

Real estate liens as security for cross-border property finance The Eurohypotheck - a security instrument with real prospects (1)

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(1) This article is the updated and amended version of the English translation of an article published in Wertpapier-Mitteilungen (WM) 2006, pages 1941-1949: Die grundpfandrechtliche Sicherung grenzüberschreitender Immobilienfinanzierungen, Die Eurohypotheck – ein Sicherungsinstrument mit Realisierungschancen. It was the basis of a lecture given during the «Cursos de verano 07, Universidad Rey Juan Carlos, *La Reforma del Mercado Hipotecario*, 12 de julio, Aranjuez».

I. DEVELOPMENT OF CROSS-BORDER MORTGAGE BUSINESS

Cross-border investment in real estate is not a new phenomenon. However, its funding by foreign banks – i.e. cross-border financing by a bank situated in State A of a property situated in State B – was only boosted with the realisation of the single market, along with its abolition of barriers under the law on the supervision of banks.

The development of complex, high-volume international financing methods has meant that under many legal systems real estate liens have not kept pace with modern requirements (2).

1. ITS BEGINNINGS: SIMPLE LOW-VOLUME STRUCTURES

For a long time cross-border mortgage transactions were not of any great interest to German banks. Apart from a few cases, mostly in regions close to the German border, business was confined to national territory. This was particularly so in the case of German mortgage banks, which were not permitted to secure loans on properties situated in other EC States by way of real estate liens until the middle of 1988.

The banks lacked the necessary know-how about property markets and legal terms and conditions because, until then, they had confined their activities to domestic mortgage transactions. The VDH/vdp (3) therefore started up an intensive information and training programme. Since 1989 the VDH/vdp has been analysing legal terms and conditions in the form of national seminars, as well as conducting an intensive systematic review of mortgage and land registration law in the individual EU States – both through working groups on foreign business and its own VDH/vdp staff.

(2) The 1989 Second Banking Law Coordination Directive – which had to be transposed into national law by 1.1.1993 – established the principle that any credit institution authorised in an EC State should be permitted to carry on business in another EC State without being obliged to also obtain permission there. This principle of mutual recognition of banking authorisations granted by national authorities, also known as the country of establishment principle, is an established principle of EU law and is now to be found in Article 23 et seq. of the so-called EU Banking Directive (Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, European Union Office Journal L 177/1 of 30.6.2006).

(3) The former Verband deutscher Hypothekenbanken (VDH) changed its name in July 2005 to Verband deutscher Pfandbriefbanken (vdp) because the enactment of the Pfandbrief Law (PfandBG) meant that the mortgage bank institution that, until then, had been regulated by the Law on Mortgage Banks (HBG) was abolished as a special institution governed by statute. To show the historical development of Pfandbrief banks the vdp has documented the «origin» of its member institutes in a «family tree» on its website at <www.pfandbrief.de - Über uns - Unsere Mitgliedsinstitute>.

Most mortgage banks were hesitant in taking on foreign mortgage business – not least of all because of the fact that, during the reunification period, all available resources were invested in developing the new German Länder. The fact that this then involved venturing into territory as yet unknown also meant that, at that time, they were only inclined to take small steps on a few foreign markets, with small volumes of credit that seldom amounted (after conversion) to more than 500,000 euros.

At the beginning of the 90s the structure of real estate funding transactions in Europe still generally took a relatively simple form. Foreign lending structures were therefore also simple. It quickly became apparent, however, that the different legal terms and conditions, particularly in relation to land registration and real estate liens, would lead to procedures for the grant of credit – and particularly the disbursement of loans – that differed from the procedure then followed in Germany.

If ownership title passes *inter partes* as soon as a written transfer deed is concluded but a mortgage is not created until it is entered in the land register (4), the problem then is that the vendor will not want to lose or encumber his title to the property before he receives the purchase price, the purchaser does not yet have authority to dispose of (mortgage) the property but the bank will not pay over the loan to the purchaser before being sure that it will receive a mortgage over it. When one then also considers that a legal instrument such as a caution (*Vormerkung*) does not exist everywhere outside Germany and that, in many countries, there is no comparable system of land registration encompassing the positive principle of good faith inherent in registration nor any notarial system of the German kind, the initial problems faced by the banking industry become very clear.

There was also the fundamental problem that most Western European legal systems only made provision for accessory mortgages and the German mortgage banks were therefore unable to apply the contractual structures and procedures used at home based on the *Grundschild* (land charge).

This did not mean that all transactions were based on legally uncertain foundations, but it became necessary to understand the established procedures and solutions to problems that foreign banks had already developed to counter weaknesses in the law – both those weaknesses already established and those that were at first sight just conceivable (5). All of this meant, however, that at first the banks' internal working methods had to be specially

(4) For example, in Spain; see STÖCKER, *Die Eurohypothek*, Berlin 1992, p. 164 et seq. and further references. The same legal situation exists in Poland.

(5) One of the most important sections of the VDH/vdp country reports was therefore always an overall presentation of mortgage finance procedure, in which the various framework terms and conditions were summarised and the practical modes of procedure up to disbursement were described.

tailored to the needs of each individual transaction – with corresponding consequences on transaction costs.

As from 1991, German mortgage banks were allowed to include foreign mortgage loans in the cover pool for mortgage Pfandbriefe (6). The research results therefore were not only circulated within the association but were also made available to the banking supervisory authority through a series of consultations (7).

2. INCREASE IN LOAN FIGURES AND PROFESSIONALISM

As soon as the mortgage banks took on foreign business they had to decide their future strategy. For reasons of cost German mortgage banks quickly stopped regarding the direct cross-border funding of residential properties for private clients as a feasible area of business (8). Professionalism, specialisation and cost all led to the mortgage banks setting minimum amounts below which they would not consider loan enquiries. At first that limit was approximately DM 1 million but with many banks it soon became DM 3 or even 5 million (9).

A simultaneous expansion of business to cover all EC States was impossible for purely staffing reasons. The constant pervasion of both legal and commercial conditions and the revenue question meant that, at the beginning, the banks concentrated on just a few countries and on financing some less commercial types of property, particularly offices and retail properties. In order to keep a constant watch on market developments the trend now is to set up representative offices in the most important locations (10).

(6) The reasons for this Law are printed at *VDH*, 100 Jahre HBG, Frankfurt a.M. 1999, p. 590 et seq.

(7) In July 2007, a new series of workshops was started in order to provide banking supervisory authority with updated informations on mortgage law in Europe and USA.

(8) Demand for finance here mainly related to holiday homes. It was usually just small loans that were being asked for, which did not even cover the banks' costs since applicants wanted German loan conditions but did not want to bear any more costs. The expense of a bank employee making a trip abroad to check whether the property actually existed and was situated on the land that was to be given as security, together with the transaction procedure involving a notary and land registration, made such loans into loss-making transactions for the banks.

(9) Various attempts were made to set up the necessary network of branches to attract customers abroad in the retail sector by way of cooperation with foreign banks; however, this route was generally unsuccessful; it only succeeded in quite exceptional circumstances where there were strong financial links between the banks.

(10) This sometimes brought with it the problem that EC law did not govern the representative offices and many foreign bank supervisory authorities tried to categorise them as branch offices – with corresponding costly registration obligations. The solution here was to show the representative office – in the course of registration under 24 (a) (3)

The original strategy of assisting German clients with their investments abroad and concentrating on the local market in a heavily fragmented property market was soon supplemented (or even replaced) by the taking-on of pan-European financing for highly professional international investors, an area which has steadily developed and won an ever-increasing share of the market. The sums invested achieved new dimensions, given the circumstances at the time. These became impossible for individual banks to manage. In the mid-90s it was still exceptional for a share of a cross-border loan allocated to an individual mortgage bank to amount to a sum of DM 100 million. The involvement of highly professional lawyers, mostly from large international law firms, also quickly became the norm, bringing with them their own ideas on contractual content and collateral mechanisms. This led to greater professionalism generally and also, to a certain extent, to standardisation of international mortgage business.

3. PORTFOLIO FINANCE AND INITIAL SYNDICATION

Rising investment costs made it increasingly necessary to have recourse to consortium loans, also known as syndication. The securing of such loans by way of mortgage made great demands on the legal expertise of all concerned. Under the *Hypothekbankgesetz* (Mortgage Bank Law, the «HBG») German mortgage banks were even obliged to structure collateral in such a way that they themselves had a direct interest in it. Indirect security that was only given to the syndicate leader was unacceptable in principle. It was only in UK transactions that a solution was quickly found based on the English concept of a trust (11). Under other legal systems it was found necessary to use complex devices such as joint creditor arrangements, mortgages ranking *pari passu* and the division of real estate liens.

It quickly became apparent to the VDH/vdp that the original idea of drawing up a uniform questionnaire for all countries once and for all would not suffice. Arrangements were therefore made for other specialist areas to be included as «specialist topics» alongside the list of questions in the so-called country reports (12) so as to cover the most significant matters with which

of the current version of the KWG (German Banking Law) – as an accompanying measure to the conduct of direct cross-border business.

(11) See BELLINGER/KERL, *Hypothekbankgesetz*, Kommentar, 4th edition, Munich 1995, § 1, paragraph 37; see with regard to the whole topic PICHERER, *Sicherungsinstrumente bei Konsortialkrediten von Hypothekbanken*, Frankfurt a.M. 2002 (vdp Series, Volume 14).

(12) These national reports contain a great deal of vital basic information on the law governing the supervision of banks, land and company registration, mortgages, loans, leases, enforcement and insolvency. Some of the conclusions from these reports have been

specialists in foreign mortgage business would have to deal (13). One of the main points was the mortgage backing of initial syndicated loans; the chief legal topic in this regard is the creation of real estate liens ranking *pari passu*.

Both structures and legal issues became even more complex when it was not just one property that was to be financed, but a whole portfolio. One good example of this is the finance for the acquisition of almost 90 office and retail properties situated in Switzerland, which was provided in 2001 by a consortium of 4 German mortgage banks. The total volume of that finance amounted to approximately CHF 800 million. The properties were spread over various Swiss cantons.

The reason for a portfolio transaction is that, given the risk diversification effect, the risk with a portfolio is lower than the sum of the individual risks. It is quite clear, in the context of securing portfolio finance by real estate liens, that the best collateral is achieved by a collective real estate lien as it evens out fluctuations in the values of individual properties with *in rem* effect (14).

The concept of a collective real estate lien is one known to Swiss mortgage law (15). However, the Swiss law on notaries and authentication does not permit a notary from one canton to authenticate matters relating to another canton. It is therefore impractical to have a collective real estate lien over properties in different cantons. Real estate liens ranking *pari passu* were therefore entered in the land registers against each property on behalf of each of the syndicate banks (16). This ultimately meant that it was necessary to

published at SCHUB, «Allgemeine rechtliche Voraussetzungen des Hypothekarkredits in den Ländern der Europäischen Gemeinschaft und den benachbarten EFTA-Staaten», in RÜCHARDT (publisher), *Handbuch des Hypothekarkredits*, 3rd edition, Frankfurt a.M. 1993, p. 685-755.

(13) These special topics relate to the procedure for disbursement of loans, agreements on interest and securing by real estate lien, real estate collateral in bankruptcy, contract structure for redemption payments and damages for early repayment, collateral structure for syndicated loans, disbursement procedure and the earliest possible date of taking into coverage, full and partial assignment of claims secured by mortgage, the cost of creating a mortgage, and assignment/pledging of leases. These 9 special topics, which have been worked on since the middle of the 90s, were supplemented a few years ago by two other topics: a guide to realisation of collateral and a guide to secondary syndication.

(14) §§ 1132, 1192 BGB. For details see BAUR/STÜRNER, *Sachenrecht*, 17th edition, Munich 1999, § 43, p. 497 et seq.

(15) § 798 ZGB. See with regard to the Swiss law on collective real estate liens MÜHL/PETERET, *Recht der Kreditsicherheiten in europäischen Ländern*, Part V: Switzerland, Berlin 1983, p. 259 et seq.

(16) Mortgage notes (*Schuldbriefe*) or mortgage assignments (*Grundpfandverschreibungen*) were used, depending upon the canton. For the differences between these two kinds of Swiss real estate liens see STÖCKER, *Die Eurohypothek*, Berlin 1992, p. 230 et seq. and further references. For current discussion on the reforming of the Swiss *Schuldbrief* see STAEHELIN, *Der Schuldbrief in der aktuellen Revision des ZGB*, *Basler Juristische Mitteilungen*, Issue No. 1, February 2006, pp. 1-21.

create approximately 350 individual real estate liens and to obtain the cooperation of notaries in all of the cantons – with the corresponding consequences in terms of cost. The portfolio nature of the entire loan was achieved using contractual devices (17).

Previously unknown technical difficulties were also then encountered in the extensive credit decision-making processes that had to be completed in parallel by the mortgage banks concerned and finally harmonised before the loan agreement could be signed.

4. SECONDARY SYNDICATIONS

The lengthy credit decision-making processes and multifarious harmonisation problems amongst syndicates have caused property investors during the last few years to increasingly insist, if possible, on just one bank granting the loan – which then later passes it on in tranches to other banks by way of secondary syndication. It is only banks with a large equity capital base that can conceive of this - due, not least of all, to the provisions governing large exposure contained in the *Kreditwesengesetz* (German Banking Law - «KWG») (18).

Generally speaking, however, those banks that take on part of the loan from the financing bank will also want a share of the real estate lien (19) – e.g. to minimise the risk or to implement special provisions associated with the provision of security by way of a real estate lien, particularly regarding risk weighting for capital adequacy ratio purposes (20). In the case of finance that acts as the cover pool for mortgage Pfandbriefe, in particular, it is necessary for the Pfandbrief bank itself to be able to claim entitlement to rea-

(17) With portfolio structures of this kind individual real estate liens are created for each individual property and it is agreed that the bank should be free to proceed on the basis of any real estate lien, although only once overall in relation to the loan exposure. SPV structures are generally used in international commercial credit transactions: with these, a holding company (normally a limited liability company) is set up by the investor/borrower for each property, with that company holding the property. These holding companies agree *inter se* to accept liability for the commitments assumed by the others. A real estate lien is created in respect of each property. The real estate lien over a property is collateral for the loan exposure. The other real estate liens are collateral for liability claims against the SPV.

(18) For KWG provisions on credit secured on real estate in the case of large exposure, see STÖCKER, *Realkredit und Pfandbriefsicherheit*, Berlin 2004, p. 15 et seq. (VDH/vdp Series, Volume 18).

(19) If they should waive it they can extend purely refinancing credit, possibly in the form of a sub-participation. This is ultimately just a loan to another bank without any right *in rem* to the real estate lien and does not constitute partial assignment of the loan secured.

(20) See in detail STÖCKER, *Realkredit und Pfandbriefsicherheit*, p. 8 et seq. (VDH/vdp Series, Volume 18).

lisation (21) – and under many legal systems this is not possible without also having title to the real estate lien itself.

There are various ways of achieving this under German law. Because of the legal non-accessoriness of a *Grundschild* (land charge) a part of the loan exposure can be assigned. Partial assignment of a *Briefgrundschild* (certificated land charge) is also possible – even without a partial certificate having to be created (22).

The legal position is more complex in the case of *Buchgrundschulden* (uncertificated land charges), which have been the instruments most widely used in practice for many years, as it is expensive for them to be transferred in part because of the necessary entries in the land register (23). However, this is ultimately no hindrance to the financing of major commercial properties where the property investor pays the costs.

Uncertificated land charges were often not assigned, however, but just held fiduciary for the other banks involved (24). Uncertainty as to whether the status of the beneficiary bank would be insolvency-proof and as to the resultant absence of cover for mortgage Pfandbriefe, together with the decisive costs argument in the case of major transactions, led the German legislature, in 2005, to create the legal framework for a so-called «Funding Register» (25).

In other European countries the problem is that there are often only accessory real estate liens the partial assignment of which is a very expensive operation. Nor can those costly formal requirements be circumvented by only

(21) Under § 1 (2) PfandBG a claim on a bank to the assignment or partial assignment of a mortgage that is held fiduciary will now also be sufficient provided that it is possible to require segregation of the mortgage in the event of the credit institution's insolvency. This also applies to foreign mortgages; see in this respect STÖCKER, *Das Refinanzierungsregister – zur Deckungsfähigkeit der insolvenzfesten Treuhand-Grundschild*, ZfgKw 2005, p. 997 et seq. (1000).

(22) See PICHERER, *Sicherungsinstrumente bei Konsortialfinanzierungen von Hypothekenbanken*, Frankfurt a.M. 2002, p. 256 et seq. (VDH/vdp Series, Volume 14).

(23) §§ 1192 Abs. 1, 1154 Abs. 3, 873 Abs. 1 BGB.

(24) See in detail PICHERER, *Sicherungsinstrumente bei Konsortialfinanzierungen von Hypothekenbanken*, Frankfurt a.M. 2002, p. 44 et seq. (VDH/vdp series, Volume 14).

(25) Gesetz zur Neuorganisation der Bundesfinanzverwaltung und zur Schaffung eines Refinanzierungsregisters (Law on the Reorganisation of the Federal Financial Administration and on the Creation of a Refinancing Register), BGBl. of 27.9.2005, Part I, p. 2809-2819. The provisions on the refinancing register came into force on 28.9.2005. They were inserted in the Banking Act, § 22a – 22o KWG. The content of this Act is explained in detail in TOLLMANN, *Die Sicherstellung der Insolvenzfähigkeit bei der Asset Backed Securitization nach dem neuen Refinanzierungsregister gemäß §§ 22a ff KWG*, WM 2005, p. 2017 et seq.; FLECKNER, *Das Refinanzierungsregister – Tatbestandliche Grenzen und Vorschläge zur Verbesserung*, WM 15/2006, p. 697 et seq. For information on the political background to the legislation see STÖCKER, «Das Refinanzierungsregister – zur Deckungsfähigkeit der insolvenzfesten Treuhand-Grundschild», in *Zeitschrift für das gesamte Kreditwesen* 18/2005, pp. 997-1001.

assigning part of the loan exposure – with the mortgage, on the other hand, being held fiduciary – as it is not possible in the case of a strictly accessory security for an interest as creditor of the real estate lien and an interest in the claim secured to be separated without adversely affecting the real estate lien.

The vdp's working groups on international business have for many years been looking into the legal position in those European property markets of most importance to its membership; it has come to the conclusion that it is only possible to have efficient secondary syndication in a few countries – that is to say, mainly in Denmark, Germany, England and Wales, Scotland, Sweden and Switzerland – because of the problems with inflexible types of real estate liens faced in many places (26). It is therefore vital for it to be possible to enter in the funding register not just real estate liens but also exposure, including accessory mortgages. This will enable pan-European syndication to be structured via German banks.

5. PORTFOLIO FINANCE AND SECONDARY SYNDICATION

Where portfolio finance is combined with subsequent syndication the legal situation becomes even more complex. This is clear from an example of major funding that was provided in Poland in 2004 with a German mortgage bank as lead arranger. From the start the idea was to involve two other banks, if possible before closing – and both of those banks wanted to then pass on parts of their exposure to other banks.

The finance was intended to cover the acquisition of almost 30 retail properties spread throughout Poland with a volume of finance that initially amounted to approximately 600 million euros but was ultimately upped to more than 900 million euros.

After many years of detailed technical preparatory work and lobbying, the Polish Mortgage Foundation (27) had, by mid 2001, succeeded in getting the Polish legislature to introduce an initial contractual collective mortgage

(26) If it is possible to provide for segmentation of mortgage exposure right from the start and if the denomination is also known an efficient mode of practice is also possible in France by having separate individual «copies exécutoires à ordre» issued, which can then later be used to transfer mortgage tranches; for the formalities required in this context and for exceptions in the case of banks, see STÖCKER, *Die Eurohypothek*, Berlin 1992, p. 113 et seq.

(27) The Polish Mortgage Credit Foundation (Fundacja na Rzecz Kredytu Hipotecznego) was founded in 1991 by the former Minister of Finance Balcerowicz and converted in 1996 to a new system of financing through credit institutions, so that it now has the structure and working procedures of a specialised banking association. For more information on its structure, scope of activity, the institutes and institutions funding the foundation and its specific responsibilities see «www.fukrehip.pl» in Polish, English and German.

into Polish mortgage law (28); it was then possible to use that legal instrument to also transfer the portfolio effect to the loan security *in rem*.

Through its Land Register Judge Conferences (29) the Mortgage Foundation has also managed to achieve a high (formerly non-existent) degree of transparency and uniformity in the formal requirements for land registration applications throughout Poland as a whole – especially as the papers and discussion records have been published by the Mortgage Foundation.

Despite these legal openings, secondary syndication is actually an extremely expensive and complex procedure requiring the partial assignment of the collective mortgage and then the partial assignment of the various elements. Any change in a collective mortgage means that the change has to be entered in each of the land registers concerned – with full documentation being generated for the entire transaction (30). Costly procedures such as this can only be undertaken in limited numbers – however sound the business reasons might be.

6. PORTFOLIO FINANCE SPANNING SEVERAL DIFFERENT COUNTRIES

Realisation of the EU single market has resulted not only in an increase in cross-border supplies of goods but also in an expansion of cross-border investment in financing of property. However, there are no national or European statistics available on cross-border mortgage loans.

The VDH/vdp has been compiling statistics from amongst its members for many years and from these it has established a steady growth in foreign mortgage business. After a cautious trial period, German property financiers began to enter this field to a greater extent in the mid 90s, accelerating towards the end of the 90s.

In 2006, the proportion of new commercial property finance extended by vdp members abroad was 67% (31). This was mainly in Great Britain, Fran-

(28) See DREWICZ-TULODZIECKA/SOERGEL/STÖCKER, *Mehr Rechtssicherheit für die Hypothek in Polen*, WM 2002, p. 891 et seq. (p. 894 et seq.). This collective mortgage is not created, however, until it has been registered against the last of all of the properties encumbered.

(29) The Polish Mortgage Foundation runs these Land Register Conferences annually in conjunction with the Polish Ministry of Justice with the assistance of judges from the Supreme Court and registrars from all of Poland's land registry districts, as well as banking lawyers and advocates.

(30) In the finance case mentioned this resulted in approximately 80,000 sheets of paper!

(31) vdp, Jahresbericht (Annual Report) for 2006, p. 28 on the financing of commercial properties. In 2006 loans in the sum of about € 24 billion (33%) were granted on domestic real estate whilst cross-border mortgage loans of about € 48 billion (67%) were granted.

ce, the USA, Italy and Spain. This led to the volume for cross-border commercial mortgages granted by vdp member banks amounting to about € 92 billion by the end of 2006, which corresponded to a 44% share of total exposure (32). This shows that cross-border property finance is now of very great significance.

Over the last few years international investors have increasingly pressed for portfolio transactions entered into to span more than one country. This makes it possible for them to ensure that the risk of individual properties going down in value is counterbalanced by others increasing in value. It enables them to include in their overall projects and funding those properties which, without the portfolio effect, could not be realised at all – or only realised on unfavourable terms. From the financing banks' point of view this risk-balancing effect cannot be achieved *in rem* by using real estate liens as it is not possible to have a cross-border collective real estate lien.

The legal instrument of a collective real estate lien, which is available under many legal systems (33), cannot therefore be used when the properties to be encumbered are situated in different countries. The securing of the loan then becomes more complex, the risk to the banks is greater and the loan therefore becomes more expensive than it might conceivably be if a collective real estate lien were to be used.

The introduction of a real estate lien uniform to all EU Member States could help if it could be created in the form of a collective real estate lien over properties situated in different EU Member States.

II. LEGAL ISSUES

The legal work already done to facilitate cross-border mortgage transactions, some of which was started many years ago, will be detailed below. A few fundamental legal issues should be mentioned first of all.

1. APPLICABLE LAW

In mortgage transactions with foreign connotations a clear distinction has to be drawn between the loan agreement and the real estate lien as they can

(32) Vdp, Jahresbericht 2006, p. 30 et seq. with details on loan approvals and exposures across individual countries. The most important countries here are: Great Britain, France, the Netherlands, Spain and the USA.

(33) According to a more recent vdp study of real estate liens in Central Europe, collective real estate liens exist in transactions in, for example, Bosnia-Herzegovina, Estonia, Germany, Croatia, Austria, Poland, Romania, Slovenia, the Ukraine and Hungary. No such collective real estate liens are to be found under Czech or Spanish law, however.

both be governed by different legal systems. In the case of the real estate lien the law of the country in which the encumbered property is situated is the law that is to be applied (*lex rei sitae* rule). In principle, however, the parties are free to choose the law that is to apply to a loan agreement; restrictions are imposed here, in particular, in the consumer credit field. Under the international private law of European legal systems it is recognised that the law applicable to a real estate lien and the law applicable to the exposure secured may differ. This applies to all kinds of real estate liens irrespective of whether they are accessory or non-accessory instruments.

2. CONNECTION BETWEEN THE REAL ESTATE LIEN AND THE EXPOSURE SECURED

The practicalities of a real estate lien are very greatly influenced by its flexibility. The stronger the link between the exposure secured and the real estate lien the less flexible the structure of the loan arrangement will be. In the case of strictly accessory real estate liens changes to the exposure secured, a change of creditor and therefore assignability, are greatly restricted and are only possible (if at all) at a high cost and with a possible loss of priority (34).

Real estate liens in Europe present very differing degrees of accessoriness and cannot therefore be used to secure credit with uniform flexibility. According to research conducted by the vdp there are four distinguishable levels of flexibility of real estate liens; the most flexible form of real estate lien known under the respective legal systems will be taken as comparison:

- a) Contractual accessoriness with a high degree of flexibility: Denmark, Germany, England and Wales, Estonia, Finland, Ireland, Scotland, Sweden, Switzerland and Hungary;
- b) Statutory accessoriness with a relatively high degree of flexibility as long as the bank and client remain the same: Netherlands, Austria, Poland and Spain;
- c) Statutory accessoriness and a low degree of flexibility: France (35), Latvia, Lithuania, Portugal, Slovakia and the Czech Republic;
- d) Statutory accessoriness with a very low degree of flexibility: Italy.

(34) See STÖCKER, *Die Eurohypothek*, Berlin 1992, p. 191 et seq.

(35) As a result of a recent reform of mortgage law the «hypothèque rechargeable» would appear to be more flexible than previous forms of mortgages. However, the vdp's enquiries into its practical applications have not yet been finalised so that the flexibility of this new form of mortgage in France has not yet been assessed.

3. EUROHYPOTHEC

Mortgage loans are of great significance in Europe, having a volume of more than 4 billion euros. It is not yet possible to talk of a pan-European single market in mortgage loans however; indeed, the mortgage market is mostly nationally orientated. One of the proposals for facilitating cross-border credit business is to create a property loan security instrument that could apply uniformly in all EU States in addition to existing national real estate liens and could be used as a flexible and efficient means of financing property transactions.

Real estate business and finance transactions have been experiencing dynamic growth in some EU States over the last few years, although not everywhere to the same extent. EU expansion has brought ten new Member States into the EU. Capital is not equally spread throughout Europe. The new EU States in particular require a great deal of capital input to achieve the same level as the older EU States. The new Member States have therefore modernised their property laws and, in this context, also their law on mortgages over the last few years in order to achieve better conditions for both domestic and foreign capital – and, in doing so, have also modernised the infrastructure of their real estate collateral (36).

The challenge for the European Union now is to create modern instruments for cross-border property finance based on very different legal traditions. This is not really a new topic, even in property law.

Eurohypothech guidelines

As early as 1966 the so-called Segré Report had submitted its proposal to the former EEC Commission that in order to integrate European capital markets a flexible real estate lien – similar to the German *Grundschild* – should be introduced in all Member States (37). Research into this was star-

(36) In some parts of Central Europe there are now better rules governing real estate liens than in many Western countries – e.g. the well-developed computerised land registers in Lithuania and Hungary and the elimination of undisclosed preferential rights in Poland.

(37) In the autumn of 1966 a group of experts appointed by the EEC Commission and headed by Prof. Claudio SEGRÉ - then Head of Research at the EEC Commission Directorate-General for Economic and Financial Affairs - submitted an extensive report on «The Development of a European Capital Market». The experts' task was to carry out a comprehensive investigation of the problems arising from the liberalisation of movements of capital and the implications of the integration of capital markets. The most significant structural differences in the individual capital markets were portrayed and capital flows within the EEC indicated. The «Segré Report» came to the following conclusion (p. 177): «An

ted but then interrupted as it was thought that quicker progress would be made on the concept of mutual recognition of finance procedures. This did not prove correct, however, in relation to property law.

In 1987 the International Union of Latin Notaries suggested creating a uniform «Eurohypothec» throughout Europe following the example of the Swiss *Schuldbrief*; that Eurohypothec would then be available in addition to real estate liens already in existence (38). This topic has been the subject of academic discussion in several European countries, with more and more practitioners also joining in during the last few years. The VDH/vdp has been at the forefront of this work. Its extensive research work conducted since 1989 into foreign property laws shows not only that there are huge differences in national mortgage legislation but also that some kinds of mortgages are so narrowly structured that modern forms of credit can either not be secured by mortgage at all or only at a great deal of expense. It was also deemed appropriate to draft the wording of a real estate collateral legislation in the context of the consultancy procedure started in 1992 within Central and Eastern European emerging countries on the reform of mortgage loans (39).

The VDH/vdp therefore in 1998 set up a working party of academics, notaries and banking lawyers, which drew up and published «Guidelines for

approximation or harmonisation of the laws on real estate liens within the individual Member States should be considered a priority. The land charge described in the previous chapter could play a vital role in funding house building as it is more adaptable and cheaper than the *hypothec*. It would also be appropriate to allow mortgages and land charge entries to be made in a currency other than the national currency.» Another conclusion is also reached (p. 165): «The introduction of a mortgage common to all Member States would help to integrate capital markets. The German *Grundsschuld* could be suggested here, a very adaptable means of providing security». On these proposals in the Segré Report, see KIRCHER, *Grundpfandrechte in Europa*, 2004, p. 418 et seq. and p. 442 et seq.; STÖCKER, *Die Eurohypothek*, Berlin 1992, p. 216 et seq. KIESGEN, *Ein Binnenmarkt für den Hypothekarkredit*, Cologne, 2004, p. 38.

(38) Re. this proposal by the UINL see in particular WEHRENS, *ÖnotZ* 1988, pp. 181-191; WEHRENS, WM 1992, pp. 557-563; WEHRENS, «Real Security Regarding Immovable Objects – Reflection on a Euro-Mortgage», in *Towards a European Civil Code*, The Hague/London/Boston 1998, pp. 551-564; KIRCHER (footnote 35) pp. 481-506; STÖCKER, *Die Eurohypothek*, Berlin 1992, pp. 228 et seq (this was partially translated into Spanish by Manuel CASERO MEJÍAS and published: «La Eurohipoteca», en *Revista Crítica de Derecho Inmobiliario*, Madrid, Febr. 1994, pp. 91-182); WACHTER, *Die Eurohypothek - Grenzüberschreitende Kreditsicherung an Grundstücken im Europäischen Binnenmarkt*, WM 1999, p. 49 et seq.

(39) This was triggered by more and more urgent requests for assistance on the modernisation of the law on securing loans on real property being directed at the VDH by the emerging countries. See in this respect STÖCKER, «Zum Aufbau von Strukturen zur Immobilienfinanzierung in den Reformländern und den dabei auftretenden Schwierigkeiten des Know-how-Transfers», in DROBNIG (publisher), *Systemtransformation in Mittel- und Osteuropa und ihre Folgen für Banken, Börsen und Kreditsicherheiten*, Max-Planck-Institut für ausländisches und Internationales Privatrecht, Hamburg 1998, pp. 315-323.

a Non-Accessory Security Right over Real Property for Central Europe» including concrete proposals for legislation (40).

These guidelines were taken as the basis for the work done by the pan-European group of experts initiated in Spain «The Eurohypothech», with which the VDH/vdp was also involved (41). The guidelines were revised and for the first time worded in English during a workshop in Valladolid in June 2004.

At the end of 2004 the «Forum Group on Mortgage Credit» set up by the EU Commission (42) incorporated in its recommendations the idea of creating a Eurohypothech (43). This meant that the idea of a Eurohypothech gained hold within the EU Commission.

The VDH/vdp agreed with the view expressed by «The Eurohypothech» group of experts and invited the members of the Forum Group's «collateral» sub-group, experts from the Northern European initiative on cross-border land registration networking (EULIS) (44) and from the pan-European study

(40) WOLFSTEINER/STÖCKER, *Nicht-akzessorisches Grundpfand für Mitteleuropa*, ZBB 1998, pp. 264-270, and DnotZ 1999, pp. 451-467 (English translation – A Non-Accessory Security Right over Real Property for Central Europe - published in Notarius International 2003, pp. 116-124).

(41) See in this respect the website for that group of experts: www.eurohypothech.com. It contains a large number of literary references on the topic of the Eurohypothech.

(42) In March 2003 the EU Commission set up a so-called Forum Group on hypothech credit consisting of 25 national experts; its purpose was to establish the barriers preventing cross-border mortgage credit within the EU and draw up recommendations on the further integration of the internal market in mortgage credit. The Forum Group's report was published at the end of 2004: *European Communities, The Integration of the EU Mortgage Credit Markets – Report by the Forum Group on Mortgage Credit*, Brussels 2004.

(43) EC, Report by Forum Group, p. 30 (116): «The Forum Group discussed other ways to facilitate transfers of mortgages, focussing on the Euro mortgage and the European Security Trust». Furthermore (117): «The Forum Group considered the Euro mortgage to be an alternative tool which could be introduced by Member States, without substantial changes to their existing legal systems, as it would operate under the rule of *lex rei sitae*. Such a pan-European non-accessory mortgage instrument could:

- avoid burdensome and costly inquiries in other Member States concerning local regulations and the quality of the national mortgage instruments;
- reduce additional and differing formalities and authentication;
- offer mortgage collateral as security for more than one mortgage credit;
- enable easy transfer of the mortgage as well as the property;
- meet the requirements for cross-collateralisation on a cross-border basis;
- meet the requirements for securitisation and mortgage portfolio management; and
- enable the creation of bank syndicates for mortgage finance».

(44) *Ploeger/van Loenen*, EULIS – At the Beginning of the Road to Harmonization of Land Registry in Europe, *European Review of Private Law* 2004, 379, 382: «EULIS is a project within the eContent programme of the Directorate-General Information Society of the EU. It is collaboration between the organizations that provide computerized access to the legal information on real estate of eight European jurisdictions: Austria, England and Wales, Finland, Lithuania, the Netherlands, Norway, Scotland and Sweden». Up to now Germany has unfortunately not been represented government-wise. In addition

on property law by the European University in Florence and other experts to attend two workshops in Berlin each lasting several days. From November 2004 to April 2005 those experts collaborated on drawing up the «Basic Guidelines for a Eurohypotheç», which were published by the Polish Mortgage Credit Foundation in May 2005 (45). The challenge here was, on the one hand, to draft a flexible real estate lien that met all modern finance structure requirements whilst, on the other hand, creating an instrument that would work by being capable of integration in all European legal systems. Although it was not possible to finalise the wording in every detail that work did provide concrete suggestions with regard to legal structures and identifying interfaces with national legal systems.

The outcome of this work now forms the basis of further reflection in Brussels on the development of mortgage laws in Europe. The greatest success of these endeavours to date has been that the idea of a Eurohypotheç has been taken up by the EU Commission in its «Green Paper on Mortgage Credit in the EU», which was published on 19.7.2005 (46). In that paper the EU Commission notes the Eurohypotheç projects and announces that the proposals drawn up will be examined. The economic analysis of the suggestions put forward by the Forum Group on Mortgage Credit, which was commissioned by the EU Commission, puts the idea of a Eurohypotheç in a positive light (47). The Eurohypotheç was also the subject of expert testimony to the EU Commission on the green paper in Brussels on 7.12.2005. Whilst the workshops organised by the vdp have dealt with the content of a Eurohypotheç, discussion in Brussels has focussed on the question of whether a Eurohypotheç is needed at all and whether any such instrument could be introduced under the so-called «26th Regime».

Nowadays there is no further work on the Eurohypotheç in Brussels. There are rumors that the White Book on mortgage credit will not touch the item of the Eurohypotheç. This is not negative, because herewith there will be more time for further deep analysis of mortgage law in Europe without

to the vdp, only representatives of the Bundesnotarkammer are represented on the German side at EULIS. See too the EULIS website at: www.eulis.org, also *Zevenbergen*, Registration of property rights; a systems approach – Similar tasks, but different roles, Notarius International 2003, p. 125 (136 et seq.). The EULIS+ Project has now been started, the aim being to link the land registries in Latvia, Lithuania, Poland, Slovakia and the Czech Republic to EULIS; vdp is taking part in this project.

(45) DREWICZ-TULODZIECKA/MORTGAGE CREDIT FOUNDATION, Basic Guidelines for a Eurohypotheç, Outcome of the Eurohypotheç workshop November 2004/April 2005, Warsaw 2005.

(46) *EU Commission*, Green Paper – Mortgage Credit in the EU, Brussels, 17.6.2005, (47) and (48).

(47) *London Economics*, The Costs and Benefits of Integration of EU Mortgage Markets, Report for European Commission, DG – Internal Market and Services, August 2005, p. 69.

hard politically motivated pressure. On national levels the discussion on Eurohypothech already contributed to modernisation of mortgage collateral law.

It is the right way to include the Eurohypothech and items of accessoriness into more conferences, like it was done in June 2007 in Maastricht and in July 2007 in Aranjuez. More and more specialists dealing with the so-called «Common Frame of Reference on contract law in Europe» get interested in the Eurohypothech idea. This will lead to more scientific work on real estate collateral law in Europe. Already several young lawyers all over Europe have studied the flexibility of their national mortgage law and used the «Basic Guidelines on a Eurohypothech» as benchmark for their research. Such studies should be initiated and supported much more. The practical need for more detailed information is obvious.

Need for a Eurohypothech

The Berlin workshops have made it clear that a Eurohypothech is not needed where a single bank grants a customer a loan that is secured by a charge on real estate provided that none of this changes during the whole term of the loan. However, this simple structure is increasingly becoming the exception. Property investments, by their very nature, are and will continue to be long-term investments because the capital used in their financing can only be returned over long periods of time. Changes in economic cycles, which are also reflected in financing structures, are becoming more and more frequent in both commercial and private sectors; this is particularly so in the case of Central and Eastern European countries, with their rapid economic and social development.

Loans secured on real estate today are amended, redeemed, subjected to both initial and subsequent syndication, assigned, certificated, secured by charges against more than one property, divided up and sold in part. Refinancing measures, equity optimisation, risk control and diversification now make it increasingly necessary to transfer large portfolios of mortgage loans (48).

As soon as the loan exposure secured is affected by a change in funding the question that immediately arises is what legal consequences this will have on the real estate lien. If the change consists of the fact that the exposure secured is to be replaced by new exposure this will basically mean, in the case of a strictly accessory mortgage, that the mortgage perishes and a new

(48) The Funding Group set up by the EU Commission at the beginning of 2006 identified as one of the most important and urgent problems in the creation of an EU single market in mortgage credit the issue of legal obstacles to the transfer of mortgage portfolios.

one has to be created as security for the new exposure. This generates costs and fees, a loss of priority and takes a great deal of time (49).

Many national legal systems offer solutions to some of the legal problems, but generally only for specific structures (50). There is a general tendency to weaken strict accessoriness (51), although this is being done in a very non-uniform manner for individual groups of cases, all with different structures. All of these solutions are difficult enough at national level but virtually irresolvable in cross-border situations (52).

Hence, a Eurohypotheck should not be designed along the lines of specific individual financing structures; it should be structured as a neutral credit collateral instrument flexible enough to serve all traditional funding purposes and also satisfy future credit structure requirements.

Owner protection

The most vital principle is that a Eurohypotheck should not be a new credit product but just a uniform European-wide real estate lien. None of the highly political dissension at consumer protection level in both national and cross-border credit transactions should therefore be applied to the Eurohypotheck.

It should, of course, be noted in a consumer protection context that the owner of a property encumbered by a Eurohypotheck must not be placed in a worse position than with a national mortgage. This is quite feasible, as can be seen from the proposals put forward by the Berlin group of experts.

If the Eurohypotheck should be fashioned, for example, on the structure of a German *Sicherungsgrundschuld* (land charge) the theoretical risk faced by an owner of being obliged to pay twice in the event of the loan debt and the

(49) On the need for a Eurohypotheck from the economic point of view, see *Stöcker, Die Eurohypotheck – Struktur einer ökonomischen Analyse, Immobilien & Finanzierung 2005*, p. 766 et seq.

(50) In France, special provisions have been brought in on the transfer of mortgages but these only apply in the special cases regulated there; see *Stöcker, Die Eurohypotheck*, p. 108 et seq. Such special provisions have been adopted in many European countries over the last few years in order to facilitate the securitisation of mortgage credit, i.e. (as well as France) in Spain and Belgium – that is to say, wherever the transfer of mortgages for funding purposes is only feasible under general legislation at great expense.

(51) This is evident, for example, in the now quite overwhelming use of the maximum amount mortgage in Austria, the «hypothèque pour toutes sommes» in Belgium and in the introduction in 2006 of the «hypothèque rechargeable» in France.

(52) The French law on «obligations foncières» provides that mortgages can be transferred, without complying with the general provisions of civil law, from the parent bank (originator) to the highly specialised mortgage bank subsidiary, which then issues the French covered bonds on that basis. This can only apply to French mortgages, however, as the French legislature cannot overrule foreign mortgage and land registration law so as to have effects in property law.

land charge being assigned to different new creditors without agreement, turns not on the land charge *per se* but on the effect of the German legal principle of good faith in relation to entries in the land register. It would therefore only be necessary to provide that claims and objections under the security agreement, the debt and the land charge together could be held against any person acquiring the real estate lien. The owner must nevertheless avail himself of that opportunity in proceedings, just as in the case of an accessory mortgage (Hypothek) (53).

In order to more easily convey this idea of appropriation by way of a security agreement the phrase now used in relation to the Eurohypothec is not «non-accessoriness» but «contractual accessoriness».

Flexibility in a real estate lien is therefore achieved by converting statutory accessoriness (54) into contractual accessoriness (55) by means of a legislatively prescribed security agreement. The mere change in terminology from «non-accessory» to «contractual accessory» has contributed to a clearly better understanding of the basic structure of a Eurohypothec and of the central legal instrument of a security agreement; it has also deflected a great deal of resistance on theoretical grounds, especially in Romanic law families.

4. EUROTRUST

The EU Forum Group has also supported the idea of a pan-European law of trusts in conjunction with the Eurohypothec (56).

Because of the technical legal separation of the loan debt from the real estate lien a Eurohypothec could facilitate European-wide security structures based on the principle that only the loan debt is sold or assigned but the real estate lien is held on trust – which also could be called fiduciary relation. Then, however, it is of great importance to ensure that such a fiduciary relation is insolvency-proof – i.e. that the beneficiary under the fiduciary relation retains its full legal status even if the trustee becomes insolvent (57).

(53) See in detail KÖNDGEN/STÖCKER, «Die Eurohypothek – Akzessorietät als Gretchenfrage?», *ZBB* 2/2005, p. 112 et seq.

(54) The terms used in European discussions are «accessoriété légale» and «statutory accessoriness».

(55) This is termed «accessoriété conventionnelle obligatoire» and «compulsory contractual accessoriness».

(56) *EC*, Report by Forum Group, p. 31 (118).

(57) See above under I.4. with regard to the German funding register.

5. EUROHYPOTHEC AND EUROTRUST APPLICATIONS

a) With these two legal instruments *European-wide syndication* would be much easier than it is today. It would then be possible not only to draw on a uniform real estate lien under all legal systems but to also make use of the «trust» vehicle so popular in Anglo-Saxon legal circles – or the «*Treuhand*» device developed under German law – by providing that the Eurohypothech is only created for the benefit of a «trustee». In order for this trustee to be able to give the syndicate members insolvency-proof status in the event of the trustee becoming insolvent it would have to have its principal place of business in a country that recognises insolvency-proof trust status (58). It would seem to be appropriate to also create a common European standard in this respect, a so-called «Eurotrust» (59).

b) The same also applies to the cross-border funding of mortgage credit by way of *securitisation*. With securitisation, the predominant feature is the insolvency-proof transfer of «mortgages» to an SPV. Such a transaction, termed a «true sale» in international parlance, is not the same thing as an assignment and transfer under property law. A «true sale» requires the achievement by the transaction of special insolvency-proof segregation of assets in the event of the originator's insolvency; the latter will generally not only be the original lender but also the monitor of the mortgage loans. With a Eurohypothech in the form set out in the Basic Guidelines, the loan exposure could undoubtedly be assigned to the SPV whilst the Eurohypothech (which is a separate legal interest to the loan exposure) could be held on trust by the originator so as to avoid the high cost and delays caused by amendments to the land register – and this would be so throughout Europe. There would nevertheless be no hope of success without legal separation between the loan exposure secured and the real estate lien and without insolvency-proof trust status.

c) The recently emerging «*structured covered bonds*» would also partly be put on a European-wide basis as it is of vital importance here that the real estate liens be transferred to an SPV. «Covered bonds» is now customary international terminology for products like the German «*Pfandbrief*» and the Spanish «*cédulas hipotecarias/territoriales*». They are of huge importance in the market; at the end of 2006 the volume of all covered bonds in Europe amounted to approximately 1.9 trillion euros (60).

(58) This is the case, for example, in English legal circles and also under German law as a result of the funding register.

(59) See in this respect Nasarre-Aznar/Stöcker, Eurohypothech and Eurotrust - Future Instruments of a Pan-European Mortgage Market, in de Vries Robbé / Ali (ed.), *Innovations in Securitisation, Yearbook 2006, Alphen aan den Rijn 2006*, p. 111 et seq.

(60) See European Covered Bond Council (ECBC), *European Covered Bond Fact Book*, Brussels August 2007, p. 15. There, most covered bond structures in Europe are

The aim of structured covered bonds in the UK (61) and the Netherlands is to use normal securitisation structures to plug the gap in countries where there are no special provisions regarding insolvency law. This means that the mortgage loans are «transferred» to an SPV (62). That SPV guarantees the bonds that are issued by a credit institution (63), which is in turn required so that the special provisions of EU law for covered bonds can apply (64).

The transfer of mortgage loans from a credit institution to an SPV raises many problems (65) in a property law context. These could be partially resolved by a Eurohypotheec – as described above – particularly with regard to portfolios of cover assets spread throughout Europe.

d) If the transfer of an individual mortgage loan were to be easier or if it could be replaced by trust solutions this would also be possible for a large number of mortgage loans. With a Eurohypotheec and a Eurotrust the expansion of pan-European diversified portfolios of mortgage loans would become easier – with positive benefits with regard to the spread of risks by credit institutions and the use of more efficient funding structures. All this applies equally to traditional *Pfandbriefe*, structured covered bonds and mortgage backed securities.

6. ROUND TABLE ON «THE FLEXIBILITY OF REAL ESTATE LIENS IN CENTRAL EUROPE»

An analysis of fundamental legal theory and a systematic evaluation of experience in credit practice are very important to the reform of mortgage law. This applies at both national and European level.

explained. See further the website of the ECBC «hypo.org» with additional country reports, legislation data and an overview.

(61) For the UK version of structured covered bonds see. Engelhard in: ECBC, European Covered Bond Fact Book, Brussels August 2006, p. 125.

(62) With the MBS this SPV issues the bond instruments, with structured covered bonds the SPV guarantees the bond instruments issued by a credit institution.

(63) Instruments have recently also been issued in the USA, some of which are called «contractual covered bonds». These are not issued by a credit institution, however, but in the case of Washington Mutual by a trust with its head office in Delaware. The structure is set out in detail in the basic prospectus of 4.9.2006, p. 6 et seq.

(64) The most significant special provision relates to risk weighting for covered bonds; cf. in this respect Engelhard, Covered Bonds and the EU Capital Requirements Directive, in ECBC, European Covered Bond Fact Book, Brussels August 2006, p. 179 et seq.

(65) With these «transfers» it is necessary to consider whether these are real legal transfers or just charges or pledges over the cover assets or whether there is any specific structure under English law (particularly an equitable assignment or an equitable charge). It is also necessary to analyse whether the transaction covers the assets in full or just in part. It is also necessary to ask what consequences the assignment or transfer of collateral might have with regard to other exposure for which the collateral assigned or transferred was also originally intended to be security.

In order to put further work on a wider basis the vdp has set up a Round Table on «The flexibility of real estate liens in Central Europe». Three two-day discussions have now been held with leading experts from Austria, Bosnia-Herzegovina, Croatia, Estonia, Germany, Hungary, Poland and Slovenia with regard to the theoretical principles and practicalities of their national real estate liens, culminating in detailed national reports. Those countries were selected according to whether there were currently non-accessory real estate liens or real estate liens with extremely loose accessoriness in existence or whether flexible real estate liens of that kind were intended to be introduced in their national legal systems. The results of this Round Table were published recently (66). The vdp intends to extend these talks to other countries (67).

Results to date have shown that in many countries maximum amount mortgages are used; some of these are extremely flexible but only provided that there is no change of owner or creditor. No in-depth comparative-law review of real estate liens in Europe is anywhere near complete. There is a great need for examination of the theoretical link between the loan agreement and the creation of real estate liens, into questions regarding the burden of proof and acquisition in good faith (68) and on the utilisation of abstract promissory notes (69).

(66) STÖCKER, Otmar (Red.): «Flexibilität der Grundpfandrechte in Europa», Band I. Ergebnisse der Workshops vom Juni 2005/Dezember 2005/Juni 2006 in Berlin (Flexibility of Real Estate Collateral in Europe, volume 1), Berlin 2006, vdp series volume 23.

(67) During the next round of talks reports are to be received on Norway, Russia, Romania, Serbia, Turkey and Ukraine. After that, the Northern and English legal circles could be included and possibly, later on, increased consideration of the Romanic-law families.

(68) In many countries is it customary with accessory mortgages for the bank to have disbursement of the loan confirmed in the agreement creating the mortgage, so that disbursement is not made until then. This means, in principle, that the same effect is achieved as by the creation of a non-accessory land charge before disbursement of the loan, which is quite legitimate and necessary from the financing bank's point of view. Those that stress the consumer-protection effect of the strict accessoriness of their mortgages do not mention this widespread practice however.

(69) In Sweden a real estate lien is not created to secure the loan; a «skuldebrev» is created that runs alongside the loan as a separate commitment. It is also of interest to note that in many US federal states it is customary to create a real estate lien for a promissory note, which also forms an independent commitment existing alongside the loan. Under German credit practice too, use was sometimes made of a combination of an abstract promissory note secured by way of a mortgage although this practice was discontinued because the securing land charge was easier to manage; see also with regard to that «abstract mortgage» Baur/Stürner, Sachenrecht, 17th edition, Munich 1999, § 36, paragraph 76, § 37, paragraphs 18 and § 40, paragraph 45 et seq.

RESUMEN

EUROHIPOTECA

Las operaciones inmobiliarias complejas y la financiación (por ejemplo, la financiación de carteras y la estructuración) exigen gravámenes inmobiliarios modernos y flexibles. Este es, desde luego, el caso a nivel nacional, pero es aún más el caso en operaciones transfronterizas. La expansión de las carteras diversificadas pan-europeas de crédito hipotecario —y de su cesión a otros bancos o vehículos de refinanciación— es un desafío importantísimo que desafortunadamente a menudo no se supera, por lo menos no sin incurrir en costes desmesurados.

La eurohipoteca y el eurotrust podrían constituir un medio viable de lograr esto. Ya están sobre la mesa las primeras propuestas concretas. Se hace un llamamiento a los juristas y profesionales europeos a participar en este labor. Aunque el desarrollo de dichos instrumentos legales a nivel europeo podría tardar un tiempo, desde luego que el trabajo sirve de algo. El trabajo hecho sobre los principios de la Ley Hipotecaria en Europa puede por lo menos hacer una aportación clara a las mejoras que se hagan a nivel nacional, demostración de lo cual se encuentra en algunos ejemplos alentadores de Europa Central y del Este.

ABSTRACT

EUROHYPOTHEC/EUROMORTGAGE

Complex property transactions and financing – e.g. portfolio finance and structuring – require flexible modern real estate liens. This is certainly the case at national level, but even more so in cross-border transactions. The expansion of pan-European diversified mortgage credit portfolios – and their transfer to other banks or refinancing vehicles – is a huge challenge that unfortunately is all too often not mastered at all, or at least not at reasonable expenses.

The Eurohypothech and the Eurotrust might be a feasible means of doing this. The first concrete proposals are already on the table. Academics and practitioners in Europe are being called upon to participate in this work. Although it might take some time for such legal instruments to be developed at European level the work is certainly not being done in vain. Work done on the principles of mortgage law in Europe can at least make a definite contribution towards improvements at national level, as demonstrated by some encouraging examples in Central and Eastern Europe.

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