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The Austrian parallel debt: an overview

The parallel debt is an Anglo-American construct which particularly can offer the possibility to facilitate the administration of mortgages in a banking consortium in Austria. It is a contractual construct by means of which (in simplified terms) a contractual obligation is newly constructed 'in addition' to one or more already existing validly established contractual obligation and is to exist in parallel with the already existing debt. The parallel debt simulates (in one obligation) all the existing obligations between the borrower and the members of the consortium. Regarding Austrian legislation, this poses the question of whether a parallel debt constructed in such a way is to be considered an abstract obligatory relation and, as such, legally voidable.

As the concept of the parallel debt is used to collateralise the debts within a banking consortium by means of a mortgage, there also arises the question of whether the parallel debt actually – in such a relation – leads to the desired effect, considering the strict accessoriness of the Austrian mortgage.

Concept of the parallel debt within the banking consortium

In order to reduce administration costs within a banking consortium, all claims of members of the consortium against the borrower should be secured by a single mortgage. This mortgage should collateralise all claims of the members of the consortium (the entire borrowed amount) and only be made out in the name of the consortium manager. The consortium manager is to administer the mortgage in a way that keeps the administrative workload as low as possible. Due to the strict accessoriness of the Austrian mortgage and the principle that claims held in trust cannot be secured by a mortgage for the trustee, the prescribed result can only be reached making use of the parallel debt. For this reason a claim by the consortium manager against the borrower is constructed: based on this, the borrower owes the consortium manager the entire borrowed

amount (of every single member of the consortium). This 'new claim' can be collateralised.

Opinions of science/research and jurisdiction

Recently Riedler, Rabl, Welser and the author of this article have been particularly concerned with the topic of the parallel debt. Neither science/research nor judicature has consistently spoken out for or against the effectiveness of the concept of parallel debt in Austria. The authors mentioned above point to the fact that – with regard to the ineffectiveness of abstract obligatory relations as well as the strict principle of accessoriness that has to be applied to mortgages – the parallel debt has to be critically evaluated.

The legal situation in Germany and France

A decision of the French Cour de Cassation is interesting in that it shows that the idea of the parallel debt does not have to contradict the principles of a legislation which is built on the causal tradition. This insight is, however, not sufficient to justify the effectiveness of the parallel debt, but this trend confirms that the 'parallel debt' is not necessarily legally void in a legislation which is built on the causal tradition.

In Germany, parallel debt is classified as an abstract obligatory relation that takes effect on basis of the provision of section 780 of the German Civil Code (BGB); but even if abstract obligatory relations are accepted by the BGB, the German doctrine also requires a *causa* – in the broadest sense (of the word) – for the parallel debt to be effective.

Approach to a solution

Together with the fact that a valid mortgage can only be established for the beneficial owner of a claim, the strict principle of accessoriness, which is applied to mortgages in Austria, leads to the necessity of creating a parallel debt. The principle of accessoriness is meant to guarantee that the security interest



(the mortgage) is linked to the claim and that the mortgage cannot be detached from the claim. Due to the principle that a trustee cannot create a mortgage for claims held in trust, which is confirmed by judicature, it is shown that legislature wanted to ensure that – in addition to linking claim to mortgage – there also has to be a particularly close connection between the mortgage and the creditor of the claim.

Complying with the principle of accessoriness might, however, be of lesser importance when it comes to the question of whether the parallel debt is suitable for a collateralisation of the members' claims: in case the answer to the question of whether the parallel debt can be validly agreed and put into effect, is yes, then an obligatory relation – which can be basically secured in accordance with the principle of accessoriness – exists.

The most important point of criticism with regard to the parallel debt is, however, that in Austria abstract obligatory relations (ie, without a case) are void. The parallel debt is actually an abstract obligatory relation, as – taking the example of the banking consortium – at first glance there cannot be any claim by the consortium manager covering the entire loan granted by the members of the consortium, because the single member of the consortium is the beneficial owner of the regarding claims.

The fact that the parallel debt is likely to be an abstract claim only leaves the possibility of finding a way to legally support this special abstract claim. In this respect, well-recognised law institutes in Austria point to the guarantee according to section 880a of the Austrian Civil Code (ABGB). Due to the provision mentioned above, an actually abstract obligatory relation can take effect when there are three parties involved. The present case of the banking consortium shows such a trilateral relation (the creditor, the members of the consortium and the consortium leader). The proposed solution can take effect as follows.

According to the provision of section 880a of the ABGB, the borrower promises and guarantees the consortium manager that

he owes the consortium manager the entire amount borrowed from all members of the consortium in case he does not settle his debt to each member of the consortium duly and in time. In order to avoid being criticised as a structure to facilitating circumvention (of the system), concrete regulations have to be agreed, which guarantee that the borrower cannot be made to pay back twice – each member of the consortium and the consortium manager. If this is ensured, the parallel debt can be validly agreed on as a guarantee and put into effect according to section 880a of the ABGB.

It has to be kept in mind that the construction of the parallel debt in this way is neither secured by relevant rulings of the high courts nor easy to realise. Nevertheless, from the author's point of view this construction does not contradict any principles of the Austrian legislation and therefore is to be considered effective.

Current practice

Accessory securities can only be used to collateralise specified claims. This only leaves the possibility to secure the respective claims of consortium members by independent mortgages one-on-one. To optimally utilise the mortgages within the consortium, all the regarding properties have to be mortgaged. The mortgages have to be diversified throughout existing properties in terms of value. If the collateralisation of the members of the consortium is to take place using only one property, a co-equality agreement (*Gleichrangigkeitsvereinbarung*) between the individual members of the consortium is recommended.

It should be noted that the realisation and the distribution of proceeds from collaterals have to be regulated within the consortium. For this, pool agreements have to be made. The distribution of proceeds in particular, as well as the realisation and administration of mortgages, would be easier if only one mortgage could be created for the consortium manager. This goal can be reached only with a parallel debt.