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# THE UNEASY CASE OF TORTIOUS INTERFERENCE WITH A CONTRACTUAL PROHIBITION OF ASSIGNMENT

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## **Abstract**

*Tortious interference with an existing contractual relation, induced by a third party, is regarded as a valid ground to impose extra-contractual liability upon the inducer. The following article aims to compare the different types of legal approach to this type of tort throughout a variety of national legislations. As it turns out, its field of application is quite broad and comprises both individuals and legal entities irrespective of their mercantile capacity. This leads to the issue about the possibility to apply the tort in case of a contractual prohibition of assignment. Despite the fact that all the necessary pre-requisites of this tort, set forth by the legislator or clarified by case law, can be established whenever there is a breach of the clause prohibiting assignment, national and supranational legislative acts seem reluctant to impose a tortious liability upon the assignee. The main reason for this circumstance is the influence, exerted by the respective provisions of the Uniform Commercial Code, that have subsequently been adopted by the United Nations Convention on Assignment in International Trade (2001). A glimpse upon various provisions of European legislations, as well as some relevant case law, reveal the lack of a uniform approach within the EU. The article puts to critical discussion the influence upon economic relations of an eventual introduction of extra-contractual liability imposed upon the assignee for inducing the breach of an anti-assignment clause.*

**Key words:** *pactum de non cedendo; contractual prohibition of assignment; tortious interference with contracts; inducement for breach of contract; UN Convention on Assignment of Receivables in International Trade.*

## **INTRODUCTION**

Interference with contractual relationships is widely regarded as a separate kind of tort, where a third party, stranger to a contractual relationship, induces the debtor to breach his or her contractual obligations, mainly in order to gain some lucrative advantage, e.g. to enter into a subsequent contract with the defaulting debtor or to disrupt the usual flow of the commercial affairs of the creditor. Extra-contractual liability is imposed upon those who knowingly do not respect existing contracts of other participants in civil and commercial affairs and attempt to achieve a positive result on the expense of their own immoral conduct (*McBride, N., Bagshaw, R.* p. 631 et seq).

The issue about the applicability of this tort has recently been a matter of recent discussion, given the grave implications caused by the COVID-19 pandemic upon social and economic relations worldwide. The better part of 2020 and 2021 was witness to an ever-growing demand for supplying protective masks and respirators to every continent. The short-lived, but acute struggle to obtain these products was sometimes accompanied by improper conduct, carried out by official representatives of several countries. It has been established that despite the existence of a contract to provide the said medical equipment to a certain destination, the seller has been offered a substantial amount of money to re-route this shipment to another country, thereby breaching the already concluded sales contract. Such an inducement even happened on the airport, just moments before the cargo airplane containing the goods took off<sup>1</sup>.

Some of the affected parties even called such practice „contract theft” and even “modern piracy”, since it caused not only legal and economic, but also moral and health implications to the society. A recent study of these unfortunate accidents offered to broaden the concept of tortious interference with contractual relations, so that it can encompass the civil liability of international entities, such as states, as well. It has been proposed that a normative basis for allocating this extra-contractual civil liability whenever a third party induces the breach of a sales contract can be found in the provision of art. 7 (1) of the CISG (*Fachetti Silvestre, G.(2021)*). The drafters of the Convention have provided a uniform requirement to observe good faith in international trade.

As it turns out, tortious interference with contractual relations is a versatile concept capable of adapting to various circumstances and thus applicable to virtually every kind of contractual obligation. However, it would seem that there is a problem to acknowledge its applicability to the case of a contractual prohibition of assignment.

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### I. THE CONTRACTUAL PROHIBITION OF ASSIGNMENT AND ITS INTERRELATION WITH THE TORT IN EUROPE

Also known as “*pactum de non cedendo*”, this particular contractual arrangement consists of agreement between a debtor and a creditor, whereby a legal obligation is placed upon the not to transfer the receivable arising out of the contract. The clause can be bargained with respect to every otherwise transferable receivable. Therefore, it is of no surprise that there are legal provisions throughout different national legislations aimed at regulating the legal consequences of a *pactum de non cedendo*. The main legislative is whether parties can effectively exclude an asset from participating in civil and commercial affairs solely by their own volition.

#### I. 1. The clash between the principle of free alienability of assets and the principle of the parties’ will

Despite some national differences, a comparative overview of the contractual prohibition of assignment would reveal that there are two main types of legislative approach to the institute. The former pre-supposes the free alienability of assets and rules out every possibility for contractual parties to exclude a receivable from participation in civil and commercial affairs. Usually, the legislative embodiment of this principle still retains the possibility for the debtor and the creditor to bargain a contractual prohibition of assignment; however, this arrangement may not tamper with the subsequent change of the creditor. Should the creditor dispose of the receivable at variance with the contractual prohibition, the assignment is valid.

The latter approach is to provide *pactum de non cedendo* with a legal effect *vis-à-vis* third parties, thus effectively excluding the possibility for the creditor to transfer the receivable. National legislations differ about the intensity of the contractual prohibition of assignment, i.e. whether it can be effectively held against any third party, or there must be some accompanying circumstances in the legal sphere of the assignee (such as the knowledge about the *pactum de non cedendo*) which justify the exclusion of the transfer. Therefore, the purported attempt of the creditor to transfer the receivable will either be considered outright void or the debtor may be able to assess whether it tampers with his interests.

In order to assess whether tortious interference with a contractual prohibition on assignment can be imposed whenever the assignee (or anyone else) has induced the creditor to assign a receivable in breach of a *pactum de non cedendo*, one must take into consideration some circumstances. There is no need to apply this type of tort whenever the respective national legislator has enacted the possibility to effectively exclude the transferability of a receivable via a *pactum de non cedendo* with regard to third parties. This way, the debtor enjoys a high level of legal protection and can simply refuse to pay its new creditor, stating that there is a contractual prohibition of assignment. The most categorical type of legal approach can be found in the provisions of § 399 of the **German Civil**

**Code**<sup>2</sup>. The common rule, applicable to all participants in civil transactions, provides that an assignment at variance with a *pactum de non cedendo*, should be considered void. This rigid legislative concept has been somewhat toned down by the introduction of § 354a of the **German Commerce Code** in 1994<sup>3</sup>. In order to promote the transfer of receivables among persons acting in a mercantile capacity, the German legislator provided that a *pactum de non cedendo*, agreed between merchants and entrepreneurs does not preclude the subsequent transfer of the receivable. At the same time, however, this provision granted the debtor with the possibility to pay its initial creditor and, ultimately, to ignore the transfer, whenever a contractual prohibition of assignment is present. Despite the fact that the German legislator has enacted the possibility to impose extracontractual liability upon any third party who deliberately damages another person (§ 826 of the German Civil Code)<sup>4</sup>, this tort will not be applicable to the system of legal relationships arising out of a *pactum de non cedendo* under German law, due to the high level of legal protection attributed to the debtor, who can simply refuse to pay the new creditor. Thus, there is no point in bringing an action vis-à-vis the assignee, despite his intention to interfere with the contractual prohibition of assignment.

The same type of legal approach is embodied in the provisions of art. 164, para. 1 of the **Swiss Civil Code**<sup>5</sup>, art. 3:83, para. 2 of the **Civil Code of the Netherlands**<sup>6</sup>, art. 509, para. 1 of the **Polish Civil Code**<sup>7</sup> et seq.

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<sup>2</sup> Cf. Art. 399 BGB (translated) - *Exclusion of assignment in case of change of contents or by agreement A claim may not be assigned 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.*

<sup>3</sup> Cf. Section 354a HGB (translated) - (1) *If the assignment of a monetary claim is excluded by agreement with the debtor pursuant to section 399 of the Civil Code and the legal transaction underlying such claim is a commercial transaction for both parties, or if the obligor is a legal person under public law or a special fund under public law, then the assignment nonetheless will be effective. The debtor may, however, render performance to the previous creditor with discharging effect. Agreements in derogation herefrom are void. (2) Subsection (1) does not apply to a claim under a loan agreement where the creditor is a credit institution within the meaning of the Banking Act.*

<sup>4</sup> Cf. Art. 826 BGB (translated) - *Intentional damage contrary to public policy A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.*

<sup>5</sup> Cf. Art. 164 of the Swiss Civil Code (translated) – *The creditor can transfer his receivable without the consent of the debtor, as long as this effect is not hindered by a legal provision, a contractual arrangement or because of the nature of the receivable.*

<sup>6</sup> Cf. Art. 3:83, para. 2 of the Civil Code of the Netherlands - . *The transferability of a debt-claim may be excluded by an agreement between the creditor and debtor“.*

<sup>7</sup> Cf. Art. 509 of the Polish Civil Code (translated) - *Assignment. § 1. A creditor can, without the debtor's consent, transfer a claim to a third party (assignment) unless the same is contrary to the law, a contractual stipulation or the nature of the obligation*

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It is worth mentioning that the Belgian legislator undertook a major reform in the law of obligations, whereby the Belgian Parliament adopted a new Book 5 of the Belgian Civil Code containing legal provisions on general contract law, applicable to contracts concluded after 01. January 2023. Part of this modernization process is the introduction of art. 5:174 of the **Belgian Civil Code**, which deals with the legal effect of a contractual prohibition of assignment. As a general rule, the assignment in breach of such a restriction will be valid and can be enforced vis-à-vis the debtor. However, where the assignee acts in bad faith and intentionally induces the creditor to dispose of the receivable, the assignment cannot be enforced vis-à-vis the debtor due to the assignee's knowledge of the contractual restraint<sup>8</sup>. As one can deduce, the Belgian legislator considers the intentional interference with a contractual prohibition of assignment to be the very reason why a debtor cannot be expected to perform to a new creditor. Instead, the debtor retains the possibility to perform to the original creditor, as if no assignment has taken place.

Furthermore, one cannot find a model to resolve the conflict between the legal interests of the debtor and the assignee in national legislations who represent the other legal extreme – i.e. they grant an efficient legal protection of the assignee by completely excluding an extracontractual liability vis-à-vis the debtor. Among them worth mentioning are the provisions of § 166, para. 3 of the **Estonian Law on Obligations**<sup>9</sup>, as well as art. 6:195 of the **Hungarian Civil Code**<sup>10</sup>. A similar approach, clearly in favour of an unhindered transfer of receivables, has been incorporated into the provision of art. L.442-3 of the **French Commercial Code** (amended as of 03. December 2020)<sup>11</sup>, whereby contractual

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<sup>8</sup> Cf. Art. 5:174 of the Belgian Civil Code, as follows – “*La cession d'une créance contraire à une interdiction de cession contractuelle n'est pas opposable au débiteur cédé lorsque le cessionnaire est tiers complice de la violation de cette interdiction.*”

<sup>9</sup> Cf. art. 166 of the Estonian Law on Obligations (translated) –

(2) *Agreements concluded between an obligor and an obligee whereby assignment of the claim is precluded or the right to assign the claim is restricted have no effect against third parties.*

(3) *The provisions of subsection (2) of this section shall not preclude or restrict the liability arising from agreements entered into between the original obligee and the obligor for violation of the prohibition to preclude or restrict the right to assign the claim. The person to whom the claim is assigned shall not be liable for violation of such agreement.*

<sup>10</sup> Cf. art. 6:195 of the Hungarian Civil Code (translated) –

(1) *Any term excluding the assignment of a claim shall be null and void in respect of third parties.*

(2) *The provision contained in Subsection (1) shall not affect the assignor's liability for any breach of the term excluding assignment. Any contract term that allows the right to terminate or stipulates the payment of a contractual penalty for non-performance shall be null and void.*

<sup>11</sup> Cf. Article L442-3 (Modifié par LOI n°2020-1508 du 3 décembre 2020) of the French Code of Commerce:

*Sont nuls les clauses ou contrats prévoyant pour toute personne exerçant des activités de production, de distribution ou de services, la possibilité :*

restraints on alienation of receivables are pronounced null and void. Thus, the potential assignee cannot be held liable for inducement of breach of contract, since there is no valid legal obligation for the creditor to refrain from transferring the receivable.

## I. 2. The French legal approach

On the other hand, for a period of over two centuries, spanning from its enactment in 1804 until 2016, the French Civil Code neither provides rules on the contractual prohibition of assignment, nor does it contain tortious interference with contracts<sup>12</sup>. *Pactum de non cedendo* was perceived as a variation of the general clause prohibiting alienation, mostly because of art. 1689 of the French Civil Code (in its version from 1804 until 2016) that regards the assignment as a type of a sale-purchase contract<sup>13</sup>. That is why French scholars considered a contractual prohibition of assignment to have a limited effect in a manner that it cannot lead to the exclusion of the receivable from further participation in civil and commercial affairs (*Huc, Th., p. 345-349*). At the same time, the original drafters of the Code Civil never regarded tortious interference with contracts as a separate kind of tort. Instead, they chose to enact *un régime général de la responsabilité délictuelle*, a general tort clause, that is abstract and highly applicable in various scenarios, thereby allowing the court to determine the presence of the elements necessary to impose tortious liability (art. 1382 of the French Civil Code until 2016, corresponding to art. 1240 of the French Civil Code<sup>14</sup>).

As it would seem, until 2016 the prevailing view amongst French scholars was in favour of a restrictive effect of any contractual prohibition of alienation in civil law. This would equally apply to *pactum de non cedendo* as well, so that an assignment in breach of such a restriction will be considered valid, with no possibility retained for the debtor to refuse paying the assignee. Thus the existence of the first necessary element in the form of a weakened legal position of the debtor is present. The second one should be a rule which prevents the assignee from intentionally interfering with the legal obligation of the creditor not

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a) *De bénéficiaire rétroactivement de remises, de ristournes ou d'accords de coopération commerciale ;*

b) *De bénéficiaire automatiquement des conditions plus favorables consenties aux entreprises concurrentes par le cocontractant ;*

c) *D'interdire au cocontractant la cession à des tiers des créances qu'il détient sur elle.*

<sup>12</sup> Pursuant to the major amendments of the French Civil Code in 2016, the French legislator has specifically enacted rules on the contractual prohibition of assignment (art. 1321, para. 4), as well as a general duty to “respect” the contract of other persons (art. 1200 of the French Civil Code).

<sup>13</sup> Cf. Art. 1689 Code Civil in its version until 2016 provides that - *Dans le transport d'un droit ou d'une action sur un tiers, la délivrance s'opère entre le cédant et le cessionnaire par la remise du titre.*

<sup>14</sup> Cf. Art. 1240 of the French Civil Code - *Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.*

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to dispose of the receivable. As it turns out, French case law has acknowledged such a possibility, based entirely on the general tort clause.

As early as 1905, the French Court of Cassation has acknowledged the admissibility of such a tortious action<sup>15</sup>. The facts of case reveal that several famous circus artists have concluded a contract with *Casino de Paris* to perform a sophisticated acrobatic trick during the grand opening ceremony of the *Casino*. The parties agreed upon a penalty clause of 18 000 French francs with regard to non-performance of the acrobatic trick. Two days prior to the grand opening the circus artists paid the penalty clause and avoided the contract. This led to postponing the date of the grand opening and the necessity to conclude new contracts with other, less popular circus artists. Ultimately, the Casino had its grand opening, however the event was rather drear and unattended, mainly because of the significant delay and the absence of the famous circus artists. It was subsequently established that the *Isola* brothers, owners of *Theatre Olympia*, offered a significant sum of money to the circus artists should they agree to terminate the contract with *Casino de Paris* and to perform their trick on the stage of the theatre instead on the grand opening of the Casino. Upon finding out, *Casino de Paris* brought an action vis-à-vis the *Isola* brothers. The court ruled that there is a tort, committed by the defendants, who intentionally induced the circus artists and thus prevented the performance of the previously concluded contract. The court found a legal basis for allocating liability upon the *Isola* brothers in the general tort clause, incorporated in art. 1382 of the French Civil Code (in the version until 2016).

Subsequent cases only affirmed the reasoning adopted by the court that such an action is admissible whenever there is an intentional interference with another person's contract, irrespective of the type of the contract and the legal obligations arising from it. The same principle applies to the obligations *non-facere* (to refrain from doing something) as well. In a case, a buyer of a machine acquires the ownership over it and takes upon himself a legal obligation not to dispose further with it. However, a competitor of the seller intentionally induces the original buyer to breach the non-alienation agreement and to resale the machine. The original seller brings a tortious action vis-à-vis his competitor, which is affirmed. The court finds that there is a breach of a *pactum de non alienando*, the general non-alienation clause (*Palmer, V., p. 323*), induced intentionally by the competitor.

Perhaps the main difference between the general tort clause, on the one hand, and the case-law-developed intentional interference with contracts, on the other, lies in the requirement of “*mal foi*”, or bad faith, which French courts insist

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<sup>15</sup> Cf. Cass Civ. S. 1905.II.284, via **Palmer, V.**, A Comparative Study (from a Common Law Perspective) of the French Action for Wrongful Interference with Contract. – The American Journal of Comparative Law, Spring 1992, vol. 40, No. 2, p. 305-306. - <https://doi.org/10.2307/840563>

to be proven as a fact of the case. However, scholars note that French courts adopted a broad meaning of the “bad faith” requirement that encompasses various states of mind, including fraudulent conspiracy, intention to injure and previous knowledge of the contract (*Palmer, V., p. 323*).

To my view, this willingness of French courts to qualify an intentional interference with a contract is hardly surprising, since this particular type of behavior has long been frowned upon in France. The aforementioned court judgments from the beginning of the 20<sup>th</sup> century are actually a reverberation of a long since gone normative rule from feudal times and from the *Ancien Régime*. It is a well-known fact that the plague epidemic brought about severe consequences throughout the European continent, one of them being a considerable shortage of workforce. Perhaps in order to ensure the harvest, an Ordinance from 30. January 1350, issued by the French King John II of France (1350 – 1364), forbid the practice to convince workers to leave their current employer by offering them a higher wage. Despite the fact that the provided sanction was of a public law nature, this Ordinance testifies that even at this early feudal period, the act of intentionally convincing someone to breach an existing obligation arising out of a service contract was considered unlawful. This act, known as *débauchage*, remained prohibited and even outlived feudal times.

Several centuries later, in the time of the guilds, *débauchage* was once again prohibited by guild law. The right to compensation for damages sustained because of an inducement for breach of service contract was acknowledged by an Ordinance from 16. October 1720. Despite the abolishment of the guild system after the French revolution from 1789, the act of *débauchage* was still considered unlawful and undesired. In order to protect the interests of the good-faith employer, as early as 1803 French authorities introduced the *livret* - the predecessor of the employment record book - an official personal document recording the employment status. Every employer was supposed to enter the termination of the service contract. Should an employer hire a person despite the lack of an entry of the termination a previous service contract, civil liability was imposed upon him (*Palmer, V., p. 319 – 320*).

Despite the fact that *débauchage* did encompass the narrow sphere of service contracts, at the beginning of the 20<sup>th</sup> century French jurisprudence was well aware of the institute and thus had no trouble with its unequivocal application. What actually occurred was that French case law, using the general tort clause, stretched out the sphere of application of *débauchage* to all kinds of contracts and provided the common principle that intentional interference with another person’s contractual obligation will be considered a tort.

However, it is noteworthy that there is no record of a French court judgment providing compensation for intentional interference with a contractual prohibition of assignment. This idea, however, is no stranger to modern literature (*Kämper, L., p. 957*).



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### I. 3. The Common Law Approach

National legislations belonging to the common law family have traditionally acknowledged the possibility to allocate extracontractual liability upon the person who intentionally interferes with another person's contract. In sharp contrast to many civil law legislations, the common law has developed a separate kind of tort, known as “*inducement for breach of contract*”.

Despite some isolated views tracing the origin of the institute back to the plague epidemic of the 14<sup>th</sup> century – in a stunningly similar set of circumstances to Continental Europe (*Dobbs, D.*, p. 337-340, who states that labor shortage caused by the plague epidemic in England was the reason why King Edward III prohibited enticing a laborer from his hire by his Ordinance of Labourers from 1349), most modern scholars agree that the earliest encounter of the concept can be found in the famous case of *Lumley v. Gye (1853)*<sup>16</sup>. The facts around the case reveal that the signer Johanna Wagner agreed with Benjamin Lumley to sing at *Her Majesty's Theatre* and to refrain from entering into other engagements for the said period of time. The opera impresario Frederick Gye convinced Ms Wagner to sing at the stage of the Royal Italian Opera and to breach her obligation to Lumley. An action was brought vis-à-vis Gye. *Crompton J* awarded damages for interfering with the contract between Ms Wagner and Mr Lumley.

It is worth pointing out that until this case, English case law did not acknowledge a general duty for third persons to avoid interfering with other person's contracts<sup>17</sup>. Actually, *Crompton J* did not depart from this rule, but stated that in exceptional cases such a conduct might be considered a tort, should it have been deliberately undertaken by a third party, with the intention to obstruct the contractual performance of the debtor - „... *an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant... commits a wrongful act for which he is responsible at law.*“ Several decades later, the applicability of the tort vis-à-vis every contractual relationship was established by *Bowen v. Hall (1881)*<sup>18</sup> and by legal scholars (*McBride, N., Bagshaw, R.*, p. 631).

A remarkable circumstance about *Lumley v. Gye (1853)* is that the legal dispute arises from the performance of an obligation under a service contract, just like in France. To my view, the resemblance of situations is stunning, which might suggest that there is a common principle, shared on both sides of the English Channel, entrenched in the origin of the tort. However, contemporary

<sup>16</sup> Cf. *Lumley v. Gye [1853] EWHC QB J73*, (1853) 118 ER 749.

<sup>17</sup> „...As a general proposition of law... no action will lie for procuring a person to break a contract.“

<sup>18</sup> Cf. *Bowen v Hall (1881) 6 QBD 333*

scholars do not seem inclined to state that there is a historical connection between these two types of legal approach (*Palmer, V., p. 303 - These parallels follow each other so closely that one is tempted to say that there must have been some cross-fertilization of legal ideas across the Channel. Yet on closer inspection this seems highly unlikely, for all of the internal evidence – the opinions themselves, the authorities cited, the commentary and doctrine surrounding them – is devoid of any reference or allusion to a foreign law.*”).

However, another similarity between French and the English law regarding the tort in case can be found in the facts of *British Motor Trade Association v. Salvadori (1949)*<sup>19</sup>. Just like in France, a British court ruled that the inducement to breach of an anti-alienation clause (*pactum de non alienando*) should be considered tortious. The facts are as follows: after the Second World War the demand for automobiles was substantially higher than the supply. In order to prevent speculative re-sale, the British Motor Trade Association included a non-alienation clause in every sale contract, whereby the buyer obliges himself to refrain from transferring the automobile for a period of one year after its purchase. A third party (Salvadori) induced the buyer to dispose of the newly acquired vehicle and the Association brought an action for tortious interference. The court granted damages to the Association and the principle that interference is possible even with a *pactum de non alienando* was re-affirmed in subsequent court judgments<sup>20</sup>.

However, it should be pointed out that there is a major difference between the French and the English approach to the legal consequences of the contractual prohibition of assignment. As it has been already pointed out, prior to 2016 there was no explicit rule on *pactum de non cedendo* in the French Civil Code, which led the majority of scholars to perceive this contractual arrangement as a mere case of the general non-alienation clause. English law did adopt a more complex type of legal approach. After being witness to some shifts in the perception of *pactum de non cedendo* throughout the years, case law established the judgment on *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd (1993)*<sup>21</sup> as the primary authority on determining the legal consequences of a contractual prohibition of assignment. The court provided that the legal effect of *pactum de non cedendo* should be construed individually, given every single case and that it depends entirely on the volition laid down by parties. This would mean that given on the mutual intention of debtor and creditor, a contractual prohibition of

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<sup>19</sup> Cf. *British Motor Trade Association v Salvadori [1949] Ch 556*.

<sup>20</sup> It is interesting to contemplate on the fact that the British Motor Trade Association was plaintiff in a case regarding tortious interference with a non-alienation clause of sold vehicles on more than one occasion. The court judgment on *British Motor Trade Association v Gray [1951] SC 586* reveals that without any hesitation the judge affirmed the action and even cited *Lumley v. Gye (1853)* as applicable precedent.

<sup>21</sup> Cf. *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1993] UKHL 4, [1994] 1 AC 85*.

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assignment may either lead to the absolute exclusion of a receivable from participation in civil and commercial affairs or may simply be regarded as a personal promise not to dispose of the receivable with a limited effect<sup>22</sup>.

Thus, English courts embraced the “principle of will” theory in its fullest expression. The same flexible approach was adopted by contemporary British scholars as well (*Leslie, N., Smith, M., p. 575-576*). However, it is acknowledged that the most desired form of a contractual prohibition of assignment is the one that produces an *erga omnes* effect and can be enforced vis-à-vis any third party - „*The aim of such a term would be to render invalid any purported assignment of the benefit of a contract. The debtor would remain obliged to render performance, not to the assignee, but only to the assignor. Such a provision would not preclude the assignor from transferring the benefit owed to him to a third party after he received this from the debtor. This sort of prohibition on assignment is likely to be the most common.*“).

Since parties are generally free to determine the exact legal consequences of a contractual prohibition of assignment, it would be possible to limit the effect of this arrangement to the parties who stipulated it. This naturally brings up the question – is it possible in this case to be held liable for intentionally interfering with the *non-facere* obligation of the creditor? At first glance it seems that all the necessary ingredients are present, since English courts acknowledge the existence of a separate tort and at the same time allow parties to attribute to their contractual prohibition of assignment the legal consequences they consider to be most suitable. This would mean that if parties have limited the effect of a *pactum de non cedendo* to a mere personal promise of the creditor, inducing the breach of the legal obligation arising thereof seems to be reasonable. While modern legal scholars have no doubt that such a malicious conduct on behalf of the assignee should be regarded as tortious (*Bridge, M.- “The making of this contract of assignment would amount to a breach of the first contract by the assignor and might also render liable the assignee in the tort of inducement of breach of contract.”*); the same view is expressed in *Beale, H., Louise Gullifer, Sarah Paterson, p. 203-230, footnote № 65*), they seem to be having difficulties in the estimation of the exact scope of damages that the debtor has sustained in this situation (*Beale, H., Louise Gullifer, Sarah Paterson, p.215 - „...however, it is*

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<sup>22</sup> It is worth mentioning that there is a separate set of rules on assignment between partners acting in a mercantile capacity. The provision of the Business Contract Terms (Assignment of Receivables) Regulations, enacted in 2018, are aimed at facilitating the access of micro-, small- and medium-sized enterprises to financing via factoring and securitization in order to ensure their liquidity. Thus, the modern English legislator provided that „2. - (1) *Subject to regulations 3 and 4, a term in a contract has no effect to the extent that it prohibits or imposes a condition, or other restriction, on the assignment of a receivable arising under that contract or any other contract between the same parties.*“ By no means this provision should be regarded as the general rule, since it is aimed exclusively at business transactions.

very difficult to see that the customer has suffered quantifiable loss.“). Just like in France, despite the presence of all necessary elements, there are no available English court judgments on tortious interference with a *pactum de non cedendo*.

## II. IN THE SEARCH FOR A SUPRANATIONAL RULE

The evident lack of a purely national rule, aimed at resolving the conflict between the legal interests of the debtor and the assignee by allocating tortious liability upon the latter in the case of an intentional interference with a contractual prohibition of assignment leads us to the supranational acts regarding this matter. Perhaps the most resolute supranational attempt to facilitate the transferability of receivables in international business relations by limiting the legal consequences of a *pactum de non cedendo* is embodied in the provisions of ***The United Nations Convention on The Assignment of Receivables in International Trade (2001)***<sup>23</sup>, also known as the New York Convention. Despite the fact that the Convention has not still entered into force, since it required five ratifications<sup>24</sup>, its provisions are a clear expression of contemporary trends in transnational business law, one of them being the facilitation of access to financing for small- and medium-sized enterprises.

With regard to the contractual prohibition of assignment, the drafters of the Convention adopted a balanced approach. On the one hand, they explicitly limited the effect of such an arrangement solely to stipulating parties<sup>25</sup>. At the same time, perhaps in order to prevent undermining the legal nature of this contractual arrangement, they provided contractual liability of the creditor vis-à-vis the debtor for failing to comply with the promise not to transfer any receivables arising out of their contract.

However, even at a relatively early stage in the course of the preparatory work on the provisions of the Convention, conflicting views were expressed regarding the extracontractual liability of an assignee who intentionally interferes with a contractual prohibition of assignment. One view was that releasing the assignee from liability towards the debtor might result in the debtor having to pay the assignee, while being unable to recover from the assignor damages suffered by the debtor as a result of the assignment. Such a situation might arise, for example, if the assignor had, in the meantime, become insolvent. In addition, it was pointed

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<sup>23</sup> Full text and additional resources available at - <https://uncitral.un.org/en/texts/securityinterests/conventions/receivables> (accessed on 10.07.2023).

<sup>24</sup> The current status of the ratification procedure throughout different national legislations can be observed here - <https://uncitral.un.org/en/texts/securityinterests/conventions/receivables/status> (accessed on 10.07.2023).

<sup>25</sup> Cf. Article 9. Contractual limitations on assignments

1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables.

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out that such an approach might unduly restrict the autonomy of the parties to agree that certain receivables arising between them were not assignable, and would, in addition, be inconsistent with the approach taken in a number of national legal systems.

The prevailing view, however, was that extending the liability of the assignor for violating an anti-assignment clause to the assignee, would result in assignees having to examine a large number of contracts in order to ascertain whether they included anti-assignment clauses or not. That is why the members of the Working Group initially decided to completely exclude any tortious liability of the assignee<sup>26</sup>.

The tides changed in 1999, as the issue regarding the legal relationship between the debtor and the assignee was once again put up for discussion. With respect to tortious liability, once again there was a variety of perspectives. One view was that, if the aim of the draft Convention was to provide easier access to credit, it should avoid burdening the assignees, as potential financiers, with any liability in connection with the breach of an anti-assignment clause. The opposite view was that, under the laws of many countries, certain types of misconduct by the assignee might engage its tortious liability (for example, in the case of a possible inducement of the assignor by the assignee to assign receivables in violation of an anti-assignment clause with the intent to harm the interests of the debtor). It was stated that, to the extent that such tortious liability would only sanction malicious behaviour on the part of the assignee, the domestic tort law should apply. In addition, it was observed that mere knowledge by the assignee of the existence of an anti-assignment clause should not give rise to liability of the assignee, since such a possibility might deter potential assignees from entering into receivables financing transactions.

After discussion, the Working Group agreed that the final version of art. 9, para. 2 of the Convention regarding the legal consequences of a *pactum de non cedendo* should be redrafted to ensure that an assignee would have no contractual liability for breach of an anti-assignment clause by the assignor, while it would defer to domestic law to sanction manifestly improper behaviour<sup>27</sup>.

The revised approach was ultimately adopted and on 12. December 2001, by Resolution 56/81 The General Assembly of the United Nations adopted the final version of the UN Convention on the Assignment of Receivables in International Trade. The provision of art. 9, para. 2 adopts the view that mere knowledge of the assignee regarding the existence of a *pactum de non cedendo* is not enough to constitute tortious interference. The official Explanatory Report

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<sup>26</sup> Cf. Yearbook of the United Nations Commission on International Trade Law, 1997, Vol. XXVIII, p. 134, where these two conflicting views are being considered.

<sup>27</sup> Cf. "Assignment in Receivables Financing," United Nations Commission on International Trade Law Yearbook 30 (1999): 55-164, p. 63

accompanying the Convention explicitly states that the aforementioned provision does not exclude the extracontractual liability of the assignee, but merely limits its sphere of application<sup>28</sup>.

To my view, this approach is rather self-explanatory. The Working Group's main ambition is to affirm the assignment as a means to resolve liquidity issues in small- and medium-sized enterprises. Part of this process is to facilitate the transfer of receivables in international business, which cannot be achieved if the assignee is constantly facing a possible tortious action. That is why, as a general rule, mere knowledge of the existence of a contractual prohibition of assignment shall not be enough to allocate extracontractual liability on the assignee.

However, the wording of art. 9, para. 2 of the UN Convention is to be interpreted in a sense, that it does not *prima facie* exclude tortious interference with a contractual prohibition of assignment. Actually, such a situation should be regarded as an exception. The "common rule" is that the assignor initiates the transfer, mainly because of lacking liquid funds. The assignee considers this transfer an investment, since the price paid for the receivable is lower than its nominal value. Only in exceptional cases, the initiative to dispose of a receivable originates from the assignee. Once possible reason for this conduct may be that the assignee strives to become the new creditor of this particular debtor, in order to be able to exert economic pressure. This may be the case where the assignee and the debtor may be involved in the same branch of economic activity and the assignee uses the assignment as a means to press an economic competitor. Another possible motive can be found in the case, where the prospective assignee wishes to acquire shares from the debtor, but has received a refusal. In this case, this person will be very interested to acquire a receivable vis-à-vis the debtor, so that in the case of non-performance of the debtor, he will be in a strong position to propose a *datio in solutum* – transfer of shares instead of payment of the receivable.

As these two cases suggest, the motives of the assignee are immoral and undoubtedly deviate from good faith business practice. They cannot be regarded as an expression of the "common rule" as well. Actually, the aforementioned two cases can give a rational explanation why the drafters have not dealt with tortious interference within the Convention. On the one hand, their aim is simply to boost international business transactions by removing some obstacles preventing the unhindered transfer of receivables. It goes without saying that part of this process is to provide a substantial level of legal protection of the assignee. At the same

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<sup>28</sup> „However, if such liability exists, the Convention narrows its scope by providing that mere knowledge of the anti-assignment agreement, on the part of the assignee that is not a party to the agreement, does not constitute sufficient ground for liability of the assignee for the breach of the agreement.“, p. 34-35 - <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ctc-assignment-convention-e.pdf> (accessed on 10.07.2023).

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time, however, the members of the Working Group cannot tolerate malicious conduct exercised by the assignee and provide that should national applicable law contain an explicit provision allocation extracontractual liability upon the assignee in this situation, the Convention will not prevent this to happen. The assignee cannot refer to art. 9, para. 2 of the Convention in an attempt to exclude the liability for tortious interference with *pactum de non cedendo*.

It is worth mentioning that some earlier scholars have expressed their doubts about the existence of a tortious liability in this case (*Vogt, N., Kremslehner, Fl., p. 191*). Others interpret art. 9, para. 2 of the Convention as an attempt of the drafters to exclude any liability of the assignee vis-à-vis the debtor, but to admit that such a liability may be founded on the applicable national legislation (*Sigman, H., Smith, E., p. 739-740 - „This language of the Convention, clearly intended to protect innocent assignees from tortious interference claims by debtors, arguably may leave some residual risk of such a claim being made by a debtor under national law against an assignee who has knowledge of the anti-assignment term and nevertheless proceeds to take the assignment.“*).

The prevailing view among modern scholars is that the UN Convention does not eradicate *a priori* the possibility to allocate tortious liability upon the assignee, but simply excludes mere knowledge of the assignee about the anti-assignment clause as valid grounds for an action; the possibility for a tortious action is however intact (*Schütze, E., p. 199 – „Der Zessionar, der nicht Partei der Abtretungsbeschränkung war, kann demgegenüber nur deliktisch haften.“*).

To my view, the set of rules, prepared by the Working Group on the contractual prohibition of assignment, represent a fairly balanced legal approach. Drafted with the aims to promote transferability of assets and to relieve parties from burdensome litigation in mind, one should not forget that the provisions of the UN Convention deal exclusively with assignment in international trade (art. 3 of the Convention). Consumer affairs are explicitly excluded from the scope of application (art. 4 of the Convention), which is narrowed down to persons acting in a mercantile capacity (*Bazinas, S., p. 54*) - professionals who engage in everyday business affairs, often involving the assignment of receivables. These persons are in need of a rule that promotes unhindered transferability of assets, so that a wide range of objects may be used to acquire economic advantage. Thus, the provision of art. 9 does not provide them with a level of legal protection that might be considered even excessive regarding their needs. Where a consumer has a justifiable interest to deal solely with the original creditor and to prevent further transfer of the receivable, a professional does not. This liberal approach encompasses mere knowledge of the assignee as well. What it does not encompass, however, is a case of malicious conduct and intentionally tampering the contractual prohibition of assignment, since both do not fall under the definition of sound international business practice (art. 9, para. 2 of the Convention).

It is not surprising that this balanced approach, put forth by the Working Group, has served as a model for subsequent supranational attempts to harmonize the anti-assignment clause, such as art. 19, para. 3 and art. 20 of the OAS Model Inter-American Law on Secured Transactions from 2002<sup>29</sup>, art. 13, para. 2 of the UNCITRAL's Model Law on Secured Transactions from 2016,<sup>30</sup> as well as the draft versions of UNIDROIT Model Law on Factoring from 2022<sup>31</sup>.

It would seem that boosting the transferability of receivables by limiting both the effect of a *pactum de non cedendo* and the scope of application of the tortious interference with this arrangement proved to be a balanced approach. Quite logically, national legislators used it as a role model in some recent amendments of civil codes (*Gardos, P., p. 9*), such as paragraph 1396a of the Austrian Civil Code. Introduced in 2005, this provision is applicable to persons acting in a mercantile capacity and leaves consumers out. As it is evident, the Austrian legislator follows quite closely the philosophy of the UN Convention on the Assignment, as paragraph 1396a of the Austrian Civil Code not only limits the effect of a *pactum de non cedendo* solely to contracting parties, but also excludes the assignee's tortious liability for inducement of breach of contract in case of a mere knowledge of such an arrangement. Nevertheless, this provision is regarded

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<sup>29</sup> The provisions state the following - Article 19 - *A security interest in a receivable, other than a claim under a letter of credit, is effective notwithstanding any agreement between the account debtor and the secured debtor limiting the right of the secured debtor to grant security in or assign the receivable. Nothing in this Article affects any liability of the secured debtor to pay damages to the account debtor for breach of any such agreement.;*

Article 20 - *The account debtor may not waive the following defenses: 1. Those arising from fraudulent acts on the part of the secured creditor or assignee.* The full text is available here - [http://www.oas.org/en/sla/dil/docs/secured\\_transactions\\_book\\_model\\_law.pdf](http://www.oas.org/en/sla/dil/docs/secured_transactions_book_model_law.pdf) (accessed on 11.07.2023).

<sup>30</sup> The provisions state the following - Article 13. *Contractual limitations on the creation of security rights in receivables 1. A security right in a receivable is effective notwithstanding any agreement between the initial or any subsequent grantor and the debtor of the receivable or any secured creditor limiting in any way the grantor's right to create a security right. 2. A person that is not a party to the agreement referred to in paragraph 1 is not liable for the grantor's breach of the agreement on the sole ground that it had knowledge of the agreement* [https://uncitral.un.org/en/texts/securityinterests/modellaw/secured\\_transactions](https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions) (accessed on 11.07.2023).

<sup>31</sup> Cf. Model Law on Factoring Working Group Sixth session (hybrid) Rome, 28–30 November 2022, latest version available at - <https://www.unidroit.org/wp-content/uploads/2023/04/Study-LVIII-A-%E2%80%93-W.G.6-%E2%80%93-Doc.-7-Report.pdf> (accessed on 11.07.2023 г.) Article 8 — *Contractual limitations on the transfer of receivables 1. A transfer of a receivable is effective notwithstanding any agreement between the debtor and a transferor limiting in any way a transferor's right to transfer the receivable. 2. Neither a transferor nor a transferee is liable for breach of an agreement referred to in paragraph 1, and the debtor may not avoid the contract giving rise to the receivable on the sole ground of the breach. A person that is not a party to an agreement referred to in paragraph 1 is not liable for the transferor's breach of the agreement on the sole ground that it had knowledge of the agreement.*



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as somewhat controversial by some Austrian scholars, who consider art. 1396a ABGB as an unnecessary generalization of several supranational provisions, who have a very specific scope of application – international assignment, factoring etc. It is argued that promoting these rather specialized provisions to a general rule, applicable to all actors in mercantile relations, would not prove to be a sensible legal solution (*Spunda, A., p. 195*).

### CONCLUSION

*There is a good reason why, as a general rule, there are no national legislations who combine the inter partes effect of a contractual prohibition of assignment with an allocation of extracontractual liability for breach of this agreement. Usually, the legislator limits the legal consequences of a pactum de non cedendo solely between contracting parties in order to promote business. So, whenever a contractual prohibition of assignment is bargained between consumers or other persons not acting in a mercantile capacity, there are much better suited means to provide legal protection of their interests, such as nullity of the assignment in breach of this arrangement, or preserving the right of the debtor to perform to the original creditor. It is simply not prudent to subject a consumer to a limited legal protection and at the same time to encourage him to bring a tortious action vis-à-vis the assignee. The consumer has an interest to retain the original creditor and not to enter into tedious civil litigation.*

*On the other hand, merchants and entrepreneurs are professionals. A change of the creditor, conducted even in breach of a stipulation to refrain from an assignment, will not have such a detrimental legal and economic effect upon those persons. Therefore, a limited effect of a pactum de non cedendo should be considered reasonable. The same idea – to promote business, is the reason why, as a common rule, no extracontractual liability should be allocated upon the assignee, as this would prevent the very idea of free transferability of assets in a market economy. However, the legislator cannot turn a blind eye on a case of abuse of law and whenever an assignment is merely an instrument of the assignee to achieve an immoral or even unlawful result, it is fair to hold him liable for maliciously inducing the breach of pactum de non cedendo.*

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