

Transfer of Contracts under Hungarian Law

Abstract

The paper explores how the transfer of contracts has evolved in Hungarian law. Even though the Civil Code of 1959 did not include rules on the transfer of contracts, the courts acknowledged that legal succession in the position of a contracting party is possible by way of a trilateral contract, where all rights under the original contract are assigned and all debts are assumed. The new Civil Code of 2013 incorporated some rules that developed in the case-law of the courts, but these rules have led to uncertainties. These can all be traced back to the fundamental question of how the transfer of contract can be described, whether it is a novation, an assignment together with an assumption of debt or whether it is a *sui generis* legal institution. This paper argues that the transfer of contract can be described as a transfer of all rights and the assumption of all debts under a contract. A law based on this interpretation can fulfil the needs of all parties involved and can fit into the system of the Hungarian Civil Code.

Keywords: transfer of contracts, legal succession, Hungarian Civil Code, assignment, assumption of debt

I Introduction

Ten years ago, in 2013, the Parliament passed an act on the new Hungarian Civil Code.¹ The Code entered into force in 2014, replacing the first Hungarian Civil Code of 1959.² One of the innovations of the New Civil Code was the introduction of a chapter on the transfer of contracts. Under the Old Civil Code, the courts handled the transfer of contracts without real problems by applying the rules on assignment and transfer of debt. Even though academics criticised this approach, it suited the parties' needs. Ideally, therefore, the New Civil Code's task should have been merely to formulate model rules that reduce the transaction costs of the parties without disrupting the well-developed solutions. However, surprisingly, this is not what happened.

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¹ Act V of 2013 on the Civil Code (New Civil Code).

² Act IV of 1959 on the Civil Code (Old Civil Code).

This paper will proceed as follows. Section II will provide an overview of how the courts handled the transfer of contracts. It will show, furthermore, that even though the Old Civil Code did not regulate how contractual positions can be transferred, several laws provided for the transfer of certain contractual positions. Section III will explain the rules on the transfer of contracts introduced by the New Civil Code. Section IV will provide an overview of the legislative changes that have occurred after the entry into force of the New Civil Code and explain how these changes make it difficult to understand what a transfer of contract is. Section V will explain how the transfer of contracts can be described. The paper argues that, in principle, the transaction can qualify as a transfer in the legal sense, the amendment or novation of the original contract, the combination of assignment and assumption of debt or, if none of the previous solutions is feasible, a *sui generis* transaction. The paper will argue that the contractual position can be transferred by assigning all rights and claims and assuming all debts and obligations under the contract. To reach this conclusion, the paper also explains that the New Civil Code and the legal literature interpret the scope of rights that transfer to the assignee in the case of an assignment too narrowly. The law should recognise that all rights relating to the assigned receivable transfer automatically to the assignee unless the parties agree otherwise, and all rights relating to the underlying contract can be transferred to the assignee if the parties so agree. Section VI provides an example of why it is essential to understand the legal nature of the transfer of contract. The New Civil Code copied the UNIDROIT Principles' rule on advance consent, not paying attention to the fact that, in the UNIDROIT Principles, the transfer of contract is a bilateral contract, whereas in the New Civil Code, it is a tripartite contract. The New Civil Code's rules are therefore difficult to insert into the structure of contract law. Section VII contains the summary of this paper's findings.

II Transfer of Contracts under the Old Civil Code

The Old Civil Code contained rules on the transfer of receivables³ and the assumption of debts,⁴ but it did not regulate the transfer of contracts. The lack of codified rules did not mean, however, that contractual positions were non-transferrable under Hungarian law. There were several laws that expressly provided for the transferability of certain contractual positions, and the practice also developed solutions to transfer contractual positions with regard to contracts where transferability was not provided for by law.

³ Section 328–331 of the Old Civil Code.

⁴ Section 332–333 of the Old Civil Code.

1 Transfer of Contracts Based on Legislation

Although the Old Civil Code did not regulate the transfer of contracts in general, it contained a provision that implied there could be a statutory transfer of lease contracts. If the ownership of a leased property was transferred, the lease agreement was also transferred to the acquirer.⁵

Apart from the Old Civil Code, rules on the transfer of contract were introduced in Hungary as a result of the implementation of various European Union directives. The Labour Code⁶ implemented the Transfer of Undertakings Directive,⁷ which provided that, in the event of a transfer of an undertaking, the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.⁸ The Hungarian implementing legislation of the Package Travel Directive⁹ also provided for the right of the traveller to transfer the package travel contract to a third party.¹⁰

There were certain sectoral rules that also provided a party with the right to transfer their contractual position. To name a few examples, the Credit Institutions Act,¹¹ the Insurance Act¹² and the Investments Firms Act¹³ all provided the regulated entity (i.e., credit institutions, insurance companies and investment firms) with the right to transfer their portfolio of contracts. These acts also ensured that these transfers did not require the participation of the party remaining in the contract.

⁵ Section (1) 432 of the Old Civil Code. This rule followed the German *Kauf bricht nicht Miete* rule of Section 566 of the *Bürgerliches Gesetzbuch*.

⁶ Section 36 of Act I of 2012 on the Labour Code.

⁷ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (Transfer of Undertakings Directive).

⁸ Article 3 (1) of the Transfer of Undertakings Directive.

⁹ Article 9 (1) of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (Package Travel Directive).

¹⁰ Section 7 of Government Decree 281/2008 (XI. 28.) on package travel contracts. Until the New Civil Code entered into force, the Government Decree expressly provided the traveller with the right to transfer the package travel contract. After the New Civil Code entered into force, as the right to transfer the contract is provided by the New Civil Code, the Government Decree only requires that the organiser shall be informed of such transfer.

¹¹ Section 17 of Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises.

¹² Section 93 of Act LX of 2003 on Insurance Institutions and the Insurance Business.

¹³ Section 140 of Act CXXXVIII of 2007 on Investment Firms and Commodity Dealers.

2 Transfer of Contracts outside the Field of Sectoral Laws

Even though the Old Civil Code did not include rules on the transfer of contracts, after Hungary's transformation to a market economy in 1989-1990, more and more contracts contained provisions allowing one or both parties to transfer their contractual positions. For example, as syndicated loans appeared on the Hungarian market, these loan agreements often provided that the creditor may transfer their position. The debtor's consent, necessary for such a transfer, was often already written into the loan agreement.

The court practice accepted without much hesitation that such a transfer was possible. Several judgments confirmed that if all three parties agree, a legal succession in a contractual position is possible. Some even explained that such a transfer is possible, as the transfer of a contractual position is nothing more than the assignment of all rights and the assumption of all obligations under the contract.

The Supreme Court, in a 2006 judgment, explained that '[t]here is no legal impediment to the contracting parties and a third party agreeing on a tripartite contract of succession covering all rights and obligations in the entire contractual subject position'.¹⁴

The judgment of a regional court of appeal provides a detailed explanation of how the courts approached these contracts.

The position of a contract, with the rights and obligations arising from it, is freely transferable by virtue of freedom of contract, and the transfer of the contract results in the change of the contracting party. Although the rules of [the Old Civil Code] on assignment and assumption of debts apply to the transfer of specific claims and the assumption of certain obligations and not to the transfer of contractual positions, [the Old Civil Code] also does not prohibit the assignment and assumption of all claims and obligations arising from the contract, and therefore the so-called assignment of contracts is valid.¹⁵

III Transfer of Contracts in the New Civil Code

When the New Civil Code was prepared, one of the goals of the legislator was to codify legal solutions that had been developed by the courts in the previous decades.¹⁶ The first paper issued by the drafting committee explained that

[t]he new Civil Code has to regulate the assignment of contract that combines the legal institutions of assignment and the assumption of debt. It happens frequently in business

¹⁴ BH 2006. 409.

¹⁵ Szeged Regional Court of Appeal BDT 2008. 1883..

¹⁶ See the original concept of the New Civil Code published as a special issue of *Magyar Közlöny [Official Gazette]*.

practice that not only a claim but, with the cooperation of the contracting partner, the entire contractual position is transferred to a third party: contract assignment. In such a case, the rules on assignment and assumption of debt are combined. [...] In most cases, the existing rules provide a satisfactory solution; however, it is worth considering on which points the rules on assignment and assumption of debts should be supplemented to ensure that the legal conditions for the assignment of contracts are fully met.¹⁷

It was no surprise, therefore, that the New Civil Code introduced rules on the transfer of contracts.

Under the New Civil Code, the assignor, the assignee and the other party may agree to transfer all the assignor's rights and obligations to the assignee.¹⁸ This rule does not follow the UNIDROIT Principles. Whereas, under the Principles, the assignment of contract is a bilateral contract between the assignor and the assignee,¹⁹ the transfer of contract is a trilateral contract between the party leaving the contract, the party entering the contract and the party remaining in the contract.

The legal effect of the contract is that the assignee acquires all the rights and is subject to all the obligations that the assignor had under the contract.²⁰ This solution is also significantly different from the solution of the UNIDROIT Principles. Under the Principles, the party leaving the contract and the party entering the contract are jointly and severally liable.²¹ The party remaining in the contract has the right to discharge the party leaving the contract,²² or to retain this party as an obligor in case the party entering the contract does not perform properly.²³

The Code also introduced rules on set-off. The party entering the contract is not entitled to set off the claims that the party leaving the contract had against the party remaining in the contract, and *vice versa*, the party remaining in the contract may also not set off claims it had against the party leaving the contract. However, there is one exception to this rule. The party entering the contract can set off the legal predecessor's claims relating to the transferred contract, and similarly, the party remaining in the contract can set off contract-related claims.²⁴

The New Civil Code also provides rules on securities. All securities securing the legal predecessor's rights transfer automatically to the legal successor. As a mirror image of this rule, the securities securing the performance of the legal predecessor's obligations cease

¹⁷ Magyar Közlöny [Official Gazette] 2002/15/II. 136.

¹⁸ Section 6:208 (1) of the New Civil Code.

¹⁹ Article 9.3.1 of the UNIDROIT Principles of International Commercial Contracts.

²⁰ Section 6:208 (2) of the New Civil Code.

²¹ Article 9.3.5 (3) of the UNIDROIT Principles of International Commercial Contracts.

²² Article 9.3.5 (1) of the UNIDROIT Principles of International Commercial Contracts.

²³ Article 9.3.5 (2) of the UNIDROIT Principles of International Commercial Contracts.

²⁴ Section 6:208 (2) of the New Civil Code.

to exist unless the provider of the given security consents to the transfer of the contract.²⁵ The current rules were introduced in 2016. The original ones provided that all securities are terminated in the case of a transfer of contract. To limit the negative effects of such termination, the New Civil Code provided that if the original obligation was secured by way of a charge, and the provider of the security gave its consent, a new charge is established. The new charge will exist at the rank of the original charge.²⁶

Like the UNIDROIT Principles,²⁷ the New Civil Code provides that the party remaining in the contract may give advance consent to the transfer. In such a case, the transfer shall take effect upon the notification of the other party of the assignment.²⁸ When giving advance consent, the party may reserve the right to withdraw it.²⁹ It follows, therefore, that if such a declaration is not made, consent cannot be withdrawn. The same rules apply to the providers of security. They may also give advance consent to the transfer.³⁰ The advance consent can only be withdrawn if such a right was upheld when the advance consent was given.³¹

The New Civil Code does not repeat the relevant rules of assignment and the assumption of debt. Instead, in line with the solution of the UNIDROIT Principles,³² it provides that these rules apply *mutatis mutandis* to the assignment of contracts.³³

Finally, the Code provides that if all the rights and obligations of a person arising from a contract are transferred to another person under a statutory provision, the rules on the transfer of contracts shall apply *mutatis mutandis*.³⁴

IV Developments since the Entry into Force of the New Civil Code

Taking into account that the transfer of contracts was easily possible under the Old Civil Code and that the New Civil Code did not wish to introduce material changes in this area, it may have come as a surprise that the New Civil Code's rules led to significant controversies.

On the one hand, difficulties may have arisen from the fact that the New Civil Code and its explanatory memorandum did not make it easy to answer the question of what is the transfer of a contract.

²⁵ Section 6:208 (3) of the New Civil Code.

²⁶ Section 6:208 (3) of the New Civil Code in force between 15 March 2013 and 30 June 2016.

²⁷ Article 9.3.4 of the UNIDROIT Principles of International Commercial Contracts.

²⁸ Section 6:209 (1) of the New Civil Code.

²⁹ Section 6:209 (2) of the New Civil Code.

³⁰ Section 6:209 (3) of the New Civil Code.

³¹ Section 6:209 (4) of the New Civil Code.

³² Article 9.3.7 of the UNIDROIT Principles of International Commercial Contracts.

³³ Section 6:210 of the New Civil Code.

³⁴ Section 6:211 of the New Civil Code.

It appears from the legal norm defining the transfer of contract that the legislator defined the transfer of contract as a *sui generis* legal instrument. This interpretation is also supported by the explanatory memorandum of the New Civil Code, which expressly provides that the transfer of contract is not an assignment and assumption of debt but a *sui generis* legal institution.³⁵

However, this interpretation seemed to be contradicted by the original rule of the New Civil Code, which provided that, in the event of a transfer of a contract, the securities cease to exist.³⁶ This rule, in its original formulation, implied that the transfer of a contract is a novation. The securities cease to exist because the underlying contract itself is terminated, and simultaneously a new contract is created, with the same content as the previous one, between the party remaining in the contract and the party entering the contract.

Finally, the provision that the rules on assignment and assumption of debts apply to the assignment of a contract in respect of matters not expressly regulated by the New Civil Code suggested that the transfer of contract is simply a combination of the rules on assignment and assumption of debts.

On the other hand, the uncertainty of interpretation has been significantly increased by legislative developments after 2013.

A new provision was added to the Transitional Provisions Act.³⁷ which expressly provided that if all the rights and obligations arising from a contract concluded before the entry into force of the New Civil Code are transferred to another person after the entry into force of the Civil Code by virtue of a statutory provision, the transfer leads to the termination of the legal relationship and the creation of a new contract between the party entering into the contract and the party remaining in the contract.³⁸

As explained above, the 2016 amendment to the Civil Code³⁹ went in the opposite direction. The legislator amended the rule on the termination of security, thereby removing the only provision from the New Civil Code that could have been interpreted as if the legislator thought that the transfer of contract qualifies as a novation of the contract.

The courts were struggling to address certain problems arising from the contradicting rules. One of the first questions that arose was whether the territorial jurisdiction clauses in the original contract were still valid. The validity depended on the characterisation of the transfer. If it was a legal succession, the parties are still bound by it. If, however, the transfer of contract qualified as novation, the clauses in the new contracts were invalid, as in the meantime such clauses were prohibited by law.⁴⁰

³⁵ Bill No. T/7971 p. 606, available at <<http://www.parlament.hu/irom39/07971/07971.pdf>> accessed 31 August 2023.

³⁶ Section 6:208 (3) of the New Civil Code in force between 15 March 2013 and 30 June 2016.

³⁷ Act CLXXVII of 2013 on the Transitional and Authorizing Provisions related to the Entry into Force of Act V of 2013 on the Civil Code (Transitional Provisions Act).

³⁸ Section 53/C (2) of the Transitional Provisions Act.

³⁹ Section 20 of Act LXXXVII of 2016 on the Amendment of Act V of 2013 on the Civil Code.

⁴⁰ Section 27 (6) of Act CXXX of 2016 on Civil Procedure.

The Curia therefore turned to the Constitutional Court for the annulment of the rule introduced in the Transitional Provisions Act. However, the Constitutional Court found that Section 53/C of the Transitional Provisions Act was not unconstitutional.⁴¹ The Curia, to solve the deadlock, published a uniformity decision⁴² in which it explained that the transfer of contract under the New Civil Code results in legal succession, and therefore the continuity of the legal relationship is maintained. In addition, the Curia stated that those transfers of contract that fall under the scope of the Transitional Provisions Act also qualify as legal succession, as do the content of the contract and the rights and obligations of the parties, but, for the purposes of the Transitional Provisions Act, the contract will be regarded as a new contract between the party remaining in the contract and the party entering into the contract.⁴³

V How can the Transfer of Contracts be Described?

The disputes around the New Civil Code's rules go back to the fundamental question of what a transfer of a contract is. This question needs to be raised because although we refer to the transaction as a transfer, in a strictly legal sense it is not a transfer, for the simple reason that the contractual position, in other words, the aggregate of one party's rights and obligations, is not property,⁴⁴ and therefore, under Hungarian law, it cannot be subject to a transfer in the same way one can transfer things and rights.

If it is not a transfer, how can we describe this transaction? Various explanations were made earlier in the Hungarian literature for this question: the transfer of contract can be characterised as an amendment of the underlying contract, a novation of the contract, a simple combination of assignment and the assumption of debt, or if no other solution is available, we can characterise the transfer of contract as a *sui generis* legal institution.⁴⁵

⁴¹ For a critique of the decision of the Constitutional Court, see e.g., Soma Török, 'Az Alkotmánybíróság döntése fennálló szerződések jogszabály általi módosításáról és a szerződésátruházásról' [The Decision of the Constitutional Court on the amendment of existing contracts by law and transfer of contracts] (2012) 2–3 *JeMa*; Péter Gárdos, 'Gondolatok a szerződésátruházásról az Alkotmánybíróság határozata nyomán' [Thoughts about the transfer of contracts in the light of the decision of the Constitutional Court] (2021) 7–8 *Magyar Jog* 427–444.

⁴² Uniformity decisions are binding on all courts [Section 24 (1) c) of Act CLXI of 2011 on the organisation and administration of courts.

⁴³ See the operative part of the uniformity decision No. 7/2021.

⁴⁴ Section 8:1 (1) of the New Civil Code.

⁴⁵ For possible explanations in the Hungarian legal literature, see, e.g., Pál Lászlófi and László Leszkoven, 'Gondolatok a szerződés-engedményezés jogi természetéről' [Thoughts on the legal nature of the assignment of contract] (2004) 4 *Polgári Jogi Kodifikáció* 17–24.

1 Amendment of the Underlying Contract

One way to look at the transfer of contract is by qualifying it as an amendment to the original contract. The argument of this approach could be that the New Civil Code allows the parties to amend the terms of their contract. Such an amendment can, for example, extend to deadlines and conditions. Nevertheless, Hungarian law goes even further when it accepts that the *causa* of the contract can also be changed.⁴⁶

If Hungarian law is so flexible concerning the amendment of the contract, can we also accept that the identity of one of the contracting parties is amended? This paper argues that this is not possible. *De lege lata*, the situation seems clear: the transfer of contract is not regulated as an amendment. However, it also seems that this solution would also be wrong *de lege ferenda*. Even though the New Civil Code is flexible concerning what element of the contract can be amended, there is one common element in all these cases: the amendment takes place between the same parties. A contract between Party A and Party B cannot be amended so that the contract remains intact, but Party B, the original contracting party, is replaced by Party C, who was previously not a contracting party.

2 Transfer of Contract by way of Novation

Another possibility is that the transfer of contract occurs by way of novation. This would mean that the contract between Party A and Party B is terminated, and at the same time, a new, identical contract comes into existence between Party A and Party C. This is the solution of English law,⁴⁷ where it is undisputed that the transfer of contract is not a transfer, in other words, not a legal succession, but a new contract comes into existence between the original party and the new party,⁴⁸ though this solution is based on the fact that English law does not recognise the assumption of debt. The burdens of a contract can only be passed on by way of novation.⁴⁹

Under Hungarian law, handling transfers of contract as novation would fail to take into account the actual intention of the parties and would therefore be a wrong solution.

The fact that novation does not take into account the intention of the parties can easily be shown by way of an example. As it was argued above, if the transfer is novation, the securities are also extinguished. Such a solution would clearly not be in line with the parties' intentions, as they need to create and register new securities, which costs money and takes valuable time.

⁴⁶ Section 6:191 (1) of the New Civil Code.

⁴⁷ *Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep 645 (QBD), 650.

⁴⁸ Marcus Smith and Nico Leslie, *The Law of Assignment* (OUP 2018, Oxford) 105. <https://doi.org/10.1093/law/9780198748434.001.0001>

⁴⁹ P. P. Mitchell, 'Assignment and Novation' in Hugh Beale (ed), *Chitty on Contracts*, Vol 1, (34th edn, Sweet & Maxwell 2021, London) 22-080, 22-093.

The New Civil Code can remedy, at least in part, the problems created by handling the transfer of contract as novation. The New Civil Code's original rule, which provided that the security can be re-registered at its original ranking, is a good example of this. However, the law will not be able to remedy the commercial detriments caused by such a rule. An example of such detriment could be the costs of re-registering securities. This will make these transactions more expensive.⁵⁰

It is true that the transfer of contract could be construed as a novation. For example, the law could provide that even though a novation occurred, this does not lead to the extinction of certain types of securities. I am simply arguing that if we try to understand the parties' intention, that intention focuses on a transfer or a legal succession and not on the termination of the original contract.

3 Transfer of Contract by way of Assignment and Assumption of Obligation

A third option is to treat the transfer of contract as nothing more than an assignment of all rights and claims and assumption of all debts under the contract. As explained above, the New Civil Code's original approach followed this principle, which was also the Hungarian courts' interpretation before the New Civil Code entered into force.

Two conceptual objections have been formulated in the legal literature concerning this approach. Both focus on the distinction between the contract and the rights and obligations arising from it. The first objection is that the assignment and assumption of debts result in a legal succession concerning certain rights and obligations but not in the transfer of the contract. The contract, so goes the argument, continues to exist between the original parties. The second objection is that the contractual position includes rights that are not transferable, such as the right to terminate the contract.⁵¹ This paper will primarily focus on the second objection, as this is of crucial importance. If there are, indeed, rights that cannot be transferred, the transfer of contracts cannot be described as the combined application of the rules on assignment and assumption of debt.

The conceptual objections seem to be misguided, both in the case of assignment and especially in the case of transfer of contracts.

⁵⁰ English law avoids this problem by holding the security by a trustee on behalf of all the lenders. [Louise Gullifer and Jennifer Payne, *Corporate Finance Law – Principles and Policy* (3th edn, Hart 2020, Oxford – New York) 459].

⁵¹ See, e.g. Lászlófi, Leszkoven (n 45) 17–24, 20; Attila Menyhárd, *Dologi jog* [Property law] (Osiris 2007, Budapest) 167; Attila Menyhárd, 'Engedményezés, jogát ruházás, tartozásátvállalás és szerződésát ruházás' [Assignment, transfer of rights, assumption of debt and transfer of contract] in András Osztoivits (ed), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja* [Commentary to Act V of 2013 on the Civil Code and related legislation] vol III. (Opten 2014, Budapest) 468–493.

a) Rights transferred together with the underlying claim to the assignee in the case of assignment

The starting point of our analysis concerning what rights are transferred to the assignee, together with the assigned claim in the case of an assignment should be the New Civil Code. The Code expressly states that surety, charge and interests are automatically transferred to the assignee together with the assigned right.⁵² This provision correctly recognises that rights typically do not exist in themselves. Other rights are needed to provide real value to the assigned rights.

Within this group of rights, we can distinguish between rights relating to the assigned right and rights relating to the underlying contract. Although it is disputed to what extent rights relating to the assigned right transfer automatically to the assignee, there is no dispute in the legal literature that those rights that are not automatically transferred can be transferred if the assignor and the assignee so agree. An example of this could be the right to liquidated damages. Such a right, most likely, does not transfer to the assignee when the right that is secured by liquidated damages is transferred, but nothing prohibits the parties from expressly providing for the assignment of the right to liquidated damages.

It is worth noting that the rights listed by the New Civil Code that automatically transfer to the assignee may need to be extended. The law should provide, as a default rule from which the parties can deviate, that the assignment transfers all ancillary rights attached to the claim. To take interest as an example, interest is only one of the legal consequences of late performance. It is difficult to find convincing arguments why other legal consequences of the default, for example, a right to liquidated damages, to damages in general or to replacement, are not transferred automatically to the assignee. Thus, when we say that, as a consequence of an assignment, the assignee steps into the shoes of the assignor, we are not only saying that the assignee becomes the legal successor of the assignor concerning the assigned claim but also that the assignee is entitled to all the rights which the assignor had as assignee of the claim. The assignee should thus acquire the rights attaching to the assigned claim, irrespective of whether the law expressly mentions these rights. As a response to criticism in legal literature, the legislator amended the New Civil Code's rule in 2023. The new rule provides that the rights facilitating the performance and relating to the enforcement of the receivable transfer to the assignee.⁵³

Moving from the rights relating to the assigned claim and turning to the group of rights relating to the underlying contract, we find an even more heterogeneous group of rights. These rights typically affect the existence or the substance of another right. An example of such a right could be the right to terminate the contract from which the receivable that the parties wish to assign has arisen. It is unquestionable that, under Hungarian law, these rights

⁵² Section 6:193 (3) of the New Civil Code.

⁵³ For an overview of the new rule see Péter Gárdos, *Change of Parties in the New Hungarian Civil Code from a Comparative Perspective*, *Studia Iuridica Lublinensia* (upcoming).

do not automatically transfer to the assignee. However, some authors argue that these rights can also not be transferred to the assignee even if the assignor and the assignee so agree.⁵⁴ Still, it is difficult to find compelling reasons why the parties cannot agree on the transfer of such rights. Take the example of an existing loan agreement. If the creditor assigns merely the receivables under the contract, the assignee would not be able to accelerate or terminate the agreement in the event of default. This result seems difficult to support; so the law should accept the transferability of these rights. Jansen and Zimmermann came to the same conclusion in their recently published Commentaries on European Contract Laws. They argue that '[g]iven the basic principle that the rules on assignment should not be determined on the basis of purely conceptual concerns, but should rather functionally address the practical needs of commerce, there is no good reason why assignments of unilateral rights and powers should not be possible under this rule'.⁵⁵

Based on these arguments, we should conclude that all rights under a contract can be transferred to the assignee. Either these rights transfer automatically with the assignment of the receivable, or it should be acknowledged that the parties may agree to transfer these together with the assigned receivable.

b) Rights transferred together with the underlying claim to the assignee in the case of assignment

So far, this paper has focussed on the situation when the contract remains in existence between the assignor and the counterparty and only certain rights are transferred. The focus should now shift to the situation when one of the parties wishes to withdraw completely from the legal relationship with the other party by transferring its contractual position. Even if, contrary to the arguments in the previous section, one has found compelling reasons why in the case of an assignment certain rights, such as the right to terminate a contract, cannot be assigned together with a right arising from that contract, the question needs to be reformulated: Do we also find that, in the case of a transfer of contract, there is any element of the contractual relationship that cannot be transferred to the party wishing to step into the contract? It seems to be wrong to answer that question in the affirmative.

In the context of the assumption of debt, it has long been recognised in legal literature that the Civil Code accepts that any kind of debt can be assumed.⁵⁶ One might wonder why the law sets boundaries on the types of receivables that can be transferred by way of an assignment, when similar rules do not exist in the case of the assumption of debts. The explanation is fairly straightforward. The rules are different because the assumption of

⁵⁴ See above, Menyhárd, 'Engedményezés, jogátruházás, tartozásátvállalás és szerződésátruházás' (n 51).

⁵⁵ Nils Jansen, 'Assignment of Claims' in Nils Jansen and Reinhard Zimmermann, *Commentaries on European Contract Laws* (OUP 2018, Oxford) 1642. <https://doi.org/10.1093/oso/9780198790693.003.0012>

⁵⁶ Gyula Eörsi, *Kötelmi jog. Általános rész* [Law of Obligations. General Part.] (Nemzeti Tankönyvkiadó 1998, Budapest) 226.

debt takes place with the participation of the creditor. The legislator, therefore, basically acknowledges that if all three parties are involved, all kinds of debts may be assumed. The same should also be true in the case of a tripartite transfer of contract. Just as in the case of assumption of debts, the legislator does not say that certain debts cannot be assumed, the same does not seem justified in the case of rights either.

We see, therefore, that in the case of a transfer of the entire contractual position, no claim, right, or obligation can be found, which should be regarded as non-transferrable. If this analysis is correct, we might conclude that by assigning all rights under the contract and simultaneously with the assignment assuming all debts and obligations arising from the contract, the contractual position can be transferred. This also means that it is not required to regulate the transfer of contract as a *sui generis* transaction.

VI Clarifying the Legal Nature of the Transfer of Contract

The case law of the Hungarian courts provided a very pragmatic solution to the transfer of contractual positions. This approach was useful to cater for the needs of the parties. However, the New Civil Code also provides the opportunity to clarify the legal nature of the transfer of contract. This paper will provide one example that shows why this exercise seems inevitable.

Hungarian law, similarly to the various model laws, provides that the party remaining in the contract can give advance consent to the transfer. This rule is in line with the needs of the market. For example, syndicated loan agreements often provide that the debtor gives its consent that the creditors may transfer their contractual position.⁵⁷ The legal nature of the transfer of contracts needs to be properly understood to regulate such advance consent.

The New Civil Code regulates the transfer of contracts as a tripartite contract.⁵⁸ As explained above, the New Civil Code also ensures that the party remaining in the contract can give its consent in advance. In this case, says the Civil Code, the assignment takes effect when the party remaining in the contract is notified of the transfer.⁵⁹

This rule seems puzzling. Consent in Hungarian contract law terminology means that a contract is concluded between two parties, and this contract will come into effect only if a third party that is not a party to the contract gives its consent.⁶⁰ In this case, however, the party giving consent to the transfer is a party to the transfer.

⁵⁷ Roy Goode, *Commercial Law* (2nd edn, Penguin UK 1995, London) 109; Kwan Ho Lau, 'Novation and advance consent' (2022) *Cambridge Law Journal* 1–29.

⁵⁸ Section 6:208 (1) of the New Civil Code.

⁵⁹ Section 6:209 (1) of the New Civil Code.

⁶⁰ Section 6:118 (1) of the New Civil Code.

The origin of the rule can easily be found. An earlier draft of the New Civil Code explained that the rule was influenced by the UNIDROIT Principles.⁶¹ According to them, the transfer of a contract requires the consent of the party remaining party to the contract, and such consent may be given in advance. In such cases, 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.⁶²

However, the legislator seems to have failed to take into account the fact that the New Civil Code has chosen a fundamentally different solution from the UNIDROIT Principles. Contrary to the bilateral solution of the UNIDROIT Principles, the New Civil Code regulated both the assumption of debt and the assignment of contracts as tripartite contracts. As a consequence, the advance consent does not fit smoothly into the New Civil Code's system of offer and acceptance. The New Civil Code's logic would require that the first declaration made in the course of concluding a contract is an offer or an invitation to an offer.

The advance consent will not qualify as an offer for two reasons. First, offers are declarations addressed to one or more parties, but at the time of making the advance consent, the party making the declaration does not yet know who will be the party entering into the contract and therefore cannot make a declaration addressed to the other two parties. Second, offers need to determine the material terms of the contract to be concluded.⁶³ However, the party giving advance consent cannot determine the essential terms of the contract, as the terms of the transfer agreement will be determined by the party leaving the contract and the party entering the contract.

This uncertainty was presumably also perceived by the legislator, since the title of the Section of the New Civil Code refers to 'advance consent', whereas the text of the provision refers to an 'advanced declaration'.

Advance consent is a necessary and useful tool. The law should, therefore, recognise that the party remaining in the contract can express in advance, either conditionally or unconditionally, that it accepts the change of the counterparty. In order to fit into the system of legal declarations, the New Civil Code should make it clear that, in the case of the tripartite system of transfer of contracts, the party remaining in the contract can make an advance declaration, which is not an advance consent. This advance declaration is unique in at least two respects. First, it is a declaration that is addressed to the party leaving the contract, but at the same time, it is also a declaration not addressed in relation to the party entering into the contract. Second, even though this declaration precedes in time the declaration of the other two parties, it still does not constitute an offer.

⁶¹ Péter Gárdos, 'Engedményezés, tartozásátvállalás és szerződésátruházás' [Assignment, assumption of debt and transfer of contract in Lajos Vékás (ed), *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez* [Expert Proposal for the Draft of the New Civil Code] (Complex 2008, Budapest) 858.

⁶² Article 9.3.4 of the UNIDROIT Principles of International Commercial Contracts.

⁶³ Section 6:64 (1) of the New Civil Code.

VII Conclusion

This paper provided an introduction to the New Civil Code's rules on the transfer of contracts. It explained that, until the New Civil Code entered into force in 2014, the courts managed to address the needs of the parties to a transfer of contract by accepting that the transfer of contract is possible by way of a combination of the rules on assignment and assumption of debt. This has led to a satisfactory result in a situation where the Old Civil Code provided no rules on the transfer of contract. The New Civil Code intended to codify the transfer of contracts in line with the solution of the courts. However, after the New Civil Code entered into force, several problems emerged in practice. These issues can be traced back to the fundamental question of what a transfer of contract is. This paper argued that the transfer of contract is not a *sui generis* transaction, but a combination of the simultaneous assignment and assumption of all rights and debts under a contract, leading the legal succession. The paper also showed that the legislator should proceed with caution when copying the solutions of other jurisdictions or harmonisation tools. The English law, where the need for advance consent first occurred, does not recognise that a legal succession in the contractual position is possible, and therefore handles a transfer of contract as novation. The UNIDROIT Principles regulate the transfer of contract as a bilateral transaction, whereas the transfer of contract is a tripartite contract under Hungarian law, which leads to the result that the well-drafted solutions of the UNIDROIT Principles cannot simply be 'copied' by the Hungarian legislator. The overall argument of the paper is that once we recognise the legal nature of the transfer of contract, it is possible to regulate it in a way that fulfils the needs of the parties to the contract and at the same time fits into the system of the New Hungarian Civil Code.