Gárdos, Péter*

Questions relating to the transfer of contracts**

I. Introduction

At first sight, the transfer of a contract does not raise any questions. Suppose there is a contract between A and B, in which A, for whatever reason, no longer wishes to participate, but C is willing to take A's position, and B has no problem substituting A with C. From a practical point of view, there seem to be no reason not to recognise the possibility of this change.

Of course, if this arrangement affects a third party, the law must ensure that the situation of this third party should not become more burdensome without the consent of this party. Perhaps the most typical example is where the debtor's repayment obligation in a loan agreement is secured by a guarantee. If a new debtor replaces this debtor, it is necessary to ensure that the guarantor can be released from their obligation. The argument for this is straightforward. As the guarantee was given in respect of the original debtor, taking into account the financial situation of that person or the personal relationship between the guarantor and the debtor, the guarantor may not be forced to secure the debt of the new party.

Setting aside the problem of third parties, the transfer of contract concerns only the situation of A, B and C. Having regard to the principle of freedom of contract, there is no obstacle to such a transaction.

This is precisely what we found before Act V of 2013 on the Civil Code ("New Civil Code") entered into force in 2014. Act IV of 1959 on the Civil Code ("Old Civil Code") did not contain rules on the transfer of contracts. Nevertheless, the courts recognised that, by transferring all rights and assuming all obligations under the contract, the original parties and the new party might, in a trilateral agreement, transfer the contractual position of a party.[1] This was also in line with the fact that several sectoral laws expressly recognised the transferability of the contractual position.[2]

* Gárdos, Péter, Dr. habil., Associate Professor, Eötvös Loránd University, Faculty of Law, Department of Civil Law.

** This paper is an edited version of the author's habilitation lecture held on 2 March 2023 at ELTE Law School. This paper was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences.

1 See, e.g., the Supreme Court's decision BH 2006, 409. and the decision of the Szeged Court of Appeal BDT 2008, 1883.

2 See, e.g., Government Decree 214/1996. (XII. 23.) implementing the package travel directive that allowed the transfer of the package travel contract, or Section 161(1) of Act CXII of 1996 on credit institutions that allowed the transfer of loan portfolios.

DOI: 10.56749/annales.elteajk.2023.lxii.14.241

Moreover, the Old Civil Code itself included a rule that qualified as a transfer of contract. Among the provisions on lease agreements, the Old Civil Code provided that if the lessor sells the leased property, the lease agreement automatically transfers to the buyer.[3]

Under such an approach, the New Civil Code's task could only have been to codify the solution developed by the courts and thereby reduce the transaction costs of the parties by providing appropriate model rules for the transfer of contracts. The New Civil Code, indeed, introduced such rules.[4] Even though these rules were based on the solutions developed by the courts, several problems emerged after the New Civil Code entered into force.

II. Overview of the thesis

The thesis provides an overview of the law of the transfer of contracts from a comparative approach. It starts by summarising how the transfer of contracts is regulated in those few European jurisdictions where the civil code or the law of obligations introduced rules on the transfer of contracts.[5] This overview also extends to the UNIDROIT Principles and the Draft Common Frame of Reference. Apart from this high-level overview, the thesis also provides a detailed analysis of German law and a summary of English law.

The second part of the thesis explains how the transfer of contracts was regulated in Hungarian law before the New Civil Code and provides an introduction to the rules of the New Civil Code. It elaborates on how the amendment of the New Civil Code[6] and the amendment of the Act on the Transitional Provisions of the New Civil Code[7] caused significant uncertainties, how the situation was exacerbated by the decision of

[3] Section 432(1) of the Old Civil Code.
[4] Section 6:208–6:211 of the New Civil Code.
[5] The thesis provides an overview of the rules on the transfers on contracts in Italian, Portuguese, Estonian, Slovenian, Czech and the French civil codes or laws on obligations.
[6] See Act LXXVII of 2016 on the amendment of the New Civil Code.
[7] Act CLXXVII of 2013 on the Transitional Provisions of the New Civil Code includes the transitional provisions explaining whether, in a given situation, the rules of the Old Civil Code or the rules of the New Civil Code apply. After the act entered into force, the legislator, from time to time, also introduced substantive rules in this act. One of such amendments took place with the adoption of Act CCXX of 2015, which introduced rules on the transfer of contracts. This amendment not only inserted a transitional provision concerning certain transfers of contracts, but it also stated that, in these cases, the transfer of contract leads to the termination of the original contract and the creation of a new contract. For a detailed analysis, see Gárdos P., Gondolatok a szerződésátruházásról az Alkotmánybíróság határozata nyomán [Thoughts on the transfer of contract after the decision of the Constitutional Court], (2021) (7–8) *Magyar Jog [Hungarian Law]*, 427–444.

the Constitutional Court,[8] and how the Curia's uniformity decision[9] helped in clarifying the situation.

The third part focuses on the question of what rights and obligations are transferred to the assignee in the case of an assignment. The paper argues that the New Civil Code's rule is inaccurate and the Hungarian legal literature also draws the scope of these rights and obligations too narrowly.

Building on the findings of this part, the last chapter addresses the question of how a transfer of contract may be described.

This paper summarises two findings of the thesis.

III. Advance consent to the transfer of contracts

The first finding that this paper's explanations relate to the question of advance consent. The New Civil Code provides that the transfer of contract is a tripartite agreement, but if the party remaining in the contract has given advance consent, the transfer shall take effect upon the party remaining in the contract being notified of the transfer.[10]

It seems obvious that the party remaining in the contract should have the right to notify the other party in advance that they consent to the substitution of their contractual partner. Such advance consent makes the transfer easier, and could therefore be valuable for the other party. The UNIDROIT Principles also contain a similar rule.[11] However, if we take a closer look, the concept of advance consent is slightly puzzling.

Consent, per definition, is a declaration from a third party, meaning someone who is not a party to the contract. Such a third party can be a parent company of one of the parties, the regulator of a regulated entity, or a guardian in private relationships. The UNIDROIT Principles regulate the transfer of contract as a bilateral agreement between the party leaving the contract and the new party entering the contract. This agreement, naturally, requires the consent of the party remaining in the contract.[12] The rule on advance consent easily fits in this structure. However, under Hungarian law, the transfer of contract is not regulated as a bilateral contract between the party leaving

[8] Decision 22/2018. (XI. 20.) of the Constitutional Court.
[9] Uniformity decision no. 7/2021 PJE on the enforcement of the rules governing transfers of contracts under Act No. V of 2013 on the Civil Code.
[10] Section 6:208(1) and Section 6:209(1) of the New Civil Code.
[11] Article 9.3.4 of the UNIDROIT Principles provides that the other party may give its consent in advance. If the other party has given its consent in advance, the assignment of the contract becomes effective when a notice of the assignment is given to the other party or when the other party acknowledges it.
[12] Article 9.3.3 of the UNIDROIT Principles.

and the party entering the contract, to which the party remaining in the contract can give their consent as a non-contracting party.

The Civil Code provides that the transfer of contract is a tripartite contract, to which the party remaining in the contract is also a party. Therefore, instead of consent, the Civil Code should have regulated how the party can express their declaration in advance. In principle, as this party is the first in the offer and acceptance scheme, this declaration should be an offer.[13] However, at this point in time, the party remaining in the contract does not know to whom this offer should be addressed, and, more importantly, does not know the material terms of the transfer.[14]

The law should therefore recognise the unique nature of this declaration. First, the declaration is addressed to the original party, but not addressed in relation to the new party. Second, taking into account the particularities of how the transfer takes place, this declaration should not be regarded as an offer.

IV. Characterisation of the transfer of contracts

The second finding of the thesis this paper will briefly address concerns regarding how the transfer of contract can be characterised.

The Civil Code, its amendments and the legislative developments that have taken place since the Civil Code entered into force make such a characterisation difficult, as these often contradict each other.

The thesis argues that there are five possible solutions to characterise the transfer of contracts from a doctrinal perspective: *(i)* a transfer in the legal sense, *(ii)* an amendment of the original contract, *(iii)* a novation of the original contract, *(iv)* an assignment of all receivables and rights and the assumption of obligations under the original contract to a third party, *(v)* if none of these solutions can describe the transfer of contracts appropriately, we can regard the transfer of a contract as a *sui generis* legal institution.

Handling the transfer of contracts as real transfers would be the closest to how business people treat such transfers. According to this approach, the transfer of contract is an actual transfer, the subject of which is the contractual position. This would be similar to the German law's position, where, at least according to the majority view, the transfer of contract is an actual transfer of the contractual position.[15] However, *de lege lata,* this

[13] Section 6:64 of the New Civil Code.

[14] An offeror is only bound by their offer if the offer includes the material terms of the agreement [Section 6:64(1) of the New Civil Code].

[15] K. W. Nörr, R. Scheyhing and W. Pöggeler, *Sukzessionen. Forderungszession, Vertragsübernahme, Schuldübernahme [Legal succession: Assignment, transfer of contracts and assumption of debt],* (Mohr, Tübingen, 1999) 187; K. Larenz, *Lehrbuch des Schuldrechts Allgemeiner Teil [Textbook on the law*

position is clearly untenable under Hungarian law, as only things, receivables and rights are capable of being transferred. We could, of course, restructure the system of contract law and property law so that a contractual position becomes property, but this is completely unnecessary to achieve our goal, the transferability of contractual positions.

The second possibility is to interpret the transfer of a contract as an amendment of the original contract.[16] However, it seems to be clear that the Civil Code does not regulate the transfer of contracts as an amendment. One can argue that the Civil Code could be amended so that the rules on amendment also cover the transfer of contract. However, it would seem problematic to recognise a transaction that cannot be carried out by the original contracting parties but which necessarily involves a third party as an amendment.

The third option would be to regulate the transfer of a contract as novation. Under this option, the original contracting parties terminate the contract, while the party remaining in the contract and the party entering into the contract create a new, identical contract simultaneously with the termination. The amendment of the Act on the Transitional Provisions of the New Civil Code and Decision 22/2018. (XI. 20.) of the Constitutional Court seems to support this interpretation. The thesis raises several concerns about this solution. The most important of these is that this solution clearly would not take into account the business intention of the parties. The parties do not want to terminate their contract. Instead, their intention is to achieve legal succession. The question of whether the transaction qualifies as a novation is not purely theoretical. If the transaction is a novation, and the contract together with the securities securing the performance of the obligations of the parties terminate, the parties need to conclude new contracts and register new securities. Although detailed legislation may help to ensure that the new securities maintain the ranking of the original ones, terminated as a result of the novation, the legislation will not help to eliminate the unnecessary costs that would arise as a consequence of the novation. The termination and recreation of the contract would create unnecessary costs, even for the transfer of one contract. However, such costs could make the transfer of complete portfolios of contracts commercially impossible.

The fourth option is to conceive the transfer of contract as the assignment of all rights and the assumption of all debts under a contract. This approach would follow the earlier jurisprudence of the Hungarian courts. Typically, two conceptual objections are raised against this approach. The first is a structural one. The argument is that the assignment and the assumption of debt result in legal succession concerning certain

of obligations general part], (Beck, München, 1987) 618; D. Klimke, *Die Vertragsübernahme [The transfer of contracts],* (Mohr, Tübingen, 2010) 72. DOI: https://doi.org/10.1628/978-3-16-151227-8

[16] László fi P. and Leszkoven L., Gondolatok a szerződés-engedményezés jogi természetéről [Thoughts on the legal nature of the transfer of contracts], (2004) (4) *Polgári Jogi Kodifikáció [Codification of Civil Law],* 17–24.

rights and certain obligations. However, this does not affect the underlying contract, which continues to exist between the original parties. If this is true, so goes the argument: how can the transfer of contract be achieved by this solution?[17] The second objection is that the contractual position includes rights that are not transferable. A typical example of such a right could be the right of rescission and the right of termination.[18]

The thesis argues that the transfer of contract is possible by the assignment of all rights and the assumption of all obligations under the contract. This argument was built on three pillars:

First, the New Civil Code's rule that provides that interest, surety and charge transfer automatically to the assignee in the case of an assignment[19] is wrong. This rule should be extended to other rights relating to the underlying claim, such as the right to liquidated damages or warranty claims. In addition, it should be recognised that not only rights but certain obligations also transfer automatically to the assignee. These obligations are primarily intended to help the debtor meet their obligations. The obligation to cooperate in the performance of the service is an ancillary obligation that cannot be dissociated from the position of the creditor.

Second, the thesis also suggested that the law should accept that the assignor and the assignee may agree that non-accessory rights, such as the right to termination or rescission, also transfer to the assignee. It goes without saying that the transfer of such rights should not be automatic, but there are no compelling reasons why the law should prohibit such transfers.

Whereas the first two arguments focused on the question of what rights and obligations can be transferred in the case of an assignment, the third argument focused solely on the transfer of contract scenario. The thesis argued that even if we accepted that certain rights are non-transferable in the case of the assignment of individual receivables, no argument supports why the transfer of these rights needs to be rejected in the case where the complete contractual position of a party is being transferred. The thesis used the analogy of the assumption of debt, where the legislator acknowledged that as the creditor needs to be involved in the assumption, any obligation could be transferred.[20] The legislator acknowledged that, in the case of an assumption of debt, the creditor could decide whether they mind if the original obligation, whatever that

[17] Menyhárd A., *Dologi jog [Property law],* (Osiris, Budapest, 2007) 167.

[18] Menyhárd A., Engedményezés, jogátruházás, tartozásátvállalás és szerződésátruházás [Assignment, transfer of rights, assumption of debt, transfer of contract], in Osztovits A. (ed.), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja [Large commentary to Act V of 2013 on the Civil Code and related legislation],* (Band III., Opten, Budapest, 2014, 468–493) 489.

[19] Section 6:193(3) of the New Civil Code.

[20] Eörsi Gy., *Kötelmi jog. Általános rész. [Law of obligations. General part],* (Nemzeti Tankönyvkiadó, Budapest, 1998) 226.

obligation is, will be performed by a new debtor. The same should be true in the case of a transfer of contract.

As regards the right of termination or the right of avoidance as a formative right linked to the underlying relationship, the legal literature puts forward two arguments against transferability, the protection of the assignor and the protection of the debtor. However, these arguments do not seem to make sense in the case of a tripartite transfer. The protection of the assignor does not arise in this context, since the assignor's aim is precisely to withdraw from the entire legal relationship. Nor is it relevant to invoke the protection of the debtor, since they are a party to the transfer, and the transaction cannot be carried out against the debtor's will. This provides the debtor with sufficient protection. If, on the other hand, the change of the party does not bother the debtor, it would seem unjustified to impose this protection on the debtor.

We find, therefore, that, in the case of a transfer of the entire contractual position, there are no claims, rights or obligations that should be considered non-transferable. As a result, the thesis argued that the transfer of a contract is not a *sui generis* transaction but an assignment of all receivables and rights and the assumption of debt.

V. Epilogue

As explained above, the thesis argued that the New Civil Code's rule that regulated the scope of rights that automatically transfers to the assignee in the case of an assignment is wrong and should be expanded. The thesis hoped that exploring the problem could lead to a lively discussion, which, if necessary, could result in the amendment of the New Civil Code. There was no need to rush, as the rule had existed in an unamended form since 1960 when the Old Civil Code entered into force.[21]

Suddenly, the legislator amended this rule.[22] The new provision, in force since 24 June 2023, extends the scope of rights that transfer to the assignee. Instead of providing a closed list of rights, the New Civil Code provides that all rights that facilitate the performance and enforcement of the assigned obligation transfer to the assignee.[23] The amendment also provides that if the maturity of the assigned claim depends on a declaration or other condition to be fulfilled by the assignee, the assignee may make such a declaration or fulfil such a condition as is necessary for the maturity to occur.[24] Whereas, surprisingly, the legislator had listened to the criticism, the legislator missed the opportunity to discuss and create a consensus on the new rule. It remains to be seen how the vaguely formulated terms will be interpreted by the parties and the courts.

[21] Section 329(1) of the Old Civil Code.
[22] Act XXXIX of 2023 on legislative amendments to increase the competitiveness of the economy.
[23] Section 193(3) of the New Civil Code.
[24] Section 193(4) of the New Civil Code.