Bank Confidentiality and the Sale of Loans under Austrian Law

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Introduction

Loans are sold for various reasons. For instance, loan sales are sometimes used to create a subsequent syndication of a loan which was originally entered into only bilaterally by the lender and the borrower. Loan sales are also often prompted by the wish of banks to reduce exposure to a certain borrower (e.g. a borrower who faces economic difficulties or has even defaulted) or to certain kinds of borrowers (a bank may aim at a diversification of its borrowers). A bank may also wish to reduce its loan engagement in general (e.g. in order to enter into more profitable businesses than lending). In recent years especially, the market for loans that are in default or close to being in default (so called ''non-performing loans'') has grown significantly across the world. This development was furthered by the introduction of ''Basel II'' which provides for more risk-sensitive capital adequacy requirements than its predecessor ''Basel I''.

In connection with the potential acquisition of debts, an investor will usually need particular information about these assets, both in order to assess their objective value[1] before the acquisition and in order to ''manage''[2] or assert the claims (or to supervise their management and assertion) after the acquisition. There is an inherent tension between this need for information of a potential investor on the one hand and a bank's duty of confidence on the other hand. Thus, especially where a (sufficient) consent of the customer cannot be obtained,[3] the question arises under which circumstances, if any, the disclosure of information on the borrower typically involved in a loan transfer may nonetheless be permissible.

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1. This value will depend inter alia on the creditworthiness of the debtor(s) and on whether securities have been given.
2. An acquirer could, for example, decide to grant the borrower an extension to facilitate the borrower's restructuring, which might be in the acquirer's own commercial interest.
3. Like, for example, English law, Austrian law recognises the consent of the customer to disclosure as an exception (qualification) to the bank's duty of confidentiality. However, as will be discussed later, the prerequisites for a sufficient consent are quite stringent under Austrian law.

Transfer techniques

Under Austrian law, loan assets may basically be transferred: (i) by assignment (''*Zession*''), (ii) by transfer of contract (''*Vertragübernahme*''), and (iii) by way of a transfer of the beneficial ownership (''*Übertragung des wirtschaftlichen Eigentums*'').[4]

Assignment

Pursuant to the Austrian Civil Code (ABGB) s.1392, an assignment is, ''the transfer of a receivable from the current creditor to a new creditor which does not affect its terms''. A valid assignment does not require the notification, let alone the consent of the debtor because it does not have any impact on the terms of the receivable and can therefore not result in disadvantages to the debtor. [5,6]

Transfer of contract

In the course of a transfer of contract, the buyer assumes all rights and obligations of the seller under the loan agreement. Unlike an assignment, it is only permissible with the consent of the debtor.[7]

Transfer of the beneficial ownership

With a transfer of the beneficial ownership in the loan receivables, the legal title to the assets remains with the seller, but is held on trust (*treuhändig*) for the buyer.

Regulatory framework

Source of and exceptions to secrecy obligation

Under Austrian law, bank confidentiality is expressly recognised and protected by statutory provisions.

4. If a bank is transferred by way of a universal succession (e.g. merger), the acquisition of the knowledge of the transferred bank by the legal successor does not infringe bank confidentiality. This is according to the Austrian legal commentator P. Apathy, because in the course of a universal succession, the obligation to secrecy is also transferred to the legal successor (See P. Apathy, G. Iro and H. Koziol, *Österreichisches Bankvertragsrecht I,* 2nd edn (Springer, Vienna, 2007), p.231).
5. However, until a notification, the debtor is discharged by paying the assignor. Also, cross-claims and defences against the assignor (especially set-offs) which arise before such notice, bind the assignee.
6. H. Koziol and R. Welser, *Grundriss des Bürgerlichen Rechts II,* 13th edn (Manz, Vienna, 2007), p.120.
7. H. Koziol and R. Welser, *Grundriss des Bürgerlichen Rechts II,* 13th edn (Manz, Vienna, 2007), p.135.

Section 38 of the Austrian Banking Act (BWG), which primarily regulates the scope of and the exceptions to bank confidentiality, has even been adopted as constitutional law and therefore may be abolished or amended only on a two-thirds majority vote of the Austrian Parliament.

Pursuant to s.38 BWG:

> ''. . .the credit institution, their shareholders, members of their organs, employees, as well as other persons acting for credit institutions, are prohibited from disclosing or making use of secrets which were entrusted or made accessible to them on the basis of the business relationship with customers [. . .] exclusively (Bank Secrecy)''.

The bank and its customers are free to regulate bank confidentiality differently in their contract. Thus, the customer may agree to a limitation of their right to confidentiality.

Section 38(2) BWG provides for several exceptions to bank confidentiality. For instance, pursuant to s.38(2) BWG, an obligation to secrecy does not exist if the customer ''expressly and in writing'' consents to the disclosure of the secret. It is the prevailing view that the list of exceptions to bank confidentiality under s.38(2) BWG are not exhaustive. It rather mentions examples of cases in which the interest of a bank in disclosing information, subject to bank confidentiality, typically takes priority over the interest of its customer to keep this information secret.[8] Taking into account these statutory examples, it has to be assessed in every individual case of intended disclosure whether the interest of the bank, in a measure which requires disclosure, overrides the interest of the customer in non-disclosure.[9]

Remedies for breach of confidence

A breach of the bank's obligation to confidentiality severely disturbs the trust of the customer in their bank. According to the basic principles of the Austrian private law, such a breach will therefore entitle the customer to terminate the banking contract with immediate effect.[10] An intentional or negligent violation of bank confidentiality can also create liability for damages. Austrian case law suggests that contractual provisions which are in breach of bank confidentiality could even be void pursuant to s.879(1) of the ABGB.[11]

In addition, the violation of bank confidentiality entitles the affected customer to bring an action for an injunction. The right of a customer to compel the bank from (further) disclosing information can, pursuant to s.381 of the Austrian Enforcement Code (*Exekutionsordnung*), also be secured by way of a preliminary injunction.

Furthermore, the violation of bank confidentiality may, on a motion of the affected customer, result in criminal punishment pursuant to s.101 BWG.[12]

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Consent

As already mentioned, an obligation to secrecy does not exist if the customer ''expressly and in writing'' consents to the disclosure of the secret (s.38(2) BWG). Thus, under Austrian law, a disclosure of customer-related information cannot be justified with an oral or an implied consent of the customer.

In Austrian practice, agreements underlying loans to commercial borrowers often contain a provision under which the borrower expressly agrees to the disclosure of information by the lender(s) to potential buyers. The language of these clauses is comparable to the one used in English loan agreements.

However, only in recent years have Austrian banks introduced ''disclosure consent'' clauses into their standard loan agreements with consumers. Thus, Austrian banks are parties to a vast number of consumer loan agreements which do not contain the customer's express consent to disclosure for the purpose of assignments of the bank's receivables under these loans. It is also noteworthy that the newly implemented clauses have apparently not yet been tested under ss.864a[13] and 879 ABGB[14] and under the Austrian Consumer Protection Act (*Konsumentenschutzgesetz*) which provides for rather stringent requirements as to the fairness and visibility of such terms.

8. See P Jabornegg, ''Aktuelle Fragen des Bankgeheimnisses'', *ÖBA*, 1997, p.665; P Apathy, ''Abtretung von Bankforderungen und Bankgeheimnis'', *ÖBA*, 2006, p.33, pp.35–6; OGH 29.4.1986, *ÖBA*, 1986, p.411; OGH 7.11.1991, *ÖBA*, 1992, p.338; OGH in SZ 57/29.

9. See P. Apathy, G. Iro and H. Koziol, *Österreichisches Bankvertragsrecht I,* 2nd edn (Springer, Vienna, 2007), pp.313–14.

10. See P. Apathy, G. Iro and H. Koziol, *Österreichisches Bankvertragsrecht I,* 2nd edn (Springer, Vienna, 2007), p.320.

11. OGH 19.9.2000, 10 Ob 91/00 f. The German Supreme Court has held that this is not the case under German law (BGH 27.2.2007, XI ZR 195/05).

12. Since January 1, 2006, companies are also, on specific conditions, subject to Austrian criminal law. The Act which implemented this innovation is named the Criminal Liability of Organisations Act (*Verbandsverantwortlichkeitsgesetz*).

13. Pursuant to this provision, unusual clauses in standard terms of one party do not become part of the contract if the other party could not expect such provisions under the circumstances (e.g. ''small print'') and if the clauses are unfavourable to the other party (see P. Rummel, *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch,* 3rd edn (Manz, Vienna 2003) § 864a note 1 and subsequent).

14. For example, s.879 para.3 ABGB provides protection against clauses which do not define the main performance of one of the parties and which worsen the position of the other party unreasonably.

Is disclosure without an express and written consent permissible?

In a recent case before the Austrian Supreme Court,[15] debtors argued that the assignment of loans, pursuant to s.1422 ABGB, had not become legally effective since this assignment was in breach of s.38 BWG. The Austrian Supreme Court rejected these objections based on the argument stating that ''a bank cannot be barred from disposing over its claims against customers''.

This rather dated decision is in contrast to cases relating to confidentiality obligations of advocates,[16] accountants[17] and auditors[18] where the Austrian Supreme Court has held that members of these professional guilds cannot assign their fee receivables in a legally effective way. Under Austrian law, the stated confidentiality obligations are comparable to bank confidentiality.

Against the background of these ''conflicting'' Austrian Supreme Court decisions, a differentiated approach has to be taken. As already pointed out earlier in the analysis, it is the prevailing view of Austrian legal commentators that, using the statutory exceptions to bank confidentiality as a guideline, it has to be assessed in every individual case of intended disclosure whether the interest of the bank in disclosure takes priority over the interest of the customer in non-disclosure (''balancing of interests''). Thus, in the given context, it has to be assessed under which circumstances (if any) the interest of a bank in selling loan receivables outweighs the interest of its customer to avoid the disclosure of information usually involved in such transactions.

In cases where the bank has lawfully accelerated the loan on the grounds of a default of the customer, or where a term loan is due for repayment and the customer has nonetheless not fulfilled their payment obligations, a balancing of interests will result in favour of the bank. The debtor has breached their contractual obligations and the bank could bring an action against the customer which would also result in a disclosure of customer-related information.[19] Accordingly, the Higher Regional Court of Cologne[20] did not regard the sale of an (accelerated) non-performing loan as a breach of bank confidentiality. In the reasons given for the judgment, the Court stated that:

> ''. . .it is [. . .] permissible to realize by sale or assignment claims for repayment against customers who are in default or have in other ways breached their contractual obligations''.

In a recent article, the Austrian legal commentator P. Apathy argues that the disclosure involved in an assignment of defaulted loans can also be justified with the ''general interest in the economically essential stability of the financial market''.

Apathy takes the view that even with regard to loan receivables which are not due for payment yet (e.g. receivables arising under loans where the customer is not in default), a balancing of interests may result in favour of the bank if the bank seeks to assign these loans in order to refinance itself and to transfer risk.[21] The same assessment can be drawn from a recent judgment of the German Federal Supreme Court[22] which contains the following statement:

> ''A prohibition on assignment would be in conflict with the well-founded interests of the bank. The bank is interested in the free transferability of loan receivables for the purposes of refinancing, risk reduction and equity relief''.

However, it has to be borne in mind that there is no Austrian authority which confirms this rather far reaching view.

In any case, the disclosure of non-anonymous information in connection with a transfer of loan receivables can only be permissible to the extent which is necessary for the assertion and enforcement of the receivables by the buyer. In other words, the disclosure has to be limited to the ''need to know''. In cases of doubt (like in the case of a transfer of ''performing loans''), the risk of a breach of bank confidentiality can be minimised through trust solutions (e.g. transfer of the beneficial ownership in the receivables, appointment of data trustees).

15. OGH 19.1.1989, 7 Ob, 506/89, ÖJZ 1989/73.
16. OGH 19.9.2000, 10 Ob 91/00 f, ecolex 2001, 15.
17. OGH 10.10.2002, 2 Ob 231/02 p, RdW 2003, 60.
18. OGH 28.4.2005, 8 Ob 36 / 05 k.
19. In this connection, it is noteworthy that under Austrian law, court hearings in civil proceedings are open to the public as they are in England, unless the judge specifically directs otherwise.
20. OLG Köln 15.9.2005, U 21/05. Austrian courts and legal commentators often use German jurisprudence and literature as a guideline for the assessment of banking law issues.
21. P Apathy, ''Abtretung von Bankforderungen und Bankgeheimnis'', *ÖBA*, 2006, p.39.
22. BGH 27.2.2007, XI ZR 195/05.