 (6) Reglamento IPRA-CINDER (2012).
[2065] Article 5 (1), (4) Reglamento IPRA-CINDER (2012).
[2066] Article 11 Reglamento IPRA-CINDER (2012).
[2067] Article 7 Reglamento IPRA-CINDER (2012).
[2068] Website IPRA-CINDER, 'Previous Congresses' (http://ipra-cinder.info/en/congresos-anteriores/), as consulted on 21.05.2019.
[2069] Website IPRA-CINDER, 'Congress Regulations' (http://ipra-cinder.info/en/reglamento-de-congresos/), as consulted on 22.05.2019.
[2070] Website Instituto de Registro Imobilário do Brasil, 'IPRA-CINDER International Review é lançada em evento do Banco Mundial, em Washington, D.C.' (http://www.irib.org.br/noticias/detalhes/ipra-cinder-

registration systems in English or Spanish on the IPRA-CINDER website.[2071] Contributions from European countries stem from Albania, Estonia, Hungary, England & Wales, and the Netherlands. It must not be concealed that it is advisable to enjoy these contributions with a certain degree of caution, due to the fact that they are possibly dated; the earliest publication was drafted in 1997, the most recent one in 2008. Furthermore, it offers advice on land registration matters and aims to collaborate with other international organizations, such as ELRA and to increase the number of its members.[2072] At this moment, IPRA-CINDER counts 52 member countries, which includes only a limited number of EU Member States, which is to say Austria, Belgium, Finland, France, Greece, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, and Spain.[2073] To allow quick access for interested parties, the national websites of the land registration authorities in these countries as well as the ELRA website are linked on the IPRA-CINDER homepage.[2074]

5.2.2 The European Land Information Service ("EULIS")

Table 30 – Chronological Overview of EULIS Initiatives

2002	European Land Information Service ("EULIS") (organization)
2006	European Land Information Service ("EULIS") (project)
2018	Dissolution of EULIS (organization + project)

international-review-e-lancada-em-evento-do-banco-mundial-em-washington-d-c), as consulted on 21.05.2019. Also see Website IPRA-CINDER, IPRA-CINDER International Review No2 (http://ipra-cinder.info/en/ipra-cinder-international-review-no2/), as consulted on 24.03.2020. Surprisingly, much information about this journal could not be found on the IPRA-CINDER website.

[2071] These papers can be found on: Website IPRA-CINDER, 'Registration Systems' (http://ipra-cinder.info/en/sistemas-registrales/), as consulted on 21.05.2019.

[2072] Article 2 Reglamento IPRA-CINDER (2012). Also see Website IPRA-CINDER, 'Regulations' (http://ipra-cinder.info/en/reglamento/), as consulted on 22.05.2019.

[2073] An overview of the member countries can be found on: Website IPRA-CINDER, 'Members' (http://ipra-cinder.info/en/miembros/), as consulted on 21.05.2019.

[2074] Website IPRA-CINDER, 'Useful Links' (http://ipra-cinder.info/en/enlaces-de-interes/), as consulted on 21.05.2019.

In the beginning of 2002, EULIS was founded.[2075] The objective underlying its establishment was "to provide easy worldwide access to European land and property information in order to underpin a single European property market".[2076] Four years later, in 2006, EULIS went live.[2077] The creation of EULIS constituted a collective effort from Lund University and the institutions in the Netherlands, Finland, Sweden, Scotland, England & Wales, Austria and Norway that are in charge of providing land register information.[2078] Depending on the legal system, that can be either a cadastre or a land registry.[2079] All countries however have in common that they have a digitalized database for land register information.[2080] What EULIS in fact does is to interconnect the national land registers of its members.[2081] As a result, if an Austrian notary would like to request information from the Dutch Kadaster, he could access the digital environment of the Austrian land registry, which in turn allows him to access the EULIS Portal. Through this portal, he can access the services provided by any of the other connected land registries, in our case those of the Dutch Kadaster. The notary will then be directed to the exact same service platform that is offered by the Dutch Kadaster to its national clients, which means that the Austrian notary will be confronted with a website that is completely in Dutch. The only difference is that the Austrian notary can opt for a translation of that information into English. In other words, while EULIS creates a facilitated access to the services offered by a foreign land registry, it does not standardize the national land registries' service platforms nor the information contained therein. It can therefore be still complicated to truly understand the information presented. Imagine for example a Dutch notary who accesses the database kept by HM Land Registry and finds that his client is entitled to a freehold. Unless she has some background in English law, she will not understand the provided information. What is a "freehold" or a "settlor"?

[2075] H. Ploeger & B. van Loenen, 'EULIS – At the Beginning of the Road to Harmonization of Land Registry in Europe', *European Review of Private Law*, Volume 12 No 3 -2004, p. 383.
[2076] Website Joinup, 'About European Land Information Service – EULIS' (https://joinup.ec.europa.eu/solution/european-land-information-service-eulis/about), as consulted on 15.01.2019.
[2077] H. Ploeger & B. van Loenen, 'The European Real Estate Market – Transparency, Security and Certainty through registration by EuroTitle', in: S. van Erp, A. Salomons & B. Akkermans, *The Future of European Property Law*, Munich: Sellier European Law Publishers, 2012, p. 189.
[2078] H. Ploeger & B. van Loenen, 'EULIS – At the Beginning of the Road to Harmonization of Land Registry in Europe', *European Review of Private Law*, Volume 12 No 3 -2004, p. 382.
[2079] Ibid.
[2080] H. Ploeger & B. van Loenen, 'EULIS – At the Beginning of the Road to Harmonization of Land Registry in Europe', *European Review of Private Law*, Volume 12 No 3 -2004, p. 382-3.
[2081] H. Ploeger & B. van Loenen, 'EULIS – At the Beginning of the Road to Harmonization of Land Registry in Europe', *European Review of Private Law*, Volume 12 No 3 -2004, p. 383. Also see H. Ploeger & B. van Loenen, 'The European Real Estate Market – Transparency, Security and Certainty through registration by EuroTitle', in: S. van Erp, A. Salomons & B. Akkermans, *The Future of European Property Law*, Munich: Sellier European Law Publishers, 2012, p. 189. Also see Website europa.eu, 'Land registers at European level' (https://dg-justice-portal-demo.eurodyn.com/ejusticeportal/content_land_registers_at_european_level-108-en.do), as consulted on 15.01.2019.

To counteract this complication, a set of metainformation and a EULIS Glossary were developed. The metainformation essentially provides a description of the presented information. The terms "freehold" and "settlor" would therefore be explained so that the Dutch notary is able to understand the legal dimensions of this right. In addition to an explanation of the legal concept, the EULIS Glossary translates the foreign legal terms into one's own legal language. Interestingly, within its Glossary, EULIS has also proven to be a pioneer on the attempt to create a neutral English legal terminology for this field of law, thus legal terminology that does not correspond to the legal terminology used in the English legal system.[2082] Next to the Glossary, so-called "Reference Information" is provided, which contains useful information about the national services that can be accessed through EULIS as such.[2083]

When evaluating EULIS, several advantages, especially on the administrative level, become immediately apparent. To begin with, professional customers no longer have to figure out themselves whether and if so in which ways services provided by connected foreign land registries/cadastres can be accessed. It is sufficient that customers are registered users of the digital environment provided by their own national institution.[2084] It is redundant for them to pass through the process of becoming a registered user for each foreign institution connected to the EULIS Portal separately.[2085] This ultimately also reduces the administrative burden on the side of the institutions and allows customers to access the desired information much quicker.[2086] As an additional benefit, the payment procedures are facilitated. Instead of having to pay all institutions whose services they made use of through the EULIS Portal separately, they simply pay their own national institution.[2087] It is then the national institutions who – on the basis of mutual trust - allocate the costs among each other.[2088] On the other side of the coin, when accessing the information kept by a foreign institution, EULIS users must be constantly aware of the fact that the

[2082] H. Ploeger & B. van Loenen, 'EULIS – At the Beginning of the Road to Harmonization of Land Registry in Europe', *European Review of Private Law*, Volume 12 No 3 -2004, p. 384.
[2083] House of Lords (European Union Committee), *Consumer Credit in the European Union: Harmonisation and Consumer Protection: Volume 1: Report,* London: The Stationary Office Limited, 2006, p. 17. Also see Website Joinup, 'About European Land Information Service – EULIS' (https://joinup. ec.europa.eu/solution/european-land-information-service-eulis/about), as consulted on 15.01.2019.
[2084] H. Ploeger & B. van Loenen, 'EULIS – At the Beginning of the Road to Harmonization of Land Registry in Europe', *European Review of Private Law*, Volume 12 No 3 -2004, p. 383.
[2085] Ibid.
[2086] Ibid. Website Joinup, 'About European Land Information Service – EULIS' (https://joinup. ec.europa.eu/solution/european-land-information-service-eulis/about), as consulted on 15.01.2019.
[2087] H. Ploeger & B. van Loenen, 'EULIS – At the Beginning of the Road to Harmonization of Land Registry in Europe', *European Review of Private Law*, Volume 12 No 3 -2004, p. 383.
[2088] Ibid.

foreign jurisdiction might attach a different legal value to the provided land register/cadastral information than what they are used to in their own country. After all, as can be derived from the case studies conducted in Chapter 3, the national legal systems differ greatly when it comes to the legal value that is attached to the land register information.[2089] If the users are unaware of this potential pitfall, they might implicitly assume that the information shown is complete and correct, although this might not be the case.[2090] Furthermore, accessing a foreign database might ask for the employment of a different search strategy. This is particularly true in a situation in which a user who is used to a database whose organizing unit is the parcel of land must make use of a system that is organized on the basis of the owner of a parcel of land.[2091] This in turn could have an impact on the amount and kind of information that is disclosed.

With support of the European Commission, in late 2010 and with the objective to create 'EULIS 2.0', EULIS was subjected to a general overhaul within the Land Information for Europe project ("LINE").[2092] As a part of this renewal, EULIS now also offered a limited number of gratuitous services to the ordinary citizens, among which access to the Glossary and the Reference Information.[2093] After having been poured in the form of a European Economic Interest Group in 2011, EULIS was finally dissolved on January 1, 2018.[2094] At that point, the land registries/cadastres of 21 EU and non-EU countries were connected as members of EULIS.[2095] In the framework of the European Commission's Land registers interconnection project (hereafter: "LRI"), it will be integrated in the e-Justice Portal.

[2089] H. Ploeger & B. van Loenen, 'EULIS – At the Beginning of the Road to Harmonization of Land Registry in Europe', *European Review of Private Law*, Volume 12 No 3 -2004 p. 385.
[2090] Ibid.
[2091] H. Ploeger & B. van Loenen, 'EULIS – At the Beginning of the Road to Harmonization of Land Registry in Europe', *European Review of Private Law*, Volume 12 No 3 -2004, p. 386.
[2092] H. Ploeger & B. van Loenen, 'The European Real Estate Market – Transparency, Security and Certainty through registration by EuroTitle' in: S. van Erp, A. Salomons & B. Akkermans, *The Future of European Property Law*, Munich: Sellier European Law Publishers, 2012, p. 190. Also see iLICONN Consortium, *Land Registers Interconnection feasibility and implementation analysis*, Luxembourg: Publications Office of the European Union, 2014, p. 25.
[2093] Website Joinup, 'About European Land Information Service – EULIS' (https://joinup.ec.europa.eu/solution/european-land-information-service-eulis/about), as consulted on 15.01.2019.
[2094] Ibid.
[2095] Ibid.

5.2.3 The European Land Registry Association ("ELRA")

In 2004, 12 European land registries jointly founded the Belgian non-profit organization ("*AISBL*") ELRA, which pursues the "development and understanding of the role of land registration in real property and capital markets" as well as the advancement of "a mutual understanding of land registers, to help create an open and secure Europe, serving and protecting citizens". [2096] To date, ELRA counts 33 associations in 26 countries across Europe.[2097] These European states are comprised of Turkey, Bosnia and Herzegovina, and of all EU Member States with the exception of the Czech Republic, Denmark, Germany, Hungary, and Slovakia.[2098] Not all of these associations are full members; currently, six organizations enjoy "Observing Member" status. This means that they are invited to participate in the General Assembly, as are all other associated organisations that are not officially ELRA members. The difference is however that unlike full members they are not given the right to vote in this forum. The General Assembly is presided by the ELRA president, who represents the organization externally during a two-year mandate. Together with the Secretary General, the Treasurer, and the two Administrators, the ELRA president forms the Board of Directors.

ELRA is acknowledged as the representative of the European land registries by the European Institutions. It has founded the European Land Registry Network (hereafter: ELRN) and has launched two projects – the Cross Border Electronic Conveyancing (hereafter: "CROBECO") I and II project as well as the Interoperability Model for Land Registers (hereafter: "IMOLA") I, II, and III project, all of which were financially supported by the European Commission (DG Justice).[2099] In the following, these initiatives shall be described and analysed.

[2096] Website ELRA, 'About us' (https://www.elra.eu/about-us/), consulted on 14.06.2017.
[2097] Ibid.
[2098] Website ELRA, 'Members' (https://www.elra.eu/members/), consulted on 07.03.2018. The members page leads to a slightly different count: 24 member countries and 5 observing members (with the exclusion of Estonia, which is both a full and an observing member). The members page was leading for the enumeration of the countries above.
[2099] Website ELRA, 'About us' (https://www.elra.eu/about-us/), consulted on 18.01.2019. Also see D. Wallis & S. Allanson (eds.), *European Property Rights & Wrongs*, Brussels: Wallis, 2011, p. 66.

Table 31 – Chronological Overview of ELRA Initiatives

2004	European Land Registry Association ("ELRA")
2010	European Land Registry Network ("ELRN")
	Cross Border Electronic Conveyancing ("CROBECO") I
2013	Cross Border Electronic Conveyancing ("CROBECO") II
	Common Vision for Cadastre and Land Registry in Europe
	Interoperability Model for Land Registers ("IMOLA") I
2017	Interoperability Model for Land Registers ("IMOLA") II
2020	Interoperability Model for Land Registers ("IMOLA") III

5.2.3.1 The European Land Registry Network ("ELRN")

Six years after the foundation of ELRA, in 2010, the ELRN saw the light of day.[2100] This initiative, which enjoys assistance from the European Commission, was created to "facilitate friendly access to Land Registry services at European level, providing the general public with relevant and useful information about land registration within the European Union and offering information to better understand the registration systems of the different jurisdictions".[2101] It is based on the model of the European Judicial Network. Although ELRA is the coordinator of the ELRN, it is not the case that all ELRA members are also automatically participating in the ELRN; i.e. France, Slovenia, and Turkey are not active participants.[2102] The participating ELRA members each appoint at least one ELRN contact point.[2103] It is required that the contact point fulfils three conditions: they must be a land registrar, possess legal expertise, and sufficiently master the English language.[2104] The role as a contact point brings forth a number of responsibilities towards the ELRN as well as towards their own national land registry organization.[2105] Within the ELRN, it is their duty to contribute to the publication of legal information on the ELRN, including the responsibility to keep the national

[2100] Website ELRA, 'European Land Registry Network' (https://www.elra.eu/european-land-registry-network/), consulted on 14.06.2017.
[2101] Website ELRA, 'About us' (https://www.elra.eu/about-us/), consulted on 18.01.2019.
[2102] The Slovak Republic and Bulgaria are listed as contact point but not under the header "contact point's contributions". Website ELRA, 'European Land Registry Network' (https://www.elra.eu/european-land-registry-network/), consulted on 14.06.2017.
[2103] Ibid. Also see Website ELRA, 'About us' (https://www.elra.eu/about-us/), consulted on 14.06.2017.
[2104] Ibid.
[2105] Ibid.

information provided by the ELRN up-to-date, to support each other by tending to enquiries from a foreign contact point in due time and with adequate care, and to arrange and engage in contact point gatherings. The ELRN does not disclose the personal contact information of their contact points. The contact points' page contains links that refer the interested public to the general websites of the different national land registries. Nevertheless, it is possible to directly contact a specific ELRN contact point by making use of the "Cooperation Request" function that is inherent in the ELRN platform.[2106] By simply filling in one's name and e-mail address, specifying whether the request concerns a request for "legal cooperation" or "registry cooperation", selecting one of the listed contact points, and providing information about the ground underlying the request one can submit one's concern to the contact points. At the same time, contact points are expected to nurture their own land registry with the knowledge gathered through the ELRN, especially with regard to relevant EU law.

Similarly to the role of the contact points, also the ELRN consists of an internal and an external component.[2107] The internal component is a platform for ELRN members among each other to exchange information about their respective land registration systems and to provide (practical) assistance in cross-border cases.[2108] Furthermore, it is to strengthen the correct implementation of EU and international law by land registrars.[2109] The external component is the display of factsheets on several topics related to land registration on the ELRN website, which are accessible to the broad public, though exclusively in English.[2110] In January 2019, ten factsheets were online accessible whose topics ranged from more general information on the land registration system as such to information on more specific topics such as apartment rights or the European Succession Regulation. Yet, the information disclosed in these factsheets lacks binding force.[2111] Laudably though, these factsheets reveal the year in which they were first published on the ELRN and in which they were last updated. However, it does not specify the date and month, which makes it

[2106] Website ELRA, 'ELRN: Cooperation Request' (https://www.elra.eu/european-land-registry-network/cooperation-request/), as consulted on 21.01.2019.
[2107] Website ELRA, 'European Land Registry Network' (https://www.elra.eu/european-land-registry-network/), consulted on 14.06.2017.
[2108] Ibid.
[2109] Website ELRA, 'European Land Registry Network: About us' (https://www.elra.eu/european-land-registry-network/about-us-2/), as consulted on 21.01.2019.
[2110] Website ELRA,' European Land Registry Network' (https://www.elra.eu/european-land-registry-network/), consulted on 14.06.2017. The following factsheets are currently available: "Land Registry Publicity", "Description of land registration systems", "Land Registry Proceedings", "Hidden Charges", "Condominium", "European Certificate of Succession (ECS)", "ELRD Reference Information", and "Insolvency".
[2111] Website ELRA, 'About us' (https://www.elra.eu/about-us/), consulted on 21.01.2019.

difficult for those consulting this information to estimate whether the provided information is still up to date. The only question that remains is whether all factsheets cover all ELRN jurisdictions. To provide an answer to this question, a small study was conducted on 21.01.2019. Out of the ten available factsheets, only those were included in the study, which could help to facilitate cross-border real estate transactions. Concretely, this concerned the following factsheets: “Land Registry Publicity”, “Description of land registration systems”, “Land Registry Proceedings”, “Hidden Charges”, “Condominium”, and “Land Registries & Cadastres in Europe”. The main conclusion drawn is that not all ELRN contact points have provided all factsheets. While four contact points have not distributed either of the above-mentioned factsheets, six contact points have completed all of them. The remaining 16 contact points have filled in the factsheets in different gradations. A schematic overview of the results can be found below in Table 32.

Table 32 – Overview of the Availability of the Relevant Factsheets per Contact Point

	"Land Registry Publicity"	"Description of land registration systems"	"Land Registry Proceeding"	"Hidden Charges"	"Condominium"	"Land Registries & Cadastres in Europe"
Austria						
Belgium						
Bosnia Herzegovina						
Bulgaria						
Croatia						
Cyprus						
England & Wales						
Estonia						
Finland						
Greece						
Ireland						
Italy (AdE)						
Italy (SLFdT)						
Latvia						
Lithuania						
Luxembourg						
Malta						
Netherlands						
Northern Ireland						
Poland						
Portugal						
Romania						
Scotland						
Slovakia						
Spain						
Sweden						

5.2.3.2 Cross Border Electronic Conveyancing ("CROBECO")

In a nutshell, the aim of the CROBECO project, which was launched in 2010, is to support buyers of foreign real estate through the creation of greater confidence in cross-border real estate transactions by simplifying the procedures that underlie such transactions.[2112] CROBECO offers advantages for buyers and sellers. The buyer for instance

> "can visit a trusted notary 'just around the corner' in his home country. For a native seller from the country of the plot of land the CROBECO approach might also be interesting. By accepting applicability of the contract law and forum of a foreign country he makes his property more interesting for prospective foreign buyers. He can protect his own interests by reading the bilingual deed in his own language and consult a specialist on international law in his home country to advise about the consequences of for him foreign contract law."[2113]

Two CROBECO projects need to be distinguished: CROBECO 1 and CROBECO 2.[2114] In the course of the CROBECO 1 project, the legal framework ("Crossborder Conveyancing Reference Framework" (hereafter: "CCRF")) was created, which takes as point of departure that the different (national) laws, techniques and competences that are already in place must be honoured.[2115] CROBECO therefore does not aim to harmonize these aspects but attempts to facilitate cross-border real estate transactions through a better use of the frameworks that are already available. Especially when it comes to the existing EU legal framework in the form of the Rome I and II Regulations, it could not be observed that active use was made of the possibilities enshrined therein to advance cross-border real estate transactions.[2116] It is argued that this can be changed when CROBECO

[2112] W. Louwman, Interoperability solutions for land registries, *5th ELRA Annual Publication*, 2013 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019. Also see W. Louwman & J. Vos, 'De verkrijging van buitenlands onroerend goed via een Nederlandse notaris', *JBN* 2011(2) 11. Also see the English version of this article: J. Vos, 'Using European legislation & electronic means in Cross-border conveyancing', as published on: Website ELRA, 'Articles' (https://www.elra.eu/using-european-legislation/), as consulted on 25.01.2019. In the following, reference will only be made to the published Dutch version of this article. Also see W. Louwman & J. Vos, 'De overdracht van buitenlandse onroerende zaken via de lokale notaris', *WPNR* 2013 (6992), p. 911.
[2113] W. Louwman, 'CROBECO: a future-proof system to support cross-border conveyancing', *6th ELRA Annual Publication*, 2015 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019.
[2114] Ibid.
[2115] Ibid. Also see W. Louwman & J. Vos, 'De verkrijging van buitenlands onroerend goed via een Nederlandse notaris', *JBN* 2011(2) 11. Also see W. Louwman & J. Vos, 'De overdracht van buitenlandse onroerende zaken via de lokale notaris', *WPNR* 2013 (6992), p. 912.
[2116] W. Louwman & J. Vos, 'De overdracht van buitenlandse onroerende zaken via de lokale notaris', *WPNR* 2013 (6992), p. 911.

succeeds in the development of a procedure that sets out how these possibilities can be executed in practice and not merely in theory.[2117]

At the end of 2010 and thus before the conclusion of the CROBECO 1 project in June 2012, the first CROBECO deed, drawn up by a Dutch notary, was offered for registration in Spain.[2118] The clear implementation of the CROBECO 1 framework was realized in the follow-up CROBECO 2 project, which started in 2013.[2119] In the pilot phase, only two Member States were involved: the Netherlands and Spain.[2120] From 2014 onwards also England, Wales and Portugal were involved.[2121] Due to their national legislations, CROBECO deeds could only be registered in Portugal and Spain.[2122] The CROBECO 2 project was finalized in 2014.[2123]

If a cross-border real estate transaction is realized outside the CROBECO framework, the buyer would have to turn to a legal practitioner, who is competent to draw up such a deed in the Member State in which the plot of land is located and where the deed consequently would be registered. As stated above, the lex rei sitae would then not only apply to the deed of transfer but also, as the default rule, to the contract of sale.[2124] CROBECO on the other hand allows prospective buyers to instead turn to a local legal practitioner in their own Member State to draw up the deed of

[2117] W. Louwman & J. Vos, 'De overdracht van buitenlandse onroerende zaken via de lokale notaris', *WPNR* 2013 (6992), p. 912.
[2118] W. Louwman, 'Interoperability solutions for land registries', *5th ELRA Annual Publication*, 2013 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019. Also see W. Louwman & J. Vos, 'De verkrijging van buitenlands onroerend goed via een Nederlandse notaris', *JBN* 2011(2) 11.
[2119] W. Louwman, 'CROBECO: a future-proof system to support cross-border conveyancing', *6th ELRA Annual Publication*, 2015 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019. Also see Website Kadaster, 'Jaarverslag van het Kadaster: Jaarverslag 2013', p.16 (https://www.kadaster.nl/over-ons/het-kadaster/jaarverslag).
[2120] W. Louwman, 'CROBECO: a future-proof system to support cross-border conveyancing', *6th ELRA Annual Publication*, 2015 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019. Also see S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, nr. 469. Also see W. Louwman & J. Vos, 'De verkrijging van buitenlands onroerend goed via een Nederlandse notaris', *JBN* 2011(2) 11.
[2121] Ibid.
[2122] Ibid.
[2123] W. Louwman, 'CROBECO: a future-proof system to support cross-border conveyancing', *6th ELRA Annual Publication*, 2015 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019.
[2124] Article 4 (1)(c) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6–16).

transfer.[2125] Before the deed can be drawn up, the legal practitioner must collect the necessary information from the land registry of the Member State in which the plot of land is situated.[2126] The access to this information is regulated by national law.[2127] In case of questions, the legal practitioners can either directly contact the foreign registrar or ask a registrar in their own country to link them to the foreign registrar.[2128] This assistance mechanism is a key aspect of the CROBECO project. Once the legal practitioners have collected all relevant information, they draw up the CROBECO deed. In line with the CCRF, it is the lex rei sitae that governs its form. As the deed must be understandable to parties in both countries involved, the choice was made for bilingual deeds.[2129] It goes without saying that this process presupposes that the legal practitioners are proficient in both languages. Otherwise, they are neither able to draw up the deed in the foreign language nor are they able to understand the legal information that they need to collect abroad.[2130] CROBECO deeds contain four specific conditions, which the notaries involved can retrieve from the "CROBECO-repository".[2131] In addition to the standard indemnification clause, the legal practitioners will insert choice of law conditions that determine that their own national law will apply to the (non) contractual obligations that form part of the real estate transaction.[2132] This is possible through the application of the choice of law rules for (non) contractual obligations as enshrined in article 3 Rome I Regulation and in article 14 (1) (b) Rome II Regulation.[2133] At the same time, through the application of article 25 Brussels I Regulation (recast), parties decide that

[2125] W. Louwman, 'CROBECO: a future-proof system to support cross-border conveyancing', *6th ELRA Annual Publication*, 2015 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019.
[2126] W. Louwman & J. Vos, 'De verkrijging van buitenlands onroerend goed via een Nederlandse notaris', *JBN* 2011(2) 11.
[2127] Ibid.
[2128] Ibid.
[2129] Ibid. Also see W. Louwman, 'CROBECO: a future-proof system to support cross-border conveyancing', *6th ELRA Annual Publication*, 2015 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019. Also see S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, nr. 469. Also see W. Louwman & J. Vos, 'De overdracht van buitenlandse onroerende zaken via de lokale notaris', *WPNR* 2013 (6992), p. 919.
[2130] Also see W. Louwman & J. Vos, 'De verkrijging van buitenlands onroerend goed via een Nederlandse notaris', *JBN* 2011(2) 11.
[2131] W. Louwman & J. Vos, 'De overdracht van buitenlandse onroerende zaken via de lokale notaris', *WPNR* 2013 (6992), p. 913-914.
[2132] D. Wallis & S. Allanson (eds.), *European Property Rights & Wrongs*, Brussels: Wallis, 2011, p. 67.
[2133] W. Louwman, 'Interoperability solutions for land registries', *5th ELRA Annual Publication*, 2013 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019. For a practical example on how such a condition in the CROBECO deed could be formulated, see: W. Louwman & J. Vos, 'De overdracht van buitenlandse onroerende zaken via de lokale notaris', *WPNR* 2013 (6992), p. 913.

the courts in the buyer's Member State are competent to rule on any arising dispute concerning the fulfilment of (non)contractual obligations.[2134] The inclusion of such a choice of law provision in the CROBECO deed seems to stipulate that the CROBECO deed also embraces the contract of sale. Even if the legal practitioners apply their own national law to the transaction, they must be able to oversee the legal consequences that arise not only in their own legal system but also in the legal system in which the deed will be registered.[2135] In addition, they must know which information they need to request from the foreign land register, what the legal value of that information is, under which conditions that information can be accessed and whether it is necessary to request valuable information from different sources.[2136] For this reason, the legal practitioners will need to possess in-depth knowledge about the legal system in which the deed is to be registered due to which one can safely conclude that this process requires a specialized conveyancer.[2137] To help legal practitioners in their endeavour, ELRA equips them with a toolkit called NETPRO.[2138] This system has a number of functions. First of all, on an overarching level, it contains information about the legal systems of the different participating Member States. Second, it includes a clause repository, which comprises both mandatory and optional contractual clauses for the particular Member State. The purpose of including certain optional clauses into the repository is to increase the legal protection of the buyer. These clauses are to cover for example "the different risks of unknown liabilities, public limitations and charges". Third, if it becomes necessary that certain formalities must be completed in the foreign Member State or that certain documents are needed from the foreign Member State, conveyancers can find and instruct an adequate professional, the so-called "transaction assistant", through NETPRO's professional network. In addition, as stated before, legal practitioners can turn to their own national land registry to seek assistance from the land registrars in case questions arise about the information that they need to collect from the foreign land register.[2139] Last, a choice of forum condition will be included in the CROBECO deed, which confers

[2134] W. Louwman, CROBECO: a future-proof system to support cross-border conveyancing, in: ELRA, 6th ELRA Annual Publication, 2015.
[2135] W. Louwman & J. Vos, 'De overdracht van buitenlandse onroerende zaken via de lokale notaris', *WPNR* 2013 (6992), p. 918.
[2136] W. Louwman & J. Vos, 'De verkrijging van buitenlands onroerend goed via een Nederlandse notaris', *JBN* 2011(2) 11. Also see S.E. Bartels, A.I.M. van Mierlo & H.D. Ploeger, *Mr. C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Vermogensrecht algemeen: Algemeen goederenrecht*, Deventer: Kluwer, 2013, nr. 469.
[2137] W. Louwman, 'CROBECO: a future-proof system to support cross-border conveyancing', *6th ELRA Annual Publication*, 2015 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019.
[2138] Ibid.
[2139] H.E. Bröring & W. Louwman, 'Huidige en toekomstige plaats en rol van de bewaarder bij de overdracht van onroerende zaken', *WPNR* 2011 (6875), p. 160.

jurisdiction to rule on cases that concern the (non)contractual obligations to the courts of the Member State in which the buyer resides (and the legal practitioner practices).[2140]

It is to be stressed that the use of these rules of private international law are restricted to the contractual aspects of the transfer; the registration requirements of the deed of transfer are still governed by the lex rei sitae principle. In other words, it is not possible to opt for the application of a different law other than the lex rei sitae for what concerns the registration of the deed of transfer and the transfer of ownership of the real estate are governed.[2141] In accordance with the lex rei sitae principle, it is thus still the case that the deed of transfer must be offered for registration in the Member State in which the plot of land is located. Therefore, the registration requirements are defined by the law of the place where the plot is situated.[2142] This also means that the foreign land registrars must carry the responsibility for the registration of the CROBECO deed.[2143] In particular, they will have to determine whether the CROBECO deed was drawn up by a competent legal practitioner. In cases in which deeds are offered by domestic legal practitioners, land registrars can relatively easily identify their identity through the system of qualified e-signatures. In cross-border cases, this has proven to be somewhat more problematic. The reason for this is that the countries that participate in CROBECO use different techniques, among which the software and file requirements, to realize the registration of electronic deeds.[2144] As the project's name however already discloses, CROBECO pursues the registration of electronic deeds in a foreign land register. Therefore, solutions had to be found. As a practical workaround it was determined that the foreign land registrar would receive a confirmation about the legal practitioner's competence from the latter's local land registrar.[2145] In cases where a Dutch CROBECO deed was offered for registration in Spain, the Dutch land registrar would thus confirm the legal practitioner's competence to the Spanish land registrar. Furthermore, a procedure was arranged to allow Dutch legal practitioners to

[2140] W. Louwman & J. Vos, 'De overdracht van buitenlandse onroerende zaken via de lokale notaris', WPNR 2013 (6992), p. 914.
[2141] W. Louwman & J. Vos, 'De overdracht van buitenlandse onroerende zaken via de lokale notaris', *WPNR* 2013 (6992), p. 913. Also see D. Wallis & S. Allanson (eds.), European Property Rights & Wrongs, Brussels: Wallis, 2011, p. 67.
[2142] W. Louwman, 'Interoperability solutions for land registries', *5th ELRA Annual Publication*, 2013 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019.
[2143] W. Louwman & J. Vos, 'De verkrijging van buitenlands onroerend goed via een Nederlandse notaris', *JBN* 2011(2) 11.
[2144] Ibid. Also see W. Louwman & J. Vos, 'De overdracht van buitenlandse onroerende zaken via de lokale notaris', *WPNR* 2013 (6992), p. 916.
[2145] H.E. Bröring & W. Louwman, 'Huidige en toekomstige plaats en rol van de bewaarder bij de overdracht van onroerende zaken', *WPNR* 2011 (6875), p. 160.

submit deeds to the Spanish land registrar directly and without intervention of a Dutch land registrar.[2146]

To sum up, full participation in the CROBECO project is tied to three conditions: legal practitioners must be allowed to draw up bilingual deeds, the national law must permit the registration of bilingual deeds, and it must be possible to register notarial deeds that are drawn up by a foreign legal practitioner.[2147] It is interesting to note in this regard that an ELRA survey revealed that "in 50% of the ELRA Members States the registration of foreign deeds is allowed".[2148] If these requirements are not met, it means that the involvement of a country is restricted to a one-way participation. These countries are then only involved in the first phase of the project (the drawing up of the CROBECO deed), but not in the second phase (the registration of the CROBECO deed in the land register). Another point that is worth raising is the argument that CROBECO can facilitate cross-border real estate transactions by offering the buyer the possibility to "visit a trusted notary 'just around the corner' in his home country" instead of having to make use of the services provided by a foreign legal practitioner.[2149] It is not argued that buyers will receive better legal advice from local legal practitioners, but that it might enhance their perceived experience. In itself, this is a comprehensible argument. However, in the absence of proof, it remains a hypothesis. It would be highly interesting therefore, to subject this hypothesis to empirical testing.

CNUE has taken an official stand on the CROBECO project.[2150] To begin with, the project's points of departure are critically assessed. According to ELRA, the *raison d'être* of the CROBECO project is twofold: the absence of trust and the presence of a multitude of obstacles when a European citizen wishes to acquire real estate in a different European country.[2151] According to CNUE, ELRA however

[2146] For a more technical description of this process, see: W. Louwman & J. Vos, 'De overdracht van buitenlandse onroerende zaken via de lokale notaris', *WPNR* 2013 (6992), p. 917 and W. Louwman & J. Vos, 'De verkrijging van buitenlands onroerend goed via een Nederlandse notaris', *JBN* 2011(2) 11.
[2147] W. Louwman, 'Interoperability solutions for land registries', *5th ELRA Annual Publication*, 2013 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019.
[2148] Ibid.
[2149] W. Louwman, 'CROBECO: a future-proof system to support cross-border conveyancing', *6th ELRA Annual Publication*, 2015 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019.
Also see D. Wallis & S. Allanson (eds.), *European Property Rights & Wrongs*, Brussels: Wallis, 2011, p. 67.
[2150] CNUE, *CROBECO Project – Position of the Notaries of Europe*, 2011 (http://www.notaries-of-europe.eu/files/position-papers/2011/Position-CNUE-CROBECO-18-11-11-final-EN.pdf), as consulted on 23.03.2018.
[2151] Ibid.

does not succeed in providing any clinical proof for to substantiate these claims.[2152] To concretize the existence of problems, ELRA points out several hardships that buyers have to face, which are the fact that buyers are forced to accept the intervention of a foreign legal practitioner, the application of the lex rei sitae despite the fact that they are unacquainted with this foreign law, and the fact that the official documents that must be signed by all parties are drawn up in a language other than the buyer's mother tongue.[2153] CNUE counters that these problems do not constitute a real obstacle to cross-border transactions; the nature of the Latin notariat renders these problems void.[2154] At the end, the impartiality that is inherent in the Latin notariat demands that foreign parties to an real estate transaction are informed and advised to the same extent as national parties.[2155] This standard then also demands that foreign parties – if necessary - are equipped with a translation of the documents so that they are fully aware of what they will sign.[2156] If the Latin notaries were to neglect these duties, they would quickly face strict liability.[2157] On a more global level, CNUE is not convinced that the involvement of a second registrar can be seen as a facilitation of cross-border transactions when one realizes that these transactions do work in practice when there is merely one registrar involved.[2158] Another cause of friction is the fact that CROBECO opens the possibility for the parties to give preference to a notary who is fluent in their mother tongue but rather incompetent when it comes to the lex rei sitae instead of turning to a notary who is most competent to advise them on real estate transactions in the forum rei sitae but might not be fluent in their mother tongue.[2159] Considering the complexity of these transactions, CNUE argues that CROBECO thereby makes a trade-off between legal certainty and administrative easiness and draws the following conclusion:

> "The variety and complexity of the diligence thus necessary for a real estate transaction depending the country naturally make large-scale standardization mentioned by the CROBECO project impossible."[2160]

This trade-off could also work to the disadvantage of the parties for another reason, namely because "recourse to foreign professionals and to a liability regime that is possibly different or ill

[2152] Ibid.
[2153] Ibid.
[2154] Ibid.
[2155] Ibid.
[2156] Ibid.
[2157] Ibid.
[2158] Ibid.
[2159] Ibid.
[2160] Ibid.

adapted could lead the consumer to be caught on".[2161] As a third point, CNUE highlights the fact that the CROBECO deed is certified by the registrars of the country where the notarial deed was drawn up.[2162] They thereby control whether the deed meets the registration requirements that are prescribed in their own country as opposed to the forum rei sitae.[2163] From CNUE's point of view, this is detrimental when considering the diverging roles and competences registrars have across Europe:

> "It would therefore appear clear that in many cases these registers have no professional competence to judge the full legality of a real estate act. Nor do some of them have a satisfactory liability system enabling the users to be compensated in case of error or failure to meet obligations. The CROBECO project thus appears to confer upon these registers competences that in reality are incompatible with their own nature and organization."[2164]

It is further argued that such a procedure which foresees in the certification of the CROBECO deed by the registrar of the country where the deed was drafted, would be counterproductive to the Hague Convention of 1961 on Apostille that sets out the legal framework for the recognition of foreign notarial acts.[2165] After all, once foreseen with an apostille, notarial acts must be in principle recognized by all relevant institutions of the parties to that Convention.[2166] The CROBECO deed, as argued by CNUE, however does not seem to fulfil the apostille requirements as set out in this Convention; in fact, the CROBECO procedure would rather resemble the exequatur that is threatened with extinction.[2167] Fourth, CNUE warns about the negative implications of a choice of law on the basis of the Rome I and II Regulations for both buyer and seller.[2168] This is because the parties are not free to consequently apply the law designated as applicable law to all aspects of the property transfer.[2169] This circumstance is also acknowledged by ELRA.[2170] Instead, some elements of the contract of sale will be subject to the chosen law while other elements have to be subjected to the lex rei sitae.[2171] CNUE predicts that this development will inevitably lead to a rise in legal

[2161] Ibid.
[2162] Ibid.
[2163] Ibid.
[2164] Ibid.
[2165] Ibid.
[2166] Ibid.
[2167] Ibid.
[2168] Ibid.
[2169] Ibid.
[2170] Ibid.
[2171] Ibid.

disputes.[2172] This in turn would have a negative effect on the confidence of the European citizens in real estate transactions.[2173] Fifth and last, CNUE remarks that "many Member States have conferred upon them specific missions concerning real estate transfers".[2174] Therefore, and taking into account the concerns set out above, CNUE concludes by stating that cross-border real estate transactions should rather be approached through notarial cooperation.[2175]

> "The European Notarial Network could, for example, improve the treatment of cross-border real estate sales through active cooperation between the notary from the country of residence of the seller and of the buyer, and the notary from the country of destination of the act (where the real estate is located), through the use of new technologies."[2176]

5.2.3.3 The Interoperability Model for Land Registers ("IMOLA")

EU Member States adhere to different rules and practices that regulate the access to and the structure of their land register information. As a result, it can prove to be a quite difficult endeavour to access and understand such information kept by a foreign land registry.[2177] The point of departure of the IMOLA project is to ameliorate access to foreign land register information and to create the possibility to register standardized foreign deeds.[2178] To realize this aim, a threefold solution is under development, which consists of the development of a digital standard template to present national land register information from the different ELRA Members in a uniform manner, the production of metadata in the form of a multi-lingual thesaurus that helps to explain the information contained in the standard template, and last the provision of training to legal practitioners in order to help close their knowledge gap with regard to foreign land registration

[2172] Ibid.
[2173] Ibid.
[2174] Ibid.
[2175] CNUE has implemented this method of resolution through the setting up of the EUFides project.For a description of this project, see Chapter 5.1.2.3.
[2176] CNUE, *CROBECO Project – Position of the Notaries of Europe*, 2011 (http://www.notaries-of-europe.eu/files/position-papers/2011/Position-CNUE-CROBECO-18-11-11-final-EN.pdf), as consulted on 23.03.2018.
[2177] Summary of the IMOLA Project, in: ELRA, 'Summary of the IMOLA Project', *7th ELRA Annual Publication*, 2016, p.1 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019.
[2178] Website ELRA, 'IMOLA I' (https://www.elra.eu/imola/), as consulted on 28.01.2019.

systems.[2179] IMOLA would therefore partly constitute the realization of what *Ploeger* and *Van Loenen* envisioned in 2004 as the consequential continuation of EULIS:

> "The next logical step, from the viewpoint of international accessibility of the information, and clarity about the legal implications of the provided information from the computerized systems, is the harmonization or even integration of the national land registries within the EU in one European land registry. In such a harmonized or integrated environment EULIS would be the European Cadastre on-line portal. Instead of directing the user to the individual national systems and its interface, as EULIS currently does, the future portal should provide one uniform interface. The data will be stored in the national systems, but presented in a uniform way in the portal. In this way the computerized systems do not need to be physically integrated in one European database."[2180]

Though being an ELRA project, IMOLA was co-initiated by the Dutch Kadaster and the Colegio de Registradores de la Propriedad, Mercantiles y Bienes Muebles de Espana (both being ELRA members) and EULIS.[2181] The IMOLA project was awarded a subsidy grant from the EC Civil Justice Program.[2182]

At the end of 2013, ELRA started the IMOLA I project with the purpose of creating a European Land Registry Document (hereafter: "ELRD") template together with the underlying semantic standard.[2183] Arranging national land register information into a standardized European template has proven to be a complex endeavour in practice.[2184] It almost goes without saying that comparative research forms a conditio sine qua non for the development of such a standard template. Therefore, ELRA has conducted such research to inventory the various national property

[2179] Summary of the IMOLA Project, in: ELRA, 'Summary of the IMOLA Project', *7th ELRA Annual Publication*, 2016, p.1 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019. Also see Website europa.eu, 'Land registers at European level' (https://e-justice.europa.eu/content_land_registers_at_european_level-108-en.do), as consulted on 29.01.2019.
[2180] H. Ploeger & B. van Loenen, 'EULIS – At the Beginning of the Road to Harmonization of Land Registry in Europe', *European Review of Private Law*, Volume 12 No 3 -2004, p. 387.
[2181] Summary of the IMOLA Project, in: ELRA, 'Summary of the IMOLA Project', *7th ELRA Annual Publication*, 2016, p.1 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019.
[2182] Ibid.
[2183] Website ELRA, 'New ELRA Project – IMOLA' (https://www.elra.eu/new-elra-project-imola/), as consulted on 18.01.2019. Also see Website europa.eu, 'Land registers at European level' (https://e-justice.europa.eu/content_land_registers_at_european_level-108-en.do), as consulted on 29.01.2019. For an example of a filled-in ELRD (examples are provided for Italy and Poland) and an enumeration of the guidelines underlying the ELRD, see: Website ELRA, 'IMOLA I' (https://www.elra.eu/imola/), as consulted on 28.01.2019.
[2184] J. Vos, 'Blockchain en landregistratie – wie bewaakt de bewaarder? Vrij vertaald naar de Satiren van Juvenalis (Satire VI, regel 347) (deel 2)', *JBN* 2018(11) 50.

rights, the ways in which they are registered in the land register, and the prerequisites for accessing land register information.[2185] In the end, an ELRD evolved that adheres to an A-B-C structure, whereby information about the land register object (i.e. the parcel of land) will be registered in section A, information about the owner in section B, and information about encumbrances (i.e. in the form of limited property rights) in section C.[2186] A question that is almost inherent in standardization practices is whether it can do justice to all EU land registration systems. According to ELRA, "[t]he idea was not very simplified information but a flexible model in order to include all relevant registry information".[2187] After all, it needs to provide all information necessary to enable a fair assessment of the legal situation of the parcel (or any other unit of registration).[2188] Its flexibility is however limited to a certain extent as it was originally designed for real-folio systems. However, we must not forget that some European countries (i.e. France, Belgium) still adhere to a personal folio system. For these systems, it will be more difficult to issue ELRDs because of the fact that they do not organize their own land register information in an A-B-C structure.[2189] Therefore, it might prove necessary to design a separate ELRN for personal folio systems.[2190] Considering that IMOLA is the product of judicial cooperation between the different land registries that form part of ELRA, the introduction of an ELRD constitutes bottom up harmonization.[2191]

In 2017, the IMOLA II project was launched to realize an interoperability system between the participating land registers to foster the data exchange and to produce the metadata that is needed

[2185] Summary of the IMOLA Project, in: ELRA, 'Summary of the IMOLA Project', *7th ELRA Annual Publication*, 2016, p.2 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019. Also see Website ELRA, 'IMOLA I' (https://www.elra.eu/imola/), as consulted on 28.01.2019.
[2186] Summary of the IMOLA Project, in: ELRA, 'Summary of the IMOLA Project', *7th ELRA Annual Publication*, 2016, p.3 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019. Also see J. Vos, 'Blockchain en landregistratie – wie bewaakt de bewaarder? Vrij vertaald naar de Satiren van Juvenalis (Satire VI, regel 347) (deel 2)', *JBN* 2018(11) 50.
[2187] Summary of the IMOLA Project, in: ELRA, 'Summary of the IMOLA Project', *7th ELRA Annual Publication*, 2016, p.3 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019.
[2188] Ibid.
[2189] J. Moerkerke, 'The Use of the IMOLA Template in Deed Systems', *7th ELRA Annual Publication*, 2016, p. 14 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019..
[2190] Ibid.
[2191] Summary of the IMOLA Project, in: ELRA, 'Summary of the IMOLA Project', *7th ELRA Annual Publication*, 2016, p.3 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019.

to gain a better understanding of the information contained in the ELRD.[2192] The metadata is based on a European pivot language, created by ELRA, and concerns "reference information" as well as a generic glossary, which in turn is accompanied by "national glossaries".[2193] This information allows a comparison of the various national property rights, to establish how they correspond to each other, and to facilitate the quest to find its closest equivalent in a different legal system.[2194] Therefore, with the assistance of this database, it could for instance be easily determined that the pivot term "usufruct" corresponds to the Spanish '*usufructo'*, the Italian '*usufrutto*', and the Portuguese '*usufruto'*.[2195] Nevertheless, even though these rights have similar names in the different countries, one must be aware that their legal definition is never fully identical in these countries due to differences in national legislations and interpretations in case law.[2196] To date, the following five "Reference Information Fact Sheets" have been developed and published on the ELRN Website: "LR Unit (Section A), Proprietorship (Section B), Encumbrances (Section C), Legal Value of LR Information, and Legal Effects of Registration".[2197] A study conducted on 29.01.2019 revealed that the vast majority of ELRN contact points have made all of these factsheets available. However, five ELRN contact points have not publicized any of these ELRN factsheet at the time. A schematic overview of the results can be found in Table 33. The outcome of the IMOLA II project is to be accommodated in the Land registers interconnection project.[2198]

Mid-2020, the IMOLA III project was launched, which is to continue the work carried out in the IMOLA I and II projects.[2199] Scheduled for a two-year term, it essentially aims to finalize the IMOLA project by accomplishing the advancement of the ELRD pivot language, the completion of the

[2192] Website ELRA, 'Prior Announcement IMOLA II' (https://www.elra.eu/prior-announcement-imola-ii/), as consulted on 18.01.2019. Also see Website europa.eu, 'Land registers at European level' (https://e-justice.europa.eu/content_land_registers_at_european_level-108-en.do), as consulted on 29.01.2019.
[2193] Summary of the IMOLA Project, in: ELRA, 7th ELRA Annual Publication, 2016, p. 3.
[2194] J. Vos, 'De invoering van een Europese verklaring van erfrecht en een landregistratie informatiemodel: simplificatie van het recht door invoering van formulieren?', *WPNR* 2014(7030), p. 783.
[2195] Website ELRA, 'IMOLA I' (https://www.elra.eu/imola/), as consulted on 28.01.2019.
[2196] J. Vos, 'De invoering van een Europese verklaring van erfrecht en een landregistratie informatiemodel: simplificatie van het recht door invoering van formulieren?', *WPNR* 2014(7030), p. 783.
[2197] Summary of the IMOLA Project, in: ELRA, 'Summary of the IMOLA Project', *7th ELRA Annual Publication*, 2016, p.4 as published on: Website ELRA, 'Articles' (https://www.elra.eu/publications/elra-annual-publication/), as consulted on 13.07.2019. Also see Website ELRA, 'European Land Registry Network' (https://www.elra.eu/european-land-registry-network/), as consulted on 29.01.2019.
[2198] For a description of the Land registers interconnection project, see Chapter 5.3.3.
[2199] Website ELRA, 'Kick Off Conference' (https://www.elra.eu/imola-iii/kick-off-imola-iii/), as consulted on 08.07.2020.

required technical infrastructure, its implementation by the national land registry organisations, and the connection to the e-Justice Portal.[2200]

[2200] Ibid. Also see J. Camy, 'IMOLA III: Objectives and expected results', as publishes on: Website ELRA, 'Kick Off Conference' (https://www.elra.eu/imola-iii/kick-off-imola-iii/), as consulted on 08.07.2020. Also see Website ELRA, 'IMOLA III' (https://www.elra.eu/imola-iii/), as consulted on 08.07.2020.

Table 33 – Overview of the Availability of the ELRN Factsheets per Contact Point

	"LR Unit (Section A)"	"Proprietorship (Section B)"	"Encumbranches (Section C)"	"Legal Value of LR Information"	"Legal Effects of Registration"
Austria					
Belgium					
Bosnia Herzegovina					
Bulgaria					
Croatia					
Cyprus					
England & Wales					
Estonia					
Finland					
Greece					
Ireland					
Italy (AdE)					
Italy (SLFdT)					
Latvia					
Lithuania					
Luxembourg					
Malta					
Netherlands					
Northern Ireland					
Poland					
Portugal					
Romania					
Scotland					
Slovakia					
Spain					
Sweden					

5.2.4 A Common Vision for Cadastre and Land Registry in Europe

On 22 and 23 October 2013 the Plenary Meeting of the Permanent Committee on Cadastre in the European Union was held in Vilnius.[2201] On the second day of this meeting, a "Common Vision for Cadastre and Land Registry in Europe" was finally agreed upon and signed by the European head organizations of cadastres and land registries, namely the Council of European Geodetic Surveyors ("CLGE"), ELRA, EULIS, EuroGeographics, and the Permanent Committee on Cadastre in the European Union ("PCC").[2202] The agreed vision is formulated as follows:

> "Society recognizes that Cadastral and Land Registration information and services in Europe are fundamental for a sustainable economic, social and environmental development in Europe. Information and services from the Cadastral and Land Registry Institutions/ Authorities throughout Europe are constantly innovated and tailored to meet the needs for land tenure, land value, land use, and all other related land development functions on both National and European level."

To implement this vision, the signatories first and foremost pledge cooperation with the intention to not only increase the understanding of policy makers that land register and cadastral information is of high importance for society on many different levels, but also to get this vision better through to the European Institutions.[2203]

[2201] Website EuroGeographics, 'A Common Vision for Cadastre and Land Registry in Europe' (http://www.eurogeographics.org/news/pcc-eurogeographics-elra-eulis-and-clge), as consulted on 27.03.2018. Established in 2002, the PCC aims to create a platform for European cadastres to exchange knowledge with each other, to represent their interests in the European arena, especially in the interaction with EU and other national institutions, and to strengthen the cooperation between the different national cadastres in Europe and in relation to those using the cadastral information. See: Website PCC, 'About us' (http://www.eurocadastre.org/aboutus.html), as consulted on 14.01.2019. Due to the fact that the PCC is primarily involved in the cadastral registration of land as opposed to the registration of rights on the land, it will not be discussed in more detail.

[2202] Website EuroGeographics, 'A Common Vision for Cadastre and Land Registry in Europe' (http://www.eurogeographics.org/news/pcc-eurogeographics-elra-eulis-and-clge), as consulted on 27.03.2018. The document can be found on: Website EuroGeographics, 'An Agreement "Common Vision" for Cooperation on Cadastre and Land Registry Issues (http://www.eurocadastre.org/pdf/vilnius_oct2013/PCC%20vision%20paper_final%202013%20Oct.pdf), as consulted on 27.03.2018.

[2203] Website EuroGeographics, 'An Agreement „Common Vision" for Cooperation on Cadastre and Land Registry Issues' (http://www.eurocadastre.org/pdf/vilnius_oct2013/PCC%20vision%20paper_final%202013%20Oct.pdf), as consulted on 27.03.2018.

5.3 European Union

The EU plays both a more passive and a more active role in the facilitation of cross-border real estate transactions. More passively, as has been stated above, the EU has been providing financial support in the form of grants to CNUE, ELRA, and EULIS. On a more active level, in 2010 it has created the e-Justice Portal and stimulated the setting up of five large-scale pilots to facilitate the digital provision of governmental services in European cross-border settings (E-CODEX, EPSOS, PEPPOL, SPOCS, and STORK).[2204] These pilots pursue to implement this aim in different fields. It is for this reason that only the e-CODEX project (e-Justice Communication via Online Data Exchange), which is most relevant to this research, shall be discussed in more detail below. However, it must be acknowledged that these pilots are not developed in isolation; the building blocks that were developed by the other pilots were partly incorporated in e-CODEX.[2205]

Table 34 – Chronological Overview of EU Initiatives[2206]

2002	European Judicial Network in Civil and Commercial Matters ("EJN")
2004	InterActive Terminology for Europe ("IATE")
2009	e-Justice Portal
2010	e-Justice Communication via Online Data Exchange ("e-CODEX")
2016	Land Registers Interconnection Project ("LRI")
Unknown	EU Vocabularies

[2204] A. Schmidt, *Considering e-CODEX: On Agent-Based Modeling for Normative Debates*, Paris/Helsinki: Dot Legal Publishing, 2019, p. 30 to be found on: Website e-CODEX, 'Publications' (https://www.e-codex.eu/sites/default/files/2019-04/Concerning%20e-CODEX%20by%20Aernout%20Schmidt_0.pdf) as consulted on 27.05.2019. For an overview of these pilots, see: Website European Commission, 'Effective online public services across borders (Large Scale Pilot projects)' (https://ec.europa.eu/digital-single-market/en/news/effective-online-public-services-across-borders-large-scale-pilot-projects), as consulted on 27.05.2019.

[2205] M. Velicogna and E. Steigenga, *Can complexity theory help understanding tomorrow e-Justice?*, 2016, p. 11 to be found on: Website e-CODEX, 'Publications' (https://www.e-codex.eu/sites/default/files/2019-03/Velicogna_Steigenga_2016_-_Can_complexity_theory_help_understanding_tomo.pdf), as consulted on 27.05.2019.

[2206] In the interest of safeguarding the readability of the descriptions of those initiatives, it was decided to not discuss these in a chronological order.

5.3.1 The e-Justice Portal

In 2007, the EU Member States gave the starting signal to set up the European e-Justice Portal, "an electronic 'technical platform' (which is) conceived as a future electronic one-stop-shop in the area of justice", thus creating a central port of call for European citizens and legal practitioners who are confronted with a cross-border case.[2207] As follows from the Multi-Annual European e-Justice Action Plan 2009-2013, the responsibility to carry out this endeavour lay with the European Commission, who accomplished their task by 2009 when the e-Justice Portal was functional and running.[2208] In principle, the Portal's content can be accessed anonymously and free of charge by the broader public in all official EU languages.[2209] This does not take away that accessing certain functions yet requires prior authorisation.

In addition to the European Judicial Network in Civil and Commercial Matters (hereafter: "EJN"), which shall be discussed in the following, the e-Justice Portal includes the European Judicial Atlas in civil matters, which lists all relevant EU legal instruments in the field of civil law.[2210] Upon selecting one of these instruments, one is directed to webpage that comprises all practical information that is available on the e-Justice Portal on that topic. Therefore, when selecting the European Succession Regulation, one is directed to the corresponding webpage that is already available in the EJN. The information that is made accessible through the EJN is openly accessible.

5.3.1.1 The European Judicial Network in Civil and Commercial Matters ("EJN")

The EJN was launched in 2001 and fully functional in December 2002.[2211] Aiming at the provision of practical support when facing cross-border legal issues in the areas of civil and commercial law, the

[2207] iLICONN Consortium, *Land Registers Interconnection feasibility and implementation analysis*, Luxembourg: Publications Office of the European Union, 2014, p. 18.
[2208] Notices from European Union Institutions and Bodies: Council, Multi-annual European e-Justice action plan 2009-2013 (OJ C 75, 31.3.2009, p. 1–12) , para.. 62.
[2209] Notices from European Union Institutions and Bodies: Council, Multi-annual European e-Justice action plan 2009-2013 (OJ C 75, 31.3.2009, p. 1–12), para..41-42.
[2210] Website e-Justice Portal, 'European Judicial Atlas in civil matters' (https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-321-en.do), as consulted on 01.02.2019.
[2211] 2001/470/EC: Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (OJ L 174, 27.6.2001, p. 25–31). Also see Website e-Justice Portal, 'European Judicial Network in Civil and Commercial Matters' (https://e-justice.europa.eu/content_european_judicial_network_in_civil_and_commercial_matters-21-en.do), as consulted on 01.02.2019. Also see Website e-Justice Portal, 'European Judicial Network in Civil and Commercial Matters: About the Network' (https://e-justice.europa.eu/content_about_the_network-431-

EJN offers different means to reach that aim, which can be grouped in three clusters: (a) cross-border cooperation between European legal practitioners, who can safely exchange documents through the European Commission's CIRCABC ("Communication and Information Resource Centre for Administrations, Businesses and Citizens") platform, (b) the creation of guides and factsheets for both citizens and legal practitioners on a variety of topics such as land registries, succession law, legal aid, and mediation, and (c) the provision of digital versions of the forms set out in the different European instruments, such as the European Certificate of Succession.[2212] In the realisation of these services, the EJN relies on a minimum of one national contact point per EU Member State. The possibility to contact the national contact points is restricted to registered EJN members.[2213] However, the ordinary citizen is not left behind as the e-Justice Portal also offers search engines to locate legal practitioners, such as lawyers and notaries.[2214] The European Directory of Notaries was integrated to the e-Justice Portal to provide the search engine to find a notary in a different EU Member State.[2215] The EJN enjoys support from CNUE, ELRA and the EU Member States.[2216] Denmark is the only EU Member State, which decided against participation in the EJN. The EJN

en.do), as consulted on 01.02.2019. Also see Website IATE, 'About IATE' (https://iate.europa.eu/home), as consulted on 12.03.2019. Also see Website europa.eu, 'EU Vocabularies' (https://publications.europa.eu/en/web/eu-vocabularies), as consulted on 12.03.2019.

[2212] An overview of the publications can be found here: Website e-Justice, 'European Judicial Network in civil and commercial matters: EJN's publications' (https://e-justice.europa.eu/content_ejn_s_publications-287-en.do), as consulted on 01.02.2019 and Website e-Justice, 'European Judicial Network in civil and commercial matters: Information on national law (information sheets)' (https://e-justice.europa.eu/content_information_on_national_law_information_sheets-439-en.do), as consulted on 01.02.2019. Also see Website e-Justice Portal, 'European Judicial Network in civil and commercial matters: Members' section' (https://e-justice.europa.eu/content_members__section-440-en.do), as consulted on 01.02.2019. Also see Website European Commission, 'CIRCABC', (https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp) as consulted on 22.05.2019. Also see Website CIRCABC, 'CIRCABC' (https://circabc.europa.eu/ui/welcome), as consulted on 22.05.2019.

[2213] Registered EJN members can contact national contact points through the e-Justice Portal, see: Website e-Justice Portal, 'European Judicial Network in civil and commercial matters: Members' section' (https://e-justice.europa.eu/content_members__section-440-en.do), as consulted on 01.02.2019.

[2214] Website e-Justice Portal, 'Find a …' (https://e-justice.europa.eu/content_find_a-113-en.do), as consulted on 01.01.2019.

[2215] Website CNUE, 'Notaries of Europe call for greater legal certainty for international couples (Press Release)', 2011 (http://www.notaries-of-europe.eu/index.php?pageID=239&change_language), as consulted on 01.02.2019.

[2216] Website CNUE, 'CNUE position on the European Commission's proposal for a DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters (COM(2008) 380 of 23 June 2008) (Position Papers)', 2008 (http://www.notaries-of-europe.eu/index.php?pageID=4566), as consulted on 01.02.2019. Also see Website CNUE, 'Why integrate the legal professions in the European Judicial Network? (Position Paper)', 2008, (http://www.notaries-of-europe.eu/index.php?pageID=4562), as consulted on 01.02.2019. Also see Website CNUE, 'EU notariats intend to play an active role in the European Judicial Network in civil and commercial matters (Press Release)', 2006 (http://www.notaries-of-europe.eu/index.php?pageID=439), as consulted on 01.02.2019. also see Website ELRA, 'European Judicial Network', 2007 (https://www.elra.eu/european-judicial-network/), as consulted on 01.02.2019.

contains a link to the glossary ("InterActive Terminology for Europe"; hereafter: "IATE") (2004) and the thesaurus ("EU Vocabularies") used and kept by the EU institutions, both of which also include property law terminology.[2217]

5.3.2 e-Justice Communication via Online Data EXchange ("e-CODEX")

On a legal level, the EU has already facilitated civil and criminal justice through the adoption of a number of instruments that are to harmonize the national laws of the EU Member States.[2218] To reach an optimal result however, it became apparent that these instruments yet had to be transposed to a suitable digital environment.

> "At a time when the physical barriers between countries in the European Union have been removed, the digital era poses new cross-border challenges: Challenges related to different standards, different protocols, the cross-border recognition of identities, mandates, electronic signatures, and so forth."[2219]

In other words, cooperation on a technical level had to catch up with the legal cooperation that had already been achieved. To this end the e-CODEX project was set up, aiming to realize this technical cooperation in the context of civil and criminal justice through the provision of suitable ICT solutions that allow parties from different countries to digitally communicate and exchange information "more transparent, efficient and economic" through a protected digital infrastructure.[2220] Specifically, these solutions were achieved through the development of "[c]ommon technical standards in the field of e-Identity, e-Signatures, e-Payment and e-Filing".[2221] As stated above, these standards did not have to be completely designed from scratch; instead the

[2217] Website e-Justice Portal, 'Glossaries and terminology' (https://e-justice.europa.eu/content_glossaries_and_terminology-119-en.do), as consulted on 01.02.2019.
[2218] M. Velicogna & G. Lupo, *From drafting common rules to implementing electronic European Civil Procedures: the rise of e-CODEX*, p. 1-2, as published on: Website e-CODEX, 'Publications' (https://www.e-codex.eu/sites/default/files/2018-09/Velicogna_Lupo-2016-From_drafting_common_rules_to_implementing_elect.pdf), as consulted on 26.05.2019.
[2219] E-CODEX, *e-CODEX: Facts & Figures*, to be found on: Website e-Codex, 'Publications' (https://www.e-codex.eu/sites/default/files/2019-03/e-codex_general_digital.pdf), as consulted on 26.05.2019.
[2220] Ibid.
[2221] Website European Commission, 'Effective online public services across borders (Large Scale Pilot projects)' (https://ec.europa.eu/digital-single-market/en/news/effective-online-public-services-across-borders-large-scale-pilot-projects), as consulted on 27.05.2019. Also see G. Pangalos, I. Salmatzidis & I. Pagkalos, 'Using IT To Provide Easier Access To Cross-Border Legal Procedures For Citizens And Legal Professionals - Implementation Of A European Payment Order E-CODEX Pilot', *International Journal for Court Administration*, Vol. 6 No. 2, December 2014, p. 4-5.

solutions that were developed within the other four large-scale projects could be partly taken over.[2222]

Co-funded by the EU, this large-scale pilot was carried out between 2010 and 2016.[2223] All EU Member States (with the exception of Bulgaria, Cyprus, Denmark, Luxemburg, Slovakia, Slovenia, and Sweden) as well as Jersey, Turkey, CNUE, and The European Lawyers ("CCBE") participated in this project. As a core point of departure, e-CODEX is "respecting existing national solutions" and offering their solutions to the Member States free of charge.[2224] Furthermore, the Member States are free to determine the extent to which they wish to make use of these solutions. Beginning in 2013, the technical solutions designed in the course of this project were eventually scrutinized in a number of realistic use cases in the area of civil and criminal justice.[2225] So far, e-CODEX has found application in a number of projects, such as the Interconnection of Insolvency Procedures.[2226] Although none of these projects are directly related to the facilitation of cross-border real estate transactions, it does not take away that projects intending to facilitate the cross-border communication and exchange of deeds and related documents should carefully consider the possibility to make use of this technical infrastructure to avoid reinventing the wheel. In the IMOLA project, ELRA has taken e-CODEX into account.[2227] It could not be retrieved whether the relevant CNUE projects have made use of the ICT solutions offered by e-CODEX.

[2222] M. Velicogna & E. Steigenga, *Can complexity theory help understanding tomorrow e-Justice?*, 2016, p. 11 tob e found on: Website e-CODEX, 'Publications' (https://www.e-codex.eu/sites/default/files/2019-03/Velicogna_Steigenga_2016_-_Can_complexity_theory_help_understanding_tomo.pdf), as consulted on 27.05.2019. Also see M. Velicogna & E. Steigenga, *From drafting common rules to implementing electronic European Civil Procedures: the rise of e-CODEX*, p. 10 to be found on: Website e-Codex, 'Publications' (https://www.e-codex.eu/sites/default/files/2018-09/Velicogna_Lupo-2016-From_drafting_common_rules_to_implementing_elect.pdf), as consulted on 27.05.2019.
[2223] E-CODEX, *e-CODEX: Facts & Figures*, to be found on: Website e-Codex, 'Publications' (https://www.e-codex.eu/sites/default/files/2019-03/e-codex_general_digital.pdf), as consulted on 26.05.2019.
[2224]Ibid. Also see E-CODEX, *e-CODEX: Pilots*, to be found on Website e-CODEX, 'Publications' (https://www.e-codex.eu/sites/default/files/2019-03/e-codex_pilots_digital.pdf), as consulted on 26.05.2019.
[2225] For a specification of thes e use cases, see: E-CODEX, *e-CODEX: Pilots*, to be found on Website e-CODEX, 'Publications' (https://www.e-codex.eu/sites/default/files/2019-03/e-codex_pilots_digital.pdf), as consulted on 26.05.2019.
[2226] For an overview of these projects, see: Website e-CODEX, 'Projects' (https://www.e-codex.eu/projects), as consulted on 26.05.2019.
[2227] Website ELRA, 'IMOLA 1' (https://www.elra.eu/imola/), as consulted on 27.05.2019. The e-CODEX project was not concluded at the point of time when the CROBECO project was set up.

5.3.3 Land Registers Interconnection Project ("LRI")

In the beginning of 2016, the European Commission - DG Justice launched the LRI to create one central gateway to access land register information from all EU Member States that decide in favour of this project within the e-Justice framework.[2228] The actual setting up of this project was preceded by extensive research commissioned by the European Commission and conducted by the iLICONN Consortium as to determine whether an LRI should be pursued that is to form part of the e-Justice Portal.[2229] The results of this research were published in the "Land Registers Interconnection feasibility and implementation analysis" (hereafter: "Feasibility Study").[2230] Taking into account the interconnection already achieved within EULIS, the LRI could take three different routes to realize such an interconnection: the e-Justice Portal (a) designs with its own method of interconnection, (b) "interconnects EULIS and Member State registers", or (c) "integrates and extends the EULIS platform".[2231] In the end, the third route was given preference to.[2232] To implement this solution, a two-step approach is proposed:

> "Phase 1 would address the following questions:
> - Solving the legal diversity by preparing standard clarification about the legal value and possible use of provided data;
> - Reducing language issues by translating fixed labels, proposing multiple choice pre-filled forms (e.g. for reporting a legitimate interest) and standard disclaimers as well as by implementing a glossary;
> - Implementing a uniform registration process (targeted to all users, without providing specific access rights);
> - Building a common search form, complemented with optional fields and a declaration of legitimate interest;
> - Providing standard and uniform payment/invoicing facilities."[2233]

[2228] Website Joinup, 'About European Land Information Service – EULIS' (https://joinup.ec.europa.eu/solution/european-land-information-service-eulis/about), as consulted on 15.01.2019.
[2229] iLICONN Consortium, *Land Registers Interconnection feasibility and implementation analysis*, Luxembourg: Publications Office of the European Union, 2014, p. 8.
[2230] The Feasibility Study can be accessed through the Publications Office of the European Union: Website Publications Office of the European Union, 'EU Publications: Land Registers Interconnection feasibility and implementation analysis' (https://publications.europa.eu/en/publication-detail/-/publication/831afdff-311c-4177-8d53-1d8d634b1d10/language-en), as consulted on 15.01.2019.
[2231] iLICONN Consortium, *Land Registers Interconnection feasibility and implementation analysis*, Luxembourg: Publications Office of the European Union, 2014, p. 12.
[2232] iLICONN Consortium, *Land Registers Interconnection feasibility and implementation analysis*, Luxembourg: Publications Office of the European Union, 2014, p. 88.
[2233] iLICONN Consortium, *Land Registers Interconnection feasibility and implementation analysis*, Luxembourg: Publications Office of the European Union, 2014, p. 10.

In the second stage of the project, the possibility for foreign legal practitioners to access information kept by the land registries will be created. Furthermore, the national processes will be adapted to the extent possible in order to process their requests on-line.[2234]

Interestingly, the research conducted by the iLICONN Consortium revealed that the majority of Member States positively assess the idea of setting up an LRI; only "8 Member States would not wish to participate in a possible pilot, however, this is mostly due to them being burdened by their current workload/projects and, therefore, this should not be interpreted to mean resistance against a possible Land Registers Interconnection project".[2235] CNUE by contrast, which has published its opinion on the "Multiannual European e-Justice Action Plan 2014-2018", finds clear words for the pursuit of setting up a LRI:

> "It may be observed that the benefit of interconnecting the land registers for consultation only – and even more for the possible purposes of interoperability – would be extremely limited and even prejudicial to citizens and businesses seeking information and to professionals in their daily practice".[2236]

CNUE points out that such an interconnection is difficult to realize due to the discrepancy of national laws and organizational structures that govern land registration in the different Member States. Furthermore, it is argued that the LRI would expose European citizens to several perils. To begin with, facilitating access to land register information to European citizens, who are unable to interpret and thus understand the provided information without the assistance of legal experts, poses a risk to legal certainty. At the same time, due regard must be given to the privacy of the registered right holders. On a more general level, CNUE argues that "[p]ilot projects for the interconnection of land registers, such as EULIS, have not proved their benefit to date, particularly given the low number of consultations".[2237]

[2234] iLICONN Consortium, *Land Registers Interconnection feasibility and implementation analysis*, Luxembourg: Publications Office of the European Union, 2014, p. 11.
[2235] iLICONN Consortium, *Land Registers Interconnection feasibility and implementation analysis*, Luxembourg: Publications Office of the European Union, 2014, p. 37.
[2236] Website CNUE, 'Position Papers: Position of the CNUE concerning the e-Justice Action Plan 2014-2018', 2014 (http://www.notaries-of-europe.eu/index.php?pageID=11156), as consulted on 29.01.2019. The e-Justice Action Plan can be consulted via: Website EUR-Lex,' Multiannual European e-Justice Action Plan 2014-2018' (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XG0614(01)), as consulted on 29.01.2019.
[2237] Website CNUE, 'Position Papers: Position of the CNUE concerning the e-Justice Action Plan 2014-2018', 2014 (http://www.notaries-of-europe.eu/index.php?pageID=11156), as consulted on 29.01.2019.

In addition to CNUE, also the French and German ministries of justice have taken a critical stand on this project, which they laid down in a non-paper.[2238] In short, it is questioned whether a valid legal basis exists for this project and whether there are any fruits to be borne by accomplishing an interconnection between national land registers. Particularly, the risk is pointed out that this project could undermine the privacy of those who are entitled to a property right that is registered in the land register. Further, it is emphasized that while the project would facilitate the access to land register information, it will then be to the European citizens to ensure that they draw the correct conclusions from the information they receive. What is more, it is stressed that in many jurisdictions cadastral and land registers exist, which contain diverging sets of information as they fulfil different purposes. Finally, it is argued that the interconnection would lead to an unnecessary growth of administrative burdens for the connected land registries.

5.4 European interest groups

In addition to the European and international organisations, three interest groups could be identified that are active in the real estate industry: the European Land Owners' Organization ("ELO"), the European Holiday Home Association ("EHHA"), and the International Union of Property Owners (original: "Union Internationale de la Propriété Foncière Batie"; hereafter: "UIPI").[2239] In opposite to the ELO, which focuses on sustainability issues in European rural areas and the EHHA, which dedicates itself to the improvement of the short term rental sector, only the UIPI engages itself in the facilitation of cross-border real estate transactions.

Table 35 – Chronological Overview of Initiatives by European Interest Groups

1923	International Union of Property Owners ("UIPI")
Unknown	Property Legal Advice Network ("PLAN")

[2238] Non-paper by the French and German delegations, 'e-Justice Working Party: Interconnection of land registries', 7 September 2005. At the time of writing, this non-paper could no longer be accessed through the internet. Those who wish to consult the non-paper can consult the author.
[2239] Website ELO, 'Vision' (https://www.europeanlandowners.org/about-elo/vision), as consulted on 26.05.2019. Also see Website EHHA, 'Vision' (http://ehha.eu/vision/), as consulted on 26.05.2019. Also see Website UIPI, 'History' (https://www.uipi.com/about-uipi/history/), as consulted on 26.05.2019.

Set up in Paris, almost 100 years ago, in 1923, UIPI is a non-profit organisation ("ASBL") that commits itself to the representation of the interests of those who own private property in one of the European countries.[2240] Hereby, UIPI membership is exclusively open to the national property owners' organisations and not to the individual private property owner as such.[2241] To date, 29 such organisations are UIPI members, covering 28 European countries.[2242] Contrary to possible first assumptions, these 28 countries do not exactly conform to the 28 EU Member States; the respective national organisations of Latvia, Lithuania, Luxembourg, Malta, and Romania do not participate in UIPI. Instead, membership includes non-EU countries, namely Albania, Bulgaria, Monaco, Norway, Serbia, and Switzerland.

Considering that "almost all EU areas impact on real estate and [that] there are about 50 directives that have a direct effect on real estate and the interests of European homeowners and private landlords", UIPI takes a rather broad focus on the topic and engages itself in a number of different policy areas, including sustainability, taxation, renting, restitution after expropriation, construction, "European Economic Governance", and the EU internal market.[2243] As a consequence, not all UIPI projects are equally relevant to the facilitation of cross-border real estate transactions.[2244] In this context, the most relevant project is the "Property Legal Advice Network" (hereafter: "PLAN"), that is established among several of the UIPI members, that is to say the respective national organisations of Albania, Austria, Belgium, Cyprus, Germany, Greece, Italy, Ireland, Norway, Poland, Spain, Slovenia, Switzerland, Sweden, and the UK.[2245] This project offers (oral) legal assistance to members of these organisations, who are confronted with legal difficulties that concern real estate in one of the other participating member countries, including but restricted to legal issues that might arise in the process of buying or selling real estate.[2246] To access this service, one merely has to contact their own national organisation, which will then connect you to a legal practitioner in the forum rei sitae.[2247] It is unclear however to what extent this service is free of charge. In addition to PLAN, UIPI encourages the knowledge exchange among its members on a broader scale. To inform

[2240] Website UIPI, 'About UIPI' (https://www.uipi.com/about-uipi/), as consulted on 26.05.2019.
[2241] Website UIPI, 'UIPI Members' (https://www.uipi.com/members/), as consulted on 26.05.2019.
[2242] The list of UIPI Members can be found on: Website UIPI, 'UIPI Members' (https://www.uipi.com/members/), as consulted on 26.05.2019.
[2243] Website UIPI, 'Policy Areas' (https://www.uipi.com/policy/), as consulted on 26.05.2019.
[2244] An overview of all projects can be found on: Website UIPI, 'Projects' (https://www.uipi.com/projects/), as consulted on 26.05.2019.
[2245] Website UIPI, 'Plan' (https://www.uipi.com/projects/the-legal-advice-plan/), as consulted on 26.05.2019.
[2246] Ibid.
[2247] Ibid.

each other about the different aspects that are of importance for private property owners, UIPI has gathered that knowledge and published it in reports on their website.[2248] So far, such comparative reports have been produced with a focus on taxation issues and the rental industry.[2249]

5.5 Other international organizations

The problems faced in European cross-border real estate transactions are not exclusively unique to the European market but also occur in other parts of the world. It is therefore not surprising that in addition to European notariats, cadastres, land registries, academics, and the EU itself, also a number of other international organizations, being the International Federation of Surveyors (hereafter: "FIG"), the United Nations' Food and Agriculture Organization (hereafter: "FAO"), the UNECE Committee on Urban Development, Housing and Land Management, the Land Portal Foundation, and the World Bank have set up initiatives to tackle these problems. In the following, these initiatives shall be discussed.

Table 36 – Chronological Overview of Initiatives Taken by other International Organisations

1947	UNECE Committee on Urban Development, Housing and Land Management
1998	Cadastre 2014
1999	Multilingual thesaurus on land tenure – French version
	Bi-annual WPLA sessions (start)
	WPLA reports incl. glossary of terms (start)
	Annual World Bank Conference on Land and Poverty (start)
2002	Doing Business
	Land Administration Domain Model ("LADM") (development)
2003	Multilingual thesaurus on land tenure – English and Spanish version
2009	Land Portal

[2248] Website UIPI, 'Projects' (https://www.uipi.com/projects/), as consulted on 28.05.2019.
[2249] The reports are freely accessible on: Website UIPI, 'Projects' (https://www.uipi.com/projects/), as consulted on 28.05.2019.

2012	Land Administration Domain Model ("LADM") (ISO certification)
	Land Governance Assessment Framework ("LGAF")
2014	Social Tenure Domain Model ("STDM") (publication)

5.5.1 The United Nations

The United Nations plays a role in the facilitation of cross-border real estate transactions through two bodies: the United Nations' Food and Agriculture Organisation and the United Nations Economic Commission for Europe (hereafter: "UNECE") Committee on Urban Development, Housing and Land Management.

Table 37 – Chronological Overview of Initiatives by the United Nations

1947	UNECE Committee on Urban Development, Housing and Land Management
1996	WPLA reports incl. glossary of terms
1999	Bi-annual WPLA sessions
	Multilingual thesaurus on land tenure - French version
2003	Multilingual thesaurus on land tenure - English and Spanish version

5.5.1.1 The UNECE Committee on Urban Development, Housing and Land Management

One aspect of the work carried out by the in 1947 founded UNECE Committee on Urban Development, Housing and Land Management focusses on the enhancement of its members' land administration and land management systems.[2250] To realize this objective, the Working Party on

[2250] Website UNECE, 'Land Administration and Management' (http://www.unece.org/ab/housing/land-administration.html), as consulted on 21.05.2019. Also see Website UNECE, 'The Committee' (https://www.unece.org/housing/committee.html), as consulted on 22.05.2019. To date, 56 countries (including all European countries) are UNECE members. See: Website UNECE, 'Geographical scope' (http://www.unece.org/ab/oes/nutshell/region.html), as consulted on 21.05.2019.

Land Administration (hereafter: "WPLA") has been set up, which approaches the task conferred upon them by facilitating the mutual effort of the UNECE members to exchange information about their own respective systems and by conducting research into their land administration systems.[2251] On that account, beginning in 1999, WPLA sessions have been organized every other year to foster the knowledge exchange and to draft policy if needed.[2252] The research conducted by the working party is made freely accessible through the following reports that are published on its website: 'Land Administration Guidelines With Special Reference to Countries in Transition (December 1996)', 'Study on Key Aspects of Land Registration and Cadastral Legislation (May 2000)', 'Restrictions of Ownership, Leasing, Transfer and Financing of Land and Real Properties in Europe and North America' (December 2003), 'Inventory of Land Administration Systems in Europe and North America, 4th edition (July 2005), 'Land Administration in the UNECE Region: Development Trends and Main Principles (December 2005)' and 'Survey on Land Administration Systems (English and Russian) (September 2014)'. [2253] Two aspects about these reports are noteworthy. First, the 1996, December 2005 and 2014 reports all contain a 'glossary of terms'. Second, the 2000, 2003, July 2005 and 2014 reports are all based on questionnaires that were submitted to the UNECE members. Interestingly, these reports do not only reflect the conclusions drawn from this data set but also provide the raw data in the form of the original answers of its members. Furthermore, they state the contact details of the persons who answered the questionnaire (including their phone number and e-mail address) so that they can be directly contacted by interested parties.

5.5.1.2 The United Nations' Food and Agriculture Organization ("FAO")

In 1999, the year of the 20th anniversary of the World Conference on Agrarian Reform and Rural Development, FAO issued their "Multilingual thesaurus on land tenure" composed in French.[2254] In 2003, the English and Spanish versions followed.[2255] The purpose of the creation of such a

[2251] For specific information about the WPLA, see: Website UNECE, 'Working Party on Land Administration' (http://www.unece.org/ab/housing/working-party.html), as consulted on 21.05.2019.
[2252] Website UNECE, 'Meetings & Events' (https://www.unece.org/index.php?id=11266), as consulted on 21.05.2019.
[2253] The studies can be accessed via: Website UNECE, 'Publications' (http://www.unece.org/ab/housing/publications.html), as consulted on 21.05.2019.
[2254] Website FAO, 'Thésaurus multilingue du foncier version française' (http://www.fao.org/docrep/005/x2038f/x2038f00.htm), as consulted on 24.10.2018.
[2255] Website FAO, 'Multilingual Thesaurus on Land Tenure' (http://www.fao.org/docrep/005/X2038E/X2038E00.HTM), as consulted on 24.10.2018. Also see G.

thesaurus is the establishment of a common professional working language to enable constructive communication by reducing Babylonian confusion among practitioners and academics working in the field.[2256] The Thesaurus is quite extensive, encompassing a wide pallet of topics: "legal, institutional, historical, description of space, traditional or written land tenure regulations, topographical, land management, as well as land tenure related information techniques", including terms such as "freehold", "ownership", "easement", "GPS", "right", "boundary", and "cadastre".[2257] A great advantage of this thesaurus is that it constitutes a thesaurus in both senses of this word – a reference book or encyclopaedia and a list of synonyms. When looking at its English version, each technical term is provided with a description and a reference to the corresponding term in the French and Spanish versions of the thesaurus.[2258]

5.5.2 World Bank

The World Bank has launched three initiatives that are of interest for cross-border real estate transactions: the Annual World Bank Conference on Land and Poverty, the Land Governance Assessment Framework, and Doing Business.

Table 38 – Chronological Overview of World Bank Initiatives

1999	Annual World Bank Conference on Land and Poverty
2002	Doing Business
2012	Land Governance Assessment Framework ("LGAF")

Ciparisse, *Tesauro plurilingüe de tierras*, Rome: Food and Agriculture Organization of the United Nations, 2003 (http://www.fao.org/docrep/005/X2038S/x2038s05.htm#bm05), as consulted on 29.10.2018.

[2256] G. Ciparisse, *Multilingual thesaurus on land tenure (English version)*, Rome: Food and Agriculture Organization of the United Nations, 2003, p. V, (http://www.fao.org/3/a-x2038e.pdf), as consulted on 29.10.2018.

[2257] G. Ciparisse, *Multilingual thesaurus on land tenure (English version)*, Rome: Food and Agriculture Organization of the United Nations, 2003, p. V, (http://www.fao.org/3/a-x2038e.pdf), as consulted on 29.10.2018.

[2258] The same holds true for the Spanish version. The original French version does not contain the references to the corresponding terms in English and Spanish.

5.5.2.1 Annual World Bank Conference on Land and Poverty

In 1999 the starting signal was given for the Annual World Bank Conference on Land and Poverty.[2259] What began as a rather private meeting with an attendance of ten people in its first year, has grown throughout the years to be an international conferences that is indispensable for experts in the field of land administration.[2260] The conference takes place during a period of five days and provides a platform to share best practices, cutting-edge research, and other pioneering work.

5.5.2.2 Doing Business

Another World Bank initiative is the Doing Business project.[2261] The aim of this project that saw the light in 2002 is to map business regulations across the world. To this end, an extensive data set is collected from all participating countries through a combination of different data collection methods.[2262] To begin with, the World Bank's Doing Business staff passes the annual questionnaire.[2263] This means that they critically assess the previous questionnaire and adapt it to the extent necessary. Once the questionnaire is finalized, it is distributed among the participating countries. The Doing Business staff will then control the data retrieved from the questionnaires by analysing the responding national law (to the extent possible). Furthermore, they collect and control data through (virtual/telephone) meetings with national governmental representatives and practitioners and in a small number of cases also through paying visits to the respective countries.[2264] The data that is gathered is divided into 11 themes: "Starting a business", "Employing

[2259] Website The World Bank, 'Land and Poverty Conference 2019: Catalyzing Innovation' (http://www.worldbank.org/en/events/2018/08/13/land-and-poverty-conference-2019-catalyzing-innovation), as consulted on 21.05.2019.
[2260] Website Thomson Reuters, 'Thomson Reuters Supports Annual World Bank Land and Poverty Conference' (https://www.thomsonreuters.com/en/press-releases/2013/thomson-reuters-supports-annual-world-bank-land-and-poverty-conference.html), as consulted on 21.05.2019.
[2261] Website Doing Business, 'About us' (http://www.doingbusiness.org/en/about-us), consulted on 30.06.2020.
[2262] The World Bank, *Doing Business 2020: Comparing Business Regulation in 190 Economies*, Washington D.C.: The World Bank, 2020, p. 23 (https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf), as consulted on 30.06.2020.
[2263] The questionnaires can be found on: Website Doing Business, 'Methodology' (http://www.doingbusiness.org/en/methodology), as consulted on 30.06.2020.
[2264] An overview of these representatives and practitioners can be found on: Website Doing Business, 'Contributors' (http://www.doingbusiness.org/en/contributors/doing-business), as consulted on 30.06.2020.

Workers", "Dealing with construction permits", "Getting electricity", "Registering property", "Getting credit", "Protecting minority investors", "Paying taxes", "Trading across borders", "Contracting with the government (coming soon)", "Enforcing contracts", and "Resolving insolvency".[2265] Of course, for the purpose of this thesis, the indicator "Registering property" is the most relevant one. Zooming in on this category, data is collected to describe the entire procedure involved when real estate is transferred, to specify the cost and time investments to complete these procedures and to create insight into the efficiency of a country's land administration as such.[2266]

In order to ensure a greater comparability of the data, Doing Business employs a case study approach to research "12 areas of regulation affecting small and medium-size domestic firms in the largest business city of an economy".[2267] All of the collected data is then sent to the regional teams of the World Bank so that they can comment on the provisional findings.[2268] Based on these datasets, the Doing Business report is being written and published.[2269] In 2020, the Doing Business report covered 190 countries.[2270] In addition, based on the retrieved data, the World Bank puts together an annual ranking, which pursues three objectives: create competition among the countries to improve business regulations, encourage reform programs based on quantitative indicators and provide a database on comparative business regulations that is accessible to the broad public.[2271]

[2265] Website Doing Business, 'About us' (https://www.doingbusiness.org/en/about-us), as consulted on 30.06.2020.

[2266] Website Doing Business, 'Registering Property Methodology' (http://www.doingbusiness.org/en/methodology/registering-property), as consulted on 30.06.2020. This method is not without criticism, see: B. du Marais & D. Marrani, 'Comparing Legal Certainty in France and England', in: B. du Marais & D. Marrani (eds), *Legal Certainty in Real Estate Transactions: A Comparison of England and France*, Cambridge: Intersentia, 2016, p. 4-5.

[2267] The World Bank, *Doing Business 2020: Comparing Business Regulation in 190 Economies*, Washington D.C.: The World Bank, 2020, p. 18 (https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf), as consulted on 30.06.2020. The standardizations applicable to the „Registering property" category can be found on: Website Doing Business, 'Registering Property Methodology' (http://www.doingbusiness.org/en/methodology/registering-property), as consulted on 30.06.2020.

[2268] The World Bank, *Doing Business 2020: Comparing Business Regulation in 190 Economies*, Washington D.C.: The World Bank, 2020, p. 23 (https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf), as consulted on 30.06.2020.

[2269] Ibid.

[2270] The World Bank, *Doing Business 2020: Comparing Business Regulation in 190 Economies*, Washington D.C.: The World Bank, 2020, p. 2 (https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf), as consulted on 30.06.2020.

[2271] The rankings can be found at: Website Doing Business, 'Ease of Doing Business rankings' (http://www.doingbusiness.org/en/rankings), as consulted on 30.06.2020. Also see Website Doing Business, 'About us' (http://www.doingbusiness.org/en/about-us), consulted on 30.06.2020.

The Doing Business project creates a large-scale dataset on the registration of property in the context of business regulation. This data is being made available without charge in many different forms – from the raw data via the ranking to the Doing Business report that summarizes the annual main findings.[2272] On the basis of these sources, interested parties can find practical information about the procedures and its costs and time investments as well as about the systems of land governance of the countries involved in Doing Business. However, unless these parties are more familiar with the legal system of a given country, it will be difficult for them to put that information in a broader context of land registration. Of course, one has to acknowledge that it is not the aim of Doing Business to provide an extensive overview of a country's land registration system. Instead, those responsible have made a careful selection of information about land registration systems that is necessary to realize their own aim – to provide information about business regulations on a comparative basis. Therefore, certain pieces of information that are essential to properly understand a land registration system but that are not as vital for business regulations and their interconnectedness have not been included in the data collection. This for example concerns information about the function of a notary or land registrar or the question whether all information necessary to realize a real estate transaction can be found in the land register. Furthermore, one has to keep in mind that the presented dataset is subject to common points of departure. As stated above, one of these points of departure is the location in the country's biggest city. Therefore, the presented information might not necessarily reflect the legal/administrative reality in different parts of the same country. For this reason, while acknowledging that a treasure of information on land registration systems keeps being made accessible through this project, we must conclude that this information by itself cannot suffice to provide a comprehensive scheme of land registration systems in Europe.

5.5.2.3 Land Governance Assessment Framework ("LGAF")

Created by the World Bank in cooperation with other organizations and put to practice since 2012, the Land Governance Assessment Framework (hereafter: "LGAF") - as its name already stipulates - is a framework consisting of 116 indicators with which land governance can be assessed in a specific territorial unit.[2273] These territorial units can encompass an entire country or smaller

[2272] Website Doing Business, 'Doing Business Data' (http://www.doingbusiness.org/en/data), as consulted on 30.06.2020.
[2273] Website The World Bank, 'Land Governance Assessment Framework' (http://www.worldbank.org/en/programs/land-governance-assessment-framework#1), as consulted on

administrative units within that country, such as provinces. At this point more than 40 countries have decided to apply LGAF. So far, the country reports of 39 countries have been published on the Website of the World Bank.[2274] The vast majority of these reports originate from African countries: to be specific, 24 African, 5 Asian, 5 Latin American countries and 5 countries located in Europe and Central Asia have to date published their finalized country report. The only EU Member State that has conducted the assessment and published their country report is Croatia. But why would a country decide to apply LGAF? First and foremost, the execution of the assessment through the LGAF model reveals a country's strength and weaknesses in terms of land governance.[2275] Once the points for improvement are revealed, the country's governments gain better insight where they need to set in, in order to enhance their land governance. Moreover, the fact that all countries apply the same scorecard to analyse their current state of land governance introduces a certain degree of objectivity to the assessment and its outcome.[2276]

How does the rating process work? At the heart of the process is a so-called country coordinator, a "locally recognized and independent land expert with a broad network within and outside government".[2277] It is their task to find suitable "technical experts" who are able to conduct the actual assessment. As stated above, the entire assessment comprises a rating of 116 indicators in the form of statements, which are organized in the following nine pillars: "Land Tenure Recognition", "Rights to Forest and Common Lands & Rural Land Use Regulations", "Urban Land Use, Planning, and Development", "Public Land Management", "Transparent Process and Economic Benefit", "Public Provision of Land Information: Registry and Cadastre", "Land Valuation and

16.10.2018. Also see Website The World Bank, 'Land Governance Assessment Framework: Implementation' (http://www.worldbank.org/en/programs/land-governance-assessment-framework#5), as consulted on 16.10.2018. Also see K. Deininger, H. Selod & A. Burns, *The Land Governance Assessment Framework: Identifiying and Monitoring Good Practice in the Land Sector*, Washington DC: The World Bank, 2012, p. xi. also see Website The World Bank, 'LGAF Newsletter, 5 December 2012' (http://siteresources.worldbank.org/INTLGA/Resources/LGAF_Newsletter_December_Issue.pdf), as consulted on 25.02.2019.

[2274] These can accessed via: Website The World Bank, 'Land Governance Assessment Framework: Country Reports' (http://www.worldbank.org/en/programs/land-governance-assessment-framework#2), as consulted on 16.10.2018.

[2275] Website The World Bank, 'Land Governance Assessment Framework' (http://www.worldbank.org/en/programs/land-governance-assessment-framework#1), as consulted on 16.10.2018.

[2276] Website The World Bank, 'Land Governance Assessment Framework' (http://www.worldbank.org/en/programs/land-governance-assessment-framework#1), as consulted on 16.10.2018.

[2277] Website The World Bank, 'Land Governance Assessment Framework: Implementation' (http://www.worldbank.org/en/programs/land-governance-assessment-framework#5), as consulted on 16.10.2018.

Taxation", "Dispute Resolution", and "Review of Institutional Arrangements and Policies".[2278] For every indicator, an A (best), B, C, or D (poor) rating is given.[2279] Within reasonable margins, as holds true for almost every rating mechanism, it is then on the country in question to further flesh out these ratings. When having to rate the same indicator, a more lenient country might award a B rating, while a more self-critical country might only award a C rating. Consequently, one has to be somewhat careful when trying to compare the completed scorecards of different countries. This would also be counter to its aim: "The LGAF is not intended as a tool to rank countries; rather, the scoring is developed to guide discussion in-country and arrive at a consensus using objective criteria".[2280]

How relevant is LGAF for cross-border real estate transactions in Europe? To begin with, we must conclude here that the dataset as such in the form of the scorecards and the country reports (with the exception of the information about Croatia) are not as relevant for the facilitation of European cross-border real estate transactions.[2281] The underlying technique on the other hand is more interesting; putting together national information in a standardized manner and thereby unlocking information that might not have been accessible before to an international public. The "master" scoring card, that includes the ratings of all participating countries, provides a quick overview of a countries state of the art when it comes to land governance and enables a first assessment of its strengths and weaknesses.[2282] If one is then interested in more detailed information, one can consult the respective country report.

[2278] Website The World Bank, 'Land Governance Assessment Framework: Implementation' (http://www.worldbank.org/en/programs/land-governance-assessment-framework#5), as consulted on 16.10.2018. The scorecard template can be found on: Website The World Bank, 'Land Governance Assessment Framework: Scorecards' (http://www.worldbank.org/en/programs/land-governance-assessment-framework#7), as consulted on 16.12.2018.
[2279] For a more detailed description of the rating process, see: K. Deininger, H. Selod & A. Burns, *The Land Governance Assessment Framework: Identifiying and Monitoring Good Practice in the Land Sector*, Washington DC: The World Bank, 2012, p. 39-50. For a schematic overview of the rating process, see: Website The World Bank, 'LGAF Process' (http://web.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTPROGRAMS/EXTARDR/EXTLGA/0,,contentMDK:23379372~pagePK:64168445~piPK:64168309~theSitePK:7630425,00.html), as consulted on 16.10.2018.
[2280] Website The World Bank, 'Land Governance Assessment Framework: Implementation' (http://www.worldbank.org/en/programs/land-governance-assessment-framework#5), as consulted on 16.10.2018.
[2281] Similar findings apply to the Land Portal. See Chapter 5.5.4.
[2282] The "master" scorecard can be accessed here: Website The World Bank, 'Land Governance Assessment Framework: Scorecards' (http://www.worldbank.org/en/programs/land-governance-assessment-framework#7), as consulted on 16.10.2018.

5.5.3 International Federation of Surveyors ("FIG")

All land administration systems pursue the same goal; registering a specific right that a specific person is entitled to on a specific parcel of land. Nevertheless, the national case studies have shown that different countries have made different choices to reach this goal. Consequently, a great diversity exists in the design of national land administration systems.[2283] This diversity in turn can create pitfalls for those who are unaware of these differences.[2284] At the same time, one must realize that most countries in the world do not dispose of a well-functioning and exhaustive land administration system and are struggling to develop a better system.[2285] In the absence of a suitable model system, these countries are easily abandoned to their fate when facing such an endeavour. As stated by *Lemmen*, "[p]ersonal experience learns that it is very easy to make LASs [land administration systems] very complex and that it is really complex to make it easy".[2286]

From an economic perspective, these (national) differences and difficulties likely lead to higher transaction costs, which can be minimized through the introduction of standardization.[2287] Standardisation can target different aspects of land administration.[2288] It can be used to install a common pivot language, to assist the generation of an "application software", to ease the exchange of information between different entities, and to foster "data quality management".[2289] In addition, standardization can either focus on the keeping of data in a land/cadastral register or on the processes that underlie it.[2290] Furthermore, it is advocated to refrain from standardizing both data and processes through the same model but to instead keep a model to standardize data distinct from a model to standardize the underlying processes. Thereby, a greater flexibility is created in the sense that it allows organisations to alter their internal processes without having to adapt their data model. All of these goals are united in the Land Administration Domain Model (hereafter:

[2283] Also see C. Lemmen, *A Domain Model for Land Administration*, Delft: Publications on Geodesy 78, 2012, p. 1.
[2284] For an overview of possible pitfalls, see Chapter 4.
[2285] P. van Oosterom & C. Lemmen, 'The Land Administration Domain Model (LADM): Motivation, standardisation, application and further development', *Land Use Policy* 49 (2015), p. 527-528.
[2286] C. Lemmen, *A Domain Model for Land Administration*, Delft: Publications on Geodesy 78, 2012, p. 2.
[2287] C. Lemmen, *A Domain Model for Land Administration*, Delft: Publications on Geodesy 78, 2012, p. 3.
[2288] C. Lemmen, *A Domain Model for Land Administration*, Delft: Publications on Geodesy 78, 2012, p. 5-6.
[2289] Ibid.
[2290] C. Lemmen, P. van Oosterom & R. Bennett, 'The Land Administration Domain Model', *Land Use Policy* 49 (2015), p. 536.

"LADM"), which essentially standardizes the information that is included in the register and the way that this information is structured.[2291]

The desire to create an international LADM was one of the outcomes of the Cadastre 2014 project, in which the FIG at the end of the 1990s came up with a prediction of how the cadastre would evolve in the course of subsequent 20 years.[2292] In 2002, FIG put this desire into action, encouraged by the other international organisations active in the field (FAO, UN-HABITAT, and JRC).[2293] Thereby, the following points of departure were taken into account:

> "A standardised land administration domain model should be as simple as possible, in order to be useful in practice. Additionally, it should be adaptable and adoptable to local situations. Moreover, the technology adopted should be sufficiently flexible to meet future needs and to permit system growth and change."[2294]

Ten years later, in 2012, the LADM was ISO certified (ISO 19152).[2295] So far, it has been employed by different countries and used by international organisations such as the EU, FAO, and UN-HABITAT.[2296] In 2014, a specialized version of the LADM, the Social Tenure Domain Model (hereafter: "STDM") has been publicized during the annual FIG conference.[2297] The STDM has as its advantage that it can be even better adjusted to regional needs and that it enables the distinction of

[2291] C. Lemmen, *A Domain Model for Land Administration*, Delft: Publications on Geodesy 78, 2012, p. vi.
[2292] C. Lemmen, P. van Oosterom & R. Bennett, 'The Land Administration Domain Model', *Land Use Policy* 49 (2015), p. 536. Also see Website FIG, 'Cadastre 2014' (http://www.fig.net/resources/publications/figpub/cadastre2014/index.asp), as consulted on 06.11.2018. Also see H. Ploeger & B. van Loenen, 'The European Real Estate Market – Transparency, Security and Certainty through registration by EuroTitle', in: S. van Erp, A. Salomons & B. Akkermans, *The Future of European Property Law*, Munich: Sellier European Law Publishers, 2012, p. 191-192.
[2293] C. Lemmen, P. van Oosterom & R. Bennett, 'The Land Administration Domain Model', *Land Use Policy* 49 (2015), p. 536. Also see P. van Oosterom & C. Lemmen, 'The Land Administration Domain Model (LADM): Motivation, standardisation, application and further development', *Land Use Policy* 49 (2015), p. 529.
[2294] C. Lemmen, P. van Oosterom & R. Bennett, 'The Land Administration Domain Model', *Land Use Policy* 49 (2015), p. 538.
[2295] C. Lemmen, P. van Oosterom & R. Bennett, 'The Land Administration Domain Model', *Land Use Policy* 49 (2015), p. 538. Also see Website International Organization for Standardization, 'ISO 19152:2012' (https://www.iso.org/standard/51206.html), as consulted on 06.11.2018.
[2296] C. Lemmen, P. van Oosterom & R. Bennett, 'The Land Administration Domain Model', *Land Use Policy* 49 (2015), p. 542.
[2297] C. Lemmen, P. van Oosterom & R. Bennett, 'The Land Administration Domain Model', *Land Use Policy* 49 (2015), p. 543. Also see P. van Oosterom and C. Lemmen, 'The Land Administration Domain Model (LADM): Motivation, standardisation, application and further development', *Land Use Policy* 49 (2015), p. 528. Also see Website STDM, 'STDM as a Model' (https://stdm.gltn.net/), as consulted on 13.11.2018.

more gradations of especially unofficial relationship between persons and a particular parcel of land that could not be captured by the LADM.[2298]

The data that is stored in the LADM data model is grouped in three building blocks: the "Party" block, containing information on natural and legal persons that are entitled to or are otherwise involved with a right registered in the land register, the "Administrative" block, containing information on rights, restrictions and responsibilities, and the "Spatial Unit" block, which contains information on the spatial description of land.[2299] Although this model might appear to be quite rigid at first glance, it is true that the implementers enjoy a certain degree of flexibility in the sense that they can customize the LADM standard to fit the regional needs.[2300] This for example means that it is possible to record contractual rights in addition to property rights on land.

Table 39 – Chronological Overview of FIG Initiatives

2002	Land Administration Domain Model ("LADM") (development)
2012	Land Administration Domain Model ("LADM") (ISO certification)
2014	Social Tenure Domain Model ("STDM") (publication)

Can LADM function as a model for cross-border real estate transactions in Europe? As stated earlier, its method is to identify a set of essential information and to determine how those pieces of information need to be interlinked. In that, it resembles the method underlying the IMOLA project, with the difference that LADM standardises the data in the land register itself while the IMOLA project intends to standardize land register output in the form of an ELRD. Does a solution for facilitation cross-border transactions in Europe lie in the standardization of land register data models according to the LADM? It must be kept in mind that the LADM target group rather

[2298] C. Griffith-Charles, 'The application of the social tenure domain model (STDM) to family land in Trinidad and Tobago', *Land Use Policy* 28 (2011), p. 515.
[2299] For a more detailed overview of the model and the possibilities to add building blocks to the existing model, see: C. Lemmen, P. van Oosterom & R. Bennett, 'The Land Administration Domain Model', *Land Use Policy* 49 (2015), p. 538-542.
[2300] C. Lemmen, P. van Oosterom & R. Bennett, 'The Land Administration Domain Model', *Land Use Policy* 49 (2015), p. 539.

comprises countries that struggle with a well-working land administration system. Although the case studies have shown that there are still significant differences in the way the land and cadastral registers are kept throughout Europe, the case studies also have shown that the problem of insufficient land administration systems has been eradicated already to a great extent in (Western) Europe. The question that then imposes itself on us is whether the implementation of LADM would actually benefit a well-working land administration system. The only advantage that can be thought of is the decryption of diverging national land register databases, which in turn would facilitate the access and understanding of foreign land register content and hence improve communication between land registries and other professionals who are based in different countries. It goes without saying that the existing LADM would have to be topped up with more building blocks and sub-building blocks to accommodate the existing and more complex land register databases that are in place in Europe. Another interesting question to pose then is whether the standardisation of the databases as such is necessary to achieve the pursued benefit. If the outcome of the IMOLA project is positive, then it could prove that the instalment of an IT platform might suffice to translate different land register database structures to a common template.[2301]

5.5.4 The Land Portal Foundation

One of the main obstacles to cross-border transfers of real estate that we have identified so far is the lack of a uniform dataset that comprises all relevant information for legal practitioners and citizens when being involved in such a transfer. The Land Portal aims to combat this situation by especially facilitating access to such information for poor population groups.[2302] This initiative was founded in 2009 and established in the Netherlands in the form of a non-profit organization. The already existing Land Portal database is impressive. At this moment, information is available about 67 countries, located predominantly in Latin-/South America, Africa, and South Asia.[2303] Information about European and North American countries have not been included to date. Within this dataset, information can be found on more than 600 indicators, which for example include "Accessibility of registry records", "Cadastral/registry info up-to-date", and "Land Rights in protected areas - Indigenous People".[2304] Furthermore, it contains more than 30 datasets provided

[2301] For a discussion on whether it is at all desirable to standardize land register systems, see Chapter 6.
[2302] Website Land Portal, 'Who we are' (https://landportal.org/about), as consulted on 12.10.2018.
[2303] Website Land Portal, 'Land governance by country' (https://landportal.org/book/countries), as consulted on 12.10.2018.
[2304] Website Land Portal, 'Indicators' (https://landportal.org/book/indicators), as consulted on 12.10.2018.

by "trusted providers".[2305] However, the Land Portal does not certify that the published information is correct:

> "The Land Portal cannot guarantee the veracity of the information posted by users. Any given content may have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields. Due to these reasons, the Land Portal Foundation can in no way be held responsible for the content that is contained in these webpages."[2306]

Against this background, it is interesting to understand where the provided information originates. Essentially, the information is provided by Land Portal Users. It seems that literally everybody who is interested to become a User can freely register through the Land Portal Website: "The structure of the Land Portal allows anyone with an Internet connection to register and create content." [2307] These Users can then upload content to the Portal, which in turn is made available in the form of Linked Open Data.[2308] As a consequence, the information can be freely used as long as its source is properly accredited.[2309] The ownership of this information however remains with the Users.[2310] A great challenge is then to ensure that this bulk of information that is uploaded by these Users is accessible to the public. After all, if Users employ slightly different vocabulary to describe the same piece of information, the public runs the risk that they miss important information when they do not search on all terms used by the different Users.[2311] For this reason, the "Linked Land Governance Thesaurus" ("LandVoc") has been developed.[2312] In addition to the distribution of land information, the Land Portal also offers a freely accessibly library with more than „50,000 land-

[2305] Website Land Portal, 'Discover the data' (https://landportal.org/book/data), as consulted on 12.10.2018.
[2306] Website Land Portal, 'Terms and Conditions of Use' (https://landportal.org/about/terms-and-conditions-use), as consulted on 12.10.2018.
[2307] Website Land Portal, 'Create new account' (https://landportal.org/about/terms-and-conditions-use), as consulted on 12.10.2018. Also see Website Land Portal, 'Terms and Conditions of Use' (https://landportal.org/about/terms-and-conditions-use), as consulted on 12.10.2018. An overview of Land Data Providers can be found on: Website Land Portal, 'Land Data Providers' (https://landportal.org/book/sources), as consulted on 12.10.2018.
[2308] Website Land Portal, 'How can I contribute' (https://landportal.org/docs/contributors-post-content), as consulted on 12.10.2018.
[2309] The Creative Commons Attributions license is given to the consultant to the users of this information. See: Website Land Portal, 'Terms and Conditions of Use' (https://landportal.org/about/terms-and-conditions-use), as consulted on 12.10.2018.
[2310] Website Land Portal, 'How can I contribute' (https://landportal.org/docs/contributors-post-content), as consulted on 12.10.2018.
[2311] Website Land Portal, 'LandVoc - the Linked Land Governance Thesaurus' (https://landportal.org/voc/landvoc), as consulted on 12.10.2018.
[2312] The Thesaurus can be accessed via this link: Website Land Portal, 'LandVoc - the Linked Land Governance Thesaurus' (https://landportal.org/voc/landvoc), as consulted on 12.10.2018.

related publications, laws and multimedia items".[2313] Moreover, it maintains a blog and provides a platform to initiate and participate in online discussions within the Land Portal User community.[2314] Up to date, three such discussions have been hosted by the Portal, one of which being on the Liberia Land Rights Act.[2315]

The last remaining question is now whether the Land Portal is relevant for the facilitation of cross-border transactions involving real estate in Europe. It seems wise to make a distinction here between the data contained in the Portal and the structure of the Portal as such. The data itself is of less relevance for transactions involving real estate in Europe, simply because data on land (governance) in Europe is not included in this database. Nevertheless, when focussing on the structure of the Portal, the project is a great accomplishment in terms of providing a unified access point for a wide variety of information that adheres to a common thesaurus.

5.6 Academia

It could be seen that many of the above-mentioned projects rely on the expertise of academics. One might therefore be tempted to assume that a rich wealth of comparative legal research into land registration systems can also be found outside the scope of these initiatives. The reality is however sobering, as only few such academic projects could be found.[2316] Against this background, it is

[2313] The library can be accessed via this link: Website Land Portal, 'Consult the library' (https://landportal.org/library), as consulted on 12.10.2018.
[2314] The blog can be found via this link: Website Land Portal, 'Our blogs on land' (https://landportal.org/blogs), as consulted on 12.10.2018. Also see Website Land Portal, 'Discussions' (https://landportal.org/debates), as consulted on 12.10.2018.
[2315] Website Land Portal, 'Discussion Archive' (https://landportal.org/debates/2018), as consulted on 12.10.2018.
[2316] Specifically, homage needs to be paid to: B. von Hoffmann, *Das Recht des Grundstückskaufs: Eine rechtsvergleichende Untersuchung*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1982(!). Also see J. Zevenbergen, *Systems of Land Registration: Aspects and Effects*, Delft: Nederlandse Commissie voor Geodesie, 2002. Also see S. van Erp & B. Akkermans (eds.), *Cases, Materials and Text on Property Law*, Oxford/Portland, Hart Publishing, 2012. Also see L.M. Martínez Velencoso, S. Bailey & A. Pradi, *Transfer of Immovables in European Private Law*, Cambridge: Cambridge University Press, 2017. Also see P. Sparkes, *European Land Law*, Oxford/Portland: Hart Publishing, 2007. Also see D. Wallis & S. Allanson (eds.), *European Property Rights & Wrongs*, Brussels: Wallis, 2011. Also see P. Sparkes et al., *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Brussels: European Union, 2016. In addition, contributions on matters relating to compara.tive/European land (registration) law can regularly be found in the European Property Law Journal. The challenges of European cross-border real estate transactions are also discussed in different international research communities. To be mentioned in this context are: The Association for Law, Property, and Society (https://www.alps-law.org/about-us), the Young Property Lawyers' Forum (http://yplf.net/), and the Property Law Program of the Ius Commune Research School (http://www.iuscommune.eu/startpagina.aspx?language=Nederlands).

unsurprising that academia has also taken a rather reserved position in the formulation of concrete project proposals that aim to enhance the efficiency of cross-border transfers of land in Europe. In fact, only one such proposal could be found, namely the EuroTitle; a Dutch-Spanish co-production that was first advocated by Hendrik Ploeger, Bastiaan van Loenen, and Sergio Nasarre-Aznar in 2006.[2317]

5.6.1 EuroTitle

To date, the proposal has not been put to practice. The underlying aim of this proposal is to increase legal certainty and transparency in the European real estate market.[2318] How is this achieved? The idea behind EuroTitle is to create a "common method of land registration within Europe" which, as its name already reveals, will be based on title registration, which in turn will be predicated on "(newly developed) European standards" to facilitate e-conveyancing.[2319] The formulation "common method" does not mean to express that it shall supersede the land registration systems that are already in place. Instead, it shall serve as an additional option, so that the owners of the land may themselves decide whether they prefer the classic national title or the EuroTitle.[2320] If they opt for the latter, the EuroTitle will replace the pre-existing national title.[2321] As a result, the national land registers would then as it were contain two different categories of titles – national

[2317] B. van Loenen, H. Ploeger & S. Nasarre-Aznar, 'EuroTitle: Land Registry Standard: Paving the Way to a Common Property Market', *GIM INTERNATIONAL* 19, no. 12, (2005), p. 2. In addition, an international research group exists that focusses on housing: the European Network for Housing Research. Due to the fact that this group does not specifically research cross-border real estate transactions, this network will not be described in more detail. For more information on the ENHR, see: Website ENHR, 'About ENHR' (https://www.enhr.net/aims.php), as consulted on 28.01.2019.
[2318] B. van Loenen & H.D. Ploeger, 'EuroTitle: een stap richting Europese vastgoedmarkt', *Vastgoedrecht* n12 (2008), p. 123. Also see B. van Loenen, H. Ploeger & S. Nasarre-Aznar, 'EuroTitle: Land Registry Standard: Paving the Way to a Common Property Market', *GIM INTERNATIONAL* 19, no. 12, (2005), p. 35.
[2319] B. van Loenen, H. Ploeger & S. Nasarre-Aznar, 'EuroTitle: Land Registry Standard: Paving the Way to a Common Property Market', *GIM INTERNATIONAL* 19, no. 12, (2005), p. 35. Also see B. van Loenen & H.D. Ploeger, 'EuroTitle: onmisbaar voor Europese vastgoedmarkt', *WPNR* 2006/6677. Also see H. Ploeger & B. van Loenen, 'The European Real Estate Market – Transparency, Security and Certainty through registration by EuroTitle', in: S. van Erp, A. Salomons & B. Akkermans, *The Future of European Property Law*, Munich: Sellier European Law Publishers, 2012, p. 195-196.
[2320] B. van Loenen & H.D. Ploeger, 'EuroTitle: een stap richting Europese vastgoedmarkt', *Vastgoedrecht* n12 (2008), p. 123. Also see B. van Loenen, H. Ploeger & S. Nasarre-Aznar, 'EuroTitle: Land Registry Standard: Paving the Way to a Common Property Market', *GIM INTERNATIONAL* 19, no. 12, (2005), p. 35. Also see B. van Loenen & H.D. Ploeger, 'EuroTitle: onmisbaar voor Europese vastgoedmarkt', *WPNR* 2006/6677.
[2321] B. van Loenen & H.D. Ploeger, 'EuroTitle: onmisbaar voor Europese vastgoedmarkt', *WPNR* 2006/6677. Also see B. van Loenen & H.D. Ploeger, 'EuroTitle: een stap richting Europese vastgoedmarkt', *Vastgoedrecht* n12 (2008), p. 123.

titles and EuroTitles.[2322] However, if the national titles adhere to the standards that underlie the EuroTitle, then they can be directly qualified as EuroTitle.[2323] Interestingly, irrespective of the legal effect of the national title, all Member States would have to guarantee the EuroTitle.[2324] As an additional advantage, EuroTitle ensures simple, standardized access to the underlying information.[2325]

When taking these considerations into account, does EuroTitle provide a solution for the problems that are inherent in cross-border transfers of land? To begin with, this proposal does not require the creation of a new institution. To quote the innovators, "the system would not require the introduction of a European Land Registry".[2326] Instead, EuroTitle can be nicely fitted in the already existing infrastructure of the different land registration systems, which must be assessed positively. After all, as stated above, they are registered in the same land register in which the national titles are registered. On a more critical note, it must be emphasized that the EuroTitle goes hand in hand with a guarantee of title. While such a guarantee increases the ambitioned legal certainty in the European real estate market, it can be discussed whether it is feasible for all Member States to provide such a guarantee, considering that the ability to do so is to a certain extent intertwined with the set-up of the national mechanism that governs its land registration. One is to think especially of those Member States that adhere to a negative registration system and who, as a result, do not guarantee the correctness of the information that is registered in the land registry. Will they not be able to participate in this project? Nevertheless, even if this was possible, a second observation should be made. Provided that national titles do not fulfil the EuroTitle standards, is the co-existence of national titles and EuroTitles in the land register manageable for the land registries? On the basis of the experience in the US state Minnesota, in which a deed and title

[2322] B. van Loenen, H. Ploeger & S. Nasarre-Aznar, 'EuroTitle: Land Registry Standard: Paving the Way to a Common Property Market', *GIM INTERNATIONAL* 19, no. 12, (2005), p. 36. Also see H. Ploeger & B. van Loenen, 'The European Real Estate Market – Transparency, Security and Certainty through registration by EuroTitle', in: S. van Erp, A. Salomons & B. Akkermans, *The Future of European Property Law*, Munich: Sellier European Law Publishers, 2012, p. 195-196.
[2323] B. van Loenen & H.D. Ploeger, 'EuroTitle: een stap richting Europese vastgoedmarkt', *Vastgoedrecht* n12 (2008), p. 125.
[2324] B. van Loenen, H. Ploeger & S. Nasarre-Aznar, 'EuroTitle: Land Registry Standard: Paving the Way to a Common Property Market', *GIM INTERNATIONAL* 19, no. 12, (2005), p. 36. Also see B. van Loenen & H.D. Ploeger, 'EuroTitle: een stap richting Europese vastgoedmarkt', *Vastgoedrecht* n12 (2008), p. 124.
[2325] B. van Loenen, H. Ploeger & S. Nasarre-Aznar, 'EuroTitle: Land Registry Standard: Paving the Way to a Common Property Market', *GIM INTERNATIONAL* 19, no. 12, (2005), p. 36. Also see B. van Loenen & H.D. Ploeger, 'EuroTitle: een stap richting Europese vastgoedmarkt', *Vastgoedrecht* n12 (2008), p. 124. Also see B. van Loenen & H.D. Ploeger, 'EuroTitle: onmisbaar voor Europese vastgoedmarkt', *WPNR* 2006/6677.
[2326] B. van Loenen, H. Ploeger & S. Nasarre-Aznar, 'EuroTitle: Land Registry Standard: Paving the Way to a Common Property Market', *GIM INTERNATIONAL* 19, no. 12, (2005), p. 35-36.

system co-exist, the EuroTitle innovators argue that such a dualism is not by definition problematic.[2327] Yet, one could question if such a solution, though feasible, is also desirable. The inventors of EuroTitle admit that "[t]he legal and organizational effects need to be further examined for the feasibility of this concept to be properly assessed".[2328]

As a last remark, it must be stressed again that EuroTitle cannot be qualified as a one-package-deal. The reason for this is that it provides solutions for some but not all obstacles inherent in cross-border transfers as identified above. Due to foregoing considerations, it is concluded that EuroTitle, though being a creative proposal with the capacity to catalyse cross-border transfers of land in some respects, does not offer by itself a tool to address all obstacles that are faced in cross-border real estate transactions.

5.7 Providing Solutions to Cross-border Challenges?

The European and international playing field shows a rich variety of initiatives that aim to facilitate cross-border real estate transactions in one way or the other. A relatively broad range of topics have already been addressed: Vision/strategy for the future, Using LR documents abroad, Lexicon/pivot/thesaurus, Common professional rules/ guidelines/ principles, Standardization of LR information, Knowledge sharing about LR systems & transfer processes, Connecting initiatives from different providers to enable better access, Connect LR practitioners from different countries, and Other practical support for practitioners & citizens to deal with cross-border cases (Table 42). These initiatives do not target all concerned parties to the same extent; three projects (Buying Property in Europe, CROBECO, and EUFides) are specifically aimed at the European citizens, 17 initiatives are primarily directed to the legal professionals and another 15 initiatives address both the ordinary citizen and the legal professionals (Table 40).

[2327] B. van Loenen, H. Ploeger & S. Nasarre-Aznar, 'EuroTitle: Land Registry Standard: Paving the Way to a Common Property Market', *GIM INTERNATIONAL* 19, no. 12, (2005), p. 36. Also see B. van Loenen & H.D. Ploeger, 'EuroTitle: een stap richting Europese vastgoedmarkt', *Vastgoedrecht* n12 (2008), p. 125. Also see B. van Loenen & H.D. Ploeger, 'EuroTitle: onmisbaar voor Europese vastgoedmarkt', *WPNR* 2006/6677.
[2328] B. van Loenen, H. Ploeger & S. Nasarre-Aznar, 'EuroTitle: Land Registry Standard: Paving the Way to a Common Property Market', *GIM INTERNATIONAL* 19, no. 12, (2005), p. 37.

Table 40 – Overview of the Initiatives According to their Main Target Group

Citizens	Legal Professionals	Citizens & Legal Professionals
- Buying Property in Europe - CROBECO - EUFides - LEXUNION - PLAN	- Annual World Bank Conference on Land and Poverty - Bi-annual IPRA-CINDER International Congresses - Bi-annual WPLA sessions - Cadastre 2014 - CNUE - Common Vision for Cadastre and Land Registry in Europe - ELRA - ELRN - ENN - European Code of Notarial Professional Ethics - LADM - LRI - Secure Notarial Seal - STDM - UINL - UINL Deontology and Rules of Organization for Notariats - UINL Fundamental principles of the Latin type notarial system - UINL Principles of notarial ethics - UINL Principles of the notarial function - World Notariat University	- Doing Business - e-Justice Communication via Online Data EXchange - e-Justice Portal - EU Vocabularies - European Directory of Notaries - EJN - EULIS - ENN (public section) - IMOLA - IATE - IPRA-CINDER International Review - LGAF - Land Portal - LEXUNION - Multilingual thesaurus on land tenure - Plan 2020 - UINL Lexicon - WPLA reports including glossary of terms

Table 41 – Overview of the Already Existing Initiatives

Vision/strategy for the future	- Cadastre 2.0 - Cadastre 2014 - Common Vision for Cadastre and Land Registry in Europe - EuroTitle - Plan 2020
Using LR documents abroad	- CROBECO - Secure Notarial Seal
Lexicon/ Pivot/ Thesaurus	- EU Vocabularies - EULIS - Glossaries as included in some WPLA reports - IATE - IMOLA - Multilingual thesaurus on land tenure - UINL Lexicon
Common Professional rules/ guidelines/ principles	- European Code of Notarial Professional Ethics - UINL Deontology and Rules of Organization for Notariats - UINL Fundamental principles of the Latin type notarial system - UINL Principles of notarial ethics - UINL Principles of the notarial function
Standardization of LR information	- IMOLA - LADM - STDM
Knowledge sharing about LR systems & transfer processes	- Annual World Bank Conference on Land and Poverty - Bi-annual IPRA-CINDER International Congresses - Bi-annual WPLA sessions - Doing Business - EJN - e-Justice Portal - ELRN - IPRA-CINDER International Review - Land Portal - LGAF - World Notariat University - WPLA reports including glossary of terms

Connecting initiatives from different providers to enable better access	- EJN - e-Justice Portal - LRI - UINL
Initiatives connecting LR practitioners from different countries to foster collaboration	- CNUE - ELRA - ELRN - European Directory of Notaries - IPRA-CINDER - LEXUNION - UINL - UNECE Committee on Urban Development, Housing and Land Management
Other practical support for practitioners & citizens to deal with cross-border cases	- Buying Property in Europe - CROBECO - EJN - ELRN - ENN - EUFides - EULIS - European Directory of Notaries - PLAN - UIPI
Initiatives to encourage technological collaboration	- e-CODEX

After having inventoried these initiatives, the one question that remains to be answered is how they respond to the administrative, cultural, legal, and technological challenges that were outlined in chapter 4. Theoretically, three scenarios are now possible: they fully address all challenges, they do not address any of these challenges, or they only address some of the challenges. In the rather unlikely event that the first scenario turns out to be correct, this would mean that cross-border real estate transactions are already sufficiently attended to and that the development of new approaches to solve these challenges is rendered unnecessary. On the other side of the spectrum lies the evenly unlikely second scenario, in which the initiatives do not address the challenges at all. In that case, solutions have to be created for each challenge. The most likely scenario is the third scenario. If this is true, it is imperative to tend to those challenges that are not yet (fully) covered by the already existing initiatives in order to facilitate cross-border real estate transactions. In the interest of determining the correct scenario, an overview was generated to contrast the challenges with the initiatives (Table 42) and to come to a measurable outcome that will reveal whether and if so which challenges still have to addressed.

Before turning to a substantial analysis of this overview, a few explanatory comments must be made. To begin with, the overview does not contain the initiatives that fall in the category "vision/ strategy for the future" since the vision or strategy by itself does not facilitate cross-border real estate transactions. The concrete projects that came forth from these documents on the other hand found their way into the overview. Furthermore, the LADM, STDM, LGAF, and the Land Portal were not included. The methods used therein to standardize and share information are interesting and could be used to solve certain challenges currently faced in cross-border transactions, but they are not yet applied in a European context to address these challenges. Moreover, the bi-annual WPLA sessions, the annual World Bank Conference on Land and Poverty, the bi-annual IPRA-CINDER International Congresses and the herewith related IPRA-CINDER International Review did not find their way into the following analysis. These initiatives do not directly facilitate cross-border real estate transactions but provide platforms for primarily practitioners to network, exchange best practices and the newest innovations. Additionally, LEXUNION has been excluded from the overview due to the fact that it is unclear how they exactly support a client with a cross-border real estate case. For this reason, LEXUNION could not be matched to one or more of the concrete challenges. Last, CNUE, ELRA, EULIS, the UNECE Committee on Urban Development, Housing and Land Management, the International Union of Property Owners, and IPRA-CINDER were excluded from this overview, as the establishment of these organizations as such do not address the cross-

border challenges but rather the initiatives that they launched; they do not aim to tackle a specific problem but aim to facilitate the provision of cross-border services on a more general basis. Keeping these considerations in mind, we shall now progress to the analysis (Table 42).

Table 42 – Overview of Challenges and Solutions provided by Already Existing Initiatives

	Challenges	Solutions	Outcome
Administrative challenges	**Identification of the Roadmap**	- Buying Property in Europe - Doing Business - ELRN - PLAN - WPLA reports	The challenge has already been partly addressed. PLAN provides practical support to members of its affiliated organizations through a helpdesk. The four remaining initiatives all provide a roadmap (to different extents). While the ELRN focusses on the process underlying the registration of the deeds/titles in the land register, the Buying Property in Europe project puts an emphasis on the description of the process that begins with the pre-contractual phase and leads up to the registration of the transfer of ownership in the land register. While both databases together cover the major part of the transaction chain, they do not provide information about the phase that precedes the pre-contractual phase, being the time when the buyers have decided to acquire real estate in a cross-border setting respectively when sellers have decided to sell their real estate in a cross-border setting. In addition, both databases exhibit

			geographical limitations as they contain information about the legal systems of their participating members. For the ELRN those are the ELRN members, for CNUE, those countries with a Latin notariat. Therefore, a complete European coverage is not reached. The Doing Business covers the main stages of the roadmap both on the side of the legal practitioner and of the land registry/cadastre. The same holds true for the WPLA report 'Study on Key Aspects of Land Registration and Cadastral Legislation (May 2000)'. Concerning the latter, it must be remarked that it does not cover all EU Member States and that it might be (partly) outdated.
	Choice of Legal Practitioner – Linguistic Abilities	- European Directory of Notaries - Buying Property in Europe	The challenge has already been fully addressed.
	Provision of Required Documents	- ENN	The challenge has already been fully addressed.
	Translation Costs	- CROBECO - EULIS - EUFides - LRI	The challenge has already been partly addressed. CROBECO and EUFides can help to reduce translation costs, but only if these transactions occur within the ambit of their projects. In other words,

			they do not effectuate a generic reduction of translation costs that applies to all types of cross-border transactions. EULIS, which will be integrated in the Land registers interconnection project provides an English translation of the land register information. It would be highly interesting and relevant to research whether European citizens and legal practitioners would prefer such a translation into an English pivot language or rather an official translation into their mother tongue.
	Legal Practitioner's Service Fee	- Doing Business - WPLA reports	The challenge has already been partly addressed. Although the Doing Business Website discloses this information, one needs to take into consideration that (parts of) the service fee might depend on the value of the real estate and that the Doing Business questionnaire "Registering Property Rights" collects this information by making use of fictitious case studies and especially when a legal system does not have fixed legal practitioner fees, they can only reflect an average value. The WPLA report 'Survey on Land Administration

			Systems (English and Russian) (September 2014)' provides an overview of the total transaction costs (including the tariffs charged by the land registry). However, this overview does not cover all EU Member States and it is likely that the cost indication it not up to date anymore.
	Land Registry/ Cadastre Tariffs	- Doing Business - WPLA reports	The challenge has already been partly addressed. Regarding Doing Business, the remarks made for the legal practitioner's service fee also find application here. The WPLA report 'Survey on Land Administration Systems (English and Russian) (September 2014)' specifies the tariff charged by the land registration authorities for real estate transactions. Yet, the report does not include all EU Member States. In addition, the cost indications might be outdated.
	Travel Expenses	- CROBECO - EUFides	The challenge has already been partly addressed. When a real estate transaction is carried out within these projects, travel expenses can be reduced. For all other real estate transactions, travel expenses remain an obstacle.
	Access to Land Register/	- EULIS	The challenge has already been

	Cadastral Information	- e-Justice Portal & EJN - ELRN - Doing Business - LRI	fully addressed. EULIS, which will be integrated into the land registers interconnection project, facilitates access to land register information, though only for those countries that have decided in favour of participating in this project. The scope of the project thus does not cover Europe as a whole. The Doing Business questionnaire "Registering Property Rights" collects information about the search entrance and provides links to the digital access points for the land registers (where available). Furthermore, the ELRN provides information about this topic. As stated before, the information has a geographic limitation as it is restricted to its members. Last, the e-Justice Portal & the European Judicial Network contain information on the topic. While these databases contain valuable information, they could be even more practical, containing links to the web shops or digital access points of the land registries and cadastres (if available) and contact information of the land registries if land register information cannot be

			accessed online, thereby indicating which land registry is competent to process such a request (in case of a decentralized system).
	Payment of Land Registry/ Cadastral Authority Tariffs	- LRI	The challenge has already been partly addressed. As part of the land registers interconnection project, a central payment system is to be put in place through which land registry products can be paid for no matter from which land registry they stem. This project is not carried out by all European countries so that its scope is limited to the participating countries. When European citizens will make use of this service through their legal practitioner, there is still a risk that they are unaware whether the costs connected herewith are already included in the legal practitioner's offer or whether they must be paid separately.
	Payment of Deposits/ Purchase Price	- Buying Property in Europe	The challenge has already been partly addressed. The website Buying Property in Europe clarifies whether a deposit is common in the respective legal system and informs about the amount of that deposit. It also includes information about the payment of the purchase price.

			However, as said before, the geographical scope of that database is limited as it is restricted to the legal systems of CNUE members.
	Payment of the Legal Practitioner's Service Fee		The challenge has not yet been addressed.
	Referring Citizens to the Correct Authorities	- PLAN	The challenge has already been partly addressed. The PLAN initiative offers practical help to use the UIPI network to connect those in need of help with a qualified legal practitioner abroad. Yet, this support is only accessible to members of affiliated organizations.
	Duration of the Transaction Procedure	- Doing Business - WPLA reports	The challenge has already been fully addressed through Doing Business. The WPLA report ''Survey on Land Administration Systems (English and Russian) (September 2014)' also provides this information. However, it does not cover all EU Member States and has not been updated since its publication.
Cultural challenges	**Risk of Cultural-Legal Misperceptions**		The challenge has not yet been addressed.
Legal challenges	**Necessity of a Legal Practitioner**	- European Code of Notarial Professional Ethics - UINL Deontology and Rules of Organization for Notariats	The challenge has already been partly addressed. A database that provides clear information for European citizens whether the intervention of a legal practitioner

		- UINL Fundamental principles of the Latin type notarial system - UINL Principles of notarial ethics - UINL Principles of the notarial function - World Notariat University	forms a mandatory requirement for real estate transactions and whether there are any restrictions that must be taken into account when choosing such a practitioner. When it comes to the creation of uniform standards however, it was positively surprising that many codes, principles and rules were found, both on European and international level. These standards apply to the Latin notaries but not to other legal practitioners such as solicitors and barristers.
	Choice of Legal Practitioner – Competence Questions	- (European Directory of Notaries)	The challenge has already been partly addressed. With the help of the European Directory of Notaries, citizens can easily locate a notary, who speaks a language that they understand in a given country, region or even city. Due to the fact that it is unclear in which intervals this database is updated however, one cannot necessarily rely upon the accurateness of the search results. After all, there is a (small) chance that a notary for example has to (temporarily) refrain from providing services as a result of disciplinary sanctions.
	Determination of the Seller's		The challenge has not yet been

	Power of Disposal		addressed.
	Determination of the Extent of the Object of Transfer		The challenge has not yet been addressed.
	Determination of the Size of the Parcel	- WPLA reports	The challenge has already been partly addressed. The WPLA reports 'Study on Key Aspects of Land Registration and Cadastral Legislation (May 2000)', and 'Inventory of Land Administration Systems in Europe and North America, 4th edition (July 2005)' do not specifically contain information as to determine the size of the parcel but they do indicate the quality of the boundaries per jurisdiction and the survey method used. However, not all EU Member States are covered by these reports.
	Determination of the Potential Defects		The challenge has not yet been addressed.
	Access to Land Register/ Cadastral Information	- Doing Business - WPLA reports	The challenge has already been partly addressed. The Doing Business questionnaire "Registering Property Rights" collects this information, but the level of detail provided depends on the countries. Especially in cases in which the access to this information is restricted, the published information might reveal that access is only granted to those who

			have a legitimate interest but might not explain under which conditions such an interest is present. In addition, the WPLA reports 'Study on Key Aspects of Land Registration and Cadastral Legislation (May 2000)', 'Inventory of Land Administration Systems in Europe and North America, 4th edition (July 2005)', and 'Survey on Land Administration Systems (English and Russian) (September 2014)' address this challenge. Nevertheless, these reports do not include information about all EU Member States. Further, it cannot be guaranteed that especially the older reports are still up to date.
	Comprehension of Land Register/ Cadastral Information	- IMOLA + LRI - ELRN - Doing Business - WPLA reports	The challenge has already been partly addressed. The ELRN has published a factsheet that address this challenge. However, as stated before, this factsheet is available only for those countries who are ELRN members. IMOLA, which will be integrated in the LRI, can facilitate the comprehension of land register information by issuing this information in standardized forms for those countries that participate in the IMOLA project. Last, the

			Doing Business website and the WPLA reports 'Study on Key Aspects of Land Registration and Cadastral Legislation (May 2000)', 'Inventory of Land Administration Systems in Europe and North America, 4th edition (July 2005)', and 'Survey on Land Administration Systems (English and Russian) (September 2014)' disclose whether a guarantee is given for the information kept by the land registries/ cadastres. As has been stated before, these reports do not cover all EU Member States.
	Choice of Law in Real Estate Transactions	- CROBECO	The challenge has already been partly addressed. So far, the applicable law in a deed of transfer can only be made within the CROBECO project.
	Necessity of Preceding Approval of the Competent Authority or of a Declaration by the Buyers		The challenge has not yet been addressed.
	Drawing up a Deed for Registration Abroad	- CROBECO - Secure Notarial Seal	The challenge has already been partly addressed. Legal practitioners can only successfully draw up deeds for registration abroad if they are operating within the CROBECO framework or if the

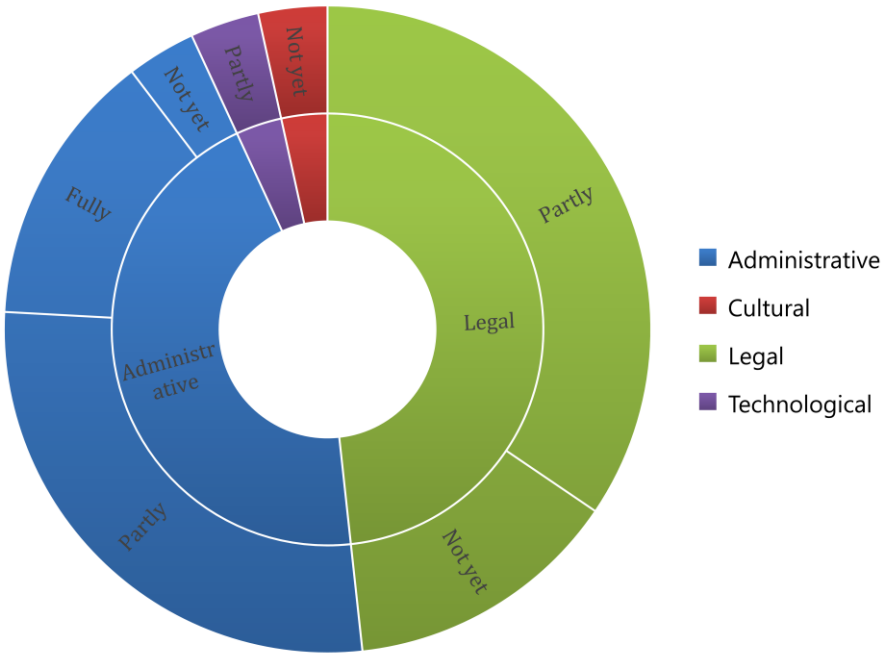
			lex rei sitae allows for the registration of foreign deeds of transfer. If the latter is the case, legal practitioners, in the absence of any initiatives on this topic, will have to find out themselves which requirements must be met. The Secure Notarial Seal could help to have a notarial deed recognized in a different country, though it does take away any legalization or Apostille requirements.
	Registrability of Foreign Deeds	- CROBECO - Secure Notarial Seal	The challenge has already been partly addressed. As said before, the Secure Notarial Seal could assist in the recognition of foreign deeds, though that would require that a legal system permits the recognition of these deeds. As followed from the national case studies, this is not often the case. The CROBECO project aimed to facilitate this registration project, but its scope is limited to transactions that are carried out within the project's framework.
	Adaptation of Foreign Rights in Rem	- e-Justice Portal & EJN + EU Vocabularies + IATE - EULIS - IMOLA + LRI - Multilingual thesaurus on	The challenge has already been partly addressed. A number of dictionaries and thesauri have already been developed that can assist with the adaptation of foreign

		land tenure - UINL Lexicon - Glossaries attached to WPLA reports	rights in rem. In addition, IMOLA, which will be incorporated in the LRI, is developing a thesaurus, which specifically aims to compare foreign property rights on a substantial level, based on a common English pivot language. Due to the fact that 'only' ELRN members are currently working on the realization of this project, the scope of the thesaurus is somewhat limited. Furthermore, it is unclear whether the IMOLA, once realized, will be made freely accessible to the broad public or whether access will be restricted to those who make use of the IMOLA/LRI services. The EULIS glossary in any case could not be accessed online at this point anymore. The other thesauri on the other hand were freely accessible online. Further, certain WPLA reports have a glossary attached to them. These glossaries are less extensive than the thesauri provided by the other institutions.
	Application of EU Law	- ENN - ELRN - e-Justice Portal & EJN	The challenge has already been partly addressed. The initiatives mentioned provide information about relevant EU legal instruments for their members. Due to the fact

			that access to this information is often not publicly accessed, it could not be determined whether it also includes information about the impact of relevant CJEU case law. Furthermore, as stated before, not all registrars and legal professionals in Europe are members of the ELRN and CNUE and in that case cannot access that information.
Technological challenges	**Different Stages of Technological Development**	- e-CODEX	The challenge has already been partly addressed. E-CODEX has not yet been applied in practice to install a technological infrastructure to facilitate cross-border communication and exchange of documents in the field of cross-border real estate transactions. The IMOLA project is however e-CODEX compliant. It is unclear whether the relevant CNUE projects are e-CODEX compliant.

On a more superficial level, this overview shows that the challenges, which are already fully addressed by existing initiatives, form a clear minority and exclusively constitute administrative challenges: Choice of Legal Practitioner – Linguistic Abilities, Provision of Required Documents, Access to Land Register/ Cadastral Information (administrative challenge), and Duration of the Transaction Procedure. On the opposite end of the spectrum, challenges that are already partly addressed form the biggest category. These concern administrative, legal, and technological challenges. The remaining challenges have not been tended to so far. Therefore, it can be concluded that there is still an unused potential to further facilitate cross-border transactions by developing solutions that tackle all challenges that are not yet (sufficiently) addressed.

Figure 7 – Overview of the Already Addressed Cross-Border Challenges



As regards content, a tendency to re-invent the wheel can be occasionally observed. The most obvious example thereof is the creation of a multi-lingual thesaurus in the area of land (registration) law. Several organizations, EULIS, ELRA, FAO, UINL, and the UNECE Committee on Urban Development, Housing and Land Management - WPLA have independently created thesauri without building on each other's shoulders. Due to the fact that not all thesauri are openly accessible, it was not possible to conduct a thorough comparison between these documents, but it

was noted that certain key terms, such as the main property rights, kept re-appearing. Undoubtly, the use of different thesauri in the same field of expertise is inefficient and can lead to dangerous situations when different definitions are given to the pivot terms. A practical example is the LRI, which will incorporate both EULIS (and its glossary) as well as IMOLA (and its thesaurus). If these thesauri do not align, the intended initiatives to facilitate the cross-border real estate market will in fact further complicate it. Therefore, it would be much more recommendable to develop a common thesaurus (at least within Europe) that is used by all countries and organizations independently of the initiative that it is used for. A factor that might increase this phenomenon lies in the accessibility of information. As has been seen, a lot of initiatives collect and publish information that can be useful to combat quite some cross-border challenges. More information exists than one might assume at first glance. However, it is quite often the case that one needs to know that this information exists and which organization has collected it before one is able to locate the desired information. Yet, even if these conditions were fulfilled, it occasionally proved to be a challenging endeavour to find the information one was looking for, such as official and topical information on the status quo of the LINE Project or the progress of the LRI. In other cases, especially in the context of project descriptions, the desired information was fairly easily accessible but predominantly stemmed from the project's initiators themselves while academic literature on these projects was sometimes rare. Certainly, this fragmentation of information is not only detrimental for the European citizen but also poses obstacles to experts in the field. Evidently, this does not take away that also positive examples exist. The EU especially builds new projects on the shoulders of already existing initiatives that were developed by other organizations (often with EU funding), as is the case with the integration of EULIS and IMOLA in the LRI. In addition, it aims to extent the e-Justice Portal as a one-stop-shop where the whole of the available sets of information and tools can be accessed through the same access point, rendering it unnecessary to find and consult the respective websites separately. Other positive examples are the CNUE initiatives "Buying Property in Europe" and the European Directory of Notaries, which demonstrate how information can be made easily accessible for third parties by designing a tool that can be effortlessly accessed from several different websites, including their own. A final observation that was made concerns the potential for cooperation between the European notaries and the European land registrars. To some extent, CNUE and ELRA work on similar topics in the area of real estate, which in some instances leads to the production of output that mirrors each other; the EUFides and CROBECO projects are probably the clearest examples of this. For third parties who are interested in one of these topics this means that they have to consult both the CNUE and the ELRA sources to get the whole picture. Moreover,

due to the fact that these sources do not follow on seamlessly, information gaps might occur or put third parties in the situation where they, on their own account, need to reconcile two sets of information with each other.

6 Facilitating Cross-Border Real Estate Transactions in Europe

6.1 Going the Full Distance – The Rise of EUCALARY

Once upon a future time, there will be a uniform European land registration system. This vision will now either energize or disturb us, depending on whether we consider ourselves to be strong supporters of European integration and a common European identity or rather passionate advocates of 'unity in diversity'. Yet, irrespective of our personal stand in this broader debate, we need to seriously examine all available options and thus consider in how far and to what expense such a drastic approach is actually capable of reducing the identified challenges to cross-border real estate transactions. Arguably, to allow an efficient implementation of this strategy, three action points need to be formulated:

1. Creation of a centralized European Cadastral Authority and Land Registry ("EUCALARY")
2. Adoption of a uniform set of rules governing the registration of rights and facts
3. Adoption of a uniform property law

In the following, the advantages and disadvantages of these action points shall be analysed.

6.1.1 Creation of a centralized European Cadastral Authority and Land Registry

One of the centrepieces of this impactful strategy is the integration of all existing national land registries and cadastral authorities in a centralized European Land Registry and Cadastral Authority ("EUCALARY"). Located in Brussels and governed by Belgian law as the applicable lex registrationis, EUCALARY could be a self-financing organization that as far as possible conducts its business independently, let alone that it must provide accountability to the European institutions in regular intervals and that its activities are being supervised by a Supervisory Board that consists of the presidents of CNUE, ELRA, CLGE, PCC, and EuroGeographics, as well as of a representative of the European Commission – DG Justice.

Concerning the division of registration tasks, EUCALARY could be inspired by the examples of the Dutch and English land registries, both of which have been centralized in the past. The day-to-day registration of deeds would then be taken care of by caseworkers, who can address themselves to a smaller group of land registrars for legal advice, who, in turn are lead by a chief land registrar. All European citizens, who are staff members of one of the national land registries and entrusted with registration tasks, could be invited to apply for a position within the European Land Registry. To this end, they would have to acquaint themselves with the new uniform set of rules governing the registration of rights and facts as well as with the new European property law. A competitive selection procedure would ensure that the applicants have acquired the necessary expertise so that EUCALARY can be manned with the best possible land registry staff. Needless to say, such an international staff requires the determination of an official working language. After all, staff members must be able to communicate with each other. Considering that English is the most widely (and best) spoken foreign language in Europe, it would seem advisable to request a certain fluency in this language from future staff members.[2329]

This leads us to the next problem: in which language is the land register to be kept and in which language do deeds have to be drawn up to be registrable? If English is chosen as the official working language, it would appear to be counterproductive to choose a different language as the official language in which the land register is to be kept. This would mean that the content of the national land registers would have to be translated into English to be entered in the English-kept European land register. Yet, much has been said about the downsides of choosing English as a language within comparative law.[2330] Therefore, it might be better to choose a more 'neutral' language, such as Latin, or to even create an individual, imaginative Pivot language from scratch. The obvious practical problem that we inevitably run into then is that it will be quite difficult to find qualified staff members, who are fluent in Latin or a newly developed Pivot language. We must therefore conclude that the problem of language barriers can therefore not fully be eradicated. This conclusion is strengthened by another point that is worth raising: unless we agree to go a considerable step further and turn Language-X, the language chosen to keep the European land register, into the

[2329] TNS Opinion & Social, 'Special Eurobarometer 386: Europeans and their Languages', Directorate-General Education and Culture, Directorate-General for Translation and Directorate-General for Interpretation, 2012, p.19-20 (https://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_386_en.pdf), as consulted on 01.07.2019.

[2330] A.J.H. Pleysier, 'Werking van een 'vindicatielegaat' (legaat met zakelijke werking) van een onroerend goed in een lidstaat dat zo'n legaat niet kent', *JBN* 2018(9) 41.

official European language, the information stored in the land register will still have to be translated to the mother tongues of those consulting the land register. However, if the national property laws are uniformed and a single European property law is created, then there are logically no substantive differences anymore across the European countries when it comes to property rights. Therefore, translating rights will be considerably easier, because we will not have to make distinctions anymore between for instance the common law 'freehold' and the civil law 'ownership' or between the French usufruct and the Dutch usufruct. Therefore, it will be possible to create a thesaurus that produces exact matches. With this in mind, it is not even necessary to restrict oneself to a single language in the keeping of the digital land register; it would be possible to simultaneously keep the land register in all official European languages, rendering it possible to automatically issue land register information in all of these languages.

The unification of the cadastral authorities will ensure that the land is surveyed mandatorily across Europe and that the same standards and techniques are not only used to conduct the survey but also to visualize its results in the cadastral map, thereby creating a single European cadastral map, whose cadastral boundaries can be legally relied upon. To this end, depending on the standards and techniques currently used, it might become indispensable to re-survey already existing boundaries. Furthermore, it will be required to survey land that has not been surveyed yet to achieve full coverage.

A special working group will be set up to develop a plan for the technological implementation, so as to ensure that the new European land register and cadastre can be kept digitally, thereby taking into account in how far it is useful to incorporate new technologies such as blockchain and smart contracts. Furthermore, it must be ensured that all professionals, who are allowed to submit documents for registration, have a secure digital signature and are registered with EUCALARY. In addition, to eliminate travel expenses, all European citizens could receive a secure digital signature, enabling them to digitally sign the required deeds and documents.

6.1.2 Adoption of a uniform set of rules governing the registration of rights and facts

Due to the fact that most European countries have a real folio system, rather than a personal folio system, the European land register will be kept in accordance with the former.[2331] This choice has the positive side effect that the IMOLA template can be used to define the layout of the land register. A standardized set of registration requirements will be adopted, which specify under which conditions rights and facts can be entered in the land register. Moreover, considering that most European countries grant open access to land register information, the European land register can be consulted without having to demonstrate a legitimate interest.[2332]

As a result of the centralization of the land registers, all legal practitioners must be able to offer deeds and other documents for registration in the European land register. Hence, the free movement of deeds of transfer, if not also of legal practitioners would *de facto* become a reality. To further reduce the number of challenges faced in cross-border transactions caused by the divergence of legal practitioners involved in real estate transactions, the Latin notaries will receive the exclusive mandate to process these transactions so that Latin notariats will be introduced in all European countries. In the interest of controlling notarial competence, all notaries must be registered in the European Directory of Notaries. If their function is terminated for whatever reason, the Directory is immediately updated. Therefore, European citizens are guaranteed that a notary is still in function when they find him or her back in this online tool.

Next to the role of the legal practitioners, also the function of the land registrars will undergo changes. Which role will be accorded to the European land registrar? It almost goes without saying that the answer depends on whether a choice is made for the creation of a positive or negative registration system. If a positive registration system is introduced, more extensive powers must be vested in the land registrar than in a negative system. From a viewpoint of state liability, it might be more attractive to opt for a semi-positive registration system as is in place in the Netherlands. After all, if a guarantee is given for the correctness of information that comes forth from a negative registration system, the risk of running into state liability is a risk that must be taken seriously. From the perspective of positive registration systems, the implementation of a negative system

[2331] L.M. Martínez Velencoso, S. Bailey & A. Pradi (eds.), *Transfer of Immovables in European Private Law*, Cambidge: Cambridge University Press, 2017, p. 16.
[2332] Doing Business, *Registering Property: Using information to curb corruption*, Doing Business 2018, p.53 (http://www.doingbusiness.org/en/reports/case-studies/2018/rp), as consulted on 21.07.2019.

might be perceived as a step back. Yet, there is an even graver problem; a negative registration system entails that notaries have to analyse the relevant underlying deeds to determine the legal situation of a plot of land. Needless to say, this implies that these deeds still exist. As has been shown in the case studies conducted in Chapter 3, this is not always a given in a positive registration system.[2333] Therefore, the more recommendable option would be to decide in favour of a positive registration system. Yet, this means that all consensual transfer systems would have to be eradicated due to the fact that registration in such a system is unlike in a tradition system not constitutive but merely declaratory. Although it is technically possible to make this distinction visible in an integrated land register by according different values to the entries, it is highly undesirable as it can easily lead to confusion on the side of European citizens. It would not facilitate the process but make it more difficult. Therefore, the status of an entry in the European land register would depend on the national property law. Consequently, the formal rules governing the registration aspects cannot be completely unified in the absence of a unified substantive property law.

6.1.3 Adoption of a uniform property law

To eradicate as many obstacles to cross-border real estate transactions as possible, one could further consider the unification of the diverging property law systems into a newly created uniform European property law. Most importantly, it will render the adaptation of foreign rights in rem redundant as those involved in these transactions will no longer have to face a colourful potpourri of national rights in rem. It almost goes without saying that a European property law must not restrict itself to the determination of a common numerus clausus but must also define how these rights can be created and transferred as well has how they extinguish. In this context, to pick just one example that arose from the case studies, prescription has been identified as a main reason for the divergence of cadastral and legal boundary. Therefore, for the European cadastral map to be reliable, inspiration could be sought from German law, leading to the abolishment of prescription as means to acquire partial parcels of land.

[2333] See Chapter 3.4.10.

A working group will be set up to create this new European property law, thereby building on the research done by *Ramaekers* and the drafters of the Draft Common Frame of Reference.[2334] The question that remains is in which form this new European property law (and the European law on registration) must be poured. To start with, if such a uniform set of rules is restricted to the EU, the question that would have to be answered is whether the EU has competence in this field. In this context, article 345 TFEU is regularly pulled out of a hat to argue that this is not the case.[2335] Having conducted a comprehensive analysis of this provision, *Akkermans* and *Ramaekers* however come to a different conclusion:

> "Article 345 TFEU is occasionally also discussed, usually by academics, in the context of the harmonisation of private law. In these discussions the question is raised whether Article 345 TFEU obstructs the development of a European property law. However, the interpretation of the Article as used in this article shows that there is no reason to assume Article 345 TFEU would form an obstacle to the development of a European property law."[2336]

This interpretation was confirmed by the CJEU, who ruled in the most recent cases on the topic, being joined cases C-105/12 *Staat der Nederlanden v Essent NV*, C-105/12 *Essent Nederland BV*, C-106/12 *Eneco Holding NV*, and C-107/12 *Delta NV* ECLI:EU:C:2013:677 that while this provision "must be interpreted as covering rules entailing the prohibition of privatisation" and nationalisation, it does not imply "that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the FEU Treaty, which rules include, inter alia, the prohibition of discrimination, freedom of establishment and the free movement of capital".[2337] In an even more recent publication, *Van Erp*, adds that "[a]rticle 345 TFEU does not

[2334] E. Ramaekers, *European Union Property Law: From Fragments to a System*, Cambridge: Intersentia, 2013, p. 271-288.
[2335] See for example L.M. Martínez Velencoso, S. Bailey & A. Pradi (eds.), *Transfer of Immovables in European Private Law*, Cambidge: Cambridge University Press, 2017, p. 13, which states that "art. 345 of the Treaty appears to be an impenetrable barrier to providing competence to the Union in this field, preventing any uniform regulation". Also see E. Ramaekers, *European Union Property Law: From Fragments to a System*, Cambridge: Intersentia, 2013, p. 126-127.
[2336] The CJEU comes to the same conclusion in joined cases C-105/12 *Staat der Nederlanden v Essent NV*, C-105/12 *Essent Nederland BV*, C-106/12 *Eneco Holding NV*, and C-107/12 *Delta NV* ECLI:EU:C:2013:677, para.36. Also see B. Akkermans & E. Ramaekers, 'Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations', *European Law Journal*, Vol. 16, No. 3, May 2010, p. 314. Also see E. Ramaekers, *European Union Property Law: From Fragments to a System*, Cambridge: Intersentia, 2013, p. 127. Also see B. Akkermans, 'EU Property Law: a (final) verdict on the meaning of Article 345 TFEU!?', *M-EPLI Blog*, 22.10.2013 (http://www.mepli.eu/2013/10/eu-property-law-a-final-verdict-on-the-meaning-of-article-345-tfeu/), as consulted on 21.07.2019.
[2337] Joined cases C-105/12 *Staat der Nederlanden v Essent NV*, C-105/12 *Essent Nederland BV*, C-106/12 *Eneco Holding NV*, and C-107/12 *Delta NV* ECLI:EU:C:2013:677, para. 29-34, 36, 69. Also see Case C-503/99 *Commission v Belgium* ("*Golden Share*") ECLI:EU:C:2002:328, para. 22, 44. Also see B. Akkermans, 'EU

exclude the development of European Union property law, but it also does not turn all national property law into a "*ius commune*" of European property law with the consequence that all national property law has to be interpreted as if it were one law being applied within one territory".[2338]

Following this argumentation, the road would in principle be free for the EU to adopt a European property law, making use of their competences enshrined in articles 81, 114, and 352 TFEU. After all, it is indisputable that the reduction of the amount of challenges in cross-border real estate transfers that can be achieved through the adoption of such European legislation will directly benefit the proper functioning of the internal market. In a last step, all that remains is that such a legislative initiative passes the proportionality and subsidiarity test.[2339] Considering the highly intrusive nature of the proposed unification of European land registration systems and given that less invasive measures can be thought of to reach similar goals (as discussed in chapter 6.2), it is highly unlikely that the EU will be able to succeed in the passing of this test. Consequently, the conclusion must be drawn that the EU does not have the competence to implement the envisioned structural reform. Therefore, it would be on the European governments themselves to negotiate on the required legislative framework and to it lay down in an international treaty. The advantage of this option is that it will be easier to involve European countries that are not an EU Member State.

Table 43 – Overview of Challenges Solved by EUCALARY

Administrative challenges	Identification of the Roadmap	
	Choice of Legal Practitioner – Linguistic Abilities	
	Provision of Required Documents	
	Translation Costs	
	Legal Practitioner's Service Fee	
	Land Registry/ Cadastral Authority Tariffs	

Property Law: a (final) verdict on the meaning of Article 345 TFEU!?', *M-EPLI Blog*, 22.10.2013 (http://www.mepli.eu/2013/10/eu-property-law-a-final-verdict-on-the-meaning-of-article-345-tfeu/), as consulted on 21.07.2019. Also see S. van Erp & B. Akkermans (eds.), *Cases, Materials and Text on Property Law*, Oxford/Portland, Hart Publishing, 2012, p.1033.

[2338] S. van Erp, 'Article 345 TFEU: A framework for European property law', in: E. Lauroba Lacasa & J. Tarabal Bosch (eds.), *El Derecho de Propiedad en la Construcción del Derecho Privado Europeo*, Valencia: tirant lo blanch, 2018, p.66.

[2339] Article 5 TEU. Also see Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No 2) on the application of the principles of subsidiarity and proportionality (OJ C 115, 9.5.2008, p. 206–209).

	Travel Expenses	
	Access to Land Register/ Cadastral Information	
	Payment of Land Registry/ Cadastral Authority Tariffs	
	Payment of Deposits/ Purchase Price	
	Payment of the Legal Practitioner's Service Fee	
	Referring Citizens to the Correct Authorities	
	Duration of the Transaction Procedure	
Cultural challenges	Risk of Cultural-Legal Misperceptions	
Legal challenges	Necessity of a Legal Practitioner	
	Choice of Legal Practitioner – Competence Questions	
	Determination of the Seller's Power of Disposal	
	Determination of the Extent of the Object of Transfer	
	Determination of the Size of the Parcel	
	Determination of the Potential Defects	
	Access to Land Register/ Cadastral Information	
	Comprehension of Land Register/ Cadastral Information	
	Choice of Law in Real Estate Transactions	
	Necessity of Preceding Approval of the Competent	
	Authority or of a Declaration by the Buyers	
	Declaration by the Buyers	
	Drawing up a Deed for Registration Abroad	
	Registrability of Foreign Deeds	
	Adaptation of Foreign Rights in Rem	
	Application of EU Law	
Technological challenges	Different Stages of Technological Development	

We can conclude that the creation of EUCALARY is capable of eradicating virtually all challenges that are currently faced in the context of cross-border real estate transactions. In the absence of a

unified European language, the necessity for translations will still occur, although it can be significantly decreased through the creation of a uniform property law. The only challenge that would still remain is the 'Application of EU Law'. The creation of EUCALARY in a utopian (or rather dystopian?) Europe could therefore create the impression to be a good idea on first sight. But what is the price that needs to be paid for it? Without a doubt, substantial sacrifices need to be made – not only are all national land registries and cadastral authorities abolished, but also are national registration requirements and substantive property law systems replaced by a unified European set of rules. The divergences that can be observed across different jurisdictions however often have a reason that point back to a country's cultural background. Such an invasive unification process will therefore certainly have negative side effects on the European cultural diversity.

On a more practical level, it must not be underestimated how challenging the integration of numerous datasets from different countries into one giant database will be. The experiences gained even within the boundaries of a single country, such as the integration of the local land charges registers into a centralized local land charges register in England or the updating of the cadastre in the Netherlands have shown how complex (though feasible) such a project can be. It goes without saying that the national land registers will have to be integrated subsequently rather than all at once. Therefore, the European land register will first have to begin as a shadow register until all national land registers have been integrated. Up to that point, the national land registers must be up and running. It is not absurd to foresee that this entire process will most probably take several years to complete. Similarly challenging will be the creation of the technological infrastructure to offer deeds and other documents for registration. This not only includes the realization of secure digital signatures for notaries and European citizens that are secure enough to enable a pure system of e-conveyancing, but also requires the assessment of how deeds and other documents can be offered for registration. Can they be digitally submitted through an online system or is it even possible to create European stylesheets to allow automated procession of these deeds as is the case in the Netherlands through KIK deeds?

Probably the biggest condition for the implementation of EUCALARY is however the passionate conviction of all European governments that such a drastic step is vital to facilitate cross-border real estate transactions. In other words, there is a considerable political element attached to the success of this project. Given the rather reduced sense of a common identity that can be witnessed in contemporary Europe, as demonstrated most radically by Brexit, it is rather unlikely that such a

political consensus can be reached anytime soon. In addition, we must remember that a far less intrusive harmonisation measure in the form of the interconnection of land registers encountered resistance. Moreover, the economic consequences such as unemployment of national land registry and cadastral authority staff, loss of income for the European countries, the costs of (re-) surveying land to create a common European cadastral map, the costs connected to the implementation of the new European system, and the necessary education of legal professionals must not be underestimated. It would be highly interesting to conduct a cost and benefit analysis of such a project. For these reasons, only one conclusion is reasonable: EUCALARY is an interesting intellectual pastime but not more than that. In other words, the "all in" option is certainly not the most desirable means to facilitate cross-border real estate transactions. One cannot but agree with *Sparkes* that the success of such an endeavour would likely be contingent on the intervention of modern-day Napoleon 2.0![2340]

6.2 Meeting in the Golden Middle

What is the alternative then to bring light into the black-box called cross-border real estate transactions? Essentially, there are two options. To begin with, we can practice ourselves in humility and accept the status quo with the achievements already made. In the light of the considerations expressed in chapter 4.3, this can only be accepted as a rhetorical option and must thus be dismissed. It is therefore far more reasonable to follow the second option, which suggests the investigation of possibilities to facilitate individual challenges in a manner that is as little intrusive as possible on the national legal regimes.

6.2.1 Methods of Resolving Administrative Challenges

In contrast to cultural, legal, and technological challenges, there is a number of administrative challenges that have been fully addressed by existing initiatives. In addition, all other administrative challenges (with the exception of the "Payment of the Legal Practitioner's Service Fee") have already been partially dealt with.

[2340] P. Sparkes, *European Land Law*, Oxford/Portland: Hart Publishing, 2007, p. 95.

Table 44 – Overview of the Status Quo of Administrative Challenges

Administrative challenges	Identification of the Roadmap	
	Choice of Legal Practitioner – Linguistic Abilities	
	Provision of Required Documents	
	Translation Costs	
	Legal Practitioner's Service Fee	
	Land Registry/ Cadastral Authority Tariffs	
	Travel Expenses	
	Access to Land Register/ Cadastral Information	
	Payment of Land Registry/ Cadastral Authority Tariffs	
	Payment of Deposits/ Purchase Price	
	Payment of the Legal Practitioner's Service Fee	
	Referring Citizens to the Correct Authorities	
	Duration of the Transaction Procedure	

The good news is that virtually all of these challenges can be resolved relatively easily. All that is needed is a facilitation of the exchange of relevant information. As has been shown in Table 42, information about the identification of the roadmap, the legal practitioner's service fee, the land registry/ cadastral authority tariffs, the payment of land registry/ cadastral authority tariffs, deposits/ purchase price, and the legal practitioner's service fee, as well as on the referral of citizens to the correct (foreign) authorities already exists. Nevertheless, three flaws could be identified: the available information in general does not cover all European countries (or at least all EU Member States), it is often not kept up to date (or it is at least impossible to assess its currentness), and it is spread across different websites and reports, which complicates its access. Therefore, the key to tackle these challenges ultimately lies in the eradication of these flaws. This can be achieved through the creation of a central database, where the available information is integrated, structured, extended to cover all EU Member States (if not all European countries), and regularly updated by the Member States. To make use of the existing digital infrastructure, such a central database could be realized within the EJN, which ultimately would have the positive side-effect that it would strengthen its objective to become a one-stop-shop in all 'civil and commercial matters'. At the same time, contrary to first intuitions, such an endeavour would not increase the burden on the Member States to provide information about their legal system, but might in the long

run even reduce it; instead of having to submit the same information to diverse organisations, they will only have to deliver the relevant information once, which ultimately also decreases the risk of providing contradictory information. However, for the EJN to be a reliable source, guidelines should be established to guarantee that the information provided by the Member States have a comparable level of detail. Furthermore, the information must be subjected to regular updates and indicate the date on which it was indicated last to allow parties to assess the currentness of the information. In the management of information, the EJN could seek inspiration from the ENN in the sense that it contains a public part, accessible for the European citizen, and a hidden part for authorized legal professionals, which contains more specific information, including the contact information of participating legal practitioner, land registry, and cadastre organizations for effective cross-border assistance. This approach ensures that the information kept by the EJN better connects to the needs of these two groups so as to prevent European citizens from being overwhelmed by legal information while providing legal professionals with the required and more in-depth information about a foreign legal system. On a more critical note, one should be cautious not to overestimate the extent of added value provided by such a database. Especially when such a database is to contain not only administrative information but also certain legal information, as will be discussed below, it is unclear to what extent its users would be able to correctly interpret the published information about a foreign legal system. For this reason, it is argued that although such a database can be valued as a useful tool for EU citizens and professional parties to access verified information about foreign real estate transactions, given the complexity of real estate transactions, it must simultaneously be admitted that it cannot replace the high-quality legal advice provided by the national legal practitioners and land registrars, in which the broader information published in the database can be deepened, enriched, and tailored to the specifics of a particular case.

Within the context of administrative challenges, the “Translation Costs” and “Travel Expenses” must be further singled out. As explained in chapter 4.1.1, translation costs apply to two kinds of documents: those that are offered for registration in the land register and those that are distributed by the land registry/cadastral authority. The IMOLA project aims to facilitate the comprehension of land register documents by providing standard templates. The success of this project will largely depend on the quality of the thesaurus, on the basis of which land register output can be translated into different (legal) languages. One can validly ask oneself to what extent this project is really capable of making official translations redundant. Unfortunately, this question cannot be answered at this point due to the fact that the project has not yet been concluded. When it comes to

documents that are offered for registration, the conclusion must be drawn that the need for official translations cannot be significantly decreased. As has been shown in the case studies, it is not uncommon for national legislators to restrict if not completely exclude the possibility to register documents in the land register, that are drawn up in a foreign language. The only route to completely avoid translation costs would lead to the harmonisation of national registration laws, with the effect that also documents drawn up in foreign languages qualify for registration in the land register. However, one has to realize that this measure would only benefit the parties, who offer the relevant document for registration. In a deed system, this measure would disadvantage all other parties, who are by law obliged to consult the underlying documents to establish the legal status of the real estate in question. If they are not able to read documents drawn up in foreign languages, they will have to invest in translations. In a title registration system, a similar issue arises. Whilst the parties are not obliged to analyse the underlying documents to determine the legal status of the real estate, the land registry staff will still have to comprehend the documents to enter the information in the land register. In other words, harmonizing national registration law to this end will not solve but simply shift the problem to a fellow man. Another option worth considering lies in the harmonisation of national laws to permit the registration of multilingual deeds, provided that the language version that is drawn up in the language in which the land register is kept, is legally decisive. Yet, even this option does not necessarily lower translation costs. To begin with, it builds on the assumption that for all possible language combinations, legal practitioners can be found. When it comes to Latin notaries, this assumption was proven negative, despite the fact that many of them are indeed able and willing to notarize in one or more foreign languages.[2341] Nevertheless, even if a legal practitioner can be found to draw up a multilingual deed in the desired foreign language(s), the services of a sworn-in translator will not be needed, but the translation will still have to be carried out, namely by the legal practitioner. It is then likely that the legal practitioner will charge a higher fee for the drawing up of a multilingual deed (and rightly so) than for a unilingual deed. Quantitative research would be required to establish whether the drawing up of a multilingual deed or the production of an official translation of a unilingual deed would be more financially attractive for the parties.

When it comes to the reduction of travel expenses, the situation is comparably challenging. As a point of departure, we can state that unless buyer and seller live in the same area and use can be

[2341] See Tables 26 and 27. Data on foreign language proficiency of solicitors and conveyancers could not be found.

made of the CROBECO or EUFides mechanisms (neither of which cover all European countries), this evidentially means that depending on the circumstances of the case, at least one of the parties will have to incur travel costs to sign the relevant documents in the legal practitioner's office. This would only be different if a fully e-conveyancing system was realized in which it would be technically possible for the parties to digitally sign the documents at home without ever having to be physically present in the legal practitioner's office.[2342]

6.2.2 Methods of Resolving Cultural Challenges

The cultural challenge has not yet been addressed as such by the already existing projects and initiatives.

Table 45 – Overview of the Status Quo of Cultural Challenges

Cultural challenges	Risk of Cultural-Legal Misperceptions	

Arguably though, the risk of cultural-legal misperceptions is inextricably connected to the diversity of cultures within Europe. Therefore, it is impossible to eliminate this risk completely if one is to converse cultural diversity. Nevertheless, the risk can be minimalized through the free disposal of accessible information. If parties, who are interested in acquiring real estate in a different European country, know where to locate reliable information about those transactions, they will be better equipped to make informed decisions. As stated above, a rich set of information is already available, but sometimes incomplete or (possibly) outdated and spread across a diverse set of databases so that ordinary European citizens are simply unable to locate that information unless they know that it exists and where they can find it. Even if that is the case, they will have to consult a number of different databases before a complete picture emerges, i.e. CNUE's 'Buying property in Europe' tool to find information about the (pre-) contractual stage, the ELRN factsheets for information about the interpretation of land register information, and the Doing Business reports to find information about the duration of the transaction procedure. The key to approach this challenge therefore again lies in the production of a central database within the EJN as has already been advocated as a strategy to deal with the administrative challenges.

[2342] This idea will be further discussed in Chapter 6.2.4.

6.2.3 Methods of Resolving Legal Challenges

Although none of the legal challenges have been completely resolved yet, most of them have at least been partly addressed by the existing initiatives (Table 42 and 46). Similarly to the administrative and cultural challenges already discussed, it is also observable here that the root of the problem often is a lack of easily accessible, complete, and up-to-date information. This particularly applies to the questions surrounding the necessity of a legal practitioner, the determination of the seller's power of disposal, the extent of the object of transfer, the size of the parcel, and of potential defects, as well as concerning the access to land register/cadastral information and the comprehension of this information, the necessity of preceding approval of the competent authority or of a declaration of the buyers, and the possibility to draw up a deed for registration abroad. Therefore, the easiest way to address these challenges is to simply provide this kind of information in the EJN environment.

Table 46 – Overview of the Status Quo of Legal Challenges

Legal challenges	
	Necessity of a Legal Practitioner
	Choice of Legal Practitioner – Competence Questions
	Determination of the Seller's Power of Disposal
	Determination of the Extent of the Object of Transfer
	Determination of the Size of the Parcel
	Determination of the Potential Defects
	Access to Land Register/ Cadastral Information
	Comprehension of Land Register/ Cadastral Information
	Choice of Law in Real Estate Transactions
	Necessity of Preceding Approval of the Competent Authority
	or of a Declaration by the Buyers
	Drawing up a Deed for Registration Abroad
	Registrability of Foreign Deeds
	Adaptation of Foreign Rights in Rem
	Application of EU Law

The handling of the remaining legal challenges requires a different approach. It can be observed that the EU is often inclined to respond with standardization measures to reduce impediments to the proper functioning of the internal market. In this context, research conducted by *Murray* in 2007 suggests that one should not be tempted to praise standardization as the Holy Grail of real estate transactions:

> "There appears to be little reason to foster standardization of real estate conveyancing regulation, practices or costs within the EU. Real estate is inherently a local matter. Differences in costs and practices within the EU are not so significant that there is any risk of impeding real estate development or commerce among the Member States."[2343]

However, in order to correctly interpret this argument, one must be aware that *Murray* did not examine cross-border real estate transactions as such but the regulation of the Latin notariat on Member State level in the light of European integration. For this reason, it will be analysed in the following whether certain standardization measures cannot benefit the reduction of legal challenges that arise as a consequence of cross-border transactions. Hereby, inspiration can often been sought from the European Succession Regulation. After all, it *inter alia* facilitates the process of altering the land register through the introduction of a European Certificate of Succession in order to register the heirs as the new owners of the deceased's real estate. Therefore, lessons can be learned from the introduction of choice of law options and standardized European deeds that enjoy recognition by all (participating) Member States.

6.2.3.1 The choice of law in real estate transactions

A choice of law option in real estate transactions is already an existing reality. Nevertheless, the Rome I and II Regulations restrict that choice to determining the law that applies to (non) contractual obligations so that the registration requirements will always be governed by the lex rei sitae. The CROBECO project has functioned as a proof of concept to that end. It could not be determined to what extent this choice of law mechanism is actively made use of in legal practice and what the intrinsic motivation of the parties is to make use of such an option; is this desire always built on the knowledge that the chosen law is better suited to fulfil a certain objective or is this law, especially when it is the law of the home country, merely considered to be more familiar and thus trustworthy? Follow-up research must shed light on this question and determine what the

[2343] P.L. Murray, 'Real Estate Conveyancing in 5 European Union Member States: A Comparative Study', 2007, p.130 (https://www.dnotv.de/_files/Aktuelles/murrayreportfinal310807en.pdf) as consulted on 16.07.2019.

reasons are that either persuade or discourage parties to express the desirability to make use of such a choice of law option. As CNUE points out:

> "Indeed, the ELRA recognizes that certain rules applicable to the contract, such as those relating to the transfer of the property rights, or those related to the securities, must necessarily be those of the State in which the property being sold is located. Likewise, certain formal requirements of the substantive law of the States, the overriding rules or those concerning consumer protection, the tax laws that are very present with respect to real estate transfer, necessarily limit the possibility to designate a law applicable to the contract."[2344]

Furthermore, although potentially beneficial to the parties, one must not conceal the extra burden that comes to rest on the legal practitioners, who will have to be an expert of both legal systems if they want to exclude liability. Otherwise, they cannot assist their clients in determining the national law that is more suitable for them. Furthermore, when drawing up a deed of transfer (with a choice of law for their own national law) that is destined to be registered abroad, they will have to ensure that the deed complies with all registration requirements that are imposed by the foreign law. Of course it would be possible to ask the assistance of a foreign colleague (which would probably but rightly so increase the financial obligations for the clients) or to collect information about the registration requirements and publish them in the EJN. In any event though, legal practitioners would have to ensure that these activities are covered by their professional indemnity insurance.

Another interesting legal question attached to choice of law options is the consequence thereof for the transfer of ownership. If the law of a country that adheres to a consensual transfer system (such as France) is chosen as the law applicable to (non-) contractual obligations and the deed is to effectuate the transfer of ownership in a country that adheres to a tradition system (such as Germany), the question arises when the ownership passes: at the moment when the contract of sale is concluded, in which case the registration in the foreign land register would be merely declaratory, or at the moment of registration in the land register, in which case the registration would be constitutive. Within the CROBECO project, this problem did not occur due to the fact that all countries, who participated in the practical implementation of this project, adhere to a tradition system. Yet, the question rose in the context of the European Succession Regulation. In the light of the *Kubicka* ruling, arguably the Member States would have to recognize the material effects of the

[2344] CNUE, *CROBECO Project – Position of the Notaries of Europe*, 2011 (http://www.notaries-of-europe.eu/files/position-papers/2011/Position-CNUE-CROBECO-18-11-11-final-EN.pdf), as consulted on 23.03.2018.

transfer of ownership as a result of the conclusion of the contract of sale, thereby accepting that the effect of the registration would be declaratory rather than conclusive in these cases.[2345]

Given these considerations, is it reasonable to ask legal practitioners to draw up a deed (in which the parties choose the legal practitioner's national law as the law applicable to the (non-) contractual obligations) that is destined for registration abroad? Considering that several CROBECO deeds have already been successfully registered, one does not have to approach this question purely from a theoretical perspective but can take into account experiences from practice. Furthermore, valuable lessons can be learned from the European Succession Regulation that provides for the possibility to choose the law that applies to the succession as whole, while the registration requirements for a European Certificate of Succession are determined by the lex rei sitae. Unfortunately though it was not possible to locate impact assessments that focus on this specific question, neither with regard to the CROBECO process nor with respect to the European Succession Regulation, so that it will be up to future research to shed light on this matter. After all, the lessons learned in the context of CROBECO and the European Succession Regulation can provide valuable insights into the general suitability of such choice of law options in this specific field in legal practice and how such choice of law options can be facilitated if they prove to be suitable. To this end, it would be worth considering to set up pop-up laboratories in which proposed solutions can be test-drived before they are implemented in practice.

6.2.3.2 The registrability of foreign deeds

In the absence of European and international law, the European states may themselves decide on whom they grant the competence of drawing up public documents necessary to effectuate a real estate transaction. As a general point of departure, any public document that falls through the cracks of bilateral treaties, multilateral treaties and EU legal instruments must be subject to legalization. Legalization is defined as:

> "the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears".[2346]

[2345] C-218/16 *Kubicka* ECLI:EU:C:2017:755, para. 67. See Chapter 6.2.3.2.
[2346] Article 2 Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

What on first glance sounds like a relatively simplistic procedure, in practice comes down to the pedestrian completion of an incremental process in which several steps have to be climbed before legalization is achieved.[2347] At the beginning of the process stands a notary (public) who notarizes the document, whose authenticity is then attested by a local civil servant.[2348] The latter attestation is in turn confirmed by a regional civil servant, which in turn is verified by an interregional civil servant.[2349] In a last step, this verification must be certified by the consulate of the country in which the document is to be used.[2350] Sometimes, this certification must additionally be proven true by that country's foreign ministry.[2351]

While this describes the general legalization procedure, it must be said that within the context of the EU, a small potpourri of differing legalization requirements can be observed across the Member States.[2352] It goes without saying that this is detrimental to the degree of legal certainty, which the person, who wishes to rely on a public document abroad, should be able to enjoy.[2353] Yet, on the bright sight, as shall be set out in the following, legalization has become quite redundant within the EU.[2354]

The Apostille Convention[2355]

Public documents that fall within the scope of the Apostille Convention, such as "notarial acts", do not have to undergo the process of legalization before they can be recognized.[2356] Instead, they

[2347] Chancellor Publications, *The International Legalization Handbook*, England: Chancellor Publications, 1996, p. 7. Also see D. McClean (eds), *International Co-operation in Civil and Criminal Matters*, Oxford: Oxford University Press, 2012, p. 138.
[2348] Chancellor Publications, *The International Legalization Handbook*, England: Chancellor Publications, 1996, p. 7.
[2349] Ibid.
[2350] Ibid.
[2351] Ibid.
[2352] European Commission, 'Commission Staff Working Document: Impact Assessment: Accompanying the document: Proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (COM(2013) 228 final) (SWD(2013 144 final))', Brussels, 2013, p. 48 (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0145:FIN:EN:PDF), as consulted on 21.07.2019.
[2353] Ibid.
[2354] Ibid.
[2355] Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.
[2356] Article 1-2 Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. Whether a document qualifies as "public document" is determined on the basis of the law of the Contracting State in which it is drawn up. For the recognition of the *Apostille* it is irrelevant whether

must follow the lighter *Apostille* procedure which consists of the certification of "the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears".[2357] To signal this certification, the public document in question is provided with an *Apostille* certificate.[2358] Such a certificate only proves the formal validity of the document but not its substantive validity.[2359] Furthermore, and this constitutes a real problem in practice, the *Apostille* neither guarantees that the authority who issued the *Apostille* was competent to do so, nor that the public document fulfils all formal requirements that are prescribed by the applicable national law.[2360]

In the following situations, an *Apostille* must not be requested: first, if the Contracting State in which the public document is drawn up has abolished the *Apostille* or provides for a simpler procedure (either in general or specifically with regard to the public document in question) and second, if Contracting States have concluded mutual bilateral or multilateral agreements to refrain from such a request.[2361] Germany for example has concluded such agreements with some of its

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the Contracting State in which the document is to be used also considers that document to be a "public document". See: Hague Conference on Private International Law, *Apostille Handbook: A Handbook on the Practical Operation of the Apostille Convention*, The Hague: The Hague Conference on Private International Law Permanent Bureau, 2013, p. 29-30.

[2357] Article 3 Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

[2358] Article 4 Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

[2359] Article 5 Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. Also see European Commission, 'Commission Staff Working Document: Impact Assessment: Accompanying the document: Proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (COM(2013) 228 final) (SWD(2013 144 final))', Brussels, 2013, p. 50 (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0145:FIN:EN:PDF), as consulted on 21.07.2019. Also see Hague Conference on Private International Law, *Apostille Handbook: A Handbook on the Practical Operation of the Apostille Convention*, The Hague: The Hague Conference on Private International Law Permanent Bureau, 2013, p. 9.

[2360] European Commission, 'Commission Staff Working Document: Impact Assessment: Accompanying the document: Proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (COM(2013) 228 final) (SWD(2013 144 final))', Brussels, 2013, p. 49 (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0145:FIN:EN:PDF), as consulted on 21.07.2019. Also see Hague Conference on Private International Law, *Apostille Handbook: A Handbook on the Practical Operation of the Apostille Convention*, The Hague: The Hague Conference on Private International Law Permanent Bureau, 2013, p. 9-10.

[2361] Article 3 Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. Also see HCCH, 'Explanatory Report on the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents', article 3 (https://www.hcch.net/de/publications-and-studies/details4/?pid=52), as consulted on 21.07.2019.

bordering countries (Austria, Belgium, Denmark, France, Luxembourg, and Switzerland), Greece and Italy.[2362] To date, the Convention counts 113 Contracting States.[2363]

European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers[2364]

The Convention, which aims to abolish the legalization requirements for documents that are produced by diplomatic agents or consular officers, was signed on 7 June 1968 by member states of the Council of Europe and entered into force on 14 August 1970.[2365] At this point in time, it has been signed by 24 states and ratified by all with the exception of Russia and Malta.[2366] Its adoption was deemed necessary as the particular category of documents to which it refers, had been expressly excluded from the scope of the Apostille Convention.[2367] When analyzing this Convention, it becomes apparent that it has a more drastic impact on the verification process of the concerned documents than the Apostille Convention has. While the latter has replaced the legalization requirement by another (though simplified) *Apostille* process, the Convention has abolished the legalization requirement as a whole and even ruled out the possibility to introduce any formalities (as embodied by the *Apostille*) at a later stage.[2368]

[2362] Website Auswärtiges Amt, 'German public documents for use abroad' (http://www.auswaertiges-amt.de/sid_5886E1BF7CE0B33C1F972BAA4FAC651F/EN/Laenderinformationen/01-Laender/Konsularisches/UrkundenverkehrTeilA_node.html#doc483724bodyText2), consulted on 31.03.2017.

[2363] Website HCCH, 'Status Table: Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents' (https://www.hcch.net/en/instruments/conventions/status-table/?cid=41), consulted on 31.03.2017.

[2364] European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers, London, ETS No.063.

[2365] Article 2 European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers, London, ETS No.063. The term "legalization" as used in the Brussels 1987 Convention is given the same meaning as in the Apostille Convention. See Council of Europe, 'Explanatory Report to the European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers', London, 1968, p. 1-2 (https://rm.coe.int/16800c92f4), as consulted on 21.07.2019.

[2366] Website Council of Europe, 'Chart of signatures and ratifications of Treaty 063: European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers (status as of 31/03/2017)' (https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/063/signatures?p_auth=9IJUMVcU), consulted on 31.03.2017.

[2367] Article 1 Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. Also see Council of Europe, 'Explanatory Report to the European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers', London, 1968, p. 1 (https://rm.coe.int/16800c92f4), as consulted on 21.07.2019.

[2368] Article 3, 5 Convention abolishing the legalization of documents in the Member States of the European Communities. Also see Council of Europe, 'Explanatory Report to the European Convention on the Abolition of

The Brussels 1987 Convention[2369]

A similar approach was taken by the European Communities in the Brussels 1987 Convention, which also sought the abolishment of legalization requirements. The Convention defines to which types of public documents it applies.[2370] "Notarial acts" are included in its scope.[2371] As is the case in the European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers, the Brussels 1987 abolishes "all forms of legalization or other equivalent or similar formality".[2372] To date, 11 Member States have signed the Convention.[2373] Out of these 11 Member States, merely Belgium, Denmark, France, Ireland, and Italy have accomplished ratification.[2374] Cyprus, Estonia, and Latvia have acceded to the Convention.[2375] And in these numbers lies the crux because the entering into force of the Convention is conditional upon its ratification by every Member States of the European Communities".[2376] Yet, Member States who have ratified the Convention are free to determine that it shall have binding force in relation to other Member States, who accomplished its ratification.[2377]

Legalisation of Documents executed by Diplomatic Agents or Consular Officers', London, 1968, p. 1, 5 (https://rm.coe.int/16800c92f4), as consulted on 21.07.2019

[2369] Convention abolishing the legalization of documents in the Member States of the European Communities.

[2370] Article 1 Convention abolishing the legalization of documents in the Member States of the European Communities.

[2371] Article 1 (2)(c) Convention abolishing the legalization of documents in the Member States of the European Communities.

[2372] Article 2 Convention abolishing the legalization of documents in the Member States of the European Communities.

[2373] Website overheid.nl, 'Convention abolishing the legalization of documents in the Member States of the European Communities', (https://verdragenbank.overheid.nl/en/Treaty/Details/001097.html), consulted on 31.03.2017.

[2374] Ibid.

[2375] Ibid.

[2376] Article 6 (2) Convention abolishing the legalization of documents in the Member States of the European Communities. Also see European Commission, 'Commission Staff Working Document: Impact Assessment: Accompanying the document: Proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (COM(2013) 228 final) (SWD(2013 144 final))', Brussels, 2013, p. 50 (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0145:FIN:EN:PDF), as consulted on 21.07.2019.

[2377] Article 6 (3) Convention abolishing the legalization of documents in the Member States of the European Communities. Also see European Commission, 'Commission Staff Working Document: Impact Assessment: Accompanying the document: Proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (COM(2013) 228 final) (SWD(2013 144 final))', Brussels, 2013, p. 50 (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0145:FIN:EN:PDF), as consulted on 21.07.2019.

Regulation (EU) 2016/1191

To further improve the experience of the internal market for its citizens, the European Union aims at the reduction of the bureaucracy that surrounds the recognition of public documents in a different Member State by "cutting red tape".[2378] One of the concrete outcomes of this initiative is Regulation (EU) 2016/1191, which provides for the promotion of "the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union".[2379] As such, it targets a further simplification of the recognition requirements provided for in the Hague Convention by abolishing the *Apostille* requirement.[2380] To this end, multilingual standard forms are provided.[2381] The Regulation was adopted on 6 July 2016 and made applicable from 16 February 2019 onwards.[2382] As its title already reveals, the application of this new Regulation does not comprehend public documents as a whole but is instead limited to few fixed types of documents.[2383]

[2378] European Commission, *Green Paper: Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records*, Brussels, 2010 (COM(2010) 747 final). Also see European Commission, 'Commission Staff Working Document: Impact Assessment: Accompanying the document: Proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (COM(2013) 228 final) (SWD(2013 144 final))', Brussels, 2013, p. 5 (https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0145:FIN:EN:PDF), as consulted on 21.07.2019. Also see European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strengthening Citizens' Rights in a Union of Democratic Change: EU Citizenship Report 2017*, Brussels, 2017 (COM (2017) 30 final), para. 1.7. Also see A. Staab, *The European Union Explained: Institutions, Actors, Global Impact*, Bloomington: Indiana University Press, 2013, p. 99.

[2379] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (OJ L 200, 26.7.2016, p. 1–136).

[2380] Preamble (nr. 2-3) of Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (OJ L 200, 26.7.2016, p. 1–136).

[2381] Articles 1 (2), 6 (1)(b), 7-12 Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (OJ L 200, 26.7.2016, p. 1–136).

[2382] A few provisions will be applicable beforehand. See: article 27 (2) Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (OJ L 200, 26.7.2016, p. 1–136).

[2383] Article 2 (1)-(2) Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (OJ L 200, 26.7.2016, p. 1–136).

Public documents required to effectuate real estate transactions are not included in this enumeration, so that the regulation does not apply to these documents.

Introducing the obligation to recognize foreign deeds of transfer?

Hence, European countries are not obliged by European or international law to recognize a foreign deed of transfer for registration in the land register. The question thus is whether the introduction of such an obligation would be favourable. At first sight, a free movement of deeds of transfer might sound like the ideal solution. The parties would not have to turn to a legal practitioner in the forum rei sitae but could instead make use of the services offered by a legal practitioner in their home country. We recall that this is one of the main corner stones of the CROBECO project and that we already concluded that the validity of this consideration is rather limited to a cross-border case where both buyer and seller reside in the same area. If the parties live in different areas of the same country or even in different countries, the claim that they prefer to turn to a local legal practitioner is more difficult to uphold. Especially if the parties reside in countries that know the Latin notariat, they will have to agree on a single notary to assist them with the real estate transaction, which ultimately means that the notary will only be local for one of the parties.

But even if we were to depart from this consideration, we have to agree that a national deed of transfer can only be entered in a foreign land register if it complies with the registration requirements that are set by the lex rei sitae. As described above, this has been accepted as a given by the CROBECO project and also by the European Succession Regulation. As a consequence, the deed that would be drawn up by a legal practitioner would not be a purely national deed but in fact a synergy of the law of Country-A governing the (non-)contractual obligations and the law of Country-B that governs the registration requirements. In other words, this endeavour would boil down to the promotion of CROBECO deeds. However, as follows from the case studies conducted in chapter 3, national laws often require that deeds of transfer have to be drawn up in the respective national language by legal practitioners, who are authorized to offer their services within the territory of that state. Therefore, in order to promote CROBECO deeds, one would have to harmonize national registration requirements or introduce an instrument of private international law to force the recognition of these deeds in other Member States, thereby making use of similar mechanisms as have been employed in the European Succession Regulation. The significant difference with the European Certificate of Succession would however be that these national deeds of transfers would not be subject to standardization, thereby risking that these deeds do not include

all needed information and thus fail to fulfil the remaining registration requirements. However, after the CJEU's recent ruling in the *E.E.* case, which shall be discussed in more detail below, it is now unequivocal that in addition to the European Certificate of Succession also unstandardized national certificates of succession can qualify either as being 'decisions', which must be recognized by the authorities in different Member States, or as being 'authentic instruments', which must be accepted in the different Member States.[2384] Future research will have to reveal what kind of problems are faced in the process of recognizing or accepting unstandardized national certificates of succession in a different Member State. For now, it appears that there are only two way of removing these obstacles: the adoption of uniform registration requirements across the EU Member States or the creation of a PIL for registration requirements. It goes without saying that the likelihood of winning sufficient political support to actually implement such ideas must be carefully and realistically determined. If legal solutions are to be found within the EU framework, it must be assessed whether the EU has competence in first place and whether the proposed measure is in compliance with the principles of proportionality and subsidiarity.[2385] Outside the EU framework, European countries are of course free to enter into bi- or even multilateral treaties to realize the intended changes regarding the applicable registration requirements. However, taking into account the political sensitivity attached to this topic, it would require a pressing necessity to pursue this aim that cannot be established at this point.

In addition to the political opposition, projects aiming to create a PIL or even a common set of registration requirements for (cross-border) deeds of transfer also encounter challenges of a more legal nature. Most prominently, two interesting issues that such projects would have to tackle is the authority to draw up a document for registration in the land register and the evidentiary effect that needs to be accorded to a foreign deed. This first issue will arguably not form a considerable problem among the group of European countries that know the Latin notariat. If we follow the example set by the European Succession Regulation, it would be reasonable to demand that these countries recognize deeds that are drawn up by other legal practitioners. However, the intervention of qualified legal practitioners is not always required. In some countries, such as in England, it is possible for the parties to do their own conveyancing. It goes without saying that it is a far bigger step to demand the recognition of these DIY deeds than of a notarial deed. The recognition of foreign deeds poses another challenge to positive systems. Unlike in negative registration systems,

[2384] Case C-80/19 *E.E.* ECLI:EU:C:2020:569. Also see articles 39 and 59 European Succession Regulation.
[2385] See: Chapter 6.1.3.

where deeds have to be registered as long as they comply with the registration requirements, land registrars in a positive registration system must refuse the registration of a deed, even though it complies with the registration requirements, if such registration were to falsify the land register. Therefore, there is a very fine area of potential conflict of on the one hand being obliged to recognize foreign deeds and on the other hand having to apply the legality principle.

The second issue that needs to be addressed concerns the effect of foreign deeds. Especially in positive land registration systems that provide a guarantee for the correctness of their land register information, it will be more challenging to give full effect to a foreign deed than would the case in a negative registration system. As briefly stated before, within the context of the European Succession Regulation, a distinction is made between foreign 'decisions', which must "be recognised in the other Member States without any special procedure being required" and foreign 'authentic instruments', which are to be merely accepted by the participating Member States.[2386] This terminological difference points to a difference in effect that is accorded to decisions and authentic instruments. While the effect of an authentic instrument is limited "to the evidentiary effect of the *instrumentum* [being] the *factual* elements recorded by the certifying authority", the recognition of decisions also extends to the so-called *negotium*, "the substantive law content".[2387] Legal practise however has shown that the two categories 'decisions' and 'authentic instruments' are not as explicit as the first reading of the applicable legal provisions might suggest. The reason for this is that decisions can only be issued by authorities that constitute 'courts' within the meaning of article 3(2) European Succession Regulation, whereby the definition of 'court' has proven to be somewhat ambiguous, especially because the question whether Latin notaries are 'courts' needs to be answered on a country-by-country basis, thereby taking into account the national legal frameworks in which they operate.[2388] In order to clarifiy these intertwined issues, questions as to whether a national certificate of succession must be qualified as a decision or rather as an authentic instrument were submitted to the CJEU in the *WB*[2389] and the *E.E.*[2390] case.[2391] In the *WB* case, the

[2386] Article 39, 59 European Succession Regulation.
[2387] H.-P. Mansel, 'Article 59 – Acceptance of Authentic Instruments', para. 2-3, 33-37, in: A.-L. Calvo Caravaca, A. Davì & H.-P. Mansel (eds.), *The EU Succession Regulation: A Commentary*, Cambridge: Cambridge University Press, 2016. Also see Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 72-73, 77.
[2388] Article 3 (1)(g) European Succession Regulation. The question whether a notary in a particular Member State falls within the ambit of the definition 'court' ex. article 3(2) European Succession Regulation was referred to the CJEU in cases C-658/17 *WB* ECLI:EU:C:2019:444 (concerning the qualification of a Polish notary) and C-80/19 *E.E.* ECLI:EU:C:2020:569 (concerning the qualification of a Lithuanian notary).
[2389] Case C-658/17 *WB* ECLI:EU:C:2019:444.
[2390] Case C-80/19 *E.E.* ECLI:EU:C:2020:569.

CJEU concluded that a Polish notary, who issues a certificate of succession, does not qualify as a 'court' and that the Polish certificate of succession therefore must be categorized as an authentic instrument and not as a decision.[2392] In the *E.E.* case, the CJEU did not provide a definite answer to the question whether the Lithuanian notary is a 'court' under article 3(2) European Succession Regulation. Although the CJEU argued that it is likely that this question cannot be answered affirmatively, they grant the final right to a say in this matter to the Lithuanian court that made the request for a preliminary ruling.[2393] Moreover, the CJEU reiterated that a national certificate of succession only qualifies as a 'decision' if it is issued by a 'court'.[2394] When it comes to the standardized European Certificate of Succession, it is evident that it must be recognized by the other Member States in accordance with article 69 European Succession Regulation. Its effects are outlined in paragraphs 2-5 of said provision. In particular, paragraph 5 states that "[t]he Certificate shall constitute a valid document for the recording of succession property in the relevant register of a Member State, without prejudice to points (k) and (l) of Article 1(2)". This provision precisely demonstrates the crux when it comes to the recognition and enforceability of standardized deeds in general; it inevitably creates a rather unexplicit stress field between the guarding of national registration requirements and the national numerus clausus on the one hand and the uniform recognition of the standardized deed on the other hand. In legal practise, it is unavoidable that this generates a certain degree of uncertainty for legal practitioners as to where the boundary between the guarding of the national registration system and the obligation to recognize the European Certificate of Succession must be drawn and different approaches to answer this question have been formulated.[2395]

[2391] Also see: K. Zimmermann, 'Case C-80/19 E.E. – Do Latin notaries qualify as 'courts' and are they bound by the rules of jurisdiction under the European Succession Regulation?', *M-EPLI Blog*, 04.10.2019 (http://www.mepli.eu/2019/10/case-c-80-19-e-e-do-latin-notaries-qualify-as-courts-and-are-they-bound-by-the-rules-of-jurisdiction-under-the-european-succession-regulation/), as consulted on 13.07.2020.
[2392] Case C-658/17 *WB* ECLI:EU:C:2019:444, para. 63, 72.
[2393] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 54-56.
[2394] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 59-60.
[2395] An overview of these approaches in the specific context of the European Succession Regulation can be found in: C. Budzikiewicz, 'Article 69 - Effects of the Certificate', para. 20-21, in: A.-L. Calvo Caravaca, A. Davì & H.-P. Mansel (eds.), *The EU Succession Regulation: A Commentary*, Cambridge: Cambridge University Press, 2016. It has also already led to a request for a preliminary ruling in case Case C-558/16 – Mahnkopf**,** which is discussed under the subsequent header "A standardized European deed of transfer?".

Creating common registration requirements in Europe?

The introduction of a common set of registration requirements for deeds of transfers in Europe can hardly be considered as being a realistic endeavour. To begin with, if the common registration requirements were limited to deeds of transfers in cross-border cases, this would mean that two sets of registration requirements will co-exist within each European country: one set for the cross-border deeds of transfers, the other for all other deeds and documents that can be entered in the land register of a given country. Ultimately then, a measure intended to simplify cross-border transactions would in fact significantly increase the complexity of land registration practice and must for this reason be dismissed. The only way out then would in theory be the creation of uniform registration requirements for all documents that can be entered in the various European land registers, though it can be safely expected that such a project would be doomed to failure on political grounds.

Creating PIL for registration requirements in Europe?

If the creation of uniform registration requirements is not the ideal option, would it be a better option to create a PIL instrument for registration requirements, taking as a connecting factor the law that applies to the contractual obligations? This would mean that Dutch parties could chose Dutch law to govern their (non-)contractual obligations in accordance with the Rome I and II Regulations when wanting to transfer a vacation house in Germany. They would turn to a Dutch notary, who would draw up a deed of transfer in accordance with Dutch registration requirements and offer it for registration in the German land register. For the Dutch parties and the Dutch notary, such a legal framework would certainly be more beneficial compared to the drawing up of a more complicated CROBECO deed. However, the German land registrar, who would have to recognize the deed of transfer, would then be confronted with the thankless task of having to verify that the deed complies with the foreign registration requirements. It goes without saying that this would amount to an unbearable burden for the land registry staff. Of course, one could require that the compliance with the registration requirements is controlled and guaranteed by the Dutch land registrar before it can be submitted to the German land register, but the consequence would be that the national land registers would become colourful potpourris of deeds that comply with differing sets of registration requirements. One of the biggest dangers hereby is that these foreign deeds do not contain the information and guarantees necessary for legal practitioners to exercise their function

in accordance with the legal requirements, especially in negative registration systems where they have to consult the underlying deeds to verify the legal situation of the real estate. In fact, we would then sacrifice legal certainty for efficiency. Arguing that this is not an option, should we then alternatively consider the introduction of a standardized European deed of transfer to further facilitate cross-border real estate transfers?

A standardized European deed of transfer?

The creation of a uniform deed of transfer needs to be well considered. It is not necessary though to start completely from scratch as one can draw upon the European Certificate of Succession that was created by the European Succession Regulation for inspiration.[2396] This regulation, which is adopted by all EU Member States with the exception of Denmark, Ireland and the United Kingdom, entered into force on 17 August 2015 with the purpose of facilitating cross-border successions.[2397] Prior to the entering into force of this Regulation, heirs were likely to have to complete a bureaucratic and costly hurdle race before they could invoke their entitlements that arose from the succession. Take for example a German national, last habitually resident in Aachen, who passed away in July 2015. The succession estate comprised all goods located in Germany, including the family's home, and a vacation house in the Netherlands. Upon request of the heirs, the competent German court drew up a German certificate of succession. With this certificate in their hands, the heirs then turned to the Dutch *Kadaster*, to request the registration of their entitlement to the vacation house. Due to Dutch legislation, the registrar had to refuse this request. This is due to the fact that only Dutch certificates of succession, drawn up by a Dutch notary in the Dutch language could be registered in the land register.[2398] In practice, the heirs would then have to request the assistance of a Dutch notary, who, on the basis of the German certificate of succession, would eventually draw up a Dutch certificate of succession in accordance with the legal requirements under Dutch law. This procedure is not only costly and time consuming; it also demands a certain degree of stamina from the heirs to find the right paths. To facilitate this situation, the European Certificate of Succession was created with which the heirs and others who derive entitlements from a succession can prove these entitlements in all Member States in which the European Succession

[2396] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, 27.7.2012, p. 107–134).
[2397] Article 83 and recitals 82-83 European Succession Regulation.
[2398] Article 3:31 BW and article 41 Kadw.

Regulation is ratified, under the condition that the deceased passed away on or after 17 August 2015.[2399] Therefore, coming back to the example just given, the heirs could simply request the German court to issue a European Certificate of Succession instead of a German succession certificate. With this European Certificate of Succession they can then invoke their entitlements in both Germany and the Netherlands. It is only that it must be officially translated into Dutch.[2400] On paper, a European Certificate of Succession therefore seems to be a much more attractive possibility to deal with cross-border succession. Nevertheless, it can be observed in practice that this possibility is at times intentionally neglected and that the traditional route repeatedly still comes out on top.[2401] The explanation of this phenomenon seems to be of financial nature; the issuance of a European Certificate of Succession is more expensive than the issuance of a German certificate of succession and the issuance of a Dutch certificate of succession by a Dutch notary combined.[2402]

In addition to the European Certificate of Succession (and its attachments), the European Succession Regulation introduced a number of other forms, namely for the application to issue a European Certificate of Succession, the enforcement of authentic instruments and judicial settlements as well as for an "attestation issued by the court or competent authority of the Member State of origin".[2403] To facilitate the recognition and enforcement of these forms, they have been standardized and made available in all official languages of the EU. [2404] So far, digital templates of these forms have not been made available through the e-Justice Portal though a promise has been given ever since the entering of the European Succession Regulation that these will be made available in due time.[2405]

[2399] Articles 63 and 83 European Succession Regulation.
[2400] Article 41 Kadw.
[2401] A.J.H. Pleysier, 'Werking van een `vindicatielegaat' (legaat met zakelijke werking) van een onroerend goed in een lidstaat dat zo'n legaat niet kent', *JBN* 2018(9). Also see R. Wagner, 'Erste Rechtsprechung (des EuGH) zur EuErbVO', *NJW* 2017, 3755.
[2402] A.J.H. Pleysier, 'Werking van een `vindicatielegaat' (legaat met zakelijke werking) van een onroerend goed in een lidstaat dat zo'n legaat niet kent', *JBN* 2018(9).
[2403] Articles 46 (3)(b), 59 (1), 60 (2), 61 (2), 65 (2), 67 (1) European Succession Regulation.
[2404] Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 359, 16.12.2014, p. 30–84).
[2405] Website e-Justice Portal, 'Succession: General Information' (https://e-justice.europa.eu/content_general_information-166-en.do), as consulted on 28.08.2018.

Content-wise, article 68 European Succession Regulation enumerates the information that *can* be included in the European Certificate of Succession; it is not required to include all listed information in the Certificate as long as the provided set of information suffices "for the purpose for which it is issued".[2406] Against this background, the template of the European Certificate of Succession marks certain information as being mandatory.[2407] Subject to debate is whether national authorities can demand the inclusion of information that is neither listed in article 68 European Succession Regulation nor indicated as mandatory information by the European Certificate of Succession but that is required on the basis of their own national law. In the end, article 1 (2) (l) European Succession Regulation provides that the registration requirements are to be determined by the lex rei sitae. In German literature it is for instance argued that in order to enable the provision of the full picture of a concrete succession in a European Certificate of Succession, it should also be possible to include relevant information on entitlements (such as legacies) and obligations under the law of obligations, despite the fact that they are not included in the enumeration of article 68 European Succession Regulation.[2408] Another example concerns the inclusion of any information to identify the immovable property that might form part of the succession (such as the cadastral code or the address) in the European Certificate of Succession. Further, this piece of information is not marked as mandatory information in the Certificate's template itself. Footnote 13 of Annex 5 of Implementing Regulation (EU) No 1329/2014[2409] that refers to Form V – Annex IV ("Status and rights of the heir(s)") merely states the following:

> "Indicate if the heir acquired the ownership or other rights on the assets (in the latter case, please indicate the nature of these rights and the other persons having also rights on the assets). In case of a registered asset, please indicate the information required under the law of the Member State in which the register is kept so as to permit the identification of the asset (e.g. for immovable property exact address of the property, land register, land parcel or cadastral number, description of the property (if necessary append relevant documents)."

In other words, the inclusion of information to enable the identification of a parcel is encouraged but not required. Nevertheless, it can occur that the inclusion of the cadastral information in a

[2406] Article 68 European Succession Regulation.
[2407] Mandatory information is marked with an asterisk.
[2408] S. Bandel, 'Rechtsübergang und Rechtsbegründung durch ausländische Vindikationslegate in Deutschland', *MittBayNot* 2018, 99.
[2409] Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 359, 16.12.2014, p. 30–84).

certificate of succession is required based on national registration law in order to enable the land registrar to identify the respective parcels that fall in the succession. In case of a land register that is organized by the persons who are entitled to a right, a lack of this information in the European Certificate of Succession will not cause great problems in practice. After all, it is mandatory to fill in the name of the deceased. However, if the land register is organized by parcels, then the lack of this valuable information might pose the land registrar before much greater problems, especially so if the same land register cannot be searched by the name of the owner of a parcel. Articles 1 (2) (l) and 68 European Succession Regulation therefore lead to a stress field which hampers the realization of the aims that underlie the European Succession Regulation. To provide just one example from legal practice: registration requests of European Certificates of Succession that were drawn up by the German courts have been refused by Austrian land registrars as they did not include the cadastral code of the parcels (amongst certain other related information), which forms a requirement under Austrian law.[2410] When the heirs then turned back to the German courts to ask them to include the cadastral code, so that the Certificate could be registered in the Austrian land register, their requests were declined. In three cases, the heirs started proceedings against the dismissal before German courts.[2411] In none of these cases, the applicants have been successful. The courts essentially held that the inclusion of information about specific goods that fall within a succession estate is contrary to German law, according to which the heirs inherit the succession estate as whole rather than a number of specific goods (§1922 BGB).[2412] Furthermore, they argued that it is not possible for them to alter the European Certificate of Succession in this situation, as it falls outside the scope of article 71 European Succession Regulation which outlines the conditions for an alteration of the Certificate.[2413]

It goes without saying that for EU citizens this situation is highly unfortunate and cannot be reconciled with the aim of the European Succession Regulation. It rather hampers the situation of heirs who need to demonstrate their rights to a succession in a different country rather than facilitate it. They are caught between two stools and are in fact given a run-around. At the same time, the registration of their European Certificate of Succession seems to be a distant prospect; the

[2410] § 433 Allgemeines bürgerliches Gesetzbuch (ABGB) (StF: JGS Nr. 946/1811), § 33 Abs 1 lit d Gesetz vom 12. Dezember 2001 zur Regelung des Grundverkehrs (Grundverkehrsgesetz 2001 - GVG 2001) (StF: LGBl Nr 9/2002 (Blg LT 12. GP: RV 81, AB 222, jeweils 4. Sess)). See also: OGH (Austria), Urteil vom 29. August 2017 - 5 Ob 108/17v.
[2411] OLG Nürnberg, Beschluss vom 5.April 2017 – 15 W 299/17. Also see OLG Nürnberg, Beschluss vom 27. Oktober 2017 – 15 W 1461/17. Also see OLG München, Beschluss vom 12. September 2017 – 31 Wx 275/17.
[2412] M. Leitzen, 'Kubicka und die Folgen: Vindikationslegate in der Rechtspraxis', *ZEV* 2018, 311.
[2413] OLG München, Beschluss vom 12. September 2017 – 31 Wx 275/17.

Austrian land registrars will not register the Certificate unless the cadastral code will be included and the German courts refuse to add the needed information as this would constitute a violation of their own national law. It would be an erroneous belief though that this legal discrepancy has only occupied German courts and not also the Austrian courts. At the end of August 2017, the Austrian Supreme Court gave its ruling in a case at the heart of which was the outlined problem matter.[2414] The dispute arose when an Austrian land registrar refused to register the buyer of a property in Austria as the new owner. The issue at hand was that the seller of said property had not been registered as the owner in the land register yet. Instead, his deceased father was still registered. Therefore, the application for registration included the contract of sale as well as a European Certificate of Succession, which stated that the seller was the sole heir of his father's succession estate. The Certificate however did not include the cadastral code of the parcel. Therefore, the land registrar argued that it was not sufficiently clear whether the seller had indeed inherited the parcel in question. In essence, the Court trades article 1 (2)(l) European Succession Regulation against article 68 European Succession Regulation. It is acknowledged that the exact scope of the article 1 (2)(l) is not clear and has been subject to debate in legal doctrine. Nevertheless, the Court decided to follow the stream of doctrine according to which the question whether an heir has become the owner of the goods falling under the succession estate is not determined under the lex rei sitae but under the law that is applicable to the succession. Only a short six weeks later, this conclusion was confirmed by the CJEU in the *Kubicka* ruling. Therefore, it is German and not Austrian law that determines whether the seller has become the owner of the parcel. Additionally, the Supreme Court held that article 68 European Succession Regulation does not require the inclusion of cadastral codes or other information on the basis of which a parcel can be identified. Therefore, the Court concluded that the inclusion of such information in a European Certificate of Succession cannot be required. It would be interesting to know whether the Austrian Supreme Court had come to a different conclusion when the inclusion of the cadastral code had been required for solely administrative reasons rather than to establish that the seller in question had indeed become the owner of the property. If even the requirement to include a cadastral code for purely administrative reasons cannot be requested on the basis of article 1 (2)(l) European Succession Regulation, what is then the legitimate purpose of this provision? It would be carved out to such an extent that only a useless empty shell would be left.

[2414] OGH (Austria), Urteil vom 29. August 2017 - 5 Ob 108/17v.

The selection of the information that eventually finds its way into the Certificate in a concrete case therefore depends on the careful considerations of the issuing authority as to which information they deem necessary to include. One might think now that the issuing authority enjoys a certain degree of freedom in this decision. However, we must not forget that a European Certificate of Succession is issued only in a cross-border situation, where the succession estate is located in two or more Member States. In other words, the Certificate will always be used in more than one Member State. Therefore, the issuing authority must ensure that it includes all pieces of information that are required by all Member States in which the Certificate will be used. Otherwise, the heirs run the risk that the Certificate will be rejected by the (foreign) authorities and that they must turn back to the issuing authority to add the required information. Needless to say, this constitutes a frustrating, time and money consuming exercise and runs counter to the Regulation's objective of facilitating the "proper functioning of the internal market (…) by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications".[2415] It is therefore unfortunate that diverging national requirements regarding the content of a European Certificate of Succession have proven to lead to substantial difficulties in practice.[2416] Admittedly though, from a practical perspective, especially in a cross-border situation, it might prove rather difficult for an issuing authority to research which information needs to be included in the European Certificate of Succession for it to be accepted for registration in the Member States in which it will be used in a concrete case. Recital 68 European Succession Regulation states the following:

> "The authority which issues the Certificate should have regard to the formalities required for the registration of immovable property in the Member State in which the register is kept. For that purpose, this Regulation should provide for an exchange of information on such formalities between the Member States."

For issuing authorities, this suggested assistance is only of little practical use. It is unclear to which extent Member States have actively pursued this exchange yet. However, in order to counter cases of non-recognition of European Certificates of Succession, a better access to such information is an indispensable condition. Perhaps it might prove more fruitful to set up a central database within the framework of the e-Justice Portal to store the relevant information on national formality requirements, together with contact details of national contact persons.

[2415] Recital 7 European Succession Regulation.
[2416] S. Bandel, 'Rechtsübergang und Rechtsbegründung durch ausländische Vindikationslegate in Deutschland', *MittBayNot* 2018, 99.

Besides the introduction of standard forms, the European Succession Regulation did not aim to harmonize the different national land registration laws. Article 1 (2) European Succession Regulation contains a comprehensive list of matters that are excluded from the Regulation's scope. For land registration law, the most interesting of these are laid down in article 1 (2)(k)-(l) and concern:

> (k) the nature of rights in rem; and
>
> (l) any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.

Therefore, it is still at the discretion of the Member States to determine the formal registration requirements. Furthermore, they are not required to recognize foreign rights, which do not form part of their own numerus clausus. Article 31 European Succession Regulation provides for the adaptation of foreign property rights. In this context, *Bandel* puts forward the interesting question of who is in charge of the adaptation.[2417] From his point of view, the German land registry does not qualify for this task as the creation of rights and the determination of their legal content falls outside their area of responsibility. It is for this reason that he argues that adaptation must be carried out by those who either want to invoke the foreign right or who are burdened by that right. In case of a dispute, the matter must then be decided by the competent courts. In the Netherlands, it has been undisputed so far that the task of adaptation is entrusted to the land registrar. Of course, even without unravelling the different national rules governing the position of a land registrar, we can safely assume that they are not entrusted with the exact same set of responsibilities in all Member States. But is it at all possible for land registrars to give total effect to a foreign European Certificate of Succession, when they must refrain from adapting the foreign rights? Owing to the circumstances, when that Certificate stems from a different Member State, adhering to the civil law, translating a foreign property right to a national property right might not put the land registrar before insurmountable problems. It is for example quite likely that a Spanish "usufructo" corresponds to the Italian "usufrutto", though some research would be required on the side of the land registrar to indeed confirm that first intuition. And of course, even within the group of European civil law traditions, there are much more complex cases in which such an obvious

[2417] S. Bandel, 'Rechtsübergang und Rechtsbegründung durch ausländische Vindikationslegate in Deutschland', *MittBayNot* 2018, 99.

translation is not available. Yet, we must not forget that in accordance with article 20 European Succession Regulation also the law of a third country can be applicable to the succession as a whole, for example tribal law. In that case, one can expect that the changes are much higher so that adaptation is required. If the land registrars are now barred from carrying out that adaptation, then how are they supposed to give effect to the Certificate? Which rights do they enter in the land register? Such a prohibition puts land registrars before an irresolvable problem. Last, Member States are in principle authorized to obstruct the operation of foreign law in their territory on the basis of the public policy exception enshrined in article 35 European Succession Regulation. In the reality of legal practise however, the operation of foreign law may be hindered on the grounds of public policy only "as a last resort in very exceptional situation [given that] Memeber States do not have a total freedom to define their public policy as they wish".[2418] This is due to the fact that Member States must not violate European law when invoking this exception.[2419] As stated by *Wurmnest*, "the public policy reservation is affected by European values (…) which are to be followed by national judges, result mainly from the European Convention on Human Rights (ECHR), the Charter of Fundamental Rights of the European Union, the fundamental freedoms of the EU and general legal principles developed by the Court of Justice of the European Union (ECJ)".[2420]

Before delving more into the European Succession Regulation, one might wonder why it is interesting at all to take a look at this Regulation. Although this thesis primarily focuses on real estate transactions that are the result of party autonomy, also succession cases that fall within the scope of this Regulation may concern the transfer of ownership of a parcel of land, though in this case through the operation of the law rather than through party autonomy. Furthermore, in order for the European Succession Regulation to be applicable, succession cases must show a cross-border dimension; purely national succession cases fall outside of its scope. Therefore, situations arise in which the material requirements for transfer of ownership of a parcel of land that falls in such a cross-border succession are determined on the basis of the law that applies to the succession in accordance with the PIL rules that are established by the European Succession Regulation, while the formal registration requirements are determined on the basis of the lex registrationis. In other

[2418] M. Bogdan, *Concise Introduction to EU Private International Law*, Groningen: Europa Law Publishing, 2012, p.73.
[2419] Ibid. Also see W. Wurmnest, 'Ordre Public (Public Policy)', in: S. Leible (eds), *General Principles of European Private International Law*, Alphen aan den Rijn: Kluwer Law International, 2016, p. 316-317. Also see C-7/98 *Dieter Krombach v André Bamberski* ECLI:EU:C:2000:164.
[2420] W. Wurmnest, 'Ordre Public (Public Policy)', in: S. Leible (eds), *General Principles of European Private International Law*, Alphen aan den Rijn: Kluwer Law International, 2016, p.316.

words, the application of the lex rei sitae is restricted to the formal registration requirements. What seems to be a pragmatic approach on paper might lead to complex problems in practice. It is for this reason that the European Succession Regulation is very much suitable as an object of study. Furthermore, it provides us with an opportunity to study not only in theory but in real life whether the recognition of a standardized certificate, that can effectuate the transfer of ownership of immovable property in all participating EU Member States and that provides for a separation of material law and formal registration requirements, is capable to facilitate the legal situation of the EU citizens who are affected by it. After all, there has in the meantime been sufficient time to test-drive the European Succession Regulation and it had the possibility to reveal its strengths and weaknesses when being subjected to the practice test.[2421] In other words, if the conclusion is drawn that the holy grail of cross-border real estate transactions must be sought in uniform deeds of transfer, one can and should learn from the experiences made within the framework of the European Succession Regulation.

But is it possible in practice to completely uncouple the substantive law governing the distribution of the succession estate from the procedural law? An approach to answer this question can be found in the existing case law of the CJEU. So far, the CJEU has received six requests for a preliminary ruling related to the interpretation of the European Succession Regulation: *Kubicka*, *Mahnkopf*, *Oberle*, *WB*, *Brisch,* and *E.E.* It is interesting to note that so far, with exception of the *E.E.* case, all of the other cases have been exclusively referred to either by a Polish court (*Sąd Okręgowy w Gorzowie Wielkopolskim*) or by a German court (*Kammergericht Berlin* and *Oberlandesgericht Köln*).[2422] These cases shall be analysed in the following.[2423]

[2421] For an analysis of the practical challenges connected to the implementation of this Regulation, see: S. van Erp & K. Zimmermann, "The impact of recent EU conflicts of law regulations on land registration', in: G. Muller et al. (eds.), *Transformative Property Law: Festschrift in honour of AJ van der Walt*, Cape Town: Juta, 2018, p.318-340.

[2422] The only exception is the most recent case (C-80/19 E.E. (Application: OJ C 148 from 29.04.2019, p.18)) which has been referred to by a different authority, being a Lithuanian court (Lietuvos Aukščiausiasis Teismas – Lithuania).

[2423] The case C-102/18 *Brisch* ECLI:EU:C:2019:34 will not be discussed. The subject matter of the *Brisch* case is not as relevant for this topic and has therefore been excluded from a more detailed analysis. The *WB* case has already been addressed in the context of recognition of foreign (notarial) deeds.

Case C-218/16 – Kubicka

About half a year after entering into force of the European Succession Regulation, the CJEU received the first request for a preliminary ruling within the context of said Regulation. At the centre of this case is Aleksandra Kubicka. She has Polish nationality and lives with her German spouse in Germany - in a house that they co-own.[2424] Together they have two children. When Mrs. Kubicka wishes to make her last will, she turns to a Polish notary and specifically declares that she would like her succession to be governed by a legatum per vindicationem.[2425] This is possible under Polish law, but not under German law, which knows the legatum per damnationem.[2426] For this reason, the Polish notary argues that the drawing up of such a last will would not only constitute a violation of German law but also ultimately of articles 1 (2)(k)-(l) as well as of article 31 European Succession Regulation.[2427] Given that article 81 of the Polish Law on notaries ("*Prawo o notariacie*") prohibits him to draw up a last will that is contrary to the law, the notary in the end concludes that he must decline her request.[2428] This latter conclusion seems to be quite rigorous and the existence of a certain degree of astonishment about the notary's decision cannot be denied in the available literature.[2429] It is argued that it was unnecessary for the notary to reject the request as a whole. Instead, he could have very well drawn up the last will in accordance with Ms. Kubicka's wishes as long as he had informed her about the fact that she runs the risk that the vindication legacy might not be recognized in Germany. Against this background, *Bandel* and *Schmidt* even suspect that this case was instigated.[2430]

After an unsuccessful appeal against the notary's decision, Mrs. Kubicka turns to the competent regional court in Poland ("*Sąd Okręgowy w Gorzowie Wielkopolskim"*), who in turn brought the following question before the CJEU:

[2424] C-218/16 *Kubicka* ECLI:EU:C:2017:755, para. 18.
[2425] C-218/16 *Kubicka* ECLI:EU:C:2017:755, paras. 19-20.
[2426] For a clear explanation of the differences between a legatum per vindicationem and a legatum per damnationem, see: J.P. Schmidt, 'Challenged Legacies – First Decision of the European Court of Justice on the EU Succession Regulation (ECJ, 12 October 2017, C-218/16 (Kubicka))', *EPLJ* 2018: 7(1), p. 5-10.
[2427] C-218/16 *Kubicka* ECLI:EU:C:2017:755, para. 21.
[2428] C-218/16 *Kubicka* ECLI:EU:C:2017:755, paras. 16, 21.
[2429] S. Bandel, 'Rechtsübergang und Rechtsbegründung durch ausländische Vindikationslegate in Deutschland', *MittBayNot* 2018, 99. Also see J. Weber, 'Kubicka und die Folgen: Vindikationslegate aus Sicht des deutschen Immobiliarsachenrechts', *DNotZ* 2018, 16. Also see J.H.M. van Erp, 'De Europese Erfrechtverordening: Een doorbreking van het Nederlandse goederenrecht?', *WPNR* 2018 (7183).
[2430] S. Bandel, 'Rechtsübergang und Rechtsbegründung durch ausländische Vindikationslegate in Deutschland', *MittBayNot* 2018, 99. Also see J.P. Schmidt, 'Challenged Legacies – First Decision of the European Court of Justice on the EU Succession Regulation (ECJ, 12 October 2017, C-218/16 (Kubicka))', *EPLJ* 2018: 7(1), p. 18.

> "'Must Article 1(2)(k) and (l), and Article 31 of Regulation (EU) [No 650/2012] be interpreted as permitting refusal to recognise the material effects of a legacy 'by vindication' (legatum per vindicationem), as provided for by succession law, if that legacy concerns the right of ownership of immovable property located in a Member State the law of which does not provide for legacies having direct material effect?'"

Finding that the case is merely hypothetical in nature, both Germany and Hungary pleaded for its inadmissibility.[2431] Two arguments to found their claim are presented: on the one hand, it is argued that it is incomprehensible why the drawing up of the last will in accordance with Mrs. Kubicka's wishes is contrary to the law and on the other hand it is pointed out that an actual conflict is absent at this point due to the fact that the succession in question has not been opened so far considering that Mrs. Kubicka is still alive. With regard to the first ground, the CJEU essentially refers to the Polish Law on notaries. With regard to the second ground, the Court points to recital 7 of the European Succession Regulation and replies that "the regulation aims to allow citizens to organise their succession in advance" so that it is irrelevant that Mrs. Kubicka has not yet passed away.[2432]

After having established that the referred question was admissible, the CJEU turns to the substance of the case. At the heart of the European Succession Regulation lies the principle enshrined in article 21 and 23 (2) European Succession Regulation that the succession in its entirety must be subject to the one applicable law.[2433] This is to prevent fragmentation and to safeguard legal certainty. An exception to this principle is laid down in article 1 (2) European Succession Regulation, which excludes certain matters from the Regulation's scope.[2434] In this case, especially article 1 (2)(k) and (l) European Succession Regulation are of interest. To begin with article 1 (2)(k) European Succession Regulation, can the fact that "the nature of rights in rem" are not governed by this Regulation serve as a justification for non-recognition of a legatum per vindicationem in a Member State that is unfamiliar with such a legacy? The CJEU provides a negative answer.[2435] The exception enshrined in this article points to the fact that the national numerus clausus must be respected. In other words, Member States cannot be obliged to recognize a right in rem that is not included in their numerus clausus. One now needs to be able to carefully distinguish the obligation to recognize a foreign right in rem from the obligation to recognize a foreign means of transferring a right in rem that is included in one's own numerus clausus as well. It is only the first and not the

[2431] C-218/16 *Kubicka* ECLI:EU:C:2017:755, paras. 30, 33, 37.
[2432] C-218/16 *Kubicka* ECLI:EU:C:2017:755, paras. 34-36, 38.
[2433] C-218/16 *Kubicka* ECLI:EU:C:2017:755, para. 44.
[2434] C-218/16 *Kubicka* ECLI:EU:C:2017:755, para. 45f.
[2435] C-218/16 *Kubicka* ECLI:EU:C:2017:755, para.s. 46-51.

latter obligation that is covered by this provision. At the case at hand, when being confronted with a legacy by vindication, Germany is not confronted with an obligation to recognize a foreign right in rem but merely a different method of transferring a right of ownership that forms part of their own numerus clausus as well. For this reason, an appeal on article 1 (2)(k) European Succession Regulation cannot be crowned with success.

Can article 1 (2)(l) European Succession Regulation, which precludes "the recording in a register of rights in immovable or movable property" from the Regulation's scope lead to a different outcome? Again, a positive answer must be denied.[2436] The reason for this is that this provision cannot be extended as to also include "the conditions under which such rights are acquired".[2437] In addition, such an interpretation was to cause the succession to become fragmented and is thus contrary to the objectives set out by the European Succession Regulation. Following the Court's line of argumentation, it does not come as a surprise that article 31 European Succession Regulation, that governs the adaptation of foreign real rights, cannot serve as a justification for the refusal of the recognition of a legacy by vindication. Again, the CJEU argues that this provision exclusively focuses on the substance of a right and does not govern the means of transferring such a right.[2438]

For the foregoing considerations, the CJEU concludes that a Member State's refusal "to recognise the material effects of a legacy 'by vindication', provided for by the law governing succession chosen by the testator in accordance with Article 22(1) of that regulation, where that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place" is contrary to article 1 (2)(k) - (l) and article 31 European Succession Regulation.[2439]

As can be derived from the limited amount of articles that have been published after the judgment was rendered, academics and practitioners have received this almost revolutionary ruling with mixed feelings.[2440] The nature of the reaction might go hand in hand with the degree of influence

[2436] C-218/16 *Kubicka* ECLI:EU:C:2017:755, paras. 52-58.
[2437] C-218/16 *Kubicka* ECLI:EU:C:2017:755, para. 54.
[2438] C-218/16 *Kubicka* ECLI:EU:C:2017:755, para. 63.
[2439] C-218/16 *Kubicka* ECLI:EU:C:2017:755, para. 67.
[2440] Based on accessbility and language criteria, German, Dutch and English academic databases were searched on 03.09.2018. At that point in time only the following relevant articles could be found: J.H.M. van Erp, 'De Europese Erfrechtverordening: Een doorbreking van het Nederlandse goederenrecht?', *WPNR* 2018

that this judgment has on a national legal system. In the process of implementing the European Succession Regulation, the Netherlands, whose legal system knows the legacy by damnation, had for example already created the possibility to register a vindication legacy in article 27a Cadastre Act.[2441] In Germany on the other hand, the Kubicka ruling implies a complete turnaround in legal doctrine. After all, in 1994, the Federal Supreme Court militated against the recognition of legacies by vindication:

> "Die testamentarischen Verfügungen des Erblassers bezüglich des streitigen Grundstücks sind als Vorausvermächtnisse anzusehen, denen zwar nach kolumbianischem Recht im Erbfall unmittelbar dingliche Wirkung zukommt, wie das BerufungsG in Übereinstimmung mit den Rechtsgutachten zutreffend feststellt. Ein solches Vindikationslegat an einem deutschen Grundstück ist aber im Inland als Damnationslegat gemäß § 2174 BGB zu behandeln. Denn ein unmittelbar mit dem Tod des Erblassers eintretender Erwerb des Eigentums an dem vermachten Grundstück durch den Vermächtnisnehmer ist mit dem deutschen Sachenrecht nicht vereinbar. Das Vermächtnis kann hier nur nach den vom deutschen Sachenrecht für die Übertragung eines einzelnen Vermögensstücks bereitgestellten Regeln erfüllt werden." [2442]

Against this background, it is interesting to observe a multitude of different standpoints taken by German legal scholars on this matter. Within German doctrine, *Weber,* after an extensive analysis of the Kubicka judgment in the light of German land (registration) law, for examples concludes that the CJEU has incorrectly interpreted article 1 (2)(l) European Succession Regulation.[2443] *Bandel* on the other hand, while acknowledging that this ruling has indeed awakened German scholars and

(7183). Also see A.J.H. Pleysier, 'Werking van een `vindicatielegaat' (legaat met zakelijke werking) van een onroerend goed in een lidstaat dat zo'n legaat niet kent', *JBN* 2018(9). Also see J. Weber, 'Kubicka und die Folgen: Vindikationslegate aus Sicht des deutschen Immobiliarsachenrechts', *DNotZ* 2018, 16. Also see M. Leitzen, 'Kubicka und die Folgen: Vindikationslegate in der Rechtspraxis', *ZEV* 2018, 311. Also see R. Wagner, 'Erste Rechtsprechung (des EuGH) zur EuErbVO', *NJW* 2017, 3755. Also see S. Bandel, 'Rechtsübergang und Rechtsbegründung durch ausländische Vindikationslegate in Deutschland', *MittBayNot* 2018, 99. Also see J.P. Schmidt, 'Challenged Legacies – First Decision of the European Court of Justice on the EU Succession Regulation (ECJ, 12 October 2017, C-218/16 (Kubicka))', *EPLJ* 2018: 7(1).

[2441] Wet van 5 november 2014 tot uitvoering van de Verordening (EU) nr. 650/2012 van het Europees Parlement en de Raad van 4 juli 2012 betreffende de bevoegdheid, het toepasselijke recht, de erkenning en de tenuitvoerlegging van beslissingen en de aanvaarding en de tenuitvoerlegging van authentieke akten op het gebied van erfopvolging, alsmede betreffende de instelling van een Europese erfrechtverklaring (PbEU 2012, L 201) (Uitvoeringswet Verordening erfrecht), *Stb*. 2014, 430. Also see J.H.M. van Erp, 'De Europese Erfrechtverordening: Een doorbreking van het Nederlandse goederenrecht?', *WPNR* 2018 (7183).

[2442] BGH, Urteil vom 28. September 1994 - IV ZR 95/93. Also see J. Weber, 'Kubicka und die Folgen: Vindikationslegate aus Sicht des deutschen Immobiliarsachenrechts, DNotZ 2018, 16. Also see J.P. Schmidt, Challenged Legacies – First Decision of the European Court of Justice on the EU Succession Regulation (ECJ, 12 October 2017, C-218/16 (Kubicka))', *EPLJ* 2018: 7(1), p. 11.

[2443] J. Weber, 'Kubicka und die Folgen: Vindikationslegate aus Sicht des deutschen Immobiliarsachenrechts#, *DNotZ* 2018, 16.

practitioners, argues that the outcome of this case is correct.[2444] Nevertheless, he interprets the ruling rather narrowly. Concretely, he identifies three restrictions: first, the obligation to recognize a legacy by vindication is confined to such legacies that form part of the law that applies to the inheritance as a consequence of a choice of law made by the legator, second, the sole reason for the rejected recognition of the legacy by vindication must be that such a legacy does not exist in the legal system, in which it is to be invoked, and third, that the duty of recognition only applies to legacies by vindication that are to transfer the right of ownership in opposite to any other rights in rem.[2445] With regard to the first restriction, *Bandel* however notes that it should not matter whether the applicable law applies as a result of the conflict rules laid down in articles 4, 7, 10, and 11 European Succession Regulation, or of a choice of law by the legator. The most unreserved interpretation is provided by *Schmidt*, who, unlike *Bandel*, defends the correctness of the Kubicka judgment without putting it in a legal corset as to restrict its impact on the recognition of legacies by vindication. He states that the original purpose of including article 1 (2)(l) in the European Succession Regulation probably was to design a tool to protect Member States that know the legatum per damnationem from having to recognize a foreign legatum per vindicationem.[2446] After all, the area of conflict that such Member States would enter when they would be confronted with a foreign legacy by vindication in a European Certificate of Succession had already been pointed out by academics and practitioners in the drafting phase of the European Succession Regulation. After the *Kubicka* ruling, it is clear though, that this provision could not live up to this expectation. To be more effective, its wording would have had to be more precise:

> "For that purpose, Article 1(2)(l) could have been phrased in this manner: "The following shall be excluded from the scope of this Regulation: (…) (l) the question whether registered rights can be transferred by singular succession upon death." Admittedly, in this form Article 1(2)(l) would have had very little chance for approval in the legislative process, since the far-reaching exception from the unity of succession would have become very obvious. But the version of Article 1(2)(l) which was finally adopted was unable to deliver the result that at least parts of the relevant legal community had wished for."[2447]

[2444] S. Bandel, 'Rechtsübergang und Rechtsbegründung durch ausländische Vindikationslegate in Deutschland', *MittBayNot* 2018, 99.
[2445] S. Bandel, 'Rechtsübergang und Rechtsbegründung durch ausländische Vindikationslegate in Deutschland', *MittBayNot* 2018, 99.
[2446] J.P. Schmidt, 'Challenged Legacies – First Decision of the European Court of Justice on the EU Succession Regulation (ECJ, 12 October 2017, C-218/16 (Kubicka))', *EPLJ* 2018: 7(1), p. 28.
[2447] Ibid.

Case C-558/16 – Mahnkopf

The second case is concerned with the interpretation of art. 1 (1) European Succession Regulation. Mr. and Mrs. Mahnkopf, German nationals, were married when Mr. Mahnkopf passed away at the end of August 2015.[2448] Their last habitual residence was in the German capital, Berlin. In the absence of a prenuptial agreement, their matrimonial property regime was the "community of accrued gains" ("*Zugewinngemeinschaft*") as laid down in Section 1371 (1) BGB. The succession estate contains property in Germany and Sweden, which Mrs. Mahnkopf together with her son inherits. In order to process the succession, Mrs Mahnkopf turns to the competent German court in Schöneberg and applies for the issuance of a national succession certificate, which she received on May 30, 2016. The certificate states that the Claimant is entitled to the one half of the succession estate (¼ on the basis of succession law and the other ¼ on the basis of matrimonial property law as result of the application of Section 1371 (1) BGB) and their son to the other half. Additionally, she files a request for the issuance of a European Certificate of succession that allows her to register her and her son's entitlement to the Swedish property in the Swedish land register. This request is not honoured as the Court finds that her ¼ entitlement to the succession estate based on matrimonial property law falls outside of the ambit of the European Succession Regulation and can therefore not be stated on the European Certificate of Succession. Unsatisfied with the dismissal of her request, Mrs. Mahnkopf files an appeal. The Court of Appeal in Berlin acknowledges that the question whether the increase of ¼ based on Section 1371 (1) BGB falls under succession law or matrimonial property law in the context of European PIL is still unanswered in German doctrine and decides to pause the judicial proceedings until the CJEU had ruled on the following question:

> "Is Article 1(1) of [Regulation No 650/2012] to be interpreted as meaning that the scope of the regulation ("succession to the estates of deceased persons") also covers provisions of national law which, like Paragraph 1371(1) of the [BGB], settle questions relating to matrimonial property regimes after the death of one spouse by increasing the other spouse's share of the estate on intestacy?"[2449]

[2448] C-558/16 *Mahnkopf* ECLI:EU:C:2018:138, para. 20-29.

[2449] C-558/16 *Mahnkopf* ECLI:EU:C:2018:138, paras. 30, 45. Note that the Court of Appeal in Berlin has referred three questions in total. As the latter two questions were answered by providing an affirmative answer to the first question, these questions have been omitted here. Note that in the context of German PIL the question has been resolved by a judgment of the Federal Supreme Court who held that this matter falls within matrimonial property law. See: BGH, Urteil vom 13. Mai 2015 - IV ZB 30/14. Also see S. Sakka, 'Der pauschalisierte Zugewinnausgleich und das Europäische Nachlasszeugnis', *MittBayNot* 2018, 4. Also see H. Dörner, 'Erbrechtliche Qualifikation des § 1371 Abs. 1 BGB durch den EuGH: Konsequenzen und neue Fragen', *ZEV* 2018, 305. Also see J. Weber, 'Ein Klassiker neu aufgelegt: Die Qualifikation des § 1371 BGB unter dem Regime der Europäischen Erbrechtsverordnung', *NJW* 2018, 1356.

The Court points out that under article 1 (2)(d) European Succession Regulation, "questions relating to matrimonial property regimes" fall outside of the scope of that Regulation.[2450] By the same token, article 3 (1)(a) European Succession Regulation provides a definition of the term "succession":

> 'succession' means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession;

This inclusive understanding of "succession" is also reflected in recital 9 and in line with the pursued objective of the Regulation to promote the internal market. The most crucial consideration however can be found in paragraph 40:

> "Paragraph 1371(1) of the BGB concerns not the division of assets between spouses but the issue of the rights of the surviving spouse in relation to assets already counted as part of the estate. Accordingly, that provision does not appear to have as its main purpose the allocation of assets or liquidation of the matrimonial property regime, but rather determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs. Such a provision therefore principally concerns succession to the estate of the deceased spouse and not the matrimonial property regime. Consequently, a rule of national law such as that at issue in the main proceedings relates to the matter of succession for the purposes of Regulation No 650/2012."

The Court affirms that this interpretation is also in line with the distinction made between matrimonial property regimes and succession in Regulation 2016/1103.[2451] For these reasons, it is logic that this information may be included in the European Certificate of Succession.[2452] Ultimately, the CJEU therefore concludes that the referred question must be answered affirmatively.

How has this outcome been received by German lawyers? The feelings are generally mixed. On the one hand, it is acknowledged that the qualification of the accrued gain as a matter falling within the sphere of succession law increases the accuracy of the Certificate.[2453] At the same time it is also

[2450] C-558/16 *Mahnkopf* ECLI:EU:C:2018:138, para. 33.
[2451] C-558/16 *Mahnkopf* ECLI:EU:C:2018:138, para. 41. Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and nforcement of decisions in matters of matrimonial property regimes (OJ L 183, 8.7.2016, p. 1–29).
[2452] C-558/16 *Mahnkopf* ECLI:EU:C:2018:138, paras. 42-43.
[2453] S. Sakka, 'Der pauschalisierte Zugewinnausgleich und das Europäische Nachlasszeugnis', *MittBayNot* 2018, 4. Note that this article was published before the CJEU rendered their judgment.

pointed out that this accuracy can only be brought to bear as long as in a cross-border succession both succession law and matrimonial property law are governed by German law.[2454] As soon as in a succession case German succession law encounters foreign matrimonial property law that is unfamiliar with the accrued gain, it is debatable how this will impact the possibility to include the accrued gain the European Certificate of Succession.[2455] In addition, also French lawyers will have paid close attention to the judgment rendered in this case given that they, in comparison to their German colleagues, traditionally draw an even clearer distinction between matrimonial property and succession, whereby the former is considered to fall outside of the latter's scope.[2456]

Case C-20/17 – Oberle

The *Oberle* case dealt with the interpretation of Article 4 European Succession Regulation. The facts of the case are as follows.[2457] In November 2015, the father of Vincent Pierre Oberle (the claimant), who resided in France and possessed French nationality, passed away. The succession estate encompasses goods in France and Germany. A national succession certificate was issued by a French district court, according to which the succession estate is to be equally divided between the deceased's two sons. Subsequently, in order to administer the succession estate that is situated in Germany, Mr. Oberle turned to the local court in Schöneberg, Germany to request the issuance of a German succession certificate that is to state that the estate - pursuant to French law - is to be equally divided between his brother and himself. Yet, his request was rejected as the court in Schöneberg, applying the PIL rules on jurisdiction laid down in article 4 European Succession Regulation, came to the conclusion that they were not competent to rule on this matter.

Unsatisfied with the outcome, the claimant appealed against the court's ruling in front of the court of appeal in Berlin, who in turn referred the following question to the CJEU for a preliminary ruling:

> "'Is Article 4 of Regulation [No 650/2012] to be interpreted as meaning that it also determines exclusive international jurisdiction in respect of the granting, in the Member States, of national certificates of succession which have not been replaced by the European

[2454] Also see H. Dörner, 'Erbrechtliche Qualifikation des § 1371 Abs. 1 BGB durch den EuGH: Konsequenzen und neue Fragen', *ZEV* 2018, 305.
[2455] Ibid. Also see: J. Weber, 'Ein Klassiker neu aufgelegt: Die Qualifikation des § 1371 BGB unter dem Regime der Europäischen Erbrechtsverordnung', *NJW* 2018, 1356.
[2456] House of Lords (European Union Committee, 6th Report of Session 2009-10), *The EU's Regulation on Succession: Report with Evidence*, London: The Stationery Office Limited, 2010, p.5.
[2457] C-20/17 *Oberle* ECLI:EU:C:2018:485, paras. 19-27.

> certificate of succession (see Article 62(3) of Regulation No 650/2012), with the result that divergent provisions adopted by national legislatures with regard to international jurisdiction in respect of the granting of national certificates of succession — such as Paragraph 105 of the [FamFG] in Germany — are ineffective on the ground that they infringe higher-ranking European law?'"[2458]

At the very beginning, the CJEU points out that national succession certificates are not excluded from the Regulation's scope in article 1 (2) European Succession Regulation.[2459] Furthermore, this Regulation applies to successions within the meaning of article 3 (1)(a) that manifest a cross-border dimension.[2460] The jurisdiction rules laid down in article 4 European Succession Regulation govern the succession in its entirety.[2461] However, the CJEU finds that a literal analysis of this article alone is insufficient to provide an answer to the preliminary question. This is because the meaning of the formulation "to rule" in this article is unclear.[2462] Is it meant to include a non-contentious procedure such as the issuance of a national succession certificate?[2463] For this reason, a contextual interpretation has proven necessary.[2464] It follows from article 13 and recitals 32 and 59 that article 4 is also applicable to the determination of jurisdiction for non-contentious procedures, specifically the issuance of national succession certificates. Article 64 European Succession Regulation, which determines which courts have jurisdiction to issue a European Certificate of Succession, does not alter this conclusion.[2465] After all, if the issuance of national succession certificates was to be determined in accordance with national jurisdictional rules, then this would run counter to the idea laid down in recital 27 European Succession Regulation that the courts that have jurisdiction in a succession case are to apply their national law.[2466] Additionally, such an approach would lead to a "fragmentation of the succession".[2467] For the foregoing considerations, the CJEU rules that the question referred for preliminary ruling must be answered in the affirmative.[2468]

After the CJEU's ruling in the *Oberle* case was published, academics and practitioners began to wonder what its outcome would have been if a similar case was referred to the CJEU by a Member

[2458] C-20/17 *Oberle* ECLI:EU:C:2018:485, para. 28.
[2459] C-20/17 *Oberle* ECLI:EU:C:2018:485, para. 30.
[2460] C-20/17 *Oberle* ECLI:EU:C:2018:485, paras. 31-32.
[2461] C-20/17 *Oberle* ECLI:EU:C:2018:485, para. 37.
[2462] C-20/17 *Oberle* ECLI:EU:C:2018:485, paras. 38-40.
[2463] C-20/17 *Oberle* ECLI:EU:C:2018:485, para. 38.
[2464] C-20/17 *Oberle* ECLI:EU:C:2018:485, para. 41-45.
[2465] C-20/17 *Oberle* ECLI:EU:C:2018:485, para. 45-48.
[2466] C-20/17 *Oberle* ECLI:EU:C:2018:485, para. 52.
[2467] C-20/17 *Oberle* ECLI:EU:C:2018:485, para. 54-56.
[2468] C-20/17 *Oberle* ECLI:EU:C:2018:485, para. 60.

State in which succession cases are winded up by authorities, who do not qualify as 'courts' under article 3 (2) European Succession Regulation.[2469] Are those authorities also bound by the rules on jurisdiction enshrined in said Regulation when they issue national certificates of succession in a cross-border succession case? Given that the answer to this question is highly relevant for legal practice, it did not come as a surprise that it was soon referred to the CJEU in the consecutive case C-80/19 *E.E*.

C-80/19 E.E.

The CJEU's judgment in the *E.E.* case had been eagerly anticipated by practitioners and academics alike in the hope that this judgment would put an end to the debate on whether notaries, who do not qualify as 'court' under the European Succession Regulation, are bound by the competence rules enshrined in said regulation when they issue a national certificate of succession. The facts of the case can be briefly summarised. At the center of the case is a Lithuanian deceased.[2470] At the time of her death, her last habitual residence was in Germany, where she lived together with her German husband.[2471] As follows from her last will, which was drawn up in a notarial office in Lithuania in mid-2013, she disposed the entire inheritance, including an appartement in Lithuania, to her son E.E., who holds Lithuanian citizenship.[2472] For the winding up of the succession, E.E., as the sole heir, turned to a Lithuanian notary, who refused to provide his services on the ground that the exclusive jurisdiction, in his opinion, rests with the German authorities in accordance with article 4 European Succession Regulation.[2473] In response, E.E. initiatied court proceedings against the notary and the case eventually reached the highest Lithuanian court, who referred a request for preliminary ruling to the CJEU, essentially asking whether it is possible to be habitually residing in more than one country, whether Lithuanian notaries are 'courts' under article 3(2) European Succession Regulation, whether they are bound by the rules on jurisdiction when they issue national certificates of succession, whether these certificates constitute 'decisions' or 'authentic instruments', and whether it was possible for the deceased and the bereaved to accord jurisdiction

[2469] For an overview of the discussion in Dutch legal literature, see: G.A. Tuinstra, 'Hof van Justitie van de Europese Unie 21-06-2018, ECLI:EU:C:2018:485: Gaat de Europese erfrechtverklaring de nationale erfrechtverklaring (onbedoeld) verdringen?', *Erfrecht Updates* 2018/0239. Also see M. Zilinsky, 'Afgifte van een nationale erfrechtverklaring en de EU-Erfrechtverordening', *WPNR* 2018 (7208).
[2470] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 26.
[2471] Ibid.
[2472] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 27.
[2473] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 27-28.

to the Lithuanian authorities and to subject the succession to Lithuanian law.[2474] In the course of the Lithuanian court proceedings, the deceased's husband, acknowledging E.E.'s position as the sole heir, affirmed that he does not object to the winding up of the succession by Lithuanian authorities.[2475]

To begin with, the CJEU ruled that the deceased's last habitual residence must be confined to one Member State, even if the deceased also had connections to another Member State.[2476] Even if the determination of the last habitual residence can be challenging, it serves the interest of legal certainty that the last habitual residence cannot be extended to two or more Member States, given that both the applicable law and the jurisdiction are in principle deduced from the last habitual residence.[2477] Nevertheless, the CJEU also rules that the parties may – in accordance with recital 29 and within the boundaries marked by articles 5 and 7 European Succession Regulation – choose a different authority to wind up the succession than the deceased's last habitual residence in accordance with article 4 European Succession would dictate.[2478] Concerning the possibility to choose the applicable law, the CJEU positively re-affirmed that the European Succession Regulation expressly provides for a choice of law mechanism in article 22, which in turn is further concretized in article 83 and recital 39. After all, the possibilities granted by the European Succession Regulation to choose the jurisdiction and the applicable law constitute adjusting screws to "ensure that the authorities dealing with the succession will (...) be applying its own law".[2479]

As suggested earlier, the chore of the judgement is the question whether Lituanian notaries qualify as courts and connected therewith whether national certificates succession issued by them are decisions or authentic deeds. On the basis of article 3(2) and recital 20 European Succession Regulation and its ruling in the *Oberle* and *WB* case, in which it was held that "an authority must be regarded as exercising judicial functions where it may have jurisdiction to hear and determine disputes in matters of succession. That criterion applies irrespective of whether the proceedings for issuing a deed of certification of succession are contentious or non-contentious", the CJEU held that

[2474] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 29-32.
[2475] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 30.
[2476] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 45.
[2477] Article 4, 21 European Succession Regulation. Also see C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 39, 41.
[2478] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 82-84, 87, 96.
[2479] Recital 27 European Succession Regulation.

Lithuanian notaries are likely to not qualifiy as courts.[2480] This is due to the fact that the Court derives from Lithuanian notarial law that they "do not have jurisdiction to hear and determine disputes in" succession cases.[2481] Yet, the correctness of this interpretation must be confirmed by the highest Lithuanian courts before the definite conclusion can be drawn that Lithuanian notaries are not 'courts' according to article 3(2) European Succession Regulation.[2482] If the interpretation of the CJEU is held to be invalid by the highest Lithuanian court, this means that Lithuanian certificates of succession are decisions as defined in article 3 (1)(g) European Succession Regulation and that Lithuanian notaries, as 'courts', are bound by the rules on jurisdiction set out in the European Succession Regulation, not only when they issue a European Certificate of Succession but also when they issue a Lithuanian certificate of succession in a cross-border succession case.[2483] If the highest Lithuanian court however validates the CJEU's interpretation in the sense that it is correct that Lithuanian notaries are not 'courts', the result is that the rules on jurisdiction set out by the European Succession Regulation bind Lithuanian notaries only when they issue a European Certificate of Succession but not when they issue a national certificate of succession.[2484] This even implies that they are not required to apply the rules on jurisdiction to ascertain which foreign 'courts' to deal with the cross-border succession case.[2485] It is therefore possible that a cross-border succession case is handled in different Member States.[2486] Further, if Lithuanian notaries are not 'courts', a Lithuanian certificate of succession does not qualify as 'decision' but can qualify as an 'authentic instrument' that needs to be accepted by other Member States in accordance with article 59 European Succession Regulation if it meets the requirements set out in article 3 (1)(i) European Succession Regulation.[2487]

Through the ruling in the *E.E.* case, the heavily debated question whether authorities, who do not qualify as 'courts', are bound by the rules on jurisdiction set out by the European Succession Regulation when they issue a national certificate of succession in a cross-border case, has been finally settled. It also made clear how important it is to know whether the national authorities, who are entrusted with the winding up of a succession, fall under the definition 'court' and that national

[2480] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 47-51, 54. Also see C-658/17 *WB* ECLI:EU:C:2019:444, para. 56. Also see C-20/17 *Oberle* ECLI:EU:C:2018:485, para. 44.
[2481] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 52. Also see C-658/17 *WB* ECLI:EU:C:2019:444, para. 56.
[2482] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 53-56.
[2483] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 58-63.
[2484] Recital 22 European Succession Regulation. Also see Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 66-68.
[2485] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 68.
[2486] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 69.
[2487] Case C-80/19 *E.E.* ECLI:EU:C:2020:569, para. 72-78.

certificates of succession, if they qualify as 'decisions' or 'authentic instruments', must be recognized respectively accepted by foreign authorities, such as land registrars. It will be fascinating to research in the future what the effect of this judgment is on legal practise. Will practitioners still prefer the European Certificate of Succession to wind up a cross-border succession in the Member States concerned or will they rather use a national certificate of succession (in combination with the relevant standard form) to that end?[2488] In any case, each set of standard forms (for the European Certficate of Succession and the national certificate of succession) are available in all EU languages, which eliminates lingual difficulties connected to the filing of such a request. Nevertheless, once the form is filled in, the next question that needs to be addressed is where the (request for the issue of a) European or national certificate of succession must be handed in. The European Judicial Atlas in civil matters (Succession) on the e-Justice Portal provides assistance with this step.[2489] On a country basis, relevant information can be found, whereby ideally all information is available in all official EU languages. [2490] After all, if this is not the case, EU citizens run the risk that the information they need is not available in their own mother tongue. In that case, they will need to translate the needed information on their own account, which in turn arguably creates obstacles to their use of the free movement rights. At first glance, the Portal provides a possibility to select the language in which the information on the portal can be accessed. A closer look however reveals that this function includes all official EU languages with the exception of Irish. To get a better overview of whether this vital piece of information is available in the different official EU languages, a systematic study was conducted on 28.09.2018. In particular, it was determined to what extent the country-specific information within the Succession Atlas is available in all of these languages. The results of this study, which can be found in Figure 5 (Availability of National Information in all EU Official Languages (except Irish)), are quite sobering and confronting. German speakers are in the luxurious position that all information is available in their mother tongue. A similar position can be enjoyed by English and French speakers who can access all information with the exception of the information about Austria. For all other EU citizens, information that is available in their mother tongue is the information that has been provided by

[2488] Article 80 European Succession Regulation. The standard forms can be found in: Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 359, 16.12.2014, p. 30–84).

[2489] Website e-Justice Portal, 'European Judicial Atlas in civil matters (Succession)' (https://e-justice.europa.eu/content_succession-380-en.do), as consulted on 28.09.2018.

[2490] Information can be found on all EU Member States that have not opted out from the European Succession Regulation, with the exception of Lithuania.

their own country. Therefore, as soon as they like to access information about a different country, they require translation services. Two exceptions are Dutch speakers who can access the information in both Belgium and the Netherlands and Greek speakers who can access the information about Greece and Cyprus, as their mother tongue happens to be the official language in more than one EU Member State. Irish and Lithuanian natives are worst off, as they cannot access any of the published information in their mother tongue.

Once linguistic obstacles are eliminated, another question arises: how accessible is the provided information for the average EU citizen? In the cases in which notaries or *registradores* are the competent authorities to issue a European Certificate of Succession, the country-specific information in most cases includes a link either to a national search tool or to the "Find a notary" search tool provided by the CNUE. Through this tool, EU citizens can easily locate a notary without having to find and access these databases on their own. The only information that is missing is whether all notaries in a given country are competent to issue a European Certificate of Succession in all situations. It could for example be possible that geographical restrictions apply in so far as only those notaries who are appointed in the district where the deceased had his last habitual residence are competent. In those legal systems in which the competence to issue a European Certificate of Succession is conferred upon the courts, the provided information greatly differs. While some Member States (such as Germany, Spain and Hungary) merely provide the information that 'the district courts' or 'courts of first instance' are competent, other Member States such as Cyprus and Sweden provide (a link to the) full contact details of the district courts thereby making it easier for EU citizens to access this practical piece of information. Furthermore, it must be considered that the European Succession Regulation only regulates the interstate jurisdiction but not the intrastate jurisdiction.[2491] In other words, even if we know that the courts of Germany have jurisdiction in a particular succession case, it is still unclear to which specific court within the German territory the heirs have to turn to request the issuance of a European Certificate of Succession. For this reason, also in this case, the EU citizen could profit from additional – pragmatic – information.

[2491] Article 2, 4 European Succession Regulation.

Figure 8 – Availability of National Information in all EU Official Languages (except Irish)

To sum up, in order to discuss the desirability and feasibility of recognizing foreign deeds in cross-border real estate transactions, valuable lessons can be learned from the European Succession Regulation. The crucial importance to get better insight into how this Regulation works in practice should thereby not be underestimated. At this stage in time though, a complete picture is difficult to reconstruct. As discussed, the case law of the CJEU that is available to date gives some insights. The same holds true for national case law on the topic and the potential existence of infringement decisions ex article 258 TFEU of the European Commission. Regarding the latter, it was found that to date the European Commission has not delivered such a decision with regard to the European Succession Regulation. But these sources by themselves will not provide the full picture. It is for this reason that once having established which sources and databases are available, it needs to be determined which information they do not confer. To begin with, one can safely assume that not all questions about the interpretation of this Regulation come to the attention of the CJEU in the form of a request to deliver a preliminary ruling or are referred to the European Commission. After all, any of such action presupposes that the citizen, who is negatively affected by a wrongful decision of a land registrar, is actually aware of it or at the very least has a strong suspicion of the fact that this decision is not in conformity with the European Succession Regulation and the respective CJEU case law. In the end, there will not be a court case without a dispute between citizen and practitioner. Furthermore, it is difficult to find out which difficulties practitioners and citizens encounter when making use of the European Succession Regulation. Literature on this specific topic is almost absent.[2492] It is possible to question land registrars and courts in the meaning of article 3 (2) European Succession Regulation. One would then already have a better picture of the state of the art. Nevertheless, what would still be missing is the experience of ordinary citizens, who invoke this Regulation consciously or not when trying to invoke their entitlements to an inheritance abroad. Do they face any problems when requesting the issuance of a European Certificate of Succession instead of a national succession certificate? Do they encounter obstacles when applying for the registration of such a document in the land register of a different Member State? How do European citizens react when the land registrars reject their application, for example because they find that the Certificate does not contain all needed information? Another aspect is that it proves rather difficult to find out how many European Certificates of Succession have been registered in the different Member States to date and whether this amount has been increasing or decreasing over the years since the entering into force of the European Succession Regulation. The underlying

[2492] S. van Erp & K. Zimmermann, "The impact of recent EU conflicts of law regulations on land registarion', in: G. Muller et al. (eds.), *Transformative Property Law: Festschrift in honour of AJ van der Walt*, Cape Town: Juta, 2018, p.318-340.

hypothesis here is that citizens and practitioners will only make active use of the European Certificate of Succession when its benefits outweigh potential difficulties surrounding its requesting, issuance and recognition abroad. For these reasons, it has proven rather difficult to assess whether the Regulation can fully unfold its full potential in the reality of legal practice, how it has been received by European citizens and practitioners, and ultimately how successful the establishment of a European Certificate of Succession has been. To return to the original question whether it is desirable to introduce a standardized European deed of transfer, it must for now be concluded that it is recommendable to first gain greater clarity on how the European Succession Regulation works in practice before a similar instrument in the form of a European deed of transfer is further considered.

6.2.3.3 The choice of legal practitioner – competence questions

Ideally, European citizens were given a reliable tool with which they could ascertain the competence of persons claiming to be legal practitioners. While the European Directory of Notaries greatly assists European citizens in finding a notary in a different Member State, who speaks their own mother tongue, it is unclear how current the displayed database of notaries is. Therefore, it is in principle possible that notaries, who have been removed from office for whatever reason, are still displayed in the database or – in the opposite case – that newly appointed notaries are not included in this database. At this point it is not always easy for citizens to doubtlessly determine whether a person offering their services as a legal practitioner really is a qualified legal practitioner, especially when the payment of (considerable) deposits are required at an early stage of the transaction process before the parties have met that legal practitioner in person. By updating the European Directory of Notaries on a daily basis, this problem could be significantly reduced for the group of the Latin notariat (provided that the European citizen is aware of the existence of this tool and actually consults it). For all other legal practitioners, who are not Latin notaries, a similar tool would be required. So far the theory; from a practical perspective a careful cost and benefit analysis would certainly be beneficial to determine the usefulness of addressing this challenge. Admittedly, it requires a high level of criminal energy for former legal practitioners to illegally continue offering their services, let alone for legal laymen to impersonate a legal practitioner. In the absence of studies on this particular topic, research will have to be conducted to inventory to what extent this hypothetical problem is a realistic problem in practice. Moreover, even if it turns out that it is only a marginal problem in practice, it would be interesting to determine whether such measures would

help to increase the trust of the European citizen in a foreign legal professional on a psychological level and whether the costs necessary to combat this challenge would be proportionate to the pursued outcome. At the same time, it must be realized that the updating of the European Directory of Notaries can also become a useful tool for land registrars, when they have to determine the competence of a foreign legal practitioner, for example when they receive a European certificate of succession that is drawn up by a foreign notary, or when the decision was to be taken in favour of recognizing foreign deeds of transfer.

6.2.3.4 The comprehension of land register/ cadastral information

Both EULIS and IMOLA are dedicated to improve the comprehension of land register information. Cadastral information is involved only if it can be accessed through the institution that keeps land register information (as is the case in merged organization). While EULIS focussed on facilitating the process of accessing that information and providing an English translation thereof, IMOLA goes a step further and is dedicated to the development of a land register template that allows the standardized submission of land register information. Parties interested in foreign land register information would then receive a standardized form that is filled with the information from the foreign land register. The question that now imposes itself is whether the ELRD is able to fulfil the purpose for which it was created. It must acknowledge that it is unclear whether the ELRD will completely replace the national templates that are used to distribute land register information in purely national cases, whether its use will be restricted to cross-border cases, or whether it will be up to the parties to determine whether they prefer the national template or the ELRD. If the ELRD will co-exist with the national templates, one could ask oneself whether the ELRD by itself will better help the parties to understand the information that is contained therein. After all, the parties will be confronted with a document that presents land register information in a different manner than they might be used to in their own legal system (if they have ever consulted this kind of information before). Will it then make a difference whether the parties receive a foreign national land register document (translated in their own language) or whether they receive an ELRD? Especially for parties, who are not involved in cross-border real estate transfers on more regular intervals, but only once in their lives when they move abroad or acquire a holiday home, it will be difficult to uphold that the ELRD by itself (i.e. without the IMOLA thesaurus) will be more beneficial to these parties than a regular national land register document. However, the situation is different when parties are in a position in which they need to consult foreign land register information on a

more regular basis, for example if they more regularly change their habitual residence to a different country, acquire foreign real estate for investment purposes or if they professionally advice and support clients, who are faced with cross-border transactions. In these cases, it is far more obvious to point out the beneficial nature that is inherent in the standardization of land register information. Yet, we must also pose the question whether there are any risks attached to such standardization. In this context it is of utmost importance to realize the scope of the standardization exercise. The ELRD 'merely' standardizes the presentation of the land register information, following the A-B-C structure as explained in Chapter 5.2.3.3 but it does not standardize the legal nature of this information nor does it standardize the degree to which the information contained therein provides a complete reflection of the legal situation of the real estate in question. The case studies conducted in Chapter 3 have shown the different levels of completeness of land information in the land register. Despite the fact that the ELRD is a standardized template, it will have to find a way to clearly point out the limits of its standardization to (unintentionally) prevent luring those who request an ELRD into a wrong sense of security: "if it looks like a duck (…), waddles like a duck (...), and quacks like a duck (…), then it's probably a duck".[2493] Imagine somebody requesting an ELRD from the Netherlands and from England. If the template does not indicate that standardization does not influence the legal effect of the land register information accorded by national law, that person might be tempted to think that the information presented in the ELRD is guaranteed to be correct, while this would only hold true for the information from England but not for the information distributed by the Dutch *Kadaster*. Furthermore, the parties must be informed to which degree they can rely on the completeness of the ELRD information to assess the legal situation of the real estate in question and in how far it is necessary to consult additional registers and sources to that end. Otherwise, European citizens will compare apples with oranges, that are delivered to them both dressed up like a Nashi pear.

6.2.3.5 The adaptation of foreign rights in rem

The facilitation of the adaptation of foreign rights in rem is at the chore of the IMOLA project. Due to the fact that this project has not been completed yet, one can only speculate at this point whether the IMOLA thesaurus will be capable of making this activity superfluous. When being confronted with a foreign right in rem, legal professionals will ideally be able to access the IMOLA thesaurus via

[2493] R.A. Palmatier, *Speaking of Animals: A Dictionary of Animal Metaphors*, Westport/London: Greenwood Press, 1995, p.127.

the e-Justice Portal and simply look up the 'translation' of the foreign right in rem, which as stated before in Chapter 5.2.3.3, will not be a mere literal translation of the property right but the outcome of a true adaptation, taking into account the nature and content of the right. Much will therefore depend on the quality of the final IMOLA thesaurus and hence on the acceptance of this tool by the community of legal professionals in the sense that a thesaurus that does not enjoy the support of the practitioners for whatever reason, can only have a limited impact on the eradication of the necessity to conduct an adaptation from scratch. Therefore, it seems vital that in order to gain this support, the legal community is enabled to thoroughly assess the thesaurus on the basis of information regarding the (choices made in the) development of this database, the pivot terms, and their definitions.

6.2.3.6 The application of EU law

The creation of the EU internal market not only resulted in an interweavement of national law and EU law but also paved the way for the free movement of lawyers.[2494] These circumstances, coupled with the ongoing globalization, lead to a situation in which knowledge of private international law and both EU and comparative law as well as of foreign languages and its legal terminology became – and still are - indispensable for all law graduates.[2495] Considering that one of the purposes of legal education lies in the preparation of the alumni for the labour market, it is expected that an increase in courses in comparative law, European Union law, European property law and private international law can be observed in the course offers since the signing of the Treaty of

[2494] A.W. Heringa, 'Towards a Truly European Legal Education. An Agenda for the Future', in: A.W. Heringa & B. Akkermans (eds), *Educating European Lawyers*, Cambridge-Antwerp-Portland: Intersentia, 2011, p. 5. Also see N. Kornet, 'Building a European-Oriented Law Curriculum', in: A.W. Heringa & B. Akkermans (eds), *Educating European Lawyers*, Cambridge-Antwerp-Portland: Intersentia, 2011, p. 102. Also see B. de Witte, 'European Union Law: A Common Core of a Fragmented Academic Discipline?', in: A.W. Heringa & B. Akkermans (eds), *Educating European Lawyers*, Cambridge-Antwerp-Portland: Intersentia, 2011, p. 25. Also see J. Lonbay, 'The Changing Regulatory Environment Affecting the Education and Training of Europe's Lawyers', *Journal of Legal Education*, Volume 61, Number 3, p. 482.

[2495] A.W. Heringa, 'Towards a Truly European Legal Education. An Agenda for the Future', in: A.W. Heringa & B. Akkermans (eds), *Educating European Lawyers*, Cambridge-Antwerp-Portland: Intersentia, 2011, p. 15. Also see S. Atienza, 'The Evolution of Legal Education in Spain', *Journal of Legal Education*, Volume 61, Number 3, p. 471. Also see H. Wenzler & K. Kwietniewska, 'Educating the Global Lawyer: The German Experience', *Journal of Legal Education*, Volume 61, Number 3, p. 463. Also see M. Bogdan, 'Is There a Curriculum Core for the Transnational Lawyer?', *Journal of Legal Education*, Volume 55, Number 4, p. 484-485. Also see C.J.I. Magallanes, 'Teaching for Transnational Lawyering', *Journal of Legal Education*, Volume 55, Number 4, p. 519.

Maastricht.[2496] Therefore, even without the possibility to enroll in post academic studies, as time progresses, legal professionals arguably will be continuously better prepared to understand and apply EU law.

6.2.4 Methods of Resolving Technological Challenges

Table 47 – Overview of the Status Quo of Technological Challenges

Technological challenges	Different Stages of Technological Development	

Chapter 3 has shown how diverse the technological state of the art is when it comes to land registration. Although the cadastre has already been digitalized in all three chosen European countries, a digital land register and connected herewith the possibility to submit deeds for registration in the land register is still not an implicitness in all European countries. Proposals to facilitate cross-border real estate transactions must take these differences into account. If the scope of the e-Codex project was to be extended in the future to accommodate the digital submission of documents to and from land registries, an important policy decision would have to be taken: will this project be realized only among those European countries, who already possess the required digital infrastructure or will it instead require all European countries to implement a minimum level of digitalization in order to create equal possibilities to exchange land register documents? If the latter approach is chosen, how realistic will it be to expect technological solutions in the near future?

[2496] J. Smits, 'European Legal Education, or: How to prepare Students for Global Citizenship?' in: A.W. Heringa & B. Akkermans (eds), *Educating European Lawyers*, Cambridge-Antwerp-Portland: Intersentia, 2011, p. 43. Also see A.W. Heringa, *Legal Education: Reflections and Recommendations*, Cambridge – Antwerp – Portland: Intersentia, 2013, p. 92-93, 103. Also see H. Wenzler & K. Kwietniewska, 'Educating the Global Lawyer: The German Experience', *Journal of Legal Education*, Volume 61, Number 3, p. 463. Also see J. Mahoney, 'The Internationalisation of Legal Education', *Amsterdam Law Forum*, Vol. 2, No. 3. Also see S. Atienza, 'The Evolution of Legal Education in Spain', *Journal of Legal Education*, Volume 61, Number 3, p. 472-473. Also see A. Jakab, 'Dilemmas of Legal Education: A Comparative Overview', *Journal of Legal Education*, Volume 57, Number 2, p. 253. Also see S. Freeland, 'Educating Lawyers for Transnational Challenges – The Globalization of Legal Education', *Journal of Legal Education*, Volume 55, Number 4, p. 505. Critical: J. Basedow, 'Breeding lawyers for the global village: The internationalisation of law and legal education', in: W. van Caenegem & M. Hiscock, *The Future Practice of Law*, Cheltenham : Edward Elgar Publishing, 2014, p. 7.

It goes without saying that the provision of useful answers to these questions renders in-depth research into the technological standards that are in place across the various European countries necessary. In a second step, one would need to assess how the exchange of information can be realized between countries that make use of diverging technological standards (if any) and in how far new technologies such as smart contracts and blockchain can prove useful to achieve this goal.[2497] Such an ambitious project, though highly interesting, would clearly go beyond the scope of this thesis and could not be conducted without the expertise of ICT experts, thereby further acknowledging that the development of a sound technological future vision in this area must be the fruit of interdisciplinary research, that not only incorporates the legal and technological perspectives but also insights from psychology and sociology. Especially when the realization of a complete e-conveyancing system was to be put on the European agenda, it would be legitimate to ask oneself the question to what extent (if at all) European citizens would actually prefer cheaper and more efficient digital solutions (such as the possibility to digitally sign documents from their kitchen table or to participate in virtual meetings with the legal practitioner (and the other party) via a secure digital meeting environment) over personal contact with a qualified legal practitioner (that would necessitate travel time and costs).[2498] Research conducted in the banking industry for example shows that although a universal answer cannot be given, personal contact with banking staff is generally still desired by clients, while admitting that depending on the type of client and

[2497] The application of these technologies in land registration systems have been given considerable attention during the past editions of the World Bank's Annual Conference on Land and Poverty. The conference papers are available online, see: Website Catalyzing Innovation: Annual World Bank Conference on Land and Poverty: Washington DC, March 25-29, 2019, 'Conference Agenda: Session Overview: Session 02-03: Innovative technology in the land sector' (https://www.conftool.com/landandpoverty2019/index.php?page=browseSessions&form_session=565&presentations=show), as consulted on 20.07.2019. Also see Website Catalyzing Innovation: Annual World Bank Conference on Land and Poverty: Washington DC, March 25-29, 2019, 'Conference Agenda: Session Overview: Session 06-02: Emerging technologies, data ownership & privacy' (https://www.conftool.com/landandpoverty2019/index.php?page=browseSessions&form_session=930&presentations=show), as consulted on 20.07.2019. Also see Website Land Governance in an Interconnected World: Annual World Bank Conference on Land and Poverty: Washington DC, March 19-23, 2018, 'Conference Agenda: Session Overview: Monday, 19/Mar/2018' (https://www.conftool.com/landandpoverty2018/sessions.php), as consulted on 20.07.2019. Also see Website Responsible Land Governance: Towards an Evidence Based Approach: Annual World Bank Conference on Land and Poverty: Washington DC, March 20-24, 2018, 'Conference Agenda: Session Overview: Monday, 20/Mar/2017' (https://www.conftool.com/landandpoverty2017/sessions.php), as consulted on 20.07.2019.

[2498] The first step in the obligation to recognize digital IDs is Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73–114).

service offered, digital advice and investment options might be preferred over personal contact.[2499] At the same time, it must be acknowledged that not all solutions that can be provided through (new) technology are likewise desirable from a legal perspective, especially when they increase the vulnerability to fraud and undermine legal certainty. Future interdisciplinary research will have to ensure that all of these perspectives are taken into account, thereby guarding that the legal certainty offered by the national land registration systems is not burned on the stake of efficiency.

[2499] K. Dallerup et al., 'The future of customer-led retail banking distribution', McKinsey&Company, 2017, p.3-6 (https://www.mckinsey.com/~/media/mckinsey/industries/financial%20services/our%20insights/the%20future%20of%20customer%20led%20retail%20banking%20distribution/the-future-of-customer-led-retail-banking-distribution-2017.ashxhttps://www.mckinsey.com/~/media/mckinsey/industries/financial%20services/our%20insights/the%20future%20of%20customer%20led%20retail%20banking%20distribution/the-future-of-customer-led-retail-banking-distribution-2017.ashx), as consulted on 20.07.2019.

7 Conclusion

Before the answer to the main research question shall be presented, the sub-research question shall be answered.

SUB-RESEARCH QUESTIONS

1 How do real estate transactions occur across the different European countries?

Initially, it was thought that European continental land registration systems would show greater similarities with another continental system rather than with the English land registration system. Despite the fact that the common Napoleonic heritance still shines through in the continental systems, one would be mistaken to belief that they all have since developed in the same direction. For instance, taking the Dutch system as a point of departure here, the comparative exercise has shown that it more closely resembles the English system when it comes to the organisational structure and the process of digitalisation than the German system. Yet, the very chore of the system, a parcel-based registration system as opposed to a system that takes legal interests as the organisation unit for the land register is still commonly shared in the continental Napoleonic systems. Considering that a more detailed comparison of the three chosen land registration systems has already been conducted in Chapter 3.4, the following conclusions shall only reflect the main research findings in the interest of avoiding repetitions.

What is the constitution of land registration?

The constitution of the land registry, the land register, the cadastral organisation, and the cadastre shall be discussed separately.

<u>The Land Registry</u>

The Dutch and English land registries both underwent a process of centralization in the past, so that a centralized land registry is now in charge of land registration in these countries. Given that they must be self-financing, these land registries are able to conduct their business independently. Despite the fact that these land registries operate with several branches located in different parts of

the country, a centralized land register is kept. In Germany, the organisation of land registries still is decentralized. A separate land registry is attached to each of the 661 local courts and every land registry keeps their own distinct land register. Similarly to its Dutch and English counterpart, a German land registry can independently carry out the tasks entrusted on them by law, but unlike in the Netherlands and England & Wales, it is not required that they are self-financing. Another similarity of German, Dutch, and English land registries is that they all also keep other registers and indices (related to the land register).

The Land Register

In order to find out who the owner of a plot of land is, two databases can be consulted that are both kept by the land registry: the collection of the deeds and other documents that were offered for registration and the register that organises that information in a standardized template. Every legal system has decided which of these databases needs to be consulted to determine the plot's legal situation. The database that is enjoys such legal priority is the land register. In positive registration systems, such as England & Wales and Germany, the land register is the latter database, while in a negative registration system, such as the Netherlands, the land register refers to the collection of the deeds.

The Cadastral Organisation

In comparison to the organisation of land registries, the organisation of cadastral organisations demonstrates even more considerable differences across the three jurisdictions. In the Netherlands, a cadastral organisation still exists but has been merged with the centralized land registry. In Germany, the organisational structure and even the determination of the organisation's name is subject to state law. Similar to the German land registries, the cadastral organisations are still decentralized. In England & Wales, a classic cadastre does not exist. Instead, there is a mapping agency ("Ordnance Survey").

The Cadastre

Despite the fact that the cadastral organisation is differently organised in Germany and the Netherlands, the cadastres in these countries show striking similarities. They both consist of a cadastral map and a cadastral register and have full coverage of the country's territory. Only one distinctive factor exists: while the Dutch cadastre is fully centralized, the German cadastre is decentralized so that each cadastral organisation keeps a distinct cadastre.

What is the role of the legal practitioner?

The Latin notary, who represents the interests of all parties involved in the real estate transaction, is the designated legal practitioner in Germany and the Netherlands. It has been shown however that within the group of Latin notaries, different sub-types exists. In the Netherlands it is for instance possible for Latin notaries to combine their function with another profession or to be simultaneously public official and entrepreneur, which does not belong to the possibilities for a German Latin notary. Nevertheless, the requirements to be appointed as a Latin notary and to be removed from office, their competences, and their duties are congruent to the largest extent. In England, where the Latin notary does not exist, real estate transactions are taken care of by virtually all lawyers (though traditionally solicitors) and licensed conveyancers. In contrast to the Latin notary, the English legal practitioner will only represent the interests of one of the parties to the transaction. Solicitors and licensed conveyancers must comply with the law and regulations determined by their respective professional head organisation. It is the head organisation on whom it is bestowed to appoint new members and terminate their function.

What is the role of the land registrar?

Land registrars in all three legal systems share a common ground regarding the nature of their function (they are all public officials) and their main responsibility of keeping the land register. For the rest, considerable differences are noticeable, especially with respect to the level of education required for an appointment as a land registrar and the division of tasks. Noteworthy, in Dutch and English practice, the registration of deeds is not entirely taken care of by the land registrars themselves, but by mandated land registry staff, who merely consult the land registrars for advice in case of complicated registration questions. In Germany by contrast, all deeds are registered by the land registrars themselves (unless they are obliged to turn to the land register judge in a given case), although they are supported with the preparatory work by other land registry staff. Furthermore, it is interesting to note that Dutch land registrars are appointed by the land registry itself; in Germany and England & Wales the appointment is entrusted on external officials.

What is the relationship between the legal practitioner and the land registrar?

From an outsider perspective, it was not possible to conceptualize the relationship between these two groups of legal professionals. Evidence for an active collaboration between legal practitioners and land registrars could only be found in Netherlands.

Which information can be entered in the land register?

For an overview of a complete list of registrable rights and facts, reference is made to the respective case study. In the Netherlands and England & Wales, the legislator has made it easy for those interested in gathering this information by providing a central legal provision that lists the (most important) rights and facts that can be entered in the land register. However, it must be underlined that the Dutch provision is not conclusive so that other legal bases exist that allow the registration of additional rights and facts in the land register. German law on the other hand lacks a comparable legal provision and instead has a multitude of individual legal bases in different legal instruments. The legal nature of the registration is generally speaking constitutive in all three jurisdictions, but there are certain exceptions of declaratory registrations.

Is the information that is entered in the land register/cadastre publicly available?

Acknowledging that different legal requirements apply for the accessibility of land register and cadastre information, these will be dealt with separately.

Land Register Information

Information from the land register is publicly accessible to the broad public in the Netherlands and England & Wales. Few exceptions apply, such as with regard to the access of the index of proprietors' names and the day list in England & Wales. Considering the openness of these systems, the question must be asked whether it is possible to apply for the shielding of one's information in the land register. Only the Netherlands offers this possibility under certain conditions. In England, applications to shield personal information will not be honoured as they are not provided for in the law. However, different techniques exist to reach the same goal. In Germany, access to land information is conditional upon the passing of a strict test, demonstrating a legitimate interest. In addition to the legal entitlement to access land register information, differences exist with regard to the information needed to access the land register (name of the owner, plot number, address, etc.) and the height of the tariff due for accessing the land register.

Cadastral Information

Unlike accessing land register information, the conditions for accessing cadastral information in Germany and the Netherlands are largely similar, i.e. they are in principle openly accessible, though in Germany, restricted access applies to personal information stored in the cadastre.

What is the legal value of the information that is entered in the land register?

A certain level of protection is granted to all persons (in good faith), who consult the land register. Needless to state, in a positive system, such as Germany and England & Wales, the level of protection is higher as the land register information is deemed to be correct (though not necessarily complete!). Within these two jurisdictions, the level of protection accorded in the English system is even higher than in the German system due to the principle of conclusiveness. Contrariwise, negative land registration systems such as the Netherlands, do not guarantee the correctness of land register information. This does not mean though that those who consult the Dutch land register are left unprotected as they might be able to call upon the third party protection mechanism. Interestingly, this mechanism does not only cover the correctness but also the completeness of information.

How does the process of transferring a plot of land in a purely national case look like?

The process of transferring a plot of land in a purely national case adheres to certain common characteristics in all three systems. Without going into detail, essentially there needs to be a written contract of sale, a written deed of transfer, the identification of the parties' identity by a qualified legal practitioner, and the registration of the deed of transfer in the land register. Regarding all other aspects underlying such a process, sometimes severe differences in approach can be witnessed across Germany, the Netherlands, and England & Wales.

What exactly is the object of a real estate transaction and how are boundaries defined?

Defining the object of a real estate transaction requires the careful distinction of the cadastral parcel and the plot as defined by civil law, as these two concepts do not necessarily overlap in all jurisdictions in all situations. Connected herewith is the legal value of a boundary as indicated on a cadastral map (or the English MasterMap). Only in Germany, the cadastral boundary (and thus the cadastral map) can be legally relied upon. In England & Wales, the question of whether one can rely on the boundaries indicated on the MasterMap, depends on the qualification of that boundary as either a general or determined boundary. Only the latter type of boundaries can be legally relied upon. In the Netherlands, by contrast, all cadastral boundaries merely provide an indication of the shape of the plot and its location in relation to each other so that they cannot be legally relied upon to determine the object of the real estate transaction.

Despite the fact that different legal values are accorded to the 'cadastral' boundaries in these

countries, it can be observed that the process of making them visible in the territory and the procedure of splitting a parcel into two or more parcels are quite similar in Germany, the Netherlands, and England & Wales, though it is not possible in all systems to transfer a newly splitted parcel of land before it has been surveyed. For these reasons, it is not surprising that the fictive case of the encroaching pavilion has different consequences across the three jurisdictions.

To what extent is land registration digitalized?

A complete system of e-conveyancing has not been realized in any of the three chosen jurisdictions. However, the level of digitalization already achieved in the Netherlands and England & Wales is considerably higher than in Germany, where the digitalization of the land register and the introduction of the possibility to offer digital deeds for registration in the land register falls within the competence of the German states and thus cannot be forced upon by the federal legislator. In the Netherlands and England & Wales the realization of a digital land register, the submission and registration of digital deeds, and the issuance of digital land register data has long been a reality.

How are cross-border real estate transactions approached?

As has been expected, national approaches to cross-border real estate transactions still are rather nationally oriented. Generally speaking, deeds of transfer drawn up in a foreign language cannot be entered in the Dutch, German or English land register. Under certain conditions, an exception can be made for the registration of Welsh deeds in the English land register. Similarly, land registrars in Germany and the Netherlands will refuse the registration of deeds of transfer that were drawn up by foreign legal practitioners. In England, by contrast, it is possible to enter deeds drawn up by foreign legal practitioners in the land register, provided that the parties' identities were verified by an English legal professional.

2 Why are cross-border real estate transactions more challenging than purely national real estate transactions?

Real estate transactions are already complex undertakings when they occur within the borders of a single state. If these transactions feature one or more cross-border elements, it is commonly assumed that they inhibit more challenges than a comparable national transaction. These challenges have been identified and grouped into four different categories: administrative, cultural, legal, and technological challenges.

Which problems arise in cross-border real estate transactions that do not arise in purely national real estate transactions?

Not all of the 29 challenges that were identified are exclusive to cross-border real estate transactions. In fact, 20 of these challenges also occur in purely national transactions. However, only five of these challenges have an equal impact on both types of transactions. The remaining 15 challenges are more gravely experienced in a cross-border setting. The nine challenges that only arise in a cross-border transaction are: Choice of Legal Practitioner – Linguistic Abilities, Translation Costs, Referring Citizens to the Correct Authority, Risk of Cultural-Legal Misperceptions, Choice of Law in Real Estate Transactions, Drawing up a Deed for Registration Abroad, Registrability of Foreign Deeds, Adaptation of Foreign Rights in Rem, and Different Stages of Technological Development.

Is it desirable to combat these problems?

Although cross-border real estate transactions come in different flavours so that the challenges are experienced with different degrees of intensity, it is argued that the pure existence of such challenges cause these transactions to be more time consuming and cost intensive than a national transaction. Furthermore, it has been established that it is primarily the European citizen rather than the legal professional, who is most severely disadvantaged by these challenges, when making active use of their free movement rights. As a result, the 29 challenges distort the proper functioning of the internal market. Unfortunately, it was impossible to find reliable, up-to-date, and freely accessible statistics that shed light on the frequency with which cross-border real estate transactions occur in Europe. However, on the basis of migration statistics, it can be expected that this frequency will significantly increase in the near future. Therefore, it is argued that it is desirable to combat these challenges.

3 What is the current state of affairs when it comes to the facilitation of European cross-border real estate transactions?

A considerably wider spectrum of initiatives to facilitate European cross-border real estate transactions exists than originally expected. The oldest initiative, the foundation of the International Union of Property Owners dates 1923. It is noteworthy that most of these initiatives stem directly from legal professionals in the field, rather than from academics, political institutions, or the EU.

Are there European private initiatives in the field that were created by the European notaries, land registrars or other interest groups?

A great number of European initiatives has been realized by Latin notaries and land registry and cadastre staff. On the side of the notaries, LEXUNION, the Council of the Notariats of the European Union, and the International Union of Notaries are to be mentioned, while land registry and cadastre staff are involved in the European Land Information Service, the European Land Registry Association, the International Property Registries Association and International Centre of Registration Law, EuroGeographics, the International Federation of Surveyors, the Permanent Committee on Cadastre in the European Union, and the European Union of Rechtspfleger. In addition, the EU plays an active role by realizing a digital infrastructure for the exchange of information and more passively through the provision of financial support to these interest groups.

Are there international initiatives in the field that facilitate cross-border real estate transactions in Europe?

International organizations active in the field include the United Nations' Food and Agriculture Organization, the Land Portal Foundation, and the World Bank.

Do these initiatives fully address the problems that are inherent in cross-border real estate transactions?

The original hypothesis that the existing initiatives do not yet fully solve all challenges that occur in cross-border real estate transactions could be confirmed. As a matter of fact, only four challenges have already been fully resolved. All of these challenges are administrative challenges: Choice Legal Practitioner – Linguistic Abilities, Provision of Required Documents, Access to Land Register/ Cadastral Information, and Duration of the Transaction Procedure.

4 In view of the current state of affairs, how can European cross-border real estate transactions be facilitated even further?

Which are the problems that still need to be solved?

The following six challenges have not been tended to at all: Payment of the Legal Practitioner's Service Fee, Risk of Cultural-Legal Misperceptions, Determination of the Seller's Power of Disposal, Determination of the Extent of the Object of Transfer, Determination of the Potential Defects, and Necessity of Preceding Approval of the Competent Authority or of a Declaration by the Buyers. The

remaining challenges have been partly addressed by the existing initiatives. As a result, we can conclude that cross-border real estate transactions can be further facilitated by addressing the (partly) unsolved challenges, thereby building upon the shoulders of the initiatives that have been realized so far in order to prevent trying to reinvent the wheel over and over again.

How can these problems be solved?

The first option considered was the introduction of a uniform European land registration system, consisting of the creation of a centralized European Cadastral Authority and Land Registry ("EUCALARY"), the adoption of a uniform set of rules governing the registration of rights and facts, and the adoption of a uniform property law. Although such measures are capable of eliminating virtually all challenges arising in cross-border real estate transactions, the price that would have to be paid is simply too high. Therefore, an intermediate solution had to be found.

Administrative Challenges

The vast majority of these challenges can be addressed by setting up a central database within the EJN environment in which the available information about the land registration systems is structured and mandatorily updated by the participating European countries in regular intervals. Ideally, all European countries commit themselves to this project to ensure complete coverage. Taking inspiration from the ENN, the database would be split into a public part and a closed part that is exclusively accessible to legal professionals and contains more specific legal information. On the one hand, such a database will provide to citizens and legal professionals a useful tool to locate up-to-date, verified, and clustered information on foreign land registration systems. Thereby, it allows a solid first orientation for citizens, who are interested in acquiring a plot of land in a foreign country, and legal professionals, who find themselves confronted with a cross-border real estate acquisition. However, on the other hand, given that also certain legal information should be included in this database, the limitations of such a database become visible. It goes without saying that such a database, while providing information about the registration systems in general, cannot supersede the qualified legal advice of legal professionals, in which the specifics of each unique real estate transaction are taken into account. In this regard, it is also questionable whether citizens are able to correctly interpret the (legal) information published in the portal if they lack a solid understanding of the foreign legal system in its entirety.

The challenges "Translation Costs" and "Travel Expenses" require the application of a different

method. To begin with the translation costs, a distinction must be made between the documents that are offered for registration and the land register information distributed by the land registry. Regarding the first, translation costs cannot be eradicated. It is merely possible to shift the duty to provide an authentic translation from the European citizen to the land registry staff (the costs of which will probably be allocated back to the European citizen by including them in the land register tariffs due for the registration of the deed of transfer). It is however possible to reduce the translation costs for land register information. In this regard, much will depend on the success of the IMOLA project. Travel expenses will always occur unless the parties can make use of the CROBECO or EUFides project or if a full-fledged e-conveyancing system is realized in the future in which the parties can sign official documents at their kitchen table and attend virtual meetings with the other party and the legal practitioner(s) involved.

Cultural Challenges

This challenge is connected to the rich cultural diversity in Europe. Unless one is willing to eradicate this diversity, the only useful approach left lies in the provision of centralized, complete and up-to-date information that is easily accessible to the various European stakeholders. The approach of the cultural challenge therefore hooks in the proposed solution for the administrative challenges.

Legal Challenges

Although most legal challenges have been partly addressed by the existing initiatives in the field, none of them have been completely resolved yet. Again, the simplest means of solving most of the legal challenges is the creation of a centralized European database within the EJN, while acknowledging that the provision of qualitatively good information cannot fully render the intervention of a trained legal professional unnecessary. Those concern the necessity of a legal practitioner, the determination of the seller's power of disposal, the extent of the object of transfer, the size of the parcel, and of potential defects, as well as concerning the access to land register/cadastral information and the comprehension of this information, the necessity of preceding approval of the competent authority or of a declaration of the buyers, and the possibility to draw up a deed for registration abroad. The remaining legal challenges demand another approach. Hereby, the European Succession Regulation can teach us valuable lessons, especially with regard to choice of law options and the introduction of standardized deeds. Unfortunately though, impact assessments of the European Succession Regulation are largely absent so that it is

difficult to examine whether choice of law options and standardized European deeds actually facilitate the lives of European citizens or whether they rather cater for more complications. Therefore, one would be well-advised to first conduct such an assessment before decisions are taken to introduce such measures in the field of cross-border real estate transactions. Furthermore, it will have to be assessed whether it is desirable to daily update the European Directory of Notaries to provide a tool for European citizens to verify the competence of (alleged) notaries and to introduce a similar tool for legal practitioners other than Latin notaries. The necessity of addressing the challenge of comprehending land register and cadastre information and the adaptation of foreign rights in rem will depend on the success of the IMOLA project, thereby taking into account the possible pitfalls inherent in the creation of a standardized land register form. Last, with regard to the application of EU law, this problem will arguably continuously decrease, with universities recognizing the need to offer courses on European, comparative and private international law to prepare their students for the labour market, in which they will be coercively confronted with cases on the intersection of national and foreign, European, or private international law.

Technological Challenges

In all of the chosen jurisdictions, the cadastre has been completely digitalized. Contrariwise, digitalization did not find its way into all European land registers. Therefore, any proposal to facilitate cross-border real estate transactions on a technological level must acknowledge this unequal technological playing field. For instance, considerations to extend the scope of the e-Codex to the information flow to and from European land registries, would have to carefully ponder the question whether such a project could encompass all European land registries or whether it would have to be restricted to those land registries, who have already digitalized their information exchange to a sufficient degree. It goes without saying that deciding in favor of the first scenario would significantly align the technological infrastructure of land registries across Europe. On the downside however, it cannot be neglected that the implementation of such a project would require a considerably longer period of time than if preference was given to the second scenario. But even opting for the second scenario, as efficient as it might seem at first glance, comes with an important disadvantage: the gap between those land registries that are already technologically advanced and thus could qualify for participation in such an e-Codex project and those land registries that would be excluded from participating due to an insufficient technological infrastructure would necessarily increase.

Related herewith, it is questionable whether it is actually feasible to implement a common Europe-wide technological solution in the near future and to what extent new technological developments such as smart contracts and blockchains can be employed for that purpose. The development of concrete technological solutions requires interdisciplinary research and the expertise of different professions, not the least of ICT specialists. It is for these reasons that the formulation of such a solution would go beyond the scope of this thesis. In addition, technological advancements, how efficient they might be, should always be carefully balanced with the principle of legal certainty as one of the fundamental cornerstones of land registration. Last, in order to assess the degree to which existing technological challenges should be addressed, it would be highly interesting to conduct follow-up psychological and sociological research to address the question whether EU citizens would actually prefer more technologically efficient (and thus cheaper) solutions over personal contact with legal practitioners.

MAIN RESEARCH QUESTION

How can cross-border real estate transactions in Europe be facilitated?

After having answered the sub-research questions, all that is left is to provide an answer to the centrepiece of this research - the main research question. We remember the original hypothesis:

> Cross-border immovable property transactions can be facilitated by (i) introducing standardized multilingual templates for deeds of transfer and land registration output, (ii) creating a legal basis for the registration of such deeds in the land register, (iii) providing a secure platform for the exchange of information, (iv) creating a central and transparent database which contains all relevant information for practitioners, and (v) introducing a greater flexibility in the national land laws regarding the choice of applicable law to the contract of sale.

The final conclusion however turns out to be far more conservative in a sense. As stated before, the question whether it is useful to introduce standard multilingual deeds of transfer and choice of law options can only be affirmed or negated once the practical implications of the European Succession Regulation have been thoroughly researched. The creation of a secure platform for the exchange of information could be realized through the already existing e-Codex project, provided that the participating national land registers have undergone the process of digitalization. The most promising approach to counter many of the challenges that arise in the context of cross-border real

estate transactions seems to lie in the setting up of a centralized database in which all relevant information is structured according to a common template, regularly updated and covering all European countries. However, such a database is relatively useless if the European citizen is unaware of its existence. Promotion is therefore – as so often - the key to success.

On a broader level, this research has revealed that we are still in the beginning stage of bringing light into the black box in which cross-border real estate transactions are caught so that we are tempted to build the discussion in this field on a fundament of hypotheses. As a result, in order to formulate useful proposals to combat the challenges with which the different stakeholders are confronted in cross-border real transactions, more groundwork is needed. Hopefully, this thesis has done its part to contribute to the achievement of this goal.

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Bundesnotarordnung (BNotO) in der Fassung der Bekanntmachung vom 24. Februar 1961 (BGBl. I S. BGBL Jahr 1961 I Seite 97) (BGBl. III/FNA 303-1), zuletzt geändert durch Art. 4 G zur Neuregelung des Schutzes von Geheimnissen bei der Mitwirkung Dritter an der Berufsausübung schweigepflichtiger Personen vom 30.10.2017 (BGBl. I S. BGBL Jahr 2017 I Seite 3618)

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Gesetz über das Erbbaurecht (Erbbaurechtsgesetz - ErbbauRG) vom 15. Januar 1919 (RGBl.S. 72, ber. S. 122) (BGBl. III/FNA 403-6), zuletzt geändert durch Art. 4 Abs. 7 G zur Einführung eines Datenbankgrundbuchs vom 1.10.2013 (BGBl. I S. 3719)

Gesetz über die geodätischen Referenzsysteme, -netze und geotopographischen Referenzdaten des Bundes (Bundesgeoreferenzdatengesetz - BGeoRG) vom 10.05.2012 (BGBl. I S. 1081 (Nr. 21)).

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Gesetz über Kosten der freiwilligen Gerichtsbarkeit für Gerichte und Notare (Gerichts- und Notarkostengesetz - GNotKG), (Anlage 1: Kostenverzeichnis, nr. 17000-17003) vom 23. Juli 2013 (BGBl. I S. 2586), zuletzt geändert durch Artikel 7 des Gesetzes vom 17. Dezember 2018 (BGBl. I S. 2573)

Gesetz zur Einführung des elektronischen Rechtsverkehrs und der elektronischen Akte im Grundbuchverfahren sowie zur Änderung weiterer grundbuch-, register- und kostenrechtlicher Vorschriften (ERVGBG) vom 11. August 2009 (BGBl. I S. 2713)

Gesetz zur Einführung eines Datenbankgrundbuchs (DaBaGG) vom 1. Oktober 2013 (BGBl. I S. 3719), zuletzt geändert durch Art. 19 EU-KontopfändungsV-DurchführungsG vom 21. 11. 2016 (BGBl. I S. 2591)

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Rechtspflegergesetz (RPflG) in der Fassung der Bekanntmachung vom 14. April 2013 zur (BGBl. I S. BGBL Jahr 2013 I Seite 778, ber. 2014 I S. 46) (FNA 302-2), zuletzt geändert durch Art. 4 G zum Internationalen Güterrecht und zur Änd. von Vorschriften des Internationalen Privatrechts vom 17.12.2018 (BGBl. I S. BGBL Jahr 2018 I Seite 2573)

Richtlinien zum Datenaustausch im Verfahren SolumSTAR für das Grundbuch- und Katasteramt (SolumSTAR-Richtlinien), AV. D. Justizministeriums v. 19.12.2007 (1512 – I.14), Datenaustausch mit den Grundbuchämtern in der Fassung vom 25. September 2012

Richtlinien zur Erhaltung der Übereinstimmung zwischen Grundbuch und Liegenschaftskataster (Übereinstimmungs-Richtlinien) AV d. Justizministeriums (3850 - I. 42) und RdErl. d. Innenministeriums (32 - 51.10.02 - 8410) v. 29.10.2009.

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Zivilprozessordnung (ZPO) in der Fassung der Bekanntmachung vom 5. Dezember 2005 (BGBl. I S. BGBL Jahr 2005 I Seite 3202, ber. 2006 I S. 431 und 2007 I S. 1781) (FNA 310-4), zuletzt geändert durch Art. 5 Abs. 26 G zur Einführung einer Karte für Unionsbürger und Angehörige des Europäischen Wirtschaftsraums mit Funktion zum elektronischen Identitätsnachweis sowie zur Änd. des PersonalausweisG und weiterer Vorschriften vom 21.6.2019 (BGBl. I S. BGBL Jahr 2019 I Seite 846)

Germany - State Law

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Sächsische E-Justizverordnung (SächsGVBl. S. 291), zuletzt geändert durch Neunte Änderungsverordnung vom 11.6.2018 (SächsGVBl. S. 413)

Vermessungsgesetz für Baden-Württemberg (VermG) v. 1. Juli 2004 (GBl. S. 469), zuletzt geändert durch Artikel 55 der Verordnung vom 23. Februar 2017 (GBl. S. 99, 105)

Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG) v. 31. Juli 1970 (BayRS III S. 687), zuletzt geändert durch § 1 Abs. 181 der Verordnung vom 26. März 2019 (GVBl. S. 98)

Gesetz über das Vermessungswesen in Berlin (VermGBln) vom 9. Januar 1996 (GVBl. S. 56), zuletzt geändert durch Artikel 32 des Gesetzes vom 02.02.2018 (GVBl. S. 160)

Gesetz über das amtliche Vermessungswesen im Land Brandenburg (Brandenburgisches Vermessungsgesetz – BgbVermG) vom 27. Mai 2009 (GVBl.I/09 [Nr. 08], S. 166), zuletzt geändert durch Gesetz vom 19. Juni 2019 (GVBl.I/19, [Nr. 32])

Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz) v. 16. Oktober 1990 (Brem.GBl. 1990, 313), zuletzt geändert durch Art. 4 G zur Anpassung von Vorschriften aus dem Bereich Umwelt und Bau an die europäische Datenschutz-Grundverordnung vom 18.12.2018 (Brem.GBl. S. 651)

Hamburgisches Gesetz über das Vermessungswesen (Hamburgisches Vermessungsgesetz – HmbVermG) vom 20. April 2005 (HmbGVBl. 2005, S. 135), zuletzt geändert durch Artikel 4 des Gesetzes vom 31. August 2018 (HmbGVBl. S. 282, 284)

Hessisches Gesetz über das öffentliche Vermessungs- und Geoinformationswesen (Hessisches Vermessungs- und Geoinformationsgesetz – HVGG) vom 6. September 2007 (GVBl. I S. 548), zuletzt geändert durch Artikel 29 des Gesetzes vom 3. Mai 2018 (GVBl. S. 82)

Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz – GeoVermG M-V) vom 16. Dezember 2010 (GVOBl. M-V 2010, S. 713), zuletzt geändert durch Artikel 7 des Gesetzes vom 22. Mai 2018 (GVOBl. M-V S. 193, 204)

Niedersächsisches Gesetz über das amtliche Vermessungswesen (NVermG) vom 12. Dezember 2002 (GVBl. Nr.1/2003 S.5), zuletzt geändert durch Art. 9 G zur Neuordnung des niedersächsischen Datenschutzrechts vom 16.5.2018 (Nds. GVBl. S. 66)

Gesetz über die Landesvermessung und das Liegenschaftskataster (Vermessungs- und Katastergesetz – VermKatG NRW) vom 1. März 2005 (GV. NRW. S. 174), zuletzt geändert durch Artikel 2 des Gesetzes vom 1. April 2014 (GV. NRW. S. 256)

Landesgesetz über das amtliche Vermessungswesen (LGVerm) vom 20. Dezember 2000 (GVBl. S. 572), zuletzt geändert durch Artikel 18 des Gesetzes vom 19.12.2018 (GVBl. S. 448)

Saarländisches Gesetz über die Landesvermessung und das Liegenschaftskataster Saarländisches Vermessungs- und Katastergesetz – SvermKatG) vom 16. Oktober 1997 (Amtsblatt 1997, S. 1130), zuletzt geändert durch das Gesetz vom 22. August 2018 (Amtsbl. I S. 674)

Gesetz über die Landesvermessung und das Liegenschaftskataster im Freistaat Sachsen (Sächsisches Vermessungsgesetz – SächsVermG) vom 12. Mai 2003 (SächsGVBl. S. 121), zuletzt geändert durch Artikel 5 des Gesetzes vom 10. April 2007 (SächsGVBl. S. 54)

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Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Landesnotarkammer Bayern vom 3. Juli 1999 (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 24. November 1999, Nr. 3, S. 1), zuletzt geändert durch Beschluss der Versammlung der Landesnotarkammer Bayern vom 30. September 2007 zur Ergänzung der Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Landesnotarkammer Bayern nach § 67 Abs. 2 BNotO (Amtliches Mitteilungsblatt der Landesnotarkammer Bayern und der Notarkasse vom 2007, S. 1)

Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer om 18. Juni 1999 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, vom Dezember 1999, Nr. 12, S. 478), zuletzt geändert durch Beschluss der Mitgliederversammlung der Notarkammer Baden-Württemberg (vormals Notarkammer Stuttgart) vom 5. Mai 2018 (Die Justiz, Amtsblatt des Justizministeriums Baden-Württemberg, Juli 2018, S. 455)

Richtlinien der Notarkammer Berlin für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 10. November 1999 (Amtsblatt für Berlin vom 15. September 2000, Nr. 45, S. 3684), zuletzt geändert durch Beschluss vom 21. März 2012 (Amtsblatt für Berlin vom 11. April 2012, S. 675)

Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Brandenburg vom 22. November 1999 (Justizministerialblatt für das Land Brandenburg vom 15. Januar 2000, Nr. 1, S. 15), zuletzt geändert durch Beschluss vom 1. Juni 2007 (Justizministerialblatt für das Land Brandenburg vom 15. November 2007, Nr. 11, S. 166)

Richtlinien der Notarkammer Braunschweig für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer, zuletzt geändert durch Beschluss vom 2. April 2008 (Niedersächsische Rechtspflege vom 15. Juli 2008, Nr. 7, S. 224)

Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Bremer Notarkammer vom 2. Februar 2000 (Amtsblatt der Freien Hansestadt Bremen vom 1. September 2000, Nr. 63, S. 485, und vom 18. Januar 2001, Nr. 8, S. 82), zuletzt geändert durch Beschluss vom 2. April 2008 (Amtsblatt der Freien Hansestadt Bremen vom 14. November 2008, Nr. 121, S. 929)

Richtlinien der Notarkammer Celle für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 28. April 1999 und 3. Mai 2000 (Niedersächsische Rechtspflege vom 15. Dezember 2000, Nr. 12, S. 353), zuletzt geändert durch Beschluss vom 16. Mai 2012 (Niedersächsische Rechtspflege 2012, S. 240 f.)

Berufsrichtlinien der Notarkammer Frankfurt vom 14. Juli 1999 und 24. November 1999 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2000, Nr. 2, S. 65), zuletzt geändert durch Beschluss der Kammerversammlung der Notarkammer Frankfurt am Main am 13. November 2013 (Justiz-Ministerial-Blatt für Hessen vom 1. Februar 2014, Nr. 2, S. 140)

Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Hamburgischen Notarkammer vom 19. November 1999 (Hamburgisches Justizverwaltungsblatt vom 31. Januar 2000, Nr. 1, S. 2), zuletzt geändert durch Beschluss vom 28.11.2007 (HmbJVBl. 2008, S. 30)

Richtlinien der Westfälischen Notarkammer gem. § 67 Abs. 2 BNotO vom 9. Juni 1999 (KammerReport vom 23.06.2000 und vom 12.12.2000), zuletzt geändert durch Beschluss vom 27. März 2019 (KammerReport der Westfälischen Notarkammer vom 15.06.2019)

Richtlinien für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Kassel vom 25. August 1999 (Justiz-Ministerial-Blatt für Hessen, Nr. 5/2008, S. 125), zuletzt geändert durch Beschluss vom 21. November 2007 (Justiz-Ministerial-Blatt für Hessen vom 15. Dezember 2000, Nr. 23/24, S. 653)

Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Koblenz (Rl-NotKKO)vom 23. Oktober 1999 (Mitteilungen der Notarkammer Koblenz, Teil I, vom 22. Dezember 1999, Nr. 4/1999, S. 129), zuletzt geändert durch Satzung vom 5 Mai 2007 (Mitteilungen der Notarkammer Koblenz, Teil I Nr. 2 und 3/2007, S. 51ff.)

Berufsrichtlinien der Notarkammer Mecklenburg-Vorpommern vom 23. Juni 1999 und 9. Februar 2000 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 6. März 2000, Nr. 3, S. 248), geändert durch Satzung vom 13. Dezember 2006 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom März 2007, S. 476). zuletzt geändert durch Beschluss der Versammlung der Notarkammer Mecklenburg-Vorpommern vom 10. Juni 2009 (Amtsblatt für Mecklenburg-Vorpommern, Amtlicher Anzeiger, vom 23. September 2009, S. 978)

Richtlinien der Notarkammer Oldenburg für die Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer vom 17. November 1999 (Niedersächsische Rechtspflege vom 15. Juni 2000, Nr. 6, S. 164), geändert durch Beschlüsse der Kammerversammlung vom 21. April 2001 (Niedersächsische Rechtspflege vom 15. August 2001, Nr. 8, S. 260) und 24. Mai 2008

Richtlinien zur näheren Bestimmung der Amtspflichten und sonstigen Pflichten der Mitglieder der Notarkammer Pfalz vom 30. Oktober 1999 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 29. November 1999, Nr. 2, S. 7), zuletzt geändert durch Satzung vom 18. November 2006 (Amtliches Mitteilungsblatt der Notarkammer Pfalz vom 7. Januar 2007, Nr. 1, S. 2)

Richtlinien für die Berufsausübung Neufassung vom 8. Juni 2001 (Amtliches Mitteilungsblatt der Notarkammer Sachsen vom 19. September 2001, Nr. 2/2001, S. 2), zuletzt geändert durch Beschluss der Kammerversammlung vom 29.05.2015, genehmigt durch das Sächsische Staatsministerium der Justiz am 15.07.2015 und am 11.08.2015 bekannt gemacht

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Summary

European cross-border real estate transactions occur when European citizens either acquire a plot of land that is located in a different Member State or when they buy it from a seller, who is a resident of a foreign Member State. When such a cross-border element is added to the transaction, the complexity that coins purely national real estate transactions significantly increases. An additional factor is that statistics suggest that the occurrence of cross-border real estate transactions will keep increasing as European citizens exercise their free movement rights to acquire real estate as a primary or secondary residence or as a buy-to-let investment. In view of this development, it is considered desirable to reduce the complexity of such cross-border transactions to strengthen the proper functioning of the EU internal market. To this end, this doctoral thesis proposes different strategies through which such a reduction can be achieved.

The formulation of these strategies was preceded by systematic groundwork. First, in order to gain an in-depth understanding of national land registration systems, the land registration systems of the Netherlands, Germany, and England & Wales were studied through a theoretical and practical lens. This revealed that the observed divergences are not exclusively the result of the civil law – common law divide; fundamental differences exist even within the group of continental Napoleonic systems, especially when positive and negative land registration systems are being compared. This provides for the fact that for instance the German system in certain aspects, such as the mandatory involvement of a Latin notary, shows greater similarity to the Dutch system, while in other aspects, such as the legal value of land register information, more parallels can be found with the system of England & Wales, given that both are positive registration systems. Other important factors that contribute to divergences are the degree of centralization of land registries and cadastral organizations as well as the achieved level of digitalization of land registration processes.

This comparative exercise enabled the distillation of the challenges that are faced by the various stakeholders in a cross-border real estate transaction. They are either of an administrative, cultural, legal, or technological nature. Subsequently, it was determined whether these challenges also occur in a purely national real estate transaction, and, if that was the case, whether these challenges have a stronger impact in a cross-border setting. The result was that only nine of the 29 challenges that were identified exclusively occurred in the context of a cross-border real estate transaction.

However, it was also found that 15 out of the 20 challenges that occur in both a national and a cross-border transaction have a stronger impact in a cross-border setting.

Afterwards, a thorough analysis of the existing European and international initiatives that aim to contribute the facilitation of such transactions followed. Three discoveries were particularly remarkable. First, the number of relevant initiatives was considerably higher than initially expected. Second, the oldest initiative was founded almost 100 years ago. Third, in the majority of cases, the initiators were legal professionals rather than the EU, political institutions or academics. The contribution of these initiatives was then compared to the list of identified challenges so that it could be assessed which challenges still deserve attention. It was concluded that only four challenges are fully resolved through already existing initiatives. These challenges have in common that they fall in the category of administrative challenges. An additional six challenges have not been addressed at all by these initiatives. All other challenges were at least partially addressed.

Based on this analysis, different strategies for the further reduction of these challenges were evaluated. Through the creation of a centralized European Cadastral Authority and Land Registry ("EUCALARY") in combination with the adoption of a uniform set of rules governing the registration of rights and facts and the adoption of a uniform property law, virtually all challenges can be addressed. However, given its highly intrusive nature, it is dismissed as a proportionate strategy to facilitate cross-border real estate transactions. Instead, less invasive strategies for the reduction of the administrative, cultural, legal, and technological challenges were considered.

Curriculum Vitae

Katja Zimmermann (Eschweiler – Germany, 1989) holds an LL.B. in European Law School – Regular Track (2012) and LL.M. degrees in European Law School – Ius Commune Track (2014) and Dutch Law – Private Law Specialization (2014) from Maastricht University. During her studies, she participated in the MaRBLe for excellence program and the Masters Honors Research Track. She held two student assistantships and took part in four different (international) moot court competitions. In 2012, her team won the Draft Common Frame of Reference International Arbitration Moot.

Upon obtaining her master degrees in 2014, she worked as a researcher for the Netherlands' Cadastre, Land Registry and Mapping Agency. In 2015, she started her Ph.D research on European cross-border real estate transactions as an internal Ph.D. candidate at Maastricht University. In addition, she continued to work as a researcher for the Netherlands' Cadastre, Land Registry and Mapping Agency until 2019. She is involved in both the Institute for Transnational and Euregional cross border cooperation and Mobility (ITEM) and the M-EPLI Institute.

Currently, she works as a lecturer in private law at Maastricht University. Her research focuses on land registration and in particular on cross-border real estate transactions as well as on the European Succession Regulation.