

The Transfer of Rights subject to Litigation

A re-evaluation on the basis of a historical and comparative analysis

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Abstract

The transfer to a third party of a right subject to litigation, *e.g.* by assigning the disputed claim during the pendency of the suit, is not an infrequent occurrence. Nevertheless, such a transaction creates serious problems for German law: normally, the claim has to be dismissed because the transferor is no longer the “right” party. Fresh proceedings have to be instituted in which all of the facts have to be proven once more. If a transfer of rights subject to litigation is not to be forbidden outright, the law must balance the interests of transferor, transferee, and the opposite party in the proceedings. German law strikes this balance mainly by means of §§ 265, 325 ZPO (Zivilprozessordnung – Code of Civil Procedure). According to these provisions, it falls to the transferor to continue the proceedings. The transferee will, in principle, be bound by the later judgment but may participate only in a subordinate capacity as intervening party (Nebenintervenient).

These provisions of the ZPO have caused debate in academia and problems in practice since their enactment in 1877 as they do not fit well into the doctrinal structure of the code. Furthermore, the law does not fully respect the interests of the transferee to take over the proceedings – a point that is regularly criticised in practice.

The thesis seeks to explain these provisions on the basis of a comprehensive historical analysis. Such analysis unveils the way in which the drafters of the ZPO have sought to balance the interests. At the same time, the thesis attempts to re-establish a uniform doctrinal foundation for the problems created by a transfer of rights subject to litigation. Furthermore, an explanation is being provided for the historical meaning and practical application of § 325 (2) ZPO, which liberates a *bona fide* purchaser from the binding effect of a judgment against the seller.

As the current provisions leave only little room for (doctrinal) change to achieve a more balanced result, this thesis also develops alternative solutions *de lege ferenda*. To this end, it draws inspiration from a comparative analysis of the approaches adopted by the legal systems in England, France, and Switzerland. They all provide the transferee

with a much stronger position than German law: he is regularly entitled to take over the proceedings.

The reasons that have historically justified the restrictive German approach no longer exist today. Consequently, a reform of the German provisions should aim considerably to improve the transferee's position. § 266 ZPO can serve as a reference point for such a reform as this provision already envisages the taking over of proceedings by the transferee in certain cases, in which real property subject to litigation has been transferred. Combined with further findings from the comparative analysis, the thesis proposes a draft provision envisaging the change of parties as a general rule. The draft provision further seeks to ensure that any decision binds all three interested parties (transferor, transferee, and the opposite party) and that the interests of these three parties are well balanced even in special situations.