

9th Central European Covered Bond Conference, Oct. 17/18, 2005, Budapest

Panel: „Legislative improvements in Central and Eastern Europe: Quality of mortgage collateral“

Remarks on the legal situation in Germany:

I. Real estate lien and land register

Under German law all rights on real estate have to be registered in the land register (land book, „Grundbuch“). The registration is having constitutive meaning (the right comes into force through registration).

The land register enjoys “public faith” (public disclosure, „öffentlicher Glaube“) regarding the registered rights:

- What has been registered applies (positive side of public disclosure).
- What has not been registered does not apply (negative side of public disclosure)

Public disclosure covers all rights on real estate, not only ownership.

The registration fee in Germany depends on the nominal value of the registered right. A registration can take up to some weeks.

The system of registering rights on real estate is governed by federal law. Competent authorities are the local courts („Amtsgericht“).

Physical registration of real estate is made in the cadaster (which are governed by laws of the German länder). Competent authorities are administrative bodies of the länder (regularly on local level).

II. Real estate lien

The German law knows two different types of real estate liens:

- The accessory hypothec („Hypothek“, accessory means, that the existence of the charge is depending on the existence of the secured obligation),¹
- the non-accessory land charge („Grundschuld“, the land charge remains in force in favour of the creditor in case of expiring of the secured obligation). Non-accessory means, that the land charge in its existence does not depend from the obligation. It can be used to secure different obligations: Only the contract between the owner of the real estate and the creditor has to be changed, not the registration in the land book.

In practice only the land charge is used today as a very flexible instrument for real estate financing.

III. Foreclosure and bankruptcy

In foreclosure and bankruptcy it should be taken into account, that even a in civil law good designed real estate lien can loose its ability to serve as an instrument to secure credits. Important points are that – if at all – only public claims, linked to the real estate, shall be privileged to real estate liens (e. g. real estate development revenues; real estate taxes, not income taxes of the owner).

¹ Speciality of German law is, that in case of expiring of the obligation the hypothec is not expiring, but transformed into a land charge of the real estate owner („Eigentümergrundschuld“) – and can be used to secure other obligations.

1. Foreclosure

The foreclosure process can be initiated by every real estate lien. Speciality is, that the bearer of the forgoing real estate lien can decide, if he will take part in the foreclosure or not. If yes, he will take part in the distribution of the foreclosure proceeds, the real estate lien will expire. If the forgoing real estate lien will not take part in the foreclosure, in realisation (selling) of the real estate the real estate lien will be transferred to the purchaser (who will pay of course a lower price). Subsequent real estate liens automatically take part in the foreclosure process and proceedings' distribution. The proceeds are distributed according to the ranking of the real estate liens.

Only some public claims, belonging to the real estate will be satisfied from the foreclosure proceeds prior to the real estate liens.

A foreclosure process takes some months. The realisation is done by bailiffs of the courts.

2. Bankruptcy

In bankruptcy, real estate liens will be satisfied from the proceeds of selling the charged real estate, apart from the insolvency process. A small percentage of the proceeds has to be paid to the insolvency estate for the costs of the insolvency process.

Among the real estate liens the money will be distributed according to the ranking of the pledges.