

Articles

TOWARDS A CONVENTION FOR THE INTERNATIONAL SALE OF REAL PROPERTY: CHALLENGES, COMMONALITIES, AND POSSIBILITIES

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INTRODUCTION

Today's economy is increasingly global in scope.¹ Commercial transactions, once confined by regions and borders, now stretch far across the globe and reach into even the most remote pockets of civilization.² Where the particular laws of a given nation alone were once sufficient to foster economic growth, the complexity and sophistication of commercial transactions have necessitated a rethinking of this long-held individualistic approach.³ This rethinking has spurred an active discussion about the role of commercial law in an increasingly

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1. See generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

2. See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS* 1–58 (2005); see also F.T. CHENG, *THE RULES OF PRIVATE INTERNATIONAL LAW DETERMINING CAPACITY TO CONTRACT* 1 (1916) (“It would be almost a commonplace in these days to say that Private International Law is a very important branch of law. Without the least exaggeration, it may be said that the development of that branch of law is a sound proof of the progress and prosperity of a nation.”).

3. See generally GOODE ON *LEGAL PROBLEMS OF CREDIT AND SECURITY* (Louise Gullifer ed., 4th ed. 2008); Christopher McCrudden & Stuart G. Gross, *WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study*, 17 *EUR. J. INT’L L.* 151 (2006).

global world.⁴

Over the past few decades, countries have banded together to create a growing framework of private international laws that fosters the growth of global business transactions.⁵ These laws, born out of a desire by the international community to provide greater access to the global market, are meant to create a readily accessible and uniform set of rules upon which parties can rely when engaging in cross-border transactions.⁶ For example, in 1997, the United Nations Institute for the Unification of Private Law (“UNIDROIT”) released a study on security rights for highly valued mobile equipment that regularly travels across national borders.⁷ In 2007, the European Commission released the draft Common Frame of Reference, which serves as the first serious attempt toward the unification of private law throughout Europe.⁸ In 2008, the European Union promulgated the Directives on Consumer Protection.⁹ Perhaps most noteworthy of all, in 1988 the United Nations Commission on International Trade Law (“UNCITRAL”) developed the Convention on Contracts for the International Sale of Goods (“CISG”), a convention hailed as one of the most successful of its kind.¹⁰

As pervasive as this bent toward the creation of international private law has been over the past several decades, one particular area has been left out: transactions involving the sale of real property.¹¹ This omission is not surprising considering the way societies have always thought about land: a finite resource that comprises a country’s and an individual’s principal asset.¹² Inherently, people view real property as

4. See *supra* note 3 and accompanying text.

5. See Henry Deeb Gabriel, *The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and The Hague Conference*, 34 *BROOK. J. INT’L L.* 655 (2009); see also Ross Cranston, *Theorizing Transnational Commercial Law*, 42 *TEX. INT’L L.J.* 597 (2007).

6. See *supra* note 2.

7. INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW [UNIDROIT], INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT, STUDY LXXII (Jan. 8, 2010), available at <http://www.unidroit.org/english/workprogramme/study072/main.htm>.

8. See Jan M. Smits, Editorial, *The Draft-Common Frame of Reference for a European Private Law: Fit for Purpose?*, 15 *MAASTRICHT J. EUR. & COMP. L.*, 145, 145–48 (2008).

9. PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CONSUMER RIGHTS, COM (2008) 614 final (Oct. 8, 2008).

10. BRUNO ZELLER, *CISG AND THE UNIFICATION OF INTERNATIONAL TRADE LAW* 94 (2007).

11. JOHN G. SPRANKLING ET AL., *GLOBAL ISSUES IN PROPERTY LAW* 115 (2006).

12. UGO MATTEI, *BASIC PRINCIPLES OF PROPERTY LAW* 83 (2000) (“Many legal rules have been historically thought of and developed keeping land in mind. Indeed, land is a psychological entity that enshrines the ideals of immobility, perpetuity, and absence of risk.”); see also RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* 151 (1951).

being intrinsically national or local in character.¹³ The rules governing real property are personal to a country and are often detailed, individualistic, inflexible, and highly technical.¹⁴ They are moored to society's historical desire to provide certainty and to its aversion to risk.¹⁵ Real property law is considered fixed and set-in-stone such that parties are not given the freedom to deviate far from these hard and fast norms.¹⁶ Not surprisingly, because of these individualistic notions about real property, very little scholarship exists in the way of comparative real property law.¹⁷

Despite the local nature historically ascribed to real property, however, society, as a whole, has a significant interest in economic development and commerce through real estate transactions.¹⁸ This interest is not merely applicable to local economies; rather, it serves to benefit the larger global community that values international commerce.¹⁹ In particular, the sale of real property increasingly reaches across these national borders into the sphere of the international community.²⁰ The purchase of vacation homes in other countries, the attainment of real property for those who live near border areas, and the acquisition of real property by multinational and international companies are undeniable parts of the global economy.²¹ “Crossborder transactions

13. THE OXFORD HANDBOOK OF COMPARATIVE LAW 1044 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

14. *Id.*

15. ROBERT MEGARRY & H.W.R. WADE, THE LAW OF REAL PROPERTY 7 (5th ed. 1984); see also SCHLATTER, *supra* note 12, at 151 (“Wherever middle-class revolutionaries rebelled against feudal privilege and royal absolutism, they inscribed on their banners the slogan of ‘life, liberty, and property.’ That ‘property’ should be included in the sacred trinity of natural rights was . . . one of those truths which express so exactly what men want that they seem self-evident. . . . The theory that property was a natural right triumphed with the Glorious, the American, and the French Revolutions.”).

16. See THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 13, at 1044.

17. *Id.*

18. SECURITY OVER IMMOVABLES IN SELECTED JURISDICTIONS, at ix (Dennis Campbell ed., 2005) [hereinafter SECURITY OVER IMMOVABLES].

19. See generally *id.*

20. Ronald J. Scalise Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT’L L. 41, 106 (2008) (“The growing mobility of people and the increasing tendency for marriage or similar unions without respect to national borders has caused an increase in the amount of cross-border property acquisition.”); see also Amnon Lehavi, *Property Rights in an Era of Global Finance*, in ENCYCLOPEDIA OF FINANCIAL GLOBALIZATION (Gerard Caprio ed., forthcoming) (manuscript at 2), available at <http://ssrn.com/abstract=1636249> (follow “One-Click Download” hyperlink).

21. See Lehavi, *supra* note 20, at 2; see also SPRANKLING ET AL., *supra* note 11, at 115; *House Hunters International*, HGTV.COM, <http://www.hgtv.com/house-hunters-international/show/index.html> (last visited Aug. 17, 2011).

involving immovables are integral to international business dealings. . . . [And] [t]he acquisition of property in a foreign country is an integral facet of international business. . . .”²² In fact, although society may view real property law’s proper role in the constellation of legal regimes as being rigid and unassailable, the transfer of real property is a “dynamic transaction” that gives value and economic worth to the property.²³ The value of land and its efficient use is achieved through transactions between parties, and the larger the market for the transaction (i.e., the international market), the greater value and more efficient use the real property will achieve.²⁴

With these precepts in mind, the time has come to rethink the way society views real property. This involves questioning the current legal patchwork governing real estate transactions that an international buyer must navigate in order to consummate a sale. In so doing, jurisdictions should take the next step on the road toward an ever-more vibrant global economy through the creation and global adoption of a framework for the international sale of real property.

Professors Sprankling, Coletta, and Mirow have posited that setting a global framework for the international sale of real property would involve many moving parts and present an array of varying challenges.²⁵ Some of the concepts that would have to be included in such an international system would consist of a uniform land identification system, a uniform land registration system, and an electronic transaction system where all due diligence and title examinations would be digital.²⁶ One of the challenges that this Article will address involves a consideration of what form of uniform contract principles might be needed to effectuate such a framework for global real estate transactions.²⁷ Specifically, this Article examines general principles that are eminently important to any buyer: contract formation and formalities, warranties accompanying the sale, and the availability of secured financing.²⁸ Moreover, these principles are evaluated through the lens of three countries that serve as touchstones for international development and business and that each make up a different global legal

22. SECURITY OVER IMMOVABLES, *supra* note 18, at ix.

23. MATTEI, *supra* note 12, at 99–100.

24. *Id.*

25. See SPRANKLING ET AL., *supra* note 11, at 119.

26. *Id.*

27. *Id.*

28. See discussion *infra* Part II.

system of private law: the United States, China, and France.²⁹

This Article begins a discussion of whether a convention for the international sale of real property, akin to the highly successful and somewhat similar CISG, could realistically be developed and, in doing so, hopes that future scholars and policy-makers will continue to explore the possibility of such a system. Part I gives a brief overview of the CISG, which can be viewed as a model for creating an international framework for the sale of real property. Part II defines three common features of all real property contracts—contract formalities, warranties, and secured financing—and discusses their importance to an international investor. Part III examines how three different countries that are currently highly engaged in international business and investment—the United States, China, and France—view contract formation requirements, warranties, and secured financing. Part III then determines, based on general comparisons, whether a convention for the international sale of real property could be developed for each basic real property contract provision. Finally, this Article concludes by arguing the many existing shared contract principles in each of the subject countries makes an international framework entirely possible to develop, at least with regards to these particular provisions, while acknowledging some of the difficulties inherent in the task.

I. THE CISG: WHAT IT IS AND WHY IT WORKS

To fully understand how a global framework for the sale of real property could be developed and how its attendant concerns could be overcome, it is helpful to gain an appreciation of a similar international protocol—the CISG. This commercial treaty for the sale of goods faced the same types of challenges in its formative days that a convention for the sale of real property might face; today, however, the CISG is hailed as one of the most successful and consequential efforts at the harmonization of laws in modern history.³⁰ By reviewing the process in which the CISG was created and passed, one can gain a better perspective as to the challenges, and perhaps the solutions, that would be involved in crafting a treaty for the international sale of real property.

29. See discussion *infra* Part III.

30. Of the uniform law conventions, the CISG has been described as having “the greatest influence on the law of worldwide transborder commerce.” Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG*, 36 VICTORIA U. WELLINGTON L. REV. 781, 781–82 (2005).

A. *What is the CISG?*

Before the CISG was adopted, buyers and sellers who engaged in international business often complained of contractual difficulties involved in conducting global transactions.³¹ These issues were exacerbated by distance and language, as well as the desire of most parties to have their own domestic laws—with which they were most familiar—govern the transaction.³² The international community finally acknowledged these issues in Vienna, Austria in 1980.³³ “Recognizing the difficulties that choice of law issues pose in cross-border transactions,” the various countries of the world—notably the major players in world trade—came together and adopted a uniform system of rules to govern contracts when the parties are from different countries.³⁴ This treaty—called the Convention on Contracts for the International Sale of Goods—governs contracts involving the sale of goods between persons of different countries.³⁵ The treaty officially took effect in 1988, allowing eight years from its initial adoption for various countries to ratify the Convention.³⁶ As of January 1, 2010, seventy-four countries have ratified the treaty, with these countries making up the vast majority of world trade.³⁷

Though successful today, the CISG’s success did not come about overnight.³⁸ To the contrary, the CISG was the result of many failed attempts at creating a uniform commercial law.³⁹ The movement toward the harmonization of international commercial law began as far back as 1930 with the creation of UNIDROIT.⁴⁰ This movement was followed

31. JEROLD A. FRIEDLAND, UNDERSTANDING INTERNATIONAL BUSINESS AND FINANCIAL TRANSACTIONS § 4.01[1], at 177 (2005); *see also* William Seabrooke & Paul Kent, *Resolving Institutional Uncertainty in International Real Estate Decisions*, in INTERNATIONAL REAL ESTATE 35, 35–72 (William Seabrooke et al. eds., 2004) (discussing, generally, the institutional uncertainties that international investors face in global real estate transactions).

32. FRIEDLAND, *supra* note 31, § 4.01[1], at 177.

33. *Id.*

34. *Id.*

35. Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT’L L. & BUS. 165, 166 (1995).

36. *See* FRIEDLAND, *supra* note 31, § 4.01[2], at 178.

37. *CISG: Table of Contracting States*, PACE L. SCH., <http://cisgw3.law.pace.edu/cisg/countries/cntries.html> (last updated Aug. 3, 2011).

38. *See* FRIEDLAND, *supra* note 31, § 4.01[2], at 178.

39. *Id.*

40. *Id.*

by several draft conventions, all of which were rejected or never gained much momentum.⁴¹ Before the CISG, the closest the world came to an international treaty for commercial law was at the Hague Conference in 1964. The Conference produced two potential treaties—neither gained many signatories—with the United States signing neither—and neither had a meaningful effect on world trade.⁴²

In response to these failures and growing concerns over the legal travails of doing business on a global scale, the United Nations created UNICITRAL in 1968.⁴³ The mission of this group was to create an “effective, widely-acceptable set of international sales rules.”⁴⁴ In consultation with corporate, government, and academic stakeholders from countries of various levels of development and economic and legal systems, UNICITRAL presented the CISG treaty to the world at the Vienna Convention, where it was ultimately adopted.⁴⁵

B. *Why is the CISG Successful?*

The Convention’s success has been largely attributed to a desire by the international community to remove the many legal barriers to a free-flowing world-trade market.⁴⁶ The CISG, through its uniform provisions, increased business predictability and lowered transactional and legal costs.⁴⁷ It harmonized the law with respect to, among other things, contract formation, remedies for breach, risk of loss, and delivery in the sales of goods across state borders.⁴⁸ Initially, many countries were hesitant to sign the treaty for fear of losing many of their domestic legal institutions regarding the sale of goods.⁴⁹ This fear, however, was overcome by allowing countries to adopt the treaty subject to specific

41. *Id.*

42. These two treaties were the Uniform Law for the International Sale of Goods and the Uniform Law for the Formation of Contracts. *See* FRIEDLAND, *supra* note 31, § 4.01[2], at 178.

43. *Id.* at 178–79.

44. *Id.* at 179.

45. *Id.*; *see generally* PETER SCHLECHTRIEM & PETRA BUTLER, UN LAW ON INTERNATIONAL SALES: THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (2008).

46. *See* Joseph Lookofsky, *Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules*, 39 AM. J. COMP. L. 403, 403–04 (1991).

47. *See id.* at 404.

48. COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 941–55 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005).

49. *Id.* at 3–4.

reservations.⁵⁰ For example, a country with a specific provision on warranties of sale might have chosen to maintain that institution in the version of the treaty that it adopted because, in that country's experience, the specific provision provided a superior avenue of redress than that which might have been contemplated in the CISG's provisions on warranties. In this way, each country was able to adopt precisely those provisions that it felt helped further the global economy, but still maintain a level of individualism and choice by keeping several of its own property laws in place.⁵¹

Going beyond merely what individual signatories chose to adopt, the treaty's success can also be attributed to the fact that private parties whose transactions fall within the ambit of the CISG can similarly contract around certain provisions.⁵² The treaty gives a great deal of freedom to the parties in deciding to what extent they wish the CISG's provisions to govern their transaction.⁵³ Therefore, in the case of less sophisticated parties or for transactions of lesser complexity, the CISG operates as a default set of rules, while parties of a more sophisticated nature may mold and shape their agreements around the framework laid out by the CISG and adopt only the provisions they desire.⁵⁴

Lastly, and as with most any international treaty, the notion that each of the relevant players are sitting around the table for the drafting of the treaty goes a long way toward its eventual adoption.⁵⁵ This collaborative process engenders buy-in and gives the project added credibility.⁵⁶ Such was the case with the CISG during its formation from 1968 to 1980.⁵⁷ A significant contributing factor in the creation of a political environment in which the treaty would come to be internationally ratified was effective participation of representatives from across the globe, in countries of varying economic development, and from differing legal systems.⁵⁸ The participation of representatives from countries with different legal systems, and at different points of

50. ELDON H. REILEY, INTERNATIONAL SALES CONTRACTS: THE UN CONVENTION AND RELATED TRANSNATIONAL LAW § 1.5, at 11 (2008).

51. *See id.*

52. INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 1.01[1], at 1-6 to 1-7 (Nina M. Galston & Hans Smit eds., 1984) [hereinafter INTERNATIONAL SALES].

53. *Id.*

54. *Id.*

55. *See id.* § 1.01[5], at 1-15.

56. INTERNATIONAL SALES, *supra* note 52, § 1.01[5], at 1-15.

57. *See id.*

58. *Id.*

economic development, played a major role in the CISG's success.⁵⁹

As evidence of its great success, the CISG has been ratified by countries from "every geographical region, every stage of economic development and every major legal, social and economic system,"⁶⁰ and has been hailed by legal scholars and businesspeople as having the greatest impact of any other international effort on "worldwide transborder commerce."⁶¹ Similar to the way today's society views real property as unassailably local in character, many felt that the law regarding the sale of movable goods was also too individualistic and local in scope to ever be unified internationally.⁶² However, the desire to create a robust global marketplace and decrease the cost and uncertainty associated with doing business across borders caused society to reconsider these antiquated notions and eventually develop the CISG that the world enjoys today. This process was extensive and exhaustive and was accomplished by evaluating the many commonalities shared by nation-states. This same exercise should be conducted with respect to the creation of a convention for the international sale of real property, and this Article endeavors to begin and hopefully spur a continued discussion of what such a treaty might entail.

II. CONTRACTS FOR THE SALE OF REAL PROPERTY: BASIC PROVISIONS

As international trade and investment in real estate continues to be a pervasive part of the global economy, the principles and rules governing the real estate contract are becoming increasingly important.⁶³ This Part analyzes three specific contract principles—contract formation, warranties, and the availability of secured financing—and discusses their importance to a potential international investor-buyer engaged in the

59. *Id.*

60. John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 2000–2001*, at 115, 115–265 (2002).

61. See Schlechtriem, *supra* note 30, at 782.

62. See generally *INTERNATIONAL SALES*, *supra* note 52, § 1.01[1], at 1-6 to 1-7.

63. See, e.g., *Bahamas Investments Paying Aggressive Returns to Investors*, PRWEB (May 12, 2010), <http://www.prweb.com/releases/2010/05/prweb3970164.htm>; Richard Ellis, *Asian Real Estate Investment Markets Remain Resilient in Q1 2010: CBRE Survey Finds Q1 Investment Turnover Jumped 215% Year-on-Year*, THAIIPR.NET (May 11, 2010), [http://www.thaipr.net/nc/readnews.aspx?newsid=3964FEC3CAE86E9761D8FB55F89A305&sec=all&query=QXNpYW4gUmVhbCBFc3RhdGUgSW52ZXN0bWVudCBNYXJrZXRzIFJlbWFpbiBSZXNpbGllbnQgaW4gUTEgMjAxMA==](http://www.thaipr.net/nc/readnews.aspx?newsid=3964FEC3CAE86E9761D8FB55F89A305&sec=all&query=QXNpYW4gUmVhbCBFc3RhdGUgSW52ZXN0bWVudCBNYXJrZXRzIFJlbWFpbiBSZXNpbGllbnQgaW4gUTEgMjAxMA==; Real Estate Company Looks to Iraq for Business); *Real Estate Company Looks to Iraq for Business*, CBS NEWS (May 13, 2010), <http://www.cbsnews.com/stories/2010/05/13/national/main6480315.shtml?tag=mncol;lst;1>.

global real estate market.

A. *Contract Formalities*

Because a contract lays the foundation of every transaction, having a uniform set of rules to govern these contracts helps create predictability in the marketplace and encourages investments.⁶⁴ Form requirements are imposed on certain transactions, like the sale of real property, when the contract has particular economic or social significance.⁶⁵ In many jurisdictions, the exchange of a verbal promise is just as binding as one that is reduced to writing.⁶⁶ Some contracts require only tacit consent of the parties, while others require formal acceptance.⁶⁷ Further, some contracts do not even come into existence until they have been filed with a certain governmental entity.⁶⁸ Knowing which combination of rules governs the contract is important when conducting real estate transactions. Investors want certainty and the ability to reduce the risk that their investments will fail.⁶⁹

With respect to real estate, the global investor wants to ensure that the form the contract takes will leave very little room for speculation as to what the parties intend.⁷⁰ This is particularly important when the buyer and the seller are from different countries and the real property is located in a foreign state. If the contract requires too little, then litigation can later ensue and cause not only added costs to the buyer, but might also ultimately end in the property being forfeited and the buyer's entire efforts being a waste.⁷¹ A definitive writing, an accurate and detailed description of the property, and a specific stipulation as to the price are, among other things, essential formalities to ensure that the investor will receive exactly what he bargained for in the transaction.⁷²

In more routine transactions or in transactions between people from

64. See Arthur T. von Mehren, *Formal Requirements*, in 7 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW pt. 1, ch. 10, at 5 (Arthur T. von Mehren ed., 2008).

65. See *id.* at 44.

66. See *infra* Part III.A.1.

67. See *infra* Part III.A.1.

68. See *infra* Part III.A.2.

69. See generally BENOIT B. MANDELBROT & RICHARD L. HUDSON, THE (MIS)BEHAVIOUR OF MARKETS: A FRACTAL VIEW OF RISK, RUIN, AND REWARD (2004); Kent D. Daniel, David Hirshleifer & Avandhar Subrahmanyam, *Overconfidence, Arbitrage, and Equilibrium Asset Pricing*, 56 J. FIN. 921, 921–65 (2001).

70. See Mehren, *supra* note 64, at 9–10.

71. See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW §§ 20.05–.06[A], at 328–29 (2d ed., 2007); see also Mehren, *supra* note 64, at 9–10.

72. See SPRANKLING, *supra* note 71, §§ 20.05–.06[A], at 328–29.

the same country, there might be a desire for a more relaxed set of rules and a more casual scheme to govern the conditions required for contract formation. In the case of a buyer and seller from different countries, however, the parties will want specificity and detail in the drafting of the agreement.⁷³ These heightened formalities help ensure that the investor's intentions are satisfied and both parties to the international sale receive exactly what they bargained for in the deal.⁷⁴ These formalities have been described by scholars as serving "evidentiary, cautionary, and channeling" functions in the transaction.⁷⁵ Compliance with formality requirements provides clear evidence about the "existence of key terms of the contract, and thus avoid[s] the pitfalls of perjury and faulty memory."⁷⁶ Further, formalities call for a ceremony of sorts: one in which the attention of both parties is called to the fact that they should be cautious because they are about to enter into a legally binding agreement under which either may be called to perform.⁷⁷ Lastly, formalities help differentiate between those phases of the transaction that are merely negotiations and those that are actually part of the legally binding agreement.⁷⁸

B. Warranties

In every sale of real estate, the buyer will want to know exactly what he is purchasing. This is achieved, in part, through the use of warranties of title and condition. The warranties give real life consequences to otherwise abstract and general axioms of the law governing the sale of real property.⁷⁹ Whereas most property law speaks broadly of ownership, conveyance, and form, the warranties provide a concrete set of rules and, more importantly, remedies for the parties to use should the real property or the transaction suffer from a fatal defect

73. *Id.*

74. *Id.*

75. Mehren, *supra* note 64, at 9 ("Formal requirements may be imposed to protect the interests of some or all of the persons participating in—or affected by—exercises of private autonomy. Nonobservance of formal requirements appropriately has different effects depending upon whether protection is to be accorded to both (or all) of the parties, to one party, or to third parties only."); *see also* Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 *FORDHAM L. REV.* 39 (1974).

76. *See* SPRANKLING, *supra* note 71,

77. *See* Mehren, *supra* note 64, at 9–10.

78. *See* SPRANKLING, *supra* note 71, §§ 20.05–.06[A], at 328–29.

79. *See* MATTEI, *supra* note 12, at 172.

or flaw.⁸⁰ These warranties are incorporated—either by operation of law or by agreement of the parties—into the deed of sale.⁸¹ These warranties, sometimes called covenants, take many forms and can be shaped to fit the needs and desires of the parties and the particular nuances of the transaction.⁸² Basically, they serve as mechanisms for the seller to “warrant” or promise the buyer that he is, in fact, receiving what he bargained for, and that, among other things, the property is free and clear of encumbrances, liens, defects, and superior claims by third parties.⁸³ Should any of these promises be breached, the warranty provides a way for the buyer to seek compensation and sometimes even damages from the seller.⁸⁴ Often these warranties are triggered at the moment of the sale, and other times—where the defect or vice might not be discovered until later or until there is action by a third party—the warranties will become actionable upon the happening of that future event.⁸⁵

To the international investor, engaged in transactions so far away, these avenues of recourse against the seller are essential in the event that there is a fundamental defect in the property or if a third party asserts superior title once ownership is transferred.⁸⁶ Warranties create a type of insurance upon which the prudent investor can rely when making acquisitions of foreign real property since the buyer is not always in a position to completely rely upon the seller.⁸⁷ This lack of reliance does not stem from the fact that foreign sellers are inherently untrustworthy vendors, but rather that an international buyer has to grapple with a variety of cross-border obstacles such as language, culture, distance, a potential lack of the opportunity to fully inspect the real property, and a complex filing system evidencing superior interests, to name a few.⁸⁸ These barriers make warranties even more important in international transactions than in domestic ones where the parties share similar, if not the same, cultures and systems for real property conveyance. The warranties give protection to the buyer in cases of fraud or fundamental

80. *Id.*

81. *See id.*

82. GERALD KORNGOLD & PAUL GOLDSTEIN, REAL ESTATE TRANSACTIONS 248–49 (5th ed. 2009).

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* KORNGOLD & GOLDSTEIN, *supra* note 82, at 248–49.

87. *Id.*

88. *See generally id.*

defects in the transaction and promise “that there are no outstanding conditions or encumbrances that might interfere with the buyer’s ownership or use of the land.”⁸⁹

C. Secured Financing

In today’s economy, almost all transactions involve the need for and availability of credit.⁹⁰ This is especially true in the real estate arena where almost all transactions are financed through borrowed money.⁹¹ As a part of obtaining financing, the lender will require that security be posted to ensure that the loan is paid, and this is typically done through a type of security device that attaches to the real property itself.⁹² These legal devices guarantee that if the debtor fails to repay the loan, then the creditor can seize the property, sell it at a public auction, and use the proceeds to satisfy the balance of the debt.⁹³ Security devices range in name and type across the globe, and a prudent investor will want to know exactly what rules and theories govern these devices. Some security devices, for example, offer the borrower a chance to repay the loan—called a right of redemption—even after the initial default.⁹⁴ Further, some countries require a type of judicial process in order for the lender to foreclose on the real property, while others require no court interaction at all.⁹⁵ Knowing exactly which type of device is available and which set of circumstances surround the processes of each can play a major role in whether the individual will make a real estate investment on the global market.

The law surrounding security devices serves two goals: to protect the borrower from unfair treatment by the creditor and to protect the interests of the creditor so as to ensure that credit is continuously

89. *Id.* at 248.

90. See generally STEVEN FINLAY, CONSUMER CREDIT FUNDAMENTALS (2d ed. 2009); GEOFFREY INGHAM, THE NATURE OF MONEY (2004); ARTHUR O’SULLIVAN & STEVEN M. SHEFFRIN, ECONOMICS: PRINCIPLES IN ACTION (2003).

91. See generally SPRANKLING, *supra* note 71, § 22.01, at 357–58.

92. In exchange for the loan, the borrower will allow a mortgage or other security device to be placed on the property. Should the borrower fail to repay the loan, the lender can seize and sell the property in order to recoup the loss. See Lawrence Berger, Commentary, *Solving the Problem of Abusive Mortgage Foreclosure Sales*, 66 NEB. L. REV. 373, 373 (1987).

93. See generally *id.*

94. See Marshall E. Tracht, *Renegotiation and Secured Credit: Explaining the Equity of Redemption*, 52 VAND. L. REV. 599, 608 (1999).

95. See Robert H. Skilton, *Developments in Mortgage Law and Practice*, 17 TEMPLE UNIV. L.Q. 315, 319–20 (1943) (discussing judicial and non-judicial foreclosure procedures).

available for investment.⁹⁶ These goals, however, must be balanced to ensure the efficient operation of the market. If laws too heavily protect the borrower, then credit would dry up and become unavailable or difficult to obtain.⁹⁷ Conversely, if there were no set standards governing security devices, then creditors would hold complete power over borrowers in every transaction, which would lead to abuse.⁹⁸ A good and fair system governing security devices involves a balancing of these two competing interests in such a way that neither gets completely favorable treatment, but both are protected enough to encourage continued financing and investment.⁹⁹ In this same way, an international investor will want to ensure that adequate secured financing laws are in place in a given foreign locale such that credit will be available, but also such that the laws protect the interests of the borrower against the potential harshness and abuses of a creditor.

III. THE POSSIBILITY OF A CONVENTION FOR THE INTERNATIONAL SALE OF REAL PROPERTY

Although contract formalities, warranties, and secured financing are of primary importance to an international investor, whether a harmonization of these legal concepts is possible raises an entirely different set of issues. To determine the feasibility of a global framework, it is helpful to look at these principles in three different countries: the United States, China, and France. These nation-states, though positioned in various locations across the globe, represent centers of business and investment. The United States is an obvious choice because of its position on the world economic scene, historically viewed as a leader in business and development.¹⁰⁰ Additionally, the United States is a common law jurisdiction—a tradition of laws shared by roughly thirty-two countries around the world.¹⁰¹ Second, this Article looks at China, which has a relatively new system of private property laws that is not only a mixed legal system of common law, civil law, and

96. See SPRANKLING, *supra* note 71, § 22.01, at 358.

97. *Id.*

98. *Id.*

99. *Id.*

100. See Josef Joffe, *The Default Power: The False Prophecy of America's Decline*, FOREIGN AFF., Sept./Oct. 2009, at 21; see also William Pfaff, *The Question of Hegemony*, FOREIGN AFF., Jan./Feb. 2001, at 221 (2001).

101. See Jay L. Westbrook, *New Trends in Insolvency Proceedings 2* (2007) (unpublished manuscript), available at http://www.utexas.edu/law/faculty/jwestbrook/world_congress/westbrook_us.pdf.

socialist principles, but also has the world's fastest growing economy and has been inundated with foreign investment over the past several years.¹⁰² Lastly, this Article reviews the French system. France—although, alone, perhaps not as economically powerful as the United States—represents, for purposes of this Article, a microcosm of the much larger and more powerful European Union.¹⁰³ Further, France is a civil-law jurisdiction, a legal tradition shared by the majority of the world.¹⁰⁴ Through the eyes of each of these jurisdictions, one can evaluate the possibilities of a unified system of real estate contract principles and shed light on their many existing legal commonalities.

A. *Contract Formalities*

“Every transaction involves a contract,” and therefore, it is necessary to begin with what is required to form a contract for the sale of real property in each of the subject countries.¹⁰⁵ Although warranties and financing devices are important tools for insuring and carrying out the real estate transaction, the fundamental and essential elements of the contract must be perfected before consummation can take place. Understanding the commonalities each of the subject countries share goes a long way in revealing what might be required in an international real property treaty.

1. *The United States: An Intermediate Approach*

Most states in the United States require that the essential terms of a

102. See generally Gebhard M. Rehm & Hinrich Julius, *The New Chinese Property Rights Law: An Evaluation from a Continental Prospective*, 22 COLUM. J. ASIAN L. 177 (2009); see also *Competing with China's Rapidly Growing Economy*, WORLDFOCUS.ORG (Jan. 28, 2010), <http://worldfocus.org/blog/2010/01/28/competing-with-chinas-rapidly-growing-economy/9459/>; Cheryl Jensen, *Forecast Says China Provides Opportunities and Competition*, NYTIMES.COM (April 23, 2010, 3:00 PM), <http://wheels.blogs.nytimes.com/2010/04/23/forecast-says-china-provides-opportunities-and-competition/>.

103. See *France*, EUROPA, http://europa.eu/about-eu/countries/member-countries/france/index_en.htm (last visited Aug. 17, 2011) (“France is the largest country in the EU, stretching from the North Sea to the Mediterranean. . . . France has an advanced industrial economy and an efficient farm sector.”).

104. See generally ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM* 1–15 (2d ed. 1977).

105. Steven N.S. Cheung, *Transaction Costs, Risk Aversion, and the Choice of Contractual Arrangements*, 12 J.L. & ECON. 23, 23 (1969).

contract for the sale of real property be reduced to writing.¹⁰⁶ Although there may be other requirements for the contract to have effect as to third parties—such as registry or notice requirements—the contract will immediately have effect as between the parties to the contract once the writing requirements are satisfied.¹⁰⁷ Although this may seem simple enough, the meaning of the phrase “essential terms” has led to much debate by courts and scholars.¹⁰⁸ Generally, courts have construed “essential” to mean 1) the identity of the parties; 2) words showing each party’s intent to engage in the sale; 3) the specific purchase price; and 4) an adequate description of the property.¹⁰⁹ These rules, however, are subject to many permutations and often play out in varying ways. For example, in some states, the price need not be specified; rather, having a procedure whereby the price will be set at a later time is sufficient.¹¹⁰ Further, if no price is specified, courts may often require that the buyer pay a “reasonable price.”¹¹¹ Often there will be a condition of financing involved in real estate transactions, and courts will sometimes read in a financing condition even when the contract says nothing on the matter, while other courts will construe this absence to mean the transaction is a cash sale.¹¹² Also, the real property description requirement is notoriously difficult to nail down with any certainty.¹¹³ The description must be specific enough to preclude any other property to a reasonable certainty, yet the description need not necessarily be a legal one.¹¹⁴ Therefore, requirements for a proper description can vary from place to place.¹¹⁵

In addition, what are considered “essential terms” can vary to include many more provisions depending on the complexity of the transactions, particularly with commercial deals.¹¹⁶ In a transaction that involves parties from different countries, a court may read in special

106. See SPRANKLING, *supra* note 71, § 20.04[B][3][a], at 323.

107. *Id.*

108. *Id.*

109. See, e.g., *Wiley v. Tom Howell & Assoc.*, 267 S.E.2d 816, 817 (Ga. Ct. App. 1980) (price was not specified); *Estate of Younge v. Huysmans*, 506 A.2d 282, 284–85 (N.H. 1985) (all essential terms were satisfied); *Baliles v. Cities Serv. Co.*, 578 S.W.2d 621, 623–24 (Tenn. 1979) (property description was not adequate).

110. See SPRANKLING, *supra* note 71, § 20.04[B][3][a], at 323.

111. *Id.*

112. *Id.* at 323–24.

113. *Id.*

114. SPRANKLING, *supra* note 71, at 323–24.

115. *Id.*

116. *Id.* at 324.

requirements and conditions, which would not be applicable in domestic transactions and would need only be contemplated by those agreements that reach across national and international borders.¹¹⁷

Additionally, the contract itself—as long as it contains all the necessary elements—can be in any form the parties choose (i.e., a letter, a check, an informal note, or even a civil pleading).¹¹⁸ Although this rule seems to give parties many options, in reality it can create so much variation that the instruments are difficult to construe or recognize.¹¹⁹ To complicate the situation further, despite the writing requirement, U.S. courts have nonetheless found ways to dispense with it in certain circumstances.¹²⁰ For instance, where there is partial performance or reliance upon an oral promise to sell, courts will enforce the sale—despite the lack of proper formalities—based on principles of equity.¹²¹ Although these legal theories are used by courts to create a degree of equity among the parties, they can often create a certain level of uncertainty.¹²² Nonetheless, U.S. law places great importance on form requirements in real estate, even if these requirements have undergone a bit of watering down and have enjoyed increased fluidity as the law has progressed over the years.¹²³ The U.S. system can be described as taking an intermediate approach because it incorporates both definite and flexible principles in the formation of a real estate sales contract. Parties transacting business in the United States can still expect to observe the traditional formalities, judicial loopholes aside, when purchasing real property, and the strength and reliable enforcement of these requirements are something that a wise investor will want to be able to rely upon when dealing with real estate acquisitions.

2. *China: A Strict Approach*

As a preliminary matter—and one that should be kept in mind when

117. *See generally id.*

118. *See Hickey v. Green*, 442 N.E.2d 37, 39 (Mass. App. Ct. 1982); *Estate of Young v. Huysmans*, 506 A.2d 282, 284–85 (N.H. 1985); *Timberlake v. Heflin*, 379 S.E.2d 149, 153 (W. Va. 1989).

119. *See generally supra* note 118.

120. *See* SPRANKLING, *supra* note 71, § 20.04[B][4][b]–[c], at 326–27.

121. *See* Perillo, *supra* note 75, at 72; *see also* Michael Braunstein, *Remedy, Reason, and the Statute of Frauds: A Critical Economic Analysis*, 1989 UTAH L. REV. 383, 403–22.

122. *See* Braunstein, *supra* note 121, at 403–22.

123. *See* 14 POWELL ON REAL PROPERTY § 81.02[1][c] (Michael Allan Wold ed., 2000) (“Although the statute of frauds requires a writing, a document that is substantially less than a formal, written contract can still satisfy the requirement.”).

evaluating the other contract principles¹²⁴—China’s property law is still rather new.¹²⁵ It was only in 2007 that the government moved away from its former absolute socialist view and gradually toward the ownership of real property and the slow adoption of private ownership rights.¹²⁶ The government accomplished this shift through the enactment of the Real Property Law of the People’s Republic of China (“Real Rights Law”), largely drawn from civil and common-law sources while maintaining a touch of socialist concepts.¹²⁷ The law represents the first time in China’s history that personal real property rights have been granted to private individuals and businesses.¹²⁸

This is not to say, however, that the entire Chinese system of real property rights has become decidedly private in nature.¹²⁹ It was only with much political maneuvering that the law was enacted at all.¹³⁰ There was opposition from those in the government and in Chinese society who wanted to maintain, at least in part, principles of socialism in the ownership of real property.¹³¹ As a result, many provisions of the Real Rights Law were left ambiguous in order to placate opponents.¹³² Further, the state or, alternatively, an agricultural collective are the only groups that can have title to the land itself in China.¹³³ Thus, in reality, the transfer of real property is effectively confined to apartments, houses, and those other constructions and buildings, which are attached to the land.¹³⁴

In China, a contract for the sale of real estate is not created—with respect to the buyer, the seller, or third parties—until the necessary documents are filed in the proper registry.¹³⁵ Thus, private, unrecorded deeds and contracts have no meaning between the parties or with respect to third parties, and there are no judicial remedies or theories that can be

124. See discussion *infra* Part III.B–C.

125. See generally Steven M. Dickinson & Daniel P. Harris, *China’s New Property Law*, 2008 EMERGING ISSUES 955.

126. See ZHU Yan, *The Background, Principles and Core Contents of the Real Right Law of the People’s Republic of China*, MD. SERIES CONTEMP. ASIAN STUD., no. 2, 2009 at 1, 4, 8.

127. See generally Rehm & Julius, *supra* note 102, at 179–88.

128. See Dickinson & Harris, *supra* note 125, at 4–5.

129. See *id.* at 1.

130. *Id.* at 2.

131. *Id.*

132. Dickinson & Harris, *supra* note 125, at 2.

133. See *id.* at 6.

134. *Id.* at 4–5.

135. Yan, *supra* note 126, at 15.

relied upon in the name of equity.¹³⁶ The law will not recognize that a transfer of real property has taken place until the proper documents are filed in the land registry.¹³⁷ Thus, the land registry is considered the conclusive and sole means of evidencing ownership in real property.¹³⁸ Other instruments executed between the parties, unlike in the United States, have no effect with respect to ownership of the real property.¹³⁹

This strict approach to form requirements might lead an investor-buyer to believe that there is a great deal of certainty and reliability in China's real estate laws regarding conveyance requirements, but in reality this is not completely true.¹⁴⁰ Although the Real Rights Law does require a unified land registry system where all documents are eventually filed in one central location, each land registry may vary in procedure from locale to locale.¹⁴¹ Under the law, the parties to a real estate sale in China must file a "certificate of ownership" and other "required materials" in the public registry in order for the sale to be given effect and for ownership to transfer.¹⁴² These documents are issued by the various land registry offices throughout China.¹⁴³ Because

136. *Id.* It should be noted that Real Right Law article 15 states:

If parties enter into a contract concerning the creation, change, transfer or extinguishing of rights in rem over immovable property, such contract shall enter into effect upon its conclusion, unless otherwise provided in law or specified in the contract. A failure to register the rights in rem shall not affect the validity of the contract.

Zhōnghuá Rénmín Gònghéguó Wùquán Fǎ (中华人民共和国物权法) [Real Right Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 1420, art. 15, translated in *PRC Property Law 1420/07.03.16:[1]*, CHINA L. & PRAC. (May 1, 2007),

<http://proquest.umi.com/pqdweb?did=1281722881&sid=3&Fmt=3&clientId=8920&RQT=309&VName=PQD>. This, however, does not mean that ownership transfers, rather that a contract exists between the parties. It is unclear, however, whether article 15 would have any meaning in light of the language of article 9 that states: "The creation, change, transfer and extinguishing of rights in rem over immovable property shall become effective once registered Without registration, they shall not become effective" *Id.* art. 9. This could be, and probably is the result of the seemingly contradictory nature of the Real Property Law in general because of its political nature. In any case, scholars and practitioners agree that no ownership or interest in the property transfers or is affected until the moment the proper filing is made in the land registry organ where the property is located. See Dickinson & Harris, *supra* note 125, at 3; Rehm & Julius, *supra* note 102, at 214; Yan, *supra* note 126, at 15.

137. See Dickinson & Harris, *supra* note 125, at 3.

138. *Id.*

139. *Id.*

140. *Id.*

141. Dickinson & Harris, *supra* note 125, at 3.

142. Yan, *supra* note 126, at 15.

143. *Id.*

registries are administrative bodies and can generally set their own rules, however, the requirements for what constitutes a “certificate of ownership” and other “required materials” can vary from place to place.¹⁴⁴ This variation can cause concern for the foreign investor who wants to ensure both certainty and that the transaction accurately reflects the buyer’s intentions. However, the buyer is not completely without recourse for an error made by one of these municipal officials.¹⁴⁵ Defects in the process or the transfer caused by the negligence of the land registry office will create a cause of action for compensatory damages by the buyer and seller.¹⁴⁶ Nevertheless, the extent to which a foreign litigant will prevail in these rural or urban land registry conflicts will vary and, as with any time one litigates in a foreign country, local counsel should be employed to ensure fair and equitable representation.¹⁴⁷

China’s adoption of a strict approach toward form requirements is expected since the country is so new at creating a real estate market and private rights of ownership in real property. Although this framework may eventually develop more flexibility as the Chinese real estate market progresses, for now the international investor can rely upon a large degree of strict formality in the creation of the contract. However, buyers should be aware that the relevant documents and certificates that may be required by land registry entities can vary depending on the location of the real property.

3. *France: A Semi-Strict Approach*

Under French law, the creation of the sales contract occurs at the very moment the parties agree as to the essential elements: the thing and the price.¹⁴⁸ Therefore, as soon as these essential elements are perfected,

144. Zhōnghuá Rénmín Gònghéguó Wùquán Fǎ (中华人民共和国物权法) [Real Right Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007) 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 1420, art. 11–12, translated in *PRC Property Law 1420/07.03.16:[1]*, CHINA L. & PRAC. (May 1, 2007), <http://proquest.umi.com/pqdweb?did=1281722881&sid=3&Fmt=3&clientId=8920&RQT=309&VName=PQD>.

145. *Id.* art. 21.

146. *Id.*

147. John Fellas, *Strategy in International Litigation*, 14 ILSA J. INT’L & COMP. L. 317, 348–49 (2007).

148. See 2 AUBRY & RAU, DROIT CIVIL FRANÇAIS § 207, in 2 CIVIL LAW TRANSLATIONS 275 (La. State. Law Inst. trans., 7th ed. 1966) (“The drafting commission adopted the principle that the transfer of the ownership title occurs by operation of the

ownership will transfer.¹⁴⁹ This principle is true even if there has yet to be delivery of the property or payment of the price.¹⁵⁰ Unlike in other jurisdictions, however, the real estate contract need not necessarily always be in writing.¹⁵¹ Rather, only contracts exceeding a certain amount must be reduced to writing.¹⁵² Thus, if a transaction involving real property does not exceed a certain amount set by law, it will become enforceable between the parties even without a writing.¹⁵³ This means that even when the agreement is made through an oral promise, it will still be enforceable as long as the thing and the price are agreed upon, and the amount of the transaction does not exceed the legislatively determined 1500-Euro limit.¹⁵⁴ But, if the contract exceeds the statutorily set amount, then the French add the additional “solemn” requirement that the agreement be in writing.¹⁵⁵ French law further prescribes the form of the writing: either an authentic act or an act under private signature—both involving the use of a notary.¹⁵⁶

There is a great degree of uniformity in France in the description of real property because of the country’s extensive system of urban planning.¹⁵⁷ The requirement for a valid property description comes

agreement itself, without the need of delivery. . . . ‘The sale is completed when agreement on the thing and the price is reached.’”)

149. *Id.*

150. See CODE CIVIL [C. CIV.] art. 1583 (Fr.) (“[A sales agreement] is complete between the parties, and ownership is acquired as of right by the buyer with respect to the seller, as soon as the thing and the price have been agreed upon, although the thing has not yet been delivered or the price paid.”).

151. See Mehren, *supra* note 64, at 20.

152. See CODE CIVIL [C. CIV.] art. 1582 (Fr.); CODE CIVIL [C. CIV.] art. 1341 (Fr.) (stating that an instrument must be executed before notaries or under private signatures for all things exceeding the sum or value fixed by decree).

153. See CODE CIVIL [C. CIV.] art. 1341 (Fr.).

154. *Id.*; see also Loi 80-533 du 15 juillet 1980 pris pour l’application de l’article 1341 du code civil [Law 80-533 of July 15, 1980 Made for the Purposes of Section 1341 of the Civil Code], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 16, 1980, p. 1788 (setting the limit at 800 Euros), amended by Loi 2004-836 du 20 août 2004 portant modification de la procédure civile [Law 2004-836 of August 20, 2004 Amending Civil Procedure], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 22, 2004, p. 15032 (raising the limit to 1500 Euros).

155. 2 MARCEL PLANIOL & GEORGE RIPERT, TREATISE ON THE CIVIL LAW, pt. 1, no. 963, at 558 (La. State Law Inst. trans., 11th ed. 1959) (“As a general rule the consent of the parties suffices to form the contract, the obligations are formed as soon as the parties are in accord. Contracts which are formed thus are called consensual contracts. By way of exception, certain contracts require, in addition to consent, another element: sometimes a formality, in which case the contract is said to be ‘solemn’ . . .”).

156. CODE CIVIL [C. CIV.] art. 1341 (Fr.).

157. Interview with Olivier Moréteau, Russell Long Chair of Excellence and Professor of Law, La. State Univ. Paul M. Hebert Law Ctr., in Baton Rouge, La. (May 12, 2010)

from the requirement of “thing,” which must be present in every sale.¹⁵⁸ In other words, the thing must be adequately described so as to exclude all other possible parcels of land.¹⁵⁹ Whereas in other jurisdictions a proper description can vary widely, France has a relatively advanced nationwide system of describing real property that was initially commissioned by Emperor Napoleon and over the years has continued to be developed and further extended throughout the entire country.¹⁶⁰ This network of real property descriptions involves a plat system that incorporates almost every suburb, city, acre, and township across the entire country.¹⁶¹ The carefully laid out and detailed system is known as the *cadastre*.¹⁶² This system is highly sophisticated—particularly in cities and townships—and can identify the precise, exact contours of where a given piece of real property is located.¹⁶³ It is hailed among the French for being highly reliable and efficient because of its comprehensive coverage as well as easy access by the public.¹⁶⁴

(transcript on file with author); *see also* DOING BUSINESS IN FRANCE 11–50 (Matthew Bender ed. 2007) (“Urban planning in France has been the subject of extensive legislation in order to preserve the architectural heritage of France and, at the same time, create a framework for the development of urban and rural areas.”).

158. AUBRY & RAU, *supra* note 148, § 207, at 275.

159. *See id.*

160. *See* Pierre Clergeot, *The Origins of the French General Cadastre*, PERMANENT COMMITTEE ON CADASTRE EUR. UNION, 8 (Apr. 2003), <http://www.euocadastre.org/pdf/clergeot.pdf> (“The plot survey cadastre had now become a political and social project shared by the authorities and the citizens. This was the background in which Emperor Napoleon, advised by Gaudin, the Duke of Gaëte, Minister of Finance, made the popular decision to create the Empire’s plot survey cadastre under the law of 15th September 1807. ‘Measuring a stretch of more than seven thousand nine hundred and one square myriametres, over a hundred million plots; making a map for each commune showing these one hundred million plots; classifying all of them according to soil fertility; assessing taxable revenues on each one of them; gathering all the scattered plots belonging to the same owner under a single name and defining, by adding together all the different revenues, the total revenues of that person and recording those revenues, henceforth the basis for tax assessment, such is the aim of this operation.’”).

161. STÉPHANE GIL, *THE FRENCH LAND ADMINISTRATION: FROM THE ORIGINS TO OUR DAYS*, GENERAL TAX DIRECTORATE, PERMANENT COMMITTEE ON CADASTRE EUR. UNION, 2, <http://www.euocadastre.org/pdf/gil.pdf> (last visited Aug. 19, 2011); *see also* CADASTRE, MINISTÈRE DU BUDGET, <http://www.cadastre.gouv.fr/scpc/accueil.do> (last visited Aug. 19, 2011).

162. *See* GIL, *supra* note 161, at 2.

163. *Id.* at 5.

164. *Id.* at 5, 15 (“An exhaustive, permanent, descriptive and evaluative inventory of landed property, the cadastre reflects the civil status of built and undeveloped property. . . . The French Cadastre is entirely computerized nowadays allowing for an easy handling of an important volume of data: 35 million owners, 100 million plots, 35.5 million buildings and 600,000 street names.”).

The French, in sum, highly favor form requirements in contracts.¹⁶⁵ In fact, there are no equitable doctrines to provide relief to parties when formalities are not observed, such as exists at common law.¹⁶⁶ The proper perfection of the agreement alone will operate to transfer ownership; anything less will have no effect.¹⁶⁷ This procedure represents a policy decision by the French to take a semi-strict approach to real property form requirements by balancing the possibility of oral transfers for low-valued real estate transfers, but demanding absolute compliance in most transactions.¹⁶⁸

4. *Finding Common Ground*

From a policy perspective, form requirements serve an invaluable purpose. Investors want a level of certainty as to the terms, parties, and accompanying agreements and conditions that are attendant in any sale of real estate.¹⁶⁹ Although each of the three jurisdictions varies on the specific nuances needed to create a valid sale of real property, the similarities are significant and noticeable. While the United States takes an intermediate approach to form requirements whereas China has a strict and France a semi-strict approach, all of these subject nations place a value on formalities in real estate sales. In some cases, rules have been relaxed to allow for oral transfers, and in other instances equitable doctrines have provided for relaxed requirements when it would provide for better justice between the parties. Furthermore, in other cases a third party, such as a land registry official, becomes an essential part of certifying the transaction before it is given effect. Despite variances, all three systems require baseline formalities that involve, at the very least, a definitive writing of some sort, while providing for some exceptions in specific instances.

For a prudent investor, having the contract in writing is essential for evidentiary purposes. The buyer wants a clear agreement or set of documents that evidence what exactly was contemplated in the sale. Each of the countries requires a writing of one kind or another. Further,

165. See Mehren, *supra* note 64, at 20 (“As early as 1245 the Statute of Arles excluded testimonial proof of transactions whose value exceeded 100 sous. In 1566, the *Ordonnance de Moulins* art. 54, in order to avoid ‘complicating law suits,’ required that contracts involving a value of more than 100 livres be drawn up before notaries” (footnote omitted)).

166. See *supra* notes 148–50 and accompanying text.

167. *Id.*

168. *Id.*; see also Mehren, *supra* note 64, at 104.

169. See Perillo, *supra* note 75, at 56–58.

although there is variety as to what constitutes the “essential” or “required” terms, this variance is minimal. A template form could be created as a part of an international real property convention that would bring a base level of uniformity to the paper trail that often accompanies real estate transactions. In this way, the parties to the international sale would be able to expect that a certain prescribed form would be used in the transaction that would clearly lay out the terms that would be essential to the parties. This form could, of course, be modified to include additional information if the transaction should so require, but there would be fundamental requirements—such as perhaps the price or a method of calculating the price—which would be guaranteed in the instrument. The concept of form or template agreements is not novel.¹⁷⁰ In fact, model forms or templates are often used in business transactions today including sales, construction, arbitration, procurement, publishing, and franchising.¹⁷¹

Further, each country requires registry in order to affect third persons, but the simple execution of the document by the parties creates a valid transfer of ownership between the buyer and seller; the exception being in China. Although Chinese real property law currently requires registry in order to affect ownership rights, one must keep in mind that real estate laws and the real estate market are very new in China.¹⁷² As time progresses and parties who invest in China engage in more sophisticated transactions, it is likely that the law in this area will advance so as to become less ethnocentric and move more into the mainstream. In doing so, China’s real property law will likely come to more closely mirror the more predominant framework of ownership

170. See, e.g., *Authorization to Start Work*, PROPOSAL KIT, <http://www.proposalkit.com/htm/legal-contract-templates/pre-project-contracts/authorization-to-start-work-letter-template.htm> (last visited Aug. 19, 2011); *Right of First Refusal Partnership Agreement*, PROPOSAL KIT, <http://www.proposalkit.com/htm/legal-contract-templates/general-work-order-contracts/right-of-first-refusal-partnership-agreement.htm> (last visited Aug. 19, 2011); *USA Bill of Sale*, DOCUMENTICA FORMS, <http://www.documentica-forms.com/usa/bill-of-sale/> (last visited Aug. 19, 2011); see also 17 C.F.R. §§ 229.10–.1208 (2011) (providing specific form and substance requirements for the disclosures required related to an offering of securities).

171. See, e.g., *Contracts: Models and Drafting*, JURIS INT’L, <http://www.jurisint.org/en/con/index.html> (last visited Aug. 19, 2011) (listing an array of model contracts and provisions on a variety of topics); *Model Clause*, KUALA LUMPUR REGIONAL CENTRE FOR ARB., http://www.bmthost.com/rcakl/arbitration_model_clause.aspx?sub=arb (last visited Aug. 19, 2011); *New York State Bar Association’s Residential Real Estate Forms*, LEXISNEXIS, <http://www.lexisone.com/lfs/nyrealestforms.jsp#CONTRACT> (last visited Aug. 19, 2011).

172. See Dickinson & Harris, *supra* note 125, at 1.

transferring between the parties once the act of sale is executed.

Those who approach the idea of an international system for the sale of real property might posit, as an initial matter, that the requirements for contract formation are too different to ever be reconciled. After reviewing the law in the subject countries above, however, one can see the common themes that each country shares: the recognition that formalities bring certainty and evidentiary merit to the sale of real estate. Although each country approaches its requirements differently, these differences are small and the commonalities that are shared display a widespread commitment to requiring some level of formality in real estate contracts.

B. *Warranties*

All investors want to mitigate their risks and, because of systemic cultural or legal differences inherent in engaging in cross-border transactions, investors are often not in the best position to fully assess those risks.¹⁷³ Therefore, buyers rely upon warranties, which give them certain assurances as to the property they are about to purchase.¹⁷⁴ These warranties provide a wide array of remedies to buyers in the event that there is a defect in the title or condition of the property.¹⁷⁵ Reviewing each country's rules on warranties will reveal the many shared principles already at play in the law of warranties throughout the world. These shared principles are what will form the basis for an international structure of warranty laws to govern global sales of real estate.

1. *The United States: A Detailed, Flexible System*

In the United States there are three types of deeds from which to choose: the general warranty deed, the special warranty deed, and the quitclaim deed.¹⁷⁶ These deeds are all differentiated by the varying degrees to which they ensure the "quality of the title."¹⁷⁷ In other words, the deeds can be viewed on a spectrum with one end providing the most protection (the general warranty deed) and the other end providing the least protection (the quitclaim deed) while the special warranty deed

173. See *supra* note 69 and accompanying text.

174. SPRANKLING, *supra* note 71, § 23.03[A], at 377.

175. MATTEI, *supra* note 12, at 172.

176. See SPRANKLING, *supra* note 71, § 23.03[A], at 377.

177. *Id.*

falls in the middle.¹⁷⁸ The type of deed used depends upon the wishes of the parties and are generally very detailed and scenario specific.¹⁷⁹

Of all three deeds, the most common warranties utilized in U.S. real estate transactions spring from the general warranty deed.¹⁸⁰ Generally, this deed lists six “covenants” or promises that the seller makes to the buyer.¹⁸¹ The first is the covenant of seisin whereby the seller warrants that he is the true owner of the property described in the deed.¹⁸² This covenant entitles the buyer to damages even if he is aware that the real property does not really belong to the seller.¹⁸³ Next is the covenant of the right to convey, which states that the seller has the legal right to sell or alienate the property—rather than being, for example, in the position of a trustee with limitations on authority over the property.¹⁸⁴ The covenant against encumbrances warrants that there are no superior interests held by third parties.¹⁸⁵ These superior interests could include holders of mortgages, easements, leases, tax liens, judgments, or other privileges.¹⁸⁶ The covenant of quiet enjoyment states that there are no superior title holders, other than the seller, immediately prior to the sale.¹⁸⁷ With the covenant of possession, the seller promises to defend the buyer against any claims of superior title holders should they attempt to evict or enforce their privileges or encumbrances.¹⁸⁸ Finally, under the covenant of further assurances, the seller warrants that he will execute any accessory documents that are required to consummate the sale as may be needed.¹⁸⁹

Used less often are the special warranty deed and the quitclaim deed.¹⁹⁰ The special warranty deed contains the same covenants as the general warranty deed listed above, but protection is only provided for the defects that are created by the seller himself, not third parties or prior

178. *Id.*

179. *Id.*

180. SPRANKLING, *supra* note 71, § 23.03[A], at 377 (“[I]t is customary in about two-thirds of the states to employ general warranty deeds . . .”).

181. *Id.* § 23.03[B], at 377.

182. *Id.* § 26.02[B][2][a], at 432; *see, e.g.*, *Brown v. Lober*, 389 N.E.2d 1188, 1190–91 (Ill. 1979) (reviewing a case where the grantors purported to convey title to an eighty-acre tract without exceptions, yet did not own two-thirds of the mineral rights).

183. *Brown*, 389 N.E.2d at 1190–91.

184. SPRANKLING, *supra* note 71, § 26.02[B][2][b], at 432–33.

185. *Id.* § 26.02[B][2][c][i], at 433.

186. *Id.*

187. *Id.* § 26.02[B][2][e], at 435.

188. SPRANKLING, *supra* note 71, § 26.02[B][2][d], at 434–35.

189. *Id.* § 26.02[B][2][f], at 436.

190. *Id.* § 23.03[C]–[D], at 378.

owners.¹⁹¹ Lastly, the quitclaim deed, conversely, makes no covenants to the buyer, but rather only promises to convey to the purchaser any rights that the seller may have in the real property, if any at all.¹⁹²

In the context of the general warranty deed, if any of the covenants are breached then the buyer can seek damages from the seller.¹⁹³ The warranties are particularly significant when the buyer pays the fair market value—or even a premium—for the property and, therefore, wants to assure that his title is as perfect as possible.¹⁹⁴ This is particularly true for the international buyer who typically is paying fair market value in such arms-length transactions with foreign sellers. Of course, the warranties can be scaled back by contract in situations where there are known defects in the real property that are accounted for in the purchase price.¹⁹⁵ For example, in the case of the property's condition, if the property suffers from poor drainage or needs additional foundation work, then the seller typically discounts the price to recognize the need for the buyer to invest additional capital once the purchase is complete. In such cases, because the buyer is receiving a discount based on the known defect, the warranties will be eased to take into account the parties' intentions.¹⁹⁶

Although these warranties are extensive, reliance upon them has slightly waned in the United States due to the pervasive use of title insurance.¹⁹⁷ Nevertheless, U.S. warranties are comprehensive and provide the foreign investor-buyer with a myriad of rights and actions should infringements occur after the sale. Although title insurance is widely used in commercial transactions, it is not always used in residential transactions and, moreover, a foreign investor may purchase real property in a country where title insurance is not available or reliable.¹⁹⁸ Much like the U.S. approach to contract formalities, U.S.

191. *Id.* § 23.03[C], at 378.

192. SPRANKLING, *supra* note 71, § 23.03[D], at 378.

193. *Id.* § 26.02[A], at 431 (“If one of these covenants is breached, the grantee (and sometimes his successors) may recover damages from the grantor.”).

194. *Id.* § 23.03[B], at 377 (“The prudent grantee who is paying full fair market value for the property—and thereby assuming the grantor’s title is near perfect—will demand a general warranty deed.”).

195. *Id.*

196. SPRANKLING, *supra* note 71, § 23.03[B], at 377.

197. *Id.* § 26.02[A], at 431 (“Although title covenants are still used routinely, their importance as a source of title protection has waned in recent decades Other methods of title assurance—notably title insurance—offer better security to the modern buyer.”).

198. See generally D. BARLOW BURKE, JR., LAW OF TITLE INSURANCE § 1.1, at 2–5, § 1.3, at 17–18, § 1.3.2, at 22–23 (1986) (“Title insurance is an exclusively American invention. It involves the issuance of an insurance policy promising that if the state of the title is other

warranty law provides for a great deal of flexibility.¹⁹⁹ The parties are able to select the warranties they wish to abide by and may increase or decrease their effectiveness when the transaction calls for such adjustments.²⁰⁰ Unlike in other jurisdictions, the warranties do not attach to every sale as a default matter; rather, they must be contained in the contract between the parties in order for the warranties to apply.²⁰¹

2. *China: A Broad, Developing System*

The warranties are far less developed in China. This lack of development is due, in part, to the infancy of the real estate market itself.²⁰² The law provides a very limited range of remedies for the investor to pursue in case there are defects or vices in the title,²⁰³ and there are many questions left unanswered as to what exactly is covered by these warranties.²⁰⁴

Real Rights Law article 34 requires that the seller deliver the property to the buyer once the sale is perfected.²⁰⁵ If a third party is in possession of the property, the buyer has the right to proceed against the possessor.²⁰⁶ However, there is no specific time period for how long this action can be brought with respect to real property, which leaves some question as to how long the buyer has to cause an eviction.²⁰⁷

Further, Real Rights Law article 35 gives buyers the ability to

than as represented on the face of the policy, and if the insured suffers losses as a result of the difference, the insurer will reimburse the insured for that loss and any related legal expenses, up to the face amount of the policy.”).

199. See KORNGOLD & GOLDSTEIN, *supra* note 82, at 248–49.

200. *Id.*

201. *Id.*

202. See Dickinson & Harris, *supra* note 125, at 1.

203. *Id.* at 5.

204. Rehm & Julius, *supra* note 102, at 231–34.

205. Zhōnghuá Rénmín Gònghéguó Wùquán Fǎ (中华人民共和国物权法) [Real Right Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007) 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 1420, art. 34, translated in *PRC Property Law 1420/07.03.16:[1]*, CHINA L. & PRAC. (May 1, 2007),

<http://proquest.umi.com/pqdweb?did=1281722881&sid=3&Fmt=3&clientId=8920&RQT=309&VName=PQD>. (“If immovable property or movable property is unrightfully possessed, the rights holder may request return of the original thing.”).

206. See Rehm & Julius, *supra* note 102, at 230 (“Pursuant to article 34, the owner or other in rem entitled party has a claim for delivery against an unentitled possessor.”).

207. *Id.* (“With respect to [the] basis for claims, which makes no distinction between movables and immovables, it is unclear how long the limitation period would be.”).

proceed against third parties who “infringe” on their ownership rights.²⁰⁸ It is unclear, however, what kind of infringements the law contemplates, for example privileges, liens, leases, and other encumbrances. In this way, the language is broad and left vague, which could mean that the law is meant to encompass a variety of infringements or, as may likely be the case, the ambiguity is merely a result of the highly politicized environment existing at the time the legislation was enacted. This climate may have precluded the adoption of extremely nuanced provisions.

Real Rights Law article 36 also allows the buyer to seek compensation for damage caused to the property.²⁰⁹ Further, Real Rights Law article 37 states that when a “real right is injured” and the owner suffers a “loss from it,” then compensation may be sought.²¹⁰ There is no requirement for what degree of fault is needed; rather, it appears as though any kind of damage that is caused by another will give rise to liability, even if the act was inadvertent or the result of negligence.²¹¹ The language of the articles is very broad and all encompassing.²¹² It certainly contemplates actual physical harm to the property and physical dispossession, but it may also cover disturbances of law.²¹³ If this is the case, then perhaps the buyer can proceed against the seller if the damage was caused by his negligence in, for instance, revealing a prior encumbrance or in providing defective title to the real property. As a result of having such a nascent real property regime, China’s law of warranty leaves much to be desired.

The ability to proceed against the seller in warranty is born out of a more complex and advanced real estate market than what China currently has, but over time this will likely change and specifics of the law will be further developed.²¹⁴ For an international investor, the

208. Real Right Law of the People’s Republic of China, art. 35 (“If rights in rem are impaired or potentially impaired, the rights holder may request removal of the impairment or elimination of the threat.”).

209. *Id.* art. 36 (“If damage to or destruction of immovable property or movable property is caused, the rights holder may request repair, redoing, replacement or restoration to the original state.”).

210. *Id.* art. 37 (“If rights in rem are infringed, causing the rights holder to incur damage, it may seek damages or request the bearing of other civil liability.”).

211. See Rehm & Julius, *supra* note 102, at 230 (“Finally, arts. 36, 37 confer a compensatory claim on the rights holder in the event of harm to his property. In comparison with the otherwise applicable standard of simple negligence in Chinese tort law the regulation provides for no concrete fault requirement.”).

212. See Real Right Law of the People’s Republic of China, art. 36–37.

213. See Rehm & Julius, *supra* note 102, at 230.

214. See, e.g., Kris Hundley, *A Real Estate Revolution*, SPTIMES, Sept. 19, 2005,

ability to proceed against the seller for vices and defects that he causes or conceals from the buyer is important, and Chinese law in this area is lacking, or at least in need of refinement. One can predict that, over time, and as political tensions cool from the de-socialization of the country's real estate structure, a more comprehensive regime governing the law of warranties will emerge.²¹⁵

3. *France: A Concise, Default System*

The warranties in France are similar in many respects to those in the United States in that they are comprehensive in scope and contemplate protections from the same types of defects. Of the three subject countries, France and the United States have the most in common when it comes to the law of warranties. Unlike in the United States, however, many of the French warranties apply equally to movable and immovable property, but, like in the United States, these warranties may be waived by the parties if they so choose.

The warranties in France are implicit in every sale, and therefore there is no need to specifically designate which warranties will apply, as is sometimes the case in the United States.²¹⁶ The warranty against vices—also called the warranty against redhibition—calls for the seller to render “useful possession” to the buyer.²¹⁷ This means that the thing must be delivered without hidden defects that would render the item unsuitable for its intended purpose or would materially diminish its use.²¹⁸ This warranty, often relied upon by buyers in France, will vary depending on the nature of the thing.²¹⁹ For the warranty to apply, the

http://www.sptimes.com/2005/09/19/China/A_real_estate_revolut.shtml (“Speculators, domestic and foreign, were drawn to China’s property market for the same reasons many Americans have put their money into real estate in recent years: It’s an attractive alternative to an unreliable stock market. A survey this year found that about a third of the buyers of high-end Shanghai properties were investors.”).

215. *See id.* (“China’s residential market has been hottest in Shanghai, which surpassed Beijing in 2003 as the country’s priciest address. Average home prices in Shanghai rose 14.6 percent last year to an average \$70 per square foot. Within the city’s highly desirable central district, prices rose 27 percent last year—and 68 percent over the past three years—to more than \$109 per square foot.”).

216. *See* PLANIOL & RIPERT, *supra* note 155, no. 1464, at 820.

217. *Id.* no. 1462, at 819.

218. *See* CODE CIVIL [C. CIV.] art. 1641 (Fr.); *see also* PLANIOL & RIPERT, *supra* note 155, no. 1462, at 820.

219. PLANIOL & RIPERT, *supra* note 155, no. 1462, at 820 (“The nature of these vices vary according to the nature of the thing: it is a vice of construction in a house, a defect of quality or of solidity in a movable object, the loss of the faculty of germinating in grain

defect must be concealed such that the buyer could not have discovered it upon a reasonable inspection.²²⁰ If the buyer knows of the defect, then the action in warranty will abate.²²¹ Further, the defect must be harmful to the usefulness of thing such that the defect is not *de minimus* (inconsequential), but rather has a considerable impact.²²² Lastly, the defect must exist at the time of the sale,²²³ and defects in the real property that arise thereafter are not protected.²²⁴

It does not matter whether the seller acted in good faith when he sold the property to the buyer or if the seller has no knowledge of the defect at all;²²⁵ it is enough merely that the defect is latent, exists prior to the sale, and is not known to the buyer.²²⁶ If the buyer is successful, he can undo the sale completely and, if the seller knew about the defects and failed to disclose them, he may also obtain damages.²²⁷ It is permissible for the buyer to waive the warranty against vices, but only if the seller acted in good faith at the time of the sale by stating that no defects existed in the property.²²⁸ If the seller knew of the defect, then the waiver is void.²²⁹ This furthers the strong public policy in France of acting in good faith in all transactions, including those involving real estate.

Next is the warranty against personal acts.²³⁰ Under this warranty, the seller promises to deliver the real property to the buyer completely and warrants that he will do nothing to disturb the buyer's possession and enjoyment of it.²³¹ For example, if the seller sold a business to a buyer and then set up an identical business around the corner to deprive the buyer of his profits, then this would violate the warranty against personal acts.²³² This warranty, however, is personal to the seller himself and only applies to the disturbances of the seller, not of third parties.²³³ Disturbance is construed very broadly to mean anything that

bought for seeding, etc.”).

220. *Id.* no. 1463, at 820; *see also* CODE CIVIL [C. CIV.] art. 1642 (Fr.).

221. PLANIOL & RIPERT, *supra* note 155, no. 1463, at 820.

222. *Id.*; *see also* CODE CIVIL [C. CIV.] art. 1641 (Fr.).

223. PLANIOL & RIPERT, *supra* note 155, no. 1463, at 820.

224. *Id.*

225. CODE CIVIL [C. CIV.] art. 1643 (Fr.).

226. PLANIOL & RIPERT, *supra* note 155, no. 1463, at 820.

227. *Id.* no. 1465, at 821.

228. *Id.* no. 1468, at 822.

229. *Id.*

230. PLANIOL & RIPERT, *supra* note 155, no. 1471, at 824.

231. *Id.* no. 1475, at 826.

232. *Id.* no. 1472, at 824–25.

233. *Id.* at 824.

the seller might do that interferes with the right of the buyer to use and enjoy his property.²³⁴ This warranty is left rather vague in French law and because “[f]acts of this kind vary greatly, and are often difficult to determine; they give rise to a number of law suits.”²³⁵

Last is the broad warranty against eviction.²³⁶ This serves as a type of complementary warranty to the covenant against personal acts and is more analogous to the warranties described herein for the other subject countries. Here, the seller must fulfill two obligations: 1) defend the buyer against disturbances caused by third parties; and 2) indemnify the buyer in the case where the disturbance cannot be defended against or the buyer is evicted.²³⁷ These types of disturbances by third parties are defined broadly and include those who hold encumbrances and privileges (like mortgagees and lessors) as well as those claiming superior title to the property.²³⁸ This warranty is only triggered when a suit is filed by a third party, not merely through the threat of a potential disturbance.²³⁹ Should the buyer be forced to give up the property, he may obtain a return of the purchase price as well as damages from the seller.²⁴⁰

The warranties in France are few, but they encompass many different causes of action and provide an assortment of remedial theories. Also, a waiver of the warranties must be done specifically through a prescribed method, which usually entails express language and the waiver provision—called a *vende eu l'état*—being brought to the attention of the buyer at signing.²⁴¹ This furthers the public policy in France of providing some flexibility to modify the warranties while still holding sellers accountable. Such middle ground is very advantageous to a foreign buyer because the transaction can still be tailored to the needs of the parties, but protections exist to prevent overreaching by the seller who may be in a position of greater leverage over the buyer who is unfamiliar with the laws and customs of the foreign country.

234. PLANIOL & RIPERT, *supra* note 155, no. 1472, at 824–25.

235. *Id.* at 825.

236. PLANIOL & RIPERT, *supra* note 155, no. 1476, at 826.

237. *Id.* no. 1477, at 827.

238. *Id.* no. 1478, at 827.

239. *Id.* no. 1479, at 827–28.

240. PLANIOL & RIPERT, *supra* note 155, no. 1503, at 837.

241. See Interview with Olivier Moréteau, *supra* note 157.

4. *Finding Common Ground*

Warranties provide a type of insurance against the sometimes damaging and inconvenient consequences that often occur in real estate transactions; consequences that can be much harsher in the global market. Currently, the warranties are extensive in both the United States and France.²⁴² In the United States, the warranties come in many parts and together make up a comprehensive patchwork of remedies and protections for the buyer.²⁴³ Conversely, in France the warranties are few, but they encompass many scenarios and provide a similarly large array of remedial theories.²⁴⁴ In both countries, the foundation is already in place for a very robust warranty regime, a regime that would be entirely important to an international investor looking to ensure that the title and condition are near perfect upon purchase.

In China, however, the current warranties provide some level of protection, but a greater breadth—a breadth that can only come about through the further development of the Chinese real estate market—is needed in order to attract foreign investors.²⁴⁵ In general, Chinese law protects against the basic defects—eviction, property damage, and encumbrances—but the extent to which these laws provide such protections, particularly whether they are actionable against the seller as a “warranty” as it is understood in the other countries, is an open question.²⁴⁶ Although China’s law is not as structured and certain—or perhaps even as extensive—as that of the other countries, many similarities still exist. There is a shared value placed on giving the buyer causes of action against harms to his property or title.²⁴⁷ An international framework for the sale of real property would help foster further development in China’s warranty laws and could potentially have a positive impact on the growth of the Chinese real estate market.²⁴⁸

A convention for the international sale of real property would entail the use of many warranties. A buyer will want to have certain default protections in place such that if a defect arose or if an eviction was on the horizon after the sale was consummated, he would have recourse against the seller, or he would be able to compel the seller to defend him

242. See discussion *supra* Part III.B.1, III.B.3.

243. See discussion *supra* Part III.B.1.

244. See discussion *supra* Part III.B.3.

245. See discussion *supra* Part III.B.2.

246. See discussion *supra* Part III.B.2.

247. See discussion *supra* Part III.B.2.

248. See *supra* note 214–15.

against an adverse third party. The convention could be drafted, much like the CISG, to allow for parties to opt out of certain warranties or to scale back the effects of certain covenants when the parties intend to have a certain defect or vice included in the purchase price; the default rule, however, would be that an array of warranties would be present in every sale unless otherwise modified. This scheme would allow for sophisticated parties, such as those in commercial acquisitions of real property, to shape the contract as they wished. It would, however, provide specific, guaranteed protections to buyers, for instance in the residential context, from being plagued by the language and cultural barriers that can hinder effective negotiation.

C. *Secured Financing*

Lastly, it is necessary to review the law of secured financing—a hallmark of almost any real estate transaction.²⁴⁹ The availability of credit is central to almost all transactions, whether they be commercial or residential.²⁵⁰ The laws that govern secured financing are varied and often try to balance the risks and degree of leverage between the borrower and the lender.²⁵¹ By looking at commonalities and deviations of how each of the subject countries view and make available various security devices, one can gain a better understanding of what a global framework for secured financing would likely entail.

1. *The United States: A Varied, Liberal Scheme*

Grown out of a robust real estate market, forms of secured financing have been pervasive and varied in the United States.²⁵² These devices, often differing slightly from state to state, serve as the backbone to almost all transactions.²⁵³ The three most widely used of these are the traditional mortgage, the mortgage with a power of sale, and the deed of trust.²⁵⁴ In general, each of these devices requires that the security contract contain the material provisions of the mortgage such as the

249. See, e.g., SPRANKLING, *supra* note 71, § 22.01, at 357.

250. *Id.*

251. *Id.* at 358; see also Berger, *supra* note 92, at 375–78.

252. See ALYSSA KATZ, OUR LOT: HOW REAL ESTATE CAME TO OWN US 2 (2009) (“The money for [mortgages] came from a new and lucrative market in mortgage-backed securities—pools of thousands of mortgages packaged together by financial traders and sold as bond-like investments.”).

253. SPRANKLING, *supra* note 71, § 22.01, at 357.

254. *Id.* §§ 22.05–.09, at 362–74.

parties' names, a property description, and some manifestation of intent.²⁵⁵ Once these provisions are satisfied, the mortgage becomes effective between the parties, but it is only effective as to third parties once it is recorded in the proper registry (called perfection).²⁵⁶ Once properly perfected, an interest in the property is conveyed to the lender that secures the obligation of the borrower to repay the loan.²⁵⁷ If the borrower fails to make the required payment, then he will receive notice as to his default and will, in some circumstances, have the opportunity to pay the debt or contest the foreclosure.²⁵⁸ If the borrower still fails to pay, then the lender may have the real property seized and sold, as prescribed by law, and have the proceeds applied to the satisfaction of the debt.²⁵⁹

In the traditional mortgage, the creditor must file a petition in the courts in order to seize and sell real property if the investor-debtor defaults.²⁶⁰ Both the borrower and any individuals who have an interest in the property—such as tenants, other mortgage holders, and lien holders—will receive notice of the pending foreclosure.²⁶¹ At this point, the parties have an opportunity to raise any defenses they may have against the lender's ability to foreclose upon the real property.²⁶² If the lender is successful, he will receive a judgment against the debtor that he will then use to have the proper government official seize and sell the real property at a public auction.²⁶³ Notice will be given through newspaper advertisement, and the proceeds from the sale will be given to the lender in order to satisfy the debt.²⁶⁴ If the proceeds from the sale are insufficient to satisfy the full debt, then the lender can, in some states, receive a further judgment against the borrower personally—called a deficiency judgment—for the balance on the debt.²⁶⁵ In total, the ordinary mortgage and foreclosure process can be lengthy,

255. *Id.* § 22.04[B], at 361.

256. *Id.*

257. SPRANKLING, *supra* note 71, § 22.04[B], at 361.

258. *Id.* § 22.06[A], at 365.

259. *Id.*

260. *Id.* § 22.06[B], at 366.

261. SPRANKLING, *supra* note 71, at § 22.06[B], 366.

262. *Id.*

263. *Id.*

264. *Id.*

265. SPRANKLING, *supra* note 71, § 22.06[B], at 367 (“If bid proceeds remain after the debt and sales expenses are paid, the court determines how the surplus is allocated. Conversely, if the bid price is insufficient to pay the debt and expenses, the court in many jurisdictions instead issues a deficiency judgment in favor of the mortgagee.”).

expensive, and complex.; Nevertheless, despite these negatives, it provides a certain level of protection to the borrower because of the impartiality afforded by the presiding judge, the potential to remedy the default, and various notice provisions.²⁶⁶

This is not to say, however, that all security devices in the United States enjoy such borrower-friendly protections. In fact, other security devices are much more liberal in that the parties can circumvent the judicial process altogether. In a mortgage with a power of sale, the creditor, after giving notice to the debtor, may foreclose on the property without involving the courts.²⁶⁷ With this device, there is no judicial oversight, and therefore, it has been criticized by scholars for overly favoring the lender's position in the transaction.²⁶⁸ The power of sale lies in the hands of the lender and is created through contract, not through statutory provision, although some states do require that the lender give adequate notice to the borrower when he intends to initiate the foreclosure process.²⁶⁹

Similarly, with the deed of trust, the court is not involved with the foreclosure of the property.²⁷⁰ Instead, a trustee holds title to the property and receives a set of instructions from the parties as to what to do in the case of a default.²⁷¹ Should a default occur, the trustee will conduct an auction and distribute the proceeds to the lender.²⁷² Both of these methods can be subject to abuse since the creditor—already in a vastly more beneficial position in terms of bargaining power—can take advantage of the debtor without judicial oversight.²⁷³ But regardless of the potential for abuse, the deed of trust and the mortgage with a power of sale are highly popular because of their swiftness of process, lack of judicial oversight, and low costs to the parties.²⁷⁴

Balancing the rights of the borrower and the lender is something U.S. secured financing law has struggled with for some time.²⁷⁵ This

266. *Id.* § 22.06[C], at 367.

267. See Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1403–04 (2004).

268. SPRANKLING, *supra* note 71, § 22.06[C], at 367.

269. *Id.*; see, e.g., *Williams v. Kimes*, 949 S.W.2d 899, 901 (Mo. 1997).

270. SPRANKLING, *supra* note 71, § 22.09[A], at 373–74.

271. *Id.* at 373.

272. See Debra Poggrund Stark, *Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform*, 30 U. MICH. J.L. REFORM 639, 643–47 (1997).

273. *Id.*

274. SPRANKLING, *supra* note 71, at § 22.06[C], at 367–68.

275. See, e.g., EDMUND L. ANDREWS, *BUSTED: LIFE INSIDE THE GREAT MORTGAGE*

struggle comes from the long-held notion that the lender is always in a superior position vis-à-vis the borrower.²⁷⁶ In many ways, the relationship will always be inherently unequal because the borrower is dependent upon the lender to actually grant the loan in order for the borrower to engage in his intended transaction.²⁷⁷ Further, many have argued that the foreclosure process itself is inherently biased toward the lender because of the ease with which the lender can seize and sell the property with very little oversight and little opportunity for the borrower to contest.²⁷⁸ To an international investor, the ability to confront the lender in the beginning of the process with the benefit of judicial or impartial oversight is essential to making international real estate sales attractive.

2. *China: A Unique, Emergent Scheme*

Since the creation of the “socialist market economy in 1992, China has been faced with the task of ensuring credit and expanding corporate financing.”²⁷⁹ After the adoption of the Real Rights Law, the mortgage has become the most common, if not the only, type of security device used in China for transactions involving real property.²⁸⁰ Although other more customary devices had been used in the past, the new property law only recognizes mortgages as security over real property.²⁸¹ To create a mortgage the parties must, in a written contract, agree to the due dates, secured claims, and the type, scope, and conditions of the mortgage.²⁸² Like the formation of a contract of sale in China, a mortgage will not have effect until it is properly filed in the land registry where the real

MELTDOWN (2009); EDWARD M. GRAMLICH, *SUBPRIME MORTGAGES: AMERICA’S LATEST BOOM AND BUST* (2007).

276. See Nelson & Whitman, *supra* note 267, at 1424–29.

277. SPRANKLING, *supra* note 71, at § 22.06[A], 365.

278. *Id.*; see also Berger, *supra* note 92, at 373; Nelson & Whitman, *supra* note 267, at 1424–29.

279. Yan, *supra* note 126, at 32.

280. *Id.* at 34.

281. *Id.* at 32 (“[T]he traditional real right for security that has been retained in Chinese economic life—the ‘pawn’—is not a legal real right for security [any longer].”).

282. Zhōnghuá Rénmín Gònghéguó Wùquán Fǎ (中华人民共和国物权法) [Real Right Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007) 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 1420, art. 181, translated in *PRC Property Law 1420/07.03.16:[1]*, CHINA L. & PRAC. (May 1, 2007), <http://proquest.umi.com/pqdweb?did=1281722881&sid=3&Fmt=3&clientId=8920&RQT=309&VName=PQD>.

property is located.²⁸³ The mortgage gives the creditor the right to security over the property in the case of a default.²⁸⁴ If the proceeds from the sale do not satisfy the debt, then the creditor may proceed against the borrower directly if a guarantee agreement is executed alongside or within the mortgage agreement.²⁸⁵ Without the guarantee, the creditor may only take the proceeds from the sale of the property in order to satisfy the debt.²⁸⁶

Uniquely, a mortgage cannot be given over a parcel of land in China as it can in the other countries.²⁸⁷ This is because, generally, only the state can own the actual land and, therefore, no private person can mortgage it.²⁸⁸ Rather, mortgages may only encumber a certain list of enumerated items.²⁸⁹ For the purposes of this Article, “buildings and other attachments to land” are most applicable because these are the items that most real estate buyers will be interested in purchasing.²⁹⁰

Much like in the United States, China attempts to balance the rights of the creditor and the rights of the debtor.²⁹¹ The law provides that creditors must go through “a just and open procedure in the form of an auction, sell-off or liquidation of the property, [and] direct gain from ownership of the property is prohibited.”²⁹² In this way, the creditor must first go to an impartial judicial administrator, such as a judge, to have his rights recognized and to order a public sale.²⁹³ The law prevents the vulnerable borrower from handing over his property to the creditor in satisfaction of the debt. Rather, an auction process must take place, and only the proceeds may go to the creditor.²⁹⁴ On the other

283. Yan, *supra* note 126, at 15.

284. Real Right Law of the People’s Republic of China, art. 170 (“A security rights holder shall, in accordance with the law, enjoy the right to repayment from property encumbered by security rights on a priority basis if the debtor fails to perform its matured debt obligation or a circumstance provided for by the concerned parties for the realization of the security rights arises, unless otherwise specified in law.”).

285. See Rehm & Julius, *supra* note 102, at 223.

286. See Real Right Law of the People’s Republic of China, art. 197.

287. Rehm & Julius, *supra* note 102, at 226.

288. *Id.* (“By contrast, other legal subject matter such as plots of land (due to the exclusive state or collective entitlement), and in particular rights of use to agricultural land, are not suitable mortgage subjects.”).

289. Real Right Law of the People’s Republic of China, art. 180.

290. *Id.*

291. See Yan, *supra* note 126, at 34.

292. *Id.* (citing Real Right Law of the People’s Republic of China, art. 180).

293. *Id.*

294. Real Right Law of the People’s Republic of China, art. 186 (“Prior to the expiration of the term for the performance of the debt obligation, the mortgagee may not specify with the mortgagor that the collateral will vest in the creditor should the debtor fail to perform its

hand, the new law also allows for the mortgage contract to stipulate that, in the case of a default, the lender may “convert the collateral into its monetary value.”²⁹⁵ This would lead one to believe that a process for “self-help” is available to the creditor if such a stipulation is made in the earlier mortgage contract.²⁹⁶ In all practicality, though, the mortgagor still needs a court order to repossess the real property and, as of now, the Chinese civil-procedure provisions have not been amended to allow for this type of quick, executory process.²⁹⁷

It can be said that the Chinese law of mortgages takes an intermediate view toward borrower protection. It guarantees an open procedure whereby the parties are able to confront one another and raise claims and defenses as to the secured real property.²⁹⁸ Also, the borrower cannot be induced by the more powerful creditor into giving up title to the property once there has been a default.²⁹⁹ On the other hand, this intermediate approach could be quickly eroding not long after its creation with the advent of the Real Rights Law’s article 195 on self-help.³⁰⁰ If a complementary procedural device is enacted to make these pre-default agreements executory, then judicial oversight will be watered down to a considerable degree and may have an effect on the confidence that an international buyer may have when purchasing real property in China.

3. *France: A Traditional, Conservative Scheme*

The mortgage reigns supreme in French real estate transactions.³⁰¹ It serves as a way to guarantee credit to a borrower from a lender by creating a security interest in the property that allows the creditor to direct the seizure and sale of the property.³⁰² As French scholar Marcel Planiol wrote:

The mortgage is the most important of the real securities, from the enormous amount of capital which it guarantees, and by the value of the landed property

obligation when the debt matures.”).

295. *Id.* art. 195.

296. *See* Yan, *supra* note 126, at 34.

297. *Id.*

298. *Id.*

299. Real Right Law of the People’s Republic of China, art. 186.

300. *Id.* art. 195.

301. *See* 2 MARCEL PLANIOL & GEORGE RIPERT, TREATISE ON THE CIVIL LAW, pt. 2, no. 2650, at 473 (La. State Law Inst. trans., 11th ed. 1959).

302. *Id.* no. 2645, at 472.

which it burdens. It can therefore be said that the establishment of a good system of mortgages is an economic and a social question of the first magnitude.³⁰³

Unlike in China, however, only immovables are susceptible of being mortgaged.³⁰⁴ In order for a mortgage to be effective, it must describe the specific terms of the obligation, describe the location and description of the real property that will serve as the security, and must be executed in an authentic act.³⁰⁵ An authentic act is the execution of documents before a notary and two witnesses who attest in writing to its accuracy.³⁰⁶ The role of the notary is of specific importance in the French real estate market.³⁰⁷ Notaries, unlike their U.S. counterparts who can be non-attorneys with some special instruction, are always attorneys and are specifically trained in how to execute documents that are essential to a wide variety of transactions.³⁰⁸ Although the mortgage will have effect from the moment the documents are executed, the documents must be filed in the proper land registry in order to have effect as to third parties.³⁰⁹

Once the mortgage is executed through an authentic act, the notary will give copies of the instrument to the parties and will take the original and file it in the public record, as is his professional duty.³¹⁰ In the other two subject countries, the onus to file lies with the parties to the transaction; however, in France a foreign buyer will be relieved of having to personally take an additional step toward the consummation of the transaction.³¹¹

Of particular note, and representing a deviation from the other subject countries, France is very conservative in that the law provides no

303. *Id.* no. 2656, at 476 (footnote omitted).

304. *Id.* no. 2718, at 508.

305. CODE CIVIL [C. CIV.] art. 2418 (Fr.).

306. CODE CIVIL [C. CIV.] art. 1317 (Fr.).

307. *See* PLANIOL & RIPERT, *supra* note 301, no. 2759, at 532.

308. *Id.*; *see also* RENÉ DAVID, FRENCH LAW: ITS STRUCTURES, SOURCES, AND METHODOLOGY 65 (Michael Kindred trans., 1972) (“The notary, who is a very different official from the English notary public, and even more different from the American notary public, plays an extremely important role. He does all conveyancing, drafts wills and marriage contracts, drafts acts of incorporation, and authenticates instruments of all kinds. Frequently referred to as the ‘family counselor,’ he is well regarded and the very symbol of respectability.”).

309. CODE CIVIL [C. CIV.] art. 2425 (Fr.).

310. *See generally* LAURENCE DE CHARETTE & DENIS BOULARD, LES NOTAIRES (Robert Laffont ed. 2010).

311. *See generally id.*

mechanisms for “self-help” in the mortgage context.³¹² In other words, parties may not contract to operate outside the judicial system should a default occur on a secured loan.³¹³ If a creditor wishes to foreclose on the real property of the debtor when the debtor has defaulted on the obligation, the creditor must engage in a particular type of expedited judicial proceeding known as an *injunction payé*.³¹⁴ In this proceeding, the creditor files a petition in the local court where the debtor is located, and the court will issue an order of default.³¹⁵ The creditor will included, in this petition, the notarized mortgage documents, which are considered, by virtue of the notarization, to be self-executing.³¹⁶ The creditor will then give notice of the court’s order to the debtor, and the debtor will have a chance to appear before the court and raise any defenses that may be available.³¹⁷ Through this appearance, the debtor is able to face the creditor and address or refute the creditor’s assertions, if appropriate.³¹⁸ If no defenses are successful or if the debtor chooses not to appear, the court will then turn the order into a judgment, which will become final and non-appealable within one month of being issued.³¹⁹ From here, the creditor will bring the judgment to the local enforcement officer, the *huissier de justice*, who will conduct a public auction and distribute the proceeds to the creditor in satisfaction of the debt.³²⁰ In the alternative, the parties can include in the initial mortgage agreement a clause known as the *pacte comissoire*, which states that in the event the purchaser fails to pay the debt, the creditor may become owner of the property.³²¹ This clause, however, does not serve as a means of self-help for the creditor, leaving the borrower helpless.³²² The *pacte comissoire* may only be enforced after an expert values the real property to ensure that it is correlative to the debt owed and, most importantly, a court must review the request and ensure its fairness to

312. CODE CIVIL [C. CIV.] art. 2393–2399 (Fr.).

313. *See id.*

314. CODE CIVIL [C. CIV.] art. 1405–1425-9 (Fr.).

315. CODE CIVIL [C. CIV.] art. 1406, 1409 (Fr.).

316. CODE CIVIL [C. CIV.] art. 1407 (Fr.).

317. *See* CODE CIVIL [C. CIV.] art. 1411, 1412 (Fr.).

318. *See id.*

319. CODE CIVIL [C. CIV.] art. 1423 (Fr.).

320. *See* CODE CIVIL [C. CIV.] art. 1413–1425-9 (Fr.); *see also* DAVID, *supra*, note 308, at 65. *Huissiers de justice* are those legal professionals who deal mostly in the realm of litigation. *Id.* They are responsible for serving summonses and for the execution of judgments. *Id.* They are known as bailiffs in the English system. *Id.*

321. DOING BUSINESS IN FRANCE 11-11 (Matthew Bender ed. 2007).

322. *Id.*

the debtor.³²³

The detailed foreclosure process and the oversight of the courts in dealing with the rights of the parties is a very traditional approach in that it provides a great deal of protection and fairness to the debtor with little opportunity for innovation in the process. The debtor is given notice of the pending foreclosure as well as the opportunity to be heard and defend against seizure.³²⁴ Further, an impartial judge is present throughout the process to ensure fairness and equity.³²⁵ This process reduces the amount of overreaching that can take place in the countries that allow for parties to privately contract away judicial review. These types of protections and open processes provide a good system of support should a foreign buyer run into trouble with a lender over an international real estate purchase.

4. *Finding Common Ground*

From the foreign investor's perspective, the ability to obtain financing is of great importance because most real estate transactions are not paid for with cash.³²⁶ Although each of the three countries have a mechanism whereby the real property can be secured for payment of the loan, the foreclosure procedures are important. While in their own country, an investor might not mind engaging in a self-help process whereby the courts are removed from the foreclosure proceedings. The relative level of sophistication between the parties might incline them to want a quick and inexpensive process for the seizure and sale of the defaulted property. However, when dealing with foreign parties in distant countries, a prudent investor wants to ensure a certain level of fairness in the process. He wants a guarantee that there is judicial oversight in the process; a process that already exists in each of the countries.³²⁷

The United States, as seen with many of the other contractual principles discussed herein, offers a great deal of flexibility to the parties.³²⁸ They may choose either to engage in a judicial foreclosure or to circumvent the court system and avoid added costs altogether.³²⁹

323. *Id.*

324. CODE CIVIL [C. CIV.] art. 1411 (Fr.).

325. CODE CIVIL [C. CIV.] art. 1405-1425-9 (Fr.).

326. *See supra* note 90-91 and accompanying text.

327. *See discussion supra* Part III.C.1-3.

328. *See discussion supra* Part III.C.1.

329. *See discussion supra* Part III.C.1.

This, as mentioned, can lead to abusive practices by the lender despite some statutory notice requirements put in place by the states.³³⁰ China, with a relatively new real estate market and private real property law structure, favors the mortgage where foreclosure is accompanied by an open process.³³¹ Although the new Real Right Law provides for pre-default agreements whereby the parties can agree to dispose of the property in the case of nonpayment without going to court, this process has yet to be vetted and tried.³³² Lastly, in France, there is a strict view toward judicial review of foreclosures that provides judicial oversight at every step of the process.³³³ Notably, in France, there is no existing mechanism for the parties to contract around the court's involvement when engaging in the seizure and sale of mortgaged real property.³³⁴

In sum, all three subject countries share the mortgage as the primary means of secured financing and in each case the mortgage grants the right to seize and sell the property, as prescribed by law, and have the proceeds apply to the satisfaction of the debt.³³⁵ Further, each of the countries provide, at some base level, a foreclosure process that gives adequate notice to the borrower, gives the borrower an opportunity to raise defenses to the foreclosure, and is overseen by an impartial officer of the court.³³⁶ These common themes are shared throughout the three subject countries, and therefore including them in an international convention for the sale of real property would be accomplished without a complex overhaul of any country's existing security device system.

CONCLUSION

Just as nations once considered the law governing the sale of movables to be too individualistic and country-specific to ever be harmonized, the same attitude now pervades society's view toward real estate transactions.³³⁷ Similar to how attitudes changed with respect to global views on the sale of goods, however, there must be a rethinking as to how people view international real estate transactions.³³⁸ In an

330. See discussion *supra* Part III.C.1.

331. See discussion *supra* Part III.C.2.

332. See discussion *supra* Part III.C.2.

333. See discussion *supra* Part III.C.3.

334. See discussion *supra* Part III.C.3.

335. See discussion *supra* Part III.C.1-3.

336. See discussion *supra* Part III.C.1-3.

337. See SPRANKLING ET AL., *supra* note 11, at 1.

338. See SECURITY OVER IMMOVABLES, *supra* note 18.

ever-growing global economy where land and other forms of real property are increasingly being purchased and sold on the international market, the law must be amended to provide a strong legal framework for these global sales.³³⁹ This does not mean, of course, that each country must abdicate control over which rules will govern domestic transactions or even that existing institutions must be totally abandoned in a global real estate regime. Rather, there must be a certain level of give and take, much like with the formation of the CISG, that allows for a balancing of existing national institutions and the growing desire to support a robust global real estate market.³⁴⁰

Each of the three subject countries mentioned above share many common values when it comes to contract principles in sales of real property.³⁴¹ Each places an emphasis on the need for express intent, a writing, and a property description in the creation of a contract for the sale of real estate.³⁴² Further, each of the countries provides recourse, at some basic level, for vices with the property.³⁴³ In this way, the international buyer already can draw from a selection of existing remedial tools and theories to recover should the real property suffer from a material defect.³⁴⁴ Lastly, the security device of mortgage is both common and widely used in each of the subject countries.³⁴⁵ It provides for a way to secure credit for the purchase of real property and each country provides for a form of judicial foreclosure where the parties are guaranteed a degree of fairness and the ability to be heard.³⁴⁶

When viewing these contract principles together, one can see that the commonalities between the countries are great, and, thus, the possibility for a global treaty for the sale of real property is entirely feasible. Although no two systems are completely alike—and harmonization always involves technical and political obstacles that may take years to iron out—this Article attempts to begin the discussion of what the creation of a convention on the international sale of real property might look like, identifies some preliminary challenges, sheds light on the many shared existing principles, and posits that its creation may not be so impossible as once thought.

339. See MATTEI, *supra* note 12, at 99–100.

340. See REILEY, *supra* note 50.

341. See discussion *supra* Part III.A–C.

342. See discussion *supra* Part III.A.

343. See discussion *supra* Part III.B.

344. See discussion *supra* Part III.B.

345. See discussion *supra* Part III.C.

346. See discussion *supra* Part III.C.