Warehouse Receipts in Austria

Dr. Otto Wächtter
Graf & Pitkowitz Rechtsanwälte
Applicable Law for Goods located in Austria

- **Transfer of Ownership („Eigentum“):**
  - Title
  - Modus

- **Security Interest:**
  - Title
  - Perfection (important: Publicity - „Publizität“)
Applicable Law for Transfer of Goods resp. Security Interest located in Austria

- **Title:** Subject to Agreement
- **Modus / Perfection:** Austrian Law
Warehouse Receipt („Lagerschein“)

- Paper Documentation providing proof of ownership of Goods to be stored in a warehouse

- Duty of Warehouse Operator to deliver to the Holder of the Warehouse Receipt

Rights and Obligations of Warehouse Operator

Rights and Obligations of Depositors
Types of Warehouse Receipts

(1) Bearer Warehouse Receipt („Inhaberlagerschein“)

(2) Instrument not to order („Rektalagerschein“)

(3) Warehouse Receipt issued to Order („Orderlagerschein“)

-> Bearer Warehouse Receipt and Instrument issued not to Order discussed in literature, however in Austria currently not of any relevant practical use.

-> Issuer: Warehouse Operator („Lagerhalter“)
Warehouse Receipt issued to order

- Transferable by Endorsement

- Creation only by „Establishments officially authorized to issue such documents“

- **Legal Basis:**
  
  OLSchV („Orderlagerscheinverordnung“)
  - repealed by BRBG („Bundesbereinigungsgesetz“), BGBl I 1999/191
  - No legal basis anymore for issuing a Warehouse Receipt to Order
  - Dispute in Doctrine (Dispute): whether every Business („Unternehmen“) may still issue Warehouse Receipts issued to Order, despite repeal by OLSchV
  - In Practice: Of no relevance (never)
Who is entitled to ask for Delivery of Goods?

(1) **Bearer Warehouse Receipt**
   - Person presenting Warehouse Receipt
   - „Limping“ Bearer Warehouse Receipt („hinkender Inhaberlagerschein“)

(2) **Warehouse Receipt not to Order**
   - Person Recovery Claim was assigned to
   
   No Transfer of Ownership of Goods, only Transfer of Right to Recover Possession („Herausgabeanspruch“)

(3) **Warehouse Receipt issued to order**
   - Person shown in the Document (endorsement)
   - Certifies Right to Receive Goods - Negotiable:
     - Transfer of Warehouse Receipt issued to Order  = Transfer of Goods
     - Condition: Good is (still) stored in Warehouse
International Trading Documents in Austria

CT-Documents of the International Chamber of Commerce (Paris) for combined transport and documents of the Fédération Internationale des Associations de Transitaires et Assimilés (FIATA)

(1) FIATA-FBL      negotiable FIATA Multimodal Transport Bill of Lading
(2) FIATA-FCT      Forwarders Certificate of Transport
(3) FIATA-FCR      Forwarders Certificate of Receipt
(4) FWL            FIATA-Warehouse Receipt

(1) to (4) negotiable

Austrian Supreme Court: only re: FBL (SZ 65/69 = wbl 1992, 336 = RdW 1992-402)
Transfer of Goods

Hand-over / Delivery

Symbolic Delivery

Delivery by Order to a Third Party in Possession

Constitutum Possessorium
Delivery by Order to a Third Party in Possession

• Delivery by issuing an order to a Third Party in Possession („Besitzanweisung“)

• To Hold the Goods which are located neither on the transferrers nor the transferrees premises but will rest with a Third Person (e.g. a Warehouse Keeper).

• Transfer: Order to the Third Person that the latter shall possess the Goods for the Acquirer.

• **Transfer of Ownership:**
  – upon Third Party receiving order
  – at a later point in time if this is stated in the order (anticipated order („Antizipierte Besitzanweisung“))
Constitutum Possessorium

- The current owner [here: Iron Ore Mine / Warehouse] agrees to hold the property for the new owner and the physical control of the assets remains with him.

- Strict publicity required for pledges over movables

→ Constitutum Possessorium is generally assumed to be insufficient for creating security right such as pledges or transfers of ownership for security purposes.
Ownership Transfer for Security Purposes („Sicherungseigentum“)

- Borrower is transferring (by physical or symbolic transfer) ownership of the Goods to the creditor for security purposes:

- Ownership expires when all claims have been paid

- Deemed to be ownership with all of ownership‘s external effects, but modified in certain respects due to the fiduciary nature of the transfer *

* Schuhmacher in Straube/Ratka/Rauter, UGB 14 § 363; Peter Csoklich, Festschrift, S. 72; 4 Ob 209/04w.
## Transfer of Goods

<table>
<thead>
<tr>
<th>Form of Transfer</th>
<th>Ownership</th>
<th>Security Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hand-over / Delivery</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Symbolic Delivery</td>
<td>yes</td>
<td>yes (?)</td>
</tr>
<tr>
<td>Delivery by Order to a Third Party in Possession</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>Constitutum Possessorium</td>
<td>yes</td>
<td>no</td>
</tr>
</tbody>
</table>
Specific Issue: Retention of Ownership („Eigentumsvorbehalt“)

- Conditional seller is still owner but seller’s ownership is subject to the condition of receiving full payment.

- Ownership passes to Purchaser when the purchase price has been paid in full.

- There is no express statutory regulation under Austrian Law, however serving as a Security for the purchase price is generally accepted.
  - Conditional buyer („Vorbehaltskäufer“) has a special expectant right („Anwartschaftsrecht“) until full payment
  - Reserved Ownership of the conditional seller („Vorbehaltsverkäufer“)

Both Rights may be transferred to Third Parties.
Certificate of Ownership
by Instruction to Hold Possession / “Besitzanweisung”

This is to certify ownership of [NAME OF OWNER] of [ADDRESS OF OWNER] on [MATERIAL] (the “Material”) by Instruction to Hold Possession (“Besitzanweisung”). [NAME OF THIRD PARTY, REGISTERNUMMER, NAME OF REGISTER, ADDRESS] (the “Seller”) sold the Material to the [NAME OF OWNER] pursuant to a purchase agreement dated and effective as of [DATE] (the “Purchase Agreement”).

The Material is held in possession for the Seller by [NAME OF DEPOSIT KEEPER], registered with the [COMPANY REGISTER], EN [COMPANY REGISTER NUMBER], [ADDRESS OF DEPOSIT KEEPER] (the “Deposit Keeper”). The Material is stored at in [the premises of the Deposit Keeper] [IF POSSIBLE MORE DETAILED DESCRIPTION OF LOCATION] at the address [ADDRESS LOCATION] (the “Location”)

Seller now, per [DATE OF EFFECTIVENESS OF THE PURCHASE AGREEMENT] irrevocably and unconditionally instructs the Deposit Keeper to hold the Material in possession for [NAME OF OWNER], the new owner of the Material.

By countersigning this Certificate of Ownership, the Deposit Keeper (i) acknowledges instructions of Seller to hold the Material in possession for [NAME OF OWNER] and (ii) declares towards Bank that it holds the Material in possession for [NAME OF OWNER] at in Location.

[NAME OF OWNER] acknowledges that Deposit Keeper holds the Material in possession for [NAME OF OWNER] at the Location.

The English version of this Certificate of Ownership by Instruction to Hold Possession prevails.

SIGNED [THIRD PARTY]

..............................................................
Signature of Authorized Representative

Date:

..............................................................
Name of Authorized Representative
ERROR:

OFFENDING COMMAND: ~

STACK:

ERROR: undefined