



European Land Registry Association



COMMON CONVEYANCING REFERENCE FRAMEWORK

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1. Definitions

1. Logbook: book in Land Register, where all received applications are registered. The main function is to keep a record of date and time of receipt.
2. Application: documents sent to LR. Deeds, documents, application, etc.
3. E-Lodgement: online lodgement of digital duplicates of documents that are sent on paper to the Land Registry.
4. E-Registration: lodgement of documents in electronic format only.
5. E-Conveyancing: paperless transactions through most or all stages of the conveyancing process from pre-sale to post-completion of the transaction.
6. Receiving country: country where the real estate is located.
7. Sending country: country where agreement in respect of foreign real estate was concluded (usually the home country of the buyer).
8. Plot: piece of land in a conveyancing agreement.
9. Registrar: official, who is responsible for:
 - the recording of deeds (in deeds systems);
 - the registration of titles and titleholders (in title systems).
10. Conveyancer: professional, who processes conveyancing documents (in countries with a notarial system, a notary public).
11. ELRN (European Land Registry Network): a network of Contact Points of Land Registry associations that answers questions and publishes legal explanations of the Land Registry information provided by the national systems.

2. Introduction

The European Land Registry Association (ELRA) is conducting research to identify an alternative process for foreign electronic purchases of real estate in countries where registration of foreign deeds is permitted. The project is named CROBECO¹. It aims to set out a European framework of rules and principles for a process that, for contractual and non-contractual obligations, is based on the law choice of the two parties² and the use of digital means. The framework is referred to as the “Cross border Conveyancing Reference Framework” (hereafter CCRF) and could improve confidence of foreign buyers in reliable cross border conveyancing. In the long term the CCRF could be developed as a basis for optional generic European digital conveyancing rules. For the short term the CCRF focuses on bilateral agreements, with respect for existing legislation. This means that, although the existence of different systems will lead to different demands, the CCRF should be applicable in Member States (MSs) with different legal systems. In each of these MSs the law of the country where the plot is located (*Lex Rei Sitae*) determines the acquisition of property and applies to all questions related to real rights.

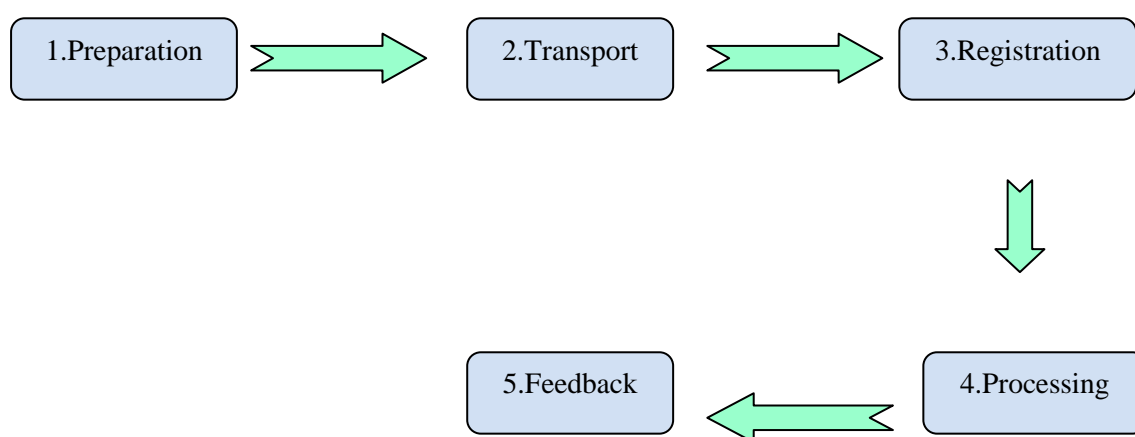
A first draft of the CCRF was published and discussed with ELRA Members in 2010 at a CROBECO conference in Brussels. In 2011 an updated version was published, commented on by stakeholders and discussed at a CROBECO conference in Tallinn. Because of the comments, and the experience of pilots, some parts of the CCRF have been rewritten. The CCRF now makes clear that CROBECO is optional and focuses on direct transmission from the (foreign) conveyancer to the registrar. The process complies with the common space of freedom, security and justice as defined in the Stockholm Program and in the Commission Action Plan. It assists the free circulation of documents by the suppression of formalities such as legalisation and apostille. The process is based on the use of electronic documents with qualified signature and is in accordance with European and national legislation. CROBECO does not demand standardization or specific validation checks of digital signatures. This is governed by

¹ THE PROJECT WAS AWARDED AN ACTION GRANT UNDER THE SPECIFIC PROGRAMME CIVIL JUSTICE 2010- 2012

² Regulation Rome I (EC) No 593/2008, 17-6-2008) and Regulation Rome II (EC) No 864/2007).

each country's legislation. The comments concerning the need for sufficient support for foreign conveyancers are adopted by adding a description of a helpdesk, a glossary, guidelines and a repository. The guidelines should explain the main features of each system. The repository with basic clauses for the transmission and mortgaging of property is meant to offer practical advice, but not to be mandatory as to the exact wording of the contract.

The process includes five stages. In some MSs some of these are combined, but even then the process remains the same.



Drawing 1. Common e-conveyancing procedure.

Basic rules for each of these stages are described in chapters 5 to 9. Before that in chapter 4 the leading principles for the CROBECO process of cross border conveyancing are described and explained. The principles are freedom to choose the law applicable to contractual and non-contractual obligations and respect for existing legal systems concerning property rights. In the IT field specific principles also have to be respected. As an old saying goes: “A chain is only as strong as its weakest link”. This means that every stage has to be in accordance with generic principles of good IT governance. These principles are described and explained in chapter 12, with a reference to European guidelines and projects and the names of MSs that have developed

best practices for a specific principle. Information on these practices can be collected from members of the ELRN. The rules in chapters 5 to 9 are not mandatory. However, the authors think that these rules will improve confidence of foreign buyers and make MSs' e-conveyancing systems increasingly interoperable. Therefore, it is recommended that these rules be followed. Together with best practices, they should supply a kind of 'tool box' for Registrars and conveyancers, who strive to introduce a more reliable and easier process for cross border conveyancing.

The CCRF will be adopted in 2012 but is never going to be finished or closed. It will be a tool which matures with time and will be constantly revisited. For example, the integration in e-Justice and the use of building blocks technique from European ICT projects such as E.CODEX, PEPPOL and STORK, are likely to lead to future changes.

3. Acknowledgments

This CCRF would not be possible without the great commitment of the following individual country experts from Netherlands, Estonia, Spain, Belgium, Portugal, Ireland, Northern Ireland, Finland, Lithuania and Cyprus who participated in the e-conveyancing working group and the excellent legal knowledge which was added by the following legal advisors from the Universities of Maastricht, Valencia and Coimbra. We acknowledge also with thanks the advice on conveyancing processes by the following Dutch notaries public.

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4. Leading principles

4.1 Freedom to choose the law applicable to (non) contractual obligations

The right to property as laid down in article 17 of the charter of fundamental rights of the European Union³ implies that Europeans should not be deprived of their possessions without fair compensation and only for public interest reasons, to the extent set out in the law. This includes a right to choose the law that is applicable to contractual and non contractual obligations concerning their property rights. The right to make such a law choice is laid down in Regulations Rome I and Rome II⁴.

Although application of these regulations is prioritized in the specific programme civil justice⁵, apart from the CROBECO pilot, in practice the law choice is not made in conveyancing contracts. The reason for that is probably a lack of a suitable conveyancing process. This process should enhance cross border transactions through the common space of freedom, security and justice and promote free circulation of documents, with the objective of a single market in real estate.

CROBECO aims to develop such a conveyancing process. It could help to protect foreign buyers against the consequences of hidden charges, limitations and overriding interests. Examples of difficulties caused by hidden charges, limitations and overriding interests are enumerated by Diana Wallis MEP and Sara Allanson in

³ EC 364/12 18.12.2000, which was given legal effect in the Treaty of Lisbon 2009.

⁴ Regulation Rome I (EC) No 593/2008, 17-6-2008) and Regulation Rome II (EC) No 864/2007).

⁵ Just/2011-2012/JCIV/AG Paragraph 4.3 under 5 and 3.

“European Property Rights & Wrongs”⁶. In all these cases choosing protection on the basis of the law of the sending country (home country protection) could have provided better protection to foreign buyers. But the seller too will sometimes prefer to apply the other legislation. If his native country is the same as that of the foreign buyer he will prefer this legislation because he is more familiar with it. In the event of a second house he will consider it more efficient to visit his trusted notary "just around the corner". Even for a seller from a receiving country with a collapsed housing market, the applicability of the sending country's legislation to obligations could be useful, despite his unfamiliarity with it. He can offer an extra incentive to prospective foreign buyers. Because the deed is bilingual, he can read it in his own language and ask a specialist on international law from his home (receiving) country for advice. As long as he does not withhold information and fulfils tax and other obligations, this seller has nothing to fear from the CROBECO approach.

4.2. Respect for existing legal systems concerning property rights

It should be emphasized that the law choice only can concern contractual obligations. The acquiring of the plot and the preference of charges will always be governed by the law where the property is located (the *Lex Rei Sitae*). Despite the aim of free circulation of documents throughout the EU, cross border conveyancing using the CROBECO system will only be possible if the plot is registered in the Land Registry and existing legislation allows the acceptance of documents from foreign conveyancers. The answers to the ELRA questionnaire show that documents from foreign conveyancers are accepted in more than 50% of the ELRA Member States. Some of these States have a title system and other States a deeds system. When the plot is located in a receiving country in which the land register operates on a title system, due to the protection provided by the conclusive title principle, cross border conveyancing seems easier, more efficient, secure and economic. In Member States with a deeds system (Belgium, France, except Alsace and Lorraine, Luxemburg, Netherlands, Southern Italy) listed names of supposed titleholders and identifications of properties serve as an index to recorded documents. Registrars in these countries have a decision function concerning the recording of documents but do not grant a title by listing the

⁶ Published on the ELRA website

buyer as the new owner, as land registers in countries with a title system do. Although in some countries (such as Netherlands) presumed defective titles are marked and notifications of such remarks are sent to the seller, buyer and conveyancer, the registration is not legally decisive. This means that foreign conveyancers have to examine underlying documents in the Land Register to draw conclusions on the existing rights and names of titleholders. Because of the fact that they are not familiar with the legislation and the language, such an examination could be difficult for foreign conveyancers. A solution could be to introduce a statement by the Registrar. After legal examination of recorded documents, he could conclude who, according to the Land Register, is entitled. There would be something like a title system "on demand" for the purpose of cross border conveyancing. A complete change of the system is not necessary. Often there are good historic and cultural reasons for the existing system. CROBECO wants to respect that. The conveyancing system in the sending country is irrelevant. A foreign conveyancer from a country with a deeds system can just as easily rely on a Land Register with a title system as a foreign conveyancer from a country with a title system.

5. Preparation of the contract

5.1. Choice of Law

As part of the preparation of the contract the conveyancer should inform the buyer and seller about the legal possibilities. In the event of that one conveyancer advises both parties, the advice should be based on a balance between the legitimate interest of both parties and for that reason should contain the possibility of the choice of law⁷.

⁷ For notaries a duty to inform both buyer and seller is laid down in common principle 2.4 of the European Notarial code of conduct (www.cnue.be/cnue-2010/en/003/005) "The notary has a duty to inform the parties of the content and effects of the instruments concerning them and advise them fully". Also, according to the same principle: "the notary shall research the most relevant way to achieve the result desired by the parties, in accordance with the applicable law". Solicitors in common law jurisdictions have a similar duty to their clients. For example in England and Wales, Outcome 1.12 in the Solicitors Regulation Authority Code of Conduct 2011 requires solicitors to ensure that their "clients are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them".

5.1.1. Law choice concerning contractual obligations

According to Article 4 of Regulation Rome I (EC 593/2008), the law of the country where the property is located is applicable to the transfer (this is governed by the law of the plot, the so called “lex rei sitae”). However with an explicit choice the parties can agree that the law of the country of the foreign buyer is applicable to contractual obligations. This choice of the law of his home country could have an important psychological effect on a prospective foreign buyer. Because of this and the fact that the (bilingual) deed is executed in his own language by a conveyancer from his home country, he gets the feeling of being legally protected in a way that is familiar to him. A consequence of the choice of law is that a buyer who discovers that the seller has violated the contract (for example because of a hidden defect) can claim compensation in his home country’s court.

5.1.2. Law choice concerning non contractual obligations

By declaring Regulation Rome II (EC 864/2007) applicable to non contractual obligations, foreign buyers could acquire protection against unknown (local) public limitations that are not recorded in the land register.

Protection could be based on culpa in contrahendo (art 12 of Rome II). Culpa in contrahendo is an autonomous concept that does not necessarily have to be interpreted within the meaning of national law. It includes the violation of the duty of disclosure. When for example a foreign buyer of Spanish real estate afterwards finds out that unknown public limitations exist, he could ask a court in his home country to decide on compensation by the seller. The grounds for liability could be non-performance, mistake or violation of pre-contractual information duties. Even when in the lex rei sitae specific case law exists for such events, the applicable foreign law will be decisive (see article 12 (1) Rome II on culpa in contrahendo). The public restrictions can never be limited by the obligation to compensate. For contractual obligations this is stated in Art 9.2 of Regulation Rome I, which includes an overriding mandatory provision of the law of the forum. The choice of law has to be made by the buyer and seller and should be part of the contract of sale. For example with the following clauses:

1. Despite the fact that the plot is located in a foreign country the buyer and the seller choose the law of(insert name of the country) to be applicable to this contract, in order to prevent the applicability of article 4.1.c of EC Regulation number 593/2008 (Rome I) as far as the contractual agreement and the accomplishment of the agreement are concerned.
2. The Buyer and the seller agree, in accordance with article 14.1.b of EC Regulation 864/2007 of 11 July 2007 (Rome II), to submit non-contractual obligations, within the meaning of that Regulation, to the law of (insert name of the country).

5.2 Unchanged roles of conveyancer and registrar

When Rome I and Rome II are applicable, registrars should scrutinize deeds in accordance with these regulations. If assistance is needed or a foreign conveyancer seeks advice about the legal requirements for registering, a registrar should assist the foreign conveyancer in the same way he does with a national conveyancer. If according to national legislation, there is a requirement to submit the application to a specific registrar, registrars should help the foreign conveyancer to do this, so far as their national legislation allows.

Registrars and conveyancers in both sending and receiving countries should choose a neutral attitude towards cross border conveyancing, bilateral deeds and the desirability of the law choice of Rome I and II. A conveyancer who is of the opinion that he has insufficient knowledge of the foreign legislation should refer to a colleague. For notaries the neutral attitude is prescribed in the ethics code of notaries. Although no specific code of conduct exists, in practice registrars behave in the neutral way notaries should behave according to their ethics code.

This neutral attitude governed the pilot exercise between Netherlands and Spain. Submission by the Dutch notary took place by sending the bilingual deed to the Dutch Registrar, who forwarded the document to his Spanish colleague. Before that the Dutch Registrar compared the electronic signature with the Certification Revocation List of the Dutch Certification Authority and verified that there had been no last minute suspension or revocation of the authority of the notary. Because this is the same procedure used regarding Dutch real estate, the Dutch Registrar's role and responsibility remained essentially the same. The Spanish registrar verified the

validity of the signature according to the Spanish e-signature act and remained fully responsible for admission of the deed to registration.

5.3 Contract of transfer or contract of sale

In some Member States, for example Belgium and France, the signing of a contract of sale directly leads to the transfer of property rights between buyer and seller. Recording of the contract of sale in the Land Register gives the transfer legal effect against third persons. In other Member States, such as the Netherlands and Cyprus, a contract of sale always has to be followed by a contract of transfer. Only the recording of such a contract of transfer leads to the transfer of property rights. In other Member States, such as Spain, a contract of sale always has to be followed by the transmission of the possession of the property, and this transmission is legally presumed to be done by taking the contract in the form of a deed. In the case of cross border conveyancing between Member States with different systems, the legislation of the State where the plot is located (the Lex Rei Sitae) will always be decisive. For example when a person from Netherlands (where a separate contract of transfer is demanded) buys a plot in Spain, the Lex Rei Sitae of Spain dictates that a contract of sale with a clause concerning the transfer of the possession is sufficient.

Country/ Systems used	BE	CY	EE	FI	IE	LT	NL	NIE	PT	ES	EW
Deed system	Yes	No			Yes*	No	Yes	Yes*	No	No	No
Title system		Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Contract of sale	Yes	Yes	Yes	Yes		Yes	Yes			Yes	Yes
Contract of transfer		Yes	Yes	No		Yes	Yes			No	Yes

Table 1: used system per country. BE= Belgium, CY = Cyprus, EE = Estonia, FI = Finland, IE = Ireland, LT = Lithuania, NL = Netherlands, NIE = Northern Ireland, PT = Portugal, ES = Spain, EW = England and Wales.

* Concerns the remaining unregistered titles of land.

5.4 Foreign conveyancers

The answers to the ELRA questionnaire show that documents from foreign conveyancers are accepted in more than 50% of the ELRA Member States. However, in countries with a common law system any person lodging an application is liable to be sued in any claim for compensation where that party contributed to any error, fraud or forgery. Home country conveyancers are familiar with this potential liability in lodging an application, but foreign conveyancers are not. Before introducing cross border conveyancing in receiving countries with common law systems some kind of certification procedure for foreign conveyancers should make sure that the foreign conveyancer is familiar with these rules.

In countries with a notarial system, involvement of a notary public is sometimes mandatory, but it is not always required to be a notary from the MS where the plot is located. In countries with a notarial system without mandatory involvement of a national notary (such as Spain), the involvement of a foreign notary is deemed possible. Then the receiving registrar has to be sure not only that the conveyancer was once authorized, but also that the conveyancer has not lost his authority because of suspension or revocation. Evidence of appointment can be provided in the certificate linked to the qualified electronic signature. Evidence of non-suspension can in future be derived from a European Certification Revocation List (in short: CRL) or an Online Certificate Status Protocol (in short: OCSP) system. Because such a central system is not operational yet, as a temporary solution, the registrar in the sending country, who is better informed about suspended conveyancers, will advise his foreign colleague about this topic.

5.5 Liability of parties

Awareness of the risk of a breach or lack of licenses as well as of hidden charges makes potential foreign buyers reluctant to buy foreign property. This restraint could be neutralized in some countries by choosing clauses from a contract clauses toolbox. As part of the contract, such clauses could regulate legal indemnification or compensation between contracting parties. A toolbox with such clauses will be based on EC regulation Rome I and Rome II, see paragraph 5.1, 12.3 and 12.4. Associated with this toolbox, there should be

guidelines or similar (as good practice recommendations for the professionals). The use of the suggested clauses remains the responsibility of the parties concerned.

5.6 Protection against contradictory titles

The intended legal effects of conveyancing documents could be frustrated by “last minute” contradictory titles. Measures to prevent such adverse effects depend on the existing legal system. Member States, with a common law system, but also some countries with a notarial system such as Germany and the Netherlands allow a “priority notice” after which, during a fixed period, the priority or registration of contradictory titles is blocked. Also, in the Netherlands adverse effects of contradictory titles are limited by the fact that the conveyancer (the public notary) has a "clearing house function". He keeps the purchase money on a client's savings account and will only transfer the money to the seller when a Registrar's report confirms that there are no contradictory titles. Member States without the possibility of a priority notice have developed systems to provide topical information about contradictory titles to a foreign conveyancer. For example in Spain, the priority principle means that the first deed on arrival gains priority against other possible deeds that could arrive later, and also FLOTI (www.registradores.org) provides foreign conveyancers consistently with opportunities to view any new entries. In that case FLOTI automatically creates a request for information that will be run directly by the Register affected. A comparable "event driven" information system is developed in the Netherlands under the name “Watchdog”.

Country/ Protection systems	BE	CY	EE	FI	IE	LT	NL	NIE	PT	ES	EW
Priority notice / protection Period in months		No	Yes -	No	Yes 3wk	No	Yes 6mo	Yes 1mo	Yes 6mo	No	Yes 6wk
Blockade on recording / Registration during Protection period		No	No	No		Yes	No	Yes	No	No	Yes
Third party effect during Protection period		No	Yes	No		Yes	Yes	Yes	Yes	Yes	Yes
Clearing house function Conveyancer		No	Yes	No		No	Yes	No	No	No	No

Table 3: Protection system per country. BE= Belgium, CY = Cyprus, EE = Estonia, FI = Finland, IE = Ireland, LT = Lithuania, NL = Netherlands, NIE = Northern Ireland, PT = Portugal, ES = Spain, EW = England and Wales.

5.7 Information from the Land Registry to the foreign conveyancer

Information will be provided in two phases. The first phase, prior to the deed, concerns the title of the seller, mortgages, seizures and attachments, pre-emptive rights and private limitations such as servitudes. In some countries this information is only provided to persons with a supposed interest. A foreign conveyancer, who states that he is acting in the purchase of a plot, should be treated as having such interest. The second phase concerns the registration procedure and its incidents. Because information prior to the deed has to be topical, countries without one central contact point, should create a facility which gives the foreign conveyancer an easy way to trace the Land Register where the plot is located, such as a graphic view or a plot identifier. Usually not all the necessary information can be collected from the Land Register. Complete information concerning public limitations, overriding interests and urban planning information will not be available. For the collecting of this information see paragraph 5.9.

Country/	BE	CY	EE	FI	IE	LT	NL	NIE	PT	ES	EW
Providing information											
Information is	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Completely public											
Information for		Yes	Yes			Yes		No	No	Yes	
persons											
With specific interest											
Central contact point		Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes*	Yes
On line acces		No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Medium of infor-	Yes	No	Yes			Yes	Yes	No	No	Yes	No
mation: e-mail											
Medium of infor-		No	Yes	Yes		Yes	Yes	Yes	Yes	Yes	Yes
mation: web services											

*** Spain has a central web page with an app from where you can reach the competent register**

Table 4: Providing information per country. BE= Belgium, CY = Cyprus, EE = Estonia, FI = Finland, IE = Ireland, LT = Lithuania , NL = Netherlands, NIE = Northern Ireland, PT = Portugal, ES = Spain, EW = England and Wales.

5.8 Information from Land Registers by others or in another language

In some Member States information can be collected from organizations of resellers. Foreign conveyancers should bear in mind that missing or erroneous information cannot be enforced against third parties, whose rights are protected by conclusive title. Damages caused by shortcomings in information can only be compensated as a personal obligation of the reseller. If information is presented in a language other than that of the home country, the name of rights and charges in the home country's language should be added. For a better understanding of the public a generic name of a so called "placeholder" could be added. In that case the information could be linked to a glossary with a description of the national legislation.

5.9 Non Land Registry information

Some Land Registries disclose supplementary data from other territorial sources or other organizations. This is done on the basis of a copy of files or with a link to such files on the basis of georeferencing information. Often Land Registries do not accept liability for the correctness of this information. In Spain for example at the present time, information on the basis of urban plans is not supported by Land Registries, due to its normative character. In the near future the information will be available through a graphic interface, although not with the legal effect of Land Registry information. As well as this "unofficial" information from other sources, information about overriding interests and other public limitations may be available from registers or databases held by other bodies. For the collecting of this information support by a local specialist that could be contacted through a National Helpdesk is advised.

5.10 Preceding conditions

In some countries, before the entry of documents, certain specific conditions have to be fulfilled. For example in Cyprus at the day of transfer an instant “market value” valuation has to be done at the public counter of the land registry to determine the level of transfer fees. In Spain for example, the tax payment should be done before the registration of the contract of sale. Foreign conveyancers who are not familiar with such conditions should be assisted by guidelines and a help desk in the receiving country.

Assistance by the helpdesk could include help with completion of tax formalities. For example in Spain the conveyancer should fill in the electronic tax declaration form and forward it to Regional Administration Taxes office. The payment of taxes can be handled directly by the foreign conveyancer through international transfer to the special Taxes Office Bank account. All questions related to incidents arising from a taxation procedure will be notified to the conveyancer or other specific representative designated by parties.

5.11 Mortgages

The confidence of prospective buyers could be improved if the mortgage, as well as the sale, is processed by a home country conveyancer. Such a development could be hampered by the fact that different mortgage models are in force.

Most widespread is the accessory mortgage. It is present in almost every Member State and creates a security which is an accessory to the secured debt. Some Scandinavian and East-European Member States have an independent mortgage. Something similar exists in Germany as “Grundschuld”⁸. The common law mortgage differs from both. Because of the respect for existing legal system in the receiving country, the CROBECO approach should only be considered for a type of mortgage that is accepted in the receiving country. This does not prevent using the CROBECO approach to create a bilingual deed with a clause which makes the legislation of the foreign buyer’s home country applicable to the contract, in those aspects of the contract related to credit and loan, while specific requirements for register entry and enforcement erga omnes will be subject to the lex rei sitae of the security. Because different foreclosure procedures cannot be changed by such an agreement, cross border mortgaging remains complex and needs cooperation with mortgage banks from the sending country. To support foreign mortgage banks in this field, guidelines with information on the existing legislation in receiving countries should be developed and laid down in the repository (see paragraph 5.12).

5.12 Support for the processing of cross border documents

A CROBECO portal should provide electronic access to a helpdesk as well as to the responsible registrars. The helpdesk should provide support for the complete cross border document flow, including tax payment, the solving of

⁸ The “Verband Deutscher Pfandbriefbanken”: makes the following distinction

Accessoriness of origin (the security is effective even if there is not yet a secured claim);

Accessoriness of scope (the amount of the security can be higher than the secured claim);

Accessoriness of competence (the creditor is always also the mortgagee);

Accessoriness of enforcement (the secured right can only be enforced if the secure claim can be enforced);

Accessoriness of extinguishment.

problems arising from the registrar's scrutiny, payment of registration fees and processing of appeals against the registrar's scrutiny. Important tools to assist foreign conveyancers are the glossary with the description of rights, the repository with clauses for contracts and reference information about the content of land registry information and the legal effects of registration. The repository of clauses should help authenticated users in sending countries to create their conveyance documents. Some clauses are mandatory, others are optional but advised to protect foreign buyers. Mandatory clauses will vary from country to country because of different national legislation. Optional clauses will vary from country to country because of different risks of unknown liabilities, public limitations and charges. The repository could also contain explanations concerning standardized certificates of succession that are derived from annex 2 of the proposal for a regulation on the creation of a European Certificate of Succession. In this way the repository could help foreign courts to execute bilingual certificates of Succession. For the filling of the repository, cooperation with other stakeholders is advisable. The decision to organize such support will differ between countries. There will be less need in German speaking countries or between countries with the same language and more or less the same legal system. However in countries with a collapsed housing market and interested prospective buyers from other parts of Europe this could be very different. In that case helpdesks in receiving countries giving information to conveyancers in sending countries could be useful. ELRA has started this for the pilot Netherlands/Spain and intends to continue that in cooperation with the organizations of conveyancers in sending countries.

5.13 Cross border acceptance of electronic signatures

The European directive on electronic signatures distinguishes between ordinary electronic signatures, advanced electronic signatures and advanced electronic signatures which are based on a qualified certificate. The last category of certificates may contain extra elements, such as the provision for the signatory being an authorized conveyancer. Receiving CROBECO countries will presumably always demand Qualified Electronic Signatures (QES). The secure generation of signatures and the issuance of certificates involving these QESs require the mediation of a

Certification Service Provider (CSP). For the cross border application of QES, there should be some form of cross border certification between CSPs or perhaps at an even higher level. A list of CSP's, that issue certificates for qualified electronic signatures is available at the national supervisory authorities. So called "root certificates" of these CSP's give proof of their identity and authority. For entering into the system of trust of the receiving country, cross border certification is needed. For that purpose at the moment the supervisory authority in the receiving country has to approve the root certificate of the CSP from the sending country. In future it is expected that a common recognition service for QES will be implemented at EU level. Under this system the adding of an apostille by conveyancers from the receiving country is superfluous. The identity and authority of the signatory are already established by the CSP in the sending country and the reliability of this CSP is proved by the root certificate that was accepted by the supervisory authority in the receiving country.

6. Transfer from conveyancer to foreign Registrar

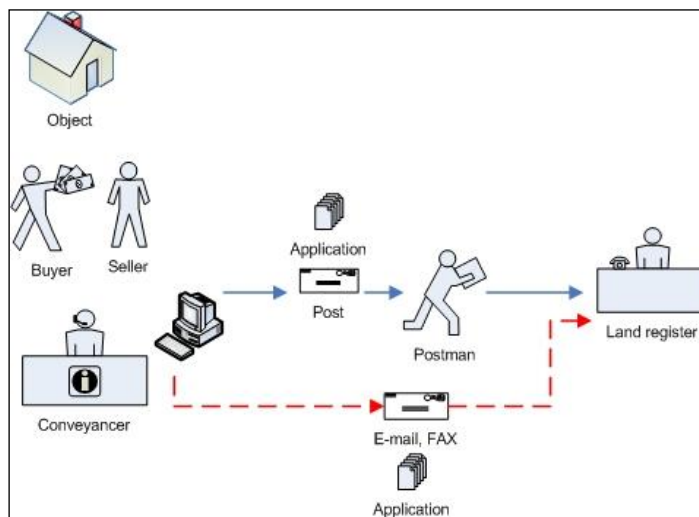
Because of the loss of time involved in paper proceedings, it is hardly possible to realize a reliable cross border conveyancing process without electronic transmission. This could take place according to two processes:

1. simultaneous transmission of digital files and sending paper documents by post;
2. electronically only.

6.1 Simultaneously

Simultaneous offering can be used when national legislation still demands that applications are made on paper. This is the case in Ireland, Northern Ireland, Cyprus, Belgium, Lithuania and Romania. In some countries the application can also be made by fax, with sending of the original paper usually required later on. However, in Portugal the original paper application is not required, because the FAX is presumed legally compliant with the original, if it is sent by an authorized professional such as a lawyer or a notary. In Portugal the receiving time of the FAX guarantees the ranking. Simultaneous transmission is advisable because of the saving of time and the advantages of computerized

filing and updating. This system of so called "electronic lodgement" is in use in Ireland. It is a suitable first step to future electronic registration and finally electronic conveyancing. For example Ireland has recently extended electronic lodgement to electronic registration of specific legal facts (cancellation of mortgages). Electronic lodgement seems also very suitable for early progress with cross border conveyancing. Depending on the legislation of the receiving MS, the foreign conveyancer could send the documents on paper or fax to the land register of the receiving country and simultaneously send a duplicate by mail or other electronic means. The ranking time (arrival of the electronic duplicate or of the paper document) depends on the legislation in the receiving country.



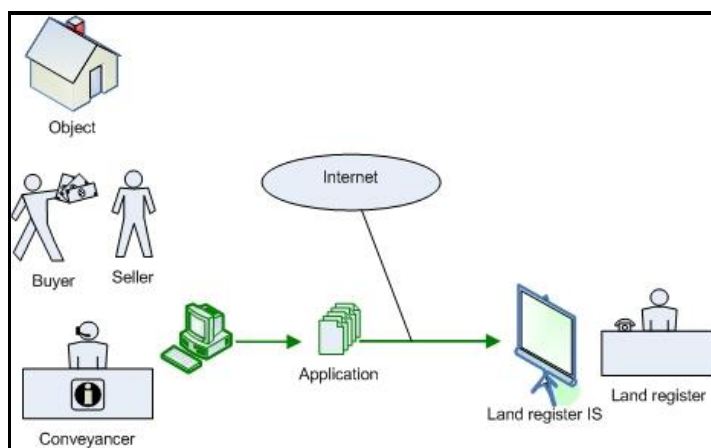
Drawing 2. Application electronic lodgement

6.2 Electronic only

Depending on the legal possibilities, electronic applications may involve:

1. Unstructured files;
2. Unstructured files with separate files or metadata;
3. A (partly) structured file with metadata that is linked to the style sheet that is previous evaluated by the Registrar. In this case also the file number of the deposited style sheet has to be added.
4. Only metadata that are linked to a previously deposited style sheet with a deposit identification number.

In Estonia and Germany the system that is described under 2 is in use. In the Netherlands and France the system as described under 3 is in use. In system 2 and 3 the metadata are used for computerized updating. The difference between 2 and 3 concerns the computerized support for the Registrar. Under system 2, the registrar has to evaluate each deed and compare his conclusions with the received metadata. Under system 3, comparison can be computerized and the metadata can be used for computerized updating of the registration. In the case of cross border electronic conveyancing, system 3 can be used for computerized comparison of a standardized first part of the deed with the previously evaluated style sheet that contains all the necessary information for the issuing of the CROBECO advice, when required.



Drawing 3. Delivery via electronic channel

Country/ Electronic registration	BE	CY	EE	FI	IE	LT	NL	NIE	PT	ES
Electronic lodging: Paper/fax		No	No		Yes	No		Yes	Yes	No
Electronic lodging: Paper/fax/e-mail	Yes	No	No	Yes		No		N/A	Yes	No
Electronic registration Without separate data file		No	Yes			Yes	Yes	No	Yes	Yes
Electronic registration With a linked data file		No	Yes			Yes	Yes	No	Yes	No

Table 5: Protection system per country. BE= Belgium, CY = Cyprus, EE = Estonia, FI = Finland, IE = Ireland, LT = Lithuania, NL = Netherlands, NIE = Northern Ireland, PT = Portugal, ES = Spain.

6.3 Involvement of the Registrar of the home country

The responsibility of registrar in the receiving country remains unchanged.

The registrar in the home country could assist with advice and by contacting organizations of conveyancers and legal scholars in his country.

In the event of a working electronic system for submission of documents in his country he could also help with solving issues of interoperability between systems. Of course in the long term to prevent any loss of time, it is best to send the foreign conveyancing document directly from the foreign conveyancer to the responsible Registrar in the country where the property is located. However, as long as generic European tools for authorisation and authentication are missing, software used by foreign conveyancers may not be compatible with those of the Registrar of the real estate. Besides, because in some countries conveyancers are not legally allowed to, or for other reasons cannot, electronically send their deed to a foreign Land Registry, a temporary solution could be very useful. This solution, (if it is not possible to send the document directly), would involve indirect submission through the Registrar of the home country of the foreign buyer. The foreign conveyancer sends the deed and all the necessary annexes to his home country Registrar through the usual channel (for example secure e-mail). This registrar, who has previously received tools for electronically submitting documents to the receiving country, forwards documents to his colleague in that country. He sends all the necessary documents and annexes through the usual channel of the country of the real estate to his colleague Registrar in that country. This would avoid the need for all foreign conveyancers individually to purchase the necessary tools for a specific country. In the case of such a temporary solution, Registrars from the home country of the buyer (who have to forward the document) are advised to ensure that they are not liable for the consequences of delay in transmission. This could be laid down in a user contract with the conveyancer. In the event that an electronic system for electronic submission is not available in their home country, specific tools for electronic submission could be provided to each of the participating conveyancers or, to prevent extra bureaucracy, to a representative of the organization of these conveyancers.

6.4 Start and finish of electronic transmission between conveyancer and registrar

In the case of electronic transmission the date and time of arrival in the electronic system of the receiving Registrar are decisive for the ranking. In the case of transmissions by e-mail an intrinsic risk of disturbances during transmission exists. This could influence the ranking but the initial transmission is a risk of the sender. On arrival at the server of the Registrar, the Registrar becomes responsible. Because the ranking time is decided by receipt in the electronic system of the Registrar, in case of e-mail disturbances between server and mailbox, the Registrars could be liable for any negative effects on the ranking. Registrars using e-mail transmission could exclude liability in an agreement with conveyancers. In the long term it is advisable to replace email by an online registration communication system.

6.5 Integrity of conveyancing documents

In case of electronic submission the integrity of cross border transmission could be protected by encryption techniques and verification of feedback. Apart from this, in case of email, information about the sender and forwarding data, or even the sender's address itself, could be altered. To prevent all of this in the Netherlands conveyancers compare feedback with earlier transmissions and the digital signature consists of an encrypted hash value of the sent documents. After receipt, the computer system of the registrar compares the decrypted signature with the hash value of the received document. The received document is recorded only if they are the same.

7. Registration

In the case of electronic lodging, the document received on paper has to be compared with the electronic file received earlier. This could be a duplicate from the paper document, but may also be a file of data that belong to the style sheet that was used for processing the document on paper. Only if the two belong together can the digital file be further processed. On receipt of the

complete document, it is also important to know what time is decisive for the ranking: the receipt of the paper document or the receipt of the digital document. This chapter deals with the different possibilities for the time of registration and the process to follow in case of refusal of registration.

7.1 Date and time of registration

Under the German legislation for electronic lodging, the time of receipt of the digital file is decisive. In the case of electronic submission opening hours are also of relevance. In some countries, such as Spain, electronic submission is possible 24 hours a day and 365 days per year. In other countries, such as the Netherlands, the stamping time of receipt always falls between 9:00 and 15:00 hours. Deeds that are electronically received after 15:00 and before 9:00 get a time stamp of 9:00 the next working day. This allows the staff of the Registrar to update the signalling of received deeds before 9:00 the next working day. From that moment on the topicality of information is that of 15:00 the last working day. A foreign conveyancer should take account of the consequence of such different systems. When for example the deed is sent to the Dutch Land Register at 16:00 hours, the time of receipt will be 09:00 hours the next working day. Another document that was sent 23:00 the same day, will have the same time of receipt. According to the Dutch Civil code, the time of signing will then be decisive for the ranking of the document.

7.2 Cross border knowledge of conveyancing legislation and procedures

It is very difficult to acquire full knowledge of every conveyancing procedure and legislation in every single Member State. For that reason the European Land Registry Network (a kind of ring of “trusted e-conveyancing Registrars”) could give support. Members of such a Ring could inform each other about the authority of conveyancers and help in solving interoperability problems. Furthermore, in consultation between those Registrars, standardized clauses in conveyancing documents could be developed and published on a CROBECO website. In addition, a help desk in the receiving country should assist foreign conveyancers in tracing public limitations.

7.3 The logbook

All Land Registries in MSs have a logbook function. This can be a separate official journal, the logbook or day list (such as Estonia, Spain, Portugal) or an integrated function in the registers of recorded deeds (Netherlands, Northern Ireland). On receipt of an application, its content will be evaluated by the Registrar and his staff. After the decision to register, in many MSs the ranking is based on the original time of receipt. However in Cyprus, the time of updating the registration of limitations could be decisive. Most MSs keep diaries in electronic form, which enables more efficient and secure centralized solutions. The process of keeping a Logbook may vary a little, but the main concept is the same: to keep a record of all received applications and thereby support decisions about their ranking.

8. Processing

8.1 Use of existing system

Registrars from Netherlands and Spain, together with conveyancers from Netherlands, have thoroughly studied the conveyancing processes in both countries (results are laid down in Chapter 12). Although there are differences, many steps seem the same. For example the already existing Spanish system FLOTI can be used for providing information to foreign conveyancers. The existing system for Dutch conveyancers to process deeds of transfer can be updated to include the processing of contracts of sale that will be sent to Spain. The existing system that gives support to Dutch Registrars in their assessing of the authority of the signatory can also be used for contracts of sale of real estate in Spain. The existing system for electronic registration of deeds in Spain can be used for the registration of bilingual documents from foreign conveyancers. Because all these systems use functionality for electronic signing and verifying authenticity and authority, the interoperability of digital files is important. Until the E-Justice portal provides such interoperability features, CROBECO partners should assure the necessary functionalities on a bilateral basis.

8.2 Multiple usability of data files

An important condition for cross border conveyancing is that the legislation of a receiving country allows acceptance of documents from foreign conveyancers. Furthermore, because of the reliability of the information from the Land Register, cross border conveyancing will be much easier when the legal conveyancing system in the receiving country is a title system (see Chapter 4.2). Another important condition is the existence of a workable process to create digital interoperability between ELRA Member States. When such conditions are fulfilled, different conveyancing processes should not block cross border conveyancing. When in the receiving country an e-lodgement system is in force (such as Ireland), the foreign conveyancer could send a deed on paper and an electronic copy to the Land Registry in his home country.. When in the receiving country an e-registration system is in force (such as in Spain) the foreign conveyancer should send the complete deed electronically. When in the receiving country an e-conveyancing system on the basis of the sending of data is in force (such as in Lithuania), the sending of data with a file number of the style sheet used could be sufficient. In a case where a mixture of e-conveyancing and e-registration by sending of deeds and data exists (as in Netherlands and Estonia) the deed could be added to the data. However, such a system only has the intended results when generic formats are used.

8.3 Feedback

After the transmission of the deed, the receiving Land Register must notify the receipt to the conveyancer in an authentic way. In the case of a dispute about the registration of the submitted documents, the interest of the parties is usually protected by the assigning of priority ranking for an additional period. In Spain for example this is 60 working days, calculated from the date on which the document has been received. During this extra time problems in the scrutiny are highlighted without any doubt that priority will be maintained. Furthermore this protection period maybe extended to another 60 working days to given parties an extra period for solving the problems arising. Sometimes a refusal by the Registrars can be appealed to a Registrar's

governing body or a judge. Sometimes a simpler procedure, such as a substitutive scrutiny by another Registrar, exists as an alternative for appeal. In such cases, an extra period may be extended to the end of the procedure. In some countries, technical disapproval is distinguished from refusal for legal reasons. For example in the Netherlands, electronic documents are technically disapproved without an additional period of priority ranking. Once prevailing problems have been resolved, the Registrar scrutinizes the deed to assess the legality of the agreement according to National law. The scope and consequences of this scrutiny depend on the existing legislation. In title systems, the Registrar verifies the national law requirements and, if necessary, the chain of titles. The entry will only be made if the requirements are observed and the chain of titles is fair. In some countries the Registrar has to report refusal of registration directly to the conveyancer who submitted the deed. Without such an obligation, a direct report is advisable to prevent delay.

8.4 Archiving

Because the actual registration grants a title, the archiving of underlying documents can remain out of the scope of CROBECO in a conclusive title system. In deeds systems persons who consult the land register have to draw their own conclusions on the basis of the files of previous recordings including the signatures. For that reason in countries with a deeds system, archiving cannot be put out of the scope of CROBECO. Archiving should include foreign electronic signatures and foreign certificates including the root certificates of the foreign Certification Authority.

Archiving does not necessarily mean that information provided subsequently has to include the original received signatures.

For example in the Estonia State Archive a digital stamp added later on is used for publicity. The digital stamp is given to the document automatically by the system at the moment of transferring it to the information system. Persons who read digital files or the documents contained in these will first see the container confirming the digital stamp and the time of giving it. On demand the container, which could include a file of one or several documents, can be opened.

9. Generic principles of good IT governance

To realize legal security in cross border conveyancing, principles of good IT governance have to be respected. In this chapter the importance of such principles in relation to cross border conveyancing is explained.

As a support for registrars and conveyancers, references are made to:

- European legislation (European guidelines and white and green papers);
- European projects;
- Best practices of ELRA members.

More information about these practices could be acquired by the contact points of the E(uropean) L(and) R(egistrars) N(etwork).

9.1 Confidentiality

A recent questionnaire reveals that six ELRA Member States define the content of an application as confidential. If one of those countries is participating in cross border conveyancing procedures, the other Member State will have to respect this and regulate exclusivity from conveyancer to Registrar and back. Exclusive accessibility by the parties who have an interest could be ensured by secure communication by closed content (encryption) or by secured electronic channels.

European projects:

E-codex: <http://www.ecodex.eu/>

PEPPOL: <http://www.peppol.eu/>

EU IMI system: http://ec.europa.eu/internal_market/imi-net/about_en.html

e-Justice (DIM WG): <http://e-justice.europa.eu>

SPOCS(Simple Procedures Online for Cross-border Services): www.eu-spocs.eu

Best practices:

Estonia.

More information: <http://www.ria.ee/index.php?id27309d>

<http://research.cyber.ee/~jan/publ/xroadares07final.pdf>

<http://www.ria.ee/xroad/presentation/>

9.2 Non repudiation

In order to give proof of the ranking of applications, Registrars should register at what time and date an electronic application is received. A mutual notification system between Registrar and conveyancer should provide proof that messages are sent and received. All applications should be time stamped in order to guarantee the exact arrival time at the Register, and should be registered according to time sequence of receiving.

Applications with the time of receipt by the Registrar should be visible to applicants, conveyancers and third parties. With qualified e-signatures the non-repudiation of an application and its payload (documents) can be guaranteed.

European legislation: COM Action Plan

European projects:

E-codex: <http://www.ecodex.eu/>

IDABC: <http://ec.europa.eu/idabc/en/chapter/5999>

EU IMI system: http://ec.europa.eu/internal_market/imi-net/about_en.html

e-Justice: <http://e-justice.europa.eu>

SPOCS(Simple Procedures Online for Cross-border Services): www.eu-spocs

Best practices: Estonia

9.3 Authorization

A Registrar has to be sure that a received foreign conveyancing document has binding legal force according to foreign legislation. For that purpose it should be clear that the conveyancer has the power to produce such conveyancing documents. In other words it must be guaranteed that he is a real public notary, a real judge, and so on. A qualified electronic signature guarantees that the document is signed by the conveyancer but in most countries gives no proof of his authority and even if it does so, there is not always a reliable registration of revoked certificates in case of a suspended or retired conveyancer. As long as a reliable (European) list of authorized conveyancers is not available,

Registrars from the home country of the conveyancer should assist foreign colleagues by providing the necessary information.

European projects:

E-codex: <http://www.ecodex.eu/>

PEPPOL (Pan European Public Procurement OnLine): <http://www.peppol.eu/>

EU IMI system: http://ec.europa.eu/internal_market/imi-net/about_en.html

e-Justice (DIM WG): <http://e-justice.europa.eu>

CROBIES: Study on Cross-Border Interoperability of eSignatures

Best practices: Netherlands, Spain, Estonia, France

European rules:

European projects: PEPPOL

Best practices: Netherlands, Spain, Estonia, France, Scotland

9.4 Identification/Authentication

A Registrar needs to be sure that a foreign conveyancer has the identity that he is claiming and also has to be sure that the identity of transacting parties is verified. Qualified digital certificates that belong to digital signatures can help to uniquely and positively identify the conveyancers. In theory this also accounts for the transacting parties, but in practice this is difficult when qualified certificates have not been issued to individuals in the home country of the transacting parties. However this is no problem when an authentic deed is processed by the conveyancer (a notary public) in the home country of the foreign buyer. In these deeds it is stated how the identity is checked by the notary public. For that reason a true copy of the deed that is signed only by the notary should supply sufficient evidence of the identity of the transacting parties. This means that the use of a qualified certificate by the conveyancer and, if requested in the receiving country, an advice by the home Registrar that the conveyancer is a notary public should be sufficient. Qualified certificates in respect of face to face control of the identity of a person have to be done by a certification authority or registration authority .

European legislation:

Electronic signatures directive 1999/93/EC.

Policy requirements for certification authorities issuing public key certificates.
ETSI TS 102 042.

European projects:

E-codex: <http://www.ecodex.eu/>

STORK(Secure idenTity acrOss boRders linKed): www.stork.eu

e-Justice (DIM WG): <http://e-justice.europa.eu>

IDABC (Interoperable Delivery of European eGovernment Services to public Administrations, Businesses and Citizens)

ISO 14721:2003 Space data and information transfer systems - Open archival information system - Reference model (OAIS):

<http://public.ccsds.org/publications/archive/650x0b1.pdf>

Repositories and Preservation Programme:

<http://www.jisc.ac.uk/whatwedo/programmes/reppres.aspx>

e-SciDR: <http://e-scidr.eu/2007/03/e-scidr-study-for-the-european-commission/>

9.5 Data integrity

The Registrar as well as the conveyancer needs to be sure that a digital file is not changed during cross border electronic transfer and after storage in the archive of the registrar. For detection of any change a check of the integrity of a document (for example by comparing hash values) could be used (see chapter 6.5). Also a guarantee that communications are not intercepted or erased should exist. In the case of a dispute in a deeds system, the Registrar should have the ability to make sure that a file that was archived in the past is unchanged. For long term archiving purposes, applications may be separated from the signature; in that case the applications should be separately electronically signed according to a reliable process.

European projects:

E-codex: <http://www.ecodex.eu/>

STORK(Secure idenTity acrOss boRders linKed): www.stork.eu

e-Justice (DIM WG): <http://e-justice.europa.eu>

IDABC (Interoperable Delivery of European eGovernment Services to public Administrations, Businesses and Citizens);

SO 14721:2003 Space data and information transfer systems - Open archival information system - Reference model (OAIS):

<http://public.ccsds.org/publications/archive/650x0b1.pdf>

Repositories and Preservation Programme:

<http://www.jisc.ac.uk/whatwedo/programmes/reppres.aspx>

e-SciDR: <http://e-scidr.eu/2007/03/e-scidr-study-for-the-european-commission/>

Best practices:

Estonia

9.6 Availability

A registrar has to be sure that a tool that was used to create evidence of authenticity, integrity, identity and successful communication is still valid. This requires that tools are available to guarantee that information of valid authentication and authorization (such as checking of a CRL or an OCSP). In practice this means that every e-conveyancing system should have a Service Level Agreement (SLA) that should characterize Service availability and Service time.

European legislation:

DIRECTIVE 1999/93/ on a Community framework for electronic signatures.

European projects:

Interoperability of electronic signatures:

<http://ec.europa.eu/idabc/en/chapter/5999>

IDABC (Interoperable Delivery of European eGovernment Services to public Administrations, Businesses and Citizens).

10. Platform for support and submission

A web platform should offer foreign conveyancers a single point of access to National systems for electronic submission and tools that support the preparing of cross border documents. This platform should contain a list/map

with CROBECO countries. After selecting a country, a screen should show the different files that have to be submitted and helpdesk screens for every receiving “CROBECO-country”. The helpdesk screen should show:

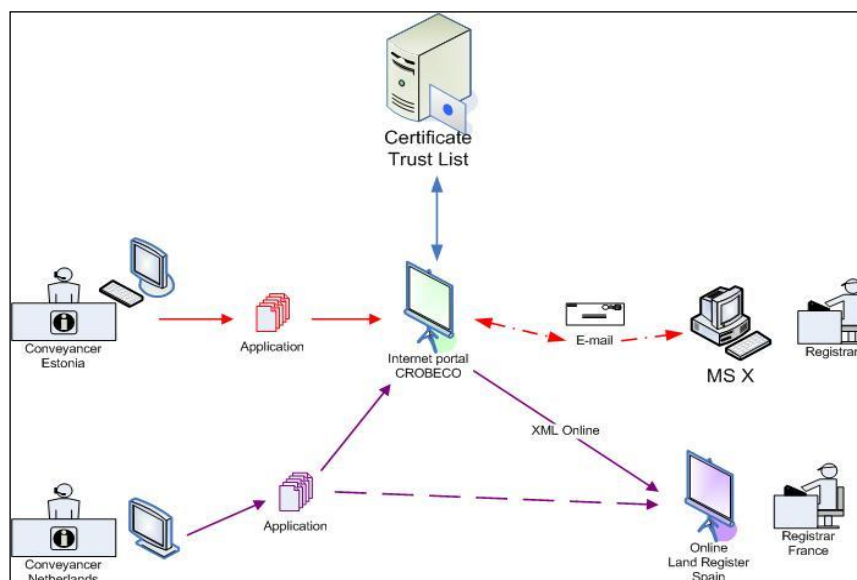
- for each conveyance contract, the status of the conveyance process;
- formalities for successful e-conveyancing;
- accepted foreign Certification Authorities;
- linked professional organizations (the so called CROBECO assistants) in the receiving country that can be hired to assist.

CROBECO assistants could be notaries in the receiving country but that will never be mandatory. CROBECO assistants can access the web platform to mark a task as finished.

A common interface should connect to:

- EULIS system LINE for providing Land Registry information;
- National systems for providing Land Registry information by non-EULIS members;
- Repository of clauses for preparing documents;
- Helpdesk with contact information of CROBECO assistants
- National systems for submission of electronic documents

The web platform will have a specific area for communication between registrars for cross border advices relating to submitted documents (see methodology) and make use of existing ELRN functionality. A PKI system should govern the different accessibility of CROBECO assistants CROBECO conveyancers and registrars. The web platform should be integrated in and comply with the technical demands of the European e-Justice portal. If possible software from other European projects (such as E-codex SPOCS or PEPPOL STORK) will be used.



11. Comments on the draft CCRF

ELRA asked other stakeholders to comment on the draft CCRF and received comments from, among else, the Council of the Notariats of the European Union (CNUE).⁹ The comments revealed that the draft CCRF gave rise to different misunderstandings.

First, CROBECO's justification was wrongly understood as only promoting trust among foreign buyers and then criticised because cross-border cooperation between notaries should be sufficient in providing this trust. Although the petitions of disappointed foreign buyers to the European Parliament¹⁰ and the Empuriabrava Case¹¹ in Spain are good examples of undermined confidence in the availability of sufficient legal protection, promoting trust is not the CROBECO project's only motivation. CROBECO primarily aims at promoting a common space of freedom, security and justice, and development of a single market as stated in art 2 of the Treaty of Lisbon and art 61 of TFEU. Achieving this objective depends on different conditions. Important is the free circulation of documents, in other words the acceptance of foreign documents concerning immovable assets, and the implementation of preventive legal certainty for transactions. This aim corresponds with the priorities of the call for proposals of the specific programme “civil justice”. CROBECO was awarded a grant for describing the framework of a suitable process to achieve this aim.

Another misunderstanding concerned the advice that registrars in the sending country provide to their colleague in the receiving country. This advice was quite incorrectly interpreted as the issuance of a new exequatur and then criticised due to the lack of liability and expertise of the sending registrar. The registrar in this case does not issue an exequatur at all. It is purely a matter of assisting the colleague in the receiving country, who continues to bear full responsibility. It concerns a voluntary tool between registrars inside the ring of trusted registrars (ELRN).

The repository of clauses was wrongly interpreted as a collection of generic clauses for all European countries and then criticised for imposing standardisation and

⁹ <http://www.cnue.eu>

¹⁰ Notice to members 19.06.2009 CM\785693EN.doc PE.426.967v01-00

¹¹ European Property Rights & Wrongs, pp. 20-21.

reducing contractual freedom. However, the clauses are just examples of possible clauses and can differ in the receiving and the sending country. Furthermore the clauses can easily be changed and the use of them is the responsibility of the conveyancer. For many European countries that represents no change to the existing practice of notaries, who use software with style sheets containing clauses for specific legal facts in their home country.

Lack of understanding of the meaning of new electronic tools caused a superfluous appeal for an apostille by notaries in the receiving country. CROBECO is based on advanced electronic signatures linked to qualified certificates. As these certificates are linked to unique private keys issued by reliable certification authorities after performing an in-person control involving reliable ID documents, there is no need for evidence of identity and authenticity.

Some comments questioned the desirability of the choice of law. It is suggested that division between applicable legislations in one contract would result in increased litigation. As the assessment of the desirability of European legislation (i.e. respect for existing legislation) is beyond the scope of registrars and notaries, the choice of law is maintained and not discussed in the CCRF. CNUE emphasised the need for sufficient legal knowledge and the numerous checks and formalities that have to be fulfilled by legal specialists in the receiving country. ELRA has adopted this comment by incorporating adding a description of the helpdesk with a glossary and a repository of clauses to the CCRF.

12. EC Regulations

12.1 EC Regulation Rome 1 No 593/2008.

**REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 17 June 2008 on the law applicable to contractual obligations (Rome I)
UNIFORM RULES**

Article 3

Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.
3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.
5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

Article 4

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
 - (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
 - (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
 - (c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;
 - (d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

Article 11

Formal validity

1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.
2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.

4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.

5. Notwithstanding paragraph 1 to 4, a contract the subject matter of which is a right in rem in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:

- (a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and
- (b) those requirements cannot be derogated from by agreement.

12.2 EC Regulation Rome II No 864/2007

Article 4

General Rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 11

Negotiorum gestio

- 1. If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.
- 2. Where the law applicable cannot be determined on the basis of paragraph 1, and the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law of that country shall apply.
- 3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the act was performed.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that country shall apply.

Article 12

Culpa in contrahendo

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.
2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:
 - (a) the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or
 - (b) where the parties have their habitual resident in the same country at the time when the event giving rise to the damage occurs, the law of that country; or
 - (c) where it is clear from all the circumstances of the case that the non contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.

Article 14

Freedom of choice

3. The parties may agree to submit non-contractual obligations to the law of their choice:
 - (a) by an agreement entered into after the event giving rise to the damage occurred;or
 - (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

13. Working processes of conveyancer and Registrars

Below the general plan of transfer of registered property is compared between countries that have participated in pilots

13.1 Netherlands and Spain

1 – Steps prior to transfer		explanation	Steps in Spain
Netherlands			
1.1	Collect personal data of purchaser(s) and seller(s), marital status	KYC procedure plus investigate whether seller and purchaser are fully authorised to enter into the transaction. Request for extract municipality register. Necessary additional reviews in relevant registers in case of bankruptcy of seller, seller been put in ward or under judicial supervision.	The same in Spain, but the notaries collect information from Land Registry and Cadaster, other information about taxes status, community of owners debts status, and so must be provided by the seller.
1.2	Review of purchase & sale agreement	Agreement is usually drafted by real estate agent.	It can be drafted by real estate agent or notary or parties themselves
1.3	Confirm receipt of bank guarantee to seller and purchaser or confirm receipt of deposit of certain part of purchase price	Agreements regarding bank guarantee or deposit are optional. But if any agreements are made in this respect the notary is obliged to monitor	Also optional. No intervention of the notary.
1.4	Review extract of land register on data of property and owners (register 4)	The extract is obtained immediately	Nowadays, obtaining the extract (nota simple) takes about three hours, by email. Once obtained, notary is informed direct and immediately of any change, also by email. And very soon it will be on line.
1.5	Collect additional information regarding property, certain pre	f.i. pre emptive rights of the municipality	Yes, pre emptive rights are only associated with some tax debts or registered real rights of other parties.

	emptive rights, rights of other parties on property as found in the extract of the land register		Also notices derived from discipline urban plan processing
1.6	Review extract of land register check which bank has a right of mortgage and other financial encumbrances (register 3)	The extract is obtained immediately	This information is included in the Land Register nota simple that was provided in 1.4.
1.7	Review previous notarial deed by which the property was transferred to the current sellers.		(It is not necessary to examine the previous deed; the Land Register information is sufficient)
1.8	Ask the bank of seller who has a right of mortgage against what exact amount the bank will grant discharge for repayment of the loan and delete the mortgage	Same procedure apply to other financial encumbrances ("beslag")	Not necessary. Notaries do not intermediate in the relationship between banks and the parties.
1.9	Draft notarial deed of transfer Draft notarial deed of mortgage	Deed of mortgage will be drafted as supplied by the bank of purchaser	Yes
1.10	Determine the tax on transfer of registered property and mention such amount on financial report and in the deed of transfer.	Tax will be paid by purchaser to the notary prior to transfer and the notary will pay the tax to the Tax authorities.	No. Notaries do not pay the taxes. Taxes are paid by the buyer after the deed (30 days period) and before registration, except when VAT is applied, in which case the seller retains it and pays it to the Tax Agency.
1.11	Collect all financial details and draft the financial report for seller and draft	The notary is in principle jointly and severally liable for payment of the tax. The financial report shows the	No

	financial report for purchaser.	exact amounts to be received from respective parties including the respective banks, seller and buyer receive separate financial reports.	
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2 – completion/day of transfer		explanation	Steps in Spain
2.1	Review extract of land register on data of property and owners (register 4)	The status of the property should be identical to situation step 1	Yes If any difference is appreciated then the notary must tell the parties in order to decide if they will continue with the purchase.
2.2	Review extract of land register on mortgage and other financial encumbrances (register 3)	The status of the property should be identical to situation step 1	This information is in the nota simple of step 2.1
2.3	All amounts, i.e. full amount of purchase price, tax and certain additional costs like invoice of the real estate agent have to be received in notary's bank account	All amounts must be at the disposal of the notary prior to the transfer. If amounts are missing, transfer is not possible.	No
2.4	Signing of the notarial deed of transfer Signing of the notarial deed of mortgage		Yes
2.5	Send true copy of notarial deed of transfer to land register via WEB ELAN	On day of transfer.	Yes, but parties can refuse it.

2.6	Send true copy of notarial deed of mortgage to land register via WEB ELAN	On day of vesting mortgage.	Yes, but parties can refuse it.
2.7	Check receipt of email from land register confirming receipt of respective documents	Same day as presented to land register; at the same time the land register allocates a specific number to the transfer as well as to the mortgage	Confirmation is on line.

3 –finalize after transfer		Explanation	Steps in Spain
3.1	Review extract of land register: status of property must be the same as shown in extract of step 2.1 PLUS a notification of the allocated number (step 2.7)	<p>Usually the first day after the day of execution of the deed and registration with land register, the land register will be checked in order to complete the transfer and take care of all payments.</p> <p>The extract should not show any other notifications (no other persons entitled to the property, no other limited rights except for known rights before completion step 2)</p> <p>The land register usually needs one or more days to fully complete registration.</p>	<p>No. Spanish notaries don't have the clearing house function. Usually, all payments are made by parties outside the notary office. But parties must declare and include in the deed the means of payment of the purchase price.</p> <p>After payment of taxes, the maximum registration period is 15 days, but normally it takes no more than a week.</p> <p>For electronic deeds only, Land Register notifies notaries of the registration of the deed. Notaries don't check the plot registry status after the deed.</p>
3.2	Review extract of land register relating to mortgage and other financial	The extract should not show any other notification (no sudden other financial encumbrances which were not known before completion	Same procedure as 3.1.

	encumbrances	step 2)	
3.3	Check with respective registers that sellers and purchasers are not bankrupt or been put in ward (“curatele”)		The information provided by Land Register in step 2.1 will include any bankruptcy of the seller. But in this case the folio is blocked to third party mortgages or seizures, with a few exceptions to this general rule
3.4	The notary takes care that the full purchase price plus tax and additional costs, all according to the financial report, will be paid to the seller, bank of seller and Tax authorities.	If a deposit was made by purchaser, such deposit was mentioned in the financial report and deducted from amount to be received from purchaser/purchasers bank	No. Notaries do not have clearing house function
3.5	Return bank guarantee to bank of purchaser		No. Notaries do not have clearing house function

13.2 Netherlands and Portugal

1 – STEPS PRIOR TO TRANSFER NETHERLANDS		EXPLANATION	STEPS IN PORTUGAL
1.1	Collect personal data of purchaser(s) and seller(s), marital status	KYC procedure plus investigate whether seller and purchaser are fully authorised to enter into the transaction.	Notaries ¹² collect personal information from seller and purchaser (and representation entitlements), including marital status

¹² Although we are always referring to notaries, it must be made clear that, according to Portuguese Law (article 24.º of Decree-Law 116/2008, 4th July), there are other legal operators who can establish the transfer of property: Notaries, Land Registrars (special proceeding of “On the spot House”), Lawyers, Solicitors, Commerce and Industry Bars.

		<p>Request for extract municipality register.</p> <p>Necessary additional reviews in relevant registers in case of bankruptcy of seller, seller been put in ward or under judicial supervision.</p>	<p>(mentioning the marital property regime and identifying the spouse)¹³.</p> <p>Notaries certify that Land Registry and Tax registry publish the property of the seller¹⁴. Notaries have access to the Tax Administration Database and may request an electronic certificate from the Land Registry. In Portuguese Land Registry, there is a “permanent certificate of the land”, a password which grants access to the Land Registry database for 1 year, allowing the control of that registry in real time.</p> <p>If the permanent certificate is requested in Registry Services, the password’s emission is immediate; If the permanent certificate is requested online, the emission takes a few hours¹⁵.</p> <p>Notaries also certify that tax obligations have been accomplished before the transaction¹⁶ (information provided by the buyer), the existence of the Technical Document of the property¹⁷ and Usage Licence¹⁸ (information provided by the seller).</p>
1.2	Review of purchase & sale agreement	Agreement is usually drafted by real estate agent.	<p>Agreement is drafted by the notary. However, it is accepted that the parties hand the notary a draft agreement, which is checked by the notary.</p> <p>Cf. Art. 42.º and 43.º of Notary Code.</p>

¹³ Art. 46.º and 47.º of Notarial Code.

¹⁴ Art. 54.º and 57.º of Notarial Code.

¹⁵ The only exception is if that property registry hasn’t yet been included in digital Land Registry; in that residual case, it will take about one working day.

¹⁶ Art. 49.º *Código IMT* (Code for Land Transmission Tax) and art. 63.º *Código Imposto Selo*.

¹⁷ Art. 9.º of Decree-Law 68/2004, 25th March.

¹⁸ Art. 1.º of Decree-Law 281/99, 26th July, altered by Decree-Law 116/2008, 4th July.

1.3	Confirm receipt of bank guarantee to seller and purchaser or confirm receipt of deposit of certain part of purchase price	Agreements regarding bank guarantee or deposit are optional. But if any agreements are made in this respect the notary is obliged to monitor	No intervention of the Notary. According to Portuguese law, property is transferred in the moment of the contract (art. 408.º Civil Code). The obligation for payment is one contract effect but not a condition for its perfection.
1.4	Review extract of land register on data of property and owners (register 4)	The extract is obtained immediately	The extract is obtained immediately, with the password referred in 1.1.
1.5	Collect additional information regarding property, certain pre emptive rights, rights of other parties on property as found in the extract of the land register	f.i. pre emptive rights of the municipality	Yes, pre emptive rights are only associated with some tax debts or registered real rights of other parties. Also notices derived from discipline urban plan processing
1.6	Review extract of land register check which bank has a right of mortgage and other financial encumbrances (register 3)	The extract is obtained immediately	This information is included in the “Permanent Certificate of the Land”, provided in 1.1.
1.7	Review previous notarial deed by which the property was transferred to the current sellers.		It is not necessary to examine the previous deed.
1.8	Ask the bank of seller who has a right of mortgage against what exact amount the bank will grant discharge for repayment of the loan	Same procedure apply to other financial encumbrances (“beslag”)	Not necessary. Notaries do not intermediate in the relationship between banks and the parties.

	and delete the mortgage		
1.9	Draft notarial deed of transfer. Draft notarial deed of mortgage.	Deed of mortgage will be drafted as supplied by the bank of purchaser	Both deeds can be drafted by Notaries. It is admitted that the Bank or the parties supply a draft, of which the legality will be controlled by notary. Cf. Art. 42.º and 43.º of Notarial Code.
1.10	Determine the tax on transfer of registered property and mention such amount on financial report and in the deed of transfer.	Tax will be paid by purchaser to the notary prior to transfer and the notary will pay the tax to the Tax authorities.	Taxes are paid by the buyer before the deed. Without the proof of payment, the Notary will not complete the transaction. Cf. Art. 49.º of Code for Land Transmissions Tax and art. 63.º Código Imposto Selo.
1.11	Collect all financial details and draft the financial report for seller and draft financial report for purchaser.	The notary is in principle jointly and severally liable for payment of the tax. The financial report shows the exact amounts to be received from respective parties including the respective banks; seller and buyer receive separate financial reports	No intervention of the Notary. According to Portuguese law, property is transferred in the moment of the agreement (art. 408.º Civil Code). Financial details do not interfere with the validity or the property effects of the contract.

2 – COMPLETION / DAY OF TRANSFER		EXPLANATION	STEPS IN PORTUGAL
2.1	Review extract of land register on data of property and owners (register 4)	The status of the property should be identical to situation step 1	Yes. If any difference is appreciated, the Notary must <u>refuse the transaction</u> ¹⁹ .
2.2	Review extract of land register on mortgage and other financial encumbrances (register 3)	The status of the property should be identical to situation step 1	This information is in the Permanent Certificate of the Land. Notary must explain to the parties the significance and effects of the mortgage and other financial

¹⁹ Article 9.º of Land Registry Code.

			encumbrances before the transaction ²⁰ .
2.3	All amounts, i.e. full amount of purchase price, tax and certain additional costs like invoice of the real estate agent have to be received in notary's bank account	All amounts must be at the disposal of the notary prior to the transfer. If amounts are missing, transfer is not possible.	No. The payment obligation is one effect of the contract. Notary does not certify its completion.
2.4	Signing of the notarial deed of transfer Signing of the notarial deed of mortgage		There are two deeds admissible: <ul style="list-style-type: none"> - Public Document: Only performed by notaries, the Public Document comprises the parties' agreement. It is signed by the Notary²¹. - Authenticated Private Document: In this case, the parties are the only ones who sign the contract. However, this contract must be authenticated by the legal operator²², who <u>signs the term for authentication</u>.
2.5	Send true copy of notarial deed of transfer to land register via WEB ELAN	On day of transfer	Yes: Notaries are charged with that obligation. However, parties can undertake that task ²³ .
2.6	Send true copy of notarial deed of mortgage to land register via WEB ELAN	On day of vesting mortgage	Yes: Notaries are charged with that obligation. However, parties can undertake that task ²⁴ .
2.7	Check receipt of email of land register confirming receipt of respective documents	Same day as presented to land register; at the same time the land register allocates a specific number to the transfer as well as to the mortgage	Confirmation by email.

3 – STEPS AFTER TRANSFER - NETHERLANDS		EXPLANATION	STEPS IN PORTUGAL
3.1	Review extract of land register : status of property must be the same as shown in extract of step 2.1 PLUS a notification of the allocated number	Usually the first day after the day of execution of the deed and registration with land register, the land register will be checked in order to complete the transfer and take care of all payments	No. Portuguese Notaries don't have the clearing house function. All payments are made by parties outside the notary office. But parties must declare and include in the deed the means of payment of the purchase price.

²⁰ Article 51.º of Notarial Code.

²¹ Article 46.º, n) of Notarial Code.

²² Notaries, Land Registrars (on the spot House), Lawyers, Solicitors and Commerce and Industry Bars.

²³ Article 8.º of Land Registry Code.

²⁴ Article 8.º of Land Registry Code.

	(step 2.7)	<p>The extract should not show any other notifications (no other persons entitled to the property, no other limited rights except for known rights before completion (step 2))</p> <p>The land register usually needs one or more days to fully complete registration.</p>	After payment of Registry fees, the maximum registration period is 10 days. Usually it not takes more than a week.
3.2	Review extract of land register on mortgage and other financial encumbrances	The extract should not show any other notification (no sudden other financial encumbrances which were not known before completion step 2)	Same procedure as 3.1.
3.3	Check with respective registers that sellers and purchasers are not bankrupt or been put in ward (“curatele”)		The information provided by Land Register in step 2.1 will include any bankruptcy of the seller.
3.4	The notary takes care that the full purchase price plus tax and additional costs, all according to the financial report, will be paid to the seller, bank of seller and Tax authorities.	If a deposit was made by purchaser, such deposit was mentioned in the financial report and deducted from amount to be received from purchaser/purchasers bank	No. Notaries do not have clearing house function
3.5	Return bank guarantee to bank of purchaser		No. Notaries do not have clearing house function