OPINION

Loan Sales and the Transfer of Collateral under Austrian Law

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Assignment; Austria; Collateralisation; Guarantees; Mortgages; Pledges; Receivables; Securitisation

Introduction

Loan receivables are usually secured by collateral. The continuing existence of such collateral is of vital interest to the parties involved in a loan transfer as it reduces the risk of default and increases, consequently, the value of the secured receivables and the achievable purchase price.

If receivables are transferred by way of a spin-off (*Abspaltung*) or by way of other constructions resulting in a universal succession (*Gesamtrechtsnachfolge*), the supporting collateral will automatically pass to the legal successor without the necessity of any further measures. This legal analysis deals with the much more complex transfer of collateral in connection with an assignment (*Abtretung*) of loan receivables, which results in a singular succession on an asset-by-asset acquisition basis (*Einzelrechtsnachfolge*).[1, 2]

The assignment of rights under Austrian law

An assignment is the transfer of a receivable from the current creditor to a new creditor which does not affect its terms. Not only receivables in a narrow sense, but all types of sellable rights can be subject to an assignment.[3] Even future receivables (rights) can be assigned if they are clearly specified or specifiable, which in any case requires that the legal basis from which they shall arise (e.g. a particular contract) is specified. In case of devisable receivables, also a partial assignment is permissible.[4]

Strictly speaking, an assignment requires both a valid "title agreement" (*Verpflichtungsgeschäft*), which creates an obligation of the assignor to assign particular receivables to the assignee (e.g. a receivables purchase agreement), and an "act of transfer" (*Verfügungsgeschäft*), which effects the receivables transfer (act of assignment). However, since the effectiveness of an act of assignment usually does not require a particular form or formal act,[5] it is usually deemed to be included in the title agreement. Thus, the coming into effect of the act of assignment usually coincides with that of the title agreement.[6]

A valid assignment does not require the notification,[7] let alone the consent, of the debtor because the assignment does not have any impact on the terms of the obligation and can therefore not result in disadvantages to the debtor. However, until such notification, the debtor is discharged by paying the assignor. Also, cross-claims and defences against the assignor (especially set-offs) which arise before such notification bind the assignee.[8]

In some cases, a receivable passes to a new creditor without an underlying title agreement and even without an act of assignment (*cessio legis*). The most important example for this is the assignment pursuant to s.1358 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*): a person who pays another person's debt for which he is personally liable (e.g. as a surety) or for which he has given a security in rem automatically acquires the rights of the creditor without the necessity of any further measures.

A mixture between an ordinary (contractual) assignment and a *cessio legis* is the so-called "necessary assignment" (*notwendige Zession*) pursuant to s.1422 of the Austrian Civil Code: a person who pays another person's debt for which he is not personally liable and for which he has not given a security in rem is entitled to request the assignment of the creditor's rights before or

[1] Loan receivables can also be transferred by way of a transfer of the entire loan contract (*Vertragsübernahme*). However, since the assignment of loan receivables forms part of such a transfer of contract, the rules for the transfer of collateral in connection with an assignment also apply to this transfer technique.
[2] 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. With this transfer technique also the legal title to the securities is held on trust for the buyer which is why a transfer of collateral does not occur.
[3] An exception are, for instance, rights of inheritance.
[4] H. Koziol and R. Welser, *Grundriss des Bürgerlichen Rechts II*, 13th edn (Vienna: Manz, 2007), pp.116 and subsequent.
[5] An exception is the assignment of rights for security purposes (*Sicherungszession*). In line with the strict public disclosures rules, which generally apply to the creation of securities in rem, its effectiveness requires the notification of the debtor.
[6] H. Koziol and R. Welser, *Grundriss des Bürgerlichen Rechts II*, 2007, pp.119 and subsequent.
[7] An exception is the assignment of rights for security purposes (see fn.6 above).
[8] H. Koziol and R. Welser, *Grundriss des Bürgerlichen Rechts II*, 2007, pp.120 and subsequent.

at the time of the payment. With such a request, the acceptance of the payment by the creditor effects the assignment of the receivable.

The transfer of collateral supporting receivables

The requirements for the transfer of collateral in connection with an assignment of secured receivables depend on the type of collateral.

Securities in personam

Suretyship

Section 1346 of the Austrian Civil Code defines the suretyship as follows:

> "A person who assumes the obligation to satisfy the creditor in case the original debtor does not fulfill his obligation is called a surety (Bürge), and the agreement between this person and the creditor is called a suretyship contract."

The validity of the suretyship depends on the existence and the validity of the secured receivable. The suretyship is therefore regarded as a right ancillary to the secured receivable.

Pursuant to s.1394 of the Austrian Civil Code in case of an assignment the rights of the assignee in relation to the receivables are identical to those of the assignor. According to the prevailing view of Austrian legal commentators, it follows that a suretyship as an ancillary right passes to the assignee without the necessity of a separate title agreement and without the necessity of a separate act of assignment.[9]

Guarantee

The guarantee (*Garantie*) does not qualify as a right ancillary to the secured receivable, since under Austrian law—unlike the validity of a surety—the validity of a guarantee does not depend on the existence and the validity of the secured receivable. Therefore, in case of an assignment of the secured receivable, the guarantee does not pass to the assignee automatically.

However, according to Austrian case law, the right to call on a guarantee can in itself be assigned.[10] Basically, that only requires a clause in the underlying receivables purchase agreement which provides for such a "parallel assignment" of guarantees (for the general requirements for an assignment of rights and for the legal consequences of the notification of the debtor [in the given context: the guarantor] see above).

Securities in rem

Pledges of tangible items

Under Austrian law, the creation of a pledge (*Pfand*), like the creation of all other types of securities in rem, requires the observation of strict public disclosure rules. As a rule, the item to be pledged has to be physically delivered to the pledgee. Only when such physical delivery is not possible or suitable, can it be substituted by symbolic delivery (e.g. marking of the item as pledged to the pledgee) or by declaration.

The validity of a pledge also depends on the validity and the existence of the secured receivable. Like the suretyship, a pledge is therefore regarded as a right ancillary to the secured receivable which passes to the assignee without the necessity of a separate title agreement. In light of the aforementioned strict public disclosure rules it is disputed, however, whether a separate act of transfer is required. In this regard Austrian case law differentiates between the contractual assignment on the one hand and the *cessio legis* and the necessary assignment on the other hand: according to precedents, only in case of a contractual assignment a separate act of transfer (e.g. physical delivery of the pledged item to the assignee, marking of the item as pledged to the assignee) is necessary.[11]

Mortgages

A mortgage (*Hypothek*) is only valid when registered with the land register (*Grundbuch*). Also, the validity of a mortgage depends on the validity and the existence of the secured receivable which is why it passes—as a right ancillary to the secured receivable—to the assignee without the necessity of a separate title agreement. As far as the necessity of a separate act of transfer is concerned, the aforementioned differentiation between contractual assignments and other types of assignment applies also to mortgages. Thus, only in case of a contractual assignment is a separate act of transfer necessary. This act of transfer consists in the registration of the new pledgee in the land register.[12, 13]

Special rules apply to the transfer of so called "maximum-sum mortgages" (*Höchstbetragshypotheken*). Such mortgages are not created in order to secure a receivable with a fixed amount, but in order to secure—up to a certain amount—all receivables which arise out of a particular "basic relationship" (*Grundverhältnis*), typically a revolving loan facility. From the land register it cannot be seen whether and, if so, to what extent, a maximum-sum mortgage is currently "used".

[9] M. Neumayr in H. Koziol, P. Bydlinski R and R. Bollenberger (eds), *Allgemeines Bürgerliches Gesetzbuch*, 2nd edn (Vienna: Springer, 2007) s.1394 margin no.3; A. Heidinger in M. Schwimann (ed), *ABGB, Volume VI*, 3rd edn (Vienna: LexisNexis, 2006) s.1394 margin no.5.
[10] H. Koziol in P. Apathy, G. Iro and H. Koziol (eds), *Österreichisches Bankvertragsrecht, Volume V*, 2nd edn (Vienna: Springer, 2009) p.306.
[11] A. Heidinger in M. Schwimann (ed), *ABGB, Volume VI*, 2006, s.1394 margin no.6.
[12] M. Hinteregger in M. Schwimann (ed), *ABGB, Volume II*, 3rd edn (Vienna: LexisNexis, 2005) s.449 margin no.11.
[13] In case of a *cessio legis* and a "necessary assignment" the assignee may petition an "adjustment" of the registered pledgee. Unlike the "registration" of a new pledgee such an adjustment has no constitutive, but merely a declaratory effect.

Basically, a bank could transfer all of its rights and obligations arising out of the revolving loan facility including the maximum-sum mortgage to another legal entity. Such a transaction would qualify as a "transfer of contract" (*Vertragsübernahme*). Unlike an assignment of receivables the transfer of an entire contract is only permissible with the consent of the debtor.[14]

If the bank wishes to assign just one receivable arising out of the basic relationship together with the maximum-sum mortgage, the basic relationship has to be "reduced" to the receivable to be assigned. Thus, the revolving loan facility has to be terminated. After such termination, the maximum-sum mortgage no longer relates to an entire basic relationship but only to the account balance which has existed at the time of the termination (plus default interest accruing as of that time).[15] In such a situation, the (former) maximum-amount mortgage is treated like an ordinary fixed-amount mortgage: in case of a *cessio legis* or of a necessary assignment of the secured receivable the mortgage passes to the assignee automatically. In case of a contractual assignment the registration of the new pledgee in the land register is required.

For the purpose of such registration, the effective termination of the revolving loan facility, has to be proved to the land registry court. Sufficient proof of this is in any case a valid and binding judgment or a written acknowledgement by the debtor (in the form of a notarial deed) confirming that the amount balance is due.[16]

Summary

Under Austrian law, the requirements for the transfer of collateral in connection with an assignment of secured receivables differ depending on the type of collateral.

As a right ancillary to the secured receivable a suretyship automatically passes to the assignee. The right to call on a guarantee has to be assigned in itself. Basically, that only requires a clause in the underlying receivables purchase agreement which provides for such a "parallel assignment" of guarantees.

As ancillary rights pledges on tangible items and fixed-amount mortgages, like sureties, automatically pass to the assignee of the secured receivable. However, given the strict public disclosure rules for securities in rem, for the transfer of the pledge or mortgage to be perfected a separate act of transfer (e.g. physical delivery of the pledged item to the assignee, registration of the assignee as the new pledgee in the land register) is necessary. In case of a maximum-sum mortgage, in addition, the termination of the underlying revolving loan facility is required so that the mortgage can be transferred with the claim for the outstanding balance amount.

Other legal issues to be addressed in connection with loan sales on an asset-by-asset acquisition basis are inter alia the concession requirements set out in the Austrian Banking Act (Bankwesengesetz),[17] the statutory duty of bank confidentiality[18] and the fee on assignments provided for by the Austrian Stamp Duty Act (Gebührengesetz).

[14] H. Koziol and R. Welser, *Grundriss des Bürgerlichen Rechts II*, 2007, p.135.
[15] M. Neumayr in H. Koziol, P. Bydlinski R and R. Bollenberger (eds), *Allgemeines Bürgerliches Gesetzbuch*, 2007, s.1394 margin no.3.
[16] OGH (Austrian Supreme Court) 3 Ob 108/03h [2004] *Österreichisches Bankarchiv* 640.
[17] See B. Köck, "Erwerb von Kreditforderungen (nicht) konzessionspflichtig?" [2009] *Österreichisches Bankarchiv* 589.
[18] See B. Köck, "Bank Confidentiality and the Sale of Loans under Austrian Law" [2008] J.I.B.L.R. 392.