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Topic: Law

Decision and liability – the natural law principle of causality

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I. Introduction

Today's article deals with the topic of decision-making and liability, and the natural law principle of causality[1]. This is a highly topical issue, given that in economics the principle of shifting and reducing liability is upheld as being close to zero. Decisions that lead to a positive outcome are attributed to the decision-maker. Conversely, decisions that lead to a negative outcome are rejected, and the decision-maker distances themselves from them.

[1] The natural law principle of causality is the so-called polluter pays principle. Who initiated which causal process that led to a specific success or failure?

The debt collection industry is a prime example of such shifts and reductions in liability, but this is also widespread in other sectors of the economy.

Furthermore, digitalization, which permeates all areas, leads to difficulties in attributing decisions and liability. In our practice, we repeatedly encounter letters from authorities or companies, either electronically or by post, from which it is unclear who made the decision regarding a specific matter. This manifests itself in the absence of a handwritten signature at the end of the letter, or even the complete lack of a named responsible case worker.

We see another instance of a lack of accountability in the political sphere. We[2] repeatedly experience that our petitions to parliaments are rejected with the explanation that we must contact the parliamentary groups, as only they can initiate a debate in the respective parliament[3].

In the field of notary services, we repeatedly encounter documents published in the commercial register that contain ambiguities regarding responsibilities, due to missing signatures or, in some cases, no documents at all, such as articles of association that cannot be found in the commercial register. While the local courts, through the competent judges[4], are actually responsible for proper registration, notaries often handle this process, particularly for economic reasons and due to the need for digitalization.

We too must remain self-critical and question the legal structures of our companies. Establishing a US LLC or a German UG (limited liability company) is possible with virtually no share capital. While this simplifies company formation and launch, it also reduces liability to the detriment of third parties if consistently poor decisions are made that ultimately lead to the company's failure. This is precisely why it is important for us to advise and support our clients at the beginning of their business formation process, preventing this unfair reduction of liability to the detriment of third parties.

This type of liability shifting and reduction repeatedly leads to injustices and undue hardships because those who had no influence on the decisions, let alone made the disadvantageous decision themselves, are held liable.

[2] "We" refers to the team at VISCORSOL LLC.
[3] See the legal basis for the right of petition: Article 17 of the Basic Law (GG) or the parallel legal provision in the constitutions of the Länder.
[4] See Section 8 et seq. of the German Commercial Code (HGB); furthermore, see the Commercial Register Ordinance (HRV), in particular Sections 23 and 27 HRV.

In this article, we aim to explain the problem of liability shifting and reduction at the expense of third parties and its impact on the entire economic system, and to present possible solutions for how this problem could be resolved from a legal perspective, taking into account simple principles of natural law.

II. The shifting and reduction of liability

Let's take a closer look at the shifting and reduction of liability. Shifting liability means that the decision-maker and the party liable are separated. The decision-maker makes a decision, but the effect of that decision does not affect the decision-maker themselves, but rather a third party who has nothing to do with the actual decision or its effect—that is, who was neither involved in the decision nor had any influence on it.

To illustrate the problem more clearly, let's consider a hypothetical example.
As an example, let's take the managing director of a company[5] who decides to enter into a specific business deal with another company[6]. He provides the contractually agreed-upon service in advance, but the business partner is subsequently unable to pay for the service rendered due to customer payment defaults.

After several unanswered payment reminders, the managing director of the service provider decides to assign the outstanding debt to his business partner to a debt collection agency[7]. The debt collection agency, which had no influence on the managing director's decision, let alone participated in it, purchases the outstanding debt. The managing director receives the purchase price and considers the transaction "successful."

A shift in liability has already occurred here, as the managing director of the service-providing company has assigned the outstanding claim to the debt collection agency. Furthermore, he has "transformed" a decision that was doomed to failure into a successful one for himself and his company.

[5] Company A
[6] Company B
[7] Company C

The debt collection agency unsuccessfully attempted to enforce the outstanding claim against the service provider's business partner through both pre-litigation and litigation proceedings, including payment orders and enforcement orders. Meanwhile, it transpired that the service provider's business partner had become insolvent. Due to the classification of the outstanding claim as risky and a newly arising legal situation, the debt collection agency decided to assign it to another specialized debt collection agency[8] for insolvent claims.

This company, specializing in insolvent receivables, purchases the claim, leading to a further shift in liability. The debt collection agency has transformed a potentially unsuccessful decision into a successful one for itself: offloading the "tainted" receivables in exchange for a purchase price.

Meanwhile, the responsible district court reviewed the application to open insolvency proceedings and rejected it due to insufficient assets to cover the costs. The business partner of the service provider is ultimately liquidated. The company specializing in insolvency receivables is the last link in the economic chain and is left with the claim, attempting to write it off for tax purposes.

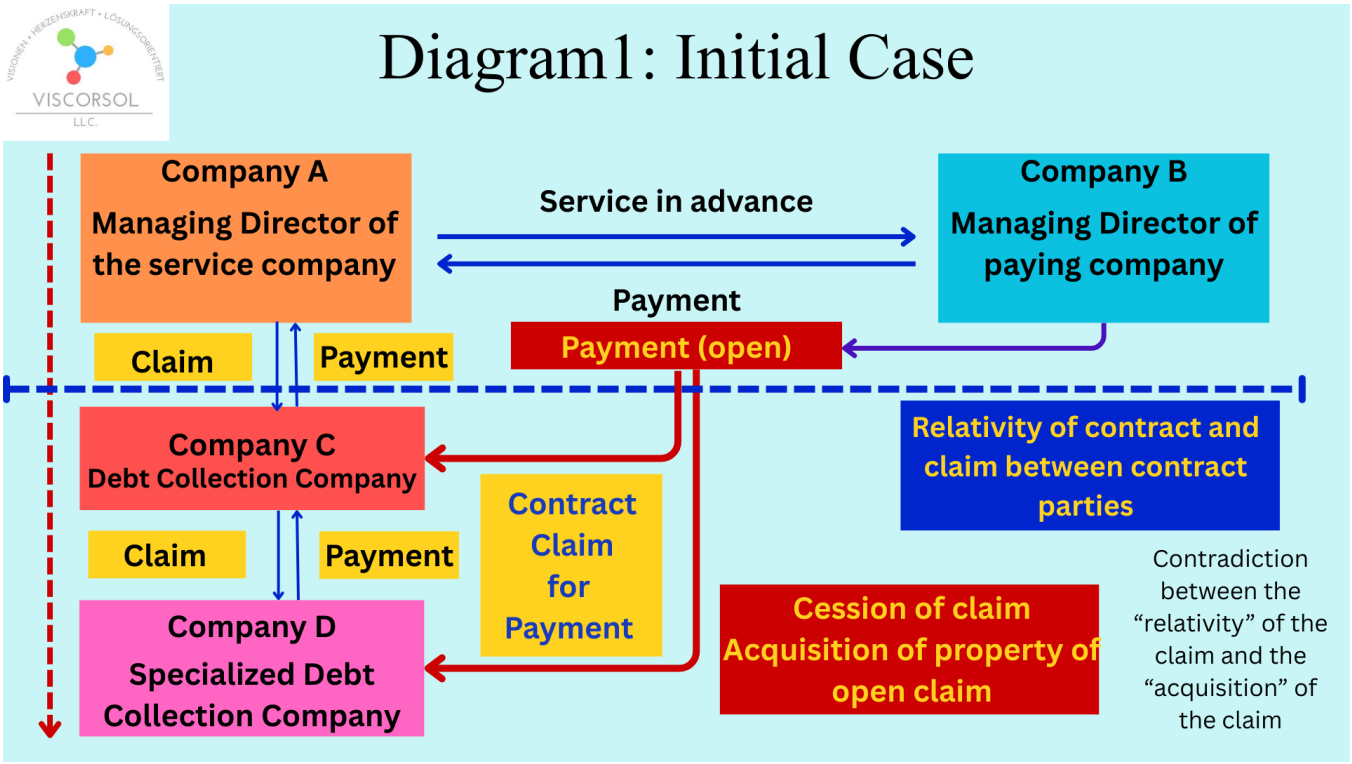
One might argue that liability for the claim has disappeared, since the service provider sold it to a third party and the specialized debt collection agency wrote it off. However, this is not the case, as the outstanding claim has been passed on to the smallest link in the chain, separating the decision from the liability. Ultimately, the tax-related write-off of "bad debts" means a burden on the public due to lower tax payments by the affected company.

And so there are many examples in economics where entire chains of liability shifting occur, but at the expense of third parties who had absolutely no influence on the original, unsuccessful decision.

In practice, we can say that the "external" failure usually ends up hanging over the last link in the economic chain. From a legal perspective, we also repeatedly see that in such cases, companies that are ultimately held responsible for the bad decisions of others are unable to prove the existence of the original claim arising from the failure. The "bad debt" then disappears quietly, so to speak, at the expense of the smallest link.

[8] Company D

Diagram 1:



II. The natural principle of causality and the relativity of the demand

In the case of an economic advantage, the question of a shift in liability becomes irrelevant according to the economic principle that whoever is successful through correct decisions may claim this success for themselves.

But what if the decision leads to failure or economic disadvantage? Is it fair to transfer a failed decision, in the form of an outstanding claim, to third parties who had no influence on the decision, let alone participated in it? Is it fair to sell the failed decision to "uninvolved" third parties and thereby turn the failure into a success for oneself? Can it be fair to write off "tainted" claims at the expense of the general public and thereby reduce one's own tax burden?

1. Principle of causality and polluter pays principle

Let us first consider the matter from a natural law perspective. A key principle of natural law is the so-called principle of causality[9], also known as the polluter pays principle. This principle takes into account the natural law that human behavior sets in motion a causal chain that ultimately leads to specific results[10]. The principle of causality establishes a causal connection, namely between human behavior as the cause of a particular outcome. In other words, who caused what to occur[11]?

The principle of causality is particularly important in criminal law, serving to logically and thus legally confirm or refute criminal offenses. We also find the principle of causality in contract law, for example, in liability based on fault in contract law or tort law. This is because the result of a causal chain can only be attributed to the person who initiated the causal chain and thereby caused the specific result.

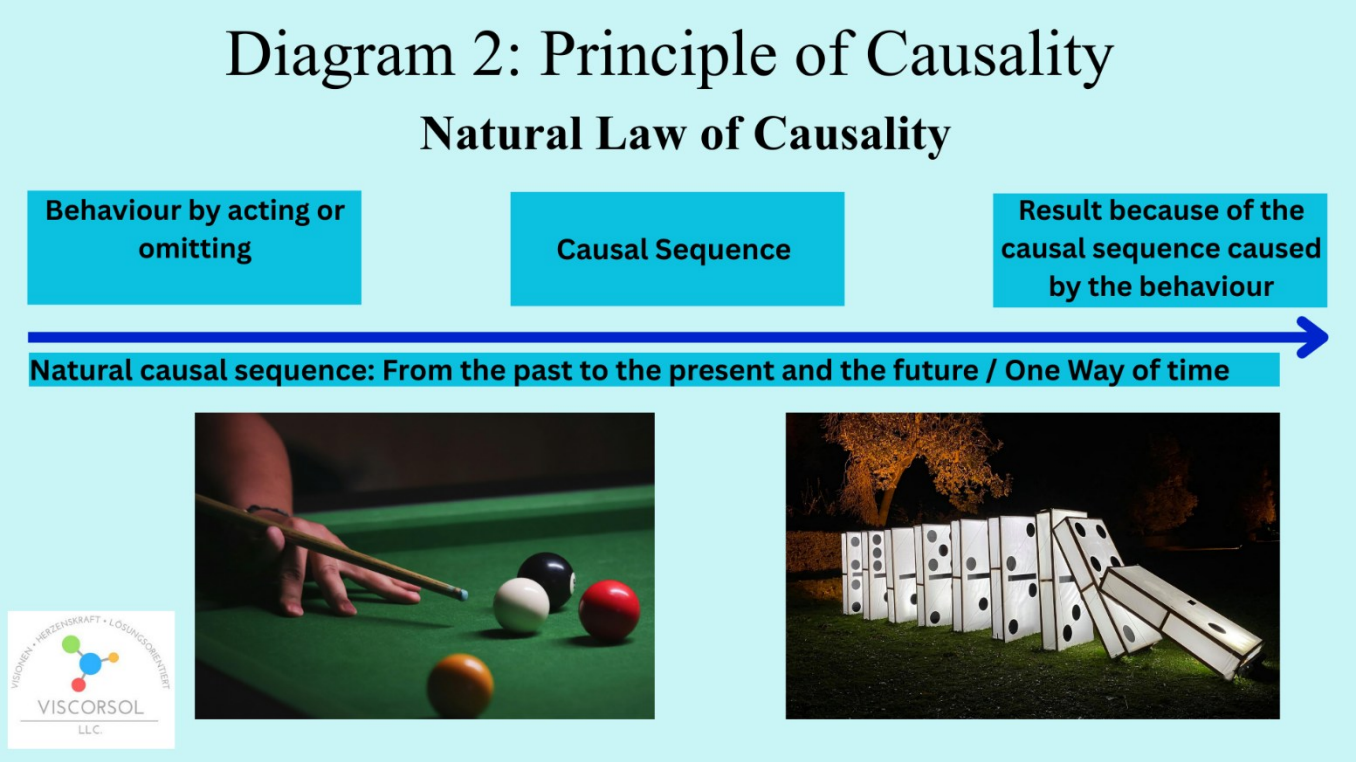
This ultimately results in the assumption of liability by the perpetrator and not by third parties who neither caused the causal chain, nor contributed to or participated in it.

This has something to do with the human sense of justice, not taking responsibility for a decision in which one was not involved and which one did not make oneself, and certainly not if the decision brings disadvantages[12].

Therefore, the principle of causality should remain a fundamental principle when considering liability. Exceptions and deviations from this principle should be carefully reconsidered, especially since a routine has developed in economics of allowing this fundamental principle to recede into the background due to considerations of expediency and profit maximization, resulting in unfair shifts of liability to the detriment of third parties.

[9] Also known as the cause-and-effect principle. This principle is particularly important in criminal law for logically confirming or refuting criminal offenses.
[10] This is primarily due to the fact that the model of time is a one-way street, moving exclusively towards the future. It is simply impossible, by its very nature, to turn back the wheel of time by going back into the past to reverse a causal chain of events.
[11] Idiom: “Name the horse and rider”.
[12] For example, this is enshrined in the principle of equal treatment and the prohibition of arbitrariness contained therein; in short, to treat equals equally and unequals unequally.

Diagram 2:



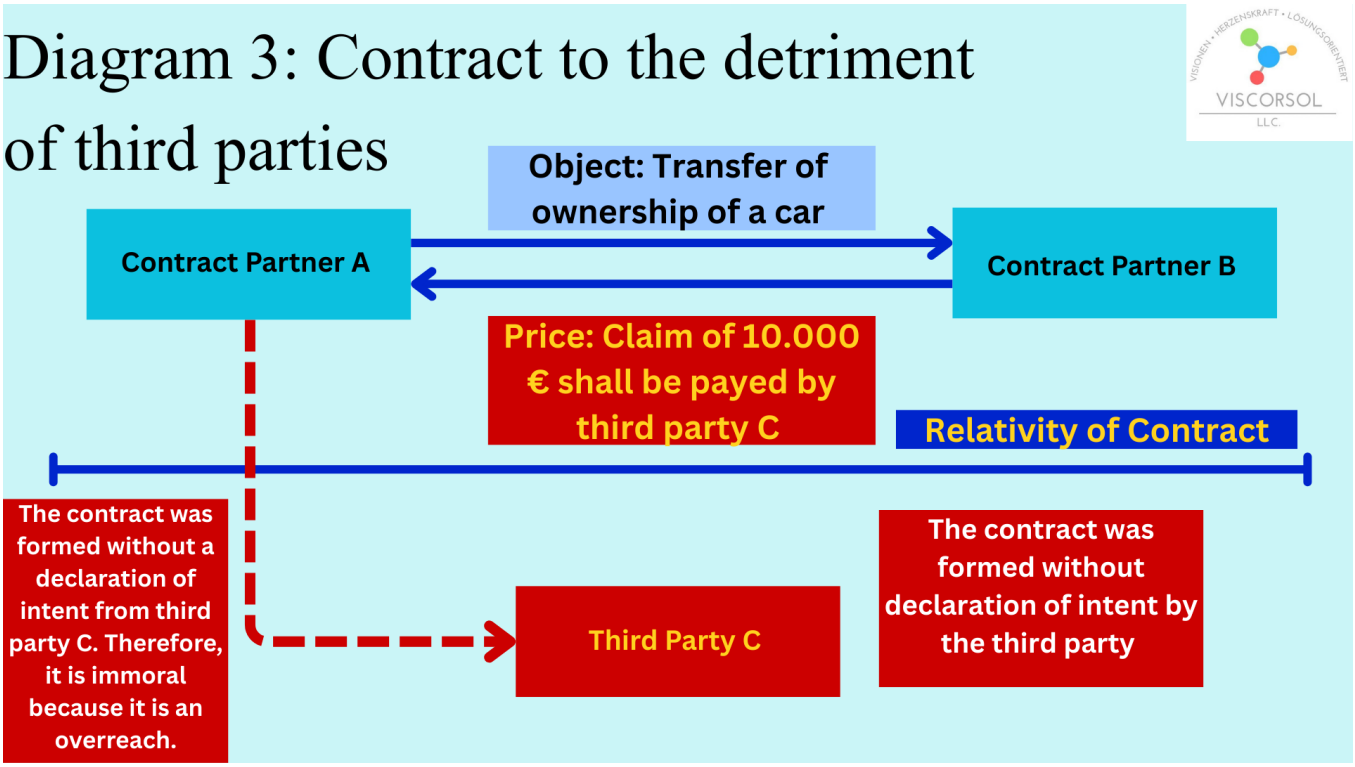
2. Prohibition of contracts to the detriment of third parties; relative effect of contracts

Another principle of contract law that is often overlooked is the prohibition against concluding contracts to the detriment of third parties. This prohibition stems from the understanding that contracts are generally only effective relatively, i.e., between those who have validly concluded the contract. Uninvolved third parties are not legally bound by a contract that has only relative effect.

Here, too, the principle of natural causality applies, meaning that contracts to the detriment of third parties are immoral and therefore invalid[13]. A contract with legal effect against third parties is only permitted in exceptional cases, namely out of goodwill, as such contracts may have a beneficial effect on the uninvolved third party in a contractual relationship[14].

[13] The immorality of contracts to the detriment of third parties arises in German law from § 138 para. 1 BGB, as well as from § 134 BGB in conjunction with Art. 2 para. 1 GG (principle of private autonomy) and Art. 3 GG (principle of equality and prohibition of arbitrariness).
[14] See §§ 328 ff. of the German Civil Code (BGB); problematic due to preferential treatment, Art. 3 of the German Basic Law (GG).

Diagram 3:



3. The assignment with its economic and legal problems

German law introduces a special situation, namely the strict separation of the obligation transaction and the transfer transaction[15]. An assignment is a transfer transaction based on an obligation transaction in the form of a purchase of receivables[16]. The contract is then fulfilled by assigning the receivable from the original creditor to the new creditor in exchange for payment of a specific purchase price[17]. Consequently, a change of creditor occurs within the framework of the assignment, leading to a separation of the decision-maker and the receivable. Further important prerequisites for the assignment of a receivable are the existence of the receivable through a valid contract, the delivery of the contract document to the new creditor, and notification of the change of creditor to the debtor[18].

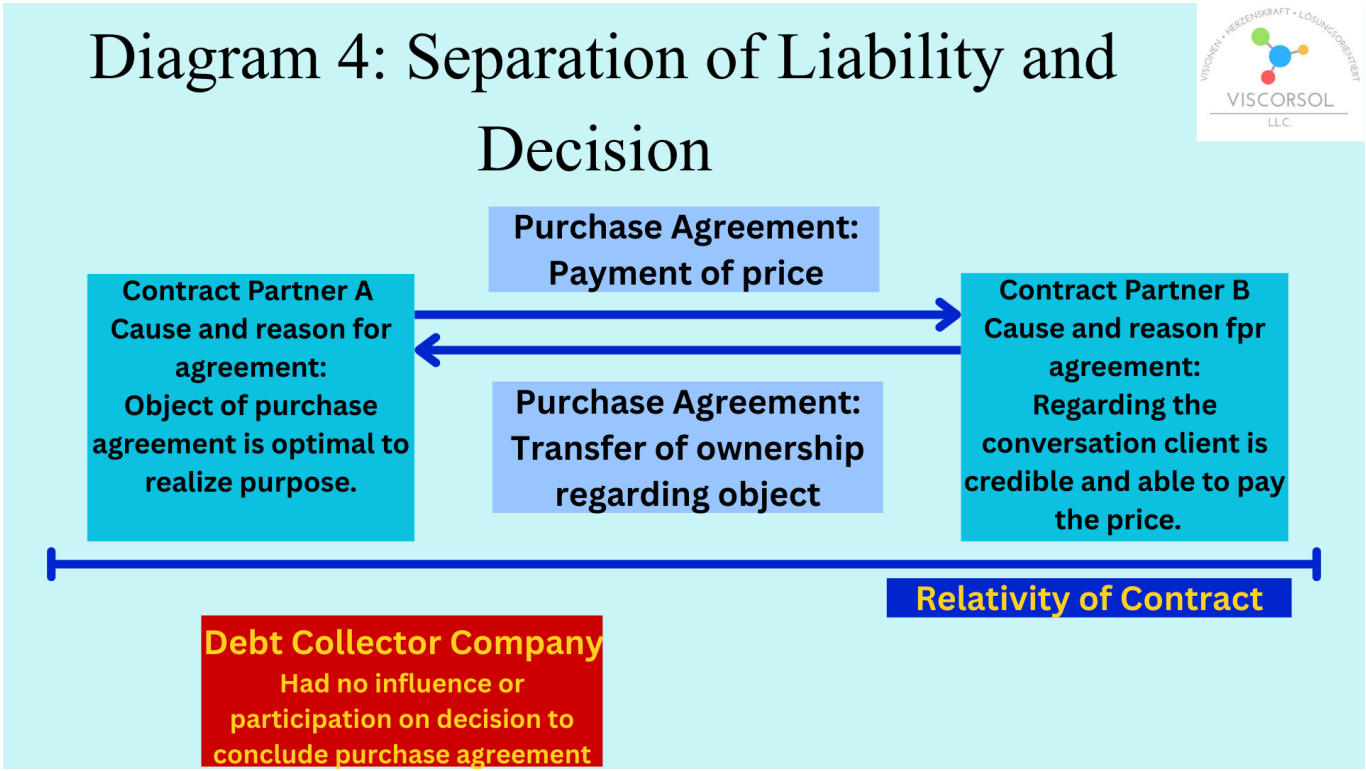
[15] Abstraction principle in German law: separation of the obligation transaction and the disposition transaction.
[16] Purchase agreement concerning a right or claim, see §§ 453 BGB in conjunction with 433 ff. BGB.
[17] The legal basis for the assignment is based on §§ 398 ff. BGB.
[18] See §§ 403 ff. of the German Civil Code (BGB).

This is precisely where a significant problem lies, namely, as already described, that the decision is separated from the claim and thus from the liability of the so-called creditor. The debtor remains the same, but the creditor thus has the option of exonerating themselves from a wrong or unfair decision they have made. After all, concluding a contract requires two corresponding declarations of intent, i.e., from the debtor and the creditor.

The claim is treated as if it were a physical object and subjected to property law, even though claims are not physical objects but rather based on mental decisions[19].

Historically, Roman law originally lacked the right of assignment, that is, the transfer of rights to claims between living persons[20]. The claim was strictly accessory to the person who had entered into the contract with another person[21]. This meant that the decision to enter into a contract and the liability were inextricably linked.

Schaubild 4:



[19] Furthermore, claims are not treated as absolute rights with exclusionary and allocation functions, so they are not covered by tort law protection.
[20] See on the follwoing link in german language: https://de.wikipedia.org/wiki/Abtretung_(Deutschland) .
[21] See on following link in german language: https://de.wikipedia.org/wiki/Abtretung_(Deutschland) .

4. The prohibition of separating decision-making and liability

In light of what has already been presented, the question must be seriously raised whether the assignment of claims should be abolished as an unconscionable legal transaction. The arguments for abolishing the assignment of claims are obvious. Besides the socially harmful consequences and the unfair and unconscionable shifting of liability, the abuse of power and the speculation surrounding the release from liability for decisions made are further arguments.

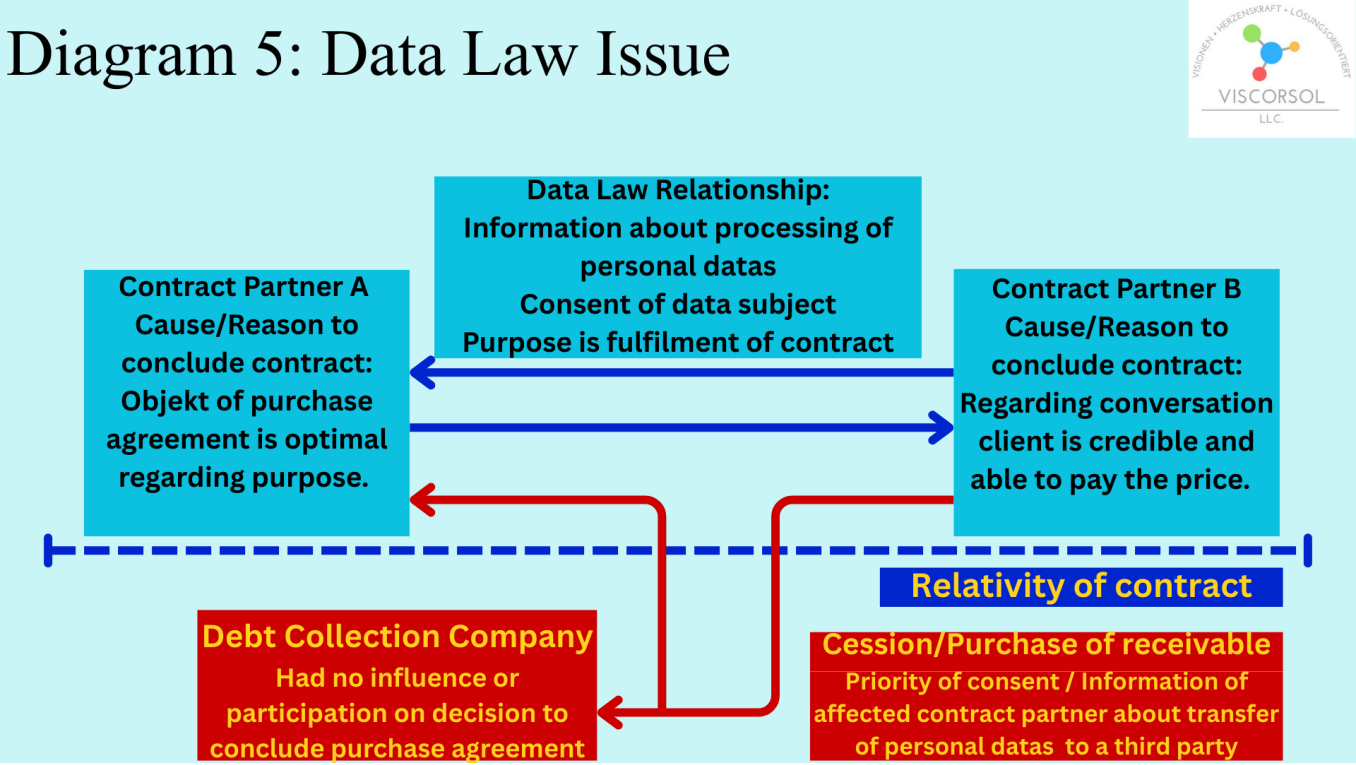
Furthermore, there are data protection arguments, as the processing of personal data is always primarily subject to the consent of the data subject. With the assignment of receivables, the personal data of the data subject, i.e., the debtor, is unilaterally transferred to third parties with the argument that the data transfer serves the purpose of fulfilling the contract[22].

One overlooked aspect is that a data processing relationship exists between the data subject and the controller, which has legal effect solely between these two parties[23]. If the controller's processing of the data subject's personal data is based on consent, then, when processing the personal data by a third party through assignment or sale of receivables, the data subject's consent must also be obtained[24], and they must be informed about the transfer of their personal data[25] to the third party. In our view, the primacy of the data subject's consent must be considered in light of the relative nature of the data protection relationship. Consequently, a violation of data protection law can be invoked if personal data of debtors is unilaterally transferred to third parties, such as debt collection agencies.

Ultimately, one should consider prohibiting the assignment of receivables altogether. Until then, however, one can make use of existing law. For example, it is possible to raise the objection of statutory prohibition or immorality of the legal transaction, arguing that the natural law principle of causality is violated and that contracts have been created to the detriment of third parties[26].

[22] See Article 6(1)(b) GDPR.
[23] See § 311 para. 1 of the German Civil Code (BGB).
[24] See Articles 5(1), (2), 6(1)(a), and 7(1) GDPR.
[25] See Article 13(3) GDPR, as a sale of receivables is pursued by assignment.
[26] See § 134 BGB in conjunction with Art. 2 para. 1 GG (principle of private autonomy); § 138 para. 1, para. 2 BGB.

Diagram 5:



5. Communication; "haircut" and negotiation to reach a solution

Now the question arises of how to deal with an unfavorable decision that results in a disadvantage. Let's revisit the example of the managing director who has provided his services in advance, but his business partner cannot make payment because he himself has insolvent customers. First and foremost, communication should be a top priority, since both parties have entered into a contract and thus established a relationship of trust. Simply sending a payment reminder without communicating with the business partner is insufficient. One should take the time to speak with the business partner and openly discuss the issue of the payment delay.

The law provides a variety of legal instruments for dealing with so-called breaches of contract while maintaining the existing contractual basis and the relationship of trust. One should make use of the principle of freedom of contract and approach breaches of contract creatively. Sometimes the longer path is more successful than constantly taking the shortest route to economic success.

To stick with the example, a deferral would have been one option. Alternatively, one could have addressed the issue of frustration of purpose and agreed on a so-called "haircut," agreeing to a partial payment to fulfill the contract[27]. Instead, no communication took place between the contracting parties, except for an attempt to deflect the claim by the shortest route through the "chain of liability," at the expense of the smallest link in the chain. However, as already discussed, this should not be the goal. Instead, the aim should be to raise awareness of existing problems and obstacles, and to develop and implement solutions for the benefit of the parties involved and the general public.

6. Tax deductibility and the economic and legal issues involved

Finally, let's turn to the last point: the tax deductibility of so-called "bad debts." The only option remaining for the last link in the chain is tax deductibility to achieve lower taxation. However, this always amounts to a release from liability at the expense of the general public. While the deductibility of "bad debts" is legitimate, it cannot be the be-all and end-all, especially when it becomes a viable business model at the expense of the community.

From our perspective, this cannot be fair because it results in an unacceptable abdication of liability. This directly contradicts the principle of natural causality and the principle that liability must always be assumed where the decisions are made.

Here, too, the question arises as to what extent the tax system needs reform. From our own experience with US companies, we can say that the tax system in the USA is characterized by a different philosophy. While in Germany, one accepts the tax rate and looks for deductions and so-called loopholes to make oneself appear less wealthy and thus pay less tax, in the USA the approach is: how much of one's generated revenue can be kept without being subject to taxation?

[27] See § 313 BGB or § 315 BGB.

III. Result

As a result, it must be concluded that shifting liability and the possibilities for exemption from liability pose significant problems for the economic system and also call into question the credibility of our legal system. These shifts and exemptions from liability lead to unethical harm to uninvolved parties and third parties, and constitute socially harmful behavior that is no longer acceptable.

Economic business models and legally untenable constructs have become established, promising convenient solutions to performance issues and intended to "relieve" decision-makers of their unpleasant and incorrect decisions. However, the main problem of "corrupted" claims and incorrect decisions cannot be solved in this way, but is instead passed on through the liability chain to the smallest link in the economic chain; in most cases, however, it ultimately falls on the general public via tax law.

We need a return to the natural law principle of the polluter pays principle. Liability must be assumed where the decisions were made. This applies not only to decisions that are advantageous, but especially to those that lead to economic disadvantage. Decision and liability must be reunited and not separated. This economic and legal principle should be enshrined in constitutions to prevent abuse of power and socially harmful behavior, and to impose a legal order on the economy.

The current law of assignment must be reviewed and reformed in favor of the natural law principle of causality and responsibility. It cannot be that claims, like tangible objects, fall under property law and can be "transferred" to third parties as new creditors, regardless of the debtor's will and despite the fact that claims arise from contracts based on conscious decisions.
Zum einen entfalten Forderungen eine rechtliche Wirkung ausschließlich zwischen den Vertragsparteien, also zwischen Gläubiger und Schuldner. Forderungen entfalten grundsätzlich keinerlei Wirkung gegenüber Dritten und werden auch nicht als absolute Rechte eingeordnet.

On the other hand, assignments of receivables are to be classified as contracts to the detriment of third parties, namely to the detriment of the debtor, because a receivable is unilaterally assigned and the creditor thereby unilaterally withdraws from their position as a contractual partner. This results in a shift of liability that violates the principle of causality and leads to an inappropriate separation of decision and responsibility, particularly when it comes to assuming responsibility for disadvantageous economic decisions.

Furthermore, data protection issues arise, because with the assignment of receivables, which occurs within the context of a sale of receivables, the personal data of the debtor in question is inevitably transferred to the new creditor. Here, too, the data subject's right to consent and disclosure must be respected if one does not want to unilaterally deprive the data subject of data control and data sovereignty and thereby become liable for violating the data subject's right to informational self-determination.

One should return to the Latin proverb "Pacta sunt servanda" and pursue alternative paths to find solutions for performance issues that serve the interests of both contracting parties and do not place an unnecessary burden on the community. Private autonomy should be given more leeway, not to undermine fundamental principles of natural law, but to strengthen the will of the contracting parties to address existing problems, communicate, and find compromises that are fair to both sides. While the shortcut of assigning claims is convenient, it is not the ideal solution for achieving positive changes and constructive approaches to existing economic obstacles, and certainly not for resolving the general problems of the economy.

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Postscript: This article is based on the human thoughts and will of the author named at the beginning of the article, without the use of digitally autonomous or other will-substituting methods.

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