

*IMOLA III: comparative law methodology
in the context*

Unitn Team IMOLA III

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Legal formants and IMOLA III

In IMOLA III legal formants are the legal basis (legal ground) of the answers (yes or not) given by the contact points with regard to a specific registration matter.

Legal formants and IMOLA III

Legal formants:

1. LEGISLATIVE FORMANT
2. CASE LAW
3. DOCTRINE
- (4. LAND REGISTRY FORMANT)

THE LAND REGISTRY FORMANT

→ SUBSIDIARY NATURE

→ not conceivable in systems in which registration is always disposed with a judicial order (Grundbuch, Libro fondiario...)

→ in other systems: rare cases in which a new kind of entry in the Land registry has been disposed without a legislative basis and the case law has not yet commented on the subject (possible, for instance, in Spain)

IN THIS CASE PLEASE SPECIFY IT AS THE ONLY FORMANT

Pivot term:
MORTGAGE

Italy – Libro fondiario



QUESTION: is it necessary to register the mortgage so that it exists legally (constitutive registration of the mortgage)?

ANSWER: YES

FORMANTS:

Legislative: art. 2808 comma 2 civil code

Case law

Doctrine

(art. 2808 comma 2 Italian civil code: *The mortgage may have as its object the debtor's or a third party's immovables and is constituted through registration in the land registry*)

QUESTION: is this mortgage considered as a property right in accordance with the applicable law?

ANSWER: YES

FORMANTS:

Doctrine

Case law

(Doctrinal references: *Coviello, Schlesinger, Bianca, Gazzoni and others*)

QUESTION: is the mortgage collateral according to the applicable law?

ANSWER: YES

FORMANTS:

Legislative: art. 2808 comma 1 and 2741 comma 2 civil code

Case law

Doctrine

(art. 2808 comma 1 Italian civil code: *The mortgage gives the creditor the right to foreclose, even with regard to a third-party purchaser, the assets bound to guarantee his credit and to be satisfied with preference on the price obtained from the foreclosure*)

QUESTION: does the mortgage guarantee a money debt?

ANSWER: YES

FORMANTS:

Legislative: art 2838 comma 1 Italian Civil Code

Case law

Doctrine

(art. 2838 comma 1 Italian civil code: *If the sum of money is not otherwise determined in the deeds on the basis of which the registration is made or in a subsequent deed, it is determined by the creditor in the note for registration*)

QUESTION: does the mortgage guarantee interests from the money debt?

ANSWER: YES

FORMANTS:

Legislative: art. 2855 comma 2 Civil Code; art. 16 Tabular law

Case law

Doctrine

QUESTION: does this mortgage confer any legal privilege or preference to the mortgagee against other creditors, not mortgagees?

ANSWER: **YES**

FORMANTS:

Legislative: art. 2808 comma 1 Italian civil code

Case law

Doctrine

(art. 2808 comma 1 Italian civil code: *The mortgage gives the creditor the right to foreclose, even with regard to a third-party purchaser, the assets bound to guarantee his credit and to be satisfied with preference on the price obtained from the foreclosure*)

QUESTION: in the event of non compliance of the guaranteed loan or debt, could lead to a foreclosure?

ANSWER: YES

FORMANTS:

Legislative: art. 2808, comma 1, Italian Civil Code

Case law

Doctrine

(art. 2808 comma 1 Italian civil code: *The mortgage gives the creditor the right to foreclose, even with regard to a third-party purchaser, the assets bound to guarantee his credit and to be satisfied with preference on the price obtained from the foreclosure*)

QUESTION: does it imply powers of auction or sale on the LR Unit mortgaged?

ANSWER: YES

FORMANTS:

Legislative: art. 2808, comma 1, Italian Civil Code

Case law

Doctrine

(art. 2808 comma 1 Italian civil code: *The mortgage gives the creditor the right to foreclose, even with regard to a third-party purchaser, the assets bound to guarantee his credit and to be satisfied with preference on the price obtained from the foreclosure*)

Note: not power of sale, only of auction

QUESTION: is the rank determined by the registration date as a general rule?

ANSWER: YES

FORMANTS:

Legislative: art 29 Tabular law

Case law

Doctrine

QUESTION: if so, could there be exceptions?

ANSWER: **YES** (*postergazione - postergation*)

FORMANTS:

Legislative: art. 2843 Italian Civil Code; art 30 Tabular law

Case law

Doctrine

Note: please, see next question

QUESTION: If so, could the rank of the mortgages be changed by an agreement of the mortgagors?

ANSWER: YES

FORMANTS:

Legislative: art. 2843 Civil Code; art. 15 Tabular law; art. 30 Tabular law

Case law

Doctrine

(art. 30 tabular law: The rank can be changed by registering or booking the postergation. For this purpose, the consent of the holder of the subordinated right is required. If the subordinate right is encumbered by the right of a third party, his consent is also required....)

QUESTION: If so, is it necessary to register the modifications on the rank so that it can have an effect on third parties?

ANSWER: YES

FORMANTS:

Legislative: Legislative: 2843, comma 2, Civil Code

Case law

Doctrine

QUESTION: Does mortgage result in a provisional or temporary registration in your LR system?

ANSWER: YES

FORMANTS:

Legislative: art. 2847 Civil Code; art. 35 Tabular law

Case law

Doctrine

(art. 2847 civil code: *The registration [of the mortgage] retains its effect for twenty years from its date...*)

Art. 35 Tabular law → mortgage reservation/booking)

Pivot term:
MORTGAGE

Spain



MORTGAGES FORMANTS

QUESTIONS	ANSWER	FORMANTS
Is it necessary to register the mortgage so that it exists legally (constitutive registration of the mortgage)?	Yes	Civil Code, Article 1875 Mortgage Act, Article 145
		Case law: Supreme Court, resolutions 31.07. 2002, 23.09. 2004, 3.06.2016
		Doctrine
		Land Register practice
Is this mortgage considered as a property right in accordance with the applicable law?	Yes	Civil Code, Article 104
		Case law
		Doctrine
Is the mortgage collateral according to the applicable law?	Yes	Civil Code, Article 1875 Mortgage Act, Article 105
		Case law
		Doctrine
Does the mortgage guarantee a money debt?	Yes	Civil code, Article 1857 Mortgage Law, Article 105
		Case law
		Doctrine

Does the mortgage guarantee interests from the money debt?	Yes/No	Civil code, Article 1857 Mortgage Law, Article 105 Case law Doctrine
Does this mortgage confer any legal privilege or preference to the mortgagee against other creditors, not mortgagees?	Yes	Civil Code, Article 1923 Case law Doctrine
In the event of non compliance of the guaranteed loan or debt, could lead to a foreclosure?	Yes	Civil code, Articles 1858, 1874 Mortgage Law, 129 Civil Procedure Act, Articles 681 and following Case law Doctrine
Does it imply powers of auction or sale on the LR Unit mortgaged?	Yes	Civil code, Articles 1858, 1874 Mortgage Law, 129 Civil Procedure Act, Articles 681 and following Case law Doctrine

Is the rank determined by the registration date as a general rule?	Yes	Mortgage Act, Article 17
		Case law
		Doctrine
If so, could there be exceptions?	Yes	Mortgage Regulation, Article 241
		Doctrine
		Land Register practice
If so, could the rank of the mortgages be changed by an agreement of the mortgagors?	Yes	Mortgage Regulation, Article 241
		Case law
		Doctrine
		Land Register practice
If so, is it necessary to register the modifications on the rank so that it can have an effect on third parties?	Yes	Mortgage Regulation, Article 241
		Doctrine
		Land Register practice
Does mortgage result in a provisional or temporary registration in your LR system?	No	Civil Code, Article 1875
		Mortgage Act, Article 145

Formants and IMOLA III

Formants are also useful:

- to define the attributes of the legal concepts in a more complete and systematic way.
 - to collect data in a structured way.
 - to connect the pivot terms with the national definitions, by uncovering the operative rules beyond the declamatory/abstract definitions.
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Legal Formants and IMOLA III

Even when the answers to different questions look the same or very similar, as for example mortgages in Italy and in Spain, the analysis of the legal formats favours a deeper view and uncovers similarities and differences among the various legal systems



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Thank you!

