



*Asesorías y Tutorías para la Investigación Científica en la Educación Puig-Salabarría S.C.
José María Pino Suárez 400-2 esq a Lerdo de Tejada, Toluca, Estado de México. 7223898473*

RFC: AT1120618V12

Revista Dilemas Contemporáneos: Educación, Política y Valores.

<http://www.dilemascontemporaneoseduccionpoliticayvalores.com/>

Año: VI

Número: Edición Especial.

Artículo no.:139

Período: Junio, 2019.

TÍTULO: Regulación legal de préstamo hipotecario: la experiencia de Rusia y los países extranjeros.

AUTORES:

1. Dr. Gennadiy A. Borisov.
2. Dra. Liana R. Barashyan.
3. Dr. Ivan N. Kuksin.
4. Dra. Inna A. Yaroshchuk.
5. Dra. Natalya A. Zhukova.

RESUMEN: En este artículo, los autores realizan un análisis de la regulación de las relaciones legales en el ámbito de los préstamos hipotecarios, basándose en estudios de ciertos actos jurídicos internacionales, publicaciones monográficas y publicaciones científicas. Analizan, en particular, el sistema de préstamos hipotecarios alemán, cuyos elementos se utilizan en el desarrollo del sistema hipotecario ruso. Se señalan las características y peculiaridades comunes de los préstamos hipotecarios en Alemania y Rusia.

PALABRAS CLAVES: Derecho hipotecario, préstamo hipotecario, contrato hipotecario, relaciones legales.

TITLE: Legal regulation of mortgage lending: the experience of Russia and foreign countries.

AUTHORS:

1. Dr. Gennadiy A. Borisov.
2. Dra. Liana R. Barashyan.
3. Dr. Ivan N. Kuksin.
4. Dra. Inna A. Yaroshchuk.
5. Dra. Natalya A. Zhukova.

ABSTRACT: In this paper, authors carry out an analysis of regulation of legal relationships in the sphere of mortgage lending, based on studies of certain international legal acts, monographic publications and scientific publications. They analyze, in particular, the German mortgage lending system, elements of which are used in the development of the Russian mortgage system. The common features and peculiarities of mortgage lending in Germany and Russia are noted.

KEY WORDS: mortgage law, mortgage lending, mortgage contract, legal relationships.

INTRODUCTION.

Study and implementation of the foreign countries' experience in the field of mortgage lending is an important component of understanding the need for legal reforms and improvement of mortgage lending in the Russian Federation at the present stage. The role and scale of state participation in the development of the mortgage lending (housing financing) model of each country depends on its maturity and approach to its construction.

It is generally accepted that in world practice there are two models of mortgage lending: one-tier and two-tier models.

The one-tier model is functioning for a long time in a number of Western European states: Germany, France, Denmark, etc. As a rule, lenders in this model are special credit organizations, namely, mortgage banks.

According to the leading Russian scientist in the field of jurisprudence, V.M. Budilova, in Russia there are elements of the German civil law system; based on this, let's consider in more detail the characteristics of the collateral law of the Federal Republic of Germany (FRG) (Budilov, 2003, p.20). Research papers by K.H. Gursky (2001), G. Kobler (1999), M. Spring (2001), T.R. Gallyamova (2015), A.V. Stepanyuk et al (2017), Bondarenko et al (2018) et. al. is devoted to the research of the mortgage system in Germany in Germany.

DEVELOPMENT.

Methodology.

Various general scientific techniques and methods of logical cognition were used in the work: systematic, analysis and synthesis, abstraction, and formal-logical approaches. The disclosure of the topic was facilitated with the use of linguistic-legal, formal-legal, and comparative-legal methods.

Results and Discussion.

In Germany, the mortgage system includes the legislation which regulates the turnover of real estate, as well as organizations servicing this turnover and registering it. In Germany, such organizations are the Land and cadastral departments, as well as the courts and notaries.

The real estate legislation in Germany is divided into substantive and procedural, which, in turn, is governed by the following legal regulators: German civil code, mortgage law, law on mortgage banks, legislation on the right of development and on the ownership of apartments; regulation on the land book, and German Code of Civil Procedure (Budilov, 2003, p. 20).

One of the distinguishing features of the housing purchase financing form in Germany is its contractual savings system which mobilizes free funds of the population for the purchase of finished housing or its construction within the specialized credit institutions: construction savings banks.

For a certain period of time, future borrowers accumulate at the bank approximately 50% of the cost of the housing which they anticipate to purchase, then the construction savings bank provides a deficient amount from the investment of other clients who applied to the institution later. Due to this principle of functioning, the building savings system is completely autonomous and operates separately from the national financial market (Arikunto, 2012; Arisetyawan, et al, 2014; Barahal, 2008).

In accordance with the German legislation, the activity of construction savings banks is based on certain principles and is carried out in accordance with uniform rules. So, the construction savings banks cannot carry out other active operations with invested funds, except for the issuance of mortgage loans to members of the institution. The activities of the construction savings banks are monitored by the Federal Office for the Supervision of Lending, which has the right to liquidate a permit to operate in the event of law violations.

A feature of this system is that, unlike a depositor of a commercial bank, who does not know how his/her money is used, a client of a construction savings bank knows for sure who uses his/her money and based on what conditions.

In Russia, such system is absent, however, there was introduced repeatedly in the State Duma a draft law on “Construction savings banks” which would allow citizens not only to buy their own property, but also save up for major repairs of the common property of apartment buildings.

Deputies see the main reason for the refusal of the draft law in the underdevelopment of the system of raising funds for housing, due to which citizens will bear significant risks, as companies attracting citizens' money are not credit institutions and there is no appropriate supervision over their financial stability. At the same time, the creation of credit institutions in the form of divisions of commercial banks does not guarantee that the invested funds will not be used for other needs.

In our opinion, a serious advantage of this model is the lack of dependence on the financial state of the credit market due to its autonomy. At the same time, a mortgage bank does not need to look for credit resources, it is only necessary to establish a margin for lending services. Interest rates for the use of the loan and interest rates deposits are set in any form. Thus, the function of a balanced autonomous model is particularly important for improving the system of mortgage lending in countries with a precarious economic environment.

In accordance with German law, the size of a mortgage loan should not exceed 60% of the value of a land plot; in Russia, the price of a land plot is 70-80% of its market value; upon that, the collateral value of the land plot transferred as mortgage collateral is determined by agreement of the borrower with the credit institution.

Lending for the purchase of a plot of land bears much higher risks for credit institutions compared to similar operations with housing, so banks pay considerable attention to land valuation.

Risks of mortgage lending upon security of land plots rise due to the impossibility to define accurately the liquidity of a plot, and the final amount of the transaction often differs significantly from the bid price. In the case of forced sale of a land plot when the borrower fails to fulfill his/her obligations to the creditor bank, there are often certain time limits; therefore, an appraiser should be able to accurately calculate the liquidation value of the plot. As a rule, high risks of lending land plots attract higher interest rates on mortgages, and, consequently, increase the amount of mortgage loans for land plots.

Based on this, in order to reduce the price of a land plot in case of concluding a mortgage transaction in Russia, it is necessary to make adjustments to the legal acts of appraisal activity, what will allow banks to develop their own instructions for assessing a land plot to conclude a mortgage transaction, as well as to determine the liquidity of an object that directly affects the price of a land plot in a mortgage credit.

Also, in Russian and German legislation, the mortgage agreement form is drafted in completely different ways. If the Russian Civil Code requires a written form, notarization, as well as state registration of a mortgage lending agreement, the German Civil Code follows the principle of form simplicity, that is, there is only an agreement between the parties, which can be either written or oral (Frenkel, 2000, p.78).

Comparing the legal regulations of Russian and German legislation in the field of mortgage lending, in particular the subject matter of contract, we can state their exactly opposite approaches. Russian legislation imperatively and in detail provides for significant terms of a mortgage contract, which for a relatively short validity period for the newly introduced norms of the Civil Code of the Russian Federation provide for simplifying application of its rules, such as the amount for obligation and deadline for the fulfillment of the main obligation.

However, in German law there are more simple rules in determining the content of a mortgage agreement. In Germany, when we conclude a mortgage agreement, an entry is made in the land register, which must contain the following information: type of collateral, name of the borrower, name of the lender, interest rates on the loan, and other accessory requirements.

As a rule, upon a mortgage transaction, a specialized mortgage deed is issued or an agreement of the parties is accepted on the basis of which the lender may at any time require the preparation of this deed. In this case, the land book specifies the condition on the prohibition of the transfer of the mortgage deed to third parties.

In the Russian Federation, land mortgage is not a common service due to stringent legal requirements for a purchased land and a borrower itself, what creates significant difficulties for taking a loan.

One of the main features of the mortgage of a land plot, which follows from the specifics of land relations, is that the mortgage, and, consequently, mortgage lending of the plot is possible if the relevant land plot is not excluded by federal law from turnover or is not limited in turnover.

There are also some legal restrictions on mortgage of land plots. Thus, mortgage lending for land plots belonging to state or municipal property is not allowed. In addition, the legislator has banned mortgage lending of part of a land plot, if the area of this part is less than the established minimum. Such a minimum is determined by the regional and municipal authorities independently through the adoption of relevant regulations.

At the same time, the regions and municipalities set the permissible minima of the land plot area, taking into account the different purpose of land and its permitted use. If a plot of land that is planned to be pledged to a bank upon receiving a loan is in joint shared property or joint ownership, only part of the land belonging directly to the borrower can be pledged as collateral. At the same time, the pledged part of the land plot should already be allocated in kind at the time when lending agreement is concluded.

This means that the location of the new land plot must be agreed by other participants in the common property. In addition, it is necessary to carry out land surveying and cadastral registration with the subsequent registration of the title.

If a condition is stipulated in the mortgage agreement that buildings located or being built on a plot of land belonging to the mortgagor are not mortgaged when registering a mortgage on a plot of land to the mortgagee, the mortgagor retains the right to all these buildings when the land is levied by the bank and at the same time acquires the right of limited use (easement) of that part of the land that is necessary for the operation of such buildings or structures according to their purpose.

Specific conditions of use of the named part of the land will be determined by agreement of the mortgagor and the mortgagee, and in case of a dispute, at law. A borrower who acts as a mortgagor of a land plot during a mortgage period has the right, without the consent of the credit institution

(mortgagee), to freely dispose of buildings and structures on the acquired plot that were not pledged to the bank.

As an exception, a client can get a mortgage loan in some banks to buy land in another region. However, here it is an imperative that there should be a branch of the credit institution that provides a mortgage in the relevant region where the borrower plans to acquire a plot of land.

In addition, banks have fewer mandatory requirements for making mortgages on land plots. For example, some credit organizations considering the possibility of approving a mortgage, pay attention to the presence of communications to the acquired land. Depending on the rules of the bank, there also may vary the requirements for the minimum size of the purchased land.

Based on this, it is necessary to make substantial adjustments to Russian legislation in order to increase the total volume of mortgage loans issued for land plots in the Russian Federation, in particular, in mortgage law concerning real estate, which implies simplification of requirements to the document flow and changing the conditions put forward to the borrower.

In addition to the mortgage, German law also contains the concept of land debt, which occupies the main role in the mortgage law concerning lien over real estate. Land debt in Germany is an abstract encumbrance of land, legally separated from the financial basis. In practice, this means that a contractual relationship is established between the requirement and the land debt (not regulated by law, as opposed to a mortgage): the so-called security land debt. The relationship between the property right of land debt and the secured claim is established in a bilateral agreement - a security agreement that obliges an owner to establish a land debt, and obliges a creditor to use land debt only to secure the requirement (Vasilevskaya, 2004, p.102).

The abstractness of the land debt in the sense of lack of accessoriness gives it greater flexibility and reduces costs:

- Land debt can serve as collateral to large number of interchangeable creditors claims against its debtor.
- When replacing a secured claim / secured claims, it is enough to enter into a written agreement, what will save costs in debt restructuring, as well as reduce the number of entries in the land registry.
- Land debt as opposed to a mortgage can meet the requirements of other lenders than the holder of the land debt, for this purpose, it is necessary to conclude an appropriate agreement between the holder of the land debt and the lender on demand.
- Protection of the interests of an owner by including the relevant provisions in the security agreement is guaranteed no worse than through a mortgage (Vasilevskaya, 2003), p. 62).

Currently, in the German doctrine and law enforcement practice, land debt is considered as a fundamental type of collateral relationship, which largely crowded out the mortgage.

It seems that in Russia a type of pledge similar to land debt by the law of Germany and a more flexible form of collateral as compared to a mortgage could also be of great importance, since this model will allow citizens of the Russian Federation to freely acquire land plots without significant obligations to a lender. In this regard, when improving Russian legislation, in particular, governing the pledge right to real estate, the pledge right to land should be considered as the main type of pledge right to real estate, like land debt in Germany, and also be settled with the help of direct norms in the law.

Based on this, it seems that conceptually the only acceptable approach from the point of view of the development of the mortgage lending market is that approach whereby a real estate mortgage underlies the issuer's liabilities on mortgage securities, but formally legally provides only the borrower's liabilities before the lender which is an issuer of equity securities. At the same time, the single-tier (German) model is economically more stable; therefore, it is more preferable in unstable economic conditions.

CONCLUSIONS.

Currently, the mortgage is a legal institution on the basis of which a system of long-term mortgage lending is created.

In Germany, a developed and legally regulated system of mortgage lending has long been formed, based on clear methods of real estate registration, and an effective practice of attracting long-term financial resources for lending through the issuance and turnover of mortgage-backed securities.

BIBLIOGRAPHIC REFERENCES.

1. Budilov V.M. (2003). Mortgage law in Russia and Germany. Spb., 21 p. (In Russian).
2. Gursky K.H. (2001). 20 Probleme aus dem BGB. Das Eigentümer-Besitzer-Verhältnis. 6.Aufl. Neuwied: Luchterhandverlag. 107 p.
3. Kobler G. (1999). Deutsche Rechtsgeschichte. 5. Aufl. - München: Vahlen. 561 p.
4. Spring M. (2001). Geschäftsfähigkeit und Verfügungsberechtigung bei Grundstücksverfügungen. Berlin: ESV. 166 p.
5. Gallyamova, T.R. (2015). Improving the efficiency of tax control as a factor of financial security of the republic of Bashkortostan. Wirtschaftswissenschaften, Management, Recht: Probleme Der Wissenschaft Und Praxis / Sammelwerk der wissenschaftlichen artikel. Der wissenschaftliche redakteur: S.I. Drobjasko. Pp. 200-203.
6. Stepanyuk A.V., Garmashev M.A., Peremyshlennikova I.N., Voronova O.N., Korolyova E.V. (2017). Contract freedom principle: a restrictive context. The Turkish Online Journal of Design, Art and Communication TOJDAC. April. Special Edition. Pp. 343-346.
7. Bondarenko S.S., Barashyan L.R., Goltsov V.B., Korobko K.I., Tychinin S.V. (2018). The Institute for Damage Prevention in the Civil Law of the Member States of the Commonwealth of Independent States. Revista Publicando. 5 # 14. (2). Pp. 822-829.
8. Frenkel 'Eh. B. (2000). German Civil Code. Comparative legal study: study guide. M.: NORMA. 366 p. (In Russian)

9. Vasilevskaya L. Yu. (2004). The doctrine on property matters in German law: a monograph. M.: Statut. 538 p. (In Russian).
10. Vasilevskaya L. Yu. (2003). Legal regulation of collateral in Germany and Russia: a monograph. M.: Publisher RGTEHU. 188 p. (In Russian)
11. Arikunto, S. (2012). Prosedur Penelitian Suatu Pendekatan Praktek. Jakarta: Rineka Cipta
12. Arisetyawan, A., Suryadi, D., Herman, T., & Rahmat, C. (2014). Study of Ethnomathematics: A Lesson from The Baduy Culture. International Journal of Education and Research, 2(10), 1-8.
13. Barahal, S. (2008). Thinking about thinking: Pre-service teachers strengthen their thinking artfully. Phi Delta Kappan, 90(4), 298-302.

DATA OF THE AUTHORS.

1. **Gennadiy A. Borisov.** Doctor in Law. Belgorod State University. Russia. Email: borisov@bsu.edu.ru
2. **Liana R. Barashyan.** Doctor in Law. Institute of Service and Entrepreneurship (branch) of DSTU in Shakhty. Russia. Email: doc-kafkfp@sssu.ru
3. **Ivan N. Kuksin.** Doctor in Law. Belgorod State University. Russia. Email: kuksin@bsu.edu.ru
4. **Inna A. Yaroshchuk.** Doctor in Language. Belgorod State University. Russia. Email: yaroshchuk@bsu.edu.ru
5. **Natalya A. Zhukova.** PhD in Law. Belgorod State University. Russia. Email: zhukova_n@bsu.edu.ru

RECIBIDO: 21 de marzo del 2019.

APROBADO: 5 de abril del 2019.