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THE FUNDING REGISTER –ON THE INSOLVENCY REMOTENESS OF THE LAND CHARGE HELD IN A FIDUCIARY CAPACITY–

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1. UNANSWERED LEGAL QUESTION CONCERNING THE REGISTERED LAND CHARGE ("SICHERUNGSBUCHGRUNDSCHULD")[1]

There was a time when credit institutions kept real estate secured loans on their balance sheets throughout their entire life and funded them themselves. Today, more and more complex financing techniques and structures are being developed, as a result of which the lenders are not necessarily the ultimate finance providers. In particular, thought is being given to how the "primary banks" might act as originator, and possibly as loan servicer and customer counselor, while the funding would be seen to by other institutions or via other financial instruments.

[1] It was possible to take legislation, established case law and literature into consideration up to 20.9.2005.

As a result of this wealth of developments, the property finance business in Germany has been undergoing a far-reaching restructuring for a number of years. Given the great significance of real estate secured loans[2], this is a topic of prime importance for Germany as a financial center.

German law knows several real estate liens, notably the accessory mortgage and the non-accessory land charge – each of which may be in certified and in registered form. For more than 30 years now, the land charge has dominated lending practice. Today, it is used by banks solely to secure loans and is referred to as "Sicherungsgrundschuld" (claim-securing land charge). The main reason for this is the non-accessory nature of the land charge, which not only makes flexible security models possible but also offers legal-technical facilitations due to the separation into loan deed and the document creating the land charge[3]. For this reason, this central component has also been included in proposals for the introduction of a real estate lien that would be standardized throughout Europe, the Eurohypothec[4]. Of importance in this context is that the legal accessoriness of the mortgage is replaced by a contractual component, the security agreement. This security agreement constitutes the law of contract link between the land charge and the secured claim. Since such an agreement is not rigidly defined by law, but is readily changeable given its contractual character, the land charge may be used for a wide variety of security models. This is true also of trust models, which are characterized by the fact that the legal and economic owners of a right differ.

However, the restructuring of property financings has long been serious-

[2] Real estate secured loans traditionally play a very important economic role in Germany:

As at end-2004, the aggregate volume of "housing loans" furnished by all banking groups amounted to € 1,086 bn: The savings banks held a market share of 27.3 % with € 297 bn, the mortgage banks a share of 20.2 % with € 219 bn, followed by the credit cooperatives with a market share of 16.2 % or € 176 bn.

The aggregate volume of "mortgage loans" granted by all German banks came to € 870 bn as at end-2004. For the purpose of the statistics of the Deutsche Bundesbank, these mortgage loans are understood to be housing loans or parts of loans with a term of more than 5 years. Assuming an average initial loan to value ratio of 80 %, this amounts to a volume of approx. € 653 bn for the inclusion of German housing mortgages in cover as the basis for the issuance of Mortgage Pfandbriefe; yet this is a very cautious estimate given that the majority of mortgage loans are amortizing loans, so that the average loan to value ratio of existing business should consequently be well below 80 %.

The "commercial real estate loans" granted by German banks totaled € 258 bn as at end-2004, in which the mortgage banks took a market share of 37.2 % with € 96 bn. Assuming also in this case an average loan to value ratio of 80 %, the potential for inclusion in cover for Mortgage Pfandbriefe may be calculated (again very cautiously) at approx. € 194 bn.

[3] For details on the reasons for the predominance of the land charge, see Stöcker, Die Eurohypothek, Berlin 1992, pp. 25 ff.

[4] See Drewicz-Tulodziecka, Basic Guidelines for a Eurohypothec, Warsaw, May 2005; Köndgen/Stöcker, Die Eurohypothek – Akzessorietät als Gretchenfrage?, ZBB 2/2005, pp. 112 ff.

ly impeded by the fact that the position under insolvency law of a registered claim-securing land charge held in a fiduciary capacity is not clear-cut. A number of examples will serve in the following to demonstrate this.

Syndicated financings: Since the participation by several banks in the credit process makes the loan accommodation more complex and time consuming, real estate investors today prefer to take out the loan with a single bank. This bank subsequently wants, however, to syndicate parts of the loan to other banks, above all to avoid having to bear the risks under the loan on its own for the entire term of the loan, and to free up equity for new loans. The assignment of parts of the claim under the loan agreement is solvable. But how is the land charge to be partially transferred in order that the syndicate members not only receive a part of the claim under the loan agreement but can also participate directly in the loan collateral?[5] This is possible in principle in the case of certified land charges, and indeed has long been practiced[6]. But usually, a registered land charge is created, which the first bank is then to hold in a fiduciary capacity for the other syndicate members. This gives rise to the question as to what the legal position of these syndicate members is with regard to the registered land charge in the event that the lead bank becomes insolvent[7].

Securitizations: With a true sale securitization, banks sell and transfer[8] their claims under loan agreements to a SPV[9], which issues bonds. These bonds are known as ABS[10] and, when real estate secured claims are transferred, MBS[11]. For this purpose, however, the collateral, i.e. the land charges, also have to be transferred to the SPV. If investors are to be convinced of the safety of the MBS, a position must be achieved through the transfer whereby difficulties, to the extent of and including the insolvency of the bank that originally held the assets, cannot have any effect on the assets.

A securitization system can only work if it is possible to transfer thousands of claims with their collaterals to a SPV within a short time, without having to shoulder a great amount of administration work or pay high fees.

[5] For the legal separation of secured claim and land charge as well as the consequences of same, see Soergel/Stöcker, EU-Osterweiterung und dogmatische Fragen des Immobiliarsachenrechts – Kausalität, Akzessorietät und Sicherungszweck, ZBB 2002, pp. 412 ff.

[6] This is explained in more detail in Picherer, Sicherungsinstrumente bei Konsortialfinanzierungen von Hypothekenbanken, Frankfurt a.M. 2002, pp. 254 ff (Schriftenreihe (Series of Papers) of the VDH/vdp, vol. 14).

[7] This topic is dealt with in detail by Picherer, loc.cit, pp. 43 ff.

[8] In this connection, the bank that originally extends a loan is known as the originator.

[9] Special purpose vehicle, i.e. a company whose purpose it is to buy claims and issue share certificates or bonds to finance this purchase.

[10] Asset backed securities

[11] Mortgage backed securities.

This becomes especially clear when one considers the mortgage business. If a bank wishes to transfer registered land charges[12], an entry has to be made in the land register. This is too time-consuming and too costly an exercise for securitization purposes. For this reason, the banks that have already conducted such true sale securitizations with German mortgage loans hold these registered land charges in a fiduciary capacity for the SPV[13]. This begs the following question with regard to the safety of the MBS: What is the SPV's legal position if the bank holding a registered claim-securing land charge in a fiduciary capacity for the SPV becomes insolvent?

Risk management operations at banks: Banks that do not spread their mortgage lending activity across a large number of real estate markets place more or less large cluster risks into their portfolios. Risk diversification could be achieved by selling parts of the portfolio and buying other risk profiles. But how are a large number of real estate secured loans to change creditor if real estate liens cannot be readily transferred?

Even if a willingness existed at home to tolerate certain legal risks to be able to achieve an inexpensive transfer, a pan-European cross-border risk exchange by way of a transfer of claims would undoubtedly fail because a prospective buyer abroad would scarcely be willing to accept legal uncertainty with regard to access to the real estate lien. This makes it very difficult for German banks to sell their real estate risks to foreign banks, and for foreign banks to buy German mortgage loans.

Transfer to Pfandbrief banks to make use of the Mortgage Pfandbrief: The full extent of the problem becomes particularly evident when one considers the position of the German Pfandbrief banks. Their most important funding instrument is the Pfandbrief. German Pfandbriefe have an aggregate volume of more than one trillion euros. Of this total, approx. € 250 bn is accounted for by Mortgage Pfandbriefe[14]. The Pfandbrief has an international

[12] In principle, the certified land charge would be a suitable and easy way to transfer the land charge. The fact is, however, that German banks mainly have registered land charges in their portfolio as loan collateral. This is because the issue of the certificates entails not only higher costs for creating the land charge but also high costs for transport and safe custody of the certificates of the land charges. There is also a risk of loss. This is the main reason in retail business why banks prefer registered land charges as collateral, with the result that the majority of German real estate liens today are registered land charges.

[13] This is, according to their information memoranda, how the problem was solved with the first two true sale securitizations of German mortgage loans (of Rheinhyp and Deutsche Bank in the mid-1990s).

[14] Taking as a basis the volume of German Mortgage Pfandbriefe (as at end-May 2005) as € 250 bn and assuming a volume of German banks' mortgage loans that are eligible for cover of approx. (653 for housing loans + 194 for commercial loans =) € 847 bn, one could conclude that a further potential for inclusion in cover exists of approx. (847 less 250 =) € 597 bn. Assuming the funding advantage offered by Pfandbriefe versus uncovered bonds to be 20 bp, the result would be an annual interest saving potential of approx. € 1.2 bn if all mortgage

reputation and is a very cheap financial instrument for procuring fixed-rate, long-term funds on the international capital market. The Pfandbrief is a bond that is issued by a bank, and its safety is assured by a number of special regulations. These, in turn, enable the issuers to obtain a high rating for their Pfandbriefe and so obtain funds on the international capital market at cheap rates[15].

The art is now to allow retail housing investors to benefit from this cheap capital. Thus, the lending primary banks could also assign the claims under the loan agreements to the Pfandbrief banks in this case, which they would include in the cover for their Mortgage Pfandbriefe, and so reduce the customers' interest burden. In the public sector in particular, intensive work has been underway for a number of years to develop structures for the issue of Mortgage Pfandbriefe of the Landesbanken on the basis of land charge secured loans extended by the savings banks. But once again, the registered land charge poses a central problem: Because the banks usually do not want to take on the workload and the risk that the handling of thousands of real estate liens involves, or cannot do so without a large amount of additional administration work, they could have registered land charges created for the customers' principal bankers which, in turn, hold them in a fiduciary capacity for the Pfandbrief banks.

But: The German Pfandbrief Act (PfandBG) follows the principle that assets may be included in the cover only if they are at the Pfandbrief bank's disposal irrespective of the risk of the insolvency of third parties or of other banks. Due to the lack of a legal provision or of a verdict by the Federal High Court (BGH) with such a clear-cut conclusion, the German Banking Supervisory Authority (BaFin) has for decades refused to allow German registered land charges that are held in a fiduciary capacity to be eligible as cover[16]. However, back in the early 1990s, the supervisory authority consented to trust models in the case of UK lendings, as under English law the trust has long been recognized as an insolvency remote legal instrument.

loans eligible as cover were funded through Mortgage Pfandbriefe. (This does not include the funding – at mismatched maturities – of mortgage loans through deposits.) Given the fierce competition between German mortgage lenders, this interest saving would ultimately benefit German consumers.

[15] For the safety of the Pfandbrief and the structure of Covered Bonds in Europe, see Stöcker, Realkredit und Pfandbriefsicherheit, Frankfurt a.M. 2004, pp. 37 ff and pp. 81 ff (Schriftenreihe (Series of Papers) of the VDH/vdp, vol. 18).

[16] Bellinger/Kerl, HBG, Kommentar (Comments on the German Mortgage Bank Act), 4th ed., Munich 1995, § 10, Circular no. 5. For detailed information on this topic, Picherer, Sicherungsinstrumente bei Konsortialfinanzierungen von Hypothekenbanken, Frankfurt a.M. 2002 (Schriftenreihe (Series of Papers) of the VDH/vdp, vol. 14).

2. INSOLVENCY REMOTENESS OF THE REGISTERED LAND CHARGE HELD IN A FIDUCIARY CAPACITY

Many years ago, case law of the Supreme Court of the former German Reich laid down the principle that the only party who should receive an insolvency remote claim to the transfer of an asset is the one who transferred the asset directly to the trustee (so-called principle of immediacy). This means that the property owner would have to create the registered land charge in favour, say, of a Pfandbrief bank. The Pfandbrief bank would then transfer this registered land charge to a primary bank in order that it may be held in a fiduciary capacity by the primary bank with insolvency remote effect in keeping with the requirements of established case law. This example demonstrates that it does not make sense to adhere strictly to the principle of immediacy where the claim-securing land charge is concerned, since the point is that the primary bank already has the registered land charge – and wishes to pass it on to the Pfandbrief bank.

This principle of immediacy has long been criticized in relevant literature; various other solutions are offered such as, for example, the notoriousness principle[17]. The German Banking Supervisory Authority (BaFin) disregards all this and takes the view that a mortgage security may only be assumed to be given when it is assured that the legal position of the beneficiary bank is insolvency remote beyond any doubt. This is not to be achieved without legal clarification or a verdict by the BGH. The specific case of a registered land charge held in a fiduciary capacity has so far not been put before the BGH. Consequently, the BGH has not yet been able to express an opinion on its insolvency remoteness.

For many years now, the Association of German Pfandbrief Banks (vdp)[18] has called for the regulation of the insolvency remoteness of the registered land charge held in a fiduciary capacity, and has initiated and supported several scientific works on this issue[19].

In June 2003, the BGH[20] rejected the existence of a right to separation in respect of a title to real estate held "in a fiduciary capacity", on the grounds that a trust was not given due to the absence of a real transfer component. For it is not, the BGH argued, consistent with the system of creditor protection to give the trustor, solely on the strength of obligations law agreements, a legal

[17] See, for example, Picherer, loc.cit, pp. 125 ff; Stöcker, Die Eurohypothek, pp. 52 ff.

[18] Known as Association of German Mortgage Banks (Verband deutscher Hypothekenbanken – VDH) until 19.7.2005.

[19] In particular, mention should be made here of the a.m. dissertation by Picherer as well as Stürner, Der vollstreckungs- und insolvenzrechtliche Schutz der Konsortialbank bei treuhänderisch gehaltenen Grundschulden des Konsortialführers, KTS 2/2004, pp. 259-274.

[20] BGH, verdict of 24.6.2003, WM 2003, pp. 1733 ff.

position entitling him to a right to separation that the trustee already owns. One problematic aspect with this decision is not so much the (by all means understandable) outcome in the individual case but the side-remark to the effect that, under laws on real property, trust agreements are suitable as a means of substantiating a right to separation only if the trustor's claim to a change of the real legal situation is secured by registration of a priority notice.

The question was not resolved as to whether these remarks by the BGH were to apply to all types of real rights, i.e. also to real estate liens, and therefore also to registered land charges, or only to real rights that constitute assets in their own right. The literature[21] took a critical view of this verdict by the BGH. Even if one could justify by sound arguments that the decision of the BGH should not extend to the case of the registered land charge, the result was nevertheless a degree of legal uncertainty that was not acceptable – certainly, this opinion was voiced by more and more legal experts at banks and law offices. This made a clear-cut legal solution all the more pressing.

One specific provision was achieved within the scope of the Pfandbrief Act (PfandBG), which entered into force on 19.7.2005: Assets held in a fiduciary capacity with other banks may also serve as cover for Pfandbriefe, § 1 par. 2 PfandBG. Whether the right to separation called for in this context exists, however, depends on other provisions, namely those governing the funding register.

3. LEGAL PROVISIONS GOVERNING THE FUNDING REGISTER

The bill was passed by the Bundestag (Lower House of Parliament) on 30.6.2005; the Bundesrat (Upper House)[22] gave its approval on 8.7.2005. The Act was promulgated on 27.9.2005[23]. Thus, the provisions governing the funding register entered into force on 28.9.2005[24].

Therefore, the question of the effect under insolvency law of a trust entered in a funding register for the purpose of funding through Pfandbriefe and

[21] See, for example, Bitter, WuB VI C. § 47 German Insolvency Code (InsO) 1.03 (of November 2003); for somewhat more detail, Bitter, in the review of the book by Picherer, WM 2003, pp. 2068 ff.

[22] The Committee of Legal Affairs of the Bundesrat was unanimously opposed to the trust provisions, whereas the Finance Committee had agreed to them; see BR-DS 515/1/05 of 1.7.2005.

[23] Gesetz zur Neuorganisation der Bundesfinanzverwaltung und zur Schaffung eines Refinanzierungsregisters (Act on the Reorganization of the Federal Finance Administration and the Creation of a Funding Register), Federal Law Gazette of 27.9.2005, part I, pp. 2809-2819.

[24] Art. 4a and 6 of the Act.

MBS received a positive answer with the creation of a special legal regulation in the German Banking Act (KWG).

The purpose of the legal provisions governing the funding register is, on the one hand, to promote securitization and, on the other, to satisfy the requirement stipulated in § 1 par. 2 PfandBG for eligibility as cover, namely that in the case of trust models a right to separation under insolvency law exists. With that, the demand long expressed by the vdp (VDH) for regulation of the insolvency remoteness and eligibility as cover of registered real estate liens held in a fiduciary capacity has been met.

3.1. Content of the Act

The Act adds to the German Banking Act (KWG) the new §§ 22a to 22o, under which a credit institution may hold claims and/or real estate liens in a fiduciary capacity for a Pfandbrief bank or a SPV, § 22a subs. 1 KWG.

In this connection, it is necessary for the credit institution to keep a so-called funding register in which it enters the assets and the party entitled to transfer (beneficiary).

The entry in the funding register gives the Pfandbrief bank or the SPV, in the event of the insolvency of the credit institution acting as trustee, a right to separation pursuant to § 47 German Insolvency Code (InsO) in respect of the assets entered in the funding register, § 22j subs. 1 KWG.

Thus, the legal consequence of the entry is only that a right to separation exists in the event of insolvency. The entry does not, on the other hand, result in a transmission of the entered rights (claims and/or real estate liens). The property law allocation of the claims and real estate liens remains absolutely unaffected by the entry in the funding register. The entry does not therefore give the parties entitled to transfer (beneficiaries), in whose favour the entry is made, a right of disposal in respect of the entered assets. Because the entry does not result in a passing of the title, it does not restrict objections and pleas of third parties against the entered claims and real estate liens[25].

The provisions governing the keeping of the funding register and the treatment of the entered assets in the event of insolvency are similar to those governing the cover register for assets covering Pfandbriefe, but in a somewhat diluted form.

The funding register may only be kept by a credit institution. Details on the form of the funding register and on the type and manner of recording will be determined by a statutory order, § 22d subs. 1 KWG[26].

[25] For clear and detailed information, see the explanatory memorandum pertaining to § 22j, BT-DS 15/5852 of 29.6.2005, p. 23.

[26] This statutory order has not yet been issued.

The beneficiary named in the funding register may in principle only be a SPV or a Pfandbrief bank. An entry for another credit institution would be void, § 22b subs. 3 KWG. However, the German Banking Supervisory Authority (BaFin) can allow a credit institution to keep a funding register for one or more other smaller institutions, § 22b subs. 2 KWG[27]. Further, a credit institution may keep a funding register for another enterprise that is not a credit institution.

A funding register monitor, whose independence, reliability and expertise must be assured, has to be appointed by BaFin at every credit institution that keeps a funding register, § 22e subs. 1 and 2 KWG.

If insolvency proceedings are instituted in respect of the assets of a credit institution that keeps a funding register, the insolvency court must appoint a funding register administrator upon the application of BaFin, § 221 subs. 1 KWG; in the case of imminent insolvency within the meaning of § 46a KWG, the funding register administrator may be appointed earlier, § 22o KWG. The right of management and disposition in respect of the assets entered in the funding register will be passed to him, § 22n subs. 2 KWG.

3.2. Possible uses to which the funding register may be put

The funding register could be of use to Pfandbrief banks in a number of different ways:

Syndicated loan: A Pfandbrief bank may enter in the funding register it keeps a share in a syndicated loan which its holds for another Pfandbrief bank. The latter can then include the share in cover for Mortgage Pfandbriefe. In this way, the time and costs involved in physically transferring the share in the land register can be avoided, and the share may be readily sold at a later point in time. This is particularly important given that, today, banks often grant loans on their own at first and syndicate them afterwards. Since the claim can also be held in a fiduciary capacity, the rule also applies to accessory mortgages.

Sale of individual loans and portfolios: A Pfandbrief bank may enter in its funding register real estate liens of loans it wishes to sell to another Pfandbrief bank, and possibly also the claims themselves. Thus, the loan portfolio can be more simply structured. The benefit becomes especially clear when selling large portfolios.

Securitization: A Pfandbrief bank may, for securitization purposes, enter in its funding register the real estate liens and also claims that are sold to a SPV.

[27] See also the explanatory memorandum pertaining to § 22b, BT-DS 15/5852 of 29.6.2005, p. 19.

Use of third-party loans to fund Pfandbriefe: When another credit institution (such as, for example, a savings bank) sets up a funding register, it can grant the Pfandbrief bank a right of transfer in respect of the real estate liens and claims entered in its register, and the Pfandbrief bank, in turn, can enter them in the cover register and use them to fund Pfandbriefe.

3.3. Trust for foreign assets

During the work on the Pfandbrief Act, the True Sale Initiative (TSI) and the leading associations of the German credit industry (ZKA) devoted attention to the various proposals for improving the legal bases for securitizations – and, in this connection, also to the question of the land charge held in a fiduciary capacity[28], whereby the main focus was placed on the German registered land charge. On the other hand, the vdp repeatedly stated that thought must also be given to foreign operations to facilitate subsequent syndications and portfolio transactions between German banks, without being bound by foreign requirements of form in respect of the transfer of mortgages. Since, above all, accessory real estate liens are to be encountered abroad, the matter of the inclusion of claims under the trust provision is also part of the question. Initial resistance to this view was overcome, and these proposals were ultimately advocated by all relevant bodies and interest groups.

Since the regulations are worded in a general manner, they also cover foreign assets[29]. For the Pfandbrief banks, this means that they may include in cover foreign mortgages that are held by a German credit institution in a fiduciary capacity and are entered in a funding register. This applies to claims under loan agreements as well as to the real estate liens that secure them.

For this, however, it is necessary that as a result of the initiation of insolvency proceedings through the trustee institution, its foreign assets remain unchanged for these insolvency proceedings – and that the settlement of same takes its bearings from German law. This is precisely the aim of the EU Directive on the Reorganization and Liquidation of Banks and Credit Institutions, which had to be transformed into national law by 5.5.2004[30]. If these prerequisites are met, this insolvency law effect of the

[28] The main legal questions are dealt with by Fleckner, Insolvenzrechtliche Risiken bei Asset Backed Securities, ZIP 13/2004 (of 26.3.2004), pp. 585 – 598, who was an intern with the Federal Ministry of Justice at the time.

[29] This is expressly confirmed in the explanatory memorandum, see BT-DS 15/5852 of 29.6.2005, p. 18, on § 22a.

[30] See also the explanatory memorandum to the PfandBG: vdp, Das Pfandbriefgesetz (The Pfandbrief Act), p. 97. To determine precisely this position in terms of insolvency law, the transformation of this Directive into each national law would have to be examined. The vdp commissioned a survey to ascertain what questions are important with regard to extend-

holding in a fiduciary capacity can also include a foreign asset, because it is of central importance that German insolvency law recognizes the effect of the funding register if the trustee institution seated in Germany becomes insolvent.

3.4. Old cases

The question remains as to what the consequences are for the various trust models that have been or are conducted without a funding register. Does the sword of Damocles hang over all of them in that the courts would have to decide that they are not insolvency remote? This is not the case. The bill made quite clear that the legal position of other trust models will not be changed as a result of the Act on the Funding Register[31]. Thus, an about-turn is out of the question. However, it is not explicitly said that the models without a funding register are insolvency remote. Insofar, the old legal-dogmatic dispute remains unresolved.

3.5. Further need for regulation

Several legal questions are not sufficiently considered.

In particular, this is true of the protection, under law of enforcement, of assets held in a fiduciary capacity from creditors of the bank keeping the register. This should not pose a problem in practice as enforcement proceedings are unlikely to be instituted against banks; for if a bank does not pay because it is not liquid, insolvency proceedings have to be initiated which, in turn, blocks enforcement. But rating agencies and analysts repeatedly ask about this loophole. It would therefore be better to close it.

Although the trust question is of special significance for Pfandbriefe and MBS, it would best serve the interests of flexibility if rights of transfer of all banks in general –domestic and foreign– could be entered in a funding register. What is more, the insolvency remoteness of the rights of transfer of foreign banks would also depend on the effects of the institution of insolvency

ing the Pfandbrief creditors' preferential right in case of insolvency to include foreign cover assets. The findings of this survey were published: Stürner, Die europäische Sanierungs- und Liquidationsrichtlinie für Banken und die deutschen Hypothekenbanken, in: Gerhardt/ Haarmeyer/Kraft (eds.), Insolvenzrecht im Wandel der Zeit, Festschrift for Hans-Peter Kirchhof on his 65th birthday, 2003, pp. 467 – 478. With regard to the examination into whether the trust would be recognized abroad, the same questions are essential.

[31] Recommended resolution and report of the Finance Committee of the Bundestag of 29.6.2005, BT-DS 15/5852, p. 16.

proceedings in respect of the assets of the German bank keeping a register being recognized abroad. Such would be the case if the country in which the foreign bank has its seat has sufficiently transformed the EU Directive on the Reorganization and Liquidation of Banks and Credit Institutions into national law[32].

4. CONCLUSION

- New structures are being developed for financing and refinancing mortgage loans. Credit institutions are devoting more and more attention to syndicated finance, securitizations and risk management. In this context, the registered claim-securing land charge held in a fiduciary capacity is an important legal linchpin.
- This becomes especially evident in the case of the inclusion in cover, by Pfandbrief banks, of loans that are secured by registered land charges which other banks hold in a fiduciary capacity. The PfandBG and the new regulations governing the funding register provide a positive solution to this old dispute.
- The insolvency remoteness of the mortgage loans held in a fiduciary capacity has now found legal clarification, with regard to domestic business and to business in other EU countries, if the trustee bank has its seat in Germany and the "mortgage" is located in Germany or another EU member state. The precondition where foreign assets are concerned is that the Directive on the Reorganization and Liquidation of Banks and Credit Institutions has been sufficiently transformed into national law in the other EU state in each case.

[32] See above, under 3.