

**Nicolas BRAHIN**  
DESS Droit Bancaire et Financier  
Université PARIS I

**Barbara CASTANIE**  
DEA Droit Administratif  
Université de Montpellier

**Jennifer SALLES**  
DEA Droit International Public et Privé  
Université de Nice

*Avocats au Barreau de NICE*

# Cabinet BRAHIN avocats

ADVOKATFIRMA I FRANKRIG / LAWYERS OFFICE IN FRANCE

Correspondant organique de :

Nice, January 7, 2010

**Legipass**  
*Avocats au Barreau de Paris*  
8, rue Auber - 75009 PARIS  
Tel : +33 01 77 49 27 40 | Fax : +33 01 40 07 04 54  
www.legipass.com

**Advokatfirmaet Finn C. Larsen**  
*Advokat au Barreau du Danemark*  
Algade 43, 1 - 4000 ROSKILDE  
Telefon +45 4635 1515 | Telefax +45 4636 3747

## THE REMORTGAGING

The remortgaging (“l’hypothèque rechargeable”) is defined by the article 2422 of the French Civil Code (Ordonnance n° 2006-346, March 23<sup>rd</sup> of 2006). This legal measure is mandatory.

Definition: The remortgaging is the process of using an existing conventional mortgage (“l’hypothèque conventionnelle”) previously included in the land registry to guarantee a new debt which is not included in the original agreement.

It has to be concluded before a notary and will be published as a remortgaging convention (“convention de rechargement”) with the former conventional mortgage agreement in the land registry (“la conservation des hypothèques”).

The publication as marginal notes is made in the land registry where the building is situated.

Remortgaging is allowed if there is an existing mortgage agreement, which expressly contains a remortgaging clause.

It is also allowed, regarding mortgages contracted before the issue of the Law in 2006, to write an endorsement (“avenant”) afterwards which will have to be published in order to be valid.

The financial law of 2007 has planned an exemption for the property tax and for the registration fees when you change your conventional mortgage into a remortgaging (Loi de finances n° 2006-1666, December 21<sup>st</sup> of 2006).

In order to benefit this exemption the endorsement has to be concluded by a private person and the mortgage must guarantee an obligation contracted by this person.

This exemption affects endorsements concluded between September 27th of 2006 and January 1<sup>st</sup> of 2009.

There is a maximum amount for a remortgaging which is the one mentioned in the former mortgage agreement.

For the registration of a conventional remortgaging, according to the article 2428 of the French Civil code, two inscription slips (“bordereaux d’inscription”), dated, signed and certified by a notary must be registered at the land registry.

Those slips must contain in order to be valid:

- The name of the creditor / mortgagee and debtor / mortgager;
- The address of the creditor;
- Date and nature of the mortgage agreement;
- Amount of the debt;
- Address and designation of the building;
- The remortgaging clause;
- The higher amount of the mortgage that can be dedicated to other debts.

The notary has to certify the slip and verified that the amount is not higher than the one mentioned in the original mortgage.

For the registration of an endorsement, two inscription slips dated, signed and certified must be sent to the land registry containing the following:

- the nature and the term of the endorsement’s inscription;
- the references and the date of the former conventional mortgage;
- the identification of the owner of the building;
- the new creditor and the new debt if there is a change.

The inscription will last for fifty years since the day of the registration. Indeed, the parties might let the inscription at the registry in order to avoid the costs release.

Concerning a property loan guaranteed by a remortgaging you will have to add a “mortgage status” form (“document de situation hypothécaire”) (article L313-14-1 of the French Consumer Code) containing further additional legal mentions as below:

- The term of the mortgage inscription;
- The identification of the building;
- Higher amount guaranteed by the mortgage;
- Amount of the former loan;
- Amount of the new loan;
- Evaluation by the loaner of the cost of the remortgaging;
- Evaluation by the loaner of the total amount of the mortgage;
- A clause mentioning that the bankruptcy of the borrower will lead to the sell of the building.

The mortgaging costs are made by the property tax (“taxe de publicité foncière”) with a rate of 0,60% plus an extra tax with a rate of 0.1% (frais d’assiette, de recouvrement, de dégrèvements et de non valeurs Code général des impôts article 1647, V).

The total tax rate is 0,715% paid on the highest amount between the amount of the remortgaging and the total amount of the debt.

If an endorsement is signed the rate of 0,715% will also have to be paid on the amount of the remortgaging.

Concerning the conventional mortgages concluded before June 25<sup>th</sup> 2006 the salary of the land registrar ("le conservateur des hypothèques") is the rate of 0.10% on the amount of the debt included in the inscription on the land registry.

Concerning the conventional mortgages concluded after June 25<sup>th</sup> 2006 the salary of the land registrar is at the rate of 0,05% paid on the amount of the debt included in the inscription on the land registry.

The land registrar also gets a fixed salary of 15 Euros.

As a conclusion, if the parties want to do a remortgaging they will have to pay the taxes mentioned above.

The assignment of debts could present the opportunity to avoid mortgaging costs.

The idea would be to keep registered the former inscription, to mention in the refinancing loan a specific clause with the assignment of debts in order to avoid the property tax.

#### THE ASSIGNMENT OF DEBTS ("délégation de créance")

The assignment of debts is defined by the article 1275 of the French Civil code.

Definition: an assignment of debt is the mean for a debtor to transfer his debt to another person, the representative ("le délégué"), who will be either liable for the entire debt alone ("délégation parfaite") or liable for a part of the debt along with the former debtor ("délégation imparfaite"). The representative will be the new loaner of the delegatee ("délégataire").

Using this proceeding the representative will pay the loan in lieu of the former debtor.

There is no need to comply with formalities.

The former debtor needs to consent to the transfer of debts.

The representative needs to give his acquiescence.

The transfer needs the delegatee's acceptance ("délégataire").

The mortgage will still exist **but** the debt will be transfer to the representative.

The parties must be very careful while doing the assignment of debts because there is a risk of substitution of debt<sup>1</sup> ("novation").

---

<sup>1</sup> Article 1271 of the French Civil Code: La novation s'opère de trois manières : 1° Lorsque le débiteur contracte envers son créancier une nouvelle dette qui est substituée à l'ancienne, laquelle est éteinte ; 2° Lorsqu'un nouveau débiteur est substitué à l'ancien qui est déchargé par le créancier ; 3° Lorsque, par l'effet d'un nouvel engagement, un nouveau créancier est substitué à l'ancien, envers lequel le débiteur se trouve déchargé.

The substitution of debt means that the former debt would be discharged along with the mortgage which is connected to the debt.

When the representative is liable for the entire debt (“délégation parfaite”), there is a substitution of the debt and its accessories such as the mortgage would be discharged by novation.

In this case, NYKREDIT REALKREDIT A/S won't be able to exercise its right over the mortgage.

In order to keep the mortgage, the parties will have to proceed to an “imperfect assignment of debt (“délégation imparfaite”).

The former debtor will have to remain liable for the debt along with its representative.

Nonetheless, according to the article 1279 of the French Civil Code<sup>2</sup>, the consequences of a perfect assignment of debt can be avoided.

Indeed, if NYKREDIT REALKREDIT A/S wants to release the former debtor from its guarantee, the new borrower can ask to the former owner not to release the inscription from the land register.

NYKREDIT REALKREDIT A/S will benefit the mortgage and the former debtor would be released from its obligation<sup>3</sup>.

The express consent of the former loaner is absolutely mandatory.

NYKREDIT REALKREDIT A/S has an option between keeping the former loaner and releasing him from the debt. Please clarify your will.

Finally, concerning all these situations, it seems unlikely that the parties will be exempted of the property tax since there are very few exemptions such as:

- Registration of a few number of loans in particular registrations requested by the State (“inscriptions requises par l’Etat”), registration of conventional mortgage for the safeties granted by the State to council houses<sup>4</sup> (“inscriptions des hypothèques conventionnelles pour sûretés des avances consenties par l’Etat aux organismes d’habitations à loyer modéré”);
- Renewal of inscriptions<sup>5</sup> (« renouvellement des inscriptions ») ;

---

<sup>2</sup> article 1279 al 1 of the French Civil Code: Lorsque la novation s'opère par la substitution d'un nouveau débiteur, les privilèges et hypothèques primitifs de la créance ne peuvent point passer sur les biens du nouveau débiteur. Les privilèges et hypothèques primitifs de la créance peuvent être réservés, avec le consentement des propriétaires des biens grevés, pour la garantie de l'exécution de l'engagement du nouveau débiteur.

<sup>3</sup> Permanent Dictionary debt collection and execution proceeding p 1067 updating 37

<sup>4</sup> article 845 of the French Inland revenue code: Sont exonérés de la taxe de publicité foncière : 1° Les inscriptions requises par l'Etat. Toutefois, la taxe qui n'a pas été perçue sur une inscription d'hypothèque judiciaire ou conventionnelle doit être acquittée lors de la radiation de l'inscription. A cet effet, le conservateur est tenu d'énoncer, tant sur le bordereau destiné aux archives que sur le bordereau remis au requérant, le montant de la taxe non perçue; 2° Les inscriptions : a) Des hypothèques conventionnelles pour sûreté des avances consenties par l'Etat aux organismes d'habitations à loyer modéré; b) Des hypothèques prises par les organismes d'habitations à loyer modéré et de crédit immobilier pour la sûreté et le recouvrement des prêts individuels qu'ils sont appelés à consentir à des particuliers; c) Des hypothèques prises en garantie des prêts d'épargne des travailleurs manuels prévus à l'article 80-III, deuxième alinéa, modifié, de la loi n° 76-1232 du 29 décembre 1976. 3° Les actes des prêts spéciaux à la construction désignés aux articles L 311-9 et L 312-1 du code de la construction et de l'habitation.

<sup>5</sup> article 663 of the French Inland revenue code : Donnent lieu à la perception de la taxe de publicité foncière : 1° Les inscriptions d'hypothèques judiciaires ou conventionnelles à l'exception des inscriptions en renouvellement; 2° Sous réserve des dispositions de l'article 665, les décisions judiciaires, actes, attestations de transmission par décès et documents visés aux articles 28, 35, 36 2° et 37 du décret n° 55-22 du 4 janvier 1955 modifié.

- Registration of endorsement of remortgaging concluded before January 1<sup>st</sup> 2009. Those inscriptions are subject to a fixed tax of 25 EUROS<sup>6</sup>.

### **As a conclusion**

If the parties decide to do an assignment of debt, they will be able to give up their share of the building but according to us it seems that the new owner will have to pay the property tax, i.e: **0,715%** of the amount of the debt.

1/ **Regarding the new loan**, the parties will have to respect the legal mentions of the Law named Scrivener<sup>7</sup>.

Indeed, NYKREDIT REALKREDIT A/S must published the loan. The publication must contain a number of legal mentions such as:

- Identification of the loaner;
- The type of loan and the project is going to finance;
- The total cost of the loan and the rate of interest;
- The cooling off period ("délai de réflexion") of 10 days upon the receipt of the registered letter with recorded delivery.

The loan itself must also contain some mandatory mentions notably:

- The identification of the parties;
- The loan schedule ("l'échéancier du prêt");
- The amount of the loan and the rate of interest;
- The amortization table of the loan ("tableau d'amortissement du prêt"); and
- The overall effective rate ("taux effectif global")....

NYKREDIT REALKREDIT A/S have the legal obligation to maintain its offer during 30 days.

2/ **Regarding the future loan offers**, you might want to amend your new loans in order to avoid the same situation.

Indeed, NYKREDIT REALKREDIT A/S will have to include in the future loans a clause of assignment of debts which will have to be registered by a French notary.

The loan agreement will also have to include more informations such as:

---

<sup>6</sup> article 844 of the French Inland revenue code: La taxe proportionnelle de publicité foncière applicable aux inscriptions d'hypothèques judiciaires ou conventionnelles visées au 1° de l'article 663 est perçue au taux de 0,60 %. Elle est liquidée sur les sommes garanties en capital, intérêts et accessoires, même indéterminées, éventuelles ou conditionnelles, exprimées ou évaluées dans le bordereau. Il n'est perçu qu'une seule taxe pour chaque créance quel que soit le nombre des créanciers requérants et celui des débiteurs grevés. Les inscriptions qui échappent à la taxe proportionnelle sont soumises à une taxe fixe de 25 euros.

<sup>7</sup> Law n° 79-596 of July the 13th 1979.

- The references of the articles of the French Civil Code referring to the assignment of debts;
- The entire history of the former loan ("l'historique de la dette");
- The actualization of the loan ("la mise à jour de la dette actualisée") (the sum already paid and the amount left to pay for the new debtor.)

This refinancing loan will then be able to be registered in the land registry without the payment of the property tax.

3/ In order to avoid those heavy legal formalities ordered by the French public consumer Law (10 days of cooling off period, offer sent by a registered letter...) the "idea" (or opportunity) could be to set up a **perfect assignment of debt** ("délégation de créance parfaite") and **not** a new loan.