

Structured “Covered Bonds” in Argentina

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1995 wurde das argentinische Hypothekenrecht dahin gehend geändert, dass die Emission von grundpfandrechtlich besicherten Obligationen und die dazu notwendige Übertragung von Hypotheken erleichtert werden. Die dabei gewählte Struktur ähnelt den strukturierten gedeckten Schuldverschreibungen, wie man sie in Europa kennt, und kann als eine Mischung aus Elementen des Pfandbriefs und der Mortgage Backed Securities verstanden werden. Ob das Produkt den europäischen Anforderungen an einen Covered Bond entspricht oder sogar Vorbild für Europa sein kann, prüfen die Autoren im Folgenden. (Red.)

In 1995 Argentina created legislation on securitising mortgages. New structures were developed, which look familiar with the new structured covered bonds in Europe. Hereby Argentinian mortgage law was modified to facilitate the transfer of mortgages – with techniques not unknown to mortgage law in Europe. In this article the background and the legal structure of the Argentinian version of “covered bonds” is shown and it will be discussed, whether they can be qualified as covered bonds.

Mortgage Law insufficient

The Argentinian Civil Code from 25th of September 1869¹⁾ was created in the late 19th century and was strongly influenced by civil law in continental Europe, especially the French Code Civil. Many civil codes and drafts herefore were taken into consideration including the parallel works in Spain, Germany, Switzerland, Austria, Italy and many other countries including Southern American ones. Therefore, the Argentinian Civil Code is fully based on European Civil Code tradition.

The mortgage law is regulated in book III, chapter XIV, Art. 3108 – 3202 of the Argentinian Civil Code. Following continental European principles, the “hipoteca” is a pledge/charge on land keeping the property in the hand of the owner. It has the aim to secure a money debt and its relation to the loan is accessory, what means that the “hipoteca” cannot exist without a claim to be secured. To create a “hipoteca”, furthermore a public document (escritura pública) and a registration in the land register are needed.²⁾ The same procedure is necessary to assign a

mortgage, which produces costs and is time consuming. This hinders any kind of capital market funding of mortgage loans like securitisation.

Legislation 1995³⁾

In 1995 a set of new legal instruments was introduced into or existing ones improved in Argentinian law by Law 24.441 to stimulate the construction market, especially the housing one, to reduce the unemployment rates, to improve long term real estate financing and to facilitate capital market funding of mortgage loans.

This law introduced the trust (fideicomiso financiero), improved the regulation of the leasing contract (contrato de leasing⁴⁾) and allows the creation of an investment fund (fondo común de inversión⁵⁾) with “títulos de participación”, whose underlying assets are “letras hipotecarias”. New securities created by Law 24.441 are mortgage bonds (letras hipotecarias), share certificates (certificados de participación) and debt securities (títulos de deuda).

Based on this new legislation, some Argentinian banks developed the following new structure of capital market funding

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of mortgages: A bank grants loans. The loans are transformed into mortgage bonds (letras hipotecarias).⁶⁾ These mortgage bonds are transferred to a trust held by an trustee (issuing bank)⁷⁾, which issues bonds. These bonds are new capital market instruments, which could be called structured covered bonds.⁸⁾ The main elements of this structure are: letras hipotecarias, fideicomiso, structured covered bonds.

“Letras Hipotecarias” (Mortgage bonds): A normal mortgage loan is a loan secured by a pledge/charge on land. An Argentinian mortgage bond is an instrument, which combines loan and land security via replacing the original loan and transforming it into a claim incorporated into a document, which can be transferred easily. The replacement is done through the technique of novation. The land security part of the “letras hipotecarias” is a pledge/charge on land. This “letra hipotecaria”, combining a payment claim with a pledge on land usually is called “mortgage bond” in the English documentation. This combination is not a unique legal instrument. It is similar to the Swiss “Schuldbrief”, which is the dominating mortgage instrument in Switzerland.⁹⁾ It was also introduced into the Turkish Civil Code, but so far (nearly) never used in Turkey.

“Letras hipotecarias” may only be created, if the pledge on land-part can have the first rank and must be expressly agreed by the document establishing the mortgage.¹⁰⁾ They must contain the name of the debtor and, if applicable, the name of the owner of the mortgaged property; the name of the creditor; the amount of the obligation included in the document, expressed as an amount specified in domestic or foreign currency; the penalty interest rates; the location of the mortgaged property and the land registry and kataster data thereof.

“Letras hipotecarias” are transferred through nominative endorsement without implying any liability for the endorser. No notice to the debtor is required¹¹⁾ nor any registration in the land register. “Letras hipotecarias” have coupons for capital or interest payment.¹²⁾ The holder of the “letras hipotecarias” or of any of the coupons thereof may foreclose the mortgage bond following the special foreclosure procedure established by Title IV of Law 24.441, when so agreed in the document creating the mortgage.¹³⁾ Claims arising from “letras hipotecarias” shall expire after three years as from the maturity date of each capital

or interest instalment.¹⁴⁾ The issue of the mortgage bond does not prevent the debtor from transferring the ownership of the real state.¹⁵⁾ The new owner shall have the rights and duties of a third party who possesses the mortgaged property sold.¹⁶⁾

Fideicomiso: The "fideicomiso" could be understood as trust. It can be created by a trust contract (*contrato de fideicomiso*).¹⁷⁾ There is a trust whenever a person (settlor) transfers the trust property title to another person (trustee), who is bound to manage it for the benefit of whoever is appointed by the trust contract (beneficiary), and to transfer it upon a specific period of time or fulfilment of a term to the settlor, the beneficiary, or the trustee.

Financial trust: Art. 19 of the Law 24.441 regulates the Financial Trust (*fideicomiso financiero*). Furthermore, the National Securities Commission (*Comisión Nacional de Valores*) has published some regulations regarding the financial trust. The beneficiary may be any natural or legal person. The special feature of a financial trust is that the trustee is a financial institution – or a company, who got a special licence by the Securities Commission. The beneficiary is owner of a "certificado de participación" or a "título representativo de deuda".

There is a large flexibility regarding the kind of assets, which can be held by a trust. These assets form a legal estate, which is segregated from the estate of the settlor, the trustee and the beneficiary and cannot be involved in any enforcement or insolvency procedure, which is running against the trustee or the settlor.¹⁸⁾ On the basis of the trust assets, the trustee can issue "títulos valores", which in the law are called "certificados de participación" (participation certificates) and "títulos de deuda" (debt securities). Comparing to other structures in securitisation in other countries it is important to see that the use of the legal instrument "fideicomiso" means that there is no need to implement a SPV into the structure in order to get insolvency segregation of the assets from the insolvency estate of the issuer.

"Cédulas hipotecarias": Sometimes the *certificados de participación* and the *títulos de deuda* are called "Cédulas hipotecarias" by market participants. Once again: These "cédulas hipotecarias" (mortgage covered bonds) are issued by the trustee (bank) on the basis of "letras hipotecarias" (mortgage bonds). And

these mortgage bonds are de-linked from the loans, which were granted initially and then replaced by the mortgage bonds. This technique allows an easy transfer of the "mortgages" from the originator to the trustee, without any need to fulfil the formal requirements of civil law regarding the transfer of normal mortgages.

The National Securities Commission regulates the public offer of the bonds, supervises them and keeps a register of all authorized trustees. Every public offer needs an issue prospectus.¹⁹⁾ One of the banks issuing "cédulas hipotecarias" is Deutsche Bank S.A., who is acting as trustee for Banco Galicia Buenos Aires S.A and for Banco Hipotecario Nacional S.A., who both are originators of mortgage loans and who transfer their mortgages by way of "letras hipotecarias" to the trustee. The trustee banks do not hold the assets (*letras hipotecarias*) on their balance sheet, but there is a balance sheet for each "fideicomiso financiero" which is separate from the trustee's one.

Comparison to covered bonds in Europe

The Argentinian mortgage bond is an interesting financial instrument to transfer mortgages, which normally is difficult because of registration needs and other administrative measures. Whereas European countries like France and Portugal regulate specific procedures to transfer mortgages from an originator to a bank issuing covered bonds, the Argentinian way is following civil law techniques of Switzerland and revitalising an old transfer technique, which existed in several European countries in former times. This should be studied more in depth in order to develop ideas how to make easier the cross-border transfer of mortgage portfolios in Europe – which is suggested by the EU-expert group on funding of mortgage loans.

Some features of the Argentinian "cédula hipotecaria" we find in bond structures in Europe and US, which are called covered bonds by market participants. A comparison with the EU law on covered bonds²⁰⁾ shows that some points are questionable. Most requirements of the EU-law seem to be fulfilled in Argentina. But one important feature of a covered bond is that it must be issued by a credit institution. In principal, this is the case in Argentina, whereas in Spanish two-tier-structures and in the Washington

Mutual Covered Bond Program²¹⁾, the issuer is a trust and not a credit institution. But does this also mean that there must be a full recourse against the issuing bank? This is not the case in Argentina – neither in the case of *Cassa Depositi e Prestiti* in Italy.²²⁾ Only the cover assets are securing the "cédulas hipotecarias". The question is, whether it is necessary to have a full recourse situation in order to fulfil the requirements of the Art. 22 IV UCITS-Directive. This will be a point of discussion in the ECBC when working on the core criteria of covered bonds.

Footnotes

¹⁾ In force since 1st of January 1871.

²⁾ "Ley Nacional de Registros de la Propiedad Número 17.801" and the Land Register Law of each province. Argentina is divided in nineteen provinces. Each of them has a Land Register Law, these laws are similar to each other.

³⁾ "Ley 24.441 de Financiamiento de la Vivienda y de la Construcción (Law 24.441 of Housing and Construction Financing), published in "Boletín Oficial" January 16, 1995.

⁴⁾ Law 24.441 replaced by Law 25.248 on Leasing.

⁵⁾ Law 24.083 modified by Law 24.441 and Law 24.781.

⁶⁾ Issuing "letras hipotecarias" novates the original mortgage credit. El artículo 37, Título III "De las letras hipotecarias" expresa: "La emisión de letras hipotecarias extingue por novación la obligación que era garantizada por la hipoteca". (Section 37, Title III "On mortgage bonds": "The issuing of mortgage bonds extinguishes by novation the obligation guaranteed by the mortgage.")

⁷⁾ The trustee is a financial institution or a corporation specially authorized by the National Securities Commission to act as a financial trustee ("Section 19, Chapter IV, Title I Law 24.441 Housing and Construction Financing").

⁸⁾ The front page of issuers prospectus sometimes use the title "Cédulas Hipotecarias". But the prospectus content talk about "certificados de participación y títulos de deuda" (share certificates and debt securities).

⁹⁾ See Stöcker, *Die Eurohypothek*, Berlin 1992, page 230 ff.

¹⁰⁾ Section 36, Title III, Law 24.441.

¹¹⁾ Section 40, Title III, Law 24.441

¹²⁾ Section 41, Title III, Law 24.441

¹³⁾ Section 45, Title III, Law 24.441

¹⁴⁾ Section 47, Title III, Law 24.441

¹⁵⁾ Section 38, Title III, Law 24.441

¹⁶⁾ Section 37, Title III, Law 24.441

¹⁷⁾ Transferring through a trust contract have certain important effects: The trust property constitutes an equity separated from that of the trustee and of the settlor (Section 14, Chapter V Law 24.441).

¹⁸⁾ Section 14 Chapter III Law 24.441: "Los bienes fideicomitidos constituyen un patrimonio separado del patrimonio del fiduciante y del fiduciario." (The trust property constitutes an equity separated from that of the trustee and of the settlor.)

¹⁹⁾ See the prospectus: <http://www.hipotecario.com.ar/Novedades/Docs/ProspectoDelPrograma.pdf>

²⁰⁾ The EU law on covered bonds and many country reports can be found in: *European Covered Bond Council, European Covered Bond Fact Book*, Brussels 2006.

²¹⁾ See WM Covered Bond Program, Base Prospectus 2006, page 69: "The Issuer is a Delaware statutory trust ..."

²²⁾ See Tamisari/Bradley, *ECBC, Covered Bond Fact Book 2006*, page 68.