

Transfer of Property, Claims, Rights and Contracts in the New Hungarian Civil Code

I Introduction

The topic of this paper is at the same time very old, and brand new in Hungarian private law. It is very old because, ever since the concept of private ownership appeared, the transfer of ownership rights had to be an inevitable subject matter of its regulation under civil law. Similarly, the transfer of claims has been a traditional element of civil law. Both institutions have their origin in Roman law, but they are also present in no Roman law based legal systems.

However, general regulations on the transfer of rights and contracts did not exist in Hungarian law until the new Civil Code¹ was adopted. The regulation in the new Code of these subject matters is new, but the problems the new regulations addressed were not unknown. There were some special rights, the transfer of which was regulated by special laws (for example, the transfer of patent rights). Nevertheless, these special regulations were not complete; they could not answer all the legal questions arising in connection with such transfers and, in the absence of a general regulatory system, the legal infrastructure remained incomplete. Why was it a problem to appeal for a well-grounded legal solution?

It was because in a modern market economy almost everything can be a product traded on the market, irrespective of the presence or absence of regulations. In business practice, for example, trading in tenements, i.e. selling the tenant's rights in rental property, was an everyday transaction without there being adequate legal regulation. Similarly, the transfer of contracts, i.e. transfer of all rights and obligations following from a certain contract as a whole, was also a typical business transaction not covered by any specific legal regulations. The lack of legal regulation, however, usually does not prevent business transactions. However, such transactions generate extra risks or costs comparing with a situation where the business transaction is regulated by legal rules designed to cover this specific transaction. The additional risks and costs come from the fact that, in the absence of adequate legal regulation, the contracting parties are expected to spend time and money on reaching an agreement on all terms and conditions of the

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¹ Act No. V of 2013 on the Civil Code (hereinafter referred to as Civil Code). The Civil Code came into force on 15th March 2014.

transaction. If they fail to do so then the enforcement of the contract and the balance between the rights and obligations of the parties can be jeopardized. Such dangers also create extra costs that must be borne by one or both parties.

The new Civil Code has regulations on the transfer of all types of subjects: property, claims, rights and contracts (contractual position), with the aim of avoiding unnecessary costs and risks. In this paper I cannot deal with all legal aspects of these transactions and their regulation. I will focus on the structure of these transactions as it was designed by the legal regulation. I shall

- describe the legal regulations and analyse the structure of the transfer in different subject matters;
- compare the structures, demonstrate the similarities and differences and try to explain these features;
- show the consequences of the regulation of transfer transactions on the regulations on sale contracts.

II The Regulation of Transfer Transactions in the Civil Code

The transfer of different subjects has no one and single set of regulations in the Civil Code. The reason for that could be not only tradition (i.e. the transfer of property and transfer of claims are traditional subject matters of regulation, while the others are new), but also the different nature of the subjects and, consequently, different needs for regulation. It could be enough only to refer to the fact that property law (including the regulation of property transfer) is a separate part of the civil law regulations (in the Code it is embodied in a separate book), while claims and contracts belong to another field of regulation, namely, to the law of obligation (again a separate book in the Code). Property law relationships and obligations are fundamentally different. Property law consists of absolute legal relationships, where the holder of the ownership right is determined in exclusivity and everybody else is obliged to refrain from violating the owner's rights. The law of obligations, however, regulates relative legal relationships, where all the participants (generally two participants are present in a contractual or tort case, but it is not uncommon to have more of them) are named, and they owe positive obligations to each other.

Such basic differences may explain the separate regulation of property law and the law of obligation, including the transfer of property or the transfer of subjects in the law of obligation. As a result, in the following I will describe the different regulations separately. However, it will be shown that, in spite of the differences, the structure of the transfer is designed similarly for all kinds of subject matters.

1 Transfer of Property

On the transfer of property, the Civil Code provides as follows:

‘(1) The acquisition of ownership of movable property by way of transfer needs a contract or other title for the transfer and the transfer of possession based on this title.

(2) The acquisition of title to real estate property by way of transfer needs a contract or other title for transfer and the registration of the transfer in the land registry.²

In this respect, Hungarian law has not changed: the transfer is a transaction that consists of consecutive elements, and all these elements are needed for completing the transfer; none of them alone is sufficient for reaching the goal of the transaction. The transfer transaction, both for movables and real property, must be based on a title, i.e. it cannot be abstract.³ The title of the transfer is most commonly a contract, but it can be any other legal fact from which the obligation to transfer the property is emerging (e.g. returning unjust enrichment or the obligation to compensate damage). If the legal title for the transfer is missing (for example, because it does not exist or it exists but is invalid for any reason) then the transfer is not complete, even if the other elements of the transfer transaction have been properly carried out.⁴

Furthermore, it is clear from the above cited rules that the title in itself is not enough for transmitting the ownership rights in a movable or real property. With regard to movables, the additional element to the transfer of property is the transfer of possession. Such a regulation, with Roman law origins⁵, is not new to modern Hungarian law. The former Civil Code followed the same pattern. However, the possibility to change this system and shift to a regime where the mere agreement between the parties may transfer the property from the former owner to the new one (a so called consensual system of transfer) was considered,⁶ but the Codification Committee decided to preserve the existing solution.

Although the structure of the transfer of property did not change, the legal regulations in the new code became more sophisticated than earlier. There is a new rule on transfer of possession⁷

² S 5:38 of the Civil Code.

³ There were no unquestionable rules in the course of the codification of the Civil Code. The possibility of changing the transfer of property into an abstract system was considered, and finally rejected. See Attila Menyhárd, 'A dologi jog szabályozásának sarokpontjai (*The Structural Key Points of Regulating Property Law in the New Civil Code*)' in Lajos Vékás, Imre Vörös (eds), *Tanulmányok az új Polgári Törvénykönyvhöz (Studies on the New Civil Code)* (Wolters Kluwer Complex Kiadó 2014, Budapest) 161; Attila Menyhárd in Lajos Vékás, Péter Gárdos (eds), *Kommentár a Polgári Törvénykönyvhöz (Commentary to the Civil Code)* (Wolters Kluwer 2014, Budapest) Vol. 1. 980.

⁴ Attila Menyhárd 'A dologi jog...' (n 3) 16.

⁵ For the notion and importance of 'traditio' in Roman Law see Róbert Brósz, Elemér Pólay, *Római jog (Roman Law)* (Tankönyvkiadó 1974, Budapest) 228–229, András Földi, Gábor Hamza, *A római jog története és intézményei (History and Institutions of Roman Law)* (Nemzeti Tankönyvkiadó 1996, Budapest) 322–324.

⁶ Attila Menyhárd, 'Észrevételek és javaslatok az új Polgári Törvénykönyv dologi jogi koncepciójának kiegészítéséhez (*Comments and Proposals to the Amendment of the Concept of the Regulation of Property Law in the New Civil Code*)' (2002) 5–6 Polgári Jogi Kodifikáció, 17–18; Attila Menyhárd 'A dologi jog...' (n 3) 159–161; Attila Menyhárd in *Kommentár a Polgári Törvénykönyvhöz* (n 3) 980.

⁷ S 5:3 of the Civil Code: [*Transfer of possession*]

(1) The transfer of possession shall materialize upon the conveyance of physical control of the thing on the basis of an agreement on this. Transfers of possession shall be governed by the provisions on contracting and on the validity of contracts.

(2) Transfer of possession shall be considered done by means of an agreement between the possessor and the acquirer of possession if:

- a) the party acquiring possession already has physical possession of the thing as a secondary possessor; or
- b) the transferor maintains physical possession of the thing as a secondary possessor.

that is different from the transfer of property. Such a difference is logical if transfer of possession is only one element of the transfer of property. Transfer of property includes additional elements, apart from the transfer of possession. The regulation of the transfer of possession was necessary for at least two reasons. First, there was a need for regulating the possible methods of transferring possession beyond the most simple and natural way of transferring the direct physical power over a thing. Second, the regulations make it clear that the transfer of possession is itself a transaction based on the will of the parties; as such, the transaction should have the characteristics of a contract. The transfer of possession is not simply a question of facts but it is a matter of the proper will of the parties to the transfer. If the transfer of possession does not comply with the requirements needed for a valid contract then the transfer will not take place, even if the thing itself comes into possession of the other party, and therefore the transfer of ownership will not be completed.

For giving a full picture it is worth mentioning that there are some special movable things which are registered in authorized registries (e.g. ships, aircraft) kept by state agencies, and the special rules on such registries requires the registration of the change in ownership rights for such changes to be accepted. With regard to such movables, the transfer of possession is not enough for the property to be transferred; it needs a third element, i.e. the registration of the transfer.

With regard to the transfer real estate property, the additional element to the title is not the transfer of possession, but the registration of the transfer in the land registry, i.e. in a public registry kept by a state organ and containing authentic data on the piece of land, the rights and obligations over the land, and the data of the right-holders. Because the transfer of land or buildings requires its registration in the land registry, which is an act of a state organ, the parties to the transaction themselves cannot complete the transfer. Even if they fulfil all their obligations in order to complete the transfer, the transfer itself cannot take place without the intervention of the state. The title (e.g. a contract in which the transferor undertakes to transfer the ownership) is not sufficient for the transfer but the additional element cannot be carried out by the transferor completely. The legal effect that the parties aim for will be completed only if the registration agency enters the transfer into the registry. The most that the transferor can do to this end is to give their consent to the registration of the transfer, what is a precondition for such a registration.

Taking all the elements mentioned above, the structure of the transfer of property is summarised in the *chart 1*.

(3) Transfer of possession shall be considered completed upon the possessor relinquishing physical possession of the thing, if so agreed by the possessor and the acquirer of possession.

(4) If the thing is held by a third party, transfer of possession shall be considered completed upon conveying the claim for the thing to the party acquiring possession, if so agreed by the possessor and the acquirer of possession.

Chart 1

Subject matter of the transfer	Title	Transaction of Transfer	Registration
Movable property – non registered – registered	E.g. an obligatory transaction (contract for sale, exchange etc.), tort liability, return of unjust enrichment	Transfer of possession	– Registration
Real estate property		Consent to registration	Registration in the land registry

2 Transfer of Claims

Like the transfer of property, the transfer of claims was also regulated by the old Civil Code. The legal institution used for such a transfer was and remains assignment. However, the wording and the content of the regulation has been changed in the new code. Now the Civil Code provides that

‘(1) The obligee may transfer his claim against the obligor to a third party.

(2) The transfer of a claim needs a contract or other title for the transfer and the assignment of the claim. Assignment is a contract between the assignor and the assignee upon which the assignor takes the place of the assignee.’⁸

The old regulation was limited to allowing the transfer of a claim by an agreement, and it did not make a difference between the title of the transfer and the actual transfer.⁹ Consequently, the structure of the transfer was not completely clear; there were theoretical and practical problems in this respect.¹⁰ Some authors had the position that the transfer of possession (*traditio*) can take place only with regard to physical things, and therefore, if transferring any other items (such as claims or rights) the differentiation between the obligation to transfer and the transfer by transfer of possession is meaningless and so the transfer of claims or rights may take place by a mere agreement between the parties.¹¹ Although it was a requirement to give notice to the obligor of the assignment, this element did not belong to the transfer. It served only to protect the obligor. The assignee acquired the claim by the assignment agreement without any further notice. Furthermore, any defect in the agreement had no legal effect in the direction of the obligor. If, for example, the agreement on the assignment was invalid for any reason, this fact did not jeopardise the legal position of an obligor acting in good faith. An obligor who had

⁸ S 6:193 (1) and (2) of the Civil Code.

⁹ See S 328 of the old Civil Code (Act No. IV of 1959).

¹⁰ Peter Gárdos, *Az engedményezés (Assignment)* (ELTE Eötvös Kiadó 2009, Budapest) 95.

¹¹ Norbert Csizmazia, ‘Az engedményezésről de lege lata és de lege ferenda (*On the Assignment de lege lata and de lege ferenda*)’ in Attila Harmathy (ed), *Jogi Tanulmányok 2002 (Legal Studies 2002)*, (Eötvös Loránd Tudományegyetem, Állam- és Jogtudományi Kar 2002, Budapest) 39, 73; Attila Menyhárd, *Dologi Jog (Property Law)* (Osiris Kiadó 2007, Budapest) 46, 153.

due notice of the assignment did not need to examine whether the transfer of claim really happened or not and if it happened validly. If the contract of assignment was faulty, the parties to the contract had to rectify the situation in their internal legal relationship.

Under the new regime, the transfer of a claim is a compound transaction. It is not enough to agree upon the assignment of the claim. That assignment needs a legal title which can be – similarly to the transfer of property – a contract, compensation for damage, return of unjust enrichment, etc. Although there is no reference to this connection, it is clear that the assignment can result in the transfer of a claim only if the basis of the assignment is a valid title for that purpose. If there is no title, a mere assignment cannot transfer the claim, and if there is only an agreement upon establishing an obligation to transfer a claim without the actual assignment, the transfer is not complete and the claim is not transferred.

The assignment as the second element of the transaction also consists of different stages. The desired outcome of the whole transaction is that the assignee takes the position of the assignor, i.e. the assignee has the right to request the fulfilment of the assigned obligation. For understandable reasons, this cannot happen without the involvement of the obligor. As long as the transfer of the claim is an internal affair between the assignor and the assignee, the legal position of the obligor does not change, i.e. they have an obligation exclusively toward the assignor. This means that the assignee cannot be deemed as having acquired the claim, because the obligor has no obligation against them. For completing the change in the participants in the legal relationship, there must be a need to order the obligor to perform their obligations toward the new obligee, i.e. the assignee.

With regard to this regulation, the structure of the transfer of a claim is summarised in the *chart 2*.

Chart 2

Subject matter of the transfer	Title	Transaction of transfer	
Transferable claim	E.g. an obligatory transaction (contract for sale, exchange, etc.), tort liability, return of unjust enrichment	Assignment	
		Contract of assignment	Notification + order to perform

3 Transfer of Rights

The regulation of the transfer of rights is a new element of the Civil Code.¹² However, the transfer of rights is not new. There was a market in transferable rights without any general legal regulation of such transfers. There were some rights with economic value, for which there were

¹² In this context the term „right” means any right except property rights, because the transfer of property has been regulated for a long time.

special legal regulations, including rules on the transfer of such rights (e.g. options or pre-emptive rights traded in the stock exchange). If such specific rights were the only subjects of transfer transactions then regulation under general civil law would not have been necessary. In fact, this type of limitation did not exist. Transfers of rights without any special regulation on their transfer did occur,¹³ and the lack of legal regulations caused problems in legal disputes arising from such deals. Consequently, there was a need for general regulation applicable with regard to the transfer of any right.

The problem of such regulation is that rights can vary over a wide range. There are rights deriving from legal relationships regulated by the law of obligation. The main characteristic of such rights is that the participants in the legal relationship are specified on both side and the parties have obligations to each other. On the other hand, there can also be rights where only the right-holder is determined by name, and everybody else – without being specified – is obliged to refrain from violating these rights. Efficient legal regulation of the transfer of rights should cover all these different rights. The Civil Code has the following rule.

‘(1) The obligee may transfer his right to another person, except where the transferability of the right is excluded by law or when it follows from the nature of the right that it cannot be transferred.

(2) As far as this law does not provide otherwise, the transfer of a right by way of subrogation needs a contract or other title for the transfer and the transfer of the right. Subrogation is a contract between the subrogor and the new subrogee, under which the subrogor is replaced by the new subrogee.

(3) The provisions on assignment shall apply to subrogation *mutatis mutandis*.

(4) If the existence of the right is certified by an authentic registry, the subrogation needs, besides the assignment, the registration of the change in the identity of the subrogator to be effective.¹⁴

The general character of the regulations is obvious from the fact that the first rule is about the determination of transferable rights. It shows that there is no presumption of the transferability of specifically regulated rights; instead, any right that meets the general requirements can be transferred. The reference to the exclusion of subrogation is a clear-cut regulation, while the ‘nature of the right’ is a highly flexible term, the interpretation of which must be clarified by the courts.¹⁵

From the point of view of the structure of the transfer transaction, the subject of the transfer has no primary importance. The rule does not make a difference on the basis of the nature of the right to be transferred. Being either absolute or relative, the right shall be transferred by a compound transaction – similarly to the transfer of property and the transfer of claims – consisting of a title and a performing transaction. The title can be again a contract or similar legal

¹³ Attila Menyhárd, *Dologi Jog (Property Law)* (Osiris Kiadó 2007, Budapest) 154–155.

¹⁴ S 6:202 of the Civil Code.

¹⁵ There could be undisputed cases. For example a right to alimentation, which could be a right deriving from a specific contract, cannot be transferred, because this right is strongly connected to the person who is the right holder under the contract.

fact creating an obligation to perform a payment or any other conduct (tort liability, return of unjust enrichment, etc.). However, the existence of such a title in itself does not transmit the right to the other party. As was seen with regard to the transfer of property and the transfer of claims, the title must be supplemented by an implementing action, which in this instance is the transfer of the right. At this point, the regulation in the Civil Code is somewhat confusing, and perhaps violates the rules of logic. According to the wording of the Code, subrogation is defined as the title for such a transfer and the transfer of the right. Although the transfer of a right cannot be the transfer of a right plus anything else, the aim of the section in the Civil Code is traceable, and the confusion can be handled if we differentiate between the transfer of a right in a broader and in a narrower sense. The real meaning of the rule should be that a title in itself is not sufficient for the transfer (in a broader sense); it needs something more (the transfer in a narrower sense). The nature of the additional element is enlightened by the further rule stating that the transfer of a right (in its narrower sense) is a contract between the transferor and the new right holder. The content of the contract should be that the new right holder takes the place of the transferor in the legal relationship from which the right to be transferred is derived. This definition is quite similar to the concept of assignment, with the exception that the subject of the contract is not a claim but a right. It is not surprising then that the rules on assignment are applicable to a subrogation contract. However, at this point there could be serious doubts whether such a reference to the rules of assignment can cover all the problems of subrogation. The application of the rules on assignment will be especially troublesome with regard to absolute rights, since the assignment is a transaction where both the obligor and the obligee are known and, therefore, the rules (e.g. on notification or on the order to perform) have their function, because there is another person who can be notified and who can be given an order. However in the case of absolute rights there is no specific other party, therefore, these rules become meaningless.

Although whether the right is absolute or relative has no importance in the transfer transaction, there is another characteristic that could be relevant. Namely, there are some special rights which are registered in an authentic register. Normally these are absolute rights and one of the aims of the registration is just to make possible for anybody to have information on the existence and the contents of these rights. In the case of such right the transfer can take place only if the change of the right holder is registered. Since the registries are kept by authorised bodies, mostly state organs, the performance of the contract includes an element which is out of the control of the contracting parties. However, the most what can be expected from the transferor is to give his consent to the transfer in order to make possible to enter the transfer into the register. The legal solution in this respect is similar to the transfer of property in immovable.

Summing up the above rules and putting aside the potential troubles in application of these rules, the structure of subrogation can be visualised thus (*chart 3*).

Chart 3

Subject matter of the transfer	Title	Transaction of transfer	Registration
Non-registered rights	E.g. an obligatory transaction (contract for sale, exchange etc.), tort liability, return of unjust enrichment	Transfer of right (a contract under the rules of assignment)	–
Rights registered in an authentic registry		Transfer of right + consent to registration	Registration in the registry

4 Transfer of Contracts

One of the greatest expectations against the Civil Code was that it would resolve the problem of the transfer of contractual positions.¹⁶ It is true that regulations on the transfer of rights did not exist either, but the rules on assignment could have helped the transfers of rights, because in both cases the legal situation was similar: there was one party with a claim or the right and the other who was obliged to perform according to the claim or the right. However, with regard to contractual positions the case is much more complicated, because in the vast majority of contracts the parties are both obligors and obligees at the same time: they have rights and obligations deriving from the contract simultaneously. If they transfer only their rights or only their obligations (these transactions were regulated separately, or at least could have been handled under the old regulations) then the other elements of their contractual position remained with the original party and therefore the transfer could not take place. The transfer of contractual rights and contractual obligations cannot happen in the same way for the simple reason that the identity of the obligor is not neutral to the other party; to the contrary, it deeply affects their interests. As such, changing the obligor in a contractual relationship cannot be carried out without the involvement of the other party. In fact, sometimes even the change in the obligee can affect the interests of the obligor and therefore obtaining their consent could be an acceptable expectation. In the contractual practice this problem was attempted to be handled by applying the rules of assignment to the rights and the rules of the assumption of debt to the obligations under the contract. Since the regulations on the assumption of debt include the obligee's right to consent to the transfer of debt, the interest of the obligee could somehow be considered; however, most the analysts found this makeshift solution to be unsatisfactory.¹⁷

Instead of forcing the parties to apply a mixture of inadequate legal institutions, the Civil Code offers a specific regulation on the transfer of contracts as follows.

¹⁶ Pál Lászlófi, László Leszkoven, 'Gondolatok a szerződés-engedményezés jogi természetéről (*On the Legal Nature of the Assignment of a Contract*)' (2004) 4 Polgári Jogi Kodifikáció 17; Péter Gárdos, 'Szerződésátruházás (*Transfer of Contract*)' (2005) 3 Polgári Jogi Kodifikáció 20.

¹⁷ Pál Lászlófi, László Leszkoven (n 16) 22; Péter Gárdos (n 16) 20.

“The party exiting the contract, the party remaining in the contract and the party entering the contract may agree on transferring the entirety of the rights and obligations of the exiting party to the entering party.

The party entering into the contract is entitled to all the rights and he is burdened by all the obligations existing under the contract between the exiting and remaining parties. The party entering the contract is not entitled to set off any other claims of the exiting party against the remaining party. The remaining party is not entitled to set off any other claims against the exiting party.¹⁸

The above cited provisions are different from the majority of those legal systems where the transfer of contractual position is regulated,¹⁹ and also from the international instruments of contract law regulation.²⁰ The special feature is that the transfer is a trilateral transaction, not only a contract between the transferor and the transferee requiring the consent of the other party in the contract.

At the same time, it also differs from other transfer transactions in the Civil Code, because there is no reference to the separation of the obligatory and the performing transaction. It seems that the trilateral contract in itself is enough for transmitting the contractual position, notwithstanding whether the exiting and entering party has a valid contractual or other obligation to transfer the contract. That means that the Code does not require a separate title, or alternatively, the trilateral contract is the single act which can transfer the contractual position.

Even if there is no obligation to transfer the contractual position, the trilateral agreement may transfer the contract to the entering party. It is interesting because, unlike with transfers of claims and transfers of rights, the transfer of a contract could have a different structure than the contract serving as legal title. With regard to the claims and rights, the contract creating the title of the transfer is made by the same parties as the performing contract, i.e. the actual transfer contract. Having the same parties, one could ask, what is the meaning of requiring different contracts? In the event of a transfer of contract, however, it would be plausible to have a contract on creating

¹⁸ S 6:208 of the Civil Code.

¹⁹ Péter Gárdos (n 16) 22; Ágnes Juhász, ‘A szerződéses pozícióban bekövetkező alanyváltozás (*Change of the party in a Contractual Position*)’ in Zoltán Csehi, Katalin Raffai (eds), *Állam és magánjog. Törekvések és eredmények az Európai Unió joga, a nemzetközi magánjog, polgári jog és polgári eljárásjog keresztmetszetében (State and Private Law. Ambitions and Results in the Cross-section of the Law of the European Union, the International Private Law, Civil Law and Civil Procedural Law)* (Pázmány Press 2014, Budapest) 143.

²⁰ Principles of European Contract Law (2002) Art. 12:201: A party to a contract may agree with a third person that that person is to be substituted as the contracting party. In such a case the substitution takes effect only where, as a result of the other party’s assent, the first party is discharged.

Draft Common Frame of Reference (2009) Book III. Art. 5:302. A party to a contractual relationship may agree with a third person, with the consent of the other party to the contractual relationship, that that person is to be substituted as a party to the relationship.

UNIDROIT Principles of International Commercial Contracts (2010) Art. 9.3.1.: “Assignment of a contract” means the transfer by agreement from one person (the “assignor”) to another person (“assignee”) of the assignor’s rights and obligations arising out of a contract with another person (the “other party”).

Art. 9.3.3.: The assignment of a contract requires the consent of the other party.

an obligation to transfer the contractual position; this contract should be concluded by the exiting and the entering party, while the performing contract could be the trilateral contract between all interested parties. However, the legal regulations lack any reference to such a structure for the transfer. Taking into consideration that, for other transfer transactions, the differentiation between the title and the performing transaction was explicit and consequent, we cannot think that different wording is intended to bear the same meaning. Since there is no reference to the title of the transfer as a precondition of the completion of the transfer, we can conclude that such a title is not required. This transaction consequently has no internal structure; there are no separate elements of the transaction that culminate in a transfer.

III Comparison of the Transfer Transactions

Comparing the regulations of different transfer transactions, one can find that, with the exception of the transfer of contracts, all of the transfers are structured uniformly. Putting together the charts showing the structure of the transfers, the same pattern can be seen. The transfer takes place only if at least two elements are present: a title for the transfer and a separate transaction, which is the performance of the obligation originating from the title. The performing action may vary: it can be a transfer of possession or registration in an authentic register or an assignment of a claim or a transfer of right (whatever this term means), but, from a structural point of view, it is quite clear that neither the title nor the performing act is sufficient in itself for completing the transfer.

The uniform regulation is not a simple coincidence. It was an explicit intention of the legislator to regulate the transfer of claims and transfer of rights in the same structure as the transfer of property.²¹

For the transfer of property, the main reason for maintaining the previous structure, i.e. to require transfer of possession of movables as an inherent element of the transfer was that, in a regime where a simple agreement transmits ownership rights (consensual system), the transferor has to keep property it does not own as without any ownership interest until the transfer of possession.²²

In addition, the transfer of possession provides publicity to the transfer. Since the owner of the property has ownership rights against anybody else, who is the owner should be known to anybody. This end can be served by requiring the transfer of possession, since in the majority of cases the possessor is the owner (or at least the possessor has some connection to the owner; perhaps he has a title from the owner to possess the thing).

Such a solution to the regulations of transfer of property was not inevitable. In foreign models we could also find other options. Consequently, how to design the regulations on

²¹ Lajos Vékás (ed), *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez (Expert Proposals for the Draft of the New Civil Code)* (Complex Kiadó 2008, Budapest) 848–849.

²² Attila Menyhárd in *Kommentár a Polgári Törvénykönyvhöz* (n 3) 980.

transfer transactions was a policy question, and it was especially a policy question in connection with claims and rights, where none of the above-mentioned argument prevails. Even if we would accept the consensual regime of transfer of claims or rights, the transition period when the property has already transferred, but the possession is kept by the transferor would not cause problem, because there is no possession of claims or rights. They are not things; they cannot be kept under physical control.

Similarly, with regard to claims and relative rights, there could be no deed for publicity. The interested parties are identified by name, so the information about the transfer can be conveyed by direct ways and not through publicity.

Furthermore, for the transfer of property, the title and the performing transaction are different by nature. Generally, the title is a contract (though it could be another legal fact like tort liability, unjust enrichment, etc.) which is an expression of the parties' will, while the performance is a physical act of transfer of control over the subject of the transfer. Separation of different phenomena has justifiable meaning. However, for transfers of claim and transfers of rights, both the title and the actual transfer have the same character; namely, they are contracts. As a matter of course, it is not impossible to keep contracts having different content separately. However, it could be questionable whether requiring a title for the transfer makes the transaction safer or more efficient or more secure. I am not convinced about that, especially because the defects of the legal title cannot have any consequences in connection with an obligor acting in good faith.

What was the reason, then, for choosing the same structure for the claims and rights as for the transfer of property? There was an argument saying that in all foreign legal systems where the transfer of claims and rights are regulated, the structure of such transactions follows the structure of the transfer of property.²³ Furthermore, the old Hungarian legal scholarship prior to World War II treated assignment as a performing transaction that needed a title for transferring the claim.²⁴ Under these arguments, the drafters of the Civil Code came to the conclusion that there is no reason for deviating from the structure of the transfer of property with regard to the transfer of claims and rights.²⁵ It is also argued that the structure including a title and a performing transaction can better serve the requirements of the complex transactions of business life, because there could be a clear dividing line between the title and the performing transaction.²⁶ Although it is not obvious what the advantage of such a solution is, compared with a transfer by a single act, one practical consequence can be identified. After a long debate, the Civil Code provided that only such claims can be assigned which already exist or at least the legal relationship from which the claims will originate exists when the assignment happens.²⁷ That means that claims from future legal relationships cannot be transferred.

²³ Péter Gárdos (n 10) 101–113.

²⁴ Péter Gárdos (n 10) 114–122.

²⁵ Péter Gárdos (n 10) 122–125; Péter Gárdos in Lajos Vékás, Péter Gárdos (eds), *Kommentár a Polgári Törvénykönyhöz (Commentary to the Civil Code)* (Wolters Kluwer 2014, Budapest) Vol. 2. 1643–1644.

²⁶ Péter Gárdos in *Kommentár a Polgári Törvénykönyhöz* (n 25).

²⁷ S 6:194 (1) of the Civil Code.

However, it is not forbidden to contract for transferring a future claim from a future legal relationship. Hence, the contract that serves as a title for the transfer may contain such an obligation, even if the assignment of such a claim is not allowed. However, if this was the only advantage of differentiating the title and the performing transaction then this aim could have been reached in a simpler way, namely by eliminating the restriction on transferable claims.

It is obvious that, even if the structure of the transfer transaction is identical, the performing transaction cannot be the same. Claims and rights cannot be handed over like things. Instead, for claims and rights, the performing transaction is a contract as well as the title in most of the cases. This will result in all probability in a confusion of the title and the performing transaction. I believe that, in practice, assuming the obligation to transfer a claim and the actual transfer by the assignment will take place in a single transaction, which does not exclude the separation of the two elements.

IV Transition of the Contracts for Transfer of Property

The uniform structure of the transfer transactions brought a need for the transformation of the contractual system in order to adapt it to this new regime. Traditionally we had specific contracts, the focus of which was on the transfer of property. The classic types of contracts, such as sale, exchange or donation contracts, are designed to serve as a title for the transfer of property. The main obligation of one party in all these contracts is to transfer the property rights over the subject of the contract. The problem was that property law in Hungary accepted, as a subject of property law relationships, only physical things (with some minor exceptions).²⁸ Taking this situation, the above-mentioned contracts were not suitable for being a title for the transfer of claims and rights, because their definition limited them to the transfer of property, and the subject of a property law legal relationship could not be anything else but physical things.

There were at least two possible solutions to this contradiction. One was to broaden the subject of property law, and then the sale contracts as a contract for property transfer included claims and rights. However, special considerations of property law regulation did not support such a broadening; therefore, we had to choose the other possible solution, i.e. their regulation in contract law. The core of the regulations was that the specific contracts with a function of transfer of property should be made suitable for the transfer of claims and rights.

This task was fulfilled by the following rules:

“The rules on the sale of goods shall also adequately apply to contracts from which an obligation to transfer rights or claims for a consideration originates.”²⁹

“The provisions relating to gifts shall also adequately apply to contracts for commitments for the gratuitous transfer of rights and claims.”³⁰

²⁸ Changing of this approach and broadening the subject of the property law was a debated topic in course of codification, however, finally the traditional solution prevailed.

²⁹ S 6:215 (3) of the Civil Code.

³⁰ S 6:235 (3) of the Civil Code.

For exchange contracts, the same result comes from the general rule according to which the rules of sale contracts shall be applied to it.³¹

The above rules change the character of these contracts. We cannot take them as contracts for the transfer of property, because they are equally suitable for transfer of other subject matters, such as claims and rights. As a matter of course, any rule connected with the physical existence of the subject of the contract cannot be applied with regard to claims and rights.

³¹ S 6:234 of the Civil Code.