**Mortgage crediting**

Mortgage crediting – to great extent new for our country type of banking services, and there are serious obstacles, which impede its development

The purposes and problems in my thesis work involve the stage analysis of mortgage process for estimation legal side of Russia mortgage, study the factors influence on the reduction credit risks.

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**Introduction**

As the mortgage operation creates an essential contribution to the development of real estate market the impotence of real estate credit is obvious. It might be used for involvement of additional investment to the different branches of economy: to agriculture, commercial activity, housing etc.

In the modern terms of general stagnation, crisis of non-payments and especially of bankruptcies of enterprises, from one side, and sharp necessity in renovation and technical re-equipment of production , from other side, the mortgage becomes the sole decision of problem.

The system of mortgage crediting for the Russian enterprises , which possess as a rule enormous fixed assets, from my point of view, represents not only acceptable, but solely possible in the present conditions.

The purposes and problems in my thesis work involve the stage analysis of mortgage process for estimation legal side of Russia mortgage, study the factors influence on the reduction credit risks. I will emphasise on the home mortgage, because this kind of mortgage occupies leading position in this section.

The thesis work consists of three main chapters, introduction and conclusion.

The introduction deals with the topicality of the subject matter, purposes and problems posed therein and contents of the thesis.

The first chapter “The essence of mortgage crediting” gives a general historical outlook of mortgage lending development and the reasons of necessity to introduce it in the modern Russia.

The essential second part of thesis deals with the current legal base on real estate issues and the possibilities to introduce mortgage lending to the bank activity.

The third part “ The problems and perspective of development of hypothecate crediting” describes the international experience in this field. The purpose of this to give overview of loan contracts in several countries and to describe American models of hypothecation, which are the most widely used in our mortgage system. Also this chapter is focuses on the existing problems of the mortgage lending and ways their optimal solving.

**Chapter 1. The essence of mortgage crediting**

**1.1. The necessity of mortgage crediting**

The establishment of market economy is impossible without attraction of the population masses to the business and production activity, and such forms of crediting investment, which will have not only urgent, paid and returnable character but the mass character, will have the priority development.

As far as the collateral is necessary condition for market crediting, and the main part of the population of the country did not possess at the beginning of the reforms and do not possess at the present time the large real monetary accumulations and considerable movable property, so the mortgage becomes the sole variant of getting credit .

The expectation of activity of investment process is strong as never before for the last years. In this case for restoration of the economy of the country the long-term credits are necessary, because it seems that the period of recovery will be long. In the situation when the wave of unpaid credits overwhelmed the banking system the presentation by the borrower of the most reliable guarantees of repayment of the loan in the time of debentures gets the determined meaning in the case of resolving of the question of granting credit. One of the most reliable means of collateral is real estate, which becomes the subject of collateral in the case mortgage crediting. In the case of appropriate care the real estate and the land almost never lose its value and on the contrary in the future its price will increase.

The actuality of this type of credit consists of the fact that in the terms of the deep crisis of the production and of the economy of the country as a whole, it is possible that the sole way for the national enterprises, which majority is at the edge of bankrupt, to get long-term credits is the mortgage of real estate belonged to them.

In the case of sharp shortage of financial sources of housing construction the necessity in dwelling increases for the account of inflow to Russia of refugees from near abroad and the change of location of troops.

In these conditions the objective necessity in long-term credits granted to the population for housing construction occurs which are not subject considerably to the inflation and which are assured in maximum form from the point of view of their return. Namely the mortgage credit is in conformity with these requirements, which is assured by the collateral of real estate.

The main purpose of creditor is receipt from borrower of the most reliable guarantees of loan return in the time of fulfillment of debentures. It is naturally that the creditor must in the first place have the strict information of financial position of the borrower, check his paying capacity, the condition of his property, the availability of debts and so on. But all that is not sufficient, especially, if the long-term crediting is considered. The mortgage is more reliable form of guarantee (in contradistinction to individual form – warranty) of payment of loan under real estate which owner is not deprived of the right to manage it; the mortgage gives the creditor the right to collect and to sell the property of the borrower in the case of non-payment of indebtedness in the time of fulfillment of the obligation.

In the terms of general stagnation, crisis of non-payments and especially of bankruptcies of enterprises, from one side, and sharp necessity in renovation and technical re-equipment of production, from other side, the mortgage becomes the sole decision of problem for enterprise. Now the banks are ready to give credits for production only in the case of availability of reliable guarantees of loan return.

The system of mortgage crediting for the Russian enterprises, which possess as a rule enormous fixed assets, from my point of view, represents not only acceptable, but solely possible in the present conditions. The enterprises need for restoration of production in the first place the renovation of means of production in accordance with modern technologies. And for realisation of such modernisation the considerable long-term and relatively cheap credit resources are necessary. The mortgage credit is in conformity with such conditions.

The history of establishment and the experience of mortgage crediting in Russia.

The combination of experience of mortgage crediting of expenses for purchase of land before revolution with the practice of individual crediting of dwelling construction in the soviet time is the reliable theoretical foundation for development of recommendations on mortgage crediting at the present time.

In Russia the first mortgage organizations appeared in the second part of XVIII century. In contradistinction to the other countries where the land was the subject of mortgage, in Russia the subject of mortgage were serfs. In 1860 the state mortgage credit organizations which existed before reforms were liquidated. After cancellation of serf right by the decree of the tsar Alexandre II the commission for development of the mortgage law was organized on which basis the mortgage banks of different form of property began to arise. However the private banks had the problem of resources attraction for a long period of time, and in connection with that the necessity in the state guarantees on attraction of such means appeared. The state took measures operatively for increase of liquidity of mortgage bonds: the persons who had them got the possibility either to use them as collateral in the purpose to get credit or to sell them.

It is important that the section appeared in the banking legislation, which regulated the activity of mortgage credit organizations, and then this legislation was divided into two parts: one – for commercial banks, which were considered as the banks of short-term crediting, the other – for mortgage banks, which acted on other principles.

The establishment of mortgage credit after 1861 was stipulated by the needs of landowners holding, which faced the difficulties of the “reconstruction” in the period of reforms. The noblemen preserved their rights on real estate, but they did not have large capitals. The need of landowners in means was satisfied for account of land long-term crediting.

The considerable demand on mortgage loans was also in the cities among the house-owners from petty bourgeoises and merchants. The development of trade and business activity, the increase of the offers of stock values in connection with the wave of joint stock foundation, required the large cash means.

In the middle of 60 years of XIX century the mortgage organizations began to appear in Russia, which were founded on the capitalist principles of functioning. At the end of 80 years the system of mortgage credit was built, which consisted of corporation, mutual and joint stock, private and state credit organizations. This system enveloped the territory of the whole European Russia.

The mortgage banks granted long-term loans (till some decades) under the collateral of real estate: private lands in the country and houses (constructions) in the cities. The banks accumulated the means for granting credits for account of issue of mortgage bonds – mortgage sheets. These bonds were supported by the property pledged as security in the bank.

The amount of interest, which was paid by the borrowers to the bank for granted loan, exceeded the amount of the interest, which was paid by the bank to the holders of mortgage sheets. This difference was the main source of the bank profit. The amount of issued into circulation mortgage sheets should not exceed the joint stock and the stock capital more than in 10 times.

The joint stock land banks tried to develop the mortgage crediting also in the cities. However the government limited in the interests of landowners its operations in the cities in the frames of one third of the total of unpaid loans.

The joint stock land banks realized its activity with support and under control of the government. The body, which effected the immediate control over the bank activity, was special office on credit affairs of the Ministry of finances. The government realized the control over issuing of shares and mortgage sheets, provided coordination of private banks with state - Noble and Peasant – banks.

The structure of the profit of the joint stock land banks was typical. The long-term loans gave approximately half of the profit, the short-term credits and the securities, belonged to the bank, gave the other part of the bank profit.

The mortgage banks invested their capitals in the state and assured by the government securities, and because of this fact the demand on their mortgage sheets and shares was increasing constantly. The demand on the shares grew also because of constant high dividends.

Creating mortgage organizations, the government saw their tasks in the fact that the land and the city property, attracted into the banking circulation, was transferred from “weak” to “strong” owners, who could organize developed production and thus could serve for increase of welfare of Russia. /11/

In Russia before the revolution the dynamic market of houses was organized, which was based on strong crediting-financial system, which was founded on pledges and promissory notes. None the less the main object of the mortgage crediting was the land but not the dwelling. The mortgage credit at that time as a rule was associated with land credit and was granted by the different types of land banks, that is the mortgage without dwelling dominated. On the contrary for the period after revolution the granting of credit under dwelling, but without mortgage, was typical, because there were not conditions for development of mortgage: the land – the invariable factor of mortgage – was nationalized.

None the less, in the soviet period the experience of dwelling crediting was formed in our country, which is in principle the base of mortgage crediting. The practice of crediting of dwelling construction in the USSR presents considerable interest. So for a long period of time the organizations of the State Bank of the USSR granted long-term credits to the population for cooperative and individual dwelling construction. The typical feature of organization of individual dwelling construction was the absence of immediate contact of the borrower with bank. The credits were granted to the population not directly but through the organizations in which the individual borrowers worked; the enterprises were guarantors of loans return. The redemption was realized by deduction of payments for credit directly from salary of the borrowers of their enterprises. The credits for dwelling were not assured by real estate or other property, and withdrawal of the property for realization in the purposes of redemption of loan was not used.

In the future, with the reorganization of the credit system, the range of the granted credits developed. The loans began to be granted not only for individual construction of the house, but also for purchase of dwelling, and for construction of second house. The question of crediting of dwelling through construction cooperative societies was resolved.

The State Bank of the USSR had separate elements in the organization of crediting of individual construction which were typical for mortgage system. Particularly the connection of construction of house with land was stipulated.

The practice of bank right protection before the other creditors existed in the form of immediate redemption of the loan from the value of the house. In the case of insufficient amount from the sale of the house for covering the claim the receipt of necessary amount for account of collection of other property of the borrower was stipulated. There were features of mortgage accountability: in the case of full redemption by the borrower of indebtedness before the bank or organization, though which the crediting was organized, the notary was informed of the fact of cancellation of prohibition on sale or transmission of the house. /9/

The limited combination of home experience of mortgage crediting of expenses for purchase of land before revolution with the practice of individual crediting of dwelling construction in the soviet time is the reliable theoretical foundation for development of recommendations on mortgage crediting in the transitional period.

**Chapter 2.Construction of safe system of crediting in modern Russia**

**Legislation on Mortgage Crediting**

The present chapter describes legal fundamentals of mortgage crediting in Russia, and also depicts the most important changes in legislation on mortgage for the last years. At the same time, I am trying to attract attention to main “perils” of considered legal relations and specifies basic directions of their optimal overcoming.

The term “mortgage” in legal practice usually covers two concepts:

1. “Mortgage” (as legal relation) is the gage of a real estate with the purpose of receiving a mortgage credit (as a rule, in a bank). For mortgage it is characteristic to leave property with the debtor. Gage in civil right is one of methods to back obligations - in this case of bank credit. In so doing, in all cases it is mandatory to register with the State bodies the gage of any real estate. In case of insolvency of the debtor, claims of the creditor are satisfied from the proceeds from sold property with priority before other creditors or by transferring the incorporated real estate in the property of the pledge.

2. “Mortgage” (as a security) means a “bond” - debt tool certifying the rights of the pledge on a real estate. Mortgage usually has a free circulation in the market.

Institute of mortgage has not received in Russia considerable development till nowadays due to different encumbrances, both economic and legal, therefore it is regulated by a rather small array of normative acts.

To the most important of such acts refer Federal Act of 1998 “On mortgage (gage of the real estate)”. General provisions on gage, not defined in the indicated law, are contained in appropriate articles of the Civil Code of the Russian Federation. Federal Act from 1997 “On State Registration of Rights on Real Estate and of Transactions With It” governs registration of real estate, the most important function of the state, absence of which would make stable turnover of real estate completely impossible.

Actual realization of bank’s rights on the mortgage is possible within limits of the law “On execution”. Separate special provisions, which nevertheless should be taken into account while making conclusions on the mortgage agreements, are scattered as well in articles of appropriate laws, such as, for example, the law “On companies of living accommodation proprietors”. In the mortgage of housing accommodations it is necessary to follow requirements of the branch housing legislation, including Housing code of RSFSR, and as well laws and regulations on registration of citizens in their places of residence. Members of the borrower’s family also have rights, established by legislation and described in Family and Civil codes of the Russian Federation. Special acts defend interests of infants, elderly persons and disabled persons.

Up to the beginning the ninetieth years mortgage practically missed. Temporary transfer of property rights on real estate, being the object of mortgage, to the creditor, was a kind of pseudo-mortgage. After settlement of accounts between the debtor and creditor rights on the real estate were transferred back. It was necessary to pay twice rather high State duties, levied from the borrower, and to be ready to run risks connected with possible dishonesty of the creditor receiving rights on real estate for undercharge. Besides, term of rights registration was rather long. In these conditions the above described scheme badly protecting the borrower, could not be distributed broadly. But also after legalization of the mortgage as civilized legal institution, in 1992, contradictions between the out-of-date branch laws did not give lawyers practical possibility to defend effectively rights, but this time not of a borrower, but of the bank-creditor. /11/

There was an impassable gap between “socialist” housing legislation and new Russian right.

Unfortunately, recent laws have only partly corrected this intolerant situation. For example, before acceptance of the law “On mortgage” there were no serious basis for ejection of insolvent debtor and his family from the gaged flat. The bank could hope only on transferring property rights with exception of the right of use or its limitation (depending on the size of living space per tenant). Nowadays ejection is quite possible, but under condition of... granting other living quarters in the same city - in our it means in Moscow, - and with allowance for all existing sanitary requirements.\* There is no court practice on realization of the rights of creditor banks in new legal conditions. Earlier collection on gaged flat could be imposed only judicially. With the purpose of avoiding the indicated rule, there was widely used practice of conclusion with insolvent borrower an agreement “on buy off”. But from the moment of replacement of initial agreement with a new one, the mortgage contract was terminated and there emerged competition with other creditors. Not all banks took it into account and bargains on purchase and further disposal of the real estate received by agreement “on buy off” could be recognized invalid.

According to the new act “On mortgage” contractual selling of real estate is possible.

The most important novelty of this law was emerging “mortgage bond”-encumbrance as a kind of securities, freely circulating in the market.\*\* Though Commissions on Securities under President still has not issued appropriate instruction, but at first glance, there are no encumbrances for issue of mortgage bonds already nowadays. There is no need to prove advantages of the mortgage over “simple” agreement on mortgage crediting. Mortgage bond is a nominal security certifying right of its holder on fulfillment of liability, backed by mortgage of property indicated in the agreement on mortgage, without submission of other proofs of existence of this obligation and the very

\* Decree of the Moscow Government N365 from the 25th of April 1995 “On

principles of mortgage crediting in Moscow”.

\*\* Chapter 3 of the Federal law N102-FL of July 16, 1998 “On Mortgage”.

right of gage on property indicated in the agreement on mortgage. The mortgage bond is issued to the initial pledge by body conducting State registration of mortgage, after actual State registration of the mortgage and is transferred by fulfillment of endorsement (partly similar to bill, under condition of observance rules of state registration).

The mortgage ensures payment to the pledge of capital amount of the debt under the credit agreement or other liability, backed by mortgage, completely or in a part, foreseen by agreement on mortgage.

Table 1

Obligation Secured by Mortgage

|  |  |
| --- | --- |
| Obligation Secured by Mortgage  | A credit agreement |
| Loan agreement |
| Any other financial obligation, including an obligation resulting from purchase and sale, lease, contact or other agreement, or infliction damages, unless otherwise provided by the federal law  |
| Obligations secured by Mortgage shall be accounted by the creditor and the debtor, if they are legal entities, in the procedure stipulated by the legislation of the Russian federation on accounting |

The mortgage established for backing of fulfillment of the credit agreement with condition of paying interest, ensures as well payment to the creditor of interest on the credit, due to him for usage of credit.

Usually, mortgage ensures as well payment to the pledge of the sums due to him:

- as compensation for damages and / or as a forfeit penalty (fine) in the case of default, delay in performance or other inadequate fulfillment of obligations, backed by the mortgage;

as interest for wrongful usage of other’s money resources, foreseen by obligations, backed by the mortgage, or by federal act.\* The problems of possibility to collect percents for usage of other’s monetary resources from a physical person who is not a businessman is not solved nowadays and as well there are no positive judicial precedents. The matter is that in court it is necessary to prove, that the citizen had possibility for settlement of the debt, but has not returned borrowed money resources, available to him, and has used them in different way. For participants of enterprise activity this fact is not proved, but presumed.

as reimbursement of legal costs and other expenses borne due to imposing collection on gaged property;

\* Article 393 of the Civil Code of the Russian Federation

- as reimbursement of expenses borne in the course of selling gaged property.

If other is not stipulated in agreement, the mortgage backs claims of the pledgee in amount existing as of the moment of their satisfaction at the expense of gaged property.

Provisions of the law on mortgage are applied to gage of real estate, arrears of housing, provided that it is being constructed on the plot allotted for construction in the order, established by the current legislation.\* But it is prohibited to accept in gage village house from family, earning its living by agriculture, because it is impossible to impose collection on such house.\*\* Here, we can see, potential for fraud. But if the house itself is constructed on unpaid credit, it is possible to impose collection on such a house. Common difficulties arising at imposing collection on housing accommodations will be described below. It is evident, that mortgage of real estate being in joint property is possible only on consent of all proprietors. But gage of a share in common property does not require consent of remaining joint owners. Though, in this case there may arise additional difficulties in the course of selling the gage, including difficulty connected with pre-emption right arising for other joint owners.

In agreement on mortgage there should be indicated the right, by virtue of which the property being subject of the mortgage belongs to the pledger. In case of housing accommodation it may be only property right.

Table 2

Contents of the Mortgage Agreement

|  |
| --- |
|  The subject of mortgage |
| defined by giving its name, location and a description sufficient to identify the subject.  | state the right under which the property being the subject of mortgage belongs to the mortgagor and name of a state agency for registration of real estate rights, which has registered this mortgagor's right.  | If the subject of mortgage if the lease right held by the mortgagor, then the leased property shall be described in the mortgage agreement as if it were the subject of mortgage; the term of lease shall also be indicated.  |
| \* Article 76 of the law “On Mortgage” \*\* Article 78 of the law “On Mortgage” |
|  The appraisal of subject of mortgage |
|  accordance with the legislation of the Russian Federation upon agreement of the mortgagor and the mortgagee (observing the provisions of Article 67 of the present Federal Law in the event of mortgage of a land plot); the appraised value shall be stated in the mortgage agreement in monetary form.  | mortgage of state and municipal real estate its value shall be appraised in accordance with the requirements of the federal law or in the procedure stipulated therein.  | The parties to the mortgage agreement may entrust appraisal of the subject of mortgage to an independent professional organisation. |
|  The obligation secured by mortgage |
| state its amount, grounds for its origination and its term of execution. In case when this obligation is based on an agreement, parties to such an agreement, its date and place of its conclusion shall be stated. If the amount of obligation secured by mortgage is to be determined at a later date, the mortgage agreement shall indicate the procedure and other necessary conditions of its determination | If the obligation secured by mortgage is to be fulfilled in parts, the mortgage agreement shall indicate the terms (frequency) of appropriate payments and the amount of instalments, or conditions that would help define this amount.  |
|  Certified by encumbrance |
| If rights of mortgage under Article 13 of the present Federal Law are to be certified by encumbrance, this shall be stated in the mortgage agreement.  |

The agreement on mortgage should be attested by a Public Notary and is subject to State registration.\* It is put in force from the moment of such registration. It is very important, that the credit agreement, which is backed by the mortgage, can be concluded after registration of the mortgage agreement. Thus the right of the gage arises from the moment of conclusion of the credit agreement and the borrower risks nothing, if the credit agreement will not be concluded at all. To make legal status of the parties unambiguous it is useful to conclude as well preliminary agreements. Before rise of gage right the property will not be considered charged as mortgage before the third persons.

\* Article10 of the Federal law N102-FL of July 16, 1998 “On Mortgage”.

Insurance of real estate is conducted in accordance with conditions of the mortgage agreement, thus the bank - pledgee has right of preference satisfaction of claims from insurance compensation before all other creditors. Therefore it is useful to insure gaged property, insured amounts being not lower than the size of the basic debt with allowance for interest. The bank has possibility to check availability and state of the gaged property in a nature and according to documents. Disposal of the gaged property by the proprietor is possible only on consent of the bank. At any universal succession (for example, by way of inheritance) the mortgage is saved, even if the succession took place with violation of law on transfer of rights. Bargain on disposal of property without consent of the bank is considered invalid.

In the case of confiscation of real estate by way of sanction for committing crime, under general rule the gage ceases \*, but the law on mortgage provides its preservation as well in this case\*\*. It seems, that in this case governs the norm of the special law. That is, the mortgage is saved as well in the case of transfer of property rights to the State. But in the case of vindication of gaged property (recovery to the rightful owner from another's illegal possession according to court decision) the mortgage ceases. It will happen, for example, in the case of purchase of living apartments from realtor, to whoms it did not belong to or in the case if the court considers invalid transfer of rights on living apartments to this realtor.\*\*\*

In general, legislation allows multiple subsequent gage of property, already charged with mortgage, which drastically reduces credit status of the borrower, expected by the bank as of the date of concluding agreement. In order to prevent this negative factor it is necessary to include appropriate forbidding term in each mortgage agreement.

In its part, the bank can concede its rights on the mortgage. But concession by the pledgee of rights for agreement on mortgage to other person is valid, if to the same person are conceded rights of claim from the debtor on the basic liability backed by the mortgage. Or else, the mortgage always follows the credit. The mortgage simplifies cession of rights on considered legal relations. Being a circulating in the market security, the mortgage is transferred by executing the next endorsement (it is required only subsequent State registration of such transfer). The mortgage is as well convenient due to the fact that it can be in its turn a subject of gage.

The foreclosure. The bank can impose collection on gaged property for satisfaction at the expense of this property of its claims emerged due to default or inadequate fulfillment of obligations, backed by the mortgage, in particular in the case of complete or partial non-payment or delayed payment of amount due. In case of periodic payments: if there happens violation of installment terms more than three times within 12 months, even if each delay is minor.\*\*\*\*

\* Item 2 of the Article 354 of Civil Code of the Russian Federation

\*\* Item 2 Article 41 of the law N102-FLof July16,1998“On Mortgage”.

\*\*\* Article 42 of the law “On Mortgage”

\*\*\*\* Item 2 of the Article 50 of the law “On Mortgage”

Collection, as a rule, is imposed under appropriate decision of a court. And, if the pledger is a citizen, the court can at his request postpone fulfillment of imposed collection for 1 year’s term, provided that the sum of increasing debt will not exceed cost of the real estate. Ex curia realization can happen on the basis of the notarially certified agreement between the parties (the above mentioned “buy off”), but in this situation the right of gage does not cease.

Mortgage of housing accommodation has features, which are not applicable to bowers and garden houses. But it remains not quite clear, how they can actually be differentiated from each other. In the bower it is also possible to “register” a relative and it suddenly becomes “the only house of a farmer”. The agreement on mortgage of housing accommodation can not be concluded by representative (“by proxy”), except for property of the wards, but in this case are required appropriate sanctions of authorized State bodies. An apartment house or a flat bought at the expense of credit of the bank in the property are considered as a gage from the moment of State registration of the contract on purchase of the apartment house or the flat (Paragraph 77 of the Laws “On mortgage”). The pledgee under the given gage is bank or other credit organization, which granted credit for purchase of this apartment house or this flat. To the gage of apartment house or the flat arising on the basis of indicated provision of the law, are applied rules governing gage of real estate arising in pursuance of the agreement. Indicated norm of the law on mortgage is convenient for the purposes to simplify accumulation of evidence for possible in the future judicial proving of the bank’s rights.

It is desirable to include all essential conditions and even all details, being at the first glance of little significance, in separate agreement. Though, Moscow mortgage program uses simplified approach. All essential conditions of the mortgage are supposed to be included in the credit agreement with the bank and in contract on purchase of the flat, acquired on the credit, and the right of gage will arise by virtue of the above mentioned provision of Paragraph 77 of the Law “On mortgage”.

To my regret, the problem of “members of the family” and their possible ejection still remains actual with any even most legally worked agreement. Imposing collection by the pledgee on the gaged apartment house or flat and selling of this property are not considered to be a basis for ejection by purchaser of this apartment house or this flat of jointly living in this premise pledger and members of his family, if for them it is the only available premise suitable for permanent residence.

The law makes exception in cases with mortgage of housing accommodation purchased on the bank credit. Insolvent tenants under the law on mortgage are obliged to eject by themselves. Though, this obligation arises within a month’s term after actual selling of this housing accommodation to third persons.\* It is clear, that the price of the flat with tenants, who are still to be ejected, will

\* Article 78 of the Federal law N102-FL of July 16, 1998 “On Mortgage”.

considerably reduce, unless gangsters will purchase it with moderate discount. But I think, what even when the law on mortgage foresees ejection, calling it “duty to release the premise”, there is no court able to satisfy the claim of purchaser on ejection of the former tenants without granting them other housing accommodation. The matter is that in the case of competition (contradiction) of provisions of different laws, preference is given to special provisions of branch legislation, that is in this case to Housing Law, instead of the Law “On mortgage”. To this legislation there exists as well direct reference in the Civil Code: “Members of proprietor’s family living in belonging to him living quarters have right to use this premise on conditions, foreseen by housing legislation.”\*\* And Housing Law foresees ejection without giving other living quarters only in one case: if tenants systematically destroy or spoil living quarters, or will use it in improper ways.\*\*\* However, this provision was not widely used for many years of its operation. In all other cases in the court decision on ejection there should be indicated other living quarters, satisfying to sanitary regulations and located in the same city, where is obliged to move ejected family. Therefore the bank should be ready to situation, when in the course of wide implementation of the program of mortgage crediting it will find necessary to organize special fund of living apartments for dislodged families.

Perspective direction for protection of the creditor bank interests is insurance of its risks, but taking into consideration all above mentioned, it is most likely to increase significantly the cost of the credit.

2.1.2. The subjects and types of mortgage and mortgage crediting.

The mortgage of land, enterprises, living houses, apartments has its own peculiarities. The inhabited house or apartment can be the object of mortgage if the owner and members of his family live in other house.

The mortgage can be established on every real estate, which the creditor has the right to sell or to alienate in other manner. The mortgage is not permitted with respect to the property, to which it is impossible to make a claim in accordance with the law.

In accordance with the main purpose the objects of mortgage distinguish:

\* Article 42 of the law “On Mortgage”

\*\* Item 1 of the Article 292 of Civil Code of the Russian Federation

\*\*\* Article 98 of the Housing Code of RSFSR

Table 3

Property which may be the Subject of Mortgage

|  |  |
| --- | --- |
|  Name of Property |  Restrictions |
|  Land plots | Except for land plots listed inArt. 63 FL “ ON Mortgage” |
| Enterprises, buildings, structures and other real estate | Used in the course of business activity |
| Residential houses, apartments and parts of residential houses and apartments  | Consisting of one or several isolated rooms |
| Summer cottage houses, garden cottages, garages and other structures  | For consumer use |
| Common restrictions: Buildings, including residential houses and other structures and facilities directly connected with land may be the subject of mortgage, provided that the rules fixed by art. 69 FL “On Mortgage” |
| Unfinished construction of real estate | Being erected on a land plot allotted for construction in the procedure established by the legislation of the RF |
| A thing with accessories | Regarded as mortgaged in complex with its accessories, unless otherwise follows from the mortgage agreement ( art. 135 of the Civil Code of the RF) |
| Indivisible thing | Part of property, which cannot be divided in kind than through impairing its main purpose cannot be an independent subject of mortgage |
| Lease rights | Rules on mortgage of real estate shall consequently be applied to rights of a lessee under an agreement on lease of such property, because the opposite is not stipulated by the federal law and this is not at variance with the nature of lese relation  |
| Aircraft, sea ships, inland vessels and space objects | Subjects of state registrations  |

In the case of mortgage of the right of rent of real estate the rules , which regulate mortgage of the property, which is let out on lease, are used.

The mortgage of land, enterprises, living houses, apartments has its own peculiarities.

Mortgage holder in accordance with the mortgage agreement of land and in accordance with the mortgage agreement of pledge on land can be the bank, which has the license from the Central Bank of Russian Federation on realization of mortgage operations. In this case the estimation of land cannot be established in the pledge less than its normative price.

The normative price for land – is a special type of payment for land. The price represents the index which characterizes the value of the land of definite quality and location, proceeding from potential income for the calculated time of recoupment. The normative price for land is used in the case of purchase and repayment of land, in the case of transmission of the land in property, in accordance with inheritance , donation, and also in the case of receipt as a collateral of banking credit.

It is necessary, however, to take into consideration, that neither home experience nor experience of foreign countries of determination of land price in the modern Russian conditions can provide strict and reliable result.

The most complicated situation became with estimation of land. The imperfection of home methodical developments consists of the fact that they are based in principle on cost estimation of the capital invested in the land, without taking into consideration its possibilities of rent formation and real behaviour of both sellers and buyers of land property, the volume and the structure of demand and offer and so on. Such determined factors as the size of rent, the possibility of different using of land, economic solvency of social demographic environment as a bearer of consumer demand, manpower, competitive relations and so on.

Namely similar methodical approach determined laughably small size of so named normative price of land. The richest chernozems of Krasnodarskiy and Stavropolskiy krais, Rostovskiy, Voronezhskiy, Volgogradskiy and the number of other regions of the country, which possess the lands of high productivity, are sold at the worthless prices in accordance with normative state estimations. In the case of such price policy and tax system the mortgage form of crediting is blocked, and the most important element of market regulation of land relations is excluded, the market mechanism of the price self regulation becomes deformed, and not only in agrarian sphere, but in the whole production economic structure of the country. /12/

If the object of the mortgage is enterprise as a whole as the sole property complex, so all the property , belonged to the enterprise as legal person , enters into the structure of mortgaged property, including the rights of requirement, patents and other exclusive rights, and also debts and obligations of this enterprise, which pass to the buyer from the moment of the state registration of the right of ownership for the purchased property. The received incomes of the enterprise, the purchased property and also debts, received by the enterprise in the period of mortgage, enter into the structure of mortgaged property.\* The structure of the property, transferred to the mortgage of the enterprise, and the estimation of its cost are determined on the basis of full inventory of the enterprise property. The act of inventory, the balance sheet and the conclusion of the independent auditor of the structure and the value of the enterprise property are the obligatory appendices to the pledge.\*\*

\*Item 2 of the Article 340 of Civil Code of the Russian Federation

\*\* Item 3 of the Article 70 of the law “On Mortgage”

The mortgage of inhabited house or the apartment is permitted for providing repayment of the loan, granted for construction, reconstruction or capital repair of inhabited house (apartment). The inhabited house (apartment) can be the object of mortgage if the owner and members of his family live in other house, in accordance with the norms of living square for occupants. The living rooms, as a part of the whole house, cannot be the subject of the mortgage on the general basis.

In the terms of economic crisis, which enveloped all sections of economy, neither the state nor the enterprises could finance sufficiently the social programs, in particular, housing construction. The resolution of living problems is laid on the population. However, the major part of the population does not have the large monetary amounts or considerable movable property, and that is why the sole variant of the credit receipt for improving of living conditions becomes mortgage.

The mortgage living credits are subdivided to the following:

the credits granted for construction of dwelling;

the credits for purchase of dwelling.

Depending on the subject of crediting the mortgage loans for construction of dwelling are divided to the credits, granted immediately to the future owner, and to the loans, granted to contractors.

The pledge becomes very important in the process of the mortgage crediting of dwelling. The creditor – holder of pledge in the case of non-fulfillment by the mortgagor of the obligation to return the loan gets the right to receive non-returned means for account of realization of mortgaged real estate in immediate order by comparison with the other creditors. The variety of mortgage is pawning. In the case of pawning in contradistinction to ordinary mortgage the property is managed not by the mortgagor but the holder of the pledge, that is bank. So, for the period of pawning the apartment mortgaged by the borrower is at the disposal of the bank.

The construction of apartment in the structure of the house with many flats or in the structure of individual living house and the expenses for its purchase can be the objects of mortgage crediting. In this case the different variants of combination of object of collateral and object of crediting are possible: the loan for living construction is granted under mortgage of dwelling; the loan for living construction is granted under mortgage of land; the loan for purchase of dwelling is granted under mortgage of dwelling. /11/

As far as in the last time it is practically impossible to receive means from the federal treasury for development of social sphere of region, the municipal banks of mortgage crediting for support of housing construction began to arise. That is why the mortgage business became attractive for many commercial structures and also for the banks.

**2.2 The stages of organization of mortgage relations between the bank and the borrower. The main directions of decrease of credit risks.**

Reduction of credit risk to minimum is the main target of the right organization of crediting. There are the whole range of the legal principal of crediting, which shall be observed both by creditors and borrowers.

The mortgage credits are issued, as a rule, by the banks, which specialize in granting long-term loans under real estate mortgage. There are first of all mortgage banks and land banks, which grant long-term loans on the whole under the mortgage of land. Commercial, agricultural and other banks can be engaged in the stated operations.

The enterprise or individual, who presumes to get banking credit, must conclude the credit agreement with the bank in written form. The preliminary stage is presentation of application for getting credit. For the bank the receipt of application for granting credit is the reason for:

examination of credit solvency and financial soundness of borrower;

conclusion of credit agreement;

conclusion of agreement of credit assurance.

In Russia the main question in the case of making decision of crediting in the modern situation is assurance of return of credit means. Proceeding from that it is necessary to consider the main methodological and organizational principles of mortgage crediting which is called in its essence to resolve the present problem.

Before direct estimation of the object of crediting and granting of credit for dwelling, it is expedient to resolve the strategic questions of crediting: concerning optimal utmost share of credit in the cost of the house, and also concerning the tactics of distribution of credit risk among the creditor, the borrower and the securities investors. /6/

Reduction of credit risk to minimum is the main target of the right organization of crediting. There are four types of risks in the western practice of mortgage crediting:

credit;

risk of agent;

risk of interest rates;

risk of advance payment.

The credit risk consists of the fact that the borrower does not realize payments for redemption of the loan in the stipulated time. The risk of agent is connected with the possibility of withdrawal by the clients in uncomfortable moment. The risk of interest rates is caused by the fact that the price of the means used by the creditor increases above the interest rate, collected by him from the client for using the credit, on unpaid loans that leads to losses on these loans. This type of risk is classic risk of long-term investments, which are financed for account of short-term deposits or from other short-term sources.

The risk of advance payment consists of the fact that the borrower pays the indebtedness in advance, when the interest rates for the credit decrease, and in its essence it is close to the risk of interest rates, that is why some specialists do not include the stated risk in separate category.

The main principle of the risk distribution – to distribute it among those who are better prepared for protection from it. So, the credit risk (the whole or by parts) can be transferred to insurance companies, and a part of the risk of agent and the risk of interest rates can be transferred to the investors of securities. The determination of the optimum share of the credit in the cost of object of crediting and in the amount of collateral assures reduction of the risk.

The correlation between the volume of the loan and the cost of mortgage characterizes the quality of the sources of debts return and permits to determine, which part of credit can be paid for account of realization of real estate, and which part of credit will be compensated by the insurance company. This question shall be the main in the case of conclusion of the credit agreement. The lower interest of the loan in the size of the collateral reduces the risk of the bank, but brings down its competitiveness and it does not attract clients. The increase of the stated correlation attracts clients, but in this case the risk of creditor grows. At the present time in the western countries we can see the increase of the share of loan in the collateral. So in the USA for a long period of time it was considered as usual the granting of loan in the size of 50% of the estimated cost of mortgage, and the last time the loans reach 80% of the mortgage.

One of the universal method of assurance of guarantee of loan return is diversification, which permits to distribute in even manner the risk among borrowers. The principle of action of this mechanism consists of the following.

As a rule, not all the clients of the bank become defaulters at the same time. Usually one client from fifty does not fulfill obligations on repayment of credit, however, it is very difficult to determine in good time the concrete defaulter. In such conditions the private person, who grants credit the other person, bears the whole risk. In contradistinction to him the bank, which grants credits different clients under collateral of real estate, can afford considerable number of non-returns of loans, establishing the norm of interest for their use, which can compensate this risk. In this case all the depositors become united in original pool on loans under pledge, and everyone from them participates in compensation of possible risk.

For assurance of opportune return of payments the right choice of instrument of housing crediting is rather important, which could take into consideration all modifications of business solvency of the client at the different stages of payment of the loan and the real possibilities of creditor. Among the proposed range of such instruments “the instrument with regulated delay of payments” (IRDP) is the most popular, which is recommended by Marisol Ravitse (the Institution of economy of the city, the USA). The basic interest rate on IRDP is established on some points above, than the interest rate on interbanking credit market, and that exceeding becomes constant during all credit period. The payments on loan in this system do not exceed 30% from the income of family also during all period of loan validity. /6/

Now we shall consider the main stages of credit process.

In the case of resolution of question of granting credit for purchase of dwelling the bank-creditor shall estimate the possibility of the borrower to assure opportune return of the loan. From this point of view in the foreign practice there are two main stages in the process of crediting of dwelling:

analysis of credit solvency of the borrower;

estimation of the collateral.

These two aspects are in conformity with two manner of return of granted means: from salary and other incomes of the borrower or in the result of sale, mortgage. In this case the first variant has dominated meaning.

**2.2.1. The analysis of credit solvency of the client.**

The main purpose of creditor is receipt from borrower of the most reliable guarantees of loan return in the time of fulfillment of debentures. It is naturally that the creditor must in the first place have the strict information of financial position of the borrower, check his paying capacity, the condition of his property, the availability of debts and so on.

Before conclusion of credit agreement with client, the bank shall examine thoroughly the person of the borrower, taking into consideration three main factors: stability, payment solvency and readiness to pay debts.

In the case of analysis of the first factor – the stability – the bank considers the duration of living of the client on the present location and the stable place of working, taking into consideration that the changes of work could influence on opportune payment of debts, and the change of living location will complicate the inquiry of the borrower.

In the process of determination of payment solvency the incomes of the borrower shall be estimated, including principal incomes, additional incomes and others, which shall be compared with the present and proposed expenses. The criterion for making positive decision is the condition, that the borrower has cash in the size not less than 20% from the amount of purchased house. For estimation of payment solvency the following coefficients are used : construction coefficient – the correlation of received salary and other monthly incomes to the debts on dwelling; opposite to the construction coefficient the debts coefficient, which characterizes the total amount of the borrower debts ; the coefficient of correlation of loan to the value of the house. /9/

In the case of analysis of the borrower readiness to pay debts it is necessary to take into consideration the fact if the borrower realized in time all payments in the past. The bank examines all information, connecting with the creditors of the borrower and using in this case the services of private agents, who collect information concerning borrowers and banks-creditors. The banks may use special questionnaires for receipt by the borrowers of housing credit in the necessary cases in the process of examination of credit solvency of the client.

In the case when the enterprise is a borrower or, for instance, farming keeping, the determination of credit solvency of the received result depends considerably on the quality of collected information. The credit solvency is determined by the indices, which permit to reveal exactness of the client in the calculations on previously issued credits, current financial position, perspectives of its change, possibility to attract different sources for mobilization of monetary means.

In this purpose “the financial face” of the enterprise shall be determined in the first place, its financial economic activity shall be examined in the purpose to provide promptness, payment and return of credit.

But helping the enterprise, the bank shall remember about its own interest. This process is realized especially sickly at the present time – in universal mass non-payments of the enterprises to each other and to banks. At the present time the information centers are absent , which develop information concerning financial position of enterprise and render such information in accordance with the requirements of interested individuals. There are many reasons of these facts – confidence of reported information of financial economic activity of the enterprise. That is why any creditor is obliged to estimate independently the financial stability of the future borrower. Simultaneously the reputation of the client is examined – his honesty and decency in the calculations, attitude to his obligations in the past. The source of information for analysis of credit solvency of the enterprise is balance sheet. In the case of consideration of the borrower reporting the creditor shall determine: has he good payment solvency, is his balance liquid, has he and in what size proper circulating capital, how manoeuvrable are his means, to what degree does he depend on the used sources of the means, is he stable in financial position, what is the perspective of improvement of his financial economic activity, is his sphere of activity profitable.

For replying to the established questions it is necessary to use many indices which method of calculation is presented in the table 4.

Table 4

Indices of financial position of the enterprise

|  |  |
| --- | --- |
| Indices and their content | Formula of calculation |
| 1 | Payment solvency (Пл) – shows the difference between current assets (Ат) of the enterprise and its obligations (О) | Пл.=Ат-О |
| 2 | General liquidity (Ло)- reflects the degree of cover by current assets short-term obligations (Ок) | Ло= Ат-Ок |
| 3 | Intermediate index of liquidity(Лп)-permits to establish to what degree the obligations can be covered for account of monetary means and future expected earnings (Ад) | Лп=Ад-Ок |
| 4 | Net circulating capital (Кч)- shows the exceed of current assets over short-term debts | Кч=Ат – Ок |
| 5 | Coefficient of financial manoeuvrability (Км)- shows which size of own capital (Кс) is invested into current assets | Км=Кч/Кс |
| 6 | Coefficient of independence(Кн)- certifies specific gravity ofown capital in the currency of balance (В) | Кн=Кс/В |
| 7 | Coefficient of financial stability(Ку)-reflects specific gravity those sources of financing, which have long-term character of using (Од) | Ку=(Кс+Од)/В |
| 8 | Coefficient of financing (Кф)- shows which part of property is financed for account of own means | Кф=Кс/О |
| 9 | Profitability of enterprises(Рп)- shows the share of net profit (Пч), which falls on one rouble of active currency of balance (А) | Рп=Пч/А |
| 10 | Turnover of assets(Оа) or current assets (Оат)-characterizes the speed of turnover of all or current assets | Оат=Р/АтP-earnings without special tax |
| 11 | Profitability of realized production, works, services(Рпр)reflects net profit from each rouble of realized production, works, services | Рпр=Пч/Р |
| 12 | Profitability of own capital(Рк)- shows the result of financial economic activity, the profit received on invested capital | Рк=Пч/Кс |
| 13 | Investments profitability(Ри)- certifies effectiveness of means using, invested into enterprise. | Ри=Пб/(В-Ок) |

The presented range of indices is sufficient for estimation of financial economic activity of the enterprise. It is naturally, that for answering the question better or worse the enterprise works in the reported period the dynamics of the presented indices are necessary.

2.2.2. Value appraisement of real estate in pledge

The mortgage gives the creditor the right to collect and to sell the property of the borrower in the case of non-payment of indebtedness in the time of fulfillment of the obligation. That it is necessary to estimate the value of the property of the borrower more correctly, chousing more appropriate methods of a valuation.

Accordance with the legislation of the Russian Federation upon agreement of the mortgagor and the mortgagee (observing the provisions of Article 67 of Federal Law “ On Mortgage” in the event of mortgage of a land plot); the appraised value shall be stated in the mortgage agreement in monetary form.

The parties to the mortgage agreement may entrust appraisal of the subject of mortgage to an independent professional organisation.

Value appraisement of real estate in pledge depends on thee factors: real estate prime cost, profitability and location. Taking into consideration foreign experience in hypothecary crediting in value appraisement of real estate mainly three methods can be used: expendable method, comparative method and profitable method. Expendable method is based in studing investors’ possibilities in buying real estate in this case one must take into consideration that the prudent investor would not pay for the object a higher price than the price which he could pay if he taken the appropriate land for development and for constructing the analogical building in function and quality and without great delays in near future.

This method is useful for our country. It can be used if there is not enough information about comparative sales that is this method can be in passive markets. At the same time using of the expandable method as the main method in value appraisement of real estate stimulates a sharp rise in prices of real and it doesn’t give real market value of the object.

In value appraisement of real estate of the market value of the building the building is compared with analogical buildings soft before, which actual market value is well know. But in this case we must take into consideration a number of factors correcting the value appraisement. These factors are location of the building, ecological situation, remoteness of the industrial works, closeness of health and cultural centers, communication network. The value appraisement depends also on architectural peculiarity, the style of building, the type of construction, the disposition of the rooms, hidden defect in building. The problem of value appraisement is finally decided by modeling as market price is in the base of the value appraisement. /13/

After obtaining of the loan the borrower bears the responsibility for safety of the building in pledge and measures for maintaining of the building. These measures are repairs in time, fire insurance, insurance against natural calamities for bank interest, refusal against reconstruction or fortifying of the building without the permission of the bank and using of the properly for illegal activity.

**2.2.3. The sole order of real estate registration.**

The mortgage system cannot function without the sole for all the country order of registration of objects of real estate, including dwelling, land, pledge sheets.

At the present time the registration of real estate is based on the separation of the land from other property connected with it. The consequence of such situation is registration of different types of real estate in several state organizations. That is necessary to consider the experience of foreign country. The original mortgage begins then when the creditor independently on his location can receive reliable information of position of the real estate which he is interested in, including information of previously made mortgages or rent agreements independently on location of the client.

The agreement on mortgage should be attested by a Public Notary and is subject to State registration. It is put in force from the moment of such registration.

Table 5

Certification by a Notary and State Registration of Mortgage Agreement

|  |  |
| --- | --- |
| Elements forms of agreements | Requirements  |
| Certification By a Notary  | Mortgage Agreement shall require certification by a notary |
| If an agreement lacks any data mentioned in Article 9 of the present Federal Law or if the rules mentioned in Item 4 of Article 13 of the present Federal Law are violated, then such agreement shall not be subject to notarisation as a mortgage agreement.  |
| Non-observance of rules on notarisation of mortgage agreement shall lead to its nullity. Such agreement shall be considered null and void.  |
| . If a mortgage agreement states that the mortgagee's rights in conformity with Article 13 of the present Federal Law shall be certified by an encumbrance, then such an agreement shall be submitted to a notary along with the encumbrance. A notary shall state the time and place of notarisation of the mortgage agreement on the encumbrance as well as number and stamp the sheets of the encumbrance in keeping with second part of Item 3 of Article 14 of the present Federal Law.  |
| State Registration of Mortgage Agreement | Mortgage Agreement shall be subject to state registration.  |
| If an agreement lacks any data mentioned in Article 9 of the present Federal Law or if the rules mentioned in Item 4 of Article 13 of the present Federal Law are violated, then such agreement shall not be subject to state registration as a mortgage agreement.  |
| Non-observance of rules on state registration of mortgage agreement shall lead to its nullity. Such agreement shall be considered null and void.  |
| Mortgage agreement shall be considered concluded and shall enter into force since the moment of its state registration.  |

The mortgage system cannot function without the sole for all the country order of registration of objects of real estate, including dwelling, land, pledge sheets. The attempts of administrations of separate regions to establish in the purposes of acceleration of mortgage introduction the local rules of such accounting can lead to the variety incompatible with meaning of mortgage and cause negative consequences. At the present time the registration of real estate is based on the separation of the land from other property connected with it. The consequence of such situation is registration of different types of real estate in several state organizations: committees on land resources and land-tenure regulations, bureau of technical inventory , committees of direction of state property, housing committees. Each of these bodies realizes registration of rights for land, buildings, constructions, living houses and premises in accordance with its rules. Imperfect accounting of real estate raises doubts with respect to lawfulness of transaction of sale-purchase, mortgage, and leads to abuses. In such conditions it is impossible to provide protection of commercial interests of legal person and individual in the case of transaction with real estate.

The participants of Business Club of the journal “Law”, discussing the question of establishment of market economy in the part of regulation of real estate by the Russian legislation, decided, that the absence of mechanism of registration of mortgage agreement transferred all market of real estate in the hands of officials, who nobody knew, who could paralyze, distort every law, or put the fulfillment of the law in dependence on their decision, and this is the first condition of transformation of legal business into criminal business.

Besides, in the case of estimation of application concerning registration of mortgage of real estate, it is necessary to take into consideration that the law admits repeated mortgage of real estate to different persons and at the same time establishes the principle of seniority.\* It consists of the fact that each person whose right appears earlier, will get the first the satisfaction of his requirements from the amount received from the sale of the mortgage object. Accordingly each later holder of mortgage will receive only the rest which is left after full satisfaction of requirements of previous holders.

It means that in the case of the decision of the question if it should grant credit under collateral or enter into other obligation covered by collateral, the future mortgage holder should take into consideration the fact if the property offered as collateral has already been mortgaged, and if yes so what will be the volume of the requirement assured by the mortgage.

On the strength of novelty of the questions, which concern registration and appearance in connection with this of the whole range of vagueness it is necessary to consider the experience of foreign countries, where the systems of real estate registration are rather strictly developed.

In the countries with developed market economy the registration of real estate has considerable meaning. It is considered as the base of market functioning. The real estate registration is effected in two systems: the system of transactions registration and the system of rights registration. In the first case the documents, which confirm fulfillment of transaction, shall be registered and

\* Item 1 article 342 of Civil Code of Russian Federation

filed in special books in chronological order. This system is typical for majority of the states of the USA, England and the range of other countries. In this system the main factor is registration of rights of property, which shall be realized under the agreement between previous and new owners.

The first owner is obliged to check the ground of his rights for the land. The new owner who is interested in the fact that the transaction was assured against faults, shall hire special firm, legal company, which examines the whole history of property on this land or the object of real estate for the period of 70 years. It is made in the purpose to find out if there are any circumstances or unknown previous owners who can have any rights for this land or the object of real estate. This type of the registration system has imperfection , which , in accordance with general opinion, consists of the fact that the system cannot give the purchaser of real estate or the creditor all necessary information and makes them to suffer considerable losses, necessary for inspection of content of registered documents.

In the second case the rights for real estate are registered. In this case any actions are subject to registration, which concern the stated rights. The advantage of such registration consists of the fact that the participants of the market of real estate have the possibility to receive necessary information from appropriate body without extra expenses. This system of registration is named Central-European and is the most popular in the world and presumes that the right of property is guaranteed by the state. There the lands and the objects of real estate are subject to the state registration in the land book in which the full and exact information of real estate is introduced. It is established for these purposes that all registered rights for coming into power must be introduced into land book. The guarantee of completeness and rightness of information of real estate is the most precious thing for this system. It can be reached by introducing into land book of information which is the most substantial for the characteristic of the legal position of real estate. First of all the rights of owners shall be registered, and also the lease of mortgage; the rights, appeared on the strength of other transactions; the rights of using of real estate by other persons than the owner /servitudes/, for instance the rights of establishment of boards with advertisement , the right of passage, different burdens /fees, arrests, court decrees/, mutual using particularly in condominiums. The enormous advantage of this system is the possibility to restore without additional expenses the history of owners of real estate objects. /9/

The bright proof of the role of Central Europe system is fixation of keeping of land book not only in the national legislation of separate countries, but also in the international acts. So the obligation of the state for keeping of land book is stipulated in the paragraph of the first article of the first additional protocol of European convention on human rights .

In accordance with the opinion of A. Lazarevskiy/ the head of the Division of the methodical assurance of the State Committee of property of Russia/, the above-mentioned system of registration when the state guarantees the rights of property, undoubtedly is cheaper than the registration of transactions. Exactly Russia needs such system. “From our point of view – he says – the first task is the creation of the sole for our country system of registration. First, we need register of objects of real property as physical objects, with statement of strict borders of the land on the location, with statement of physical parameters of constructions, and the second register – it is the register of legal rights of owners for this real estate. Second, the registration of legal rights separate from the first registration is necessary. In this case the land shall be considered not as a physical object, but as a range of rights for using of land in the permitted limits. The rights for change of using, sale, mortgage – all these rights shall be enumerated in the land book, and also the restrictions.

All the owners shall be named in the chronological order from the moment of registration of the object of real estate. The administrator – representative of the state, that is registering body, must guarantee reliability of realized operations. The observations and recommendations of doctor Otman Shtekkor /Union of the German mortgage banks/ are devoted to the problem of the real estate registration. He thinks that for issuing mortgage credits it is necessary both loan-contractual right and legislation of mortgage and land books. In the case of creation of system of land books it is very important to determine in good time the reasons of land registration. It is also important to provide that the registration records were full. The purchaser of property must entrust the correctness and completeness of records. Every interested person shall have the possibility to get quickly et not expensively reliable information of legal situation on land. Excessively high tariffs of the land-book administration and notary will only provide deviation from registration and lead to roundabout transactions. It is especially important that the information of land-survey will be in strict conformity with the records of owner rights in the land –book, that the identification of the lands and the establishment of their legal status can be realized in every time. /8/

The law “On pledge” stipulates one more type of registration of real estate – keeping by the mortgagor of the book of mortgage recording. In this case the mortgagor is obliged not later than ten days after appearance of mortgage to introduce in the book record of the type and the object of mortgage, and also the volume of liquidity of the obligation assured by the collateral. The mortgagor must bear responsibility for opportune and correct introduction of information of mortgage into the book and also for deviation because of incomplete and insufficient information from presentation of the records book for examination.\* However, the stated norm does not work. The Civil Code does not stipulate the obligation of mortgagor to keep book of mortgage recording, and only establishes, that mortgagor is obliged to inform every next pawnee of all existed mortgages of this property and to be responsible for expenses, caused to pawnee by non-fulfillment of these obligations.\*\* The absence of the norm of keeping by the mortgagor of the book of mortgage recording in the Civil Code can be possibly explained by the fact that this

\* Article 31 of the law “On Pledge” of the Russian Federation on 29 of May, 1992 N2872-1

\* \* Item 3 of the article 342 of the Civil Code of Russian Federation.

question shall be resolved by the law “On mortgage”. However, the law “On mortgage” does not contain either such norm, and it is omission of legislator. In my opinion the law “On mortgage” shall contain norm of obligation of mortgagor to keep the book of mortgage recording or the book of registration of mortgage into which the mortgagor is obliged not earlier than ten days after appearance of mortgage to introduce information of type, object of mortgage and the volume of liquidity of obligation assured by collateral, and to present it for examination to every interested person. Besides it is necessary to stipulate also responsibility of mortgagor for inopportune keeping of records in the book of mortgage registration, for incompleteness or incorrectness of records and also for deviation from duties to present the book of mortgage registration to the interested persons.

The original mortgage begins there and then where and when the creditor independently on his location can receive reliable information of position of the real estate which he is interested in, including information of previously made mortgages or rent agreements independently on location of the client.

The mortgage presumes registration of mortgage transactions in standard order by the sole body in narrow connection with legal practice, court, arbitration court, in this result the possibility of repeated mortgage is excluded. The functioning of this system is impossible without creation of the unified general base of information of mortgaged real estate. In this it is its main difference from systems, which are based on separate information, published in different newspapers and advertisement editions, which do not bear responsibility for reliability of proposed information. This problem can be decided with help of central network of computer communications.

**2.2.4 Insurance – important element decrease of credit risks.**

Carrying out of mortgage operations is as well connected with definite risks, to which refer risk of loss (destruction) or damage of the subject of gage etc. Insurance allows considerably reduce this kind of risks.

The legal basis for insurance of mortgage operations are the norms contained in the Paragraph 3 of the Chapter 23, and also in the Chapter 48 of the Civil Code of the Russian Federation, Law of the Russian Federation from November 27, 1992 No 4015-1 “On organization of insurance business in Russian Federation” and Federal Law from July 16, 1998 No 102-FЗ “On mortgage (gage of the real estate)” (hereinafter referred to as “law on mortgage”).

Article 343 of the Civil Code of the Russian Federation stipulates that the pledger or pledgee depending on who of them has gaged property, is obliged, if other is not stipulated be the current legislation or agreement, to insure gaged property at expense of the pledger. The same provisions are contained and defined in a more detailed way in the Article 31 of the law on mortgage. Provisions of this law say, that insurance of the property gaged in accordance with agreement on mortgage, is conducted pursuant to conditions of the indicated agreement. Thus, in case of absence in the agreement on mortgage of other conditions on insurance of the gaged real estate, the pledger is obliged to insure this property at his own expense for a total cost from risks of losses and damages, and if the total cost of the property exceeds the size of the backed liabilities – for the sum not less than the sum of these backed liabilities. /7/

As a rule, the beneficiary according to agreement on insurance of real estate being subject of the gage, is nominated the pledgee, that is the creditor under liabilities, backed with the gage. However and in cases, when the gaged property is insured for the benefit of other persons (for example, for the benefit of the pledger), for the purpose to protect interests of the pledgee - creditor, the pledgee has right to satisfy claims under liabilities backed with the mortgage directly from insurance indemnity paid in case of loss or damage of the gaged property. The indicated requirement is subject to satisfaction on priority basis before satisfaction of claims of other creditors of the pledger and persons, to whose benefit is carried out insurance.

If pursuant to the terms and conditions of the agreement of insurance the gaged property is insured for the sum lower than the total cost of property, than in the case of insured accident which has entailed loss or damage of insured property, insurance company reimburses to the pledgee only part of losses calculated proportionally to ratio of the sum of insurance to full (insurance) cost of the gaged property. Insurance agreement may stipulate a higher size of insurance indemnity, but not exceeding the full (insurance) cost of property. The indicated provision referring to so-called incomplete property insurance, is stipulated in the Article 949 of the Civil Code of the Russian Federation.

Insurance of gaged property is one of important terms and conditions of agreement on mortgage. Pursuant to the Article 35 of the law on mortgage if the pledger does not fulfill his responsibility to insure the gaged property, the pledgee has right to require advance fulfillment of liabilities, backed by the mortgage, and if such demand will not be satisfied, the pledgee has right to impose collection on the gaged property.

Chapter 3. The problems and the perspectives of mortgage crediting.

**3.1. Foreign experience of mortgage crediting**

The examination of the world experience of mortgage credit organization shows, that this market has considerable potential.

The mortgage banks appeared for the first time in Germany in XVIII century. The first mortgage bank was the state bank, founded in Silesia in 1770 for rendering financial support to large landowners. At the beginning of XIX century the activity of mortgage banks extended on the small landlord properties, and then on the peasant lands. In the middle of 60 years of XX century there were in Germany 13 state and 25 private land banks. The control package of shares of majority of the banks belonged to large banks.

In other countries there is no similar strict system of mortgage banks. So in the USA in 1916 the land banks were organized in 12 districts for issuing long-term loans under collateral of land. At the present time the mortgage credits in the USA are granted on the whole by loan-savings associations, mutual-savings banks and small farmers banks, which have regional meaning. /6/

In Canada the mortgage banks are engaged on the whole in crediting of operations with real estate. At the beginning the object of their activity was crediting of agriculture under collateral of land and agricultural constructions, and then – in principle housing construction.

In France the biggest land bank (“Crédit fonds de terre de France “ ) and its affiliate “ Office of businessmen ” (“ Comptoir des entrepreneurs ”) grant credits to landowners and construction companies for housing and production construction. Mortgage operations are realized also the bank of land crediting (French land bank) which was founded in 1853. The bank credits on the whole the large construction for the period from 3 to 20 years.

In the European countries, as Finland, Sweden, Belgium, Holland there are both private and state mortgage banks. So in Finland the private banks grant mortgage credits. Real estate serves as collateral – land and constructions, both production and non-production. The banks mobilize more than 70% of means by issuing of mortgage bonds. In Sweden four mortgage banks function which are under state control. They are engaged in crediting of housing construction, agriculture, shipbuilding, and also trade. In Belgium the special credit organizations realize operations of granting long-term loans, which form so-called state credit section. This section consists of Central department of mortgage crediting, which loans are guaranteed by the state. In Holland the mortgage credits are granted by agricultural credit institutions, organized on cooperative basis. They are unified by the Central cooperative peasant bank (Rabobank).

There are mortgage banks in some developing countries (Argentina, Mexico, Nigeria and others).

Now we will consider some distinctive features of organization of mortgage crediting in developed countries. The experience of these countries in this sphere to some extent can be used in the conditions of Russia.

For the countries of Romanic German right (The whole Western Europe, except Denmark) the similar regime of mortgage is typical: notary certified act, land-survey or land book, publications of mortgage ant other essential formalities.

The registration of mortgage is realized by state officials ( in the countries with land book – by the judge). He registers all acts of law of estate on transactions with real estate (sale, purchase, servitude , privileges and others) and also forms real and personal card-index. With his help it is possible to receive real picture of mortgage and privileges with respect to real estate. All these factors permit creditor to be convinced of the fact that:

the mortgage property really exists in acts (with help of land-survey or land book);

the property is not mortgaged (with help of card-index of registration or judge).

Without above-mentioned services it is impossible to create good functioned safe mortgage system. Otherwise great difficulties may appear for organizations which grant loans.

If the creditors do not have strict idea of mortgaged property, they can suffer losses because of the reason that such property did not exist. Moreover because of the fault in records, which should be kept in strict chronological order, the creditor can lose his preferential right, which will be transferred to other creditors./8/

In other countries the conception of mortgage is more flexible and less formalized , especially in the countries of English Saxon right with regime “Equity & Common Law”. Particularly there is no necessity in naturally certified act, and mortgage can bear general character, that is the object of mortgage is not emphasized or the publication is absent. Two above-mentioned systems are used in Denmark.

Why in the case of availability of rich own experience before revolution and possibility of using of the experience of developed countries the mortgage in our country did not occupy adequate place?

The claims on this question can be made to all participants of the market – borrowers, creditors and the state. And even first of all to the state, because till now the favourable legal base was not created, by no means the creation of the secondary market is stimulated. The latter is very important. Many economists think , that this is secondary market which will become kernel round which the whole structure will begin develop. Four level similar system (and rather effective) already exists in the USA, in which federal agency of mortgage crediting is introduced as a additional element in chain between links “the state” and “mortgage bank” – it is to some extent the agent of federal government. And there are several such agents in the USA – Federal National Association, Federal Homebuilding Loan Mortgage Corporation, Federal Land banks, created for crediting under mortgage of farming lands and , which act in accordance with the principles of above mentioned associations, and others. All these organizations represent original areas on which the present segment of the securities market functions. Receiving the guarantee from the government these associations buy the pledges from private financial institutions. In their turn the monetary means come to associations from the sale of own securities. The profit received from the trade of these securities is invested to great extent to the homebuilding and in this manner the retrospective link is effected. /6/

Thus the importance of existing of such associations is determined by those functions, which they realize: development of standards of mortgage crediting, assistance in support of liquidity of banks through refinancing of some types of credits, issuing of own securities for attraction of new investments in the sphere of homebuilding. It is necessary to note that this section of the market of debentures is the largest in the world in accordance with the volume of attracted capital.

The examination of the world experience of mortgage credit organization shows, that this market has considerable potential. It is important that it help to resolve one of the most sharp social question – providing the population with dwelling.

**3.2. The problems. The first steps of organization of mortgage crediting In Russia.**

Mortgage crediting – to great extent new for our country type of banking services, and there are serious obstacles, which impede its development. The main obstacles are insufficient normative legal examination of the question, complication of attraction of long-term resources for mortgage, estimation of different types of risks and payment solvency of borrower. All these problems impede considerably development of mortgage in Russia. However nobody doubts that it will be used in all parts in the future.

The organization of the system of long-term homebuilding mortgage crediting in Russia becomes complicated because of some circumstances. The high and unstable rates of inflation determine potentially important risk of interest rates in the case of long-term crediting. The risk of homebuilding crediting, connected with the possibility of using of home property as a collateral, increases also because of insufficient legal examination of the question of possibility for the bank of making claim on mortgaged property of the client in the case of nonpayment of the credit by the borrower. The genuine experience of mortgage operations does not exist, and 1500 commercial banks, which function now, form bad controlled and not very reliable system.

However, in spite of all problems, some process in development home crediting is reached for all that. The interest of the banks to these operations can be explained, first, by existing already now of real solvent demand on long-term home loans and , second, by foresight in the future of the large market for mortgage credits, and understanding of the fact, that now it is possible to occupy good position for receipt in the future of the share on this market.

The creation full legislative normative base will provide the passage to the civilized forms of mortgage crediting, to the mass development of mortgage. As we already noted the result of large and difficult work was adoption by the State Duma of the law of Russian Federation “On mortgage”. From the point of view of association of mortgage banks the adopted law on the whole is in conformity with the purposes and the tasks of development on the legislative basis of civilized mortgage of home crediting. However this law is ideal, it can be tested by the practice, by life.

The difficult position was formed in the practice of mortgage crediting in the agricultural section. The situation is there so that many farmers have accounts in the local banks, but all the accounts are empty. In particular, in accordance with the information of the Institution of business development, after decrease of interests rates on deposits the confidence of the farmers to the banks reduced in catastrophic manner.

The peasants now prefer to act by methods related to natural economy. And also the banks do not invest willingly money into agricultural section. First, agriculture – it is object of crediting, connected with the high risk because of its dependence on factors which cannot be forecast. Second, the existing legislation limits the right to consider as collateral agricultural property, that is land. Absence of legislation of land finally influences not only on the sphere of mortgage crediting, but on many other factors of the market. However, if to speak about private property on land, it is hardly possible that after adoption of this law today to-morrow we will get high-developed market of mortgage crediting in agriculture. It is necessary to recall the example of Lithuania where in the period of government of Pruskene the land was distributed practically free of charge, however the peasants did not want to take it. It is possible that the reasons here are deeper, and even not legal or economic, but psychological . You know, before 1917 the secondary market of mortgage developed in Russia rather successively, however compulsory interruption of seventy years odd not only cancelled mechanism of its activity, but led to psychological negative attitude of people to possibility of undertaking any responsibility. It is absolutely that the above-mentioned has large meaning in the idea of organization of mortgage crediting, but it is more important in this relation realization of already adopted and confirmation of acts and decrees on home questions not adopted yet, because mortgage home crediting occupies leading positions in this section.

At the same time the laws, adopted by the State Duma “On mortgage”, “On state registration of rights for the real estate and transactions on them”, do not signify the large spreading in the regions of the country of civilized principles of mortgage crediting, because the financial credit institutions, the banks cannot independently resolve questions of assurance of liquidity in the case of long-term crediting.

This problem shall be solved with help of the institution of secondary market of mortgage credits, it is necessary to create special body, which issues securities, guaranteed by the government. The Association of mortgage banks from the first days of its organization works for organization of Federal Agency on home mortgage crediting, in which the role of the state from the point of view of participation and support is high especially on this stage of the beginning of civilized mortgage. It is expedient to consider the mortgage system organized by the government of Moscow.

**3.2.1. The chart of mortgage crediting on the pattern of Moscow mortgage program.**

Taking into consideration the large concentration of banks, realty firms and other organizations on the real estate market in Moscow and the experience of financing of transactions with it, the local market of mortgages is organized in the city which will take part in the future in the federal market in the case of its organization.

The basis and the point of the beginning of realization of this idea can be the Decree of the city Government N365 from the 25th of April 1995 “On principles of mortgage crediting in Moscow”.

As we already noted, in the developed countries the organization and the regulation of mortgage market as a rule are effected by some state or private organization which acts on behalf or by order of the state, as for instance “Fenni May” in the USA. In Moscow the similar city organization is formed for realization of these functions under control of the Commission on securities – Moscow Mortgage Agency (MMA). /Appendix 1/

The Agency is formed as a municipal organization with the next gradual sale of its assets to private organizations. It works with narrow contact with the government of Moscow, under its direction and control. It participates in development of programs of financing of real estate market in Moscow, in development of securities market of the city, in their realization together with appropriate departments of the government.

The general purpose of MMA – assurance of mortgage crediting by financial resources and the guarantees of their return on mortgage loans, issued by the banks. There are the following functions, realized by the agency:

Purchase from banks of mortgage credits, forming in necessary cases of their pools and sale to other banks, insurance companies and other financial structures;

Realization and organization of issue and distribution of securities on credits bought from the banks;

Sale of the right of participation in credits on the base of agreement and forming of pools of mortgage credits;

Guarantee of return of means, issued by the banks in the form of loans in accordance with the programs of MMA;

Realization of certification of participants of mortgages secondary market ;

Development and realization of charts of mortgage crediting and secondary market in the limits of MMA;

Organization of preparation of skilled specialists on mortgage, preparation and realization of attestation of organization of participants of mortgage market in the city.

**Mechanism of functioning**

The bank which granted mortgage credit, sells it to MMA and by this method gets the possibility to grant this amount once more. The bank is obliged to service credit (collection of payments and alienation of property in the case of non-return of credit). The payments on the amount of credit are transferred through the bank to MMA. The amount of credit rate shall be divided between the bank (payment for service) and MMA (payment for resources).

In the case of resale of credit (MMA purchases from the creditor the credit and sells it to other bank) the cession of requirements shall be formed (article 380-382 of the Civil Code of Russian Federation, part 1). Primary creditor can serve such credit, who bears responsibility only for quality of service.

In the case of necessity of crediting of transaction on object of high value, when even large bank cannot (or does not want) grant loan, MMA forms credit pool for such amount. After purchase of the share of participant in the credit pool, bank buys the right for receipt of determined interest from the flow of earnings, received on credits, and also in proportion from it the rights for mortgage on credit. MMA issues and distributes for the amount of bought mortgage credits the securities, which have profitability equal to interest rate of credit less incomes of the bank and MMA. The securities have different periods of turnover and naturally different rates. For the purpose that the securities on mortgage were profitable for investor , their profitability shall be for some points above the profitability of the state securities. All securities of MMA have guarantees of the Moscow government.

MMA provides for the bank of creditor the return of amount of the credit granted by him. The borrower realizes monthly payments on credit to the bank-creditor in accordance with the schedule of payments, stipulated by credit agreement. The amount of return of indebtedness on credit is spent for covering the amount of securities of MMA. The bank transfers some part of credit rate , equal to income of the agency, stipulated in it, on its settlement account, and the balance is income of the bank. The difference of the time of securities redemption which have different period of turnover and issued on mortgage credits of several banks, and which have different time of payment on them , smoothes over the peaks of disparity of need and availability of credit resources of the banks participants of MMA and possible presentation to payment of securities. In the case of exceed of such resources the bank can participate in credits of other banks immediately or by purchase of securities of MMA, and on the contrary, in the case of their shortage, attract resources of other banks or sell securities to MMA.

The agency on separate pools of mortgage credits realizes their sale to other financial companies of Moscow and other cities and regions. Thus, from one side , rather free financial resources of participants of financial market will be attracted to Moscow, from other side, rather free for this moment financial resources of Moscow will be transferred to other regions for decision of problems of homebuilding and home purchase by population of other cities and regions.

At the present time the range of problems exists, which impedes development of mortgage crediting. The general instability of economy, low level of incomes of majority of population by comparison with the cost of dwelling, high taxes and inflation can be taken to the factors, which influence negatively on the development of mortgage.

But the most serious problem – it is insufficient help of the state in financial, organizational and legislative questions. The state in the countries with developed system of mortgage crediting, especially on the first stage, undertakes financial support of long-term crediting. The state support can be realized either with help of privileged taxation of the banks, constructors and other subjects, connected with the operations of construction financing or dwelling purchase, or with help of subsidies of the borrower. The organized help is necessary, first of all, for organization of the above-mentioned Federal Agency on mortgage crediting, which could buy from the banks credit obligations and issue securities under pledges, providing in this form the liquidity of mortgage credits.

**Conclusion**

Summing up, it is necessary to note that the detailed consideration of such type of credit services as mortgage credit shows its big potential in Russian conditions. Russia – the country of enormous land riches and exactly mortgage of land, and also of fixed assets of many enterprises can provide means for transformation of production into the market conditions.

Mortgage crediting – to great extent new for our country type of banking services, and there are serious obstacles, which impede its development. The main obstacles are insufficient normative legal examination of the question, complication of attraction of long-term resources for mortgage, estimation of different types of risks and payment solvency of borrower.

All these problems impede considerably development of mortgage in Russia. However nobody doubts that it will be used in all parts in the future. That is why farsighted bankers try already now to understand this profitable and perspective niche, the more so as there is no serious competition on the present market. Even in the existing legal and economic situation several charts of mortgage crediting have been already developed, which permitted to realise these operations with profit and with minimum risk.

The possibility of using of mortgage for homebuilding crediting helps to decide not only the task of financial assurance, but also the sharp problem for Russia of dwelling.

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