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THE LEGAL NATURE OF MORTGAGE BONDS

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Summary

This article deals with theoretical and practical research of legal nature of mortgage bonds and their application in financial market of Ukraine. The legal analysis of concepts, features, and types of mortgage bonds is provided. It is proved that legislation of Ukraine for regulating a particular circulation of mortgage bonds, has a complex character. The existence of a significant amount of legislative and by-laws legal acts in sphere of mortgage bonds legal relationships allows to emphasize importance of these documents and current need for their existence for purposes of investment, attraction of funds by both state and non-state financial institutions, as well as a demand for their improvement and conformity with the international law.

Key words: mortgage-backed securities, mortgage bonds, mortgage collateral, refinance.

Аннотация

В статье проводится теоретическое и практическое исследование правовой природы ипотечных облигаций и применение их на финансовом рынке Украины. Осуществляется правовой анализ понятий, признаков и видов ипотечных облигаций. Обосновывается то, что законодательство Украины, регулирующее оборот ипотечных облигаций, имеет комплексный характер. Наличие значительного количества законодательных и подзаконных нормативно-правовых актов в сфере регулирования правоотношений относительно ипотечных облигаций подчеркивает значимость этих бумаг и необходимость их существования для инвестирования, привлечения дополнительных средств как государственным, так и негосударственным финансовым учреждениям, однако нуждается в совершенствовании и согласовании с международным законодательством.

Ключевые слова: ипотечные ценные бумаги, ипотечные облигации, ипотечное покрытие, рефинансирование.

Problem formulation. Under current conditions, the mortgage market is essential for economic development of country. As known, financial investment is made using a specific tool –mortgage-backed securities. The global experience has shown reliability, transparency, and liquidity of mortgage-backed securities. But at same time, there are some issues on application of these securities in Ukrainian market.

The relevance of the research topic is confirmed by the existence of unsolved issues, currently, there is no complex research on regulation and application of mortgage-backed securities, in particular, mortgage bonds in Ukraine.

Status of research. The particular issues in field of civil law regulation of mortgage bonds circulation have been developed in scientific works of S. Glibko, R. Karpov, V. Pospolitak, N. Prikoznyuk, V. Bazilevich, N. Pogoreltsev, O. Lukomsky, A. Vladykin, N. Kruchko, N. Kuznetsova, I. Nazarchuk, N. Kvit and others.

Purpose and objective of article is a research of mortgage bonds legal nature in refinancing system and use of Ukrainian market. The novelty of work lies in an exploration of very nature of mortgage bonds and national experience of their application in financial market of Ukraine.

Presentation of main matter. According to pt. 3 of part 5, Article 3 of Law of Ukraine «On securities and stock market», mortgage-backed securities are securities, which issuance is provided by mortgage collateral (mortgage pool) and that affirm right of a holder to receive funds belonging to them from issuer. Mortgage securities include mortgage bonds, mortgage certificates, and pledges. Most scientists believe that of listed securities only mortgage bonds and mortgage certificates are financial instruments, which can be simultaneously regarded as refinancing means and investment means on financial services market. For example, S. Glibko notes that mortgage-backed securities should include mortgage bonds and mortgage certificates [1, p. 111].



In order to identify problems in use of mortgage-backed securities on Ukrainian stock market, let us focus on individual issues of mortgage bonds.

Mortgage bonds are a type of mortgage-backed securities and play a special role in mortgage lending system. This type of securities is backed by mortgage assets and aimed at refinancing.

In accordance with Law of Ukraine «On mortgage bonds», mortgage bonds are bonds of issuer pursuant to obligations which are secured by mortgage collateral in manner prescribed by law. Under current legislation, mortgage bonds can be issued in form of conventional mortgage bonds and structured bonds. Mortgage bonds have following features: they are uncertified, registered and issued [2].

The Ukrainian market has experience of issuance and circulation of mortgage bonds. To determine process and stages of non-state funded mortgage bonds, following example should be reviewed.

In 2012, a JSC «ARZHK» has issued conventional mortgage bonds. An issuer, «ARZHK», possess a license to carry out activities on provision of financial loans from borrowed funds, issued on June 13, 2012 by National Commission on Securities and Stock Market, which carries out state regulation of markets of financial services № 614 810 valid through 13 June 2015. It should be noted that activity of «ARZHK» aimed at ensuring a system of non-state refinancing of banks engaged in mortgage lending for population.

A public JSC «Joint Stock Bank UkrGasbank» acted as a manager of mortgage collateral. The manager has exercised its powers under contract on management of mortgage collateral, which is concluded between manager and issuer (in this case, «ARZHK») until registration of respective mortgage bonds issuance. An agreement on management of mortgage coverage was provided by National Commission on Securities and Stock Market for registration of respective issue of mortgage bonds. As a Service Provider acted a public joint stock company «State Savings Bank of Ukraine», contracted by a maintenance contract of

mortgage assets and reserve service bank acted a public joint stock company «The State Export-Import Bank of Ukraine». A limited liability company «BDO» has acted as a mortgage collateral auditor. As depositary – a private joint stock company «AUSD» [3].

It should be noted that basic agreement for managing mortgage coverage in accordance with applicable legislation is an agreement on management of mortgage collateral agreement on management of mortgage collateral is concluded for a period until termination of mortgage collateral and may not be less than maturity of mortgage bonds.

The Law of Ukraine «On State Regulation of Securities Market in Ukraine» determines that activities of management of mortgage coverage is an activity that is carried out by a mortgage collateral manager on their behalf for a fee for a certain period based on agreement on management of mortgage-backed, and provides a representation of owners of mortgage interest bonds, monitoring compliance with conditions of replacement mortgage assets or inclusion of new mortgage assets of mortgage collateral, monitoring timeliness and completeness of payments by issuer for an ordinary mortgage bonds, ensures compliance with mortgage collateral requirements of law, to perform other functions prescribed by law [4].

In accordance with Law of Ukraine «On mortgage bonds», essential terms of contract on management of mortgage coverage of conventional mortgage bonds are following: 1) information on manager and issuer, a person authorized to keep documents on mortgage collateral, including their full names, addresses, bank details, and identification code according to Unified state Register of legal entities and individual entrepreneurs; 2) rights and duties of manager, issuer and holders of mortgage bonds to fulfill functions of mortgage collateral management; 3) amount and manner of payment of costs and control of remuneration; 4) powers of control when foreclosure of mortgage collateral; 5) reasons and procedure for replacement of control; 6) procedure for amending agreement on management of mortgage coverage [2].

In addition, pt. 1, Sec. V of «Provisions on Mortgage-Backed Conventional Mortgage Bonds», order of conducting register of mortgage collateral and mortgage coverage of management of conventional mortgage bonds», approved by decision of NKTSBFR № 1902 from 27.12.2012, defined that management of mortgage coverage is an activity that involves implementation of following manager's basic functions: monitoring of mortgage collateral; monitoring of execution of order obligations of Issuer under conventional mortgage bonds; representing the interests of owners of conventional mortgage bonds in relationship with Issuer and other persons in courts and public bodies, as well as foreclosure of mortgage collateral; in case of foreclosure of mortgage coverage, mortgage cover maintenance services and distribution of funds from mortgage collateral in accordance with law and prospectus; in event of default, holders of acquisition of conventional mortgage bonds of such rights: 1) require issuer of early execution of monetary obligations on mortgage bonds; 2) adopt forced debt collection measures on mortgage bonds of issuer in accordance with law; 3) to foreclose on mortgage collateral; 4) to meet their requirements due to issuer's other assets in event of insufficient funds after foreclosure of mortgage collateral. The owners of conventional mortgage bonds exercise above rights through control measures [5].

Contractual relations under management of mortgage-backed inherent other types of contracts. In case of an auditor audit (by an audit firm) a trilateral agreement between manager, issuer and auditor (auditing firm) is to be concluded on inspection of mortgage collateral. In addition, related persons are not permitted to act as manager, issuer, and auditor.

According to Sec. 2, Art. 15 of Law of Ukraine «On mortgage bonds», as a manager could act a financial institution with a license to carry out professional activities in securities market – mortgage-backed management activities, and according to Art. 21 of same law, as manager of mortgage collateral structured mortgage bonds can act a bank or non-



bank institution which possess a license for mortgage-backed administration, issued by NKTSBFR. The procedure and conditions for issuing licenses to carry out certain types of professional activity in stock market (securities market), license renewal, issuance of duplicate and copy of license are approved by decision of NKTSBFR № 817 from 14.05.2013 [6].

In addition, licensing terms for professional activities in securities market, mortgage-backed management activities, were approved by decision of NKTSBFR № 235 from 7.02.2012. The main are following requirements: 1) amount of registered share capital for activities of mortgage-backed structured mortgage bonds management must be fully paid in cash in amount of not less than 35 million hryvnias and for activities of mortgage-backed management of conventional mortgage bonds. Not less than 25 000 000 hryvnias; 2) licensee (except for a bank) for implementation of mortgage-backed management activities should have a net worth of not less than minimum authorized capital established by law for mortgage cover management activities (other than companies, for which the second financial year date of their creation is not over yet) [7].

It should be noted that maintenance of mortgage assets in mortgage pool are measures aimed at ensuring proper implementation of mortgage lender functions in relations with debtors on relevant mortgage assets. In addition, the functions of servicing of mortgage assets in mortgage cover mortgage bonds may rely on issuer or to one or more service organizations. As a Service Provider may act a bank or other financial institution which in accordance with legislation has right to perform such operations (Art. 9 of Law of Ukraine «On Mortgage Bonds»). It should be noted that Service Provider deals under contract for servicing of mortgage assets with issuer, and in case of issuance of structured mortgage bonds, with manager.

In addition to agreement on mortgage-backed administration and maintenance of mortgage assets, issuer and manager enter into a contract with auditor to conduct an auditor's check if checks are not carried by manager.

Regarding on depository service contract, in case of issue of conventional mortgage bonds, contract for depository services is concluded by issuer. In case of issuance of structured mortgage bonds contract for depository services concludes manager.

Thus, the state registration of prospectuses and mortgage bonds is provided by National Commission on Securities and Stock Market on basis of documents submitted by issuer.

Note that release agents, accommodation, service and repay of conventional mortgage bonds are issuer, manager, service provider, depository, auditor, National Commission on Securities and Stock Market. It is necessary to emphasize author's opinion on state supervision over mortgage bonds circulation. Subparagraph 83, para. 3 of Regulations of National Commission, carrying out state regulation of financial services markets, approved by Presidential Decree of 23 November 2011 1070/2011, which states that powers are National Committee of Financial Services establish procedures for keeping records of mortgage collateral and operations with them [8]. According to para. 30-01, part 2, pt. 7 of Law of Ukraine «On State Regulation of Securities Market in Ukraine», powers of NKTSBFR are referred within limits defined by Law of Ukraine «On mortgage bonds» to establish requirements for implementation of mortgage collateral management activities. Thus, according to S. Glibko, authority to regulate securities issuance and circulation, namely mortgage bonds should be consolidated within a single state body – NKTSBFR [1].

Functions of state regulation, supervision and control in sphere of issue and circulation of mortgage bonds, as well as activities of financial institutions are provided by National Commission on Securities and Stock Market regarding issue and circulation of mortgage bonds, mortgage collateral and activities of managing mortgage-backed, and activities of financial institutions, that are not banks – National commission, carrying out state regulation of financial services markets in accordance with Sec. V Art. 27 of Law of Ukraine «On mortgage bonds». Therefore, in our opinion, if in addition

to main body, which performs function of government regulation, there should act an additional one, to provide additional guarantees to investors and as a mortgage bond holders.

Mortgage bonds are a relatively new mechanism in financial market of Ukraine, but at time of existence and having a large number of regulatory and legal framework, unfortunately, this tool has not gained a widespread success.

JSC «UkrGasbank» became first subject in Ukraine to issue mortgage bonds. Thus, JSC «Joint Stock Bank UkrGasbank» in amount of USD 50.0 million in 2007, State Commission on Securities and Stock Market registered issue of conventional mortgage bonds. In 2008. Securities Commission registered eight issuances of conventional mortgage bonds totaling UAH 270.0 million, of which one issuance is registered for JSC CB «Khreshchatyk» and 7 issuances for State Mortgage Institution. The issuance of mortgage bonds have been reported in 2009 and 2010 reports on Securities Commission, and in 2011, according to report has National Commission on Securities and Stock Market.

As of 31.12.2012 NKTSBFR registered mortgage bond issues totaling USD 1.07 billion. In 2012, Commission registered two issues of conventional mortgage bonds totaling USD 750.00 million, of which one issuance was registered for OJSC «Agency to refinance home loans» (hereinafter – ARZHK) in amount of USD 250.00 million, other – State Mortgage institution in amount of USD 500.00 million [9].

As of 31.12.2013, NKTSBFR had registered mortgage bond issuance totaling USD 1.32 billion. In 2013 NKTSBFR registered issue of conventional mortgage bonds of PJSC «Agency to refinance home loans» in amount of USD 250 million [10].

Key indicators in stock market demonstrate low circulation of not solely mortgage bonds, but also mortgage-backed securities in general. Thus, volume of mortgage-backed securities trading in securities market is 0,02% for period 2010–2014. Compared with other financial tools such as stocks, corporate bonds, investment certificates



and others, we can conclude that circulation of mortgage bonds on stock market equals zero.

In general, data show a low activity on issuance and circulation of mortgage bonds in Ukraine. On this occasion, various causes are possible. According to S. Gibko, imperfect legal regulation of mortgages could be identified as one of reasons, including shortcomings of legal regulation of similar functional essence of mechanisms of mortgage lending through issuance of mortgage bonds and transactions with consolidated debt [1, p. 113].

Conclusions. Having examined legal nature of mortgage bonds and national experience of these securities circulation on Ukrainian financial market, it can be argued that a possible cause of low activity of mortgage bonds circulation lies within other credit facilities for purchase of housing. For example, a fund for financing construction and operation of real estate fund. In accordance with Law of Ukraine «On financial and credit mechanisms and management of property for housing and real estate transactions», financing construction funds is transferred to manager of FSF for administering, which are used or will be used by manager in future under terms of Fund's Rules and agreements on participate in CFF; and operations fund real estate, funds received by manager background in management, as well as real estate and other property, property rights, and income earned from management of these funds, including property rights and right to claim, acquired under contract on participation in fund financing construction.

That is part of FSF to allow investors to obtain ownership of housing, construction of which they invest in and participate in VON gives right to receive income from real estate operations. This is confirmed by above-mentioned law, certificate VON – security certifying right of its holder to receive income from investing in real estate.

Therefore, in our opinion, scope of mortgage bonds in Ukrainian market requires further study and improvement. It is this segment of stock market is one of most important for the country's economy.

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