focus

- Germany
- Portugal
- Brazil
- Nordic countries

The acquisition of real estate in Germany, Portugal and Brazil

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Introduction

Who does not dream of a holiday flat in Brazil or Portugal at one of the beautiful beaches? In fact, the number of Europeans realizing this dream has increased within the last few years. Sometimes legal problems may occur which have to be solved in another country where the real estate is situated. In this context, there are several decisions of German courts concerning the acquisition of real estates situated in Brazil and Portugal.[1] The first question regarding these cross border legal relations is: Which law is applicable?[2]
While the questions relating to property itself are governed by the law of the place where the property is located (lex rei sitae), the law applicable to the contract can differ, especially if the parties chose another (foreign) law.[3] If the case comes, for example, to a German court, the judge has to know and make use of the foreign law.[4] In German legal practice, experts are asked to prepare an opinion concerning this case. A general knowledge of the acquisition of real estate in other law systems could also be helpful to the Eurojuris lawyer regarding the possibilities of the formation of cross border contracts.

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[1] Landgericht Berlin, 29.9.2004, IPRax 2004, p. 261, Landgericht Bonn, 25.1.2002, IPRax 2003, p. 65; Landgericht Stuttgart, 3.3.2000, process no. 24 O 190/99, not published.
[2] Cf. Geiben, Aquisição de imóveis no Brasil por alemães e conflitos de sistemas no Direito International Privado alemão, in: Revista Trimestrial de Direito Civil (Rio de Janeiro), No. 22 (2005), p. 165 - 186.
[3] Cf. art. 27 I 1 EGBGB (corresponds to art. 3 I 1 Rome-Convention of 1980).
[4] Cf. § 293 Code of civil procedure (ZPO).

1. The German Civil Law System[5]

A specific characteristic of the German civil law is the principle of abstraction (Abstraktionsprinzip): The law of rights in rem (Sachenrecht) is independent from the law of obligations (Schuldrecht). According to this principle, transactions regarding rights in rem are valid irrespective of the existence or validity of an underlying obligation (sales contract) which may bind the parties concerned to perform the transaction in question.

All changes of rights in land (property rights as well as other rights) are subject to a uniform principle of law (§ 873 BGB): These legal acts do not depend on an underlying contract but require an agreement regarding the change in the right in rem between the present titleholder and the acquiring party. An entry in the land register under the regulations of the land registry act (Grundbuchordnung) is also an essential condition for effecting the change in legal position. Therefore the entry is not merely a declaratory act.

Although an underlying obligation, a.contract of sale for example, is not necessary for the validity of the act in rem, an obligation is a prerequisite as a legal ground (causa) to make the transaction permanent. The absence or the invalidity of such an underlying obligation gives rise to a quasi-contractual claim for restitution in rem based on § 812 BGB.

In German legal practice the two contracts (sales contract and agreement to the change in the right in rem) are incorporated in one notarial act.

Securing the acquisition of real estate: Vormerkung [6]

As the right in rem does not change with the conclusion of the sales contract, no additional contract – such as a preliminary contract - is necessary to secure the acquisition like in roman based law systems (see especially Portuguese and Brazilian law). However the land registration system delays legal transactions concerning real estate and makes these transactions dependent on bureaucratic acts, the timing of which the parties cannot influence. Furthermore, there is a risk in the case of bankruptcy or a risk that the seller of the real estate (who is still titleholder until the registration) might transfer it to a third party even if the buyer had already paid the price. For these reasons, all rights concerning the change in legal position can be secured by means of a Vormerkung (§§ 883-888 BGB). This is a priority notice which can be entered (quickly) in the land register.

[5] See Ebke/Finkin, Introduction to German Law, The Hague 1996, p. 229 foll.

[6] Ebke/Finkin, Introduction to German Law, The Hague 1996, p. 237.

2. The Portuguese Civil Law System

The current Portuguese Civil Code (CC) of 1967 is eclectic influenced by many European civil codifications such as Swiss, German and Italian civil codes. Even if the Portuguese civil code is less dependent on the French Code Napoléon than the other Southern European codes, the law of rights in rem is based on the French system, the principle of consent.

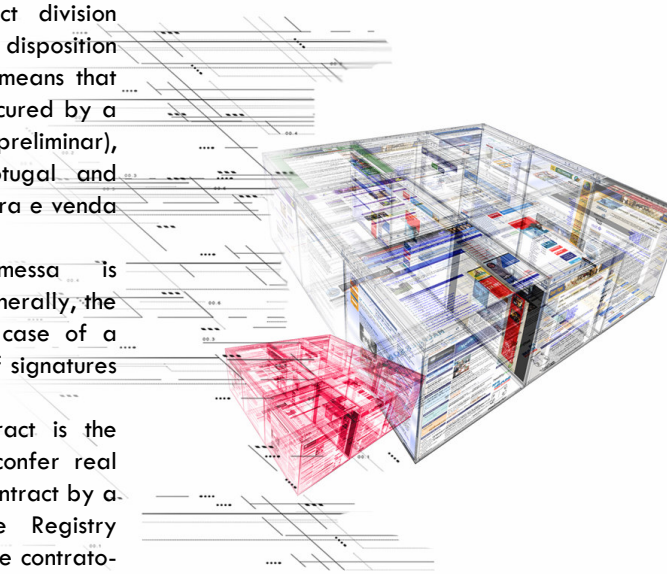
a) The acquisition of real estate

The property passes in Portuguese law - like in French Law - by the simple sales contract, concluded in the form of a notarial document (escritura pública, art. 875 CC). The written form is sufficient if an urban residential real estate is financed by the loan of an authorised bank.

The register of the title in the Real Estate Registry (registo predial) is only declaratory for the change in right, but it makes the right public avoiding a bona fide acquisition by third parties.

b) Securing the acquisition of real estate: contrato-promessa

A peculiarity of the legal systems in roman tradition by not making a strict division between the obligation and the disposition contract (like German law does), means that the acquisition of real estate is secured by a preliminary contract (contrato preliminar), called contrato-promessa in Protugal and promessa or compromisso de compra e venda in Brazil.



The Portuguese contrato-promessa is regulated in arts. 410 foll. CC. Generally, the written form is enough; in the case of a building or flat, the notarization of signatures is necessary.

The special quality of the contract is the possibility, that the parties can confer real effects (eficácia real) to the pre-contract by a registration in the Real Estate Registry (registo predial). The register of the contrato-promessa prevents any future bona fide acquisition. In the case of a disposition to third parties, the promesee can claim for restitution. Moreover, the promesee has wide legal powers - laid down in art. 830 CC - to persecute his rights of the contrato-promessa, namely the execution to conclude the main sales contract.

Finally, special rules concerning compensatory damages exist: According to arts. 441, 442 CC, all payments made before the conclusion of the main sales contract are to be considered as sinal (salvage-money).

3. The Brazilian Civil Law System

In the beginning Brazil with its Portuguese roots adopted the Roman legal system. After the independence of Portugal in 1822, its' own legal culture has been developed, which culminated in the creation of the Brazilian Civil Code of 1916 (CC/1916). It combined elements of the civil codes of France, Germany, Portugal, Spain, Italy and Switzerland. An example of the German influence is the general part of the CC/1916 which is widely orientated on the corresponding part of BGB. Beside of the CC/16 exists a large number of supplementary legislation, such as statutes and ordinances (leis, decreto-leis and decretos), concerning special questions of the civil law.

On the 11th of January 2003, the New Brazilian Civil Code (CC/2002) entered into force. It is divided into a general and a special part. The special part contains four books including the law of obligations, law of associations, law of things and property as well as the family law. Most of the changes took place in the field of the law of associations and the family law. There are also modifications in the law of obligations and property, concerning partly the acquisition of real estate.

The CC/1916 and the first part of the Commercial Code of 1850 are expressly revoked by the CC/2002. The Code does not decide to what extent the already mentioned supplementary legislation is still applicable or not. In the case of the Consumer Protection Code (Código de Defesa do Consumidor) from 1991 for example, the applicability is admitted.[7] Concerning other statutes and ordinances it has to be decided in each case if the rule is still applicable.[8]

a) The acquisition of real estate

Issues regarding contracts and real estate property are governed primarily by the CC/2002.

The acquisition of a real estate property in Brazil due to inter vivos transactions is generally agreed between the purchaser and the seller by means of a sale agreement (compra e venda, arts. 481 foll. CC/2002). The system of transfer is characterized by the principle of titulus and modus adquirendi. Which means, the property does not pass by the simple titulus, the sales contract (like in France and Protugal). It is furthermore necessary to register the title in the Real Estate Registry as modus adquirendi (arts. 1227, 1245 C.C./2002).

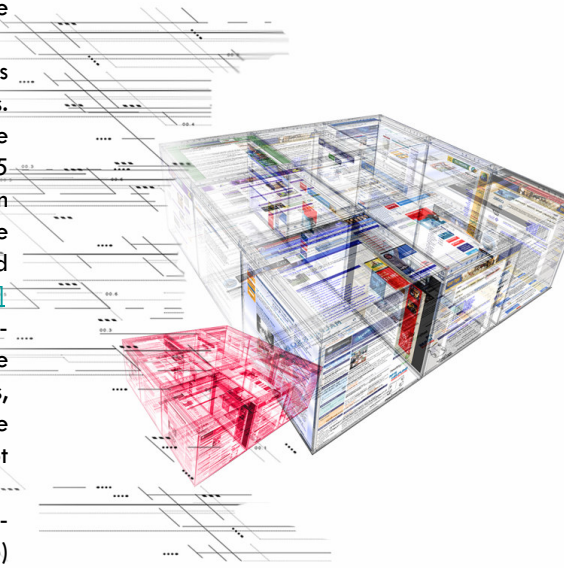
Only sales contracts concerning a real estate with a value of more than thirty times the actual minimum wage has to be concluded in the form of a notarial document (escritura pública, art. 108 CC/2002), whereas others do not need any formal requirements. As the focus lays on holiday apartments, the amount is always exceeded and the notarial form has to be observed.[9]

b) Securing the acquisition of real estate: compromisso de compra e venda [10]

As already mentioned, the preliminary contract is called promessa or compromisso de compra e venda (promise to conclude a sales contract) in Brazil. The compromisso de compra e venda was first expressly regulated in the decreto-lei no. 58 of 10.12.1937. José Osório de Azevedo Jr. calls it "the most Brazilian of the contracts of the civil law" because of the wide spread use in the legal practice.[11] Also in Brazilian law, the parties can confer real effects (eficácia real) to the pre-contract by a registration in the Real Estate Registry. The power to persecute the rights of the promesee are regulated in the Code of Civil Procedure[12] and the Consumer Protection Code.[13]

The New Civil Code of 2002 now integrates rules concerning preliminary contracts (arts. 462 - 466 CC/2002) and the promessa de compra e venda with real effects (arts. 1225 VI, 1417, 1418 CC/2002). It is admitted in the Brazilian doctrine, that the promessa de compra e venda on a real estate is concluded according to the arts. 462 foll. CC/2002.[14] Art. 462 CC/2002 intends that the pre-contract has to meet all requirements of the main contract except the form. That means, that the pre-contract concerning a real estate can be concluded even orally. This was not possible before.

Pre-contracts that do not have any salvage-money clause (clausula de arrependimento) give parties the right to persecute the conclusion of the main contract by appointing a term (art. 463 CC/2002). After expiry, the judge can substitute the declaration of intention of the one part, who does not execute (art. 464 CC/2002).



[7] Cf. Cláudia Lima Marques in: Cláudia Lima Marques, Antônio Herman V Benjamin, Bruno Miragem, Comentários ao Código de Defesa do Consumidor, São Paulo 2003, p. 24 foll.; Geiben, Aquisição de imóveis no Brasil por alemães e conflitos de sistemas no Direito International Privado alemão, op. cit., p. 177 foll.

[8] Cf. Helena Dinz in: Ricardo Fiuza, Novo Código Civil comentado, São Paulo 2002, p. 1843; Geiben, op. cit., p. 178.

[9] As the actual minimum wage is 300 Brazilian Reais, the value has to be over 9,000 Reais, corresponding more or less to 3,400 Euro.

[10] See in detail: Nikolaus Geiben, Vorverträge in Brasilien vor und nach dem neuen Código Civil von 2002, in: Erik Jayme, Christian Schindler (ed.): Portugiesisch - Weltsprache des Rechts, Aachen 2004, p. 173 foll.

[11] In the beginning, the prescription only concerned parcelled out urban land. Later on, it was developed by other supplementary laws and extended to other real estates. See *Leis* no. 649 (11.3.1949), no. 6.014 (27.12.1973) and no. 6.766 (19.12.1979).

[12] Arts. 639 foll., 461 *Código de Processo Civil*.

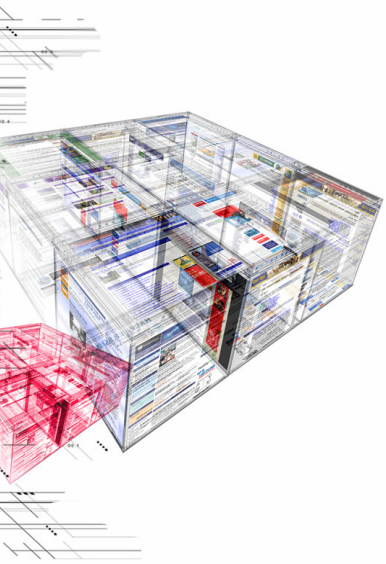
[13] Arts. 51 IV, 53 *Código de Defesa do Consumidor*.

[14] Cf. Jones Figueirêdo Alves, in: Ricardo Fiuza, op. cit., p. 410 foll.

The single paragraph of art. 463 CC/2002 intends that the preliminary contract has to be registered. Herewith, the legislator wanted to finish the former discussion whether the rights of the preliminary contract can be persecuted without registration or not. Nevertheless, the Federal Council of the Judiciary (Conselho da Justiça Federal) pronounced contrary to the text of art. 463 CC/2002 in an official advice, that the prescription of the single paragraph of art. 463 CC/2002 has to be interpreted as a requirement of effect against third parties.[15] As a result of this opinion, the rights inter partes can be executed without registration. Concerning the effect erga omnes, however, there is no doubt that a registration is necessary.
It is also stated clearly in the Civil Code in the arts. 1225 VI, 1417 CC/2002 that the compromisso de compra e venda is a real law (direito real).

c) Restrictions of acquisition of real estate

Foreign individuals or foreign-owned companies are generally allowed to acquire real estate property in Brazil upon the same conditions as national individuals or companies.
However, there are restrictions referring to the purchase of property located near the coast or frontiers or certain specific areas designated as being of national security.
The acquisition of rural property by foreigners who have permanent residence in Brazil or by foreign companies authorized to operate in Brazil is regulated by Law no. 5.709 from 1972. This law determines that individual foreigners with residence in Brazil cannot acquire more than an area equivalent to 50 units of rural property (módulos rurais). The area of each módulo rural is regulated by the law of the unit of the Federation where the land is located. Foreigners who do not have permanent residence in Brazil cannot acquire rural properties in Brazil, apart from acquisition due to heritage.
Due to the 1995 amendment of the Federal Constitution which removed the distinction between Brazilian companies and those with foreign equity control the restrictions concerning the acquisition of rural properties are now discussed. However, the restrictions on foreign individuals and foreign corporate entities authorized to operate in Brazil remain in force.
Foreign companies can only acquire rural property if the purpose is the implementation of agricultural, cattle-raising, industrialization or colonization projects, and if such projects are linked to their respective statutes (law no. 5.709).
Such projects must be approved by either the Brazilian Agriculture Ministry or the Department of Trade and Industry. Moreover, the President of Brazil has an exceptional right to authorize the acquisition in certain circumstances.



[15] *Enunciado n° 30: A disposição do parágrafo único do art. 463 do novo Código Civil deve ser interpretada como fator de eficácia perante terceiros.*

4. Necessity of the spouse's consent to the sales contract

If the seller is married, one has to pay attention to the spouse's eventual consent to the contract of alienation of real estate. In all legal systems discussed in this article, exist this necessity even if the prerequisites differ (§ 1365 BGB [if the real estate constitutes the main fortune], art. 1682-A Portuguese CC [concerns mainly marital houses or flats], art. 1647 Brazilian CC/2002 [all real estates]). This requirement of consent is generally relevant for sales contracts concerning real estates in all matrimonial regimes unless a separation of property is stipulated in a marriage contract.
Regarding the preliminary contract, the law systems differ: While the consent to the sales contract[16] in German law is necessary, it is not the case for the conclusion of the contrato-promessa itself but for an eventual execution of the rights. In Brazil, there is a tendency to abandon the necessity of the consent regarding to the non registered preliminary contracts. However, the consent is necessary for the registration in any case.
It is a question of the respective International Private Law, how to qualify the institute of the marital consent (regime or effect of the matrimony) finally to get to know if the consent has to be considered according to the respective law or not.

5. Conclusion

In Portuguese and Brazilian law, the acquisition of a real estate requires the conclusion of a valid sales contract. In Brazil, the change in legal position requires furthermore the respective registration in the Real Estate Registry. In Germany, the legal position of the titleholder is not directly concerned by the simple conclusion of the sales contract. The seller has only the claim to conclude the contract concerning the right in rem. In German legal practice, these two contracts are generally incorporated in one notarial act.
In Portuguese and Brazilian legal practice, the parties conclude generally a preliminary contract (compromisso de compra e venda) securing the intended sales contract and the acquisition. A characteristic is the possibility to confer this preliminary contract a real effect by registration.
In German law, such a preliminary contract is not necessary because of the above mentioned principle of abstraction. The function of the preliminary contract fulfils the sales contract, and the Vormerkung (priority notice in the register) corresponds functionally to the registered preliminary contracts of Portuguese and Brazilian law.

[16] As mentioned above, preliminary contracts (even if they exist in German law) are not necessary and - for this reason - usually not used in German legal practice concerning the acquisition of real estate.

Acquisition and sale of real property in nordic countries

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On Saturday, 1 October 2005, a Jurismus Nordic meeting was held on the premises of Holm & Schmidt Advokatfirma. 22 young lawyers from Finland, Norway, Sweden and Denmark came together to discuss various subjects, including the different laws relating to the acquisition of residential real property in the Nordic countries. In addition, Christian Husum of Meespierson Intertrust, part of the Fortis Bank, gave a lecture entitled "Doing business in China".

Prior to the meeting a questionnaire had been prepared containing 11 general questions, which had been answered by a lawyer from each of the Nordic countries. The completed questionnaires formed the basis of the discussion on 1 October 2005.
The following brief summary of the main conclusions is based on the completed questionnaires and the debate at the Jurismus Nordic meeting.

When the subject of the legal systems of the Nordic countries is raised, it is often thought that the Nordic countries have more or less uniform provisions within the various legal fields. This is indeed often the case. However, when it comes to the provisions relating to real property transactions, there may be vast legal differences between buying a property in Oslo, Stockholm, Helsinki or Copenhagen. In Norway, Finland and Sweden real property transactions are regulated by law whereas Denmark has no law applying specifically to the acquisition and sale of real property. However, there are a number of consumer protection laws and laws concerning formalities to be observed when buying and selling real property.

In Norway and Denmark a distinction is made as to the type of real property that can be purchased, while no such distinction is made in Finland and Sweden. As long as a plot of land or a building qualifies as real property, the legal systems in Finland and Sweden generally make no distinction as to what type of real property is being transferred while this is the case according to the Norwegian and Danish regulations.

Danish law stipulates who can buy real property while no such provisions apply in Finland, Sweden or Norway. Despite Denmark's membership of the EU, only Danish nationals who have been domiciled in Denmark for a minimum of five years may buy a summer cottage in Denmark. This was in fact one of the conditions for Denmark's entry into the EU. Danish law also to some extent restricts commercial undertaking's access to buying summer cottages whereas this is not the case in the other Nordic countries.

In all of the Nordic countries the act of perfection vis-à-vis innocent third parties is registration of title to the property whereas the contract is binding between the vendor and the buyer already at the time when the parties sign the contract. Title, charges and encumbrances may be entered in the land register.

In Sweden, Norway and Denmark a registration fee of up to 275 Euro is paid for the registration of a charge or other encumbrance. The registration of a title or legal charge (mortgage) is subject to an ad valorem registration fee of up to 2.5 % of the value of the property or mortgage in addition to the flat registration fee. In Finland all you have to pay is a 60 Euro fee for the registration of title and 40 Euro for the registration of charges, encumbrances and easements, irrespective of the value of the property or the mortgage. On the other hand, a buyer in Finland has to pay a transfer tax of 4% on the purchase price to the state.

In Denmark a consumer is entitled to a cooling-off period of up to six days from the execution of the contract in return for paying the vendor 1% on the purchase price. In Norway and Sweden there is no cooling-off right, while a cooling-off right applies in Finland, but only if it follows from the contract and certain specific conditions have been fulfilled.
As a general rule, the vendor is not liable to pay tax on the proceeds from the sale of real property in Norway, Finland and Denmark, while a vendor in Sweden is taxed on the proceeds at the rate of 20% unless the vendor reinvests the money in a new real property within a short period of time.

As regards financing the purchase of real property, the system is same throughout the Nordic countries. The transaction is typically financed by a mortgage loan secured on the house. However, the loan must not exceed 80 to 90 per cent of the purchase price. The balance may be financed by an ordinary bank loan.

While the main thing to watch in Denmark, Sweden and Norway is a number of formal details in the contract, such as matters relating to the lawyer and financing, whether there are tenants in the property, whether there is a sufficiently recent and updated structural survey by a building expert etc., a buyer in Finland executing a contract must pay specific attention to defects and inadequacies in the property that may not appear for a while after the transfer.

Having had a nice long and very informative debate, all the participants in the meeting had come to realise that, despite the common legal histories and general comparability of their respective countries, there are many minor and major differences when it comes to buying real property in the Nordic countries. With this in mind, all of the participants had been persuaded to make use of the Jurismus and Eurojuris networks the next time one of their clients expresses an interest in buying a real property in one of the other Nordic countries.