

## A Comparison of United States and Foreign Condominiums

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## A COMPARISON OF UNITED STATES AND FOREIGN CONDOMINIUMS

The condominium form of ownership is a product of an historical development originating in ancient times.<sup>1</sup> Where land was scarce and housing requirements great, condominiums emerged as a practical alternative to conventional residential development.<sup>2</sup> The individual ownership feature of the condominium concept, in particular, has an international attractiveness.<sup>3</sup>

Most commentators agree that the origin of modern European condominium legislation is found in article 664 of the Code Napoleon of 1804.<sup>4</sup> This provision allotted responsibility for repair and reconstruction among owners of individual stories of a single building and was carried, along with the rest of the Code, to the other countries of Europe.<sup>5</sup> Thus, the seed of the condominium idea lay within the legal systems of continental Europe, waiting to flower should the proper climate develop.

In the twentieth century the destruction wrought by two world wars and the contemporaneous scarcity of land suitable for development engendered an awakening of interest in the condominium. As construction progressed, the inadequacies of article 664 and its sister statutes, which left unanswered such questions as the rights and obligations of unit owners as to common areas, the legal effect of agreements among owners, and the right of a majority to obligate all the owners by resolution, evidenced the need for comprehensive legislation.<sup>6</sup> France,

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<sup>1</sup> For a concise account of these early precursors of the condominium concept see A. FERRER & K. STECHER, *LAW OF CONDOMINIUM* § 31 (1967) [hereinafter cited as FERRER & STECHER]. See also Kerr, *Condominium—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 3 (1963) [hereinafter cited as Kerr].

<sup>2</sup> Many towns of the Middle Ages were hemmed in by massive walls, inducing experimentation with new modes to make more effective use of scarce space. Extensive co-ownership of floors of buildings occurred in the French towns of Grenoble, Rennes and Lyons. See Leyser, *The Ownership of Flats—A Comparative Study*, 7 INT'L & COMP. L.Q. 31, 33 (1958) [hereinafter cited as Leyser]; Brown, *French Co-property of Apartments: A Model for English Law?—I*, 110 SOL. J. 591 (1966).

<sup>3</sup> See, e.g., Leyser, *supra* note 2, at 32. For a concise account of the advantages and disadvantages of the condominium see Davis, *Condominium and the Strata Titles Act*, 9 CAN. B.J. 469, 475 (1966).

<sup>4</sup> FERRER & STECHER, *supra* note 1, at § 35; Leyser, *supra* note 2, at 34.

<sup>5</sup> See Kerr, *supra* note 1, at § n.7 for the following translation of article 664:

When the different stories of a house belong to different owners, if the deeds do not specify the responsibility for repair and reconstruction it shall be as follows: The main walls and roof are the responsibility of all the owners, each in proportion to the value of his story; The owner of each story takes care of the floor on which he walks; The owner of the first story [*i.e.*, the first above the ground floor] takes care of the staircase leading to it; The owner of the second story takes care of the staircase leading to it; and so forth.

<sup>6</sup> See Leyser, *supra* note 2, at 35 and Kerr, *supra* note 1, at 4 for a further account of the need for detailed legislation.

in 1938, became the first country to enact a modern condominium law.<sup>7</sup> Shortly thereafter, Italy, Spain and the Netherlands adopted major condominium laws.<sup>8</sup> Due to an express prohibition of part ownership of buildings in the 1900 German Civil Code, little condominium activity occurred in Germany, Austria and Switzerland until after World War II.<sup>9</sup> However, today all three countries have condominium legislation.<sup>10</sup>

Nor was the development of early condominium legislation restricted to continental Europe. The condominium has long been extensively employed in Latin American countries for residential, resort and commercial purposes.<sup>11</sup> To meet the problems posed by co-ownership in this field, complex legislative schemes were enacted. Brazil, Cuba, Mexico and Venezuela were early movers in this area.<sup>12</sup> Since the civil codes of Spain and Portugal provided the foundation for the Latin American legal systems, the latter laws are generally consonant with the European codes.<sup>13</sup>

By the late 1950's, the condominium idea was beginning to take hold in the United States. At this time, Puerto Rico had a newly enacted horizontal property statute<sup>14</sup> which borrowed heavily from Cuban law.<sup>15</sup> Both Puerto Rico and Cuba, in turn, were strongly influenced by Spanish enactments.<sup>16</sup> The United States Federal Housing Authority drew extensively from the Puerto Rican statute when it constructed a set of guidelines on condominium ownership,<sup>17</sup> and the influence of

<sup>7</sup> For the text of this statute and a discussion of its provisions see E. KISCHINEWSKY-BROQUISSE, *STATUT DE LA COPROPRÉTÉ DES IMMEUBLES DIVISÉS PAR ETAGES OU PAR APPARTEMENTS* 21 (1958). See generally Leyser, *supra* note 2. Even before this French legislation, Belgium had adopted a special statute to supplement its article 664 provision in response to rapid condominium construction in Brussels. See Act of July 8, 1924, amending the Civil Code Belgium by adding art. 577 bis.

<sup>8</sup> See Leyser, *supra* note 2, at 35-37.

<sup>9</sup> *Id.*

<sup>10</sup> See FERRER & STECHER, *supra* note 1, at §§ 21, 23, 32.

<sup>11</sup> I. P. ROHAN & M. RESKIN, *CONDOMINIUM LAW AND PRACTICE* § 2.03 (1965) [hereinafter cited as ROHAN & RESKIN]. See Kerr, *supra* note 1, at 4. A survey taken in the last decade revealed that 80% of the commercial buildings in Rio de Janeiro and Sao Paulo, Brazil, were condominiums. BUS. WEEK, Mar. 23, 1963, at 72.

<sup>12</sup> FERRER & STECHER, *supra* note 1, at §§ 44, 45, 49, 50.

<sup>13</sup> See Kerr, *supra* note 1, at 4.

<sup>14</sup> P.R. LAWS ANN. tit. 31, §§ 1291-93(k) (1968).

<sup>15</sup> The Cuban model was chosen since the Puerto Rican and Cuban Civil Code and Mortgage Laws were similar, and thus the Cuban statute could be incorporated into Puerto Rican positive law with minimal amendment. FERRER & STECHER, *supra* note 1, at § 51.

<sup>16</sup> FERRER & STECHER, *supra* note 1, at §§ 50, 51.

<sup>17</sup> In 1958, to meet the demands posed by increasing population and a lack of usable urban land, Puerto Rico enacted its Horizontal Property Act. P.R. LAWS ANN. tit. 31, §§ 1291-93(k) (1968). Influenced in great measure by this statute, the United States Congress enacted section 234 of the National Housing Act of 1961, 12 U.S.C. § 1715y (1970), authorizing the FHA to insure condominium mortgages. Subsequent to section 234's

this model on subsequent state legislation in this country has been significant.<sup>18</sup>

This note will spotlight aspects of foreign condominium regulation that differ from our own, indicating possible areas of study for future United States legislation. Since the concept is relatively new in America, we may be able to benefit from analysis of the past efforts of more experienced lands. More current legislation is also worthy of note. The Australian condominium legislation, which was enacted contemporaneously with those in many states, has some particularly novel characteristics. The Canadian statutes were developed after our own and will be examined for possible reflections of prior American experience.

#### THE COMMON LAW CONDOMINIUM

While most countries have a statutory approach to condominium regulation, England remains an anomaly, retaining a common law "flat" ownership system. Although the basic condominium concept had long been acknowledged in English property law,<sup>19</sup> flat ownership was not extensive until after World War II. Today, the idea is widespread, with flats being sold in one of three ways: freehold, leasehold or cooperative.<sup>20</sup>

The major problem in the common law approach is that this "sale of flats" system . . . requires for its effectiveness the enumeration of a rather long list of easements and special covenants" in each individual transaction.<sup>21</sup> Whether these covenants are enforceable by and against third parties is not clear. While there has been little litigation surrounding flat ownership, apparently due to the fact that English solicitors have

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adoption, the FHA published a model statute illustrating what was thought to be the best framework within which to obtain the objectives of condominium ownership. FHA U.S. FEDERAL HOUSING ADMINISTRATION, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MODEL STATUTE FOR CREATION OF APARTMENT OWNERSHIP, FORM NO. 3285 (1962) reprinted in 1A ROHAN & RESKIN App. B-3.

<sup>18</sup> 1 ROHAN & RESKIN Introduction II-1.

<sup>19</sup> Scamell, *Legal Aspects of Flat Schemes*, 14 CURRENT LEGAL PROBLEMS 161, 165 (1961) [hereinafter cited as Scamell]. There is no doubt that separate ownership of units in a building is compatible with the common law. For an interesting and prophetic analysis, from a common law perspective, of the notion of owning "distinct strata of the landscape," see Ball, *Division into Horizontal Strata of the Landscape Above the Surface*, 39 YALE L.J. 616 (1930).

<sup>20</sup> Because English mortgagees believe that covenants in leases are easier to enforce than covenants of freeholders, they are more apt to lend money to one who is purchasing a leasehold flat. Therefore, not unexpectedly, leasehold flats are most prevalent. Scamell, *supra* note 19, at 164.

<sup>21</sup> FERRER & STECHER, *supra* note 1, at § 54. The employment of positive covenants running with the land may be particularly troublesome if the condominium is a high-rise building. Also, this approach is thought to be inadequate to face the problems posed by the destruction, obsolescence or appropriation of the building. See A. ROSENBERG, CONDOMINIUM IN CANADA, § 208.1 (1969) [hereinafter cited as ROSENBERG].

demonstrated ingenuity and care in the drafting of relevant documents, many authorities are urging the adoption of uniform condominium legislation.<sup>22</sup> Delineating in detail the legal dynamics of individual ownership would ease the prevailing uncertainty as to the nature, scope and obligations of flat ownership. Furthermore, comprehensive legislation would generate within financial circles confidence in flat ownership as a viable housing alternative, hence spurring future development.

#### STATUTORY APPROACHES TO CONDOMINIUM REGULATION

Condominium statutes enacted throughout the world are essentially similar.<sup>23</sup> Certain basic concerns pervade the various codes. Generally, the purchaser acquires individual ownership of his unit or apartment and a co-ownership interest in the development's common areas. The unit owners cannot partition the common areas. Because the success of a condominium depends upon cooperation, an organization plan expressing the condominium's rules, the manner of dividing the common expenses, and the method of managing the development is usually required. Finally, provisions enabling the commencement of legal actions against nonconforming owners and restrictions on the right to transfer individual units have been enacted to protect unit owners from undesirable neighbors.

#### *Nature and Extent of Ownership*

A condominium purchaser acquires a two dimensional ownership interest, *i.e.*, separate ownership of one's unit and co-ownership of the common areas. American statutes vary somewhat in their classification of the legal interest acquired,<sup>24</sup> some requiring that ownership be in fee simple absolute,<sup>25</sup> others allowing leasehold or subleasehold condominiums.<sup>26</sup> Statutes possessing the flexibility of the latter form are better suited to cope with the difficulties posed by the traditional rule prohibiting restraints on alienation. Foreign statutes also exhibit controversy in this area.<sup>27</sup> Nevertheless, the prevailing notion is that the

<sup>22</sup> FERRER & STECHER, *supra* note 1, at § 54(a). However, one authority suspects that, as long as the present system is "in fact running smoothly," legislation will not be forthcoming. Scamell, *supra* note 19, at 182.

<sup>23</sup> 1 ROHAN & RESKIN § 2.01. See D. CLURMAN & E. HEBARD, *CONDOMINIUMS AND CO-OPERATIVES* 3 (1970).

<sup>24</sup> 1 ROHAN & RESKIN § 5.01[3].

<sup>25</sup> See, *e.g.*, N.Y. REAL PROP. LAW § 339-e(11), (15) (McKinney 1968).

<sup>26</sup> See, *e.g.*, CAL. CIV. CODE § 783 (Deering 1971).

<sup>27</sup> Leyser, *supra* note 2, at 38. European countries with legal systems related to the French Code treat the interest as "a true right of ownership." However, those influenced by the German legal system are somewhat inclined to view the right as something less than full ownership. *Id.*

purchaser acquires title in fee, limited only by the rights of the other owners.<sup>28</sup>

A second concern relates to which dimension of ownership is to be deemed paramount. Most provisions follow the lead of the French Code and perceive the individual unit ownership right as supreme.<sup>29</sup> Others, such as Germany, stress the common area co-ownership factor.<sup>30</sup> Commentators generally favor the French approach.<sup>31</sup> What people find attractive in condominiums is the opportunity to own their own apartment without the accompanying chores of home ownership. However, they fear being too dependent upon the other owners. Hence, it is important that the communal dimension, a necessary concomitant of this form of ownership, remains secondary to the critical feature, *i.e.*, independent ownership of one's unit.

It must be noted in this regard that the purchaser of a foreign condominium may not necessarily be acquiring individual ownership of his apartment. In Israel, the state owns approximately 92 percent of the land and landholders usually have been granted a long-term lease.<sup>32</sup> Therefore, the purchaser of a unit in an Israeli condominium must carefully ascertain the exact nature of the property right being acquired.<sup>33</sup> Mexico, the scene of a recent boom in resort condominiums (particularly in Acapulco), strictly regulates foreign ownership of real property.<sup>34</sup> Due to a provision in the Mexican constitution, foreigners cannot own property within one hundred kilometers of the country's international borders nor within fifty kilometers of its coasts.<sup>35</sup> However, to stimulate foreign investment, a decree was published in 1971 which provides a method for foreigners to acquire long-term use, but not ownership, of real property in the proscribed areas.<sup>36</sup> Therefore, a

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<sup>28</sup> FERRER & STECHER, *supra* note 1, at § 74.

<sup>29</sup> Leyser, *supra* note 2, at 38.

<sup>30</sup> *Id.* at 39.

<sup>31</sup> I ROHAN & RESKIN § 5.02.

<sup>32</sup> I CONDOMINIUM REP., June 1973, at 1. The lease concept is gathering favor in the United States, particularly in the commercial area.

<sup>33</sup> It has been said that "the difference between owning an apartment in a condominium and having a long-term lease lies mainly in the way in which the rights are transferred." *Id.* at 1-2.

<sup>34</sup> For a discussion of recent developments in Mexican law applicable to purchasing a condominium, see HOUSE & HOME, Aug. 1973, at 32, 34.

<sup>35</sup> Article 27(I) stipulates that:

Under no circumstances may foreigners acquire direct ownership of lands or waters within a zone of one hundred kilometers along the frontiers and of fifty kilometers along the shores of the country.

Constitution of Mexico 1917 (as amended), 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Flanz eds. 1971).

<sup>36</sup> See HOUSE & HOME, Aug. 1973, at 32, 34.

non-Mexican purchaser of a condominium, pursuant to this trust arrangement, acquires a firm but incomplete interest in the property.

### *Management*

Obviously, cooperation is vital for a successful condominium venture. Therefore, legislation, whether here or abroad, usually requires that the unit owners be organized into an association or corporate body for the purpose of determining how the condominium will function on an economic and social level.<sup>37</sup> Provisions like those in the New South Wales Act, which decree that the unit owners, upon registration of the strata plan, shall constitute a corporate body, touch upon a controversial issue.<sup>38</sup> Most American authorities do not favor statutes rendering the group of unit owners a legal entity,<sup>39</sup> although the corporate approach has been offered as a means of lessening the unit owner's unlimited tort liability risk.<sup>40</sup> Lacking capital assets, the membership corporation would be an empty device, probably incapable of serving a useful function or satisfying the management demands of the condominium.

At any rate, foreign enactments, as well as American legislation, permit unit owners, whether they be organized as a corporation or an association, to work out the precise details of their governing scheme.<sup>41</sup> Because condominiums vary greatly in size and nature, it is preferable that methods of assigning voting rights, amending bylaws and setting quorum and voting requirements be left to the determination of unit owners.

Sometimes, a statutory mandate for majority action may cause disruption, particularly in a large condominium.<sup>42</sup> However, it is probably desirable to require approval by a certain percentage of the unit owners when the condominium's managers face major decisions, such as

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<sup>37</sup> See, e.g., N.Y. REAL PROP. LAW § 339-v(1)(a) (McKinney 1968) stating that the bylaws shall provide for the nomination and election of a board of managers. Pursuant to art. 14 of the French statute, the owners are by law organized into a "syndicat." Statute of July 10, 1965, [1965] J.O. Ferrer and Stecher note that, although the "syndicat" is not expressly stated to be a juridical entity, authorities generally assert that it does possess a juridical personality. FERRER & STECHER, *supra* note 1, § 72.

<sup>38</sup> The Conveyancing (Strata Titles) Act No. 17, as amended by Act No. 55 of 1961, N.S.W., § 14(1)(a) (Austl.).

<sup>39</sup> 1 ROHAN & RESKIN § 10A.03[1].

<sup>40</sup> For accounts approving adoption of incorporation of common elements, see Knight, *Incorporation of Condominium Common Areas?—An Alternative*, 50 N.C.L. REV. 1 (1971); Note, *Condominiums: Incorporation of the Common Elements—A Proposal*, 23 VAND. L. REV. 321 (1970).

<sup>41</sup> See, e.g., ch. 2 art. 6 of the Spanish condominium statute providing that the owners may fix rules to "govern the details of co-existence." Act of July 21, 1960 (B.O. July 23, 1960) (Spain).

<sup>42</sup> 1 ROHAN & RESKIN § 5.04.

extensive renovation or termination. Addressing itself to this problem, the Bahama Islands statute stipulates that the condominium cannot be partitioned unless at least ninety percent of the unit owners approve the proceeding.<sup>43</sup>

While all owners may have a voice in the management of the condominium, votes will be weighed in one of various ways, depending upon the system used. Usually, voting power will be based on the monetary value of the voter's unit in proportion to the total value of all the units.<sup>44</sup> Occasionally, however, floor area is the critical factor.<sup>45</sup> The Israeli law, providing that each unit owner has an equal vote, regardless of his unit's area or value, denotes a distinctively democratic quality.<sup>46</sup>

### *Common Elements and Expenses*

Most foreign codes adhere to the prevalent American approach requiring filing of a detailed enumeration of the common parts,<sup>47</sup> although occasionally a statute will merely require a brief mention of the common elements.<sup>48</sup>

Secondly, analogous to the allocation of weight given a unit owner's vote, not all legal systems mandate that one's share in the common elements (and thus in the expenses generated) be based on the proportionate value of one's apartment in relation to the entire development. At times, as has been noted, floor area is the measure.<sup>49</sup>

Using floor area renders unnecessary periodic reappraisals of each unit's value. However, floor area may not coincide with value in some buildings. A unit with a smaller floor area may have a higher value than

<sup>43</sup> The Law of Property and Conveyancing (Condominium) Act No. 30 of 1965, § 30(1) (B.I.).

<sup>44</sup> See, e.g., C. Civ. art. 1118 (M. Beltramo, G. Longo & J. Merryman transl. 1969) (Italy).

<sup>45</sup> See, e.g., art. 5 of the Spanish statute, Act of July 21, 1960 (B.O. July 23, 1960) (Spain).

<sup>46</sup> The Land Law, Model Rules for the Owners of the Dwellings in a Cooperative House 13(b) (1969) (Israel). A recent study by one Israeli authority disclosed that:

The allocation of voting powers in the general meeting equally among the tenants, ignoring differences in the sizes or values of the apartments, was also found to correspond to what the tenants considered desirable. The small number of instances in which this arrangement was changed evidences this fact.

J. WEISMAN, *THE CONDOMINIUM LAW: A STUDY OF ITS OPERATION* 95-96 (1970) [hereinafter cited as WEISMAN].

<sup>47</sup> See, e.g., the Mexican and Italian statutes, which list in detail within the legislation itself the common parts of a development. Decree of Dec. 2, 1954, [1954] D.O., implementing art. 951 of the C. Civ. ch. 2, art. 12, 13 (Mex.); C. Civ. art. 1117 (M. Beltramo, G. Longo & J. Merryman transl. 1969) (Italy).

<sup>48</sup> The Bahama Islands legislation merely explains that "'common property' means so much of the property which, upon the recording of a Declaration, is not contained within the boundaries of any unit." The Law of Property and Conveyancing (Condominium) Act No. 30 of 1965, § 3 (B.I.).

<sup>49</sup> See text accompanying notes 44-45 *supra*.



a larger one due to its preferable location within the building. If the idea is to have the owners of the more valuable units bear a higher share of the common expenses and, concomitantly, obtain a greater voice in the condominium's management, floor area will often be an inappropriate measure.

Thirdly, few foreign statutes are concerned with the relative usefulness of a particular common item to one or more unit owners.<sup>50</sup> In this respect, the Italian Code's allocation of expenses for common parts or services in proportion to their usefulness to each individual is quite exceptional.<sup>51</sup> It also provides that a stairway's maintenance and reconstruction expenses are to vary according to the value and height of each story.<sup>52</sup> The Israeli law permits the unit owner, upon acquiring unanimous approval, to attach parts of the common elements that are not used by all unit owners.<sup>53</sup> Once attached, the area, which might be a parking space or a section of a garden, for example, loses its "common" dimension and becomes part of the unit to which it is attached.

Finally, American statutes provide that the lien which attaches to each unit for the cost of labor and material expended by third parties on the common elements at the behest of the association may be removed from an apartment by the payment of one's fractional share of the total amount.<sup>54</sup> The foreign statutes that were examined do not consider this problem. In the absence of legislation, unit owners, if members of an association, may be deemed to be jointly and severally liable on the contract. Hence, a unit owner's liability may extend beyond his percentage interest.

### *Instruments for Creating a Condominium*

An unusual aspect of foreign condominium law is that the recording of the declaration or master deed is not generally required.<sup>55</sup> In opposition is the common American requirement that the declaration,

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<sup>50</sup> The statutes usually do not specify that each owner *must* contribute in proportion to his interest in the common elements toward repairing an item of relative usefulness, for example, an elevator. Such matters are open to agreement among the owners.

<sup>51</sup> C. Civ. art. 1123 (M. Beltramo, G. Longo & J. Merryman transl. 1969) (Italy). European statutes draw a distinction between repairs and improvements. See C. Civ. art. 1121 (M. Beltramo, G. Longo & J. Merryman transl. 1969) (Italy), providing that a dissenting owner cannot be compelled to contribute to pay for expensive or luxurious alterations. See also N.Y. REAL PROP. LAW § 339-1(2) (McKinney 1968) providing that a lien cannot be filed against the unit of an owner who did not consent to the performance.

<sup>52</sup> C. Civ. art. 1124 (M. Beltramo, G. Longo & J. Merryman transl. 1969) (Italy).

<sup>53</sup> The Land Law § 41 (1969) (Israel). Frequent use has been made of this registration of attachments provision. WEISMAN, *supra* note 46, at 96.

<sup>54</sup> See FERRER & STECHER, *supra* note 1, at § 117(b).

<sup>55</sup> *Id.* § 84.

bylaws and unit deeds be recorded.<sup>56</sup> For the most part, while "[r]ecording is, of course, contemplated, and is in fact quite extensively regulated . . . it is not generally made mandatory"<sup>57</sup> in other countries. Israel, however, has a strict requirement that, unless a deed is registered in the official land registry, the purchaser of an apartment in a condominium has merely a contractual right.<sup>58</sup>

The American statutes, seeking "to regulate matters such as building maintenance, budgeting, assessment and collection, capital improvements, and occupant control" list specifics to be included within the condominium's bylaws.<sup>59</sup> However, reasoning that major differences exist among condominiums which preclude standardization of bylaws, the statutes usually pursue a flexible approach regarding content.<sup>60</sup> Foreign acts demonstrate a similar attitude.<sup>61</sup>

### *Termination*

The American condominium owner is barred from bringing an action to divide or partition the common areas.<sup>62</sup> This prohibition has an international character,<sup>63</sup> although limited exceptions are present. The Italian Code allows a division of the common property among one or more unit owners as long as it may be accomplished without adversely affecting any of the other owners.<sup>64</sup> The Israeli attachment provision, discussed above, is, in effect authorization for a limited form of termination.<sup>65</sup>

Most statutes, whether foreign or American, permit a voluntary termination of the project, usually contingent on approval by all or a specified majority of the owners.<sup>66</sup> Those holding claims against the con-

<sup>56</sup> See, e.g., N.Y. REAL PROP. LAW § 339-s (McKinney 1968), providing that neither the declaration nor any amendment "shall be valid unless duly recorded."

<sup>57</sup> FERRER & STECHER, *supra* note 1, at § 84.

<sup>58</sup> The Land Law § 7(b) (1969) (Israel) provides that "[a] transaction which has been completed by registration shall be regarded as an undertaking to effect a transaction."

<sup>59</sup> Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 1006 (1963).

<sup>60</sup> See, e.g., N.Y. REAL PROP. LAW § 339-v(1) (McKinney 1968).

<sup>61</sup> See, e.g., ch. 4, art. 33 of the Mexican statute, Decree of Dec. 2, 1954, [1954] D.O., implementing art. 951 of the C. Civ.

<sup>62</sup> See, e.g., N.Y. REAL PROP. LAW § 339-i(3) (McKinney 1968), providing that no right to partition the common elements exists except upon termination of the condominium pursuant to § 339-t.

<sup>63</sup> See, e.g., ch. 1, art. 1 of the Spanish statute which states that the commonly owned property cannot be subdivided. Act of July 21, 1960 (B.O. July 23, 1960) (Spain).

<sup>64</sup> C. Civ. art. 1119 (M. Beltramo, G. Longo & J. Merryman transl. 1969) (Italy). The usual rule is that the common area cannot be partitioned, but an exception is made, as stated in the text, where there is no need for these elements by the other owners.

<sup>65</sup> See text accompanying note 53 *supra*.

<sup>66</sup> See, e.g., The Condominium Act of 1967, Ont. C. 12, s. 20(1) (Can.), providing that if 80%, or any higher percentage stated in the declaration, favor termination, the property

dominium must also acquiesce in the termination. Since the legislators' goal is to preserve the continuity of the condominium, it is wise to require a unanimous or near-unanimous resolution before termination be permitted.

### *Control*

Foreign and American statutes restrict, in varying detail, the behavior of unit owners.<sup>67</sup> Generally, the provisions are designed for flexibility, the intent being to authorize the condominium association to enact and enforce rules promoting compatibility within the development.<sup>68</sup> Because enforcement problems may arise, many acts specify the legal avenues accessible to the association in an action against a unit owner or lessee.

The Mexican statute provides that an owner who refuses to adhere to the agreed-upon obligations of ownership may be compelled to sell his rights at a public auction.<sup>69</sup> To pursue this action, the association must have the prior approval of three-quarters of the remaining owners. If the violator is a tenant of a unit owner, the administrator, having obtained the approval of three-quarters of the owners, may bring an action against the owner to force him to have the premises vacated.<sup>70</sup>

Foreign statutes do not impose any significant limitations on an owner's ability to freely alienate his property.<sup>71</sup> However, the common American practice of granting to the condominium association a right of first refusal is sanctioned in certain foreign jurisdictions as well.<sup>72</sup> The Ontario and Manitoba statutes, for example, adopt a *laissez-faire* approach by simply providing that a declaration may contain a provi-

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may be withdrawn from the Act. See ROSENBERG, *supra* note 21, at § 904.3 for a discussion of the inequities that might result when consent is not unanimous.

<sup>67</sup> N.Y. REAL PROP. LAW § 339-j (McKinney 1968), requires that a unit owner "comply strictly" with the bylaws and with the rules and regulations adopted pursuant to the bylaws. A similar European requirement is found in the Italian statute, wherein it is declared that decisions reached at a membership meeting are binding on all unit owners. C. Civ art. 1137 (M. Bertramo, G. Longo & J. Merryman transl. 1969) (Italy). For a discussion of various bylaw provisions and their enforcement in the United States, see Note, *Promulgation and Enforcement of House Rules*, *infra*.

<sup>68</sup> Risk, *Condominiums and Canada*, 18 U. TOR. L.J. 1, 46 (1968) [hereinafter cited as Risk] wherein the author observed that "[t]he interdependence of the owners and the units, and the general appeal of a 'planned' development are the justifications for permitting the developer and the owners to impose restrictions on use and occupancy."

<sup>69</sup> Decree of Dec. 2, 1954, [1954] D.O., implementing art. 951 of the C. Civ. ch. 6, art. 43 (Mex.).

<sup>70</sup> *Id.* at ch. 6, art. 42.

<sup>71</sup> The German statute, however, does contain a stricter limitation on the ability to dispose of one's rights by requiring that the other unit owners must consent to the transfer. However, there must be an "important reason" for withholding consent. Leyser, *supra* note 2, at 39.

<sup>72</sup> FERRER & STECHER, *supra* note 1, at § 94.

sion restricting the sale or transfer of units.<sup>73</sup> Pursuant to the Mexican statute, although an owner need not solicit the consent of the other owners before embarking on the sale of his unit, he must give notice to a lessee of his unit, should one exist, of an intent to sell, together with the price and conditions of the sale.<sup>74</sup> Within ten days, the lessee must exercise his right of first refusal. A lessee who has not given the requisite notice may, within fifteen days after becoming aware of the unit's alienation, tender the requisite purchase price and be substituted as purchaser.

### *The Rights and Liabilities of Unit Owners*

Certain universal problems arise when a group of people owns part of a building individually and shares ownership of the remaining areas. The extent of individual tort liability and insurance coverage present major areas of concern. At present these issues are largely unsettled both in America and elsewhere, but some foreign legislators have developed noteworthy schemes.

Generally, foreign codes do not express in clear fashion the extent of an individual owner's possible tort liability.<sup>75</sup> Bound together in a common venture, the unit owners are, at least in theory, jointly and severally liable for tortious conduct in respect to the project's common areas,<sup>76</sup> but the statutes do not address themselves to this point. Also unresolved is the question of whether one owner may sue another or the association itself in tort. Commentators stress the need for specific legislation in these areas.<sup>77</sup>

One possible approach, followed in the Ontario and Manitoba Acts, is to specify that the corporation alone, and not the individual owner, will be liable for torts arising out of an occupier's negligence.<sup>78</sup>

<sup>73</sup> The Condominium Act of 1967, Ont., c. 12, s. 3(2)(d) (Can.); The Condominium Act of 1968, Man. c. 10, s. 5(2)(d) (Can.). See REPORT OF ONTARIO LAW REFORM COMMISSION ON THE LAW OF CONDOMINIUM 12 (1967) commenting that the most acceptable restraint would be a right of first refusal given to the corporation.

<sup>74</sup> Decree of Dec. 2, 1954, [1954] D.O. (Mex.).

<sup>75</sup> The New South Wales legislation provides that the corporate body may be sued in tort "in respect of any matter connected with the parcel for which the proprietors are jointly liable." See The Conveyancing (Strata Titles) Act No. 17 of 1961, N.S.W., § 14(5)(c) (Austl.), reprinted in A. RATH, P. GRIMES & J. MOORE, STRATA TITLES 35 (1962) [hereinafter cited as RATH].

<sup>76</sup> See 1 ROHAN & RESKIN § 10A.03; Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 995 (1963); Kerr, *supra* note 1, at 41-42.

<sup>77</sup> ROSENBERG, *supra* note 21, at § 708; 1 ROHAN & RESKIN § 10A.05. American purchasers of foreign condominiums must be careful to limit their liability, where possible, particularly if the condominium will be run on a rental pool arrangement. The large number of nonowner users may result in greater carelessness and, ultimately, more accidents.

<sup>78</sup> The Condominium Act of 1967, Ont., c. 12, s. 7(12) (Can.); The Condominium Act of 1968, Man., c. 10, s. 8(11) (Can.).

However, since condominium owners are rarely organized into corporate entities, this solution is not available in most American states.<sup>79</sup> Also, providing by statute that the corporate body may be sued in tort does not necessarily immunize the unit owner from suit.<sup>80</sup> The corporate veil may always be pierced if the sole reason for incorporating is to escape liability.

Various foreign enactments, directed at the complex and unsettled casualty insurance area, have been the source of innovative and progressive ideas.<sup>81</sup> The owner's desire to adequately protect his apartment and the association's aim of sheltering the common elements, while seemingly complementary goals, may lead to conflicts where independent insurance remedies are sought. Unless both plans are carefully integrated, too much or too little coverage may be the result. Many commentators argue that, from an economic and social perspective, insuring the entire condominium by purchasing a master policy furnishes the most effective coverage.<sup>82</sup>

Under various Canadian statutes, which mandate incorporation by the unit owners, the corporation is required to insure the development at replacement value.<sup>83</sup> The demand that the corporation purchase the insurance is consonant with the theory that a condominium, as a co-ownership undertaking, must be protected against risks that might result in termination. Where the corporate form does not exist, foreign statutes do not appear to consider the purchase by the association unlawful, even though the association does not have a legal property interest in the common elements.<sup>84</sup>

<sup>79</sup> *But see Note, Condominiums: Incorporation of the Common Elements—A Proposal*, 23 VAND. L. REV. 321 (1970), wherein the author argues that unit owner liability exposure might be eliminated by forming a separate corporation to hold and manage the common elements.

<sup>80</sup> *See RATH, supra* note 75, at 36-37, wherein the author discusses this problem under the New South Wales legislation, The Conveyancing (Strata Titles) Act No. 17 of 1961, N.S.W., § 14(5)(c) (Austl.).

<sup>81</sup> One such provision in the Israeli law was recently changed, however. The requirement that the condominium be insured as a unit against fire was repealed after it was found that most condominiums had ignored it. WEISMAN, *supra* note 46, at 97, 103.

<sup>82</sup> *See Ellman, Fundamentals of Condominium and Some Insurance Problems*, 1963 INS. L.J. 733, 737. *But see Risk, supra* note 68, at 59-60, observing:

The general interest in flexibility and the variety of reasonable possibilities are powerful reasons to include in the legislation only any grants of power or capacity that are considered necessary to achieve an adequate programme, and to leave the details and the obligation to the developer and the owners.

<sup>83</sup> The Strata Titles Act of 1966, B.C., c. 46, s. 14(1) (Can.); The Condominium Property Act of 1966, Alta., c. 19, s. 21 (Can.); The Condominium Property Act of 1968, Sask., c. 14, s. 21 (Can.).

<sup>84</sup> American legislatures have overcome this problem by specifically authorizing the association to purchase a master casualty policy. *See, e.g.,* N.Y. REAL PROP. LAW § 339-bb (McKinney 1968). *See also Risk, supra* note 68, at 57-58.

Once the insurance coverage is adequately effected, the problem of applying the proceeds after casualty occurs still remains. Some foreign codes specify that, unless the owners agree otherwise, the money must be used to reconstruct the damaged building.<sup>85</sup> A problem is posed by the traditional right of a mortgagee to have the proceeds applied to reduce any amount remaining due on the mortgage. Commentators have warned that "exercise of [the mortgagee's option to pre-empt insurance proceeds] by a single lender may adversely affect every unit owner in the project."<sup>86</sup> Therefore, the Canadian legislation mandating that the corporation expend the insurance proceeds to repair and reconstruct is a positive approach.<sup>87</sup>

In the New South Wales Act, a unique compromise approach has been devised to solve the insurance dilemma.<sup>88</sup> The entire building or development is insured by a master policy purchased by the corporation. Concurrently, the individual owner may purchase insurance for his unit to the extent necessary to cover any mortgage debt. Lastly, the insurance carrier is assigned the mortgage or a sub-mortgage valued at the sum paid to the mortgagee. Because the draftsmen sought to encourage rebuilding, they provided for insuring the entire condominium. Permitting the individual unit owner to insure his part of the building creates a double insurance situation. To alleviate insurers' fears that the owner will have an incentive to destroy his unit, the provision subrogating the insurer to the mortgagee's rights was enacted.<sup>89</sup>

### *Destruction, Obsolescence and Eminent Domain*

Although the condominium concept was well established on the foreign housing scene long before its emergence in America, adequate attention has not been paid in the foreign codes to the problems posed by the destruction, deterioration or governmental appropriation of any part of the development. Although these areas have been considered

<sup>85</sup> See, e.g., C. Civ art. 1128 (M. Beltramo, G. Longo & J. Merryman transl. 1969) (Italy), providing that insurance proceeds "paid relative to the common parts are destined for their reconstruction."

<sup>86</sup> I ROHAN & RESKIN § 11.06[4].

<sup>87</sup> ROSENBERG, *supra* note 21, at § 1004 proposes that the mortgagee be compelled to waive the right to use the proceeds to satisfy the mortgage. He points out that the mortgagee should have the unit owner purchase a special policy for the mortgagee's benefit.

<sup>88</sup> The Conveyancing (Strata Titles) Act No. 17 of 1961, N.S.W., §§ 17(1), 17(2) (Austl.). See I ROHAN & RESKIN § 11.06[4].

<sup>89</sup> See RATH, *supra* note 75, at 46:

Section 17 represents a compromise between the views of mortgagees and insurers. Apparently the views of strata dwellers are unrepresented . . . It aims to remove the dangers inherent in double insurance by a species of subrogation of the insurer to the mortgagee's rights. All that a proprietor achieves by wilfully destroying his lot is a change in the identity of his mortgagee.

in general, no remarkable schemes have been promulgated.<sup>90</sup> Commentators have observed the effective use of arbitration to resolve certain destruction and obsolescence problems.<sup>91</sup> Otherwise, the legislation is apparently similar to American statutes, focusing primarily on the establishment and proper functioning of the condominium, and giving little consideration to what will occur when a building, either for physical, social or economic reasons, is no longer an attractive investment.<sup>92</sup>

An exception to the rule is article 1128 of the Italian Code.<sup>93</sup> Addressing the problems posed by the total or partial destruction of a building, it declares that if the value of the building is reduced by three-quarters or more, a member may demand that the land and materials be disposed of at an auction sale. If a lesser degree of destruction occurs, the unit owners must meet and decide whether to reconstruct. If reconstruction is favored, any owner who is unwilling to participate must transfer his rights to the group or to certain of the owners. Lastly, the proceeds recovered from insuring the common areas are to be allocated toward meeting the reconstruction costs.

Concerning the deterioration of a building to the point of obsolescence, the Mexican Code provides that a majority of the owners may decide to reconstruct or to sell the building.<sup>94</sup> If the choice is reconstruction, a dissenting minority cannot be compelled to share the cost. However, the majority is authorized to respond by acquiring the ownership interest of the minority at a price determined by judicial appraisal.

Few foreign codes even consider the questions and problems, far from remote, encountered by a public taking of all or part of the condominium's land.<sup>95</sup> If the expropriation is complete, how will com-

<sup>90</sup> Foreign legislation usually contains some provisions applicable in the event of partial or total destruction. See Leyser, *supra* note 2, at 45. However, while providing for the percentage of the owners necessary to support reconstruction, or for the percentage of the building which must be destroyed to permit termination, few address in any detail other pertinent considerations such as the rights of minority owners, how refinancing may be obtained to enable major repairs, or how insurance proceeds may best be allocated to serve the needs of all unit owners.

<sup>91</sup> See Leyser, *supra* note 2, at 50; note 92 *infra*.

<sup>92</sup> Professor Rohan believes that American legislatures followed the Puerto Rican statute too closely, and failed to explore some of the approaches developed by foreign legislators. He notes that "the roles of arbitration machinery and judicial proceedings," utilized abroad, have been neglected in America. Rohan, *Drafting Condominium Instruments: Provisions for Destruction, Obsolescence and Eminent Domain*, 65 COLUM. L. REV. 593, 624 (1965).

<sup>93</sup> C. Civ. art. 1128 (M. Beltramo, G. Longo & J. Merryman transl. 1969) (Italy).

<sup>94</sup> Decree of Dec. 2, 1954, [1954] D.O., at ch. 7, art. 47 (Mex.).

<sup>95</sup> See ROSENBERG *supra* note 21, at § 903 for an analysis of the problems posed when condominium property is either partially or totally condemned. The Brazil statute avoids the difficulties surrounding partial condemnation by permitting appropriation of

pensation be paid? If it is partial, how will the ownership interests in the common elements be affected? If an owner's unit is taken, how will his entire interest be valued?<sup>96</sup> These are vital questions that remain to be answered by most legislatures.

Since a single statutory solution may not suffice,<sup>97</sup> one desirable approach may be found in the New South Wales statute.<sup>98</sup> Pursuant to section 19, when a building is damaged (and presumably expropriation would fall within this provision as having a "damaging" effect) but not completely destroyed, the court, upon application by the corporation, a proprietor or a registered mortgagee, may determine whether the building should be reconstructed in whole or in part, and whether the interests of the unit owners affected by the destruction should be conveyed to the remaining owners.<sup>99</sup> The court is authorized to issue necessary and expedient orders.<sup>100</sup>

### CONCLUSION

Examination of foreign approaches to condominium regulation indicates areas which might merit consideration by American legislators.

First, we might study the feasibility of forming the unit owners into a corporate body and/or incorporating the common areas. However, efficient management can be attained under the direction of a unit owners' association or through professional agents employed by the association. Adequate insurance schemes are available to protect the unit owners from tort liability. However, incorporation may be a

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all, but not part, of a condominium. Law of June 25, 1928, Decree No. 5.491, art. 7, [1928] Coleção 108.

<sup>96</sup> One commentator urges that fair apportionment of insurance and condemnation proceeds among the condominium unit owners must be assured. Since original sales prices may not be an equitable criteria, consideration should be given either to distribution on the basis of current value or to allowing courts to determine the distribution of condemnation and casualty insurance proceeds, and to make any other amendments to common interests as they see fit in any given situation. Schreiber, *The Lateral Housing Development: Condominium or Home Owners Association?*, 117 U. PA. L. REV. 1104, 1158 (1969) [hereinafter cited as Schreiber].

<sup>97</sup> See 1 ROHAN & RESKIN § 12.04[5].

<sup>98</sup> The Conveyancing (Strata Titles) Act No. 17 of 1961, N.S.W., §§ 19(3)(a), 4 (Austl.).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* § 19(3)(b). The following orders are specified in the statute:

- (i) directing the application of insurance moneys received by the body corporate in respect of damage to the building;
- (ii) directing payment of money by the body corporate or by proprietors or by some one or more of them;
- (iii) directing such amendment of the strata plan as the Court thinks fit, so as to include in the common property any accretion thereto;
- (iv) imposing such terms and conditions as it thinks fit.



vehicle for financing capital improvements in a way that would not pose undue hardship on the unit owners.<sup>101</sup>

Second, changes in the insurance area may be in order. Foreign legislators have evolved approaches providing extensive coverage without overburdening any one party. The New South Wales plan offers a plausible alternative. The allocation of the proceeds of a casualty policy should be clarified by statute. An individual who purchased a unit for \$50,000 in year ten possesses the same undivided interest as one who paid \$20,000 for his unit in year one. Should each receive the same sum when the proceeds of an insurance policy are distributed? How both might be protected,<sup>102</sup> and when and how the proceeds should be used for reconstruction, are questions that have not yet been completely answered. Nevertheless, some of the foreign procedures that have been designed to alleviate these problems may offer some help to American legislators.

Third, the area of eminent domain and destruction also requires more thought, both here and abroad, but the New South Wales attempt to grapple with this concern may be the best current source of ideas.<sup>103</sup>

Fourth, more specific judicial and/or administrative procedures are necessary to facilitate the enforcement of rules, the settlement of disputes and the regulation of condominium development. Some foreign legislators have forged ahead in this area.<sup>104</sup>

Lastly, innovative approaches relating to common areas have been employed in other countries, and should be considered. The Israeli attachment provision, if used when appropriate, would lessen common expenses as the benefitted unit owner acquires sole responsibility for the care of the property he appropriates.

Also, the idea of allocating expenses generated by elements of the common property, such as elevators and staircases, based on relative usefulness, is interesting. Concededly, among American owners no outcry has arisen and perhaps unit owners do not find present allocations

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<sup>101</sup> One commentator argues that the larger condominium could benefit substantially from creating a corporation and leasing the common areas to the corporation. The legal fees arising out of this transaction would not burden a large group of unit owners, especially when balanced against the potential benefits: a limiting of individual liability and increased ability to finance capital improvements. Knight, *Incorporation of Condominium Common Areas? — An Alternative*, 50 N.C.L. REV. 1, 20 (1971).

<sup>102</sup> One solution would be to mandate that the proceeds "be distributed in accordance with the value of units at the time of [the destruction] . . ." Schreiber, *supra* note 96, at 1119. Another approach, although not very feasible in a high-rise building, would be "for each unit to maintain a separate policy of casualty insurance." *Id.*

<sup>103</sup> See Rohan, *Drafting Condominium Instruments: Provisions for Destruction, Obsolescence and Eminent Domain*, 65 COLUM. L. REV. 593, 620-21 (1965).

<sup>104</sup> See, e.g., THE LAND LAW §§ 72-77 (1969) (Israel), wherein detailed steps for dispute settlement are set forth.

unfair. Furthermore, many common elements are of unequal usefulness, rendering a precise allocation virtually impossible. Nevertheless, some degree of apportionment of common expenses measured by relative usefulness is worth consideration.<sup>105</sup>

Clearly, the foreign condominium scene provides a variety of approaches to problems universally encountered and warranting attention. To be sure, the need for constant revision and expansion of condominium legislation exists in countries other than our own, even where the condominium experience is not as new as ours. However, American legislators would do well to keep abreast of the new developments arising in some of the more innovative countries in this ever-expanding field of legislation.

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<sup>105</sup> One authority recommends that

[c]ondominium legislation should permit the fixing of any equitable basis for determination of the interest, vote and share of expenses for each unit. The common interest should not be fixed solely according to the original sales price, nor should there be a compulsory tie-in between the apportionment of voting power, sharing of expenses, and interests in distribution of assets. Equalization of voting power and sharing of assessments among all units should be permitted regardless of differentials in values or sizes of units.

Schreiber, *supra* note 96, at 1158.