Commodification of claims: The admissibility of various tort claim assignments and the implications for third-party funding

A comparative analysis of the regulations of the United States, England, Germany and Austria

By Anna Schmallegger
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Declaration Statement

I hereby certify that this is original work, that this thesis does not contain any materials from other sources unless these sources have been clearly identified in footnotes, and all quotations have been properly marked as such and full attribution made to the authors thereof.

I further authorise Leiden University, the Faculty of Law, the LL.M. Adv. Programme in International Civil and Commercial Law, its Programme Board and Director, and/or any authorised agents of the Institution, and persons named here in and above, to place my thesis in a library or other repositories including but not limited to associated websites, for the use of the visitors or personnel of said library or other repositories. Access shall include but not be limited to hard copy or electronic media.

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# List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ABGB</td>
<td>Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code)</td>
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<td>AM. JUR.</td>
<td>American Jurisprudence</td>
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<td>BGB</td>
<td>Bürgerliches Gesetzbuch (German Civil Code)</td>
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<td>BGH</td>
<td>Bundesgerichtshof (German Supreme Court)</td>
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<td>CAT</td>
<td>Competition Appeal Tribunal</td>
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<td>CFA</td>
<td>Conditional fee agreement</td>
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<td>DBA</td>
<td>Damages-based agreements</td>
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<td>Geo. L.J.</td>
<td>The Georgetown Law Journal</td>
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<td>GWB</td>
<td>Gesetz gegen Wettbewerbsbeschränkungen (German Act against Restraints of Competition)</td>
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<td>that is</td>
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<td>Mo. L. Rev.</td>
<td>Missouri Law Review</td>
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<td>OGH</td>
<td>Oberster Gerichtshof (Austrian Supreme Court)</td>
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<td>OLG</td>
<td>Oberlandesgericht (Appeal Court)</td>
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<td>ÖJZ</td>
<td>Österreichische Juristenzeitung (Austrian lawyers journal)</td>
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<td>ÖZK</td>
<td>Österreichische Zeitschrift für Kartellrecht (Austrian competition journal)</td>
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<td>UCLA L. Rev.</td>
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<td>Vand. L. Rev</td>
<td>Vanderbilt Law Review</td>
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<td>VbR</td>
<td>Zeitschrift für Verbraucherrecht (Journal for consumer law)</td>
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<td>ZWeR</td>
<td>Zeitschrift für Wettbewerbsrecht (Journal for competition law)</td>
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Executive Summary

Access to the courts has always been anything but cheap. The needs of those claimants, who have a meritorious claim at one's disposal but are risk-averse and/or do not have enough assets to be able to afford a lawsuit, were recognised as a business opportunity. However, the practice of litigation funding has not developed in a uniform way, and thus access to the courts faces various constraints throughout the world. In order to overcome these obstacles, I was curious, whether a commodification of claims has already been established in the United States, England, Germany and Austria - and if not, whether such a development might be possible in the future. Therefore, this thesis aims at taking a closer look at those four jurisdictions in order to find out to what extent the assignment of tort claims is allowed there and what the reasons for this are. By doing this, I encountered not only various forms of assignments, but also other investment tools like contingency and conditional fees, as well as diverse third-party funding arrangements, which will also play a role in my thesis. Please note, that I did not analyse the options of litigation funding through legal aid or litigation insurance.

The present comparative study undertakes the analysis of the assignability of tort claims by applying a jurisdiction-by-jurisdiction analysis. Each legislative and judicial system is dealt with in an individual chapter. While the assignability of tort claims represents an important part within each section, other funding instruments are also described. The core objective was to discover the particularities of each legal system. It may be "old" rules and principles like champerty and maintenance grounded in common law or the importance of an attorney's independence, everything plays a significant role in the allowance of the assignment of personal tort claims, as well as other funding mechanisms. The results of these observations built the basis for my comparative inquiry in chapter six, as well as for my conclusion and my main findings. The paper at hand reveals that a clear distinction between common law and civil law can be identified, when it comes to the full assignment/sale of tort claims. The reason behind this is - as my research in this paper will show - that one encounters significant barriers to assign one's personal tort claim to someone else in the US and in England since these countries do not allow the speculation over a claim of another person in order to give a "stranger" the opportunity to make a profit. In order to make a comparison, my thesis will also take a closer look at the civil law countries Germany and Austria. Due to the lack of the doctrine of champerty, this approach does not exist in their civil codes, resulting in a less stringent approach when it comes to the financing of lawsuits through outsiders. In the search for potential obstacles in these countries, I faced the fact that, in contrast to the common law countries, attention is shifted to the independence of an attorney. As will be shown, this approach leads to restrictions concerning other funding instruments, for example contingency fees. It will be seen that common law and civil law also have different approaches when it comes to the assignment for debt collection, whereas the two law systems harmonise more regarding the allowance of assignments for security purposes. As far as England is concerned, it seems that its legal system lies somewhere in between the civil law countries and the US. One the one hand, champerty can make an assignment of personal tort claims invalid, but on the other hand, the development of contingency fees differs from the US's. Due to the absence of a comprehensive authorisation of contingency fees, Germany, Austria and England provide a good business opportunity for third party funding companies.

As a result, I think the question of preference for one regulation or system is of interest. Behind this background, the points of view of claimants, attorneys, as well as of investors, is the subject of my last chapter. For which solution someone opts, depends in my opinion, on the prospects or outcome he or she is looking for. Thus far, there have not been any rules imported for companies, which want to buy and sell claims in order to gain a big profit out of such a trade. It remains exciting to see whether, and to what extent, such a commodification of claims might be possible in the future.
Main Findings

My thesis aims to establish the admissibility of tort claim assignments in the US, England, Germany and Austria. By addressing this topic, other possibilities of litigation financing came up and, therefore, also play a role in my thesis. In addition to my comparative analysis in chapter six, as well as to my conclusion in chapter seven, the main outcome of my thesis can also be shown – simplified – in the form of the following table:

<table>
<thead>
<tr>
<th></th>
<th>United States</th>
<th>England</th>
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<td>Contingency fee, which leads</td>
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<td>lawyer together with a profit</td>
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<td>agreements</td>
<td>Contingency fees are</td>
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It must be pointed out that the statements in the table above are portrayed in an over-simplified manner. Differences exist not only between common law and civil law, but also between the individual jurisdictions, as well as in the manifold rules of each of the states in the US. Furthermore, it does not include the specific requirements or restrictions for each of these instruments. For instance, since there has not been – as far as can be ascertained – a German or Austrian court decision dealing with the full abandonment of the control over one’s lawsuit, there is still a risk that this might also violate
public policy under certain circumstances. Besides, the assignment of tort claims to a consumer organisation in Germany is subject to more stringent guidelines than in Austria. Nevertheless, all in all, these two civil law countries are very akin to one another. Although US and English law share similarities when it comes to the assignment of personal tort claims, England takes a stricter approach when it comes to contingency fees. Against this background, England appears to be the most rigorous country: not only restrictions according to tort claim assignments exist, but also difficulties when it comes to contingency fees, the so called DBAs. Yet, a remedy can be seen in the process of third-party funding established in the last years.
1. Introduction

Although access to justice is a fundamental human right, not everybody is in a position to make a claim in order to receive damages for any loss suffered. Such actions often require a considerable investment in time and budgetary resources. For instance, damage claims derived from infringements of competition law which typically demand a complex factual and economic analysis. In addition, the potential claimant might not have enough information in order to start proceedings and/or his individual damage is relative small. As a consequence, an injured party will think twice whether or not to start proceedings. Moreover, it may be that a potential claimant does not have enough money to go to court or that he is risk-averse – there are various reasons why someone stays away from proceeding. However, as their claims might represent value and are therefore a commodity, making use of them has been recognised as a business opportunity.

Against this background, both common law and civil law have found, and are still in the process of doing so, different ways to overcome this obstacle, which opens the door for new business activities. One possibility to tackle the financial barrier can be seen in transferring the claim to another person or company that makes a credit available – in different ways as well as for diverse reasons. The starting research question for my master thesis was, therefore, to what extent the assignment of tort claims is allowed in the United States, England, Germany and Austria, and what the reasons for allowing or not allowing such assignments are. The choice of the two common law countries United States and England, on the one hand, and the two civil law countries Austria and Germany on the other hand, can be explained by the different principles reflected in those regulations. Whereas the prohibition against champerty and maintenance plays a role in the common law countries, Austria and Germany are characterized by the general prohibition of contingency fees. These underlying considerations have, as will be seen, an influence on the permission of tort claim assignments.

During my research, however, I was confronted with different denotations, meanings, forms and effects of claim “assignments”. One can think about the real sale or full assignment of a claim, a debt collection or an assignment for security purposes. Closely related to these instruments are conditional-fees or contingency fee agreements as well as the third-party funding, for example, by an investor. Thereby, the proceeding is funded by someone who has no other connection with the litigation and who will, only in the cases of successful claims, be paid a percentage of the recovery sum. Though, in the previously mentioned circumstances, an assignment of the claim for security purposes will normally be conducted. In order to make my master thesis easier to understand, I will describe these different options and their possible effects shortly in the following paragraphs:

By using the first mentioned transfer of a claim, a sale, the buyer receives full, i.e. legal and economic, ownership of the claim in exchange for an amount of money. Thereby, the risks, but also the benefits

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2 W. van Boom, Litigation Costs and Third-party Funding, in W. van Boom (Ed.), Litigation, Costs, Funding and Behaviour – Implications for the Law 9 et seq (2017).

of the trial are transferred to the new owner. Hence, he has all the control over the proceedings. The seller might participate in any further proceedings merely as a witness and receives an agreed upon amount of money in advance, regardless of the outcome of the lawsuit. Yet, the parties can also agree on a conditional price, which is only paid after the proceedings. In such circumstances, the seller does not receive the full advantage (immediate liquidity) of an unconditional sale.

When it comes to assignments, several variants can also be distinguished. Deciding for a full assignment, the claim is transferred from the former creditor (assignor) to the new owner (assignee), also resulting in a change of ownership and control, thus, it is a sale. Depending on the jurisdiction, a notification to the debtor or even an approval might be required. However, the claim transfer by using the mechanism of a mere claim collection (Inkassozession), puts the assignee in the position of a creditor in relation to third parties but at the same time is obliged to transfer the received money to the assignor. Accordingly, the assignee has the legal ownership whereas the economic ownership stays with the assignor. In addition, the former creditor normally also retains the control over and the risk of the procedure and, thus, gets any awarded profit less a fee for the assignee, but only after a fruitful lawsuit. Such a construction is often used in connection with cartel damage claims in Austria and Germany, whereby the claims have been collected by the economically strongest plaintiff or by a special purpose vehicle. Finally, and generally together with third-party funding, an assignment of a claim can be carried out for security reasons, which serves to hedge the costs incurred and the potential success fee. As far as litigation funding by a third party is concerned, a full transfer of the risks of the proceeding to the assignee takes place. In case of a successful result of the lawsuit, the assignor obviously has to share the profit with the assignee because of that. Nevertheless, control over the proceedings is not shifted to the funder.

If permissible under the respective regulation, instead of contracting with a third-party funder, a success fee can also be stipulated with an attorney. Such an agreement based on a contingency fee (as well as no cure no pay-rule or quota litis) "denotes an agreement that no fee will be charged for the lawyer's services unless the lawsuit is successful or is settled out of court". Contingency fees are usually a "percentage of the money recovered "to compensate for the risk involved".

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7 Under Austrian law, such a notification or even approval is not necessary; see Neumayr in KBB (Ed.), Allgemeines Bürgerliches Gesetzbuch Kommentar, § 1392 para 2 (2005).


9 Eversberg, Prozessfinanzierung für den Versicherungsprozess, in Veith, Grafé and Gebert (Eds.), Der Versicherungsprozess 172 (2016).

10 G. Wagner, Litigation Costs Recovery – Tariffs and Hourly Fees in Germany, in P. Gottwald (Ed.), Litigation in England and Germany, Legal Professional Services, Key Features and Funding 172 (2009).


Consequently, the risk and costs of a procedure are generally shifted to the lawyer. In the same way as a third-party funder, an attorney participates in the profit if the case is won.\(^\text{13}\) Still, the legal ownership and, therefore, the control over the proceedings remains with the claim owner. The time and the amount of payment depends on the result of the trial.

The four more closely considered jurisdictions at hand do not provide for the same level of accessibility to those funding prospects. As a result, one of the main targets of my master thesis is to discover the various limitations and possibilities given in those legal frameworks, as well as to ascertain the reasons for the allowance or non-allowance of claim assignments. Furthermore, an aim of my work is to find out whether there can be any considerable differences identified between common law and continental law – both concerning allowance and the reasoning behind this. Besides, I will attempt to figure out if there can be a line drawn that separates the sale from the different assignments of a tort claim in these regulations and if so, what the differences between these claim transfers are. Finally, procedural questions relating thereto, for example standing issues in connection with the admissibility of the claim, can arise and should therefore be addressed.

All in all, the objective is to figure out which of the diverse jurisdictions provide the most preferable framework for claimants and whether any one of these hinder equal access to a high standard of justice due to a lack of funding possibilities. Furthermore, I am curious whether a real commodification of claims is doable in one of these countries that goes beyond the mere offering of a good structure for third-party funders. Still, not only funding companies but also lawyers are seeking business opportunities by funding their claimant’s lawsuit. However, as will be seen, this is not equally allowed in all law systems at hand.

2. United States

2.1. The common law prohibition against certain forms of maintenance and champerty

In connection with the debate concerning financing civil litigation, the argument that the traditional common law doctrines of maintenance and champerty as well as barratry were violated by such interventions, is raised. The *Oxford English Dictionary* defines maintenance as the “the offence of aiding a party in a legal action without lawful cause.”\(^{14}\) Champerty, which is a form of maintenance, is a practice in which one person “agrees to support another in bringing a legal action, in exchange for part of the proceeds of the litigation.”\(^{15}\) The difference between them is that the maintainer does not get any remuneration for his support of the litigant.\(^{16}\) Consequently, having an interest in the litigation does not lead to champerty or maintenance.\(^{17}\) These doctrines arose in medieval England in order to prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of law. The reasoning behind this can be seen in the manner in which trials were performed during this time. Due to trials by ordeal or by battle, lawsuits were treated with disdain. As a necessary evil, they were tolerated, but they should never be encouraged and in no way supported by third parties.\(^{18}\) Hence, when it comes to the involvement of a third person, the real function of champerty and maintenance was and still is to hinder the stirring up of a lawsuit, which the plaintiff would otherwise not file, by an investor.\(^{19}\)

Although critical voices are being raised and litigation is seen as a positive force now, as well as the fact that contingency fees for attorneys are allowed throughout the United States, not all of them have yet formally and completely abolished these common law doctrines. Most of the states seem to have more or less “relaxed” prohibitions on champerty.\(^{20}\) An example for the elimination of this doctrine is Massachusetts, where the court ruled that it should not be recognised any more. According to the Supreme Court of Massachusetts, the past fears like “speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position”, can be prevented by other means. Instead of applying the doctrine of champerty, an agreement to finance shall be reviewed in order to find out whether the fees charged are fair and reasonable or whether “any recovery by a prevailing party is vitiated because of some impermissible overreaching by the


financier”. South Carolina argued in a similar fashion in order to abolish champerty as a defence. A similar result, even by different means, can be recognised in the states of Maine and Ohio, which enacted laws in order to set rules for agreements between third-party litigation funders and consumers. Maine’s legislation provides, among others, a registration duty with state authorities as well as a duty to disclose the fees and interest rate charged and a representation that the funding company will not make any decisions in the court proceeding. An almost uniform rule was introduced in Ohio in 2002, which overruled a former decision of the Ohio Supreme Court stating that such contracts were void because of champerty and maintenance.

Although not abolishing the doctrine of champerty, Florida is an example for applying a less rigid champerty rule. The doctrine is limited to those cases, in which an “officious intermeddling” took place. Such intermeddling was not realised in one case where someone lent money to one’s brother, who needed to continue his ongoing antitrust case. The sister, who lent the money, did neither instigate nor concern herself with the litigation. Another state, in which generally a “relaxed” prohibition on champerty is exercised, is New York. The doctrine, which was developed to impede “the commercialisation of or trading in litigation” is codified in New York Judiciary Law § 489. Accordingly, no person or co-partnership, nor any corporation or association shall solicit, buy or take an assignment of a debt, or other thing in action, or any claim, with the intent and for the purpose of bringing an action or proceedings thereupon. Non-compliance leads to a misdemeanor in connection with a fine of not more than five thousand dollars. § 489 (2) contains a safe harbour, which precludes a champerty defence when the sold debts (or other things in action) have an aggregate purchase price of at least five hundred thousand dollars. The defence of champerty was argued by the defendant in the case Merrill v. Love Funding, who was sued by the buyer of a distressed debt. The Court of Appeal rejected the defence and stated that champerty only bars purchased claims that would not be prosecuted if not “stirred up”. According to the court, the law’s purpose is “to prevent attorneys and solicitors from purchasing debts, or other things in action, for the purpose of obtaining costs from a prosecution thereof, and was never intended to prevent the purchase for the honest purpose of protecting some other important right of the assignee.”

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21 *Saladini v. Righelli*, 687 N.E.2d 1224 (Supreme Court of Massachusetts 1997).

22 *Osprey, Inc. v. Cabana Limited Partnership*, 532 S.E.2d 269, 382 (Supreme Court of South Carolina 2000).

23 Maine Revised Statutes Annotated Title 9-A §§ 12-104, 12-106.

24 Ohio Revised Code Annotated § 1349.55.


30 New York Judiciary Law § 489 (1) and (2).

it is not allowed to acquire "a right in order to make money from litigation", it is permissible to acquire "a right in order to enforce it".\textsuperscript{32}

Unlike the previously mentioned case Merrill v. Love Funding, the Supreme Court of New York recently denied such an acquisition with the intent to buy a debt for oneself and to enforce it through litigation, in the case Justinian Capital SPC v. WestLB AG. This claim was prohibited by champerty because the claimant did not really buy the notes but rather remitted the majority of their value back to the sellers. The court compared the case with merely buying approximately 15-20% of the notes. Also in such a case, "it could not sue for 100% of the lost value caused by the defendants – it would be limited to the value of its share." In the case at hand, the claimant, an empty shell, was just formed for the sole purpose of filing the action while the seller still effectively controlled the notes. Hence, as the plaintiff did not really own its claimed debt, the court concluded that champerty was realised by such a litigation by proxy.\textsuperscript{33}

To conclude, due to the absence of a nationwide consensus, the applicability of the doctrine of champerty is uncertain in many states.\textsuperscript{34} As a result, whether and under which circumstances this defence is (still) possible, depends on the respective law and/or jurisprudence of the state in which the proceeding occurs. As can be seen from above, there are significant discrepancies between the states' rulings and laws. Some states abolished the doctrine, while others still enforce it. In addition, those applying the doctrine might clearly have established rules when the transfer of a litigation claim is possible, like New York in the distressed debt market\textsuperscript{35}, or rather only using vague wording which in turn leaves a lot of room for uncertainty.

2.2. The assignability and non-assignability of a cause of action based in tort and its reasoning

As can be seen above, the doctrine of champerty still plays a role in some states. According to this, a claim is not freely assignable but rather has to be filed by the person who was actually harmed. One could say it wants to prevent a "stranger" taking the case to the court and benefit thereof.\textsuperscript{36} The question arises where the dividing line runs, on the one hand, assignments where such a (alleged) "danger" is actually the case and which are therefore not allowed and, on the other hand, when an assignment might be possible.

According to US law, an assignment is "a [voluntary] transfer of property or some other right from one person (the assignor) to another (the assignee), which confers a complete and present right in the subject matter to the assignee".\textsuperscript{37} It can be followed that through an assignment, the assignee is put in

\textsuperscript{35} R. Reardon and W. Russell, Complexities in Applying Champerty In Large-Scale Commercial Cases Noted; New York Court of Appeals Roundup, New York Law Journal 256, 3 (2016).
\textsuperscript{36} A. Sebok, The Inauthentic Claim, 64 Vand. L. Rev. 69 et seq (2011).
\textsuperscript{37} 6 Am. Jur. 2d Assignments § 1.
the shoes of the assignor, the party who originally had the right to bring the lawsuit, meaning the person who was actually harmed.\textsuperscript{36}

2.2.1. Personal injury claims

Today, the rule is that all causes of action can be assigned, unless there is an express prohibition in a statute or it is against public policy.\textsuperscript{39} The former includes the canon that "mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of assignment". Though, today, the pairing of assignability and survivability is questioned by some courts.\textsuperscript{40} Concerning the latter one, this might be violated by assignments of causes of action that tend to increase and distort litigation, hence which lead to maintenance and champerty.\textsuperscript{41} Based thereon some states differentiate between contract and tort claims. According to these states, actions arising out of contracts might be assignable, while the assignment of personal tort actions before judgment is void since they promote champerty and thus violate public policy. This exception is narrowed to actions "for torts, for personal injuries and for wrongs done to the person, the reputation, or the feelings of the injured party, and those for breach of contracts of a purely personal nature, such as promises of marriage". This is the case in North Carolina, where the Court of Appeal stated that an implied warranty of merchantability and fitness for a particular purpose is an element in a contract of sale. Thus, the claim for damages for economic loss resulted from the malfunction of a generator were assignable.\textsuperscript{42} In contrast, the failure to properly inspect and test the generator was seen as sounded in tort claims and, as a result, not assignable.\textsuperscript{43} The assignment of a personal injury action was also denied in California,\textsuperscript{44} in Kansas\textsuperscript{45} and Oklahoma.\textsuperscript{46} However, the separation between tort and contract claims could not be clearly differentiated in all these cases, leaving scope for uncertainty.

A further distinction was made by a claimant before the Supreme Court of Indiana. According to this approach, a cause of action based in tort arising from injuries to personal property is assignable, while this does not apply to a cause of action in tort to recover personal injuries. In this case, the claimant, a chiropractor, argued that he was not enforcing an assignment of a personal injury claim against the insurer, but only the assignment of proceeds from such a claim. While such a distinction was denied by the Supreme Court of Indiana,\textsuperscript{47} Maryland’s highest court did not see any "danger of champerty or

\textsuperscript{36} A. Sebok, The Inauthentic Claim, 64 Vand. L. Rev. 68 (2011).
\textsuperscript{39} 6 Am. Jur. 2d Assignments § 7; A. Sebok, The Inauthentic Claim, 64 Vand. L. Rev. 72 (2011).
\textsuperscript{40} P. Morgan, Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims, 66 Mo. L. Rev. 683 (2001) at 689 where he refers to the decision Comegys v. Vasse and footnote 54 where he denotes the case Geertz v. State FarmFire & Cas, according to which "the reason for this equation between survivorship and assignability is seldom explained."
\textsuperscript{41} 6 Am. Jur. 2d Assignments § 7; A. Sebok, The Inauthentic Claim, 64 Vand. L. Rev. 72 (2011).
\textsuperscript{44} In re Croshier, 228 B.R. 468, 37 U.C.C. Rep. Serv. 2d 761 (Bankruptcy Court of S.D. California 1998).
\textsuperscript{46} Dipple v. Hunt, OK CIV APP 17, 517 P.2d 444 (Court of Appeal of Oklahoma 1973).
\textsuperscript{47} Midtown Chiropractic v. Illinois Farmers Ins. Co., 847 N.E.2d 942, 8 (Supreme Court of Indiana 2006).
maintenance, nor any other public policy reason to preclude the assignment of expected personal injury claim benefits to secure hospital or medical expenses already incurred." According to the Maryland court, not only does the enforcement of assignments of proceeds from personal injury claims to providers of healthcare services avoid infringement on certain public policy concerns, but it promotes a good policy. In conclusion, its reasoning was twofold: on the one hand, the court draws a line between injury to property and personal injury. The claims at hand were commercial claims, which survive the death of its original owner, and not merely personal injury claims, which can neither be turned into property rights, nor survive the assignor. On the other hand, the court argued based on the public policy doctrine. 48

The ratio behind this property approach lies in the distinction between losing and retaining control over one’s lawsuit. In the case of assigning a personal injury claim, the assignor would lose all control and decision-making rights over the proceeding as well as the aspect of litigation strategy. In contrast, by assigning “merely” the proceeds from such a claim, he remains the owner of the lawsuit and, therefore, retains control over the disposition of the claim. He only loses the “fruits” of the suit but not the control over it. However, this distinction is not accepted by all courts, thus, the mere assignment of the proceeds is, according to those courts, only the assignment of the personal injury claim itself. 49

Concerning the public policy doctrine, the court argued that without such an assignment, “the health care provider may be forced to pursue its claim expeditiously against the patient” in case he cannot afford it himself. The effect would be that the patient might be forced to fight in two lawsuits, one against the tortfeasor and one as defendant against the health care provider. In order to avoid such a risk of losing the patient’s personal property, but rather give him “a measure of financial stability”, the court allowed the enforcement of an assignment for proceeds received from the tort action. 50

2.2.2. Professional malpractice and fraud claims

In addition to personal injury (proceeds) claims, tort claims arising out of professional, mostly legal, malpractice and fraud are not assignable in almost all states. An exception to the former statement can be found in Indiana and Florida, where actions against accountants’ malpractice in preparation of an audit are assignable. According to them, the unequal treatment of a professional action against a lawyer, on the one hand, and an auditor on the other hand, is based on the different relationship to its respective client. The reasoning for the non-assignability of legal malpractice claims is “the personal nature of legal services which involve a confidential, fiduciary relationship of the very highest character, with an undivided duty of loyalty owed to the client.” Compared to this, the accountant is independent and only gives an opinion on financial statements. Although the court acknowledges that an accountant’s duty of confidentiality is similar to that of an attorney, it points out that, unlike an


49 However, in those jurisdictions, with a few exceptions, this prohibition does not apply to the recovery of the payment of medical costs by an insurer. This is seen as legal subrogation, which merely constitutes a lien upon the proceeds; see A. Sebok, The Inauthentic Claim, 64 Vand. L. Rev. 82 et seq (2011).

attorney, he or she does not advocate a client’s position. By auditing his or her client, the auditor rather has a responsibility to the public which goes beyond the relationship with the client.\textsuperscript{51}

Fraud normally does not result in personal injury but rather in economic loss. Nevertheless, fraud claims are not assignable in all states which is justified by public policy. In addition, some states differentiate with regard to whether the fraud claim follows from a personal injury or an injury to property or contract.\textsuperscript{52}

2.3. Conclusion

As we have seen above, assignability of claims is the rule in the US today. However, the old common law doctrines of maintenance and champerty still play a role in some states. As a result, an exception to the general rule of assignability applies when it comes to personal injury tort claims, proceeds from such claims, professional malpractice and fraud. Whereas the assignment of the former is forbidden throughout the United States, one may find different approaches concerning the latter in the respective states. One reason, and perhaps a connecting factor between those claims at the same time, is that such claims are purely personal and do not survive the death of its original owner as well as that their assignment violates public policy.\textsuperscript{53} Another explanation can be found in the ownership approach\textsuperscript{54}, which wants to prevent that the real owner loses the control over his or her lawsuit. As long as this does not happen, there seems to be no risk of a “stranger” taking over the decision-making right of the case, and benefit thereof.

Perhaps this approach was another justification for the different treatment between the non-assignability of specific claims to non-lawyer third parties on the one hand, and the permission of the contingency fees for attorneys on the other hand. Although no assignment takes place in the latter one, it is a form of maintenance and champerty. However, the no-cure-no-pay doctrine was permitted in 1930 due to the industrialisation where an increasing number of actions for compensation against railroads and other powerful tortfeasors were filed. In order to meet this objective, a lawyer was allowed to “invest in his client’s civil litigation”, anything else was seen to be “ineffective” and would only hamper low-income groups from gaining access to justice.\textsuperscript{55}

Taking all these diversities into account, some problems seem to be inevitable in practice due to the lack of clarity and predictability. The applicability of the doctrines of maintenance and champerty is not really transparent\textsuperscript{56}, but rather depends on the respective state. Consequently, the outcome of such a proceeding is not only influenced by the place of jurisdiction but also by the particular judge in charge.

\textsuperscript{51} KPMG Peat Marwick v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa., 765 So. 2d 36 (Supreme Court of Florida 2000); A. Sebok, The Inauthentic Claim, 64 Vand. L. Rev. 86 et seq with further references (2011).

\textsuperscript{52} A. Sebok, The Inauthentic Claim, 64 Vand. L. Rev. 88 et seq (2011).

\textsuperscript{53} 6 Am. Jur. 2d Assignments § 49; A. Sebok, The Inauthentic Claim, 64 Vand. L. Rev. 64 et seq and 74 (2011).

\textsuperscript{54} See above paragraph 2.2.1.


\textsuperscript{56} W. van Boom, Litigation Costs and Third-party Funding, in W. van Boom (Ed.), Litigation, Costs, Funding and Behaviour – Implications for the Law, 17 (2017) concerning English law. However, this seems also to be valid in the United States.
of the case. But even then, each lawsuit may end differently according to the various facts in each case. Particularly, in association with the above-mentioned assignment of proceeds from a personal injury claim, it appears that circumventions are unavoidable. As a result, whether a party has success will therefore depend on the intelligence of its lawyer and on the resulting standpoint of the judge.
3. England

3.1. The common law prohibition against certain forms of maintenance and champerty

In the past, similarly to the United States, champerty and maintenance were thought to benefit those who were in need of protection. On the one hand, these doctrines should protect the defendant from "vexatious litigation brought by a funded claimant" and on the other hand, the underprivileged claimant forced to pay a percentage of their awarded damages to its investor.57 However, times have changed and English law also increasingly dissociated from those doctrines which resulted in their abolition as crimes or torts through the Criminal Law Act 1967 for three main reasons: first, there was already a lot of lawful litigation funding by third parties like trade unions, insurers, trading associations, the state through legal aid, and those who had a legitimate interest in supporting one's lawsuit. Secondly, hardly anyone could bring the required evidence of damage by proving that without the help of the funder, the claim would not have been filed or continued. Thirdly, significant cases were very seldom, thus, there was no need anymore.58

3.1.1. Third-party funding

So, although the claimant had to share his or her awarded damages with the funder in case of a win, the view that third-party funding is favourable for those who cannot afford access to justice and would therefore recover nothing at all, gained the upper hand in England.59 In the case Gulf Azov Shipping Co. Ltd. v Idisi, the Court of Appeal stated that "public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation."60 Although the implementation of the Jackson Final Report increased the possibilities for third-party litigation funding61, champerty and maintenance can still play a role as part of the law of public policy because the elimination as a crime or tort by the Criminal Law Act 1967 "shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal".62

If champertous, the unlawful funding can render a litigation funding contract unenforceable,63 lead to an order for non-party costs against third-party funders or to a stay of the principal proceedings and,
finally, forbid the quantum meruit claim of an investor.\textsuperscript{64} In order to avoid these consequences, it is necessary that the third-party funder does not control the dispute, but rather ensures that the client is advocated by an independent solicitor. In addition, the third-party funder must not act in a way that could lead to a violation of an attorney’s duty. Furthermore, he is not allowed to “improperly stir up litigation and strife” and to demand extremely high percentages of the profit. Finally, any liabilities which the third-party funder agrees to bear, have to be written down in the litigation funding contract.\textsuperscript{65}

3.1.2. Conditional and contingency fee agreements

Concerning the funding by one’s attorney, compared to the United States, England kept a more rigorous approach. However, the above-mentioned movement also changed the public policy approach towards the payment of a lawyer by its client on a no-win-no-fee basis.\textsuperscript{66} This led to the introduction of Section 58 of the Courts and Legal Services Act 1990 (amended through the Courts and Legal Services Act 1999), which permits the provision of advocacy or litigation services under a conditional fee agreement (CFA)\textsuperscript{67}, i.e. “a fee under which a lawyer will recover his normal fee (with or without a percentage uplift) in certain events”. Here, the starting point is the lawyer’s normal profit costs.\textsuperscript{68} Whether a CFA is champertous has to be examined on a case-by-case basis, in which one has “to look at the CFA in the round, and decide whether it would undermine the purity of justice, or would corrupt public justice”.\textsuperscript{69} In contrast, a contingency fee entails a lawyer receiving some of the client’s recovery. Hence, the starting point here is the client’s profit.\textsuperscript{70} Only since 2013 – based on the Jackson Final Report – a sort of contingency fee, the damages-based agreements (DBAs), has allowed attorneys to work for their clients in return for a percentage of the rewarded profit if the case is won. However, so far, this funding mechanism is not yet widely used, in particular, because of the low possible percentages for lawyers.\textsuperscript{71} Whether such an agreement is champertous also has to be observed in each case. However, as will be seen below, courts still seem to have a more strict approach in this regard.

In addition, also the distinction between funding by third persons and funding by lawyers still plays an important part under English law. This can be followed from Lord Neuberger in \textit{Sibthorpe v. Southwark}.


\textsuperscript{65} R. Mulheron, \textit{England’s unique approach to the self-regulation of third party funding: a critical analysis of recent developments}, Cambridge Law Journal, 73 (3), 582 et seqq (2014), who refers, inter alia, to the Code of Conduct for Litigation Funders which also can be attributed to the Final Jackson Report.


\textsuperscript{69} \textit{Sibthorpe v. Southwark LBC} [2011] EWCA Civ 25, at 35.

\textsuperscript{70} \textit{Rees v. Gateley Wareing} [2014] EWCA Civ 1351, at 24; Final Jackson Report, Chapter 12, para 1.1.

LBC stating that in contrast to allegedly champertous agreements “to which a person conducting the litigation (or providing advocacy services) is not a party”, agreements with such a person have “always been treated as a special category or species of champertous agreements, and are subject to stricter rules.”

Regarding these agreements, champerty remains “substantially” as described and discussed in Wallersteiner v. Moir concerning a contingency fee. By paying the lawyer a proportion of the recovery, champerty is realised since a lawyer has to advise his client “with a clear eye” and in an impartial manner. Furthermore, a lawyer’s duty to represent his or her client’s interest may conflict with his or her obligation to act with “scrupulous fairness” towards the court, if he or she can profit from the successful outcome of the proceedings. However, a contingency fee agreement between an accountant and the client was not seen as champertous because in the case at hand it was only an ancillary service to the conduct of litigation (the accountant did not “conduct litigation”) and enabled an impoverished claimant access to court. The fact that the arrangement in this last mentioned case was not concluded with a solicitor but rather with an accountant, should not be overlooked. Despite the fact that DBAs were introduced in 2013, even today, it remains – as we will see below – questionable whether this contingency fee agreement would have been valid in case of termination with an attorney.

In the above-mentioned case of Sibthorpe v. Southwark LBC, the specific CFA according to which the claimant’s solicitor indemnified its client against orders for the defendant’s costs if the client loses, it did not violate public policy. Lord Neuberger admits that this indemnity leads to a financial interest of the solicitor in the outcome of the proceedings but concluded that:

[n]o case has been cited in which it has been held to be champertous for a person to agree to run the risk of a loss if the action in question fails, without enjoying any gain if the action succeeds. Further, if one considers the various judicial definitions of champerty, they all envisage a gain if the action concerned succeeds. [...] and while there may also be a loss if the action fails, what is different about the indemnity is that there is just a loss if the action fails.

3.1.3. Conclusion

Although the application of champerty has become more and more relaxed and despite introducing DBAs, the idea of this doctrine has still not been laid to rest. Just recently, a contract was not enforceable as it prepared for a contingency fee for the provision of litigation services, since it was “prohibit[ed]”. The Court of Appeal pointed out that the solicitor could “have entered into a conditional fee agreement that complied with section 58” of the Courts and Legal Services Act. As already

74 R (Factorstam Ltd) v. Secretary of State for Transport, Local Government and the Regions [2003] QB 381, at 79-90, other arguments rendering to this conclusion were that the agreement has been concluded after the claimants succeeded already in the question of liability, the proportion was “not extravagant” and their work was carried out in a transparent way; see also Sibthorpe v. Southwark LBC [2011] EWCA Civ 25, at 32.
76 Rees v. Gateley Wareing [2014] EWCA Civ 1351, at 64 and 65; the case at hand concerned primarily the question whether the work carried out by a solicitor was the provision of litigation services, as he (only) assisted the solicitor who conducted litigation. The Court of Appeal came to the conclusion that some of their activities constituted “litigation services”, which led to the application of section 58 of the Courts and Legal Services Act.
mentioning above, in case of a contingency fee agreement – instead of a CFA – together with an
attorney, the court seems to scrutinise it with more care. Hence, in respect of this decision, uncertainty
remains.

This means that in order to be on the safe side, a CFA is more in accordance with the English
approach, which, on the one hand, aims to prevent an attorney from receiving more than his or her
ordinary profit costs. As long as the remuneration stays in this range, there is no danger of
participation in the “spoils”. This implies that there is no risk that the attorney’s own interests might
conflict with the duties to the court to act in a honest and trustworthy way without there being any “risk
to the purity of justice”. One the other hand, due to the decrease of legal state aid and high insurance
costs, underprivileged claimants are afraid of filing their claims although they have good prospects. In
order to enable them to have access to justice, “more flexible funding arrangements” are deemed valid

3.2. The assignability and non-assignability of a cause of action based in tort and its reasoning

When it comes to the real assignment of a cause of action, English law seems to harmonise with
those states of the US which apply a stricter approach concerning champerty. Under English law, an
assignment is the transfer of a contractual right, for example a debt owed by A to B, from B (assignor)
to the new creditor C (assignee). The debtor A is not a party to the assignment and his consent is not
needed.\footnote{A. Burrows, English Private Law 8.328, 3\textsuperscript{rd} ed. (2013).} Initially, due to fear of champerty and maintenance, the assignment of a case of action had
no effect under common law. However, it was possible under equity, unless the assignment in fact led
to an “officious intermeddling” by the assignee in litigation between the assignor and its debtor.\footnote{A. Burrows, English Private Law 8.329, 3\textsuperscript{rd} ed. (2013).}

After the introduction of one administered court system for common law and equity through the
Judicature Act 1873, section 136 (1) of the Law of Property Act 1925, it now provides for a statutory
assignment. According to this, “the legal right to a debt or other legal thing in action is transferred to
the assignee if the assignment is absolute and in writing and if written notice of it has been given to
the debtor”. In the case that these conditions are not fulfilled, the assignment is still effective in equity.
Though, in contrast to a statutory assignee, who “can sue the debtor alone”, the equitable assignee
“must join the assignor as a party to the action”. The reason behind this is to prevent the debtor from
any disadvantages, which could derive from not having both parties before the court. However, if such
a practical need does not exist, the courts do not demand such a joinder any more.\footnote{A. Burrows, English Private Law 8.331 and footnote 1296, 3\textsuperscript{rd} ed. (2013) with further references.} Concerning the
genral principle of consideration in English law, the approach in connection with assignments is that it
is no requirement if the assignment is a completed gift.\footnote{A. Burrows, English Private Law 8.337 \textit{et seqq}, 3\textsuperscript{rd} ed. (2013).}

3.2.1. A genuine commercial interest

Today, the assignment of causes of action is possible but void if it violates the doctrines of
maintenance or champerty, which has to be examined in each case.\footnote{A. Burrows, English Private Law 8.347, 3\textsuperscript{rd} ed. (2013).} Like in the United States, there
seem to be less problems with contract claims. The assignments of liquidated, hence, fixed and
definite, contract claims as well as the contract claims for unliquidated damages were lawful.
Concerning the latter, champerty or maintenance was denied because the assignee had a proprietary
interest or a genuine commercial interest.63 This “test of genuine, commercial interest”64 is also of
importance for the assignment of tort claims, as will be seen below.

It was introduced in the “leading assignment decision” in Trendtex v. Credit Suisse.65 Trendtex had a
claim for damages for breach of contract against the Central Bank of Nigeria. As Trendtex could not
afford the further proceedings, it assigned all its claims by way of security to its creditor bank Credit
Suisse, which financed the lawsuit. This assignment did not cause any problems, since Credit Suisse
as a creditor of Trendtex “had had a genuine and substantial interest in the success of” the
proceedings against the Central Bank of Nigeria. However, the following assignment according to
which Trendtex assigned all its residual rights against Central Bank of Nigeria to Credit Suisse,
stipulated that it had no further interest in the claim and that Credit Suisse could sell the claim to a
third party for $ 800,000. The claim was subsequently settled for $ 8 million by this buyer. Trendtex
wanted to have the agreement set aside because of having fulfilled champerty. The House of Lords
considered that the assignment was champertous because it led to the possibility of a profit being
made, either by Credit Suisse or the third party, from the cause of action. As Trendtex gave up its
control over the litigation and Credit Suisse had the sole right of initiative for the launch of
proceedings, such an assignment realised “trafficking” in litigation. Hence, this second assignment of
a cause of action was void as it violated public policy since it was “a step towards the sale of a bare
cause of action to a third party who had no genuine commercial interest in it in return for a division
of the spoils”.66

3.2.2. Personal injury claims

Although this case was about an action based in contract, it was used as a justification in the case
Simpson v. Norfolk, where the questions arose whether a cause of action in tort for damages for
personal injury is possible and if so, under which circumstances such an assignment would be void
due to public policy.67 Similarly to most of the states of the US, problems with the assignability arises
in the context of tort claims, in particular with personal claims, as such rights cannot generally be
assigned.68 However, in the last mentioned case, Moore-Bick LJ’s verdict goes one step further in
comparison to some other common law countries.69

64 W. van Boom, Litigation Costs and Third-party Funding, in W. van Boom (Ed.), Litigation, Costs, Funding and
65 A. Tettenborn, Personal injury claims and assignment: interesting times?, Professional Negligence 2012, 28(1),
61.
66 Trendtex Trading Corporation v. Credit Suisse [1982] A.C. 679 (HL); see also Simpson v. Norfolk & Norwich
University Hospital NHS Trust [2011] EWCA Civ 1149 at 14.
69 A. Tettenborn, Personal injury claims and assignment: interesting times?, Professional Negligence 2012, 28(1),
63.
The husband of the claimant, Mr. Simpson, died of cancer. In addition, he had suffered from an infection in the hospital, which caused him more pain during his last days. His widow claimed that this was the hospital's fault because they had not taken reasonable care regarding the hospital's cleanliness. Although the claim was settled, the claimant still felt that the hospital's standards of cleanliness were insufficient. A few years later, Mr. Catchpole was also infected during his treatment at the same hospital. As he started proceedings, the claimant became aware and they agreed on the assignment of his cause of action for £1. Afterwards, the claimant persuaded the proceedings in her own name and demanded £15,000. Yet, the financial aspect was not her primary goal, but rather to highlight the inadequacies of the hospital.93

The defendant argued that such a claim is not assignable and, furthermore, that the claimant had no genuine commercial interest. Concerning the first issue, the Court of Appeal ruled that the claim for damages for personal injury is not "so inherently personal as to be unassignable" because "the obligation to pay compensation, which arises by operation of law, is not one that is personal in the sense that it depends upon the identity of the claimant".91 Hence, it stated that tort claims for personal injury are assignable because these damages are "a species of property". Arguments concerning problems with witness statements, set-off's or counterclaims were not convincing since they might occur whenever an assignee files a claim based on section 136 of the Law of Property Act 1925.92 However, the claimant did not fulfil the requirement of a genuine commercial interest according to the Trendtex case. Lord Justice Moore-Bick pointed out:

that the law will not recognise on the grounds of public policy an assignment of a bare right to litigate, that is, a right to litigate unsupported by an interest of a kind sufficient to justify the assignee’s pursuit of proceedings for his own benefit. Moreover, as the decision in Trendtex itself demonstrates, the assignment of a cause of action for the purposes of enabling the assignee or a third party to make a profit out of the litigation will generally be void as savouring champerty.93

Although Mrs. Simpson did not act in a random manner, her personal "campaign" against the hospital simply did not constitute a sufficient interest in the claim to justify the assignment. As a result of this case, although tort claims are assignable, "an assignment of a bare cause of action in tort for personal injury remains unlawful and void" as long as the assignee's motive does not pursue to receive a redress for a legal wrong. Otherwise, there would be a risk of supporting a system of selling and purchasing claims only for the purpose of gaining a profit.94

3.3. Conclusion

To summarise, problems in relation to assignments of choses in action arise when it comes to personal tort claims. Insofar, England seems to be similar to the United States. Though, the decision in Simpson v. Norfolk might extend the rules for such assignments as their assignability were clearly

stated. Nevertheless, in practice in most of the cases, both jurisdictions will still come to the same result as problems may arise under which circumstances of this assignment are not seen as contradicting champerty under English law. As we have seen, when it comes to third-party funding and CFA, a more liberal approach is taken in England now, but this does not necessarily apply to the assignment of personal tort claims or to contingency fees. Regarding the introduction of DBAs, the latter is still associated with some risks.

Although assignable, the limit for personal injury claims is reached if one does not have a genuine commercial interest in the assigned claim. This is fulfilled, and thus champertous, if the assignee only claims his or her own profit whereas it seems possible when a creditor sues in the name of the victim in order to get his or her money from the tortfeasor. Similarly, it seems possible to assign its claim to a, for this purpose founded, company, where the assignor still has an interest in this company.

As is the case in the US, the purpose for not allowing these assignments is to safeguard the pureness of justice and the interests of weak plaintiffs. So, whenever someone supports a claim with "justification or excuse" no champerty arises because in this case, there is no "officious intermeddling with the disputes of others in which the meddler has no interest whatsoever." However, it is questionable as to what is meant by "uncrupulous purchasers" or the tracking of "ulterior motives." One might conclude that one has to ask, "Why would anyone assist in the proceedings of another person? Is there a reasonable or legitimate basis for litigating for someone else?" This is not the case, and champerty and maintenance still arise if someone is only interested in his or her own gain. However, if the assignee has him or herself suffered loss or is a creditor who had lent some money to the assignor, it seems that he or she has enough interest to claim the tortfeasor as an assignee of someone else. In all the other cases, an impoverished claimant can seek assistance only by means of funding without giving up any control over one's claim. Nevertheless, also in these mentioned circumstances, uncertainty remains whether the "interest test" is satisfied in each respective case.

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96 Trendtex Trading Corporation v. Credit Suisse [1982] A.C. 679 (HL) at 703A-D.


98 This was the case in JEB Recoveries LLP v. Binstock [2015] EWHC 1063 (Ch) where the assignor still hold one-third in the company (the assignee and claimant). However, this case was not about the cause of action but rather about debts.


4. Germany

4.1. The assignability of tort claims (§ 398 BGB and § 399 BGB)

To begin, we do not need a chapter about the doctrines of maintenance and champerty since they are unknown under German law. Therefore, as will be seen, less problems arise from assignments of tort claims or other ways of litigation funding through a third person. It is a kind of paradox that civil law countries like Germany allow these practices, and at the same time are hostile towards contingency fees, whereas common law permits contingency fees or at least CFA while struggling with assignments in order to fund litigation proceedings by third persons.\footnote{102}

Accordingly, as a rule in the German Civil Code (BGB), every claim can be transferred from the assignor to the assignee by contract, whereby the assignee steps into the shoes of the assignor (assignment according to § 398 BGB). This rule applies to both contract and tort claims.\footnote{103} § 399 BGB excludes the assignment of a claim only "if the performance cannot be made to a person other than the original obligee without a change of its contents or if the assignment is excluded by agreement with the obligor."\footnote{104} The former exception concerns "highly personal rights" where the person of the obligee is an essential part of the performance and special-purpose services. It includes, for example, maintenance in nature, an entitlement to leave, to receive an operation or to be portrayed.\footnote{105} Moreover, the contract between the assignee and the assignor can be concluded by conclusive conduct and the debtor must not be informed. However, his position must not be worsened.\footnote{106}

In light of the considerations above, and in connection with the first decision of the follow-on claims in the cement cartel cases, one can conclude that the assignment of tort claims to a third-party funder is possible. The last mentioned case included the sale of the damage claims to an entity that bundled those individual claims and filed the claim on its own behalf. The sale price was mostly dependent on the success of the claim. The appeal court pointed out that this fact is compatible with the circumstance that the assignee had to act "in the predominantly economic interest of the former claim owner". As a result, the appeal court concluded that the claimant was empowered to conduct litigation.\footnote{107} However, the claim was recently dismissed because the assignments before July 2008

\footnote{102}{G. Wagner, *Litigation Costs Recovery – Tariffs and Hourly Fees in Germany*, in P. Gottwald (Ed.), Litigation in England and Germany, Legal Professional Services, Key Features and Funding 172 (2009); Eversberg, Prozessfinanzierung für den Versicherungsprozess, in Veith, Grafe and Gebert (Eds.), Der Versicherungsprozess 186 (2016).}


\footnote{107}{OLG Düsseldorf 14 May 2008, VI U (kart) 14/07 (Zementkartell) at 80 et seqq, confirmed by BGH 7 April 2009, KZR 42/08; W. van Boom, *Litigation Costs and Third-party Funding*, in W. van Boom (Ed.), Litigation, Costs, Funding and Behaviour – Implications for the Law, 15 (2017).}
contravened the former German Legal Advice Act because the entity also provided some legal advice which was prohibited under the former law. Furthermore, the changed assignments after 2008 were also unlawful as they were considered to be contrary to public policy since the entity, a special purpose vehicle, did not have enough financial means to pay the expenses of the defendants if the case was lost. This led to the unlawful transfer of risk towards the defendants.

For this reason, the capital requirements for third-party funding have been increased. As more and more follow-on litigation is to be expected, the business for litigation funding through third companies intensifies. In this context, it is worth mentioning that only through the amended German Act against Restraints of Competition (GWB) in 2013, consumer associations and associations representing the other side of the market are allowed to claim for injunctive relief and for abatement or removal. The latter also includes the refunding of payments which were anticompetitive. Consequently, the assignment of such claims towards those associations are lawful. However, one must not ignore the existing high barriers in order to bundle claims for a number of injured parties. § 33 (2) number 1 GWB states, for example, that associations representing the other side of the market need to have a significant number of affected members.

The above-mentioned change in the German Legal Advice Act has its origin in the fact that contingency fees like under American law or conditional fees under English law were not allowed at all in Germany until 2008. Since then, in exceptional cases, success fees are permitted under specific conditions. The reason for a change of this regulation was a judgment by the Federal Constitutional Court, stating that it is unlawful to have such a rule without any exemptions, in particular in order to create access to justice for those claimants who cannot afford it otherwise. However, due to the strict requirements for such agreements, success fees are still not liberalised and are therefore not widely used. The reasons might be that the limits of this rule are still blurred and that well-off claimants are not eligible for it due to the financial requirements stated in the rule. Furthermore, even if a contingency fee is contracted, the loser has to pay the fees of the opponent’s lawyer, as well as the court costs in the event of losing the case (the loser pays rule). To put it more simply, the claimant might still face existential difficulties if he loses the case. Consequently, regardless of one’s financial status, filing of a claim still remains risky for a lot of clients who do not want to bear all those risks. Concerning the stated paradox at the beginning of this chapter, the restrictions for success based fees triggered a greater need for litigation funding by third parties than in the United States in order to overcome these financial risks.

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108 OLG Düsseldorf 18 February 2015, VI U (kart) 3/14 (Zementkartell) at 47 et seqq.

109 OLG Düsseldorf 18 February 2015, VI U (kart) 3/14 (Zementkartell) at 8, 31 and 94 et seqq.


111 § 33 (2) number 1 GWB.

112 C. Duve, Success-Fees in Germany, in P. Gottwald (Ed.), Litigation in England and Germany, Legal Professional Services, Key Features and Funding 216 et seqq (2009).

4.2. The Prozessfinanzierungsvertrag (procedure-funding contract)

4.2.1. In general

As already indicated above, the funding of third party’s tort claims is recognised as legitimate due to the possibility of assigning those claims based on § 398 BGB. What’s more, the restrictions concerning success-based attorney fees created a market demand for this activity, especially in connection with the bundling of claims. As a result, it is a very attractive business model. Another reason for this can be seen in the fact that German law consists, not only of severe and fixed provisions for the fees of attorneys, but also monopolises their profession to the German bar. Such restrictions do not apply to third-party funders. Finally, the fee-shifting to the losing party supports the rewarding of this business.  

Following this, claimants who are risk-averse and therefore reluctant to begin legal proceedings, or who cannot afford it, can call on one of the approximately 15 funding companies\textsuperscript{115} in order to have the lawsuit funded, and the company pays the fees of the opponent’s lawyer in case of a loss of proceeding. For assuming this risk, the claimant has to pay a substantial percentage of the possible proceeds (between around 20% and 50%) to the third-party funder, likewise a \textit{quota litis} but not with the lawyer. In other words, by contracting a third-party funder, the remuneration – instead of the fee of the attorney – depends on the success of the proceeding.\textsuperscript{116}

The funder is not allowed to give legal advice to the claimant. This must still be done by the lawyer, which leads to a “sensible division of labour” between the funder, who is the investor of the claim, and the attorney, who has the monopoly for giving legal advice.\textsuperscript{117} Due to the major risk factors, third-party funders are not willing to invest in every claim. On the contrary, they carry out extensive due diligences in order to scrutinise not only the merits of the respective claim, but also the creditworthiness of the opponent. In assuming low chances of success, the funder will not invest into the proceedings. This seems to be the major part since in reality only one in ten claims is funded.\textsuperscript{118} Concerning the contract itself, different opinions exist among German literature. Whereas one side takes the view that such contracts constitute a contract \textit{sui generis} with elements of both insurance and credit contracts, the opinion of the vast majority is that these contracts are silent or undisclosed.


\textsuperscript{117} Eversberg, \textit{Prozessfinanzierung für den Versicherungsprozess}, in Veith, Gräfe and Gebert (Eds.), \textit{Der Versicherungsprozess} 167 (2016).

\textsuperscript{118} Eversberg, \textit{Prozessfinanzierung für den Versicherungsprozess}, in Veith, Gräfe and Gebert (Eds.), \textit{Der Versicherungsprozess} 168 et seq (2016); Wagner, \textit{Litigation Costs Recovery – Tariffs and Hourly Fees in Germany}, in P. Gottwald (Ed.), \textit{Litigation in England and Germany, Legal Professional Services, Key Features and Funding} 172 et seq (2009).
partnerships under the BGB between the investor and the claimant.\textsuperscript{119} The funder and the claim owner do not only share the same interest, the best optimal realisation of the claim, the contract also imposes extensive information and coordination obligations on the claim owner. However, the funder is never allowed to supersede the lawyer since a firm separation between financing the process on the one side and legal advice on the other side has to be maintained.\textsuperscript{120}

4.2.2. The assignment

In order to receive funding, the claim owner has to assign the claim to the funder for security. That silent security assignment has two advantages for the funder. It does not only serve to hedge the costs incurred and the potential success fee, but also serves as a “means of discipline” for claim owners who do not comply with their obligations or who want to deceive or cheat the funder. Considering the procedural aspect, the claim owner litigates in his own name. Against the background of a silent partnership, the fact that third-party funding is taking place is usually not disclosed, i.e. without any notice to the debtor. In comparison, it is worth mentioning that such an assignment for security would lead to a loss of the locus standi in Switzerland. Hence, only a pledge for security is given there.\textsuperscript{121}

However, the question arises whether such an assignment really leads to a change of ownership and particularly to a shift of control over the proceedings. From the abovementioned considerations, it results that such an assignment for security cannot be equated with a “real” sale of a claim, whereby the acquirer steps into the shoes of the seller, the original claim owner. Such a “market of legal claims” must be distinguished from the market for third-party funding.\textsuperscript{122} Although the funder is entitled to be informed and has a vote regarding process and cost-incurring measures, specifically whether a settlement can be accepted or not, the control over the lawsuit seems to stay with the claim owner. If they are unable to reach an agreement, the party which wants to settle is entitled to cancel the procedure-funding contract. Compared to that, in a “market for legal claims” the investor would buy the claim, which he then files in his own name. Thus, the funder gets control over the lawsuit and the former claim owner serves as a witness and receives the purchase price only after a successful trial.

\textsuperscript{119} Eversberg, Prozessfinanzierung für den Versicherungsprozess, in Veith, Gräfe and Gebert (Eds.), Der Versicherungsprozess 166 and 172 et seq (2016); J. Jaskollo, Prozessfinanzierung gegen Erfolgsbeteiligung, 72 et seqq (2004) who clearly is in favour of the partnership argument; also D. Böttger, Gewerbliche Prozessfinanzierung und Staatliche Prozesskostenhilfe: Am Beispiel der Prozessführung durch Insolvenzverwalter, 188 (2008) confirms that the funder and the claimowner share a common objective: to file an action and gain a reasonable profit; W. van Boom, Litigation Costs and Third-party Funding, in W. van Boom (Ed.), Litigation, Costs, Funding and Behaviour – Implications for the Law, 15 (2017) with further references.

\textsuperscript{120} Eversberg, Prozessfinanzierung für den Versicherungsprozess, in Veith, Gräfe and Gebert (Eds.), Der Versicherungsprozess 172 (2016); M. de Morpurgo, A Comparative Legal and Economic Approach to Third-Party Litigation Funding, 19 Cardozo Journal of International and Comparative Law 402 (2011).

\textsuperscript{121} Eversberg, Prozessfinanzierung für den Versicherungsprozess, in Veith, Gräfe and Gebert (Eds.), Der Versicherungsprozess 172 (2016); W. van Boom, Litigation Costs and Third-party Funding, in W. van Boom (Ed.), Litigation, Costs, Funding and Behaviour – Implications for the Law, 16 (2017); as we will see below, Austria also follows the German model.

As this model leads to the loss of the anonymity of the investor, it has only been implemented rarely.\textsuperscript{123}

4.3. Possible restrictions and their reasons

On the basis of the above-mentioned considerations and in the absence of the common law doctrines of champerty and maintenance, it can be concluded that assignments of tort claims to third-party funders, in particular for security reasons, are permissible in Germany.\textsuperscript{124} A reason might be that in those cases, the control over the lawsuit stays with the claim owner. However, that's not all. In light of what has been stated thus far, it seems that even the assignment for other purposes, including a real sale, is permissible, as long as it is not the lawyer him or herself who is the assignee or the buyer of the claim.\textsuperscript{125}

As a result, when it comes to litigation funding and assignment of claims, the most severe restrictions in Germany can be found in the field of contingency fees. In contrast to the United States, a lawyer is in principle not allowed to give legal advice and finance the lawsuit at the same time, whereas no public policy reason arises if a third party invests in the lawsuit. One gets the impression that financing through outsiders is considered as "much more harmless".\textsuperscript{126} The reason behind this is that contingency fees have been seen as "inappropriate" because they might lead to incorrect decisions by lawyers. According to German lawmakers, contingency fees "run contrary to the independent role of the lawyer as a guardian of the law". The lawyer acts on the behalf of the client and must therefore be disconnected from his own profit and economic interest. As already mentioned above, due to a change of law in 2008, this harsh principle is less strict when it comes to impoverished clients. In such limited situations, a deviation from the general rule is probable.\textsuperscript{127}

However, this ethical regulation concerning the independence of the lawyer from his client, which exists for lawyers attending the bar, does not apply to the parties of a procedure-funding contract, in which the lawyer does not participate.\textsuperscript{128} As long as the separation of financing on the one hand, and giving legal advice on the other hand, is obeyed, no real problems arise.

\textsuperscript{123} M. de Morpurgo, A Comparative Legal and Economic Approach to Third-Party Litigation Funding, 19 Cardozo Journal of International and Comparative Law 356 (2011); Eversberg, Prozessfinanzierung für den Versicherungsprozess, in Veith, Gräfe and Gebert (Eds.), Der Versicherungsprozess 186 et seq (2016).

\textsuperscript{124} M. de Morpurgo, A Comparative Legal and Economic Approach to Third-Party Litigation Funding, 19 Cardozo Journal of International and Comparative Law 403 (2011).

\textsuperscript{125} W. van Boom, Litigation Costs and Third-party Funding, in W. van Boom (Ed.), Litigation, Costs, Funding and Behaviour – Implications for the Law, 16 (2017).

\textsuperscript{126} G. Wagner, Litigation Costs Recovery – Tariffs and Hourly Fees in Germany, in P. Gottwald (Ed.), Litigation in England and Germany, Legal Professional Services, Key Features and Funding 172 (2009).

\textsuperscript{127} See § 1 and § 49b (2) of the Federal Lawyers’ Act (Bundesrechtsanwaltsordnung) and § 4a Lawyers’ Remuneration Act (Rechtsanwaltsvergütungsgesetz); G. Wagner, Litigation Costs Recovery – Tariffs and Hourly Fees in Germany, in P. Gottwald (Ed.), Litigation in England and Germany, Legal Professional Services, Key Features and Funding 169 et seq (2009); M. de Morpurgo, A Comparative Legal and Economic Approach to Third-Party Litigation Funding, 19 Cardozo Journal of International and Comparative Law 404 (2011).

\textsuperscript{128} M. de Morpurgo, A Comparative Legal and Economic Approach to Third-Party Litigation Funding, 19 Cardozo Journal of International and Comparative Law 403 (2011); Eversberg, Prozessfinanzierung für den Versicherungsprozess, in Veith, Gräfe and Gebert (Eds.), Der Versicherungsprozess 167 (2016).
4.4. Conclusion

Compared to common law jurisdictions, proceedings before a court in civil law countries like Germany are less costly 129 and more supported by legal aid. Nevertheless, due to the lack of contingency fees for every claimant, access to court is still a question of financial means. Against this background, Germany is an attractive market for third-party litigation funding. As we have seen, due to the absence of the doctrine of champerty, assignments of tort claims are possible according to § 398 BGB. In connection with procedure-funding contracts, the claim owner assigns the claim to the funder for security reasons. 130

However, the cases stated above include only the assignment to a third-party funder or at least to a special purpose vehicle like in the cement cartel case. Hence, the real owner still had relations to the assignee in some way. The question arises, whether the assignment to someone else who has nothing to do with the case, or in the words of English law, to someone who does not have a genuine commercial interest in the assigned claim, is also doable. I think, a clear distinction has to be made between the cases where the assignor gives up his control over his claim (which would constitute a “market of legal claims”) and where the assignor still has control or at least some influence on the claim (which “merely” leads to the market for third-party funding). 131 Whereas the former case seems to constitute a real sale combined with an immediate cash flow, in the latter event, the transfer of money depends on the outcome of the trial. The above-mentioned cases in Germany give the impression that they relate “only” to the market for third-party funding. So far, it is therefore still open whether a further step in the commodification of claims that has already started, and the creation of a new business model, is possible.

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129 Under American law, the private party has to pay for discovery, witness examinations etc, which is done by the court in civil law countries; see M. de Morpurgo, A Comparative Legal and Economic Approach to Third-Party Litigation Funding, 19 Cardozo Journal of International and Comparative Law 406 (2011).

130 See above 4.2.2.

5. Austria

5.1. The assignability of tort claims (§ 1392 ff ABGB)

Like Germany, Austria is a civil law country, which states in its Civil Code (ABGB) that the assignment of a claim from the assignor (the former creditor) to the assignee (the new creditor) is possible.\textsuperscript{132} In addition to the assignment, a contract for the sale or donation of the claim or a security agreement (the Title) is necessary. There is only a change in the person of the creditor, whereas the content of the claim stays the same. It follows that the legal situation of the debtor cannot be worsened. For this reason, the debtor must not be informed of the assignment. However, as long as there was no notice to the debtor, he can make payments to the assignor in discharge of his obligations.\textsuperscript{133} § 1393 ABGB only forbids the assignment of “highly personal rights”\textsuperscript{134}, for example a maintenance claim or the right of the employer regarding performance. Besides, there are few other legal bans on assignments like the salary assignment from a consumer to an entrepreneur. Compensation claims for damages and personal injuries do not constitute such personal rights. Hence, it is generally recognised that the main rule of § 1392 ABGB also includes tort claims. Similar to German law, the assignment can be excluded beyond that due to an agreement between the debtor and the creditor.\textsuperscript{135}

When it comes to litigation funding, restrictions can be found when it comes to contingency fees. Similar to German law, though without any exceptions\textsuperscript{136}, contingency fees are not allowed in Austria. According to § 879 (2) Z 2 ABGB a contract is null and void if a “legal friend” (for example a lawyer or notary) participates in the awarded profit in case of winning the lawsuit. Although already termed as “outdated”, it is a general accepted rule in Austria. The purpose can be seen in protecting the claimant from “unfair speculation”. The outcome of the proceedings is not predictable by the claimant. Consequently, a lawyer should not be able to take advantage of this situation by having his own financial interest in the result of the lawsuit.\textsuperscript{137} Behind this background and due to the absence of the doctrine of champerty, Austria offers an attractive market place for litigation funding companies.

The Austrian jurisprudence has experience with “mass tort” claims on the one hand, and professional legal funding companies on the other hand, due to the funicular railway disaster in Kaprun in 2006 and the investor compensation claims in the aftermath of the finance crisis.\textsuperscript{138} Although Austrian law does not provide for a class action as is the case under American law, there are comparable forms of

\textsuperscript{132} § 1392 ABGB.

\textsuperscript{133} Welser and Zochling-Jud, Bürgerliches Recht Band II 134 et seqq, 14\textsuperscript{th} ed. (2014); see also § 1394 and 1395 ABGB.

\textsuperscript{134} § 1393 ABGB.

\textsuperscript{135} Welser and Zochling-Jud, Bürgerliches Recht Band II 146 et seq, 14\textsuperscript{th} ed. (2014); Neumayr in KBB (Ed.), Allgemeines Bürgerliches Gesetzbuch Kommentar, § 1393 para 3 (2005); Erl in Rummel (Ed.), Kommentar zum ABGB, § 1393 para 3 (2002).

\textsuperscript{136} Insofar is the German legal position different to the Austrian’s one; see H. Krejci, Gilt das Quota-Itis Verbot auch für Prozessfinanzierungsverträge?, ÖZ 8, 345 (2011).

\textsuperscript{137} K. Davani, Class Action Lawsuits against the Tobacco Industry in Austria and Beyond, juridicum 1, 11 (2009); see also § 879 (2) Z 2 ABGB.

collective actions which were established by the rulings of the Supreme Court. According to those judgments, claims must be founded on materially similar legal grounds and the main issue of the proceedings must relate to the same factual or legal questions. Typically, an independent (consumer) organisation may collect individual claims and bring a suit in the organisation's own name, but in the interest of all participants. After the proceedings are concluded, the secured damages are distributed among the participants. In these cases, the assignment is most commonly only a collection assignment (Inkassozession). Accordingly, the assignee is the creditor in relation to third parties, but at the same time is obliged to transfer the received money to the assignor.

In the latter example stated above, the harmed investors formed groups and collectively assigned their claims against an investment advisor to the Vienna Chamber of Labour (Arbeiterkammer) or the Austrian Consumer Protection Association (Verein für Konsumenteninformation), who started the proceedings before the court, which were funded by third parties. For this reason, the applicant consumer organisation concluded a procedure-funding contract with a third-party funder. In this context, the defendant objected inter alia that the funding organisation, as well as the applicant consumer association itself, would constitute a "legal friend" according to § 879 (2) Z 2 ABGB and that the assignments as well as the funding contract therefore violate the prohibition against contingency fees (quota litis ban). As a result, the nullity of the funding contract (between consumer organisation and funding company) would render the assignments void (between investors and consumer organisations). Due to the invalidity of the assignments, the consumer association would not have standing to bring an action.

The Austrian Supreme Court ruled only on this last question by deciding that even if the funding contract had been invalid, merely the agreement about the success fee would be void (like a partial nullity), but not the assignment of the claims to the consumer association. Whether the procedure-funding contract contradicts § 879 (2) Z 2 ABGB was left open. However, as a result, the Austrian Supreme Court stated that the assignments to the consumer organisation were valid. The court pointed out that the prohibition of contingency fees serves as a client protection and the "professional honour" rather than the opponent of the lawsuit. Without having the possibility of assigning those small individual investor claims, a lot of these victims would not have filed the claim. The Austrian Supreme Court concluded that the assignment of those claims did not disadvantage the claim owners but rather enabled them access to justice. Thus, it benefited the assignors, who were mainly consumers.

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139 OGH 21.08.2003, 4 Ob 116/05 w, in which several borrowers assigned their claims against a credit institute to the Austrian Chamber of Labour in order to claim the repayment of the excess interest paid; see also OGH 14.07.2010, 7 Ob 127/10t; C. Dorda and F. Hörlsberger, Austria, in R. Clark (Ed.), The Dispute Resolution Review 59 (2011).

140 C. Dorda and F. Hörlsberger, Austria, in R. Clark (Ed.), The Dispute Resolution Review 59 (2011).


143 OGH 27.2.2013, 6 Ob 224/12b; A. Klauser, Prozessfinanzierung, Rechtsfreunde, quota litis und Sammelklage, Offene Fragen nach 6 Ob 224/12b, VbR 1, 12 (2013).

144 OGH 27.2.2013, 6 Ob 224/12b; A. Klauser, Prozessfinanzierung, Rechtsfreunde, quota litis und Sammelklage, Offene Fragen nach 6 Ob 224/12b, VbR 1, 12 (2013).
Another example of collection assignments was set up in the follow-on proceedings based on antitrust damages. However, under Austrian Law it would also violate moral principles if the claim owner assigned his or her claim to another person without assets, only to pass the cost order risk. This approach is therefore in line with the above-mentioned cement cartel case in Germany. In this context, the question arises whether an assignment still contradicts public policy if the claim owner him or herself is also impoverished. One could ask whether the assignment from such a person or company to another impoverished person or company actually places the defendant at a disadvantage. According to Eckel, no public policy reservations would arise if the injured companies, mostly small and medium-sized enterprises, did not themselves have enough assets for the reimbursement of court and counterparty costs. In order to be on the safe side, an agreement between the assignor and the assignee stipulating joint liability for those legal costs is suggested. Another possibility might be the "full assignment" of the claim against an payment of an agreed price in advance. From the practical viewpoint, however, the question of an appropriate amount of the price for the claim is apparent. Moreover, it is questionable whether someone will be willing to pay the price for damages claims in advance. A solution might be to involve also in these antitrust cases a litigation funding company.

5.2. The Prozessfinanzierungsvertrag (procedure-funding contract)

In addition to Germany, other civil law countries like Switzerland and Austria also have an established market for third-party litigation funding. A few of the well-known companies in Germany are also active in Austria, for example Roland ProzessFinanzAG. It invests in "class actions" as well as in individual actions exceeding a certain amount. Similar to Germany, the court and lawyer costs as well as the costs of the opponent are covered in return for a share of the outcome of the trial. The claimant has to assign or pledge the claim for security purposes to the company and files the claim in his or her own name and with the help of an attorney. Furthermore, the above-mentioned restrictions in Germany also apply in Austria. In other words, the case already has to be prepared in order to be scrutinised by the company regarding its success probability. In addition, the defendant must be solvent. Finally, the funding company has some information and voting rights concerning the conclusion of settlements. In the above stated compensation claims based on incorrect investment advice, the funding agreement between the applicant organisation and the funding company stated that the latter will pay all proceeding costs including those for legal advice. In case of the loss of the lawsuit, it also takes

146 M. Eckel and D. Konrath, Sitzenwidrigkeit der Abtretung von Schadenersatzforderung gegen Kartellanten, ÖZK 2, 73 et seq (2014) with reference to the decision of the LG Düsseldorf 17 December 2013, 37 O 200/09 (Kart) which was confirmed by OLG Düsseldorf 18 February 2015, VI U (kart) 3/14 (Zementkartell), see FN 92 and 93 above.
147 M. de Morpurgo, A Comparative Legal and Economic Approach to Third-Party Litigation Funding, 19 Cardozo Journal of International and Comparative Law 400 (2011); Eversberg, Prozessfinanzierung für den Versicherungsprozess, in Veith, Gräfe and Gebert (Eds.), Der Versicherungsprozess 167 (2016).
over the opponent's costs, but in the case that the lawsuit is won, it receives 30% of the proceeds.\textsuperscript{149}

First, a discussion arose concerning the classification of the contract itself. Like in Germany, whereas some authors are of the opinion that it constitutes an insurance contract,\textsuperscript{150} others hold the perspective that they include elements of several contracts and are therefore a contract sui generis.\textsuperscript{151} In addition, in literature, there were controversial discussions about its compatibility with the quota litis prohibition. While some authors think that the funding company is a "legal friend" because of its legal pre-examination and its ongoing process monitoring, others refer to the decisions of the Austrian Supreme Court, according to which the term must be interpreted narrowly. Furthermore, the term should only be used for professionals who are subjected to professional rules.\textsuperscript{152} As already stated above, this question was left open by the Supreme Court.\textsuperscript{153}

Other voices criticised the lack of supervision of the financing companies by public law. Despite its similar business model with insurance companies, only the latter is subject to public control and strict rules. As can also be seen as a financial service, a "code of professional conduct" was requested, particularly for the procedure-funding contracts with consumers. Furthermore, the fact that those companies work with preformed, standardised contract terms would restrict contractual freedom of individual plaintiffs as only a percentage share of the profit is "variable".\textsuperscript{154} On the other hand, and in particular in connection with the investor "class action", it is also acknowledged that access to court is often only possible due to this financing system.\textsuperscript{155}

Despite some open questions, one can conclude that although the financier has some information rights and his agreement to a settlement is needed, the claim owner retains full control over the process. It is only funded by another person or company. As already identified above for Germany, a transfer of ownership of the claim cannot be inferred from that. Rather, it "simply" creates a market for third-party funding, which has to be differentiated from a "market of legal claims". In the last-mentioned case, the original owner gives up any control over his or her lawsuit, as a result of which the new owner can do whatever he wants with the claim. He cannot only lodge it with the court, but also sell it


\textsuperscript{150} E. Karauscheck, Prozesskostenfinanzierung – ein weitgehend ungeregeltes Glücksgeschäft?, VR H 6, 25 (2012) with further references.

\textsuperscript{151} H. Krejci, Gilt das Quota-litis Verbot auch für Prozessfinanzungsverträge?, ÖJZ 8, 347 (2011).

\textsuperscript{152} E. Karauscheck, Prozesskostenfinanzierung – ein weitgehend ungeregeltes Glücksgeschäft?, VR H 6, 22 (2012) with further references; P. Oberhammer, Sammelklage, quota litis und Prozessfinanzierung, eccolex 2011, 972 and A. Klauser, Prozessfinanzierung, Rechtsfreunde, quota litis und Sammelklage, Offene Fragen nach 6 Ob 224/12b, VbR 1, 12 (2013) argue for the non-application of § 879 (2) Z 2 ABGB in relation to process funding companies; H. Krejci, Gilt das Quota-litis Verbot auch für Prozessfinanzungsverträge?, ÖJZ 8, 341 (2011) and R. Parzmagr and T. Schoebel, Prozessfinanzierung: Zulässiges Erfolgshonorar oder verbotene quota litis?, ÖJZ 12, 533 (2011) support the view that the financier is a „friend of law“.

\textsuperscript{153} See above 5.1.

\textsuperscript{154} E. Karauscheck, Prozesskostenfinanzierung – ein weitgehend ungeregeltes Glücksgeschäft?, VR H 6, 22 (2012) with further references.

\textsuperscript{155} P. Oberhammer, Sammelklage, quota litis und Prozessfinanzierung, eccolex 2011, 976.
to another person in order to attempt to get a higher price.\textsuperscript{156}

5.3. Possible restrictions and their reasons

It is a characteristic of civil law countries to forbid contracts with lawyers, whereby they receive a percentage of the awarded money if victorious in the lawsuit. In contrast, there seem to be no real restrictions when it comes to assignments of tort claims, regardless of whether it is a full assignment against pre-payment or an “Inkassozession” against payments after the successful completion of the trial. As a result, comparable to Germany, the greatest restrictions in relation to third-party financing can be found in the quota litis ban. The reason behind this rule is also the same: the independence and the economic autonomy of the attorney must be preserved. Though, Austrian law does not foresee any exceptions to this rule. Hence, a poor person is mostly dependent on state aid, which means that he or she cannot choose their own lawyer, but will rather be represented by someone who will most probably not give 100% during the trial. American lawyers observe this fact as an “intolerable unfairness” since there aren’t any similar concerns about public policy issues in the United States if an attorney participates in attaining the profit.\textsuperscript{157}

In order to receive equality of arms when it comes to legal advice, remedy can be found through a litigation funding company. Since the Supreme Court has not ruled so far whether such financing contracts contradict the quota litis prohibition, problems might arise if a lawyer constantly works together with an investor company as a so-called “contract attorney”. In such circumstances, the right of the party to choose its own lawyer may be restricted.\textsuperscript{158} Yet, a violation of the quota litis ban will be realised if the lawyer simultaneously acts as a financier of the claim.\textsuperscript{159} Furthermore, the prohibition might already be harmed if the investor has a lot of influence on the process control and acts as an indirect representative.\textsuperscript{160} Contrary to these critical opinions and voices, others pointed out that by considering the content and purpose of the financing contract, litigation investors cannot be understood as “legal friends”. The examination of the prospects of success do not qualify as legal advice.\textsuperscript{161} As a result, in order to avoid any infringements of the essential lawyer independency, it is necessary to abide by the rules of splitting-up between financing the process and providing legal advice.

5.4. Conclusion

\textsuperscript{156} M. de Morpurgo, A Comparative Legal and Economic Approach to Third-Party Litigation Funding, 19 Cardozo Journal of International and Comparative Law 354 and 356 (2011); see also above 4.4.

\textsuperscript{157} P. Oberhammer, Sammelklage, quota litis und Prozessfinanzierung, ecolex 2011, 976.

\textsuperscript{158} E. Karauscheck, Prozesskostenfinanzierung – ein weitgehend ungeregeltes Glücksgeschäft?, VR H 6, 22 (2012).

\textsuperscript{159} E. Karauscheck, Prozesskostenfinanzierung – ein weitgehend ungeregeltes Glücksgeschäft?, VR H 6, 23 (2012) referring to E. Wagner, Rechtsprobleme der Fremdfinanzierung von Prozessen, JBI 431 (2001) with whom he agrees.

\textsuperscript{160} R. Parzmayr and T. Schobel, Prozessfinanzierung: Zulässiges Erfolgshonorar oder verbotene quota litis?, ÖJZ 12, 535 et seq (2011); A. Klauser, Prozessfinanzierung, Rechtsfreunde, quota litis und Sammelklage, Offene Fragen nach 6 Ob 224/12b, VbR 1, 15 (2013) referring to P. Bydlniski, who provided an expert opinion in that stated case.

\textsuperscript{161} A. Klauser, Prozessfinanzierung, Rechtsfreunde, quota litis und Sammelklage, Offene Fragen nach 6 Ob 224/12b, VbR 1, 15 (2013). This was also confirmed by the court of first instance in this lawsuit.
Due to the absence of the doctrine of champerty and the prohibition of success fees with attorneys, litigation funding companies are very active in Austria, in particular in connection with "mass tort" claims. The question whether these contracts infringe the quota litis ban has not been answered by the Supreme Court yet. However, there are strong arguments that if the investor does not simultaneously act as a legal advisor, such a financing service is not equivalent to the legal service.\footnote{A. Klauser, Prozessfinanzierung, Rechtsfreunde, quota litis und Sammelklage, Offene Fragen nach 6 Ob 224/12b, VbR 1, 15 (2013).} In all these cases the claim owner has, even if sometimes more and sometimes less, an influence on the process flow. As far as can be seen, there are no cases where the original claimant fully assigned or even sold his or her claim and thereby lost control of it entirely. Whether such a commodification of claims will arise in the future is therefore left open. Unquestionably, arguments concerning the standing might be issued if the seller gives up any control of his or her claim. Analogous to England, public policy matters may also play a role in Austria if the buyer does not have a genuine commercial interest in the assigned claim, but rather tries to make a profit with the filing of the claim.
6. Comparative Analysis

6.1. Assignments

One of my goals was to find out whether there may be any considerable differences identified between common law and continental law concerning the allowance of assignments of tort claims and the reasoning behind this. In order to do so, I chose the jurisdictions of American and English law on the one hand, and German and Austrian law on the other hand. Although present to a varying extent in the individual states of America and England, the doctrine of champerty and maintenance can still play a role when it comes to the transfer of a personal claim to a third person. Compared with this approach, civil law countries like Austria and Germany, which are not familiar with these doctrines, do not face any difficulties in connection with the assignment of tort claims to third parties. Both of their Civil Codes clearly state that possibility.\textsuperscript{163}

6.1.1. Sale/"full" assignment vs. assignment for security purposes

A problem I have encountered during my research was that, when it comes to the meaning of an assignment, not all court decisions in these four countries seem to be based on uniform definitions at a first glance. Hence, the question arises whether the mentioned cases at hand, and therefore, whether common law and civil law, have the same understanding regarding the content and effect of such assignments. Taking a closer look at the cases of Austria and Germany first, the two most frequently used assignments seem to be debt collection and the security assignment. While in the first case the assignee is generally a special purpose vehicle or an organisation, the claim is assigned to a third-party funder in the second case. Even though these two kinds of assignments legally materialise an assignment, this does not hold true when it comes to the economically effect. In both cases, the payment takes place ex post, i.e. after the positive ending of the lawsuit.\textsuperscript{164} In my view, as long as one stays in this field of assignment, one "only" moves within the market for third-party funding, as Morpurgo refers to. The control over the proceedings is kept by the assignor.\textsuperscript{165}

Instead, by undertaking a sale or full assignment, the seller or assignor is paid ex ante (i.e. immediately, and the price depends on the expected awarded sum) and the control of the lawsuit is shifted to the buyer or assignee. Hence, it appears that a sale and "full" assignment of a claim have the same consequence. The buyer or assignee can file the claim at the court but he might also be allowed to trade the claim as a security by trying to get a higher price from a second buyer or assignee due to an alteration of the value of the claim or of the case-law in the meantime. Only when such a "speculation" is possible for an investor, a "market for legal claims" is spoken of.\textsuperscript{166} As far as can be seen, the cases in Austria and Germany, which include "only" debt collection and assignments for security, belong to the former mentioned market for third-party funding. Nevertheless, looking at the relevant rules in the German (§ 398 BGB and § 399 BGB) and Austrian (§ 1392 ff ABGB) Civil Codes,

\textsuperscript{163} § 398 BGB and § 399 BGB as well as §1392 ff ABGB.

\textsuperscript{164} See paragraph 4.2.2. and 5.1. above.


\textsuperscript{166} M. de Morpurgo, A Comparative Legal and Economic Approach to Third-Party Litigation Funding, 19 Cardozo Journal of International and Comparative Law 355 (2011) with further references where it is pointed out that care must be taken when it comes to prescription issues; see also above 4.4. and 5.2.
there is no indication that even such a transaction with full transfer of control would be void.\textsuperscript{167} However, in my view, some insecurity remains since it is not absolutely clear whether a German and/or Austrian court would indeed give permission to such a commodification of claims or whether it would rule that it contravenes public policy.

In fact, that is the case in the common law countries where the assignment of a personal tort claim to a third person has always faced some difficulties due to the doctrines of champerty and maintenance. As a result, both the United States (at least to some extent)\textsuperscript{168} and England prohibit assignments of personal tort claims if it increases and distorts litigation, hence if maintenance or champerty is fulfilled.\textsuperscript{169} As previously mentioned, at a first glance the discussed lawsuits in the United States and England seem to not distinguish between the different kinds of assignments. Thus, it is not that clear which consequences relate to those assignments – do they have the effect of a sale or “only” of a debt assignment or an assignment for security? However, by taking a closer look at (some of) these cases, similar segregations concerning assignments can be identified. I start with the US case law by reflecting on the opinions of those judges in the United States, who differentiate between assignments of personal tort claims and assignments of the proceeds thereof. In accordance with these verdicts, a separation between a sale, one the one hand, and an assignment for security on the other hand, appears to occur:

\begin{quote}
[the] reasons for refusing to permit assignment of tort claims do not apply to the assignment of an interest in the proceeds of the claim. It is one thing to say we do not want unliquidated tort claims to become the subject of a secondary market in which attorneys and others can buy up claims and prosecute them when they would otherwise remain unasserted. It is quite another to say that a tort claimant should not be able to obtain treatment by giving the health care provider what \textit{amounts to a security interest in the proceeds of a claim} that is not yet reduced to judgment. For that matter, I see no reason why an assignment to any creditor of the claimant should be prohibited if the claimant and the creditor can agree on that arrangement and the terms of the assignment do not shift control of the claim to the creditor. After a simple assignment of an interest in the proceeds the injured party retains control of the lawsuit and the interest of the assignee provider is fixed at the amount of the charge for the service.\textsuperscript{170}
\end{quote}

In the first part, the judge gives the impression to equate the assignment of tort claims with a sale or with a "full assignment" because the assignee is entirely in control of the lawsuit. This seems to be associated with a payment ex-ante. According to this judge, such a commodification of claims, which would lead to a "market of legal claims"\textsuperscript{171} ("a secondary market"), should be prevented. It is not totally clear from the case at hand whether it is a condition for the unlawfulness that the seller would not have filed the claim ("\textit{when they would otherwise remain unasserted}"). Yet, this can be concluded from the judgement in \textit{Merrill v. Love Funding}, in which the allegation of champerty by the defendant was

\begin{footnotesize}
\textsuperscript{167} See paragraph 4.1. and 5.1.

\textsuperscript{168} However, based on the aforementioned under chapter 2 one has to keep in mind that the jurisdictions in each State in the United States may vary widely from each other.

\textsuperscript{169} See paragraph 2.2. and 3.2.

\textsuperscript{170} Opinion of Boehm J., who dissented with the holding of Dickson J., in \textit{Midtown Chiropractic v. Illinois Farmers Ins. Co.}, 847 N.E.2d 942, 8 (Supreme Court of Indiana 2006) where a difference between the assignment of a personal injury claim and the assignment of the proceeds from such a claim was denied – see paragraph 2.2.1. (emphasis added).

\textsuperscript{171} See above 4.4. and 5.2.
\end{footnotesize}
rejected since it only bans purchased claims that would not be prosecuted if not “stirred up”. In the second part, describing the “mere” assignment of the proceeds seems to correlate with an assignment for security ("amounts to a security interest"), which was deemed to be lawful. According to this view, the assignor keeps control of the trial. Only the payment which he owes to the assignee should be secured. On that basis, it appears that this is linked with an ex-post payment. This is, in turn, closely correlated to the "market for third party funding" as previously described.\footnote{See paragraph 2.1. and 2.2.1 as well as 4.4. and 5.2.}

Next, considering the two most relevant cases in England in the context that is relevant here, Trendtex v. Credit Suisse and Simpson v. Norfolk, a parallel line can be drawn. Based on Trendtex v. Credit Suisse one can distinguish between, on the one hand, an assignment for security reasons, which was approved since the assignee as a creditor of the assignor “had a genuine and substantial interest in the success of” the proceedings. On the other hand, the second transaction can be identified as a sale or a “full” assignment because it provided for a full transfer of control over the proceedings. Hence, the assignee (or buyer) was allowed to speculate with this claim by selling it to a third person for a higher price. As this would lead to a secondary market, in which trading of litigation takes places, champerty was fulfilled.\footnote{See paragraph 3.2.1. above.} Equally, the proceedings of Simpson v. Norfolk were concerned with a sale/"full" assignment since it led to a full shift of control over the lawsuit in combination with an ex-ante payment. The assignee/buyer could do with the claim whatever she wanted to. Thus, the assignor/seller gave up any ties with his or her rights of action. Such a possibility of profit-making is assessed to be impracticable with the requirement of a genuine commercial interest.\footnote{See paragraph 3.2.2. above.}

Based on such a closer consideration, while it has been demonstrated that there is the same differentiation among assignments in civil and common law, only the Civil Codes of Germany and Austria go a step further by allowing the sale or full assignment of tort claims, hence a shift of control over the proceedings. Still, there is a common understanding when it comes to the assignment for tort claims for security purposes. Civil law as well as common law do not have any concerns in this regard. The reason behind this is that in such circumstances the assignor keeps control over his or her claim and the proceedings. To paraphrase, no stranger calls the shots, respectively, the assignee (as a creditor of the assignor for example) has a genuine commercial interest without being able to make a decision regarding further procedures – this is the responsibility of the assignor, the claim owner.

Common law and civil law seem to drift apart when it comes to the sale or full assignment of a tort claim in order to allow the buyer/assignee to make a profit out of this claim. Giving up control over one’s personal tort claim to someone who does not have any legitimate interest in the litigation still puts champerty into effect in the United States and in England. Such a commodification of claims is not desired and therefore rejected under US and English law. Turning to Austria and Germany, so far, the courts have not had to deal with the fact that the original claim owner was paid ex-ante and did not have a say any longer. Nevertheless, due to the absence of the doctrine of champerty and according to the respective Civil Codes it looks to be possible.

However, I have to point out twofold: firstly, the informative value of this analysis is limited since the mentioned case law is very diverse among the United States and even among several judges. There are still states which have very strict and rigid rules when it comes to champerty. Furthermore, with the picked US cases at hand, just a few examples are cited. So, no universal validation can be inferred.
Secondly, as far as can be seen, there has not been any case law in Germany and Austria which deals with a sale or a full assignment of a claim thus far, resulting in a total abandonment of control over the lawsuit. Thus, the assignor was always connected to the assignee and the proceedings in some way. I conclude therefore that there is still a risk that such a commodification of claims, resulting in a speculation of lawsuits, could also be seen as a violation of public policy in Germany and/or Austria. Based on such an approach, the discrepancies between common law and civil law appear to be reduced.

6.1.2. Assignment for debt collection

Finally, as far as assignments for debt collection are concerned, the question arises: what does common law say about this? While we already know that it is possible in Austria and (with more restrictions) in Germany to assign one’s claim to an (consumer) organisation or SPV, the common law verdicts cited in my work do not say anything about that. Is such an assignment still banned in common law or does it have a different meaning and therefore a different scope of application? Based on the abovementioned matters, one can conclude that in Germany and Austria, the assignment for debt collection is used in order to realise a sort of “class action”. The claim is assigned to an organisation, to the economically strongest plaintiff or to a SPV, which sues on his or her own behalf and/or on behalf of a number of other persons. The risk of the procedure and of its costs normally remain with the assignor, who also has the last word on the procedure and receives all the profit, less the fee for a SPV. If the assignee itself is damaged, the awarded damages will be shared. As Stadler concludes, this “is not a ‘regular’ assignment, but an assignment for the primary purpose of debt collection”. It should be emphasised at this point that there are generally a lot of assignors. As a result, they split the costs for the procedure in case of the trial being lost. In the same way, it helps “to overcome an investment asymmetry” which is typically for consumer mass and cartel damage cases.

Turning to the “classical” country of class actions, US law generally states that in order to bring a class action, a “representative plaintiff must have a claim itself which is typical of the class claims”. Nevertheless, there is also a possibility for an organisation/association to file a class action on behalf of its damaged members if certain conditions are fulfilled. Furthermore, under US rule, merely a “description” of the class members is necessary, rather than an “identification” of them. Though, as far as can be seen, there is no indication of any comparable assignment for debt collection under this regime. The reasoning behind this seems to be the old doctrine of champerty, which prohibits such assignments. While class actions had always been available in the US, Europe did not have the same instrument. Therefore, claimants were forced to find other solutions in order to collect claims and did

175 See above paragraph 4.1. and 5.1.
176 See above 4.1. and 5.1.
178 Except if the SPV is also a funder or if the assignee enters into a contract with a funding company.
179 A. Stadler, Funding of mass claims in Germany, Caught between a rock and a hard place? In W. van Boom (Ed.), Litigation, Costs, Funding and Behaviour – Implications for the Law 202 et seq (2017).
so by using the assignment for debt collection.\textsuperscript{181} While the outcome of each of the proceedings according to collective actions stated above might be (more or less) similar, the used assignments for debt collection under civil law do not play a role in the class action proceedings in the US. There, instead of using such "substantive law" mechanisms, the procedural tool of a class action is used.\textsuperscript{182} This relates, in turn, to the above-mentioned implemented prerequisites, in order to restrict the allowance of actions filed by an organisation/association on behalf of its members in the US.

As for my last country which was researched, England, although a common law country, it does not have the same mechanisms for class actions like the US. Up to now, collective redress could be reached by representative proceedings or group litigation orders (which have a similar effect as opt-in class actions). Yet, some sort of "US class action style" has been introduced by the Consumer Rights Act 2015, which enables a collective action for certain competition law damages, both on an opt-in as well as on an opt-out basis. This regime is not only to be used by consumers, but also by companies as long as they have sustained some loss due to a breach of antitrust law. The representative who brings the claim does not need to be a party to it. Hence, the proceedings can be commenced either by a member of the class, or by a suitable entity (for example a consumer or trade organisation/association) on behalf of that class.\textsuperscript{183} However, this only applies within the limitation that the competent Competition Appeal Tribunal (CAT) "considers that it is just and reasonable for the applicant to act as a class representative in the collective proceedings". Among others, there must not be any conflict of interest between them and the class members, it must act "fairly and adequately in the interests of the class members", and the applicant representative must have enough assets to comply with a cost order. Regarding these strict requirements, similar to the US, the old doctrines of chancery and maintenance, which want to impede strangers from bringing foreign claims to the court, come to light again. Against this background, the relevant rule does not mention assignments "explicitly". In this respect, it seems to harmonise with US law by relying on instruments of procedural law rather than on substantive law in order to collect actions.\textsuperscript{184} Even though the US and England ultimately have a similar approach regarding collective actions, the question remains whether the English younger version develops in a comparable way to the US one. Apart from that, I want to mention another dissimilarity between those regulations, which cropped up during my research work: the lawfulness of contingency fees, which brings me to my final point.

6.2. Contingency fees

\textsuperscript{181} A. Stadler, Funding of mass claims in Germany, Caught between a rock and a hard place? in W. van Boom (Ed.), Litigation, Costs, Funding and Behaviour – Implications for the Law 202 (2017).

\textsuperscript{182} A. Stadler, Funding of mass claims in Germany, Caught between a rock and a hard place? in W. van Boom (Ed.), Litigation, Costs, Funding and Behaviour – Implications for the Law 202 and 213 (2017).


\textsuperscript{184} A. Stadler, Funding of mass claims in Germany, Caught between a rock and a hard place? in W. van Boom (Ed.), Litigation, Costs, Funding and Behaviour – Implications for the Law 210, 211 and 213 (2017); see also the relevant rules: Sec. 47B (8) of the Competition Act 1998 (as amended by the Consumer Rights Act 2015) and Rule 78 of the CAT Rules 2015.
In addition to assignments, I want to mention another small issue, with which I was confronted during the writing of my master thesis. It relates to the different approaches concerning contingency fees, which are taken by US and English law, though the fact remains that both pertain to the common law along with the doctrine of champerty:

Whereas this doctrine does not exist in civil law countries, which causes fewer problems to assignments of claims to third persons, the focus shifts to the independency of an attorney. Austria and Germany (although with an exception regarding the latter) ban the possibility for attorneys to have a financial interest in the outcome of the lawsuit.\textsuperscript{185} Turning to common law, it is, in general, the other way around: a sort of hostility towards funding by third persons can be perceived. As far as contingency fees are concerned, however, a different approach was taken by the US on the one hand, and England on the other hand. In spite of the doctrine of champerty, the US already permitted contingency fees in the early 20\textsuperscript{th} century.\textsuperscript{186} In considering this approach, the prevention of the interference by a "stranger" moves to the centre of society’s attention instead of the independency of an attorney. As stated above, England is not on the same page in this regard. Rather, it seems to have taken a similar line with the civil law countries in the past. Although a less strict approach is taken today, due to the introduction of the DBAs in 2013, there is still a risk that contingency fees are seen as contradictory to the doctrine of champerty.\textsuperscript{187} Furthermore, litigation funding through a DBA is not allowed in the course of the new procedure of claim bundling described above, which in turn is a strong argument for the choice of “only” a CFA under English law or for financing through a funding company. Similar to civil law countries, the avoidance of speculative and unmeritorious claims is the motivation behind this rule.\textsuperscript{188} Behind this background, no real allocation of English law can be affected regarding contingency fees. It does not have the same relaxed attitude as US law but also not a strict one like civil law countries – rather it is located somewhere in between.

\textsuperscript{185} See above paragraph 4.1. and 5.1.

\textsuperscript{186} See above paragraph 2.1. and 2.3. as well as 4.1; J. Peyser, ‘Playing the man not the ball’ in W. van Boom (Ed.), Litigation, Costs, Funding and Behaviour – Implications for the Law 58 (2017).

\textsuperscript{187} See above paragraph 3.1.3.

7. Conclusion

In order to guarantee access to the court, US, England, Germany and Austria all adopted – in one way or another – mechanisms, addressing situations, where a claimant cannot afford to pay the costs of a court proceeding although he or she has a meritorious tort claim. Yet, the degree of the hurdles and allowances of these instruments are different. One possibility to overcome this problem is the assignment of such claims to a wealthier person or company. Behind this background, my research question was to what extent the assignment of tort claims is allowed in these four jurisdictions. Based on my study, varying degrees of permissions and prohibitions could be identified between common law and civil law. The reason for this different approach is the doctrine of champerty, which is still present in common law practitioners' minds. Although its application has already been mitigated and a degree of flexibility has been introduced, it can still play a role in the US and England, rendering an assignment of a tort claim invalid. Such a similar doctrine does not exist in Germany and Austria because it is less about the prevention of the interference by a stranger and the profit-making than the protection of the independency of a lawyer. Attorneys should neither profit from their client's lawsuit, nor should they receive an inordinately large salary. While England, as a common law country, keeps the idea of champerty in mind, it takes an intermediate position when it comes to contingency fees.

Against this background, the question of preference of a law system or country comes up. Does one of the countries supply a framework in order to use claims as a business opportunity? Is there a jurisdiction which places its focus more on the interests of a claimant? What is the position of a lawyer and his or her chance of making a profit? Depending on what someone is looking for, different advantages can be identified. As far as investors are concerned, better opportunities for business developments can be found in Germany and Austria since there is almost no possibility for a lawyer to invest in the client claim. Moreover, the rules seem to be straightforward because security assignments and assignments for debt collection are recognised options. Furthermore, investors are not confronted with such strict guidelines like attorneys in these countries. Nevertheless, it should not be forgotten that the interaction of three parties (claimant, investor and attorney) might lead to more conflicts as well as the fact that there are some critical opinions in Austria according to which such a contract would violate the quota litis ban. In addition, by also using a SPV, attention must be paid to the condition of having enough financial means to pay the costs of the proceedings in the case that the lawsuit is lost.189 However, this argument is doubtful when a claimant, who does not have enough funding, assigns his claim to another impoverished person or company.190 Furthermore, this security issue could be solved by asking for a deposit from the claimant and/or a joint liability of assignor and assignee.191 Albeit with more restrictions due to the doctrine of champerty, England has also become an attractive market place for investors as funding is described as "the lifeblood of the justice system" by Lord Neuberger, President of the UK Supreme Court.192

189 See paragraph 4.1., 5.1. and 5.2.
190 See paragraph 5.1.
191 M. Eckel and D. Konrath, Sittenwidrigkeit der Abtretung von Schadensersatzforderung gegen Kartellanten, ÖZK 2, 73 et seq (2014); A. Stadler, Funding of mass claims in Germany, Caught between a rock and a hard place? in W. van Boom (Ed.), Litigation, Costs, Funding and Behaviour – Implications for the Law 207 et seq (2017).
192 See above 3.1.1. and J. Peysner, 'Playing the man not the ball' in W. van Boom (Ed.), Litigation, Costs, Funding and Behaviour – Implications for the Law 58 (2017) referring to Lord Neuberger's speech "From Barratry, Maintenance and Champerty to Litigation Funding" at Harbour Litigation Funding First Annual Lecture, Gray's Inn, 8 May 2013.
Such “a market for third-party funding” seems to be more or less doable in all countries, as long as the respective rules, especially if the investor does not exercise any control over the trial, are followed. However, investors who merely pursue with the aim of making a profit out of a claim, will face limitations in common law countries. Such purchases, which lead to the entire abandonment of control of the lawsuit by the former claim owner, do not fit into the common law system. Access to court is supported, but only for the purpose of its enforcement and not to make money. As no such restrictions have come to be known in Austria and Germany thus far, such a “market of legal claims” only seems to be possible in these civil law countries.\footnote{Paragraph 4.4 and 5.4.}

From the point of view of an attorney, US law is more favourable as lawyers can stimulate a process, in particular a class action, and gain a high percentage fee in cases involving a meritorious claim. It is sort of contradiction that US law allows lawyers to stir up a lawsuit, while it prohibits it for third parties at the same time. However, such extraordinary fees are, as a rule, not possible in Europe and this feature should be preserved in the opinion of the European Commission.\footnote{Z. Juska, The future of collective redress: is something new under the sun?, Global Competition Litigation Review 16 (2015).} In England, Austria and Germany, on the other hand, lawyers might profit from their cooperation with litigation funding companies. Still, in Austria, problems could arise regarding the quota litis ban in case of such a permanent working relationship.\footnote{Paragraph 5.3. above.}

Considering the most favourable jurisdiction from the perspective of a claimant, the answer depends on what he or she wants – does he or she want to act solely with a lawyer instead of an additional investor? Does he or she want to play a role in the following proceeding or does he or she wish to give up any control over it in exchange for a sum of money, which is paid ex-ante? On the one hand, US regulations are more beneficial if the claimant is not willing to bring a third party on board and at the same time, does not care about the “independency role” of a lawyer. Regardless whether a claimant does not have enough funding or is risk-averse, there is always the possibility of contracting a contingency fee (as long as it is a meritorious claim, of course). Such a claimant, who also wants to keep control over the lawsuit, might also choose the jurisdiction of England and Germany, however, restricted to more requirements and difficulties: as far as England is concerned, the claimant will face some difficulties of finding a lawyer, since the possible percentage of the awarded sum under a DBA is limited. Germany merely constitutes an opportunity if the claimant is underprivileged, but not if he or she is only risk-averse.

If there is not any issue for a claimant to have recourse to an attorney as well as to an investor, Germany and Austria as well as England, seem to be the most favourable law systems, on the other hand. The option of England falls out if the claimant wants to give up the control of their lawsuit in order to receive the purchase price immediately and independently of the outcome of the proceedings. Similar to the US, such a full assignment or sale to a third person, who does not have any commercial interest in the claim, contradicts public policy.\footnote{See paragraph 2.3. and 3.3.} Hence, a claimant who wants to sell the claim to a third person, for example a SPV, in exchange for a sum of money, which is paid ex-ante and independent of the lawsuits outcome, therefore giving up any control over his or her claim, might do so only in Germany and Austria. As a result, a real commodification of claims only seems to be realistic in
these countries at this point of time – but note the possible risk that a German or Austrian court might consider a violation of public policy due to such a speculation of claims.

In conclusion, and in light of the points discussed above, I want to stress that important differences persist in the application of assignments of personal tort claims between common law and civil law. Although the use of the old doctrine of champerty is less stringent today, I think it is unlikely that it will disappear in its entirety in the near future, since it is anchored in the mind of the current law system. All in all, it remains to be seen in which direction the four jurisdictions at hand are going in concerning commodification of claims. At this point in time, the different financing mechanisms of the four law systems at hand at least support access to the court for a number of claimants, which is in fact a positive thing. However, claimants, who have a meritorious claim and who need liquid assets but cannot afford a trial, should be given the possibility to sell their claim immediately. In order to guarantee justice and to prevent tortfeasors from escaping the obligation to pay compensation for the damages caused, a further step into commercialisation of claims should be encouraged.
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