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Adapting rights in rem



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European Judicial Network
(in civil and commercial
matters)

1 Which are the rights in rem that could arise from a succession under the law of this Member State?

French law provides that *'a security interest in rem is statutory, judicial or contractual, depending on whether it is granted by law on the basis of claim status, by a precautionary judgment or by agreement. It is movable or immovable, depending on whether it is over movable or immovable property. It is general when it is over movable and immovable property without distinction or movable property or immovable property only. It is specific when it is over only specified or specifiable property, either movable or immovable.'* (Article 2324 of the Civil Code)

In principle, security interests are not extinguished by the death of one of the parties to the encumbrance, since the assets and liabilities of the deceased are transferred to their heirs. The transfer of all property upon death covers all security interests, whether contractual, statutory or judicial.

The succession as such therefore does not create new rights in rem over movables but rather transfers existing rights in rem to the heir through inheritance.

Under Article 2329 of the Civil Code, the rights in rem over movables which may be part of a succession are as follows:

- '1. liens over movable property;
2. a pledge over tangible movable property;
3. a pledge over intangible movable property;
4. retention or assignment of ownership as security.'

The rights in rem over immovable property which may be transferred or acquired by death are as follows:

- the right of ownership and its constituent rights (right of usufruct and right of bare ownership),
- the right of use or habitation,
- the right to build,
- easements,
- emphyteusis (long lease).

Securities in rem over immovable property in the form of liens, pledges over immovable property and mortgages (Article 2375 of the Civil Code) may also be transferred or acquired in the context of the settlement of a succession. The immovable property passes to the successors with the security interest in rem attached.

2 Are these rights in rem recorded in a register of rights in immovable or movable property and, if so, is such recording compulsory? In which register(s) are they recorded and what are the registration requirements and procedure?

Under the law governing security interests in rem over movable property, the encumbrance is attached to an asset and therefore the death of one of the parties to the encumbrance does not extinguish it.

However, the encumbrance is public and is entered in a register in order to be universally enforceable. It is up to the heirs of the debtor or owner to apply to the competent registrar for formal amendment in order for the name of the new beneficiary to be entered in the register of securities over movable property and other related transactions (*registre des sûretés mobilières et autres opérations connexes*).

French law allows the heir to make this amendment by virtue of Article R. 521-16 of the Commercial Code: *'Where the application to make an amended registration relates to information which concerns the debtor or the owner of the property where they are not the debtor, and which is referred to in points 2, 3 and 4 of Article R. 521-6, the registrar shall use this information to replace the existing entry. For lease transactions relating to movable property, only the information concerning the debtor shall be replaced. In other cases, the registrar shall enter the amendment in the margin of the initial entry, indicating the date of this entry.'*

The supporting documents to be provided must prove the status of the new beneficiary as heir of the former debtor or owner.

Any transfer or acquiring by death of rights in rem over immovable property must be evidenced by a notarised statement indicating whether the successors or legatees have accepted the succession, specifying where appropriate the arrangements for such acceptance in accordance with Article 29 of Decree No 55-22 of 4 January 1955.

Such rights in rem over immovable property, transferred or acquired by death, are entered in a land register if they arise from:

- an intestate succession which involves only the transfer of property or the establishment of a usufruct,
- a testate succession which allows the bequest of any right in rem over immovable property (easement, right of use and habitation).

In the departments of Bas-Rhin, Haut-Rhin and Moselle, this entry is made for historical reasons in the land registry (*livre foncier*) kept by a judge called the land registry judge (*juge du livre foncier*) (Law of 1 January 1924). In Mayotte, since 1 January 2008, all buildings must be entered in the land registry (*livre foncier*) kept by the Department for the registration of immovable property (Service de la conservation de la propriété immobilière), and all transfers and registrations of rights over these buildings must also be recorded (Article 2509 of the Civil Code).

For the rest of France, registration is made in the land registry index (*fichier immobilier*), which centralises the information and includes personal files and building records, and is kept by the land registration authorities (*services de la publicité foncière*).

Pursuant to point 3 of Article 28 of Decree No 55-22 of 4 January 1955, registration is obligatory for notarised statements drawn up for the purpose of establishing the transfer or constitution by death of rights in rem over immovable property.

Point 6 of Article 69 of the Decree of 14 October 1955 extends the scope of the notarised statement to:

- the legal usufruct granted to the surviving spouse by Article 767 of the Civil Code,
- transfers of rights in rem over immovable property resulting from donations made between spouses to the benefit of the survivor, either by marriage contract or during the marriage,

- the granting of rights in rem over immovable property which benefit the surviving spouse and which arise from the clauses of a marriage contract assigning to each of them unequal shares in the joint property, in accordance with Articles 1520 et seq. of the Civil Code.

Under Article 33 of Decree No 55-22 of 4 January 1955, the deadline for completing this formality is four months from the day on which notarial assistance was sought. The successors may be held liable pursuant to the first subparagraph of Article 30-4 of that Decree, if notarial assistance is sought more than six months after the death or, in cases where a subsequent event alters the order of succession, the estate or the right to accept or waive a succession, more than six months after that event.

It is up to the notary drafting the deed to deposit it with the land registration authorities.

Registration results from the inclusion of the deed in the register of publications for acts of constitution, declaratory acts or acts transferring rights.

3 Which effects are linked to the registration of the rights in rem?

Following registration, the heir to a property right is considered the legal holder of it and is entitled to enjoy the same protection as the original holder from any other claimant to it who has not registered their right.

Under French general law, land registration makes it possible for third parties to be informed through the principle of free access to the land registry index, as set out in Article 2449 of the Civil Code, and to settle disputes over rights in rem over immovable property. It does not create the right in rem over immovable property but is merely the necessary condition for deeds to be enforceable against third parties.

Failure to register transfers or the constitution of rights in rem over immovable property upon death is not penalised by non-enforceability against third parties, with the exception of private bequests, unlike deeds or decisions involving transfers or the constitution of rights in rem inter vivos.

The penalty of unenforceability cannot be applied since the universal successors or successors by general title are deemed to succeed to the person of the deceased (*continuation de la personne du défunt*). Third parties therefore cannot consider that the deceased is still the right holder and thus are not entitled to ignore this transfer or constitution. In Alsace-Moselle, the effects of registration are similar to French ordinary law, although there are a number of specific features to be noted:

- the object of registration is not the deeds, but the rights,

- registration of rights is for the purpose of enforceability against third parties (Article 38 of the Law of 1 June 1924),

- registered rights benefit from a presumption of accuracy since they are reviewed by the land registry judge. The burden of proof is therefore borne by the party challenging the registered rights.

In Mayotte, the entry of a building in the land register gives rise to the establishment of a title deed attesting to the status of owner. The recording of rights in rem over immovable property in the land register makes them enforceable against third parties.

These rules are legislative.

4 Are there specific rules and procedures in place for the adaptation of a right in rem to which a person is entitled under the law applicable to the successions in case the law of the Member State in which the right is invoked does not know such right in rem?

Under French law, there is no specific rule or procedure for adapting a right in rem that is not recognised in French law.

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