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Transfer of Contracts under German Law

Abstract

The paper analyses the historical development of the transfer of contracts under German Law, regarding the principle of succession for the assignment of claims and the assumption of debts and the influence of the German Federal Court of Justice on the transfer of shares in a company. It also provides a dogmatic framing of the subject and shows the prerequisites for a valid transfer of contracts under German Law. Additionally, the paper outlines the protection of succession in contract law and how the Draft Common Frame of Reference codified the transfer of contracts. Finally, the author argues for the statutory addition of a third variant, of private assumption of debt, which is effective without the creditor's consent.

Keywords: transfer of contracts, succession, BGB, civil law, assignment of claims, assumption of debts, protection, DCFR

I Freedom of Succession in the Transfer of Contracts

When claims are assigned or a debt is assumed, individual rights are transferred or the successor takes on individual debts.[1] When a contract is transferred *(Vertragsübernahme)*, the *entire* contractual relationship is transferred to the successor whoever fully assumes the contractual legal position of the previous contracting party.[2]

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1 The following part is based on Jan Lieder, *Die rechtsgeschäftliche Sukzession* (Mohr Siebeck 2015, Tübingen), 130 ff.

2 Cf. BGHZ 44, 229, 231; 95, 88, 94 ff; 96, 302, 307 f; 137, 255, 259; Knut Wolfgang Nörr in Knut Wolfgang Nörr, Robert Scheyhing, Wolfgang Pöggeler (eds), *Handbuch des Schuldrechts – Sukzessionen – Forderungszession, Vertragsübernahme, Schuldübernahme* (2nd edn, Mohr Siebeck 1999, Tübingen), § 16; Anne Röthel, *Erman BGB* (Harm Peter Westermann et al eds, 16th edn, Dr. Otto Schmidt 2022, Cologne) Vor § 414 margin no. 2; Dominik Klimke, *Die Vertragsübernahme* (Mohr Siebeck 2010, Tübingen) 3.

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1 Basic Principles

The transfer of a contract was never written into codified law for historical reasons. When the German Civil Code *(BGB)* was created, a contract under the law of obligations was still regarded as a mere combination of individual claims and debts,[3] not as an organic combination of rights, legal situations and obligations as it is today.[4] Under this interpretation, the succession elements provided by the historic legislator (§§ 398 ff., 414 ff. *BGB*) were sufficient for the transfer of a contract. The explanatory memorandum for the 1st *BGB* draft states that:[5] 'For provisions that are not included, it is conceivable that the intentions of the parties that led to the novation can be solved by way of the rules on the assignment of claims and the assumption of debt.'

In addition, the legislator's restraint can be explained by the state of legal doctrine at the time. Even while the Civil Code was being enacted, there was still some debate about the 'succession character', in other words, the legal type of succession, of the assignment of claims[6] and the assumption of debts.[7] The idea that the legal relationship under the law of obligations was *iuris vinculum* had still not been completely overcome at that time and obstructed the idea that a contractual position/relationship could be transferred.

However, the recognition of the principle of succession for the assignment of claims and the assumption of debts brought a paradigm shift. The idea of a contractual relationship being an excessively personalised legal situation is now outdated,[8] as is the belief that contractual relationships are no more than a sum of individual claims and debts. Because modern legal doctrine considers contractual relationships to be an organism of rights, legal situations and obligations,[9] there is also a need for a special act of (contractual) succession that goes beyond the combination of assignment and assumption of debt, based on which entire contractual positions can be transferred.

This development was encouraged by the German Federal Court's judgments on the transfer of shares in a company, which the Second Civil Senate of the Federal Court of Justice

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[3] Cf. Helmut Pieper, *Vertragsübernahme und Vertragsbeitritt* (Grote 1963) 13; Karl Larenz, *Lehrbuch des Schuldrechts Allgemeiner Teil* (14 edn, C.H. Beck 1987, Munich) § 35 III; Nörr (n 2) § 16; Astrid Schaffland, *Die Vertragsübernahme* (Lang 2012, Frankfurt a.M.) 31. https://doi.org/10.3726/978-3-653-01374-0

[4] See footnotes 12 and 13.

[5] Motive zum BGB, Bd. 2, p. 78: „Für die Nichtaufnahme von Bestimmungen (…) kommt in Betracht, daß dem Bedürfnisse, welches zu der mittels Wechsels des Gläubigers oder Schuldners sich vollziehenden Novation führte, im Wesentlichen durch die Vorschriften über die Zession (…) und über die Schuldübernahme (…) gedient wird"; cf. further RGZ 119, 114, 118; BGH NJW 1961, 453, 454; Siber, *BGB*, (Gottlieb Planck ed, De Gruyter) Vor § 398 Anm. 2 a; Volker Rieble, *Staudinger BGB* (Dr. Otto Schmidt 2022, Cologne) § 414 margin no. 2.

[6] See above Lieder (n 1) 108 ff.

[7] See above Lieder (n 1) 121 ff.

[8] See above Lieder (n 1) 113 ff.

[9] Busche, *Staudinger BGB* (Dr. Otto Schmidt 2022, Cologne) Vor § 398 margin no. 198, 202 f; Nörr (n 2) § 16; Larenz (n 3) § 35 III; detailed *id.*, JZ 1962, 105, 107 ff; on this development e.g. Annette Voigt, *Umwandlung und Schuldverhältnis* (R. v. Decker 1997, Heidelberg) 19 ff.

has permitted since the 1950s by way of legal succession, if this option is either provided for in the articles of association or is approved by all shareholders.[10] In its landmark ruling of 20 June 1985, the German Federal Court of Justice, following the preceding suggestions from academic literature,[11] finally expressly recognised that contracts of obligation can be transferred 'by legal succession [...] while maintaining their identity'.[12] Accordingly, the transfer of a contract is now generally recognised as an independent unwritten act of legal succession.[13] This corresponds to the requirements of the market as well as to the intention of the parties to transfer contractual positions uniformly.[14] In legal practice, there are numerous examples of transfers of contracts that far exceed the economic significance of the assumption of debt.[15] The transfer of beer supply contracts,[16] energy supply contracts,[17] credit contracts,[18] leasing contracts,[19] rental contracts,[20] heat supply contracts,[21] magazine subscriptions[22] and other successive supply contracts[23] have found their way into the German Federal Court's judgments. The transfer of contracts also plays a significant role in restructuring and reorganising companies.[24]

The recognition of the transfer of a contract as an independent act of succession constitutes the preliminary capstone of a development that removed the legal relationship

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[10] BGHZ 13, 179, 185 f; 44, 229, 231; Herbert Wiedemann, *Die Übertragung und Vererbung von Mitgliedschaftsrechten bei Handelsgesellschaften* (C.H. Beck 1965, Munich) 51 ff; Werner Flume, *Die Personengesellschaft* (Springer 1977, Berlin) § 17 I, II; on modern legal doctrine see Karsten Schmidt, *Gesellschaftsrecht* (4th edn, Heymanns 2002, Köln) § 45 III 2 b; Matthias Habersack, *Die Mitgliedschaft – subjektives und „sonstiges" Recht* (Mohr Siebeck 1996, Tübingen) 106.

[11] See references in BGHZ 95, 88, 95.

[12] BGHZ 95, 88, 94; confirmed by BGHZ 96, 302, 307 f; 129, 371, 375; 137, 255, 258 f; cf. previously BGHZ 44, 229, 231.

[13] In general see Helmut Pieper, *Vertragsübernahme und Vertragsbeitritt* (Grote 1963, Cologne) 160 ff., 176 ff., 184 ff. and passim; as well as Busche (n 9) Vor § 398 Rn. 197; Eva-Maria Kieninger, *Münchener Kommentar zum BGB* (9th edn, C.H. Beck 2022, Munich) § 398 margin no. 4; Röthel (n 2) Vor § 414 margin no. 2 ff; Ludwig Ennecerus, Heinrich Lehmann, *Recht der Schuldverhältnisse* (Mohr Siebeck 1958, Tübingen) § 87 I; Larenz (n 3) § 35 III; Heinrich Dörner, *Dynamische Relativität: Der Übergang vertraglicher Rechte und Pflichten* (C.H. Beck 1985, Munich) 187 ff; Klimke (n 2) passim; Schaffland (n 3) 37 f. and passim; e.g. BGH NJW 1961, 453, 454; 1966, 499, 500; 1985, 2528, 2530; 1986, 2108, 2110; 1990, 1181, 1182; Susanne Heinemeyer, *Münchener Kommentar zum BGB* (9th edn, C.H. Beck 2022, Munich).

[14] Cf. early on BGHZ 13, 179; ferner Busche (n 9) Vor § 398 Rn. 199; Rieble (n 5) § 414 margin no. 17 f; Anne Röthel, Benjamin Heßeler, 'Vertragsübernahme und Verbraucherschutz – Bewährungsprobe für ein junges Rechtsinstitut' (2008) Wertpapier-Mitteilungen 1001, 1002, 1001 f; Schaffland (n 3) 37 f.

[15] Similar evaluation by Röthel (n 2) Vor § 414 margin no. 2.

[16] BGHZ 129, 371; 142, 23; BGH NJW 1991, 2903; 1995, 2290; 1996, 2094; 1998, 2286; NJW-RR 1993, 562.

[17] BGH NJW 1961, 453, 454; 1981, 1361.

[18] OLG München WM 2008, 1151; OLG Düsseldorf NJW-RR 2001, 641; cf. also BGHZ 26, 142, 147 ff.

[19] BGHZ 142, 23.

[20] BGHZ 72, 394, 396; 95, 88; 137, 255; 154, 171; BGH NJW-RR 2005, 958.

[21] BGH NJW 1981, 1361; 2012, 1718.

[22] BGH NJW 1980, 2518.

[23] BGH WM 1973, 489. – Instructive summary on the development of this line of judgments with numerous references by Nörr (n 2) § 18; see further for current judgments in Schaffland (n 3) 23 ff.

[24] Schaffland (n 3) 26 f.

under the law of obligations from the person of the contracting parties and thus led to a depersonalisation of contractual relationships. It completes – if you will – the objectification and mobilisation of property positions under the law of obligations, which began with the assignment of claims and continued with the assumption of debt.[25] The transfer of the contract is legitimised by the fundamental principle of private autonomy and the principle of freedom of succession that can be derived from it, the effects of which are not limited to legal and debt positions, but especially relate to the contractual relationship as a whole as well.[26] There are no legal obstacles to the parties' intention to achieve this outcome, since German private law, especially in view of the importance of the general concept of succession, does not contain any fundamental prohibition of a change of the contractual party that preserves the identity of the contract. If the continuity of the continuing contractual position is important to the parties, the recognition of the concept of succession cannot be avoided regarding the transfer of the contract.[27] This is even more true because the alternative solution, in the form of a cancellation and re-establishment of the contractual relationship, is associated with higher transaction costs.[28]

2 Doctrinal Issues

The legal doctrine of the transfer of contract has always been characterised by the controversy between the *fragmentation theory (Zerlegungsthese)*, which sees contract transfers as a combination of assignments of claims and assumptions of debt,[29] and the *unity theory (Einheitstheorie),* which sees it as a (uniform) succession *sui generis*, which is fundamentally different[30] from the legally regulated transfer situations.[31] The debate has

[25] Cf. Nörr (n 2) § 16; Schaffland (n 3) 34 f.

[26] Detailed Pieper (n 13) 188 ff; cf. further Nörr (n 2) 17 I, 19 I 1; Busche (n 9) Vor § 398 margin no. 197; Voigt (n 9) 34; Klimke (n 2) 5.

[27] Cf. Schaffland (n 3) 37 f.

[28] Cf. Klimke (n 2) 1.

[29] Gustav Demelius, 'Vertragsübernahme' (1922) 72 Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts, 241, 252 ff; Enneccerus, Lehmann (n 13) § 87 I 2 (p. 350); Böttger, 'Die Vertragsabtretung nach italienischem Recht' (1974) 73 Zeitschrift für vergleichende Rechtswissenschaft 1, 9; Wagemann, Die gestörte Vertragsübernahme' (2005) Archiv für die civilistische Praxis 547, 552; for judgments see RGZ 119, 114, 118; 130, 115, 118; BGH NJW 1959, 1536, 1538; 1961, 453, 454.

[30] On the basic principles Pieper (n 13) 173 ff., 176 ff; as well as BGH MDR 1958, 90; BAG DB 1973, 924; Christian Grüneberg, *Grüneberg BGB* (Christian Grüneberg, 81th edn, C.H. Beck Verlag 2022, Munich) § 398 margin no. 42; Heinemeyer (n 13) Vor § 414 Rn. 8; Kieninger (n 13) § 398 margin no. 4; Josef Esser, Eike Schmidt, *Schuldrecht, Allgemeiner Teil* (7th edn, C.F. Müller 1993, Heidelberg) § 37 IV; Larenz (n 3) § 35 III; Brecher, 'Besprechung zu Helmut Pieper, Vertragsübernahme und Vertragsbeitritt' (1964) Archiv für die civilistische Praxis 163, 519 ff; Wolfgang Pöggeler, 'Grundlagen und Probleme der Vertragsübernahme' (1995) Juristische Arbeitsblätter 641, 642 f; E. Wagner, 'Form und Beschränkung der Vertragsübernahme sowie die Einwilligung hierzu – BGH DtZ 1996, 56' (1997) Juristische Schulung 690, 692; Voigt (n 9) 29 ff., 34; Schaffland (n 3) 44 ff; see BGHZ 96, 302, 307 f; 72, 394, 395; BGH NJW-RR 2005, 958, 959; BGH NJW 2012, 1718 Tz. 33.

[31] On the significance of this controversy Dörner (n 13) 188 ff; Klimke (n 2) 21 ff., 33; on the other hand Voigt (n 9) 29 ff.

not been very fruitful to date. This is not surprising, as the two positions ultimately only emphasise the two central elements of the transfer of a contract. The dogmatic models turn out to be two sides of the same coin:

On the one hand, the unity theory correctly places succession to the contract in a wider context and considers it to be an independent dogmatic legal figure, going beyond a mere combination of assignment of claims and assumption of debts, the conclusion of which appears as a uniform legal transaction.[32] After all, the intention of the parties involved in the transfer of the contract is typically not to transfer individual rights and obligations from the contractual relationship, but to transfer the contractual relationship uniformly, as a whole.[33] The process of the transfer corresponds to the unity of the subject matter of the transfer, namely the contract.[34]

On the other hand, the recognition of succession to the contract as an independent legal concept cannot hide that the factual prerequisites and legal consequences of the transfer of the contract are mainly assessed according to §§ 398 ff. *BGB*, unless special features specific to the transfer of the contract, those resulting from the succession to the entire contractual legal position, exceptionally require a deviation from the succession provisions under the law of assignment and assumption of debt.[35]

As with the assumption of a debt,[36] the transfer of a contract is a transaction under property law;[37] it is not, as has been suggested[38] with regard to the contracting party entering into the contract, a transaction under the law of obligations at the same time. The obligation of the incoming party after the transaction is not the result of a separate contract of obligation, but is simply a consequence of the contractual position being transferred to the entering party by way of the identity-preserving succession of the incoming party to the contract. In

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[32] Cf. just BGH NJW-RR 2005, 958, 959; Grüneberg, *Grüneberg BGB* (n 30) § 398 margin no. 42.

[33] Ambiguous Lorenz Claussen, *Gesamtnachfolge und Teilnachfolge* (Nomos 1995, Baden-Baden), 112: „Der Vertragsübergang ist weder Einzelübertragung noch Gesamtnachfolge, sondern eine Sondernachfolge eigener Art."

[34] Accurately Pieper (n 13) 184.

[35] On the whole: Nörr (n 2) § 17 III 1; Klimke (n 2) 30 ff; for example BGH NJW 2012, 1718 Tz. 33.

[36] See Jan Lieder, *Die rechtsgeschäftliche Sukzession* (Mohr Siebeck 2015, Tübingen) 122 f. https://doi.org/10.1628/978-3-16-153034-0

[37] Of the same opinion Busche (n 9) Vor § 398 margin no. 201; Grüneberg, *Grüneberg BGB* (n 30) § 398 margin no. 42; Rieble (n 5) § 414 margin no. 17 f; Klaus Schreiber, *Soergel BGB* (Wolfgang Siebert, 13th edn, W. Kohlhammer Verlag GmbH 2010, Stuttgart) Vor § 398 margin no. 5; Konrad Zweigert, 'Das Statut der Vertragsübernahme' (1958) 23 (3–4) Rabels Zeitschrift für ausländisches und internationales Privatrecht 643, 655; Ulmer/Masuch, 'Verbraucherkreditgesetz und Vertragsübernahme' (1997) JuristenZeitung 654, 655; Christian Wagemann, 'Die gestörte Vertragsübernahme' (2005) 205 Archiv für die civilistische Praxis 547, 551 f; Röthel, Heßeler (n 14) 1002; Voigt (n 9) 36 ff; Schaffland (n 3) 50; cf. judgments BGH NJW 1981, 2747; BAG NJW 1973, 822, 823; OLG Oldenburg NJOZ 2007, 5937, 5941.

[38] Hubert Kaduk, *Staudinger BGB* (Julius von Staudinger, 12th edn, Dr. Arthur L. Sellier & Co. – Walter de Gruyter & Co. 1994, Berlin) Vor § 398 margin no. 36; Larenz (n 3) § 35 III; Ulrich Hübner, 'Vertragsübernahme und Vertragsbeitritt im Grunderwerbsteuerrecht' (1994) Betriebs-Berater 2044, 2045; Michael Volmer, 'Vollzugsprobleme bei Spaltungen' (1999) Wertpapier-Mitteilungen 209, 218; leaving this question open and considering it a 'terminological question' Klimke (n 2) 78 f.

addition, only the withdrawing party to the contract actually transfers a right; not the party remaining in the contract in addition to the withdrawing party,[39] as is argued in the literature with reference to the theory of disposition[40] prevailing in the case of the assumption of debt.

3 Prerequisites for a Valid Transfer of Contract

Taking into account the fundamental guarantees of private autonomy, which, together with the principle of freedom of succession, form the legal foundation of transfers of contract, their validity depends on the consent of all persons involved in the respective transaction. It is the central consequence of freedom of contract and the freedom to choose the contracting party that no one must have a (different) contracting party imposed on them against their will[41]. This can be achieved in different ways.[42]

Either the three legal entities involved in the takeover conclude a genuine tripartite contract, by way of which the contractual position of the withdrawing party is transferred to the incoming contracting party with the continuation of the remaining party unchanged, or the withdrawing and incoming parties agree on the succession to the contract by way of a bilateral contract and the remaining party consents to the takeover. Even if the last option best reflects the successional principle of the contract takeover, there is no objective need to deny the parties the option of a genuine tripartite contract, restricting decisions generally covered by private autonomy.[43] This applies even more as this legal figure is also recognised in cases concerning the assumption of debt.[44] With a view to private autonomy, there can be no objection to structuring the transfer of the contract in a bilateral manner, contingent upon the party remaining in the contract coming to an agreement with the new contracting party with the consent of the withdrawing party or with the consent of the new contracting party with the withdrawing party.[45] Whether the parties use a tripartite agreement or a bilateral contract with conditional consent is to be determined by way of legal interpretation.[46]

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[39] As stated above for the assumption of debt Lieder (n 36) 123 ff. applies to the transfer of a contract respectively.

[40] Klimke (n 2) 74 ff.

[41] See above Lieder (n 36) 100 ff., 126 ff.

[42] BGHZ 44, 229, 231; 65, 49; 95, 88, 93 ff; 96, 302, 308; 142, 23, 30 f; 176, 86 Tz. 16; BGH NJW 1961, 453, 464; 1998, 531, 532; NJW-RR 2005, 958, 959; NJW 2012, 2354 Tz. 7; Heinemeyer (n 13) Vor § 414 margin no. 8; Grüneberg, *Grüneberg BGB* (n 30) § 398 margin no. 42; Rieble (n 5) § 414 margin no. 4; Rohe, in Bamberger, Roth, *BGB* § 414, margin no. 27; Kieninger (n 13) § 398 Rn. 191 f; Weber in *RGRK, BGB* Vor § 398 margin no. 9, 10; Larenz, *Schuldrecht I,* § 35 III Fn. 43; Dieter Medicus, Stephan Lorenz, 'Schuldrecht I' (19th edn, C.H. Beck 2010) margin no. 800; Nörr (n 2) § 19 I 1; Pieper (n 13) 199 ff; Klimke (n 2) 36 ff; Schaffland (n 3) 102 ff; Knut Werner Lange, 'Rechtsgeschäftliche Vertragsübernahme und Insolvenz' (1999) ZIP – Zeitschrift für Wirtschaftsrecht 1373, 1374; Pöggeler (n 30) 641, 643.

[43] But see Dörner (n 13) 137 ff; correctly opposed by Nörr (n 2) § 19 I 1; Klimke (n 2) 45 ff; Schaffland (n 3) 105 ff.

[44] Detailed Klimke (n 2) 68 ff; Schaffland (n 3) 120 ff; e.g. BGHZ 137, 255, 259.

[45] Of the same opinion Rieble (n 5) § 414 margin no. 4.; Nörr (n 2) § 19 I 1; Schaffland (n 3) 103; of the same opinion Klimke (n 2) 50 ff; similar opinion apparently in BGHZ 96, 302, 309; BGH NJW-RR 2005, 958, 959.

[46] Detailed Klimke (n 2) 68 ff; Schaffland (n 3) 120 ff; for example BGHZ 137, 255, 259.

II The Protection of Succession in Contract Law

The protection of succession under the law on the transfer of a contract – just like the legal construct that is the assumption of a contract itself – has not been written into codified law.[47] In accordance with the basic doctrinal structures, the regulatory models for assignments of claims and debt assumptions must be used to determine the level of protection in favour of the remaining contracting party, which itself neither transfers its contractual legal position nor assumes an (additional) contractual position.[48] It is generally recognised that the legal effects of the transfer of a contract go beyond the mere combination of an assignment of claims and an assumption of debts. However, this unity of the object of the succession and the transaction of succession – which is supported by the parties' intentions – cannot conceal the fact that the modern interpretation of the transfer of contract is strongly based on the law of assignment and debt assumption. This is not surprising, since both areas of law contain the basic elements of a general model of succession, which provides a measure for the legal treatment of contract transfers – at least insofar as the special features specific to transfers of contracts do not require any deviations (i.e. from the fact that no individual claim or debt is transferred), but rather an entire, uniform contractual legal position.

1 Identity and Continuity of the Legal Position of the Remaining Party

Furthermore, the overriding principle of contractual identity under succession law applies.[49] To protect the interests of all parties involved, the succession to the contractual legal position does not affect the content and scope of the object of disposal, namely the contract. Because the new party to the contract acquires the contractual legal position as it existed in the person of the withdrawing party to the contract, the legal position of the other party – the remaining party to the contract – remains unchanged. Consequently, the general principles of the prohibition of deterioration and improvement under contract succession law also apply with regard to the transfer of the contract. Because of the transfer of the contract, the legal position of the remaining party may neither deteriorate in a legally relevant way, nor may it improve to the detriment of one of the other parties to the contract. Accordingly, any objections that the previous contracting parties were entitled to raise in relation to each other remain valid. In analogous application of §§ 404, 417(1)(1) *BGB*, objections may be raised against the new party to the contract even after the transfer of the contract and can be asserted by them against the remaining party.[50] This applies not only to the objection of non-performance of the contract according to § 320 *BGB*, but also to the right of retention

[47] The following part is based on Lieder (n 36) 673 ff.

[48] See above I. 2.

[49] See Lieder (n 36) 567 ff., 633 f., 665.

[50] Detailed on the whole Klimke (n 2) ff; briefly Schaffland (n 3) 83 f.

according to § 273 *BGB*, which can be asserted by the remaining party analogously to § 404 *BGB*[51] and by the transferee in analogy to § 417(1)(1) *BGB*.[52]

The temporal and factual specification of the preservation of objections are not subject to special rules. It is sufficient that the objections were created in the original contractual relationship before the transfer of the contract. If, for example, the limitation period has already started, it does not start anew by virtue of the transfer of the contract, but continues unchanged, even after the change of the contracting party.[53] Restrictions do apply to personal objections which – such as the objection of bad faith – are only based in the person of the withdrawing party.[54] They cannot be raised against the incoming party to the contract. Conversely, however, personal objections against the incoming party can arise for the first time upon their entry into the contractual relationship.

2 Legal Protections for the Uninformed Remaining Party to the Contract

In analogous application of § 407 *BGB*, the remaining party to the contract is also protected if the contract is transferred without their knowledge.[55] Admittedly, the validity of the transfer of the contract under current law depends on the consent of the remaining party to the contract, which must participate, either within the framework of a tripartite agreement of all parties or on the basis of a conditional bilateral agreement by way of consent analogous to § 415(1) *BGB*. However, the original contracting parties can – just as in the case of the assumption of debt[56] – consent to the future transfer of the contract in advance.[57] If the contract is taken over later without the remaining party becoming aware of the transaction, they are just as worthy of protection as the debtor who pays the assignor in ignorance of the change of creditor, or the creditor who performs legal acts in relation to the old debtor in ignorance of the change of debtor. Therefore, the trust of the remaining party to the contract in the unchanged continuation of the contractual legal position of its counterparty must also be protected by analogy with § 407(1) *BGB*. The new party to the contract must therefore accept both performance toward the previous contracting party and all legal transactions that improve the legal position of the remaining party, which are carried out without being

[51] Differentiating between consent and approval for the transfer of a contract: Klimke (n 2) 302 f; on parallels with the assignment of claims see Lieder (n 36) 634 ff.

[52] Joachim Gernhuber, *Das Schuldverhältnis* (Mohr Siebeck 1989, Tübingen) § 30 II 1 d; opposing opinion Nörr, (n 2) § 22 II; Klimke (n 2) 301 f; on parallels with the assumption of debt Lieder (n 36) 665 ff.

[53] Vgl. Rieble (n 5) § 414 margin no. 1 ff; Nörr (n 2) § 22 II; Klimke (n 2) 293 f.

[54] On this see Klimke (n 2) 294.

[55] Pieper (n 13) 212 f; *Dörner* (n 13) 281 f; Klimke (n 2) 313 f; cf. Busche (n 9) Vor § 398 margin no. 225 ff; Grüneberg, *Grüneberg BGB* (n 30) § 398 margin no. 44; Kieninger (n 13) § 398 margin no. 195; Esser, Schmidt (n 30) § 37 IV 2 b; Nörr (n 2) § 22 I.

[56] See Lieder (n 36) 667 f.

[57] See above I. 3.

aware of the transfer of the contract between the remaining party and the withdrawing party with regard to the transferred obligation. However, the remaining party can also choose whether to invoke the effects of good faith by analogy to § 407(1) *BGB* or whether it is better to proceed according to the true substantive legal situation. The protection of the remaining party ends when the transfer of the contract has come to their attention.

3 Contractual Succession following Notification

In the consistent development of the principles developed for the law of assignment of claims and assumption of debt, the trust of the remaining party in the notification of a transfer of the contract that actually never occurred or happened to be invalid is also protected in analogy to § 409 *BGB*.[58] The remaining party, which has no knowledge of the invalidity of any change in their contractual partner, is just as worthy of protection as the debtor in ignorance of the assignment and the creditor in ignorance of the assumption of debt. If the remaining party pays the incoming party on the basis of the alleged transfer of the contract, it is incompatible with the prohibition of deterioration under the law on transfer of contracts and the good faith of the remaining part to burden it with the risk of a double claim or the insolvency risk of the new contractual partner. Therefore, the withdrawing party who has notified the remaining party of the transfer of the contract must be held to accept the performance to the benefit of the new contracting party. Conversely, the notice of a transfer given by the party entering the contract establishes the legitimate expectation of the remaining party that it can now consider the incoming party as the new debtor. In accordance with the rules developed for the law of the assignment of claims and assumption of debt, the respective legal effects depend on whether the remaining party has been notified by the incoming party or the withdrawing party. The remaining party can only be certain in all respects if both parties involved in the transfer of the contract notify them of the transaction.

4 The Remaining Party's Right to Set-off

The general rules on the right to set-off apply to the remaining party to the contract: If the situation allowing the offsetting existed before the transfer of the contract, the remaining party may, according to the correct prevailing opinion,[59] set off against the successor by analogy with § 406 *BGB*. The opposing view, which considers the consent of the remaining party as a waiver

[58] On this and the following Dörner (n 13) 293; apparently also Esser, Schmidt (n 30) § 37 IV 2 b; opposing view Pieper (n 13) 214; Klimke (n 2) 179 ff., who also argues against the application of general rules of good faith (182 ff.); cf. further KG VersR 2003, 490, 491.

[59] Decidedly Nörr (n 2) § 22 II; equally Busche (n 9) Vor § 398 margin no. 222; Kieninger (n 13) § 398 margin no. 191; Grüneberg, *Grüneberg BGB* (n 30) § 398 margin no. 44; Esser, Schmidt (n 30) § 37 IV 2 b; same result by applying § 404 *BGB* also Dörner (n 13) 251 f; differentiating Klimke (n 2) 296 ff.: Application of § 406 BGB by analogy only with prior consent, but not if directly involved in the transfer of the contract.

of the assertion of such objections, amounts to an inadmissible fiction and should therefore be rejected.[60] Moreover, the unchanged continuance of the set-off situation – not unlike the assignment of claims – corresponds to the general principle of identity under contractual succession law.[61] Although the transfer of the contract cannot take place against the will of the remaining party under current law, the remaining party, even if it gives its consent, has no interest in sacrificing a previously existing set-off position. On the contrary, it corresponds to the idea of contractual succession underlying the assumption of the contract and the interpretation of § 406 *BGB* to preserve the set-off position once it has arisen for the remaining party to the contract. Anyone who argues that the remaining party has surrendered its defence options by participating in the transfer of the contract[62] gives credence to the opposite view, which inadmissibly assumes that the remaining party to the contract has waived its rights.

Conversely, the successor is prevented from offsetting a counterclaim to which the former contractual partner is entitled, despite the original offsetting situation by analogy to § 417(1)(2) *BGB*.[63] The successor lacks the necessary legal authority or power of disposal with regard to the counterclaim. In addition, the interests of the withdrawing party would be impaired if the successor could use the claim assigned exclusively to the previous party to the contract for its own interests.

III Transfer of Contract Within the DCFR

In contrast to the assumption of debt, the transfer of a contract has mostly been left uncodified in all but a few continental European countries; however, it is widely recognised as an institution of private law in practice and academia[64].[65] The transfer of a contract is the transfer of an entire contractual position, which is more legally complex than the assignment of an individual claim as well as the assumption of an individual liability due to its legal complexity.[66] In view of its central importance in modern business practice – the draft refers to rental, loan and employment contracts, as well as other continuing obligations[67] – the assumption of a contract has been explicitly regulated in the Draft Common Frame of Reference (DCFR). The brief model rules are based on the related provisions on assignment of claims and assumption of debts.

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60 Previously still Pieper (n 13) 214 f.

61 Opposing view Klimke (n 2) 297.

62 Klimke (n 2) 297.

63 Nörr (n 2) § 22 II; Dörner (n 13) 251 f; Klimke (n 2) 295 f; Schaffland (n 3) 82.

64 See comparative overview in Christian von Bar, Eric Clive, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference* (Vol. 1-6 2009) 1104 ff. https://doi.org/10.1515/9783866537279

65 The following part is based on Lieder (n 36) 1114 ff.

66 On the German legal doctrine see I.

67 v. Bar, Clive (n 64) 1102; as well as Christian von Bar, Reinhard Zimmermann, *Grundregeln des Europäischen Vertragsrechts, Teile I-III* (Sellier 2002/2005) 715.

1 The Transfer of a Contract as an Act of Legal Succession

The legal proximity of the transfer of a contract to assignment of claims and assumption of debt suggests it qualifies as a legal act of succession.[68] Art. III.-5:302(1) DCFR expresses this with sufficient clarity when it states that a contracting party can be exchanged for another person based on a legal agreement. It is therefore ultimately about the transfer of a (complex) contractual position from the previous contracting party to the contract transferee. As such, the regulatory model of the DCFR – just like the model rules on debt assumption[69] and the transfer of an individual claim[70] – deliberately decides against a solution based on novation, on the basis of which the transfer of the contract would have to be accomplished in two stages, being, (1) by the termination of the original contractual relationship and (2) by the establishment of a new contractual relationship with identical contents.[71]

The DCFR makes a convincing case for considering the transfer of a contract as an act of legal succession. This ensures a transfer of the contractual position to the successor while preserving the identity of the contract (*sukzessionsrechtliches Identitätsprinzip* – succession law identity principle[72]). In other words, the original contractual relationship continues and only undergoes a change in the contracting parties. The contract transferee enters into the (complex) contractual relationship (in the broader sense) in place of the contracting party leaving the contract[73] and thus acquires all contractual rights and obligations, with the exact content and extent to which they were previously due to the original contractual partner.

2 Participation of the Remaining Contracting Party

In accordance with the assumption of debt pursuant to Art. III.-5:203(1) DCFR, the transfer of a contract in accordance with Art. III.-5:302(1) DCFR – as previously Art. 12:201(1) Principles of European Contract Law (PECL) and Art. 9.3.3 UNIDROIT Principles of International Commercial Contracts (PICC) – requires the consent of the remaining contracting party. Although the explanatory memorandum to the draft does not provide a detailed explanation in this respect,[74] the parallels with the assumption of debt may have been decisive for the requirement of consent. This is not objectionable with regard to the overall coherence of the DCFR, and corresponds to the legal situation in all European legal systems.[75] However, within the framework of a codification of contractual assumption at

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[68] As well as in German law; see above II. 2.

[69] Detailed Lieder (n 36) 1099 ff.

[70] Detailed Lieder (n 36) 1057 ff.

[71] Vgl. v. Bar, Clive (n 64) 1103; see also v. Bar, Zimmermann (n 67) 715.

[72] Lieder (n 36) 567 ff.

[73] On the relationship under the law of obligations cf. Larenz (n 3), § 2 V; Dirk Looschelders, *Schuldrecht, Allgemeiner Teil* (10th edn, Vahlen 2012) margin no 8; Medicus, Lorenz (n 42) margin no 8.

[74] See v. Bar, Clive (n 64) 1103.

[75] Comparative overview see v. Bar, Clive (n 64) S. 1104 ff.

national and European level, the following reform proposal for a consent-free assumption of debt and, in particular, transfer of contract, should also be considered.[76]

In parallel to the law on the assumption of debt, the contracting parties are also given the opportunity to consent to the transfer of the contract in advance (Art. III.-5:302(1) DCFR); and again, under these circumstances, the assumption of the contract only becomes effective if the remaining contracting party is notified of the subsequent agreed transfer of the contract.[77] The obligation to notify the other party is misplaced in the transfer of a contract,[78] as well as in the transfer of an individual debt.[79] The legitimate interests of the contracting party can also be guaranteed through the creation or analogous application of the provisions created for the protection of debtors in cases of assigned claims (Art. III.-5:119 DCFR).

3 Applying the Law on the Assignment of Claims and Assumption of Debt

The commitment of the DCFR's explanatory memorandum to the doctrine of unity, which is also predominant in German law,[80] and regards the assumption of contract as an act of contractual succession of its own kind and not merely – like the fragmentation doctrine – as a combination of assignment and assumption of debt.[81] The transfer of a contract is thus considered a uniform act of transfer, which covers the entire contractual construct including all rights, obligations and other legal and debt positions and is more than a mere summary of the transaction relating to individual – positive as well as negative – asset positions. However, with a view to the practical result of a contract transfer, the authors of the draft rightly recognise that the contract transfer amounts precisely to this combination of assignment and assumption of debt. Therefore, it is only consistent when Art. III.-5:302(3) DCFR – just as previously Art. 12:201(2) PECL[82] – expressly orders the application of the rules on assignment and assumption of debt, depending on whether the transfer of a right to claim or a liability is at issue.

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[76] See below IV.

[77] As well as Art. 9.3.4 PICC and – although without explicit regulation – the comments on Art. 12:201 PECL, by v. Bar, Zimmermann (n 67) 716.

[78] Critical Remien, 'Drittbeteiligung am Schuldverhältnis im Europäischen Privatrecht' in Dirk Harke (ed), *Drittbeteiligung am Schuldverhältnis* (Springer 2010, Berlin) 97, 107. https://doi.org/10.1007/978-3-642-04450-2_5

[79] See Lieder (n 36) 1105 ff.

[80] See above I. 2.

[81] See v. Bar, Clive (n 64) 1103 f; also v. Bar, Zimmermann (n 67) 716.

[82] Art. 9.3.6 and Art. 9.3.7 PICC contain more detailed but consistent rules.

IV Reform of the Law of Transfers of Contract

In order to strengthen the freedom of succession further, a statutory addition to the law of debt and contract assumption should be added.[83] In addition to §§ 414, 415 *BGB*, a third variant of private assumption of debt, which is effective without the creditor's consent should be codified. This would be a supplement to the existing law, for which there is a considerable need in practice, particularly with regard to the transfer of contracts.

1 Amendment of the Law of Assumption of Debt

Once again, the overriding principle of freedom of succession[84] means an exception should be made from the creditor's consent requirement. This proposal for reform ensures a structural synchronisation of the law of assumption of debt and the law of assignment, and thus makes a valuable contribution to the development of the entire law of contractual succession in a way that is coherent in terms of inherent value judgments and structure. The proposed variant of debt assumption increases the ability of liabilities and contractual relationships to be circulated and, in this sense, serves to improve the security and ease of legal and commercial transactions. The creditor's interest in satisfaction, as well as the creditor's freedom to choose their counterparty, are no longer protected pre-emptively by the requirement of consent, but by succession protection provisions that apply after the fact. This proposal finds its inherent limits in personal liabilities and contractual relationships, the transferability of which is excluded according to general principles.

In order to protect the creditor's interest in satisfaction, an accessory joint liability of the old debtor should be established, similar to the transfer liability under split-up law pursuant to § 133 Transformation Act *(UmwG)*.[85,86] It should be limited to five years from the date of knowledge of the change of debtor, following which the old debtor shall be released from liability. In addition, the creditor should be granted a claim for security against the transferee in accordance with § 22 *UmwG*.[87] However, there is no need for a corresponding security claim by the transferee's existing creditors.[88]

The liability and security claims are flanked by a supplementary application of succession protection under private law. Principles such as (1) the identity principle under succession law and the prohibition of deterioration, (2) the doctrine of the frustration of purpose *(Geschäftsgrundlage)*, and (3) the right of termination for cause can be applied

[83] The following part is based on Lieder (n 36) 798 ff.

[84] See details in Lieder (n 36) 83 ff.

[85] Robert Hörtnagel, *Umwandlungsgesetz* (Schmitt, Robert Hörtnagl eds, 9th edn, C.H. Beck 2022) § 133 margin no. 1 ff.

[86] For details, see Lieder (n 36) 804 ff.

[87] For details, see Lieder (n 36) 807 ff.

[88] To this very issue, see Lieder (n 36) 809 f.

without any legislative changes. Legislative action is, however, required in the following cases: First, the continued existence of ancillary rights – contrary to § 418(1) *BGB* – should be provided for. Second, the regulatory idea underlying § 407 *BGB* with regard to the protection of creditors in the case of lack of awareness of the assumption of debt must be enshrined in law. Third, following the regulatory idea of § 409 *BGB*, the creditor of the claim is to be protected if they are notified of an assumption of debt.

2 Amendment of the Law of Assumption of Debt

The reform proposal developed for the private assumption of debt – change of debtor without obligatory creditor participation – has an effect on the transfer of contracts. Based on the regulations proposed, it should be possible to transfer a contract without the requirement of consent by the remaining party to the contract. This is supported by the principle of freedom of succession, as it also applies to the assumption of a contract.[89]

The creditor's interest in satisfaction and the principle of free choice of contracting party do not necessarily force a requirement for consent as long as the succession protection mechanisms developed for the assumption of debt are transferred to the transfer of contract. This applies in particular to the accessory joint liability of the withdrawing contracting party and the claim for security against the contract transferee. In addition, there are the usual instruments of succession protection under private law, which are aimed towards the debtor protection system under assignment law and the creditor protection system under assumption of debt law, as well as the doctrine of frustration of purpose and termination for cause. The latter rights of dissolution are of particular importance in the case of the transfer of a contract, because the change of contracting party, namely in the case of continuing obligations and successive delivery contracts, can be associated with intolerable hardship for the remaining contracting party resulting from the person of the party entering into the contract. Apart from this, the free transferability of entire contractual relationships according to the regulatory idea of § 399 *BGB* is excluded from the outset in the case of highly personal contractual positions. Moreover, excluding the remaining contractual partner's participation is intended as a supplement to the current system on contract transfer. The parties are still free to effect the transfer of the contract by means of a conditional bilateral agreement with the consent of the remaining party to the contract or by means of a tripartite transfer agreement.[90] There is immense practical need for a transfer of contract without consent.

The admission of a legal transfer of a contract without the consent of the remaining contracting party does not need to be specially codified, as long as the proposal developed for the assumption of debt is codified. The value judgments of the reformed law on the

[89] See above I.

[90] See above I. 3.

assumption of debt would then have the intended effect on the transfer of contract. In order to avoid legal uncertainties, it nevertheless seems preferable to include a brief reference to the provisions and principles of the law of assignment and assumption of debt in codified law – ideally in § 419 *BGB*, which is currently not used – as a minimum solution. This reference could be designed similarly to Art. III.-5:302 DCFR, which allows a uniform transfer of contractual relationships according to the rules of assignment of claims and assumption of debt.