

The Institutions of Property

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Motivation

- H. de Soto: Blueprints lost!?
 - Gap in knowledge
 - ◆ Descriptive studies lack understanding of fundamentals
 - ◆ Law and Law & Econ: fragmented & local
 - mainly Calabresi & Melamed'72, Baird & Jackson'84, Rose'88, Heller'99, Merrill & Smith'00, Hansmann & Kraakman'02
 - Goal: “Reverse Engineering” of property institutions
- This presentation is based on 4 papers:
- ◆ Mainly, “Property Enforcement as Organized Consent” (*JLEO*, 2003)
 - ◆ “Role of Title Insurance in Different Systems” (*GPRI*, 2001)
 - ◆ “Judicial Rulemaking in Western Law” (*Handbook NIE*, 2004)
 - ◆ “Economics of Notaries” (*EJLE*, 1996)

Two types of rights

- *Real* rights

 - i.e., *in rem*—“property rights” in USA law

 - ◆ Valid against all persons
 - ◆ “Run” with the asset

- *Contractual* rights (personal)

 - ◆ Valid against specific persons
 - ◆ Do not run with the asset

Real rights: problem & solution

■ Trade-off

- ◆ Enforcement advantage: *consent* of rightholder required for a right to be damaged
 - Value depends on asset's nature: e.g., land vs. intangibles
- ◆ Transaction costs: when rights may survive transactions uninformed parties are reluctant to transact

■ Solution:

organize the gathering of *consents* →
publicity required for a right to be a real right

- ◆ But two problems: organization & enforcement

Example: Mortgage

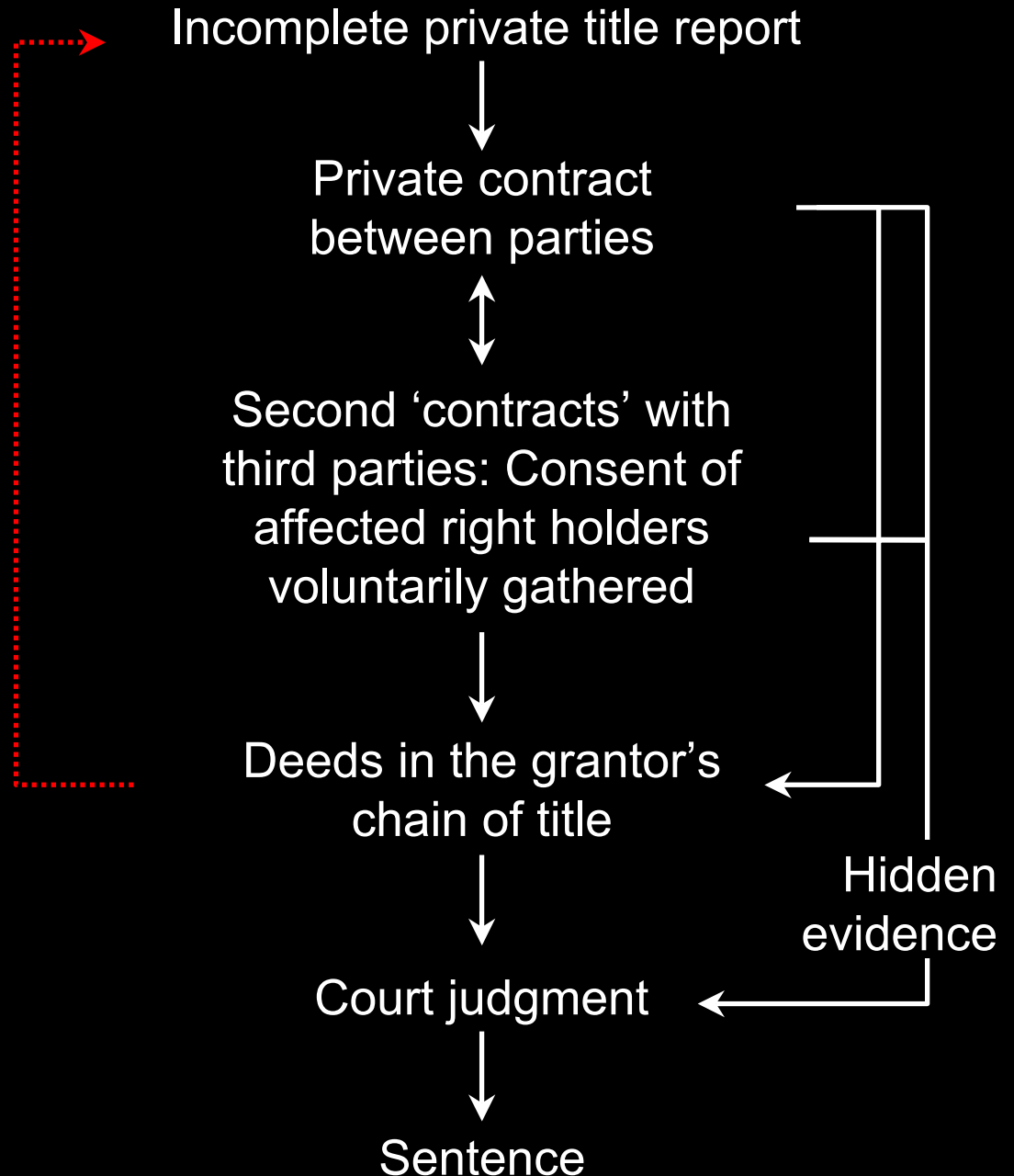
- Trade-off
 - ◆ Enforcement advantage: no default risk
 - ◆ Transaction cost: if hidden mortgage enforced, reluctance to buy, or to lend even with mortgage
- Solution: publicity required for a mortgage to be enforced → 2nd lender or buyer requires 1st mortgage removed. Difficulties:
 - ◆ Organizing publicity
 - ◆ Enforcing execution

First Part: Organizing Publicity

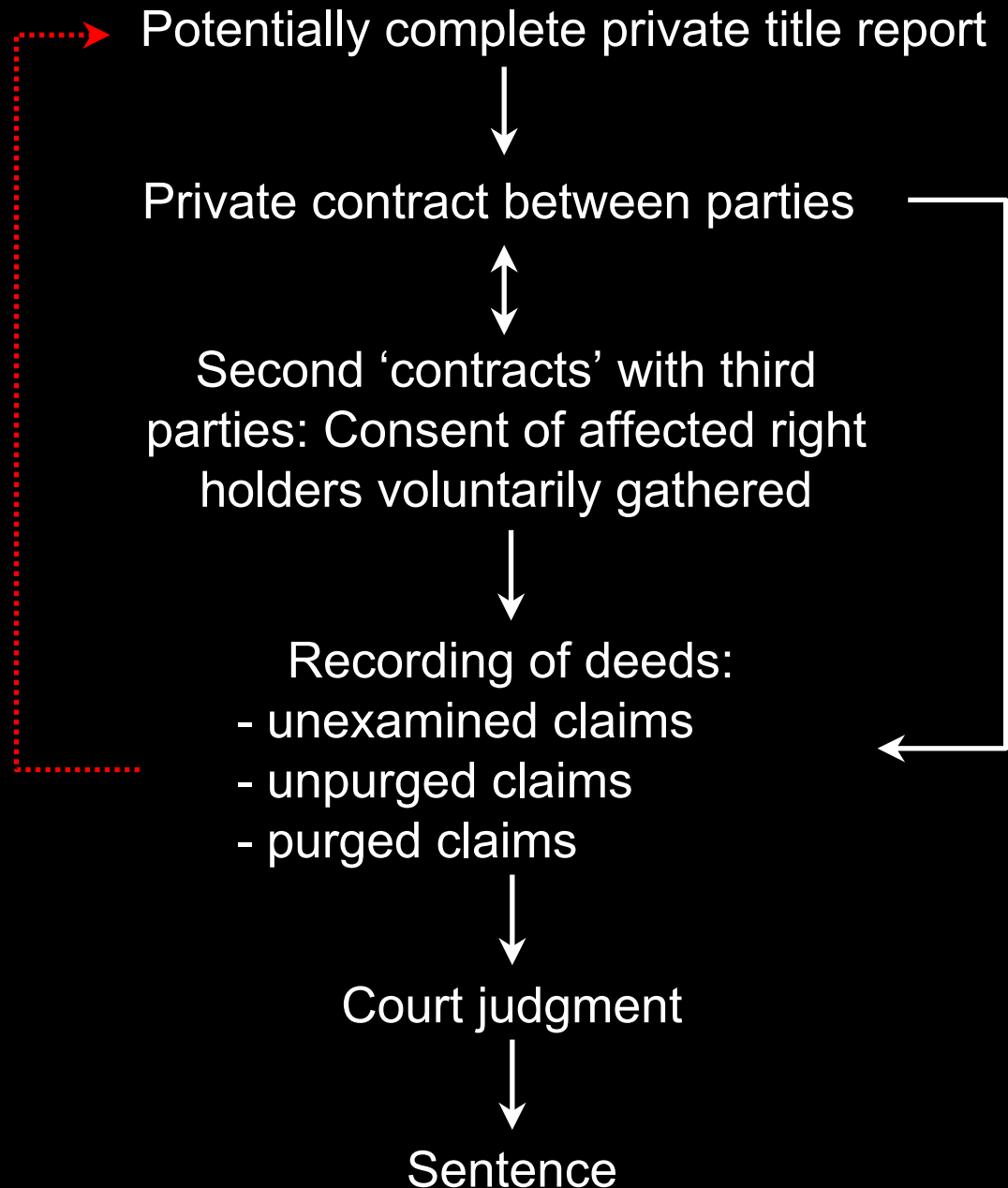
- Changing the rule of priority
 - ◆ Privacy: first in time (contract) first in right
 - ◆ Publicity: first in *filing* (publicity), first in right
 - Recording
 - Registration

Privacy

(England before registration)

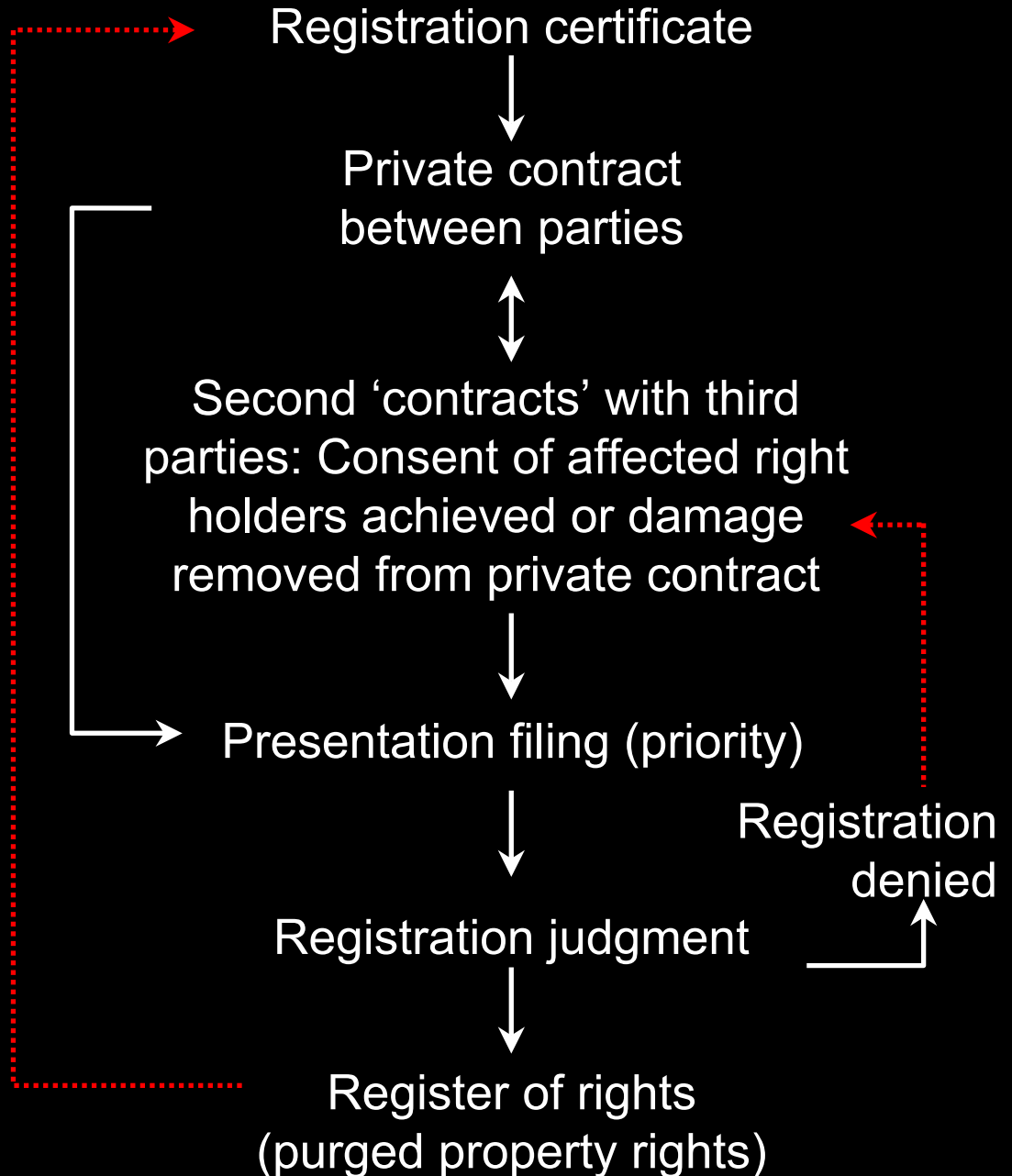


Recording (France, USA)



Registration

(Germany,
Australia,
Spain, UK)



(a) Privacy
*(England before
registration)*

(b) Recording
*(France, United
States)*

(c) Registration
*(Australia, England,
Germany, Spain)*

1st “contract”

Incomplete private
title report

Potentially complete
private title report

Registration
certificate

Private contract
between parties

Private contract
between parties

Private contract
between parties

2nd “contract”
w. 3rd parties

Second ‘contracts’
with third parties:
Consent of affected
right holders
voluntarily gathered

Second ‘contracts’
with third parties:
Consent of affected
right holders
voluntarily gathered

Second ‘contracts’ with
third parties: Consent of
affected right holders
achieved or damage
removed from private
contract

Deeds in the
grantor’s
chain of title

Recording of deeds:
- unexamined claims
- unpurged claims
- purged claims

Presentation
filing
(priority)

Court judgment

Court judgment

Registration judgment

Sentence

Sentence

Register of rights
(purged property rights)

Common product

Conclusive allocation of
property and contractual rights

Hidden
evidence

Registration
denied

Privacy, recording and registration compared

- Purging of conflicting rights
 - ◆ Voluntary & incomplete under privacy & recording
 - ◆ Mandatory & complete under registration
- Functional equivalencies
 - ◆ Civil law notaries = title “insurers” (in fact, “assurers”)
 - ◆ Registers = (recorders + courts) → acquirers fully protected
- Same effects after public intervention, but this intervention takes place at different moments
 - ◆ ex post (judicial) under privacy & recording
 - ◆ ex ante under registration → acquirers fully protected

Common organizational principles

- Competition in private contracting
 - (max) quality, (min) cost
 - ◆ Free entry & vertical integration
 - ◆ Rent seeking from “19th century” providers:
 - Civil Law Notaries, UK solicitors, etc.
 - US: “Unauthorized Practice of Law”, exception of title insurance in Gramm-Leach-Bliley Act, etc.
- Monopoly in public contracting → register independence → 3rd parties’ protection
 - ◆ Do not confuse:
multiple *doors* with multiple *registers*

Questions on performance

- Recording supposedly less costly
 - ◆ Voluntary purging—but duplication
 - ◆ Private incentives—but heavily regulated monopolies
- Registration supposedly more effective
 - ◆ Greater security—but:
 - hard to reach & maintain, falling back to recording
 - incomplete—e.g., “overriding interests”
 - too effective causes “generalized gatekeeping”

Prices for selling a \$75,000 home (1996; multiple sources)

	Recording		Registration		
	USA	France	Ger- many	Spain	UK
Lawyers	1.33%				1.17%
Certificates		0.02%		0.03%	0.14%
Notary	0.02%	1.28%	4.00%	0.35%	
Register	0.07%	0.10%	0.34%	0.10%	0.20%
Title insurance	0.70%				
Legal costs	2.12%	1.40%	4.34%	0.47%	1.51%
Real estate agent	6.00%	5.00%	5.50%	4.00%	2.52%
Taxes	3.00%	7.14%	2.00%	7.00%	1.00%
Total	11.12%	13.54%	11.84%	11.47%	5.03%

Lessons from prices

- Again, no common / civil law divide
- Substitution—e.g. USA
 - ◆ lawyers & title insurance instead of
 - ◆ notaries & register fees
- Low compared to other transaction costs
- But caveats about price comparisons
 - ◆ Prices are no costs—e.g., taxes by German notaries
 - ◆ Lower security in recording
 - ◆ Cross subsidies b/w transactions—price scales

Conclusions on organization

- See systems as technologies
 - ◆ Specific knowledge required for designing & driving bicycles & cars—also for recorders & registers
- Adaptation
 - ◆ Small gains from trade & potential risks of publicity
 - ◆ Historical evidence: Europe hesitated & did it slowly
 - ◆ Nonsense of “grafting” elements of common law w/o a theory of their function in both legal systems
- Main risks (of *both* systems)
 - ◆ Legislative and judicial debasement
 - ◆ Conveyancers’ rent-seeking
 - ◆ Poor providers’ incentives—needed: personal liability, residual compensation & careers

Second Part

Enforcing execution

- Risks
- Solutions

Enforcement risks

- Judicial risk: debasement of property rules
 - ◆ Examples: falling back to priority, possessory rights
- Legislative risk: retroactive change in rules
 - ◆ A general problem—Example: US mortgage moratorium in the 1930s
- Aggravating factors:
 - ◆ Assets: housing, farms
 - ◆ Persons
 - closely-knit local communities, foreigners
 - anti-market cognitive bias

Solutions

- Constraints on judicial rulemaking discretion
 - ◆ General problem: Arruñada & Andonova'04
 - ◆ Example: Specialized jurisdiction for property
 - ◆ Requires a gap b/w politicians & judges
- Self-enforcing institutions
 - ◆ State-own mortgage banks
 - ◆ Cooperative lenders
 - Savings and Loans
 - Building societies
 - Community mortgage systems
 - ◆ The opposite: intrinsic weakness of big & alien lenders (IBD)

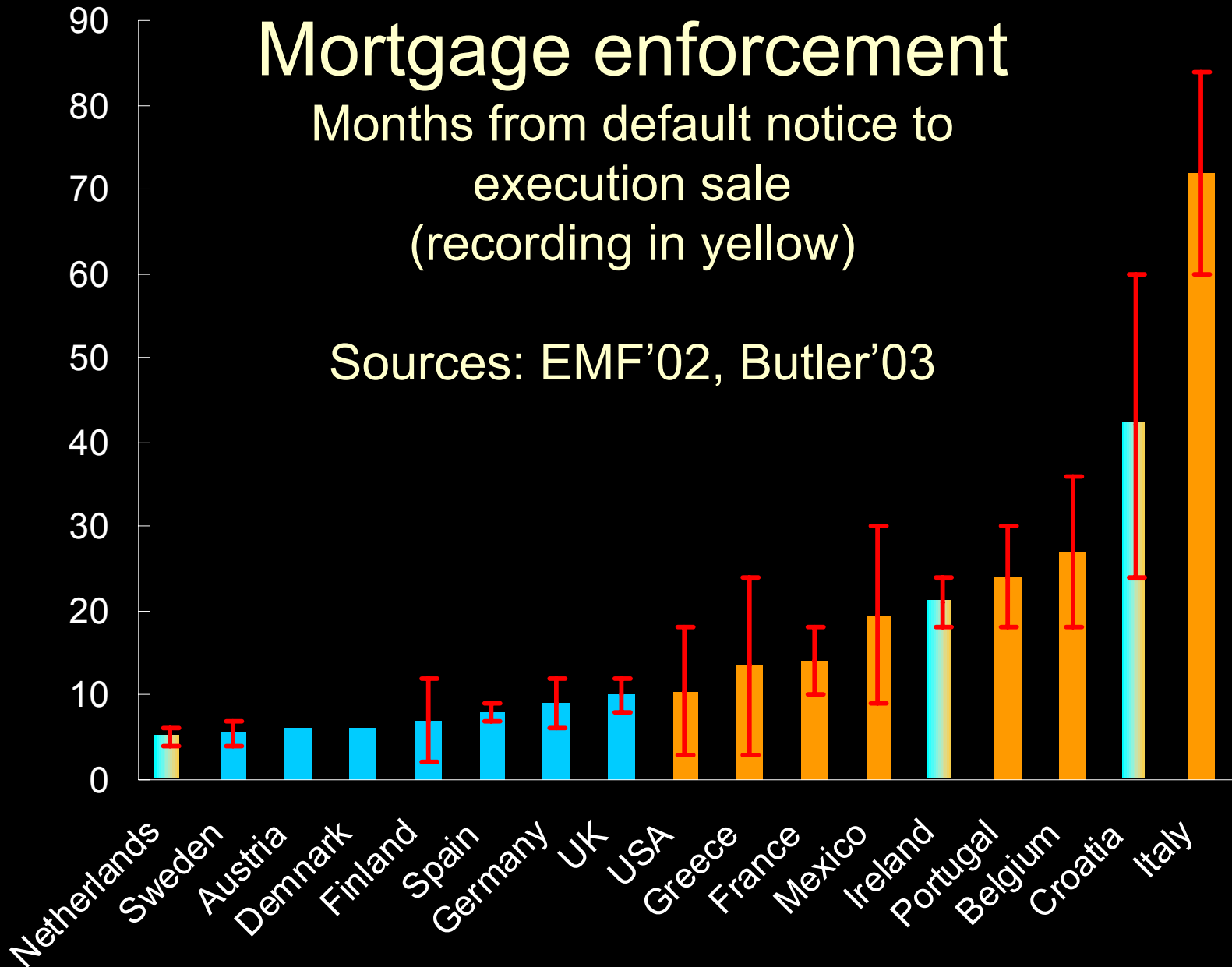
Part 3

Organization and Enforcement Together

Mortgage enforcement

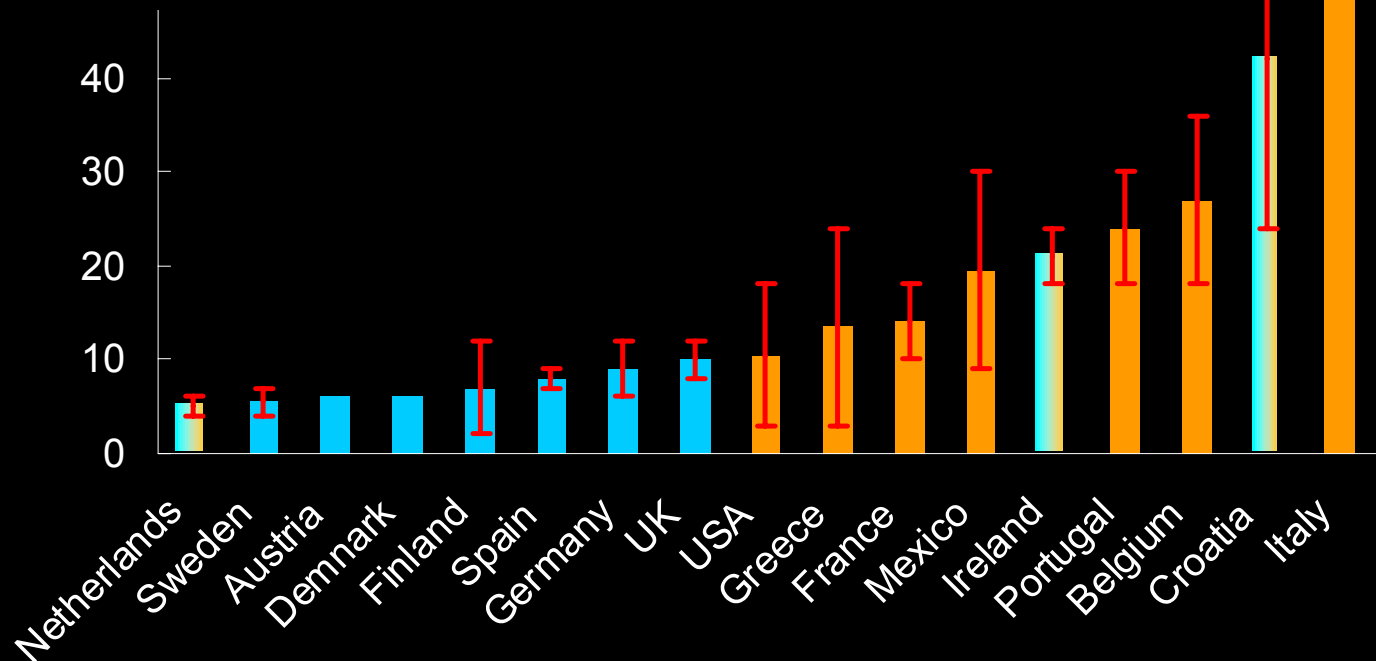
Months from default notice to
execution sale
(recording in yellow)

Sources: EMF'02, Butler'03



Lessons

- Explanatory hypothesis: Recording (i.e, mere “filing”, in yellow) postpones “purge” to execution, delaying procedures
- Also: longer delay if judiciary inefficient (Italy)— shorter in US, France, Netherlands



A final comment on movables

- Caution when granting possessor more power to pledge
 - ◆ Owner →**1**→ Merchant →**2**→ Lender
 - ◆ Trade-off
 - favors collateralization **(2)**
 - but discourages “entrusting of possession” **(1)**
 - ◆ Balance of trade-off probably hinges on the efficiency of the judiciary

Summary

- *Real* rights essential for understanding property
- Real rights pose a trade-off of enforcement benefits and consent costs
- Solution: publicity → ex ante “contracting” of consent → purged rights
- This two-step contracting is organized through:
 - ◆ Competition, ensuring quality in first contract
 - ◆ Monopoly, protecting 3rd parties in second contract
- Registration facilitates enforcement because rights are fully purged ex ante