

The transfer of contract

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Abstract: The new Hungarian Civil Code codified as a new legal instrument “the transfer of contract”. The point of the article is to deal the new law in Hungary and compare it with the Civil Code of other countries and the rules of international documents.

The transfer of a contract means the transfer by agreement from one person (the transferor) to another one (the transferee) of the transferor’s contractual position of a contract with another person (the third party). However it might seem to be clear, there were debates about its acceptance, the principles beyond it, the rights and obligations of the three parties or its limits.

In the countries where there is a debate about the acceptance, the question is still open: does it mean the need of a complex, new legal rule, or are the law of the assignment and the substitution of debtor enough?

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The new Hungarian Civil Code¹ codifies many legal instruments which were not known by the old one. One of these new legal techniques is the transfer of contract.

¹ Act. V. of 2013.

The acceptance of the transfer of contract

The transfer of a contract means the transfer by agreement from one person (the transferor) to another one (the transferee) of the transferor's contractual position of a contract with another person (the third party). That means the rights and obligations will be transferred without the simultaneous consent of the third party who stays in the contractual relationship, therefore without a new, trilateral agreement. Through the transfer of contract the conditions of the contract do not change, the transferee receives all the rights and obligations that belonged to the transferor. The third party may approve the transfer in the original contract or anytime later without specifying the transferee. That means that thorough the transfer of contract the contractual rights and duties with all its securities and defences of a bilateral, closed contract shifts to a new party, while the contract will continue to run.

There are situations when the person of a contractual position is changed without the consent of the other one. It can be, for instance in the case of legal succession between corporations or heritably between natural persons. In those cases the law declares the details of the transfer instead of an agreement of the parties. These cases can be regarded as fundamentally different to the transfer of contract therefore their analysis is beyond the length of this article.

Discussions concerning the theoretical possibility of the transfer of contract are connected to the principle of the contractual freedom. The Hungarian legal scientist Gyula Eörsi has declared that the principle of the contractual freedom means that “anyone can enter into a contract with anyone, anytime, it can be any kind of contract and they are free – aside from some, not remarkable legal limits – to appoint the elements of it”², also it means the free declarations of the contractual rights and obligations, while the obligatory legal norms are the limits of the contractual freedom. The principle of the contractual freedom and its limit ensures the possibility to the legislator to declare or to deny the transfer of contract.

The legal literature – based on German scientists – knows two theories about the contractual transfer of contract: according to the “Zerlegungstheorie”³ the legal institute of the transfer of contract does not need to be a separated transaction, because a contractual relationship means the sum of rights and obligations, therefore the transfer of contractual position can take place under the rules of assignment and substitution of debt.

² Eörsi, p.64.

³ Bauer, pp.39–40.

According to the “Einheitstheorie”⁴ which has been dominant since the 1920s, a contractual position is an integrated institute and not the sum of rights and obligations. Therefore its transfer needs a separated legal action because the assignment means the transfer of claims but not the transfer of contractual rights in their entirety. The substitution of debt is a tripartite agreement which transfers particular debts but not all of the obligations of a contractual position. Consequently claims can be transferred by the assignment and substitution of debt, but the transfer of contractual rights and obligations in general needs a new legal act.

Considering these theories any state can make their own decision about the permission of the transfer of contract. Accordingly there are some countries in which the law regulates (e.g. Italy, the Netherlands) while in others the judge decides about the permission (e.g. Germany) or the rejection (e.g. Hungary). The different practices of the countries have determinant role especially in the field of international trade, where the parties can choose the applicable law.

Transfer of contract: the legal instrument

The transfer of contract means that a contractual position will be transferred in its entirety, while the legal relationship, the contract will be maintained and “the terms of the contract will continue to run and the contract will be governed by the law as applied at the time of conclusion, which is important e.g. for the application of tax law.”⁵

As it is seen from above the transfer of contract is a tripartite legal relationship where a new party comes to a bilateral relationship with another bilateral contract. The object of this legal instrument is the contractual position which can be connected to a short- or a long-term relationship; it can apply the whole contract or just a part of it; or even a pre-contract may be transferred.

The nullity of the basic contract impacts on the contract of the transfer, an invalid contract cannot cause any legal effects therefore its position cannot be transferred. In case of a partial nullity of the basic contract the valid parts can be transferred but if the transferee was not informed about the error the rules of the mistake are useable.

⁴ Siber, in Bauer, p.65.

⁵ Withofs, p.2.

In case of the relative ineffectiveness of the contract the party who suffered infringement can choose: regards the contract as valid or can challenge the contract of transfer within the time given by the law, which can be judged invalid *ex tunc*. In this case the transferee may submit a civil claim against the transferor.

Even in the states where the transfer of contract is accepted, it is not limitless. A position can be non-transferable in the cases when an assignment would not be possible: it can be caused by the object of the contract (e.g. personal contract), by law or by the parties' agreement.

In case of third-party-beneficiary contracts, if the third party is allowed to claim their rights, the contractual position will be transferable, but the transfer cannot have direct effects on the third parties⁶, so their legal situation may not be changed.

The transfer of contract goes through an agreement in which both of the positions may be transferred. The regulations about the form of the transfer-contract are the same as the ones of the original agreement.⁷ The transfer can have a time condition which means the transfer can be permanent or temporary, therefore the transferor will become the contractual partner after a time or condition again.

The third party is allowed to give his consent either in the original contract or in a separated agreement or even in the contract about the transfer, but in the last case it will turn into a tripartite contract, where the legal instrument of the transfer of contract is unnecessary: even the law systems that do not accept the transfer of contract, – as in case of the Hungarian⁸ one – they admit the transfer in a tripartite agreement.

The main problem is the case when the consent is given before the transfer. A theory⁹ claims that the third party authorises the transferor to modify the contract in this case, however the obstacle is the conflicts of interests in this theory. According to another theory¹⁰ the original contract also can contain an offer to the transferor about the transfer. The prevailing theory¹¹ regards this contract as a third-party-beneficiary agreement, where the third party (the transferee) is unknown. The common point of the theories is that all of them recognise that if

⁶ Bauer, p.95.

⁷ Bauer, p.114.

⁸ BH 2006. 409 (Court decision)

⁹ Früh: 102. in Bauer, p.121.

¹⁰ Pieper: 206. in Bauer, p.121.

¹¹ Favre: Rz. 746. in Bauer, p.121., 124.

the original contract changed, a new consent of the third party or a tripartite contract would be needed.

The main economic advantage of the transfer of contract is that it is an effective instrument to realise financial projects. “For instance, a manufacturer of machines often needs resources to finance his production costs, if the machines are leased to his customers. In exchange for the financing, the rights from the lease contracts could be transferred to the financier.”¹²

The transfer of contract in the old¹³ and the new¹⁴ Hungarian Civil Code

The Hungarian civil law recognises two ways for altering contractual partner: the assignment and the substitution of debt. Following this attitude of the legal literature¹⁵, the operative Civil Code¹⁶ has rules for these two legal institutes, but they have many differences regarding the transfer of contract.

The practice of the Hungarian courts of justice has declared that there is no possibility to impose a clause about the transfer of contract in the original agreement. That means in the original contract the partners cannot make valid terms about that one of the partners can quit from the contractual relationship and find a new partner for the other one without his consent. But in the international legal practice there is jurisprudence for the transfer of contract, especially in cases, where the transferor is a corporation with economic benefits that uses this legal instrument in its practice.

The new Civil Code¹⁷ makes a difference in this question. Its book Nr. 6 has the title of assignments, transfer of rights, substitution of debt and transfer of contracts. The transfer of rights is also a new legal instrument: it means an assignment of transferable of rights.

The new Civil Code allows the transfer of the contractual rights and obligations in entirety, even it is made possible by the original contract or can be made under a separate agreement later.

¹² Withofs, p.2.

¹³ Act. IV. of 1959

¹⁴ Act. V. of 2013

¹⁵ Szladits, pp.122–131.

¹⁶ According to the Act. VI. of 1959. on 01. 01. 2013.

¹⁷ According to the Act. V. of 2013 at its promulgation

According to the rules of the assignment, the agreement about the transfer must specify at least the debt, the parties, the title and the sum. The personal obligations are not transferable.

The transferor must give the transferee all the necessary information and documents about the relationship and give the notice to the third party about the transfer. According to the rules of the transfer of rights in the new Hungarian Civil Code, if the original obligation is officially registered, its transfer has to be registered, too.¹⁸

During the codification in Hungary there was a debate about the naming of this legal institute. The two main options were the “transfer of contract” and the “assignment of contract”. Both of them exist in international legal documents, the Principles of European Contract Law, the legal literature of Germany and Switzerland uses the “transfer of contract” (Vertragsübertragung), while the UNIDROIT Principles and the common law countries prefer the term of the “assignment of contract”. The main argument in favour of “transfer of contract” was that the assignment means the transfer of the rights and debts, while the transfer of contract is a complex institution the transfer of a contractual position.¹⁹

International outlook

The instrument of the transfer of contract is dealt with by modern international documents in connection with contract law and also by the Civil Code in many countries. Some of them are described below.

Principles of European Contract Law (PECL)

In the second part of the 20th century there were many efforts to uniform the civil law of Europe; one of them was the work of the Lando Commission, called the Principles of European Contract Law (PECL). It is a “set of general rules which are designed to provide maximum flexibility and thus accommodate future development in legal thinking in the field of contract law”.²⁰ Since it is soft law, without binding force, it is seldom used in practice,

¹⁸ Act. IV. of 2013., 6:202 § (4)

¹⁹ Gárdos, p.11.

²⁰ Lando/Beale, p.27.

although it assembles the general rules of the European civil law and could be a basis of a European Civil Code in the future.

The Article 102 of the PECL has the title of “transfer of contract”. It allows a party of a contract to agree with a third person to be substituted as the contracting party, if the other party of the relationship assents. In this case the first party is discharged.

Although the PECL has no detailed rules for the transfer of contract, it shows the way of development and the international business actors’ need for recognition of the transfer of contract.

Draft Common Frame of Reference

The efforts to uniform the civil law of Europe continued after the PECL, its result was the Draft Common Frame of Reference (DCFR) in 2008. The DCFR contains the principles, definitions and model rules of the European contract law.

The Section 3 of Book III has rules about the transfer of contractual position, giving a possibility to a party of a contractual relationship to agree with a third person – with the consent of the other party – that the latter person is to be substituted as a party to the contractual relationship. Compared to the PECL the DCFR states that the consent of the third party may be given in advance, but in that case the transfer takes effect only after the third party is given notice of it.

UNIDROIT Principles

The UNIDROIT organisation devised the Principles of International Commercial Contracts (the Principles) in 1994, which was reframed in 2004 and in 2010. Although the document has not legal force, in practice it helps to get acquainted with the general principles of the contract law and to interpret them.

Since the edition of 2004 the Section 3 of Chapter 9 has the title of “Assignment of contracts”. After giving a definition it declares, that the rules do not apply when the contract is made under special rules governing transfers of contracts in the course of transferring a business. It requires the consent of the other party that may be given in advanced, too. The

other party may discharge the transferor and also retain the transferor as an obligor in case the transferee does not perform properly.

The transfer of contract in the law of some countries

The Article 6:159 of Dutch Code Civil (Burgerlijk Wetboek) allows the transfer of a contractual position with the cooperation of the counterparty, as far as the parties have not agreed otherwise. In the case of transfer of contract the rules of the assignment and the substitution of debt are applicable.²¹

The Italian Civil Code (Codice civile) gives more details. According to the Articles 1406–1410 the contractual position is transferable with the agreement of the third party. The notification of the third party is necessary.²²

The Civil Code of Portugal (Código civil) is similar to the Italian one, the law rules it according to the type of the original agreement.²³

The assessment of the transfer of contract

Although the legal instrument of the transfer of contract is not accepted in a big number of countries, however due to the economic pretension it will be used in many cases. Within the frames of the transfer of contract a contractual position in its entirety will be allowed to transfer to another party, but it does not mean the need of a complex, new legal rule, in many cases the law of the assignment and the substitution of debtor is useable.

According to my standpoint with the probate of the transfer of contract the Hungarian Civil Code will serve the modern economic and business life, which can be an example to follow.

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²¹ Dutch Civil Code 6:157–159 (on 19. 05. 2013)

²² Bauer, p.397.

²³ Gárdos, p.11.

References

- Bauer, C., 2010. *Parteiwechsel im Vertrag: Vertragsübertragung und Vertragsübergang*. (Dissertation) Zürich/St. Gallen: Dike Verlag.
- Demelius, H., 1922. Die Vertragsübernahme. *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts*.
- Eörsi, Gy., 1975. *Összehasonlító polgári jog (Jogtípusok, jogcsoportok és a jogfejlődés útja)*. Budapest: Akadémiai Kiadó.
- Favre, P. G., 2005. *Le transfert conventionnel de contrat*. (Dissertation) Freiburg/Zürich: SchulthessVerlag.
- Früh, P. 1944. Die Vertragsübertragung im schweizerischen Recht. (Dissertation) Zürich, Aarau.
- Gárdos, P., 2005. Szerződésátruházás. *Polgári Jogi Kodifikáció 2005/3*.
- Lando, O. and Beale, H., 2000. *Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law*.
- Pieper, H., 1963. *Vertragsübernahme und Vertragsbeitritt*. (Habilitation) Mainz, Köln/Berlin.
- Strohal, E., (ed.) 1914. *Planck's Kommentar zum Bürgerlichen Gesetzbuch nebst Einführungsgesetz*. Vol. 2. (Recht der Schuldverhältnisse), Half Vol. 1. Halbbd. (Allgemeine rTeil). 4th edition, Berlin.
- Szladits, K. 1935. *A Magyar magánjog vázлата*. II. rész. Budapest: Grill Károly Könyvkiadóvállalata.
- Withofs, V., (n.a.). *Transfer of contracts*. University of Leuven [online] Available at: <<http://www.law.kuleuven.be/rechtsmethodiek/en/documents/withofs>> [Accessed on 5 December 2013]

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