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The Contractual Prohibition of Assignment in Austrian Law

Fritz Raber*

I. Introduction	171
II. The Basis of the Assignment in the Civil Codes of Austria and Germany and the Central Issue	172
III. The Historical Development of a Misunderstanding	175
IV. Conclusions for this Special Problem in General	180
V. The Law in Germany	181
VI. The Law in Austria	186
A. The Opinion of the Austrian Supreme Court	190
B. Is the Assignee Liable for Damages?	193
C. Effects Similar to the Pactum	196
VII. Final Remarks	198

I. Introduction

Apart from a didactic aspect of "university policy,"¹ there are also methodological and comparative reasons which justify the choice of this subject. First of all, it illustrates the difficulties with which a continental European jurist is faced when trying to fight a traditional manner of interpreting a provision of his country's code of law; it permits some insight into the methods of finding the law in a civil law system. But in discussing this subject, we also come to realize how wrong it is to adopt statutes originating in a foreign legal system even if they come from the same (civil law) legal tradition. Foreign provisions should not be incorporated into one's own legal system — either by legislation or by the courts — without previous critical examination to determine whether they will fit into one's own legal system. This applies more particularly if they are based on a misunderstanding of the history of the law, as in the case under consideration.

The problem referred to arises out of a provision of the German Civil Code (*Bürgerliches Gesetzbuch* [BGB]) which was enacted in 1896 and became operative in the year 1900. The Code had developed from the German legal scholarship of the 19th century, the so-called "*Pandektenwissenschaft*." It was during the first two decades of the 20th

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1 At the time when an abridged German text was published in 93 JURISTISCHE BLÄTTER [JBL] 441-59 (1971) the reorganization of legal studies in Austria caused heated discussions of whether any advantages may be derived for modern legal training from obligatory lectures and exams on the history of law, including Roman law (and especially Canon law). The subject of this article has its roots in Roman law and may therefore show the usefulness of instruction in the history of law.

century that this code exercised a strong influence on the interpretation of the General Civil Code of Austria (*Allgemeines Bürgerliches Gesetzbuch* [ABGB]) of the year 1811, on the decisions of the courts and on legal scholarship.

II. The Basis of the Assignment in the Civil Codes of Austria and Germany and the Central Issue²

Section 1392 of the Austrian Civil Code provides: "If a claim is transferred from one person to another and is accepted by the transferee (assignee), a novation with the intervention of a new creditor arises. Such a transfer is called an assignment (cession) and it can be made with or without consideration."³

This procedure requires no consent on the part of the obligor (account debtor). Indeed, as long as the assignment is not made known to the obligor he is authorized to pay the first creditor (the assignor) or to settle the matter with him in another way (Section 1395 General Civil Code of Austria).

This form of assignment was unknown to classical Roman law (1st and 2nd centuries A.D.).⁴ The *obligatio* — the relationship under the law of obligations, enforceable by an *actio in personam* — was considered to be strictly personal. It was a legal bond between two persons which implied a duty of one towards the other.⁵

However, the transfer could be managed in another way: the debtor (obligor) could make a novatory promise (*stipulatio*) to pay another, new creditor (the transferee, assignee) the debt he owed to the former credi-

² A synopsis of the assignment of rights in American law is given by Buxbaum & Crawford, *Wirksamkeitsvoraussetzungen für Forderungsabtretungen, insbesondere zu Sicherungszwecken in den Vereinigten Staaten von Amerika* in HADDING & SCHNEIDER, *DIE FORDERUNGSABTRETUNG, INSBESONDERE ZUR KREDITSICHERUNG IN DER BRD UND IN AUSLÄNDISCHEN RECHTSORDNUNGEN* 335-98 (1986). They point out that under American law the act of assignment is part of the law of contracts and a matter of state law. Prerequisites for the creation of an assignment are determined by ordinary contract rules. Consequently the intention of the immediate parties (the intention of the assignor to give and of the assignee to receive present ownership of the claim; see 3 S. WILLISTON, *CONTRACTS* 428 at 162 [Jaeger 3d ed. 1960]) is a most important criterion.

³ THE GENERAL CIVIL CODE OF AUSTRIA 271 (J. Winiwarter & P. Baeck trans. 1972) [hereinafter Baeck].

⁴ Cf. the terse description of this period of legal scholarship given by Hausmaninger, *Diligentia quam in suis*, 18 CORNELL INT'L L.J. 183, n.15 (1985):

Classical Roman law, the law of the first two and one-half centuries A. D., was fundamentally jurists' law. Cases were heard by Roman noblemen who had little or no background in the law. Jurists from the same noble social class advised the judges. The social and professional authority of the learned jurists gave their advisory opinions at least de facto force of law. Judicial decisions were not considered binding precedents and thus were not recorded. The legal writings of the jurists, however, were authoritative works. They recorded leading and dissenting opinions and provided persuasive arguments for future legal disputes. There existed no equivalent of the common law doctrine of *stare decisis*, yet the jurists had great respect for the authority of older opinions and would not deviate from them without good reason.

Id.

⁵ See the following texts from the books of classical Roman jurists in the Digest of Justinian (Eng. trans. in P. SCOTT, *THE CIVIL LAW* [1932 & reprint in 1973] and in *THE DIGEST OF JUSTINIAN* (A. Watson trans. 1985) [hereinafter cited as *DIG.*]) and in *THE INSTITUTES OF JUSTINIAN* (J.A.C. Thomas Eng. trans. 1975) [hereinafter cited as *J. INST.*]: *DIG.* 44.7.3 pr. (Paulus); *J. INST.* 3.13.pr.

tor (assignor). Still another alternative was the so-called *mandatum*⁶ *ad agendum in rem suam*, which is the transfer of the action against the debtor by the appointment of the transferee as the creditor's representative. The transferee received a mandate to sue the debtor and to retain the judgment amount for himself. The details of the merits or demerits of these methods shall not be discussed in this connection.⁷

It was probably not long before the time of the Byzantine (that is, East Roman) emperor Justinian (527-565 A.D.) that the transferee was granted an *actio utilis* against the debtor. Today it is generally believed that the assignment as practiced under Justinian should be regarded as a complete transfer of the claim (right). Since the time of the so-called reception of the Roman Law in Europe — that is, in this connection, the time during which the commentator's legal scholarship ("*Kommentatorenwissenschaft*") was propagated in the late 15th century⁸ — a great number of theories on the nature and the prerequisites of the assignment have appeared. Klaus LUIG⁹ has given a very clear presentation of these theories to which one can refer.

With respect to Austria, section 1392 puts a formal end to the development of the assignment as a complete transfer of the right. About a century later virtually the same thing happened in Germany. Section 398 of the German Civil Code reads: "A claim may be transferred by the creditor to another person by a contract concluded with the latter. Upon conclusion of the contract, the new creditor takes the place of the former one."¹⁰ This general rule is restricted by section 399, which provides that "a claim cannot be transferred unless the performance to a person other than the original creditor may be effected without modification of the substance of the claim or if such assignment has been precluded by an agreement with the debtor." The second part of the phrase represents what is called *pactum de non cedendo* or contractual prohibition of assignment. A rule similar to section 399 is found in article 164 of the Swiss Code of the Law of Obligations (*Schweizerisches Obligationenrecht*) dating from the year 1911.¹¹

Under the law of obligations an agreement entered into by creditor and debtor pursuant to the latter alternative of section 399 of the German Code is also effective as against third parties, even if they know nothing about the agreement. Consequently, if contrary to the agreement, the creditor transfers the claim, the logical result of section 399,

6 Mandate (*mandatum*) is a consensual contract by which a party assumes the obligation to perform a gratuitous service. Cf. B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 187 (1962); F. SCHULZ, CLASSICAL ROMAN LAW 554 (1951 & reprint 1954, 1961, 1969).

7 See NICHOLAS, *supra* note 6, at 201. See *infra* text accompanying note 151.

8 See F. WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT 81 (1967); O. ROBINSON, T. D. FERGUS & W. M. GORDON, AN INTRODUCTION TO EUROPEAN LEGAL HISTORY 100 (1985); GLENDON, GORDON & OSAKWE, COMPARATIVE LEGAL TRADITIONS 46 (1985).

9 ZUR GESCHICHTE DER ZESSIONSLEHRE (1966).

10 For translation, see also THE GERMAN CIVIL CODE (I. Forrester, S. Goren & H. Ilgen trans. 1975) [hereinafter Forrester].

11 GMUER, DAS SCHWEIZERISCHE ZIVILGESETZBUCH 155 (1965) speaks about different and common rules in Germany and Switzerland, shown by a comparison of the different legal systems. Cf. also E. BUCHER, SCHWEIZERISCHES OBLIGATIONENRECHT, ALLGEMEINER TEIL OHNE DELIKTSRECHT 541 (2d ed. 1988).

which provides that "a claim cannot be transferred," would be that the transferee of the claim cannot sue the debtor. This result is at variance with the principle upheld so far that obligations are valid only between the parties concerned and are not effective as against third persons.¹²

Austrian law as well as French law lacks such a rule. But the overwhelming majority of the decisions of the Austrian Supreme Court (*Oberster Gerichtshof*)¹³ and many scholars¹⁴ borrow from their German neighbors in assessing the legal effect of the contractual prohibition of assignment. They consider it correct that the contractual prohibition be effective vis-à-vis third persons, regardless of the transferee's good faith.

This leads us to the central issue of our complex of problems: Is it possible for creditors and debtors to create an inalienable claim by virtue of a *pactum* or to make a claim inalienable by subsequent agreement to a *pactum*? The majority of courts and legal scholars do not hesitate to answer in the affirmative. They argue that there is no good reason for depriving the parties of this possible arrangement, since in all other respects parties may dispose of the claim, maintain or cancel it, either partially or entirely, as long as they remain within the general limits of

12 An exception is to be found in the Italian Civil Code (*Codice Civile*) art. 1260, providing that only the debtor can object to such an agreement vis-à-vis the new creditor, if it is established that the new creditor (assignee) knew about the agreement at the time of the cession.

13 106 JBL 311-15 (1984); *Evidenzblatt*, 36 ÖSTERREICHISCHE JURISTENZEITUNG, no. 111 (1981) (collection of court decisions, published in the law journal ÖSTERREICHISCHE JURISTENZEITUNG and cited hereinafter to the year and volume no. of the ÖJZ as *EuBL*); 37 *EuBL* no. 4 (1982), reprinted in 54 *Entscheidungen des Österreichischen Obersten Gerichtshofes in Zivilsachen* [SZ] no. 110 (official court reporter for the decisions of the Austrian Supreme Court); 106 JBL 675 (1984), reprinted in 30 *ZEITSCHRIFT FÜR VERKEHRSRECHT* [ZVR] 245 (1985); 108 JBL 183 (1986). Unlike its American namesake, the Austrian Supreme Court does not deal with constitutional issues. It is the court of last resort for criminal and civil cases (including commercial law matters) and sits in panels of five judges.

14 2 EHRENZWEIG, *SYSTEM DES ÖSTERREICHISCHEN ALLGEMEINEN PRIVATRECHTS* pt. 1: *DAS RECHT DER SCHULDVERHÄLTNISSE* 255 (2d ed. 1928) (especially note 3a); 2 MAYRHOFER, *SYSTEM DES ÖSTERREICHISCHEN ALLGEMEINEN PRIVATRECHTS* pt. 1: *DAS RECHT DER SCHULDVERHÄLTNISSE* I. ABTEILUNG: ALLGEMEINER TEIL 478 n.24 (1986) [hereinafter *MAYERHOFER, SCHULDRECHT I*]; *Id.*, *Abtretung von Bestandrechten und Abtretungsverbot*, 28 ÖJZ 146-52, 169-73 (1973); Gschnitzer, *LEHRBUCH DES ÖSTERREICHISCHEN BÜRGERLICHEN RECHTS, SCHULDRECHT: ALLGEMEINER TEIL* 100 (1965) Gschnitzer, FAISTENBERGER, BARTA & ECCHER, *ÖSTERREICHISCHES SCHULDRECHT: ALLGEMEINER TEIL* 183 (2d ed. 1986); 2 HASENÖHRL, *DAS ÖSTERREICHISCHE OBLIGATIONENRECHT* pt. 1, at 183 (2d ed. 1899); 2 STUBENRAUCH, *COMMENTAR ZUM ÖSTERREICHISCHEN ALLGEMEINEN BÜRGERLICHEN GESETZBUCH* 805 (8th ed. 1903); 3 KRASNOPOLSKI, *LEHRBUCH DES ÖSTERREICHISCHEN PRIVATRECHTS: OBLIGATIONENRECHT* 268 (1910); Pfersche, *Zur Revision des Allgemeinen Bürgerlichen Gesetzbuches*, 44 *JURISTISCHE VIERTELJAHRESSCHRIFT* 176-79 (1912); Frotz, *AKTUELLE PROBLEME DES KREDIT-SICHERUNGSRECHTES* 277 (1970). Gellner's opinion is self contradictory, see *Das vertragsmäßige Zessionsverbot, seine Wirkungen und wirtschaftlichen Funktionen*, 31 ÖSTERREICHISCHES ZENTRALBLATT FÜR DIE JURISTISCHE PRAXIS [ZBL] 1-13 (1913).

the law.¹⁵ This argument, when examined more closely, turns out to be a "*petitio principii*."¹⁶

III. The Historical Development of a Misunderstanding

For the moment this answer marks the end of a long development resulting from a misunderstanding which dates from antiquity. Though this misunderstanding has long been recognized as such, its consequences have unfortunately not been given sufficient attention. The complex of problems I am hinting at may be characterized by the short phrase: "the claim as an asset."

Better understanding of the development of this problem requires details. The differentiation between *obligatio* (obligation) on the one hand and *dominium* (real right, *ius in re*) on the other hand is generally considered one of the greatest achievements of Roman law. A much-quoted proof of this differentiation is to be found in the Digest of Justinian in which Paulus of the late Classical period says that the nature of an obligation consists in obliging (*obstringere*) another person to give us (*dare*) something to do (*facere*) or something to be responsible for (*praestare*).¹⁷

An achievement less known to non-experts in Roman law but nonetheless remarkable is the fact that, as early as the period of the classical

15 As compensation for the disadvantages which arise from the validation of the *pactum de non cedendo*, Frotz is pleading for an analogy to § 916 (2) of the General Civil Code of Austria in *Rechtsgesellschaftliche Abtretungsverbote* (1983) (unpublished paper read to the Grazer Juristic Association); see also 106 JBL 314 (1984) (reference in the Austrian Supreme Court's decision). Section 916, para. 2 reads: "A defense alleging a fictitious declaration cannot be urged against a third person who has acquired rights in reliance upon such declaration." According to its tenor § 916, para. 2 refers only to fictitious transactions, but Frotz believes that this rule may be generalized with reference to the protection of private legal relationships. In analogy to § 916, para. 2 the assignee in good faith should receive present ownership of a prohibition of assignment if the obligor causes (by negligence) the ostensible existence of an assignable claim. This legal situation would already exist if the obligor is silent. Since section 1393 of the General Civil Code of Austria states that "All alienable rights may be assigned" the obligor would have to call the assignee's attention to an existing *pactum de non cedendo* stipulated between the debtor and the creditor (would-be assignor). The court correctly criticized these considerations. 106 JBL 314 (1984). Contrary to Frotz's opinion the transferee in modern life has to reckon with the existence of a *pactum de non cedendo*, because such agreements are very common. Good faith as to the non-existence of such clauses will hardly exist. Moreover, an analogy to § 916(2) is doubtful: the basic idea of this rule is the protection of third persons where the two immediate parties know that their declarations do not correspond with the real legal situation. But this is not the case with a *pactum de non cedendo* — and over and above this, the obligor has no obligation to inform anyone. Finally the silence of the debtor does not constitute a declaration to the transferee that no *pactum* exists. Cf. Wilhelm, *Das Abtretungsverbot in der Entscheidung des verstärkten Senats*, 106 JBL 307 (1984); Iro, *OGH: Absolute Wirkung des vertraglichen Abtretungsverbot*, 2 ÖSTERREICHISCHES RECHT DER WIRTSCHAFT [RDW] 103 (1984). The Supreme Court's decision of June 12, 1986, 109 JBL 183-85 (1987) is completely wrong. In this case the debtor payed the assignee without referring to the *pactum* and without making reservations regarding future clarification. The debtor's conduct was seen as an implied waiver of his objection to the *pactum* not only with respect to debts owed but also with respect to those still accruing. In this way the external binding effect of the *pactum* is circumvented by using the legal construction of an implied declaration. See *infra* text accompanying note 77.

16 You will find more on the *petitio principii* in KLUG, *JURISTISCHE LOGIK* 153 (3d ed. 1966); SCHNEIDER, *LOGIK FÜR JURISTEN* 255-56 (1972); WEINBERGER, *LOGIK, SEMANTIK, HERMENEUTIK* 166-67 (1979).

17 DIG. 44.7.3 pr. (Paulus): *Obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitatem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum.*

Roman law,¹⁸ the law of obligations and the law of things were combined under the common aspect of the law of property. With some skill, this combination may also be detected in the aforementioned text of the Digest of Justinian.¹⁹ It is the function of the legal system to see that the debtor meets his obligations. Consequently, the creditor may trust that the obligation towards him will actually be fulfilled, not only because he trusts his debtor but also because he trusts the power of the state, which urges the debtor to meet his obligation. This "possibility of trust," so it is argued, constitutes an economic value for the creditor.²⁰

Some may consider this interpretation of the Pauline fragment too subtle and be unwilling to accept it to such a wide extent. But the Institutes of Gaius²¹ offer additional convincing evidence of the combination of the law of obligations and the law of things.

Although the question of whether Gaius' concept of *res*, or thing, and its subdivision have a doctrinal function is controversial,²² I should like to point out that the division of things into *res corporales* and *res incorporales* for the purpose of defining what belongs to a person is definitely sensible and fruitful. It is even of practical value and does not merely satisfy a desire for order.

Admittedly, though, Gaius' concept of *res* has given rise to some absurdities, owing to a combination of heterogeneous things. But this cannot delude us as to the fact that *res incorporales quae iniure consistunt* (incorporeal things, consisting merely in law²³)²⁴ such as *hereditas* (inheritance which was part of the law of property because Gaius regarded *hereditas* as an "en bloc" acquisition of corporeal and incorporeal things, that is, as a succession), *usufructus* (usufruct) or obligations however contracted could also be objects of commerce (*res in commercio*) under classical Roman law. They could be encumbered with a lien and *hereditas* could

18 Cf. H. Hübner, *Eigentumsгарantie und Eigentumsbindung im Grundgesetz und der zivilrechtliche Eigentumsbegriff*, 1960 ANNALES UNIVERSITATIS SARAVIENSIS 92 (Serie Rechts - und Wirtschaftswissenschaften No. 8, 1960) (describing the situation in the early Roman period).

19 DIG. 44.7.3 pr.

20 Cf. SEIDL, RÖMISCHES PRIVATRECHT margin number 263 (1963); Bydliniski in KLANG, 4 KOMMENTAR ZUM ALLGEMEINEN BÜRGERLICHEN GESETZBUCH pt. 2, 116-17 (2d ed. 1978) [hereinafter KLANG] which discusses the so-called "*Erwerbsschance*" (the chance for the creditor to get what is owed to him) as part of every obligation which already belongs to the creditor the moment that the obligation is created and which must also be taken into consideration by outside persons.

21 Gaius, whose full name and origin remain obscure, was a Roman law teacher without the right to deliver legal opinions on imperial acts of authority (*ius respondendi*). Among his works published between 150-180 A. D. the *Institutiones*, THE INSTITUTES OF GAIUS (F. De Zulueta Eng. trans. 1946, reprint 1951) [hereinafter G. INST.], which was a systematic textbook of Roman law for beginners, strongly influenced European legal instruction and civil law codifications. On this Roman jurist see A. HONORE, GAIUS (1962).

22 Cf. Flume, *Die Bewertung der Institutionen des Gaius*, 79 ZEITSCHRIFT DER SAVIGNYSTIFTUNG, ROMANISTISCHE ABTEILUNG [ZSS ROM.] 20-22 (1962); Mayer-Maly, *Der Ersitzungsbesitz am Sachbestandteil*, 26 STUDIA ET DOCUMENTA HISTORIAE ET IURIS 176, n.3 (1960) (points out the abilities of Gaius as a theoretician). For a general view of the discussion see Wieacker, Book Review, 85 ZSS ROM. 496-501 (1968) (reviewing GAIUS NEL SUO TEMPO, ATTI DEL SIMPOSIO ROMANISTICO, BIBLIOTECA DI LABEO III [1966]). CASAVOLA, GIURISTI ADRIANEI 145-58 (1980).

23 G. INST. 2.14.

24 Cf. Kagon, 20 TULANE L.R. 98, 378 (1945-46); GROSSO, 1 *Studi in ONORE DI E. BESTA* 33, 45 (1939).

be acquired by prescription; a claim could even be sold as is shown by an example in the Digest of Justinian (*nomen distrahere*, selling of a claim).²⁵

But just a short time afterwards under Justinian, this underlying concept of the system of Gaius' Institutes (*de personis, de rebus, de actionibus*; on the law of persons, of assets, of actions) was no longer understood correctly. The authors of the Institutes of Justinian, in particular the Byzantine professor Theophilus (died around 534 A.D.), the presumed author of the Paraphrase of Justinian's Institutes, interpreted the *res* of the classical jurists in a different way.²⁶ Theophilus' view, *res* came merely to denote "corporeal thing." The subjective legal relationship, the *obligatio*, appeared to be its opposite. Let us take *hereditas* as an example. Gaius, regarding it as an acquisition of the inheritance, still included it in the law of property assets.²⁷ With Theophilus, it changed into the considerably restricted concept of the successor's subjective right.²⁸ Thus, it is with Theophilus that the comprehensive concept of *res* began to crumble.

This conception of *res*, which dates from the time of the Paraphrase of Justinian's Institutes, threads its way through German legal history up to the time of the German *Pandektenwissenschaft* of the 19th century and had a decisive influence on the German Civil Code. Though the Glossators²⁹ were not directly acquainted with the Paraphrase itself, in their view,³⁰ as in Theophilus' view, *obligatio* had become the *mater actionis* (mother of the claim); that is, the subjective right which could give rise to legal action, as is shown by the Accursian Glossa Ordinaria (Standard Gloss).³¹ Despite the difficulties confronting the Glossators because of the Institutes of Justinian,³² where *obligatio* was unambiguously described as *res incorporalis*, *res* was given the new interpretation of *ius in re* (right in a thing).

In the following period, the *obligatio*, formerly regarded as *res*, was either considered to be *mater actionum* and, hence included in the *actiones*, or it was considered to be a separate domain.

25 DIG. 18.4.4 (Ulpian): *Si nomen sit distractum, Celsus libro nono digestorum scribit locupletem esse debitorem non debere praestare, debitorem autem esse praestare, nisi aliud convenit.* (When a debt is sold, Celsus says in the ninth book of his Digest that subject to contrary agreement, the vendor is not answerable for the debtor's solvency but only for the fact that he is the debtor. A. Watson, *supra* note 5).

26 Cf. AFFOLTER, DAS INSTITUTIONENSYSYSTEM, SEIN WESEN UND SEINE GESCHICHTE 69-78, 92-95 (1897).

27 G. INST. 2.97-3.87.

28 J. INST. Paraphrase 2.2., section 1.

29 The Glossators were a school of jurists in Bologna, Italy, that revived the study of Roman law towards the end of the 11th and 12th centuries. From there Roman law was spread all over the world. For a characterization of the Bolognese school of law see P. VINOGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE 56 (1929, reprint 1961).

30 This was their view despite the difficulties of interpreting Justinian's Institutes where "*obligatio*" is clearly defined as "*res incorporalis*." J. INST. 2.2.2.

31 *Introductio tituli* (introduction of the title) "*de obligationibus*." J. INST. 3.13. The standard Gloss of the glossator Accursius (died c. 1263) is a huge compilation of glosses to the whole *Corpus iuris civilis*, the Code of Justinian. The rule that doctrines not recognized by "the Gloss" are not to be taken into consideration by the judges (*quidquid non agnoscit glossa non agnoscit curia*; what the Gloss does not acknowledge the court does not acknowledge either) demonstrates the importance of the Accursian Gloss.

32 J. INST. 2.2.2.

It is to Johannes Apel (1485-1536), a pupil of the late Commentators,³³ but also a spokesman for Humanism in Wittenberg, Germany, that we owe the final transformation of the antithetical pair "*res — obligatio (actio)*" into "*dominium — obligatio.*" In his opinion, *res*, as mentioned in Gaius' Institutes was an inaccurate name for *dominium*; and the latter could not be related to an *actio* as a contract but only to an *obligatio*. Thus, he believed the system of the Institutes should be corrected accordingly. The relegation of Gaius' commentary book "*De rebus*" to the law of property in the restricted sense of the word, that is, the law of corporeal things, was complete. The originally comprehensive law of property (law of assets) had been reduced to the law of corporeal objects.³⁴

Savigny (1779-1861), the famous exponent of the German Historical School (*Historische Rechtsschule*)³⁵ finally found the classical form of Apel's differentiation. It dominates the entire German Civil Code³⁶ and large parts of continental legal literature. Savigny defined the nature of a legal relationship as "a domain of independent rule of the individual will." With regard to ruling over another person's will, he said:

If the rule were absolute, concepts of liberty and the personality of the other individual would be rendered void; we would no longer rule a person but rather a thing, our right would be the title to a human being, as was in fact the Roman relationship between master and slave. To avoid this, we should conceptualize a special legal relationship which consists in the rule over another person without the destruction of his liberty so as to resemble property and, in contrast to [a property relationship], this rule does not relate to the other person in his entirety but only to a single action of the latter; this action will then be considered to be excluded from the acting person's freedom and to be subjected to our will. This relationship of rule over some actions of the other person is called obligation.³⁷

This theoretical argument completes the separation of the law of corporeal things from the law of obligations. Savigny chose a voluntary conception of the contract,³⁸ meaning the conception of a claim which is definitely confined to the intersubjective relationship between creditor

33 The Commentators' period followed the Glossators' and was characterized by the subject-matter of the jurists work. While the Glossator's subject was mainly Roman law as manifested by Justinian's *Corpus iuris civilis*, the Commentators worked on all law of their time, especially on the statutes of the upper Italian communities and the feudal law of the Langobards. See O. ROBINSON, T. FERGUS & W. GORDON, *supra* note 8, at 100.

34 Cf. I STINTZING-LANDSBERG, *GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT* 290-96 (1880).

35 For a short characterization of this school, see VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 61 (2d ed. 1977).

36 Cf. WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT* 520-21 (2d ed. 1967), with further references.

37 I SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 334, 338 (1840); WIEACKER, *ZUM SYSTEM DES DEUTSCHEN VERMÖGENSRECHTES* 29, 32 (1941).

38 For other reasons for a valid contract, see Mayer-Maly, *Studien zum Vertrag II: Von solchen Handlungen, die den Kontrakten in ihrer Wirkung gleichkommen*, *FESTSCHRIFT WILBURG* 135-36 (1965); BYDLINSKI, *PRIVATAUTONOMIE UND OBJEKTIVE GRUNDLAGEN DES VERPFLICHTENDEN RECHTSGESCHÄFTES* 62-70 (1967); KREVIET, *DAS VERTRAGSRECHT IN DER MITTELDEUTSCHEN INDUSTRIE* (1965); *DIE VERTRAGSBEZIEHUNGEN DER LANDWIRTSCHAFTLICHEN PRODUKTIONSGENOSSENSCHAFTEN* (Greiner ed. 1967); Hönn, *Verständnis und Interpretation des Vertragsrechtes im Lichte eines beweglichen Systems*, *DAS BEWEGLICHE*

and debtor. These conceptions dominate the Motives (Motive) of the German Civil Code as well as the Code itself. The idea was that a claim has an external aspect, that is, its function as a person's asset.³⁹ This aspect exists apart from the internal aspect of the claim as conceived of in the classical Roman tradition; that is, the intersubjective relationship between creditor and debtor resulting in the creditor's being entitled to demand a certain person's actions or omissions. This idea was often forgotten in subsequent legislation and was already harshly criticized when the German Civil Code was drafted.⁴⁰ But this criticism remained unheeded, and the concept of *res* was not changed (the legal definition of *res* as a corporeal thing as found in section 90 of the German Civil Code was maintained),⁴¹ nor was the substance of the obligation contained in section 241 based on Savigny's voluntaristic conception ("An obligation entitles the creditor to claim performance from the debtor. The performance may consist in a forbearance."⁴²). It must, however, be mentioned that this "substance of the obligation" was not stated consistently throughout the Code. For example, the recognition of the transfer of a right to a claim constitutes a violation of the doctrine which states that the nature of an obligation corresponds exclusively to a personal relationship between creditor and debtor.⁴³

The decisive influence of the intellectual atmosphere in which a code comes into being may be illustrated by a comparison with the Austrian Civil Code. The Austrian Code was greatly influenced by the era of enlightened natural law and its proponents. Hugo Grotius (1583-1645),⁴⁴ succeeded by Samuel Pufendorf (1632-94),⁴⁵ and finally Christian Wolff (1679-1754),⁴⁶ developed (without knowledge of the system of the Gaius Institutes)⁴⁷ a special system of private law based on the consideration of human nature.⁴⁸ In this system, or more particularly in the doctrine of property acquisition, the law of corporeal things and the law of obligations, both governing the exchange of property, are united by the aspect of the law of property (of assets). Christian Wolff's teachings made an

SYSTEM IM GELTENDEN UND KÜNFTIGEN RECHT 87-102 (Bydlinski, Krejci, Schilcher & Steininger ed., Forschungen aus Staat und Recht No. 73, 1986).

39 Cf. I SOKOLOWSKI, DIE PHILOSOPHIE IM PRIVATRECHT 400-04 (1907, reprint 1959); Dnistran-skyi, *Dingliche und persönliche Rechte*, 78 JHERINGS JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS [JHERINGS JB]. 105-07 (1927-28).

40 VON GIERKE, DER ENTWURF EINES BÜRGERLICHEN GESETZBUCHES UND DAS DEUTSCHE RECHT 43-47 (1889); MENGER, DAS BÜRGERLICHE RECHT UND DIE BESITZLOSEN VOLKSKLASSEN 37 (3d ed. 1904); Kunttschke, *Zur Kritik Otto von Gierkes am Bürgerlichen Gesetzbuch in SZMADIA & KOVACS, DIE ENTWICKLUNG DES ZIVILRECHTS IN MITTELEUROPA 1848-1944*, at 153-57, 163 (1970).

41 Section 90 reads: Only corporeal objects are things in the legal sense. (I. Forrester, *supra* note 10, at 14).

42 VON MEHREN & GORDLEY, *supra* note 35, at 1190.

43 Cf. VON GIERKE, *supra* note 40, at 203.

44 GROTIUS, DE IURE BELLII AC PACIS LIBRI TRES II 2 § 1ff. (1625); cf. WIEACKER, *supra* note 36, at 291.

45 PUFENDORF, DE IURE NATURAE ET GENTIUM LIBRI VIII (1672); cf. WIEACKER, *supra* note 36, at 307, 310.

46 WIEACKER, *supra* note 36, at 332-33; WUNNER, CHRISTIAN WOLFF UND DIE EPOCHE DES NATURRECHTS 15, 29-31 (1968).

47 Niebuhr discovered the Institutes of Gaius in 1816 on a palimpsest in Verona, Italy.

48 Cf. BEYERLE, DER ANDERE ZUGANG ZUM NATURRECHT, DEUTSCHE RECHTSWISSENSCHAFT 3 (1939) (concerning the older system of natural law); WIEACKER, *supra* note 37, at 10.

imprint on the Prussian Code ("*Allgemeines Landrecht*") of 1794.⁴⁹ They influenced his pupils as well as Freiherr von Martini and Franz Edler von Zeiller, two fathers of the Austrian Civil Code and teachers of natural law, and finally the General Civil Code of Austria.⁵⁰ The system of this code largely relies upon the Institutes of Gaius. A short introduction entitled "The Civil Laws in General" is followed by the first part entitled "On the Law of Persons," and then a second part, "On the Law of Property." Due to the comprehensiveness of the *res* (thing) as conceived of in the General Civil Code of Austria, the second part also includes incorporeal things (section 285): "All that differs from a person and serves the use of men shall be called thing in the legal sense." Therefore, this second part includes a discussion of the law of corporeal things, followed by the provisions of the law of succession and, under the heading "Reflections on Personal Rights in Property," the law of obligations. A third and final part is entitled "Reflections on Rules Common to the Law of Persons and the Law of Property."⁵¹

Thus, the development originating in Roman Law and continuing in the system of the German Civil Code is a continuous one, but, as illustrated by the Austrian Civil Code, by no means a necessary one.

IV. Conclusions for this Special Problem in General

What conclusions may be drawn from these general considerations with regard to the special problems of the *pactum de non cedendo*?

Let us first of all answer the question raised earlier in this Article: Are the parties concerned allowed to define arbitrarily the substance of any claim? And, as a consequence, are they allowed to establish a claim as unassignable from the outset?⁵²

From the viewpoint of Theophilus' concept of claims as altered during the era of the German *Pandektenwissenschaft*⁵³ under Savigny's influence, the answer could be: yes. However, we have seen that this concept of the claim is one-sided because it relates exclusively to the intersubjective relationship between creditor and debtor and neglects the property aspect of the claim. Since there is a chance for the creditor to get what is owed to him, the claim does after all form part of his property and may under certain circumstances be "commercialized" like a corporeal thing

49 HATTENHAUER, ALLGEMEINES LANDRECHT FÜR DIE PREUSSISCHEN STAATEN VON 1794: EINFÜHRUNG 17 (1970).

50 Ebert, *Gesetzgebung und Rechtswissenschaft. Ein Beitrag zur Zeit des späten Naturrechts in Österreich*, 85 ZEITSCHRIFT DER SAVIGNY STIFTUNG, GERMANISTISCHE ABTEILUNG 108, n.18, 111-13 (1968); Mock, *Rechtsphilosophie und Rechtsphilosophen an der Wiener Juristischen Fakultät*, 20 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 373-99 (1970).

51 In Austria, civil procedure (*de actionibus*), the third part of Gaius' Institutes, is set forth in separate codes and does not form part of the substantive law.

52 This question does not arise with strictly personal rights. For example if A agreed to paint B's portrait for a fee, B's right could not be assigned to C at all.

53 Cf. (concerning the system of the "Pandekten") Schwarz, *Zur Entstehung des modernen Pandekten-systems*, 42 ZSS ROM. 578-610 (1921). For the doctrinal argument on which the system is based see CANARIS, SYSTEMDENKEN UND SYSTEMBEGRIFF IN DER JURISPRUDENZ ENTWICKELT AM BEISPIEL DES DEUTSCHEN PRIVATRECHTS (2d ed. 1983), Wieacker, Book Review, 1 RECHTSTHEORIE—ZEITSCHRIFT FÜR LOGIK, METHODENLEHRE, KYBERNETIK UND SOZIOLOGIE DES RECHTS (1970, reviewing CANARIS, 1st ed.) and F. BYDLINSKI, JURISTISCHE METHODENLEHRE UND RECHTSBEGRIFF 442 (1982).

and became a *res in commercio*. The *pactum* does not change the substance of the claim, as is often argued, but rather, the substance of the actual obligatory relationship. If we wanted to maintain the thesis that the substance of a claim may be modified by an agreement between the parties concerned, we would commit the methodical error of a *petitio principii*, of a *circulus in probando*, which is contrary to the laws of logic.⁵⁴ The only way to answer the question of the transferability of a claim is to examine the substance of the claim. However, in arguing that the *pactum* has made the claim untransferable in substance, I cannot anticipate what remains to be proved. This is exactly what we are trying to find out by examining the substance of the claim.

The legal value of the *pactum de non cedendo* follows from the Janus-faced character of a claim. Only if we admit that the claim may be an asset can it be the object of legal and commercial transactions and not require the approval of the primary obligor (the debtor). It may be a *res in commercio*; only then is the modern assignment conceivable.⁵⁵ From a legal point of view, the *pactum* cannot be regarded as being anything other than a *pactum de non alienando*, a contractual restraint on alienation relating to a corporeal thing.⁵⁶ It is a bilateral contract pursuant to which the creditor of a claim promises the debtor not to dispose of the claim by way of assignment. Upon acceptance of this promise, the contract becomes perfected.⁵⁷

V. The Law in Germany

What has been said about the legal nature of the contractual prohibition of assignment holds true both for Germany and Austria. But the two systems differ as to the legal consequences resulting from a breach of this contract. More precisely, they differ as to whether the assignee may legitimately acquire a claim against the debtor (obligor) in spite of a *pactum* if the claim is ceded by the creditor. Section 399, second alternative, of the German Civil Code furnishes the basis for the obligation between credi-

⁵⁴ See *supra* note 16.

⁵⁵ TOLKMITT, DIE THEORIE DER NOVATION IM GEMEINEN RECHT DES 19. JAHRHUNDERTS, (1968) (Thesis) (reviewed by Wieacker in 9 JURISTEN JAHRBUCH 19 (1968-69)), proved that even in the time of the "Pandektenwissenschaft" the construction of a novatory promise of the debtor to pay a new creditor was used to a great extent. The concept of the character of the claim in the German Civil Code is also demonstrated by the integration of the assignment into the law of obligations instead of it being classified as a disposal of the claim by virtue of the claim's function as an asset. This mistake is caused by the concept of the novatory promise (that is the idea of changing only the contractual relationship between creditor and debtor) without logically requiring the debtor's participation in the act of transfer.

⁵⁶ The analogous structure of the *pactum de non cedendo* and the *pactum de non alienando* was already recognized by Seuffert, *Wirkung vertragsmässiger Cessionsverbote*, 51 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [ACP] 106-07, 109 (1868). Cf. Judgment of Nov. 29, 1834, Oberlandesgericht Lübeck, (Lübeck Appeal Court), W. Ger., 5 SEUFFERTS ARCHIV 16 (1852); 36 SEUFFERTS ARCHIV 412 (1881); 27 Sammlung der zivilgerichtlichen Entscheidungen des Reichsgerichts (Decisions of the Supreme Court of the German Reich in Civil Matters) 341, pursuant to CODE CIVIL [C. CIV.], art. 537, 544, 1689-90 (Fr.) (concerning French law). But this opinion was not accepted. Cf. Stegemann, *Das pactum de non cedendo*, 67 ACP 318 (1884); Eck, *Gemeines (römisches) Recht, Besprechung reichsgerichtlicher Entscheidungen*, 35 JHERINGS JB 304 (1896); 39 SEUFFERTS ARCHIV 146 (1884).

⁵⁷ This view of the contractual prohibition of assignment recommends itself when the *pactum* is not contracted for at the same time the original obligation is created but, rather, afterwards; see *supra* note 15, at 103 (critical commentary to the decision of the Austrian Supreme Court by Iro).

tor and debtor, effective as against third parties.⁵⁸ The transferee of the claim cannot sue the debtor. Considering the basic concept of the character of an obligation (although the concept of "a legal bond between two persons only" is doubtful and has been completely undermined⁵⁹), these consequences seem to be anomalous. This anomaly is all the more amazing since the result of section 399, second alternative, of the German Civil Code conflicts with section 137, first sentence, of the Code.⁶⁰ This rule specifies that the power (right) to dispose freely of an alienable claim must not be excluded or limited by legal transaction. Thus I agree with some scholars in Germany who view section 399, second alternative, as a *lex specialis* to section 137, first sentence (*lex generalis*).⁶¹ The collision between those rules is easily remedied by the principle "*lex specialis derogat legi generali*."⁶²

A second group of scholars⁶³ does not consider section 137, first sentence, and section 399, second alternative, as being in opposition to one another. In their view, section 137, first sentence, cannot preclude the power of disposition; but section 399, second alternative, should give creditors and debtors the possibility of creating an inalienable claim. Therefore, they argue that section 137, first sentence, should have nothing to do with the problematic nature of a *pactum de non cedendo* since this rule speaks of an alienable right (claim). But, according to section 399, second alternative, no alienable right exists at all. I have already dealt

58 Section 399 of the German Civil Code reads: "A claim is not assignable if the performance cannot be effected in favor of any person other than the original creditor without alteration of its substance, or if assignment is excluded by agreement with the debtor." Forrester, *supra* note 10.

59 Cf. KOZIOL, DIE BEEINTRÄCHTIGUNG FREMDER FORDERUNGSRECHTE (1967); REHBEIN, DIE VERLETZUNG VON FORDERUNGSRECHTEN DURCH DRITTE (1968) (Thesis); LÖWISCH, DER DELIKTSSCHUTZ RELATIVER RECHTE (1970); 2 KOZIOL, ÖSTERREICHISCHES HAFTPFLICHTRECHT 85-90 (2d ed. 1984); MAYRHOFER, SCHULDRECHT I, *supra* note 14, at 4-8; Grillberger, *Zur Einziehung fremder Forderungen im eigenen Namen*, 33 ÖJZ 142 (1978); Bydliński in KLANG, *supra* note 20, at 116; *Missbräuchliche Verfügungen über Bankkonten und Verwendungsansprüche des Kontoberechtigten*, 16 QUARTALSHEFTE DER GIROZENTRALE [QUARTHGZ] 5-6 (1981). Bydliński, *Die Anfechtungs- und Aufrechnungsrechte des Zessionschuldners*, 36 ÖJZ 456 (1981).

60 BAUR, LEHRBUCH DES SACHENRECHTS 32, 87 (14th ed. 1987). Section 137 of the German Civil Code, first sentence, reads: "The power to dispose of an alienable right may not be excluded or limited by legal transaction." Forrester, *supra* note 10.

61 I will not discuss different considerations among this group of scholars concerning whether section 137, first sentence, governs the transferability of a claim (Schmidt, SOERGEL-SIEBERT, BÜRGERLICHES GESETZBUCH § 399, margin number 4 [11th ed. 1978-83]); 1 PLANCK, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 137, note b (1978-83); Westermann, 1 ERMANN, HANDKOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 137 margin number 3 (7th ed. 1981) or states a rule concerning the power of disposition over a claim (I think the latter approach is correct). See also LEONHARD, ALLGEMEINES SCHULDRECHT DES BÜRGERLICHEN GESETZBUCHES 659 (1929); 1 ESSER-SCHMIDT, SCHULDRECHT I: ALLGEMEINER TEIL 604-05 (6th ed. 1984); MEDICUS, ALLGEMEINER TEIL DES BGB 242 (3d ed. 1986); Däubler, *Rechtsgeschäftlicher Ausschluss der Veräußerlichkeit von Rechten?*, 21 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1120 (1968). However, I doubt that an interpretation of the party's intention should answer this question. See RAIBLE, VERTRAGLICHE BESCHRÄNKUNG DER ÜBERTRAGUNG VON RECHTEN 72 (1969).

62 E. BETTI, ALLGEMEINE AUSLEGUNGSLEHRE ALS METHODIK DER GEISTESWISSENSCHAFTEN 638 (1967) (examines the problematic nature of this principle).

63 Hefermehl, SOERGEL-SIEBERT, *supra* note 61, at 137, margin number 2b; Werner in STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 399, margin number 2 (12th ed. 1980-1984); BLAUM, DAS ABTRETUNGSVERBOT NACH PARAGRAPH 399 2. ALTERNATIVE BGB UND SEINE AUSWIRKUNGEN AUF DEN RECHTSVERKEHR 1-40 (1983) [hereinafter BLAUM, ABTRETUNGSVERBOT].

with the theory that the parties can create an inalienable claim by contract or may transform it afterwards into an inalienable one.

In view of the validity of the *pactum de non cedendo* even for third parties the German Civil Code (Section 399, second alternative) pays insufficient attention to the commercial function of a claim.⁶⁴ The fact that legal scholars have frequently attempted to validate an impermissible and therefore invalid assignment on condition that the debtor whose claim has been transferred give his *ratihabitio* demonstrates this defect in the Code. More subtle doctrinal constructions which would accomplish this same end are also to be found.⁶⁵ This must be a result of the consideration that there is no reason why the assignee should not be able to sue the primary obligor, if the latter consents to it. But this result calls for acceptable theoretical underpinnings to achieve the desired end, since the *pactum* was only devised to protect the debtor's interests.

The following sentences may well be founded on these or similar ideas: "The debtor's subsequent consent to the assignment makes an effective assignment out of an ineffective one"⁶⁶ or "the one-sided consent of the debtor cures the defect of an invalid assignment."⁶⁷ The authors weigh the consequences of these theories more or less seriously according to their respect for the written law. But the rules of the German Civil Code which are used to obtain the desired result cannot in reality furnish reasons for this result.

Two attempts to resolve this dilemma are to be found in German legal literature: Some scholars try to solve the problem with the help of section 135 of the Civil Code,⁶⁸ others use sections 185, paragraph 2, and 184, paragraph 1, of the Code.⁶⁹

Let us examine the first group of opinions. In applying the rule of section 135 to a *pactum de non cedendo*, one has to consider that legal re-

64 Yet the first draft of the German Civil Code in 1888 expressly specified that the *pactum* is only effective as between the two immediate parties. See 2 MOTIVE ZUM BÜRGERLICHEN GESETZBUCH, RECHT DER SCHULDVERHÄLTNISSE, 121-23 (1888). In the second reading this part of the section was deleted. Draftsmen argued that there were neither good reasons nor commercial interests which justified precluding the type of *pactum* which is valid vis-a-vis third parties. 1 PROTOKOLLE ZU DEM ENTWURFE DES BÜRGERLICHEN GESETZBUCHES 384 (1897-99), reprinted in 2 MUGDAN, DIE GESAMMTEN MATERIALIEN ZUM BGB 573 (1899). Thus established facts were misjudged.

65 On the problem of "useful constructions," tricks, and hidden ways for applying the law, see Scheuerle, *Finale Subsumtionen*, 167 ACP 305 (1967).

66 I LARENZ, LEHRBUCH DES SCHULDRECHTS 582 (14th ed. 1987). See *supra* note 15 and *infra* note 77 for more on problems connected with implied consent.

67 ESSER-SCHMIDT, *supra* note 61, at 605. BLAUM, *supra* note 62, at 138, 145 demands a contract, because consent is not only required when the parties contract for a *pactum*, but also when they want to cancel it. He also agrees with the aforementioned idea of the unilateral *ratihabitio*, which he calls an improper doctrinal construction.

68 Section 135, para. 1 of the German Civil Code reads: "If the disposition of an object violates a statutory prohibition against alienation which aims only at the protection of particular persons, the disposition is without effect only as it regards to (sic) these persons. A contractual disposition is equivalent to a disposition which is effected by means of compulsory execution or attachment." Forrester, *supra* note 10.

69 Section 185, para. 2: "The disposition is valid if the person entitled ratifies it, or if the disposer acquires the object, or if the person entitled has succeeded to his estate and is liable without limitation for the obligations of the estate. In the last two cases, if several incompatible dispositions have been made affecting the object, only the first disposition is effective." Section 184 para. 1: "Subsequent assent (ratification) operates from the moment when the legal transaction was entered into, unless otherwise provided." Forrester, *supra* note 10.

straints on alienation are exceptional provisions;⁷⁰ they prohibit sales transactions which are normally allowed under general legal principles. Thus, one must agree with Nipperdey⁷¹ in saying that a prohibition of alienation cannot be characterized as a legal one if general rules already declare the alienation null and void. Neither the fact that the alienator is incompetent nor that in the case of a *pactum de non cedendo* one right is connected with another one which limits the former one means that a restraint on alienation is a legal one.⁷² In addition to these considerations which argue against applying section 135 of the Code to our specific problem, I do not see why a contractual *pactum de non cedendo* should be a question of a legal prohibition of alienation. Clearly, we must distinguish between legal, judicial and official restraints on alienation on the one hand, and contractual restraints on the other hand.⁷³

But even the second attempt at solving this problem cannot satisfactorily explain how the debtor's unilateral consent should retroactively change an ineffective assignment into an effective one. First of all, there are methodological objections to the application of section 185 paragraph 2 and section 184 paragraph 1. Located at the beginning of the sixth title of the German Civil Code concerning approval and ratification, section 182 specifies in its first part: "If the validity of a contract or of a unilateral transaction . . . depends upon the consent of a third party. . . ." Now, the effectiveness of an assignment is independent of the debtor's consent. If there is no *pactum de non cedendo*, the assignment is valid without his consent. On the other hand, if there is a prohibition on assignment the clear wording of section 399 (. . . "is not assignable . . .") is an obstacle to the transfer. Section 399 very clearly answers whether an assignment can be effective, regardless of whether or not the parties have agreed to a *pactum de non cedendo*: no, it cannot. Section 399 does not discuss effectiveness at all. But the rules of section 182 and the sections which follow are only applicable if the effectiveness of a contract comes into question. If one must examine the legal qualification of the debtor's consent, then an invalid assignment cannot simultaneously be changed into an assignment dependent upon the debtor's consent. When jurists apply sections 185 and 184 they commit the error of a *petitio principii*.⁷⁴

If a *pactum de non cedendo* has been agreed upon, there is only one ("doctrinally satisfactory") way for the assignee to step into the creditor's

70 2 ENNECCERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 886-87 (15th ed. 1960).

71 *Id.* at 887 n.5.

72 BLAUM, ABTRETUNGSVERBOT, *supra* note 63, at 88, also objects to the view that section 135 should be applicable. Section 135 governs alienable claims. In the case of a *pactum de non cedendo* they no longer exist. See also Zeiss, *Wirksamkeitsvoraussetzungen für Forderungsabtretungen, insbesondere zu Sicherungszwecken in der Bundesrepublik Deutschland*, FORDERUNGSABTRETUNG INSBESONDERE ZUR KREDITSICHERUNG IN DER BRD UND IN AUSLÄNDISCHEN RECHTSORDNUNGEN 49, 56-57 (Hadding-Schneider ed. 1986; German High Court of Justice (*Bundesgerichtshof*, hereinafter BGH), 43 JURISTISCHE RUNDSCHAU 239, 240 (1978)). But Blaum does not believe in an analogy to section 135: The interest of the assignor in making an assignment is not as important as the interest of the primary obligor in knowing about the creditor (the assignee) whom he must pay. Therefore, no assignment is possible.

73 ENNECCERUS-NIPPERDEY, *supra* note 70, at 886.

74 *Cf.* Zeiss, *supra* note 72, at 56.

shoes: he can make a contract to modify the substance of the *pactum* (according to section 305).⁷⁵

The claim may then be legally transferred. I admit that this solution looks like a superfluous construction if the debtor for whose protection the *pactum* was concluded consents to the (previous and invalid) assignment. Yet, it helps to clarify what happened: An assignable right was connected with a *pactum*, and has been assigned contrary to the terms of the *pactum*. In this case section 399 states that the assignee did not acquire the primary creditor's right. This result does not change even if the debtor subsequently consents to the assignment, since under section 399 no assignment was possible. If someone rejects artificial constructions like this one for explaining or solving legal problems⁷⁶ and prefers to focus more on the parties' interests (as expressed in legal provisions), one must opt for the solution of the problem reached through the subsequent consent of the debtor. However, both solutions — the construction of the new contract and the unilateral consent — leave the problem arising from the rule of section 399, second alternative.⁷⁷ Of course the debtor need not expressly make this declaration of intention. An implied declaration will also suffice. But the question remains of whether the acceptance of an implied declaration will be appropriate not just for solving theoretical difficulties. Another problem is that the debtor often has no intention of making a declaration and the legal institution of an implied contract or declaration is frequently used in an impermissible manner.⁷⁸

As has been demonstrated, this result is a consequence of an erroneous conception of the legal obligation. I agree with Blaum⁷⁹ that this result creates a serious situation of conflict. Indeed, the free circulation of assets is sufficiently protected by the laws on executions and foreclosures if the property of the adjudged debtor is taken in fulfillment of the claim, since a stipulated *pactum de non cedendo* does not prevent the enforcement of a conventional lien, for example.⁸⁰ But, the field of private commerce is entirely lacking in protection: the debtor's individual interests are overrated in comparison with the interests of general commerce. However, I disagree with Blaum when he says that a new statute addressed to the problem of the *pactum de non cedendo* which would preclude its binding effect on third parties can offer no satisfactory solution. His

75 Section 305 of the German Civil Code states: "For the creation of an obligation by legal transaction, and for modification of the substance of an obligation, a contract between the parties is necessary, unless otherwise provided by law." Forrester, *supra* note 10.

76 For a legitimate use of constructions see Wieacker, *Die juristische Sekunde. Zur Legitimation der Konstruktionsjurisprudenz*, EXISTENZ UND ORDNUNG - FESTSCHRIFT ERIK WOLF 421-53 (1962).

77 In this sense a decision of the German High Court of Justice published in 38 WERTPAPIERMITTEILUNGEN 1404-06 (1984) held that an ineffective assignment under a *pactum de non cedendo* can only be remedied by a contract between creditor and debtor (in addition to this, a confirmation of assignment is necessary).

78 For the difficulties with implied contracts in the case law of the Austrian Supreme Court, see F. BYDLINSKI, *supra* note 38, at 12; *id.*, *Die Grundlagen des Vertretungsrechts im Meinungsstreit*, 29 BASLER JURISTISCHE MITTEILUNGEN 14 (1982); and in connection with this subject, see *supra* note 15.

79 BLAUM ABTRETUNGSUERBOT, *supra* note 63, at 35-70.

80 GERMAN CODE OF CIVIL PROCEDURE § 851, para. 2.

suggestion of "adjusting the judicial decisions"⁸¹ to the *pactum de non cedendo* (according to section 399) is extremely problematic. The guidelines for this adjustment should be the general clauses of the Code like "loyalty and good-faith" (section 242) or "public morality" (section 138). I doubt if these clauses can provide enough legal certainty for the demands of commercial life.

The suggestion of Zeiss⁸² is very surprising. For him the *pactum de non cedendo* (even with validity for third parties) is no binding contract. His only argument is: One can easily circumvent a stipulated *pactum*. This should be no argument, at least no argument which is in accordance with recognized legal methods. But one may also find more hidden paths in Blaum's book.⁸³ But such "tricks" are not confined just to legal doctrine. Even the decisions of the German High Court of Justice for Civil Matters contain such "permissible tricks."⁸⁴

All in all, it is not surprising to find increasingly the demand in Germany for legal steps which would deprive a *pactum de non cedendo* of validity with respect to third parties.⁸⁵

VI. The Law in Austria

With regard to the Austrian legal system, which contains no provision corresponding to section 399 of the German Civil Code, a satisfactory resolution of this issue may be found in existing written law upon consideration of all decisive circumstances. Section 364c of the General Civil Code of Austria contains a rule that may be applied to the *pactum de non cedendo* directly or at least by analogy. Section 364c states: "A contractual or testamentary prohibition to sell or encumber a thing or a real right shall only bind the first owner but shall not bind his heirs and other successors in interest. It shall be valid with respect to third persons if it has been agreed upon between husband and wife, parents and children, adopted or foster children or their husbands and wives, and if it has been entered into the official record."⁸⁶ However, modern legal doctrine, marked by the influence of the German Civil Code,⁸⁷ rejects the inclusion of the *pactum de non cedendo* within this rule. Some scholars argue that an obligation is not a thing and that it would be incorrect to interpret the word "thing" in section 364c of the Austrian Code as *res* in the broad sense of the legal definition. They argue that the combination of the words "thing" and "real thing" (*ius in re*) clearly shows the meaning of "thing" in section 364c as a corporeal thing, and an obligation is certainly not a corporeal thing.⁸⁸

81 BLAUM ABTRETUNGSUERBOT, *supra* note 63, at 297, 298.

82 Zeiss, *supra* note 72, at 56.

83 BLAUM ABTRETUNGSUERBOT, *supra* note 63, at 210-24.

84 See, e.g., 29 MONATSSCHRIFT FÜR DEUTSCHES RECHT 935 (1975).

85 Cf. Claus Ott, KOMMENTAR ZUM BGB ("Alternativkommentar") § 399, margin number 2 (Wassermann ed. 1980) with further references.

86 Baeck, *supra* note 3, at 67.

87 Section 364c was introduced in 1916 by an amendment which was heavily influenced by the German Civil Code of 1900.

88 Wolff, 6 KLANG, *supra* note 20, at 295 (2d ed. 1951); agreeing with this opinion: GSCHNITZER, FAISTENBERGER, BARTA & CALL, ÖSTERREICHISCHES SACHENRECHT 156-57 (2d ed. 1985).

This argument is not convincing. On the contrary, it is an example of "*Begriffsjurisprudenz*," which takes into consideration neither the legislature's objective interests nor the basic values of a law. Other scholars⁸⁹ refer to the "*Herrenhausbericht*" (HHB).⁹⁰ It primarily shows the legislative intent. On the one hand, the legislature wanted to promote free legal relationships in private commerce by limiting to a certain time period the validity of every obligation, including personal ones created by a stipulated *pactum de non alienando* (restraint on alienation; contractual prohibition of sale and encumbrance). On the other hand, it wanted to approve this *pactum* with validity for third persons if legal interests were to require that the possessions of the entitled party under the *pactum* needed protection.⁹¹ The *pactum's* effect of securing a real right could only be established, if the public were notified of this *pactum*, because good faith of a third party can only be destroyed if it is theoretically possible to know about this *pactum*. But in the opinion of the Herrenhaus commission, it is impossible to give notice of the *pactum* when movable property is concerned.⁹² With regard to restraints on assignments, the Herrenhaus report states that the "nature of the relationship"⁹³ demands the binding effect of the *pactum* with respect to the assignee, so to speak demands that the debtor may oppose the assignment in a *pactum*. These records are typically based on the model of the prevailing legal opinion in Germany at the time of the newly implemented Civil Code. This assumption is confirmed by the following sentence: "Section 399 of the German Civil Code also makes this choice." I have already spoken of the problematic nature of the uncritical adoption of German law.⁹⁴ Otte⁹⁵ has shown the danger of arguments based upon "the nature of a subject matter."⁹⁶ With this method ("*Wesensschau*")⁹⁷ an author often seeks to veil evidentiary weaknesses or to save himself the trouble of making a detailed argument⁹⁸ which can be verified in a rational manner.

89 EHRENZWEIG, *supra* note 14, at 255 n.4, 167 n.24.

90 78 PROTOKOLLE DES HERRENHAUSES, 21st Sess. 164-66, reprinted in HERRENHAUSKOMMISSIONSBERICHT [HHB] 42-44 (1912). The *Herrenhaus* was the first division of the Austrian *Reichsrat*, the competent authority for legislation (1861-1918). The second division was called the *Abgeordnetenhaus*. The minutes of the *Herrenhaus* concerning this amending law are called *Herrenhaus - (kommissions) berichte* (HHB).

91 *Id.* at 165, reprinted in HHB 43.

92 *Id.* at 166, reprinted in HHB 44.

93 That seems to be the relationship between creditor and debtor.

94 *Cf. supra* Introduction.

95 Otte, *Wesen, Verkehrsanschauung, wirtschaftliche Betrachtungsweise - ein Problem der Paragrafhe 93, 119 II, 459, 950 BGB*, 10 JURISTISCHE SCHULUNG 154 (1970); Mayer-Maly, *Romanistisches über die Stellung der Natur der Sache zwischen Sein und Sollen*, 2 STUDI VOLTERRA 113-124 (1971).

96 The reliance on the nature of a subject matter and on structures coordinated according to subject remains correct, if seen according to Wieacker's view, *supra* note 76, as a "*Art der Geltung von Sachbezügen des täglichen Lebens*" (a kind of validity of structures, coordinated as subjects of every day life).

97 *Cf., e.g.*, REINACH, *ZUR PHÄNOMENOLOGIE DES RECHTS* (2d ed. 1953), an unmodified reprint of his work *DIE APRIORISCHEN GRUNDLAGEN DES BÜRGERLICHEN RECHTS* (1913); AMSELEK, *METHODE PHENOMENOLOGIQUE ET THEORIE DU DROIT* (1964); LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 108-115, 401-04 (5th ed. 1983); WIEACKER, *supra* note 36, at 426 n.37, 591, 613.

98 For the importance of arguments in decisions, see *DIE ENTSCHEIDUNGSBEGRÜNDUNG IN EUROPÄISCHEN VERFAHRENSRECHTEN UND IM VERFAHREN VOR INTERNATIONALEN GERICHTEN* (Sprung & König ed. 1974).

However, there are still many arguments in favor of treating a contractual prohibition of cession like the model of a restraint on alienation or an encumbrance of a corporeal thing as provided for in section 364c of the Austrian Civil Code.

As a first argument, I should like to point out that, in order to protect private legal relationships, section 364c of the General Civil Code of Austria should cover all the assets⁹⁹ of a person which may be qualified as *res in commercio*. Since, according to the general opinion held today, claims are to be regarded as assets, it follows that section 364c should be applied to contractual prohibitions on cession.

There is another argument in favor of treating the contractual prohibition of sale and encumbrance (*pactum de non alienando*) like the contractual prohibition of assignment. As far as the transferor's liability is concerned, the General Civil Code of Austria classifies the assignment as a sale of a corporeal thing. A person who transfers a claim gratuitously is no longer held liable for it. However, if the assignment is made for consideration, the assignor is responsible to the assignee both for the verity and the recoverability of the claim.¹⁰⁰ Another argument justifies including the *pactum de non cedendo* within the purview of section 364c. When property is sold or acquired, *titulus* (title, that is, economic basis for the acquisition) and *modus acquirendi*¹⁰¹ (mode of acquisition) are required under Austrian law¹⁰² (unlike German law where acquisition of ownership is provided without economic basis, it is "abstract" by law).¹⁰³ Since the problems with the *pactum* revolve more or less around the sale and acquisition of property in the broadest sense of the word, titles to property (*iura in re*) and titles to claims (*obligationes*) should be treated the same, in the absence of contrary rules of law. Both the *pactum de non alienando* and the *pactum de non cedendo* constitute a contractual restraint on acquisition. There are no corresponding special rules applicable to claims. Hence, it is legitimate to apply section 364c of the General Civil Code of Austria to claims.

99 The Austrian Constitutional Court has decided several times that the claim is subject to article 5 of the Declaration of Human Rights of 1867 (*Staatsgrundgesetz für die allgemeinen Rechte der Staatsbürger* [StGG]), which protects the freedom of ownership; cf. Pernthaler, *Verfassungsrechtliche Probleme der autonomen Rechtssetzung im Arbeitsrecht*, 17 ZÖR 51, n.41 (1967); Pernthaler, *Das Problem der verfassungsrechtlichen Einordnung des Kollektivvertrages*, 1 ZEITSCHRIFT FÜR ARBEITSRECHT UND SOZIALRECHT 37 n.42 (1966); Klecatsky, *Rechtswidrige Schadenersichts- und Haftungsklauseln in Baubewilligungsbescheiden*, 15 ZEITSCHRIFT FÜR VERKEHRSRECHT 316 (1970), with further references. Cf. HÜBNER, EIGENTUMSGARANTIE UND EIGENTUMSBINDUNG 88 (1960), with further references (concerning the German "Bonner Grundgesetz").

100 This is different from the German Civil Code, which states in section 437 that the seller of a claim is responsible to the assignee only for the verity but not for its recoverability. This is inconsistent with rules concerning the sale of goods and is economically not justified.

101 On the question of the *modus acquirendi* in the case of assignments, cf. FROTZ, *supra* note 14, at 223-25; Pale, Selbmann & Ulrich, *Die Zession als Kreditsicherung - Die Sicherungsabtretung von Rechten*, 2 QUARTHGZ 12-15, 26-27 (1967).

102 Cf. WIEACKER, DEUTSCHE RECHTSWISSENSCHAFT 63 (1941).

103 According to section 929 ("Agreement and delivery. For the transfer of ownership of a movable thing, it is necessary that the owner of the thing delivers it to the acquirer and that both agree that the ownership be transferred. If the acquirer is in possession of the thing, the agreement on the transfer of ownership is sufficient") acquisition of ownership of movable things requires only consent to the transfer of ownership and similarly the assignment is construed "abstractly," as an indefeasible legal transaction.

The reasons that may be cited against treating an *obligatio* and a *ius in re* alike do not greatly affect the problems of the *pactum de non cedendo* and the application of section 364c.

However, a bona fide acquisition of an obligation should indeed be rejected in principle.¹⁰⁴ But it should not be rejected merely because in most cases it would not be possible at all. If a bona fide acquisition were acknowledged without reserve, a person might suddenly become a debtor without owing anything, without ever having had any obligatory relationship with a creditor. But such arguments do not apply in this context. In the case of a *pactum de non cedendo* the debtor concerned (obligor) does actually owe something. And if, after all, the intersubjective relationship between creditor and debtor is no longer confined to these two parties but, due to the claim's function as an asset, is effective vis-à-vis third parties, then it is in the interest of the protection of private legal relationships that the standards used for the acquisition of claims should, if possible, be the same as those used for the acquisition of corporeal things. The idea inherent in law that legal and commercial transactions should be kept free of risks that are unnecessary and unrecognizable for third persons is effectuated in section 364c, with validity for all movables.¹⁰⁵

In this context it would be impermissible to argue that it is impossible to protect private legal relationships which concern claims. Although this assertion would normally be correct, it is not so in the case of the *pactum de non cedendo*. A claim encumbered with a *pactum* that no one can recognize as such constitutes an important source of uncertainty in everyday commercial life.¹⁰⁶ This uncertainty may be eliminated by including the *pactum de non cedendo* within the purview of section 364c in accordance with the actual decision of the law. By so doing, the *pactum* would merely have relative effect, that is, would only be effective with respect to the parties to the contract.

Thus, there is no irrefutable argument against the application of section 364c of the General Civil Code of Austria to the *pactum de non*

104 Cf. MOECKE, KAUSALE ZESSION UND GUTGLÄUBIGER FORDERUNGSERWERB (Thesis) (1962); agreeing with him Jäggi, Zur "Rechtsnatur" der Zession, 67 SCHWEIZERISCHE JURISTENZEITUNG 6-8, especially 7 (1971). The question of whether the assignment is "abstract" (isolated from other legal transactions) or made with a legal basis is correctly criticized by the author with reference to the field of Swiss business law.

105 Däubler, 21 NJW 1120 (1968), concerning section 137, sentence 1 and Bydliniski in KLANG, *supra* note 20, at 117-18 (general remarks on these problems).

106 This argumentation may be supported by a comparison with American law. As for Buxbaum & Crawford, *supra* note 2, at 338-39, common law provides that claims in principle are not alienable — distinctions were made according to whether claims were characterized as legal or as equitable rights. Therefore the effectiveness of a prohibition of assignment was qualified at that time (although even then it was a controversial matter), since the objective standards for assignability were themselves controversial. In practice there was great demand for endowing these prohibitions with binding effect vis-à-vis third parties. Normally a restraint on alienation was viewed as an obligation which in the case of a breach of contract, guaranteed a payment of compensation for loss. The increasing role of assignments as security in commercial transactions rendered the old rule both unnecessary and burdensome. But American legislation has accommodated itself to changed circumstances in commerce. Cf. Mummenhoff, *Vertragliches Abtretungsverbot und Sicherungszession im deutschen, österreichischen und U.S. amerikanischen Recht*, 34 DEUTSCHE JURISTENZEITUNG (JZ) 429 (1979); J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 640-49 (2d ed. 1977).

cedendo. On the contrary, the application of section 364c is even called for by the purpose of the provision. Its application is also technically possible because of the broad construction of *res* incorporated in section 285 of the General Civil Code of Austria. Therefore, according to Austrian law the *pactum* should only have a relative effect as between creditor and debtor so that an assignment contrary to the *pactum* is valid and makes the assignor and, under certain circumstances the assignee,¹⁰⁷ liable to the debtor for damages.

A. *The Opinion of the Austrian Supreme Court*

Two striking decisions of the Austrian Supreme Court contrast with one another. The more recent one (1912) affirms the validity of the *pactum de non cedendo* with respect to the prospective assignee,¹⁰⁸ the older one (1908) refers to a case in which the creditor — a carpet dealer — had agreed not to assign his claim to the remaining purchase price under penalty of losing this right.¹⁰⁹ In its argumentation the court repeatedly explained that the *pactum de non cedendo*, which is an agreement between creditor and debtor under section 861,¹¹⁰ could neither prohibit nor cancel the transfer of the claim to third parties. In addition to this bilateral agreement the parties also stipulated to “a legal consequence in the form of a condition in case of a breach of the contract.” This legal consequence means that the debtor is released from his obligation to perform the sales contract. Without having added this resolute condition to the *pactum* “the debtor would not be able to effectuate his obvious intent not to be confronted suddenly with an entirely unknown person; . . . because of this non-compliance (that is, with the *pactum* by the creditor/assignor) he could only sue the creditor (assignor) for damages (according to ABGB section 919).”¹¹¹ The court could not have said more clearly that the *pactum* does not give the debtor an absolute right.

107 Cf. *infra* text accompanying notes 125-37 on the question of the assignee's liability for the debtor's damages.

108 Sammlung von zivilgerichtlichen Entscheidungen des K.K. Obersten Gerichtshofes, Neue Folge [GIUNF] 6043, reprinted in 31 ZBL 6 (1913).

109 GIUNF 4363, reprinted in 31 ZBL 88 (1913).

110 Section 861 of the General Civil Code of Austria reads:

Whoever declares that he will transfer his rights to another, that is, that he will permit him to do something, will give him something, will do something for him, or will omit to do something on his account, makes a promise. If the other accepts the promise validly, a contract is created by the mutual consent of both parties. As long as negotiations last and the promise is not yet given or has not been accepted, either previously or afterwards, no contract is created.

Baek, *supra* note 3, at 163.

111 Section 919 of the old version of the General Civil Code of Austria reads:

If a contract is not at all performed by one party or is not performed in due time, at the proper place or in the agreed manner, the other party is not entitled to rescind the contract except the certain cases provided by law or having stipulated reservations expressly — he may only ask for due performance of the contract and for compensation.

Cf. the latest version of Section 918:

If a contract for consideration is not performed by one of the parties in due time, at the proper place or in the agreed manner, the other party may accept performance of the contract and damages for delay, or he may, after fixing a period of grace for the performance, rescind the contract.

Baek, *supra* note 3, 175.

The decision of the court in 1912 was based on the following facts: an employee of a corporation (sewing machine manufacturers) transferred a part of his claim for sales commissions, although he had signed a document entitled "terms (and conditions) of business with respect to salesmen" which contained a *pactum* with the following formulation: "An assignment of a claim for a commission is impermissible and has no legal effect whatsoever for the corporation."¹¹² The court stated as reasons for its decision that the "stipulated invalidity of an assignment" can only be interpreted as "a contractual limitation of the claim itself, resulting from concurrent declarations of intent." One notices the influence of the new German Civil Code of 1900. But in a decision handed down only four years ago, the court illustrated another way of interpreting the "stipulated invalidity of an assignment."¹¹³ Other decisions dating from the time of "*Pandektenwissenschaft*" also deal with a *pactum de non cedendo*¹¹⁴ and are based on the same arguments made in this "case of a claim to a commission."

In a 1982 decision¹¹⁵ the supreme court discussed but did not decide whether or not the assignee has a legitimate interest in suing the debtor despite the former's knowledge of the *pactum de non cedendo*. The decision gave some hope that the court will recognize the *pactum* as having an "inter partes" effect and would abandon its view of the *pactum* as a

¹¹² In the USA the obligor is protected by substantive limits on assignments: The classic example of public protection is the prohibition of the assignment of wage claims found in many state statutes. Public law wants to protect consumers or indigent parties from the temptation of assigning claims necessary to their own maintenance. See Buxbaum & Crawford, *supra* note 2, at 342). The consideration that a *pactum de non cedendo* protects the employee (meaning the creditor) is also found in Germany and Austria. As far as these *pacta* are concluded within a single contract between employee and employer they are no different from other *pacta*. If they are part of an employment contract their contents must be treated analogous to conditions and terms of employment. But *pacta de non cedendo* concerning wage claims are even found in collective labor agreements, causing some to argue that assignments of claims necessary to the employees' maintenance could thus be prohibited. This argument must be criticized with regard to Austrian law; cf. Tomandl, *Der Kollektivvertrag - doch ein Instrument des Privatrechts*, 4 ZAS 209 (1969). It should not be the task of employees' unions to protect the employees from the temptation of buying on credit. There is neither a typical empirical theory that workers are less capable than other citizens of representing their own financial interests, nor is there a causal relation between assignment of wage claims and frequency of accidents at work which would justify collective protection; NEULOH, RUHE, RUSSEL & MANSOFF, *DER ARBEITSUNFALL UND SEINE URSACHEN* (1957) (does not give any evidence for a causal relation). Certainly, one must reject the idea that an employer has a general right to have his employees live without any debts; cf. MAYER-MALY, *ARBEIT UND RECHT* 2 (1968). Thus, collective *pacta de non cedendo* must be rejected.

¹¹³ I cannot deal with particularities which may arise from "conditions and terms" and the different positions of the parties. Cf. Section 879 para. 3 of the Austrian Code: A provision in standard business conditions or standard form contracts not settling one of the main mutual performances is null and void in any case, if the provision, considering all circumstances of the case, is of gross disadvantage for one of the parties; see also the Austrian *Konsumentenschutzgesetz* of March 8, 1979, (Consumer Protection Act) § 6.

¹¹⁴ Cf. 39 SEUFFERTS ARCHIV 146 (1884); 40 SEUFFERTS ARCHIV 288 (1885) (concerning a *pactum* between the guarantor of the obligor and the assignor); judgment of the *Reichsgerichtshof* (Supreme Court of the German Reich), 1885 HANSEATISCHE GERICHTSZEITUNG BEIBLATT 75-76 (1885); 31 Entscheidungen des Reichsgerichtshof in Zivilsachen [RGZ] 167 (decisions of the Supreme Court of the German Reich [*Reichsgericht*] in civil cases); 38 RGZ 309-10; 54 SEUFFERTS ARCHIV 392 (1899). Some decisions specify that the *pactum* has only relative effect: cf. 2 SEUFFERTS ARCHIV 206 (1848); 5 SEUFFERTS ARCHIV 17 (1852) (with reservation for the good faith assignee); 4 ANNALEN DES KÖNIGLICH SÄCHSISCHEN OBERAPPELLATIONSGERICHTS DRESDEN 466-67 (1862); 30 SEUFFERTS ARCHIV 203 (1875).

¹¹⁵ 37 *EvBL*. no. 4 (1982), reprinted in 54 SZ no. 110 (1984).

limitation of the claim itself. But recently (in 1984) an en banc panel of the court¹¹⁶ rejected¹¹⁷ criticism of this doctrine incurred as a result of the court's insisting on the absolute binding effect of the *pactum de non cedendo*.

The facts of this case are as follows: As agreed, the creditor delivered goods valued at AS 75.000 to the debtor. The debtor used his order form; on the first side (at a very prominent place) reference was made to the terms of purchase (printed on the back side of the form). One provision stated: "Claims for purchase or services may not be transferred to third parties without our prior written consent." Furthermore, contrary provisions of the creditor would only be valid if the debtor approved them. Despite this the creditor irrevocably assigned outstanding accounts receivable to a bank as security.

After this each invoice sent to the debtor included a notice of assignment, which referred to the transfer of the accounts to the bank. The debtor neither reacted to these notices nor did he pay anything to the bank. Nevertheless, he later asked the bank for a confirmation of assignment, an announcement of the transferred claims and documentation of the declaration of transfer. Although the bank complied with this request, the debtor payed the creditor (assignor). The bank sued the (ceded) debtor for recovery of AS 75.000. The debtor asserted the defense of a stipulated *pactum de non cedendo*.

In this case, too, the supreme court viewed the covenant against assignment as having an absolute binding effect. Nevertheless, at the end of its scrutiny the court used sleight of hand (section 863 of the General Civil Code of Austria¹¹⁸) by applying the construction of an implied waiver¹¹⁹ to make findings which again eliminated the undesired binding validity of this *pactum de non cedendo* with respect to third parties. With this decision the court has bolstered its view that a *pactum* has absolute binding effect. The court relies on the aforementioned arguments in favor of a strict interpretation of section 364c of the General Civil Code of Austria¹²⁰ and of the legislature's "obvious intent," which follows from the Herrenhaus report.¹²¹ The court expressly argued that this decision will promote continuity in the case law relating to section 364c.

116 According to the Law concerning the Austrian Supreme Court (*Gesetz über den Obersten Gerichtshof* [OGHG]) § 6, para. 1, the Austrian Supreme Court normally decides in panels composed of five judges. Cases concerning very important legal questions or cases in which the traditional court's opinion should or may be changed are decided by a senate composed of eleven judges (en banc panel) — section 8 OGHG. The decisions of an en banc panel have the effect of being *stare decisis* for the courts of first instance and courts of appeal.

117 106 JBL 311 (1984), reprinted in 39 *EvBL* no. 76 (1984).

118 Section 863 of the General Civil Code of Austria reads:

(1) Intention is manifest not only expressively (sic) by words and generally adopted signs but also tacitly by acts which in regard to their circumstances reveal an intention beyond substantial doubt. (2) The custom and usage prevailing in honest transactions must be taken into consideration in determining the meaning and the effect of acts and omissions.

Baeck, *supra* note 3, at 164.

119 See *supra* note 15 and text accompanying note 78.

120 That means the wording relates only to "res" or "ius in rem" but not to a claim; cf. my criticism of this opinion, *supra* text following note 88.

121 For arguments against this view see Wilhelm, *Das Abtretungsverbot in der Entscheidung des verstärkten Senats*, 106 JBL 304-05 (1984).

In refutation of this statement one has to reply that continuity alone can never guarantee a correct decision. The emphasis on the (historical) legislature's "obvious intent" is rooted in the general rule of interpretation of section 6 of the Austrian Code which reads: "No other interpretation shall be attributed to a particular provision of the law than that which is apparent from the plain meaning of the language employed and from the clear intent of the legislature." Problems arise almost immediately, because the intention of the legislature is by no means obvious, as Wilhelm clearly pointed out.¹²² Nevertheless, the supreme court viewed the absolute binding effect of the *pactum de non cedendo* as the legislature's obvious intent and only considered the possibility of a loophole in the law if the economic importance of a claim in its capacity as an asset had changed as compared to the time when the statute was passed in 1916. However, the court has denied any such change, for which it is to be and already has been severely criticized.¹²³ The court rejects my argument that section 364c guarantees protection of commerce even if it is not needed; that is, even if the third person knew about the *pactum de non cedendo* (or was bound to know about it). The court argues that this fact — third persons being protected despite their knowledge of the stipulated *pactum* — is not the basic idea behind the rule but only a consequence of it. The court maintains that qualifying this consequence as a principle of the law would be to reproach the legislature with inconsistency. I agree with this "criticism" but it does not adversely affect my argument. Although advocates of a *pactum* without an absolute effect say that the protection of third persons is the fundamental idea behind section 364c,¹²⁴ we do not demand protection in all cases. As far as claims are concerned, we restrict the "comprehensive" rule — to remain within the argumentation of the court — of section 364c: The underlying purpose of section 364c is not to protect persons from the danger of a *pactum* who know about its existence. Therefore section 364c must be construed restrictively according to its purpose (*teleologische reduktion*) and cannot be applied in a case where the assignee knew about the *pactum*. One also may go another route and hold the assignee who knew about the *pactum* liable for damages under certain circumstances.

B. *Is the Assignee Liable for Damages?*

In a recent case, which will be a leading one, the question arose of whether the debtor (primary obligor) whose debt has been assigned can claim compensation for damages from the assignee. But this question should not occur in connection with the supreme court's view that a stipulated *pactum* can substantively create or transform a claim into a non-assignable claim. A third person would not be able to assume the position of an assignee.

¹²² See *id.*

¹²³ See *id.*

¹²⁴ The free circulation of goods is only possible in this case; and this free intercourse was — as even the supreme court admits — the motivation for the legislature to amend the rule.

However, this question must be addressed from the standpoint of those who view the *pactum de non cedendo* as a contract concerning a claim which, like a contractual covenant prohibiting the sale of a corporeal object, is also an asset.

According to the strict interpretation of the principle which defines a contract as a legal bond only between two persons and according to which only the parties to the contract must respect its terms, the possibility that a third party could violate the contract is precluded and an encroachment on the primary obligor's (contractual) right through a third person — the assignee — would be disregarded.¹²⁵

But Koziol¹²⁶ has shown in a convincing manner how this principle should be and already has changed in modern doctrine and decisions, especially in connection with the area of inducement to breach a contract or damages caused by competitive commercial practices which are contrary to public policy. Koziol's discourse cannot be repeated here. The essential point in this context is his conclusion that an encroachment of a third person's claim may cause liability for damages under certain circumstances. The Austrian Supreme Court adopted Koziol's doctrinal argumentation, that is, that a right may be binding upon third persons under certain circumstances.¹²⁷ The creditor's right to demand that the debtor adhere to his contractual obligation must be protected absolutely. A person who encroaches upon the creditor's right is liable for damages caused by changing the debtor's mind. Thus, the following claim in its capacity as an asset may be the subject of such a violation: when stipulating to a *pactum de non cedendo* the *debitor cessus* obtains the right to prohibit the creditor from transferring the claim. Without a doubt, the assignor infringes upon this stipulated right if he transfers the claim of the primary contract. The question arises of whether the assignee is liable for damages. According to Koziol's basic concept, the assignee who knows about the *pactum* is liable for damages even if he did not induce the assignor to break the contract.¹²⁸

125 In this vein see older decisions of the supreme court: GIUNF 2612, 11 SZ no. 151, 16 SZ no. 66.

126 KOZIOL, *supra* note 59, at 271 (given positive reviews by: Ostheim, 4 ZAS 35-36 (1969); Rother, 169 ACP 271 (1969); Bydlinski in KLANG, *supra* note 20, at 112-13, 115-16; critical reviews: Kramer & Schwimann, 23 ÖJZ 195-96 (1968)); KRASZER, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT, INTERNATIONALER TEIL 140 (1968). REHBEIN, VERLETZUNG VON FORDERUNG-SRECHTEN (1968) and LÖWISCH, DER DELIKTSSCHUTZ RELATIVER RECHTE (1970) come to Koziol's result, but with different arguments); *cf. also* MARKESINIS, THE GERMAN LAW OF TORTS 25, 30 (1986).

127 91 JBL 213 (1969), *reprinted in* 41 SZ no. 45; 24 *EvBL* no. 58 (1969). See the argument *supra* note 20 and accompanying text.

128 I do not agree with Koziol's sweeping statement that, because of their influence on a third person's legal relationships, contractual restraints on assignment should be rights which may be disregarded by persons affected (Koziol, *supra* note 59, at 197; *see also* Bydlinski, 90 JBL 91 (1968) (on the judgment of the Austrian Supreme Court of June 6, 1967)). In his article *Das vertragliche Abtretungsverbot*, 102 JBL 124-25 (1980), Koziol states that the assignee himself should be liable for damages, if he knew about the *pactum* and induced the assignor to breach it, since *pacta de non cedendo* appear in the special, legitimate interest of the *cessus*, which justifies protection from third party encroachment on his right.

One has to consider and to weigh¹²⁹ the following elements which create the duty to compensate damage¹³⁰ caused in connection with an assignment contrary to the *pactum*: (1) knowledge of the *pactum*; (2) the interest of the primary obligor in attaining an inalienable claim; (3) the assignee's interest in preventing damage to himself; (4) the extent of the assignee's influence on the creditor (assignor) to breach the contract. These elements will weigh more or less heavily depending on the particular case and special considerations and may create the duty to compensate liability for damages. By recognizing the liability of the assignee¹³¹ for damages a way has been found to compensate for the undue hardship on the obligor which the postulated "*inter partes*" effect of a *pactum* may create.

In its decision of 1984 the supreme court also rejected the argument¹³² that the general aim of section 364c is to prevent the owner's property from being completely tied up. If this were the legislature's intention it would have had to forbid any kind of *pactum*, including one valid only with respect to the contracting parties, because of the possible liability for damages in case of breach of the *pactum* and because of possible penalties stipulated to by the parties. Both possibilities greatly restrict the right of economic self-determination. With this argument the supreme court raises the problematic nature of binding contracts which offend good morals and effectively changes the subject to this topic.¹³³ At this point, the central issue of third party or "*inter partes*" effect is abandoned.¹³⁴

Thus, pursuant to the aforementioned discussion we see that the duty to perform a contract is not touched by a *pactum de non cedendo* but rather only the commercial function of the claim is affected — that is, its binding effect upon third parties. I also referred to the problematic argument of the parties' freedom to determine the proper law of contract: the exercise of this freedom would be binding upon third persons. In fact, the *pactum* has the appearance of a contract, containing its commercial function as its subject-matter. Therefore, the general rules of contract law are applicable, especially those setting forth the consequences of contracts which are against good morals and of parties being bound to a contract. Consequently, the starting point of all discussion is the par-

129 On the method based upon the idea of a "flexible system" ("*bewegliches system*") see WILBURG, *BEWEGLICHES SYSTEM IM BÜRGERLICHEN RECHT* (1950); WILBURG, *DIE ELEMENTE DES SCHADENERSATZRECHTS* (1941); WILBURG, *Zusammenspiel der Kräfte im Aufbau des Schuldrechts*, 163 ACP 346-79 (1963); LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 453 (4th ed. 1979) and especially F. BYDLINSKI, *JURISTISCHE METHODENLEHRE UND RECHTSBEGRIFF* 529-43 (1982) with further references.

130 Cf. Wilburg, *Zusammenspiel der Kräfte im Aufbau des Schuldrechts*, 163 ACP 356-57 (1963).

131 Even if the assignee did not know of the *pactum*, the debtor still retains the possibility of offsetting his claim of damages (caused by the assignor when he breached the contract — *pactum*) against the assignee's claim, since the *pactum* was stipulated to before the assignment took place; cf. Koziol, 102 JBL 124-25 (1980).

132 *Id.* at 122.

133 In its decision of April 26, 1984, the court held that an agreement to a *pactum de non cedendo* itself is not contrary to public morality, 30 ZVR 245 (1985).

134 See GENERAL CIVIL CODE OF AUSTRIA § 879, para. 1: A contract which violates a legal prohibition or public morality is null and void.

ties' autonomy, that is, the idea that the contract is valid because each party, in the exercise of its "self-determination," wanted to create these legal consequences.¹³⁵ But to reiterate: freedom of contract does not permit the parties to create disadvantages for third persons who have no knowledge of the contract. If the creditor freely renounces the possibility of assigning the claim, the *pactum* comes into being as a valid contract. If the creditor assigns the claim despite a *pactum* he is liable for damages according to general rules of contract.¹³⁶ From the debtor's point of view there must be a legal interest in his agreeing to a *pactum*.¹³⁷ As a rule this can be easily proved, since the debtor should have the possibility of (or necessity for) offsetting his claim against those of the creditor.

C. *Effects Similar to the Pactum*

Let us have a closer look at the phrase "If the claim is transferred, it shall expire" which is sometimes added to the *pactum de non cedendo*.¹³⁸ It is a resolutory condition that is added to the *pactum*. If such a condition were incorporated into the *pactum*, the *pactum* would ultimately be binding upon third parties (the assignee) outside the contractual relationship, though in a roundabout way.

The problem has been raised with respect to the so-called *pactum de non alienando*¹³⁹ (contractual prohibition of alienation). There we find phrases like "If the thing is sold contrary to contractual prohibition, title to this thing shall pass to a third party or to the contracting party of the *pactum de non alienando*." Based on the underlying purpose of section 364c as previously discussed, it should be impossible to combine a contract concerning a corporeal thing which is to be qualified as a *res in commercio*¹⁴⁰ with a restriction of that quality, especially when this limitation is unrecognizable for third parties. Therefore, if one considers that even the lesser restraint, that is to say the *pactum de non alienando*, should not be valid with respect to third persons, it would contravene the spirit of section 364c of the Austrian Civil Code to nullify this result by permitting even greater restrictions, namely, allowing the alienation to be declared null and void while at the same time returning the property to the alienor. Consequently, if the law is interpreted correctly, this resolutory condition constitutes an illegal circumvention of the law.¹⁴¹ In this case the fundamental idea of keeping legal and commercial intercourse free

135 FLUME, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS: DAS RECHTSGESCHÄFT 7 (3d ed. 1979); see BYDLINSKI, *supra* note 38, at 56-62 (developing a new doctrine, a combined theory of the legal transaction).

136 Cf. GIUNF 4363.

137 Cf. *infra* note 143.

138 Cf. the "case of the carpet dealer," 27 ZBL 88 (1909). The supreme court also mentions the resolutory condition in the case published in 106 JBL 312 (1984).

139 1 EHRENZWEIG, SYSTEM DES ÖSTERREICHISCHEN ALLGEMEINEN PRIVATRECHTS, TEIL 2: SACHENRECHT 166 (1957). For German law see FLUME, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS § 17, no. 7 (1979); Däubler, 21 NJW 1119 (1968) and recently TIMM, 44 JZ 13 (1989).

140 Cf. HEINZ HÜBNER, DER RECHTSVERLUST IM MOBILIARSACHENRECHT 139-44 (1955); Wieacker, *Sachbegriff, Sacheinheit und Sachzuordnung*, 148 ACP 72 (1943).

141 Cf. EHRENZWEIG, *supra* note 139, at 166. Since each circumvention of the law constitutes at least a violation of the law, the expression chosen is of no consequence in the final analysis. On the equalization of "in fraudem legis agere" with "contra legem agere," cf. PFAFF, ZUR LEHRE VOM

from unnecessary risks curbs the general principle of freedom of contract which would permit one to include in a contractual relationship this type of resolutive condition.

In the case of the *pactum de non cedendo* the situation is similar. The expedient of a resolutive condition only appears to be the ideal legal construction for making the *pactum de non cedendo* binding upon third parties, neither forcing the abandonment of the basic idea that an obligation is a legal bond only between two persons nor compelling the adoption of the thesis of an inalienable claim created by contractual act. As a result of the free will of the parties, the resolutive condition transforms the claim into an inalienable one.¹⁴² This is an unlawful consequence if the claim were an assignable (alienable) one before,¹⁴³ especially when the security of legal relationships is required: Third persons (assignees) who do not know about the resolutive condition will be disappointed in their belief that the (effectively non-assignable) claim is alienable.

Despite the supreme court's opinion that the *pactum* is effective vis-à-vis third parties, the court held in this specific case that the assignee is allowed to sue the debtor. The court assumed that the debtor had made an implied waiver of his right by subsequent *ratihabitio* of the invalid assignment.¹⁴⁴ In principle the court states that the binding nature of the *pactum* vis-à-vis all persons guarantees optimal protection of the debtor. But since "considerations, even if orientated on political and economic assessments, do not allow a definite value judgment,"¹⁴⁵ the court reserves the possibility of intervention with the help of sections 863 (implied waiver or implied *ratihabitio*) and 879 (public morality) of the General Civil Code of Austria for cases where the debtor does not need this protection or where the creditor's interests are stronger.¹⁴⁶ I shall pick out an example of the reaction of legal scholars to this point of view: Wilhelm¹⁴⁷ says we have to accept the binding effect of the *pactum* on all persons because of the court's decision. But he argues that a discussion of the problematic nature of this *pactum* should only be an "academic question," since practice furnishes enough possibilities for avoiding this effect. Besides this possibility the court itself offers the alternative that

SOGENANNTEN IN FRAUDEM LEGIS AGERE, cf. 161-66 (1892); ENNECCERUS - NIPPERDEY, *supra* note 70, at 1160, with further references (on the problematic nature of the *fraus legis*).

142 Däubler, 21 NJW 1118, n.18 (1968).

143 See AUSTRIAN GENERAL CIVIL CODE § 1393: "All alienable rights may be assigned. Rights which are inherent in a person and which consequently cease with his or her death cannot be assigned. Bearer bonds are assigned by their delivery and do not require any proof of assignment besides possession." Baeck, *supra* note 3, at 272.

144 Because of the facts of the case, it is doubtful if this decision was actually correct. Cf. *supra* note 15 and Wilhelm, 106 JBL 308 (1984); Iro, 2 RDW 103 (1984). The court seems to have answered this criticism in a case with similar merits [108 JBL 383 (1986)] where it gave better reasons for assuming an implied waiver of the debtor.

145 This means an evaluation of who, as between the creditor and debtor, needs more protection. This judgment should be based on the law and its underlying purpose; political and economic assessments often vary and judges in particular cannot change the law as often as these evaluations may change because of the detrimental effect upon legal certainty that this would have (argument based upon the principle of the separation of powers).

146 So the court argues [108 JBL 384 (1986)] that the implied waiver of a party's assertion of the *pactum* "is absolutely suggestive in an economical view."

147 106 JBL 307 (1984); see also Mayrhofer, 23 ÖJZ 146, 169 (1973) (undisclosed assignment).

the would-be assignee could attach the claim (as is recognized in Austrian legal doctrine and case law in the absence of a legal provision similar to section 851 paragraph 2 of the German Code of Civil Procedure).¹⁴⁸ Wilhelm points out several ways for avoiding the *pactum de non cedendo* that can nonetheless produce the same result: The first method of circumvention is an agreement between the creditor and the would be assignee to which the creditor consents prior to an attachment of the debt (against the primary debtor). A second one is to have the would-be assignee pay the debt to the creditor pursuant to sections 1358,¹⁴⁹ 1422,¹⁵⁰ and 1042 of the Code.¹⁵¹ The would-be assignee then acquires his own claim against the primary debtor with the same substance as before. A third way already existed in classical Roman law¹⁵² in the form of a mandate to sue for the assignee's own benefit as a representative of the creditor; the primary debtor and creditor could stipulate that the debtor pay the representative as the creditor's collecting agent (*solutionis causa adiectus*).

The Austrian Supreme Court appears to view section 863 and if necessary section 879 of the Austrian Code as the only ways to avoid the undesired effects of a *pactum*. The question of whether the free circulation of claims should be protected (with the exception of the good faith acquisition of a claim by reason of the ostensible existence of a negotiable claim) remains unanswered.¹⁵³ In the final analysis, one must say that the decision of the en banc panel of the court did not resolve the problems which exist in the field of commerce. A debtor cannot count on the *pactum* as an absolute right — the court reserves possibilities for eliminating the effect of the *pactum*. But the creditor, too, cannot be assured that the court will invariably decide that the *pactum* is not effective. The handicap remains. Each acquisition of a claim will require an inquiry as to the *debitor cessus*, regardless of whether a restraint or prohibition is stipulated or not.¹⁵⁴

VII. Final Remarks

Finally, we must state the paradox: In Germany, section 399 of the Civil Code provides that the contractual prohibition of assignment is ab-

148 See *supra* note 80 and accompanying text.

149 A person who pays the debt of another which he has assumed, either personally or in regard to certain assets, is subrogated to all the rights of the creditor and is entitled to demand the restitution of the amount paid by him from the debtor. For that purpose, the satisfied creditor shall deliver to the payor all pertinent documents and means of security.

Baeck, *supra* note 3, at 265.

150 "A person who, without a legal obligation, pays the debt of another may, before payment or at the time payment is made, demand from the creditor the assignment of his rights; in the event of such demand, the payment has the effect of a discharge." *Id.* at 277.

151 "A person who incurs for another an expense which the latter, according to the law, would have been obliged to incur himself, is entitled to demand compensation therefore." *Id.* at 281.

152 See *supra* note 7.

153 The court's rejection of Frotz's opinion is correct. Cf. argument *supra* note 15.

154 And this is the existing situation, even though the court believes that the third party is not obliged to inquire into matters relating to outside claims in private legal relationships (OGH in 52 SZ no. 110: the assignor, though obliged by a factoring contract, advised his debtors to pay a third party immediately and not pay the factor at all. The third party acquired a valid claim).

solutely effective (even with respect to third parties). The new German doctrine claims either to eliminate the second alternative of section 399, because of its burden on the security of legal relations or at least demands that the statute be interpreted to require good faith and good morals so as to achieve a relative effectiveness of the prohibition. In Austria there is no provision like section 399, second alternative; on the contrary, section 364c of the General Civil Code of Austria endows a *pactum* with validity only for the parties to the contract, but the Austrian Supreme Court and some legal scholars quite unnecessarily take the contents of the second alternative provision of section 399 of the German Civil Code and incorporate them into Austrian law, thereby promulgating the absolute binding effect of the contractual prohibition of assignment — an astonishing result.