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Change of Parties in the New Hungarian Civil Code from a Comparative Perspective*

Zmiana stron w nowym węgierskim Kodeksie cywilnym w perspektywie porównawczej

ABSTRACT

The Hungarian Civil Code introduced changes regarding the change of parties. The paper argues that comparative law helped the Hungarian legislator to introduce new rules that address relevant market needs. The author shows how the clarification of the system of the transfer of receivables opened up new opportunities for the parties and how the treatment of non-assignment clauses changed in light of legislative changes in several European countries. It is argued that the new Hungarian Civil Code found the right balance between the interests of the debtor and the assignor. The second part of the article explains that the New Civil Code introduced a significant change through the rule on free transferability of rights. The third part presents how the New Civil Code introduced rules on the transfer of contracts, following the solutions of several European countries and international unification instruments, and explains the challenges posed by these rules.

Keywords: codification; change of parties; non-assignment clause; transfer of receivables; debtor; assignor; comparative law

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INTRODUCTION

The first Hungarian Civil Code was adopted in 1959.[1] This Code was in force until 2014 when it was replaced by the Civil Code adopted in 2013.[2] The New Civil Code maintained several fundamental institutions of the Old Civil Code and introduced new rules.[3] In the field of the law of obligations, the New Civil Code significantly changed, e.g., the rules on contractual liability[4] and negotiable instruments and introduced new types of contracts, such as finance lease, factoring and franchise. The New Civil Code also introduced interesting changes concerning the rules on the change of parties. This paper analyzes these rules from a comparative perspective.

A comparative analysis is especially interesting, as the official explanatory notes to the New Civil Code also explicitly referenced non-Hungarian laws. As the explanatory notes formulated, "the Bill does not choose a foreign model, but draws heavily on foreign codification examples".[5] The Bill refers to the Dutch *Burgerlijk Wetboek* and the Québec Civil Code. Furthermore, the Bill refers to the United Nations Convention on Contracts for the International Sale of Goods, the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, and the Draft Common Frame of Reference.

The experiences of foreign national laws and international legal instruments, such as the United Nations Convention on the Assignment of Receivables in International Trade and the Draft Common Frame of Reference and its commentary,[6] were also relevant for the codification of the rules regulating the change

[1] Act IV of 1959 on the Civil Code, hereinafter: the Old Civil Code.

[2] Act V of 2013 on the Civil Code, hereinafter: the New Civil Code.

[3] For a general overview of the changes, see P. Gárdos, *Recodification of the Hungarian Civil Law*, "European Review of Private Law" 2007, vol. 15(5). See also A. Menyhárd, E. Veress (eds.), *New Civil Codes in Hungary and Romania*, Cham 2017. For a historical analysis, see A. Harmathy, *Changes in the Legal System: A Comparative Essay Based on the Hungarian Experience*, "Journal of Civil Law Studies" 2019, vol. 12(2), p. 217.

[4] See, e.g., Á. Fuglinszky, *Some Structural Questions on the Relationship between Contractual and Extracontractual Liability in the New Hungarian Civil Code*, [in:] *New Civil Codes in Hungary…*, p. 107; idem, *The Reform of Contractual Liability in the New Hungarian Civil Code: Strict Liability and Foreseeability Clause as Legal Transplants*, "The Rabel Journal of Comparative and International Private Law" 2015, vol. 79(1). For a more general overview, see L. Vékás, *About Contract Law in the New Hungarian Civil Code*, "European Review of Contract Law" 2010, vol. 6(1); idem, *Über das neue ungarische Zivilgesetzbuch*, "Annales Universitatis Scientiarum Budapestinensis De Rolando Eötvös Nominatae. Sectio Iuridica" 2013, vol. 5.

[5] Bill T/7971 on the New Civil Code, Budapest, July 2012, https://www.parlament.hu/irom39/07971/07971.pdf (access: 9.1.2023), p. 370.

[6] See C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Outline Edition*, Berlin–New York 2009.

of parties.[7] This article provides an overview of the major novelties introduced by the New Civil Code in the field of the change of parties and analyses these changes in light of the experiences of foreign national law and international legal instruments.

The paper is structured as follows. The first part deals with the transfer of receivables. The first section in this part shows how the clarification of the system of the transfer of receivables opened up new opportunities for the parties. The second section explains how the treatment of non-assignment clauses changed in light of the change of legislation in several European countries. It is argued that the new Hungarian Civil Code found the right balance between the interests of the debtor and the assignor. The third section introduces how the New Civil Code distinguished between the various effects of notification and how this decision was influenced by the UNICTRAL Convention's solution. The part on the transfer of receivables concludes by reviewing what rights are transferred with the assigned receivable. The paper argues that the Hungarian legislator failed to analyze the solutions of other jurisdictions and international instruments, and this contributed to the suboptimal rule of the New Civil Code.

The second part focuses on the transfer of rights. The paper explains that the New Civil Code introduced a significant change by introducing a rule on the free transferability of rights. The third part is how the New Civil Code introduced rules on the transfer of contracts following the solution of several European countries and international unification instruments, and explains the challenges posed by these rules. Finally, part four explains the various structures that allow an assumption of debt.

The paper argues that the experiences of other countries and the various international unification instruments, on which the New Civil Code relies, helped the Hungarian legislator to introduce new rules that address relevant market needs.

TRANSFER OF RECEIVABLES

1. The system of the transfer of receivables

For the transfer of things,[8] Hungarian law follows the causal traditional system, which requires a valid contract (*iusta causa*) as the legal title for the transfer, and an act of disposition, the transfer of possession for the transfer of title of movables

[7] See, e.g., P. Gárdos, *Az engedményezésre vonatkozó szabályok újragondolása a nemzetközi gyakorlat tükrében*, "Polgári Jogi Kodifikáció" 2003, vol. 5; idem, *Tartozásátvállalás mint nováció*, "Polgári Jogi Kodifikáció" 2005, vol. 7; idem, *Szerződésátruházás*, "Polgári Jogi Kodifikáció" 2005, vol. 7.

[8] Hungarian law defines "things" as physical objects that can be taken into possession (see Section 94 (1) of the Old Civil Code and Section 5:14 (1) of the New Civil Code). The rules relating to things shall apply *mutatis mutandis* to money, securities and certain natural resources (see Section 94 (2) of the Old Civil Code and Section 5:14 (2) of the New Civil Code).

and land registry registration in the case of immovables.[9] The valid legal title (e.g. sale and purchase) will not transfer ownership; it only creates the seller's obligation to perform the act of disposition. The title is transferred only when both preconditions are fulfilled. The situation was more problematic if one tried to answer how receivables are transferred, as the Old Civil Code contained only a brief provision on this matter. This sentence provided that the assignor may transfer her receivables to a third party by way of contract.[10]

The provision seems to suggest that the structure for the transfer of movables and the transfers of receivables was different under the Old Civil Code. Instead of following the causal traditional system, the receivables were transferred according to the consensual model, i.e. the transfer only required assignment. One should, however, only cautiously draw this conclusion. The Old Civil Code, following the political ideology of the 1950s, tried to simplify the sophisticated civil law that existed in Hungarian jurisprudence and court practice before World War II. The structure of the transfer of movables reflects this. It was only around 2000 that the Supreme Court addressed the question of the transfer of movables in a case that concerned the transfer of a negotiable instrument.[11] Until this judgment, the nature of *traditio* remained undiscussed in the legal literature.[12] As the Supreme Court's analysis did not extend to the transfer of receivables, it remained unclear whether the transfer of receivables takes place according to consensual transfer.

Looking at this question from a comparative perspective, it is uncommon that the structure of the transfer of receivables does not follow that of movables. We do not argue that it is not possible to regulate the transfer of ownership of things and the transfer of receivables differently. Still, the analysis of some legal systems shows that this typically does not happen.

German law provides, for example, that the transfer of receivables requires *iusta causa*, such as a sale or a gift contract and assignment. The assignment transfers the receivable to the assignee even if the underlying agreement from which the obligation to assign has arisen is invalid (*Trennungsprinzip*, *Abstraktionsprinzip*).[13] This structure follows how things are transferred under German law.[14]

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[9] See Section 117 (2) and (3) of the Old Civil Code and Section 5:38 (1) and (2) of the New Civil Code.

[10] Section 328 (1) of the Old Civil Code.

[11] See uniformity decision no. 1/2000 of the Hungarian Supreme Court.

[12] For an overview, see L. Vékás, *Az új Polgári Törvénykönyv elméleti előkérdései*, Budapest 2001 pp. 205–206. For a critical analysis of the judgment of the Supreme Court, see A. Kisfaludi, *A részvényátruházás jogi természetéről*, "Gazdaság és Jog" 1996, vol. 4.

[13] See, e.g., D. Looschelders, *Schuldrecht Allgemeiner Teil*, München 2021, p. 456. For a comparative perspective, see H. Kötz, *Rights of Third Parties: Third Party Beneficiaries and Assignment*, [in:] *International Encyclopedia of Comparative Law*, vol. 7: *Contracts in General*, ed. A. von Mehren, Oxford 1992, p. 58.

[14] For the transfer of movables, see Section 929 of the German Civil Code; for the transfer of immovables, see Section 873 of the German Civil Code. See J.F. Baur, R. Stürner, *Sachenrecht*, München 2009, pp. 237–247, 636–644.

Austrian law may serve as another example. The transfer of movable property under the ABGB requires a legal cause (*titulus*) and the transfer of possession (*modus*).[15] However, contrary to the solution of the German BGB, the buyer acquires title only if both the legal cause and the transfer are valid.[16] The same is true for the transfer of receivables, with the exception that for receivables, the assignment of the receivable is required instead of the transfer of possession.[17]

French law provides the third example. The Civil Code (Code civil) provides that in the case of transfers based on contract, the transfer takes place when the contract is concluded.[18] We find the same in the case of the transfer of receivables. Receivables are transferred with the conclusion of a legal title, and no further separate agreements are necessary.[19]

Returning to Hungarian law, one guiding principle behind the New Civil Code was to "restore the integrity of the doctrine of private law".[20] In line with this principle, along with other changes, the New Civil Code introduced clear rules on the structure of the transfer of receivables. Under the new regime, following the model of the transfer of movables, the transfer of receivables also requires two separate legal acts: a legal title from which the obligation to assign arises and the assignment itself. This latter is defined as the contract as a result of which the receivable transfer from the assignor to the assignee. In line with the solution for the transfer of movables, receivable only transfers to the assignee if both the legal title and the assignment are valid.[21] This change also required the extension of the rules on sale and purchase agreements and other potential legal titles for the transfer of receivables.[22] Traditionally, these only covered the transfer of things, i.e. movable and immovable property. The New Civil Code left the definition of "thing" unamended but extended the scope of sale and purchase agreements and contracts for donation to claims and rights.

Although separating legal title and assignment might seem to create an unnecessarily complicated regime, it does not cause problems in practice. If the assigned receivable already exists at the time of assignment and belongs to the assignor's assets, there is no obstacle to concluding the two contracts simultaneously, even

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[15] Sections 426, 431 and 1053 of the Austrian Civil Code.

[16] A. Kletečka, *Bürgerliches Recht*, vol. 1, Wien 2006, pp. 309–311.

[17] See, e.g., H. Koziol, R. Welser, *Bürgerliches Recht*, vol. 2, Wien 2001, p. 116.

[18] See Articles 1196 (Article 1138 before the reform of the French Civil Code), 938 and 1583 of the French Civil Code.

[19] Articles 1321 and 1583 of the French Civil Code. For a comparative overview, see C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *op. cit.*, pp. 1049–1055.

[20] L. Vékás, *Az új Polgári Törvénykönyv*..., p. 197.

[21] Section 6:193 (2) of the New Civil Code.

[22] See Section 6:215 (3) of the New Civil Code for sale and purchase of receivables, Section 6:235 (3) of the New Civil Code for donation agreements, and Section 6:405 of the New Civil Code for factoring agreements.

in one deed. Furthermore, the distinction between the two transactions opens up possibilities for the parties.

Let us take the example of future receivables, where the parties intend to enter into a binding relationship, but the legal relationship out of which the receivable will arise does not yet exist (e.g. a claim for rent arising from a lease agreement that has not yet been concluded). The New Civil Code provides that such receivables cannot be assigned.[23] However, building on the distinction between the legal title and the assignment, it is possible to conclude the sale and purchase agreement. The sale and purchase agreement does not transfer the receivable to the assignee, but the seller will be obliged to assign the receivable once such an assignment becomes possible.

A second example could be an existing receivable that does not belong to the assignor at the time of the transaction. Again, the sale and purchase agreement can be concluded, creating a legally binding obligation to assign the receivable. The assignment will follow later once the seller is in a position to assign the receivable.

A third example could be the transfer of a receivable that the parties wish to make conditional on the fulfilment of some conditions, e.g. the approval of the transaction by an authority. They can conclude the contract and agree that the assignment will only occur once the conditions are met.

Therefore, we can conclude that the New Civil Code clarified how receivables are transferred. This clarification has built on the experiences of comparative law by realizing that when regulating assignment, legal systems typically follow the structure of how ownership is transferred. Although this conclusion is not supported by legal literature, it is likely that legal systems find the arguments behind their system of transfer of ownership so compelling that they see no reason to deviate from these rules in the case of receivables. The New Civil Code, using the system of the causal tradition, nicely fits into this structure. The distinction between *causa* and *traditio* provides practical benefits to the parties.

2. Restrictions of free alienability, focusing on the example of non-assignment clauses

Civil codes typically acknowledge that not all types of claims may be assigned. For example, jurisdictions accept that personal claims are non-assignable. The non-transferability of personal claims had been the rule under the Old Civil Code,[24] which remained unamended in the New Civil Code.[25] The same approach is fol-

[23] Section 6:194 (1) of the New Civil Code provides that a claim can only be assigned if the legal relationship from which the claim arises already exists at the time of assignment.

[24] Section 328 (2) of the Old Civil Code.

[25] Section 6:194 (3) of the New Civil Code.

lowed, e.g., by the German BGB[26] and the Austrian ABGB.[27] Although practical differences exist, the underlying concept is similar in all jurisdictions. There are situations where the creditor's identity is so important that "the justified expectation of the debtor in not having to render performance to another person outweighs a policy favoring free assignability".[28]

Public policy concerns form the second category of restricting assignability. National laws differ significantly concerning when an assignment is prohibited due to public policy concerns. This paper will not address this issue. Neither the Old Civil Code nor the New Civil Code provided a rule that assignments are invalid if the assignment is against public policy. However, several laws introduced restrictions based on this idea, and as an *ultima ratio*, the contract could be null and void if they were obviously contrary to good morals.[29]

There is a third category within the group of non-assignable receivables, namely those rendered non-assignable by the debtor and the creditor. The question of non-assignment clauses was heavily discussed in legal literature, and the last three decades have led to significant legislative changes. These legislative changes affected the New Civil Code's solution.

The Old Civil Code provided no rule on non-assignment clauses. Legal literature and earlier court practice argued that if the original contracts contain a clause that provides that the receivables arising from the contract cannot be assigned, any assignment in breach of such a provision is null and void. It was difficult, however, to adequately explain how a contractual provision between the debtor and the creditor can restrict the free alienability of a receivable. In a published Permanent Court of Arbitration award, the tribunal argued that the parties are free to include non-assignment clauses in their contracts based on the principle of freedom of commerce, and the breach of such a non-assignment clause leads to the invalidity of a subsequent assignment.[30] The commentary of the Old Civil Code argued that "the parties may agree that a claim arising from a legal relationship may not be transferred and assigned. By assigning such a claim, the creditor would commit a breach of contract, and therefore the assignment may not be recognized as valid".[31] This argument is surprising, as it is hardly the legislator's purpose to help the parties avoid the breaches of contracts. The fact that the conclusion of a contract qualifies

[26] Section 399 of the German Civil Code.

[27] Section 1393 of the Austrian Civil Code.

[28] H. Kötz, *op. cit.*, p. 61.

[29] See, e.g., the various restrictions on wage assignments. For a comparative analysis, see *ibidem*, pp. 60–61. See further N. Jansen, R. Zimmermann, *Assignment of Claims*, [in:] *Commentaries on European Contract Laws*, eds. N. Jansen, R. Zimmermann, New York 2018, pp. 1638–1639.

[30] VB00 188, 2002/1.

[31] G. Gellért (ed.), *A Polgári Törvénykönyv magyarázata*, Budapest 2007, p. 1179.

as a breach of another contract does not support the argument that the conclusion of the contract is invalid.

Critiques in legal literature argued that non-assignment clauses do not have any third-party effect. Consequently, a subsequent assignment is valid but constitutes a breach of the non-assignment clause.[32] The court practice also changed in line with this critique in recent years. A judgment of the Municipality Court explained that an assignment concluded notwithstanding a non-assignment clause is not invalid. In such a case, the assignor is in breach of contract; therefore, the debtor may claim damages.[33] The Supreme Court explained in a judgment that, in the absence of any legal provision to the contrary, non-assignment clauses do not extend to third parties and therefore do not make the assignment of such claims impossible.[34]

The approach concerning non-assignment clauses also changed in other European jurisdictions.[35] Whereas Article 9 of the Uniform Commercial Code provided that non-assignment clauses are ineffective,[36] on the Continent, it was widely held that non-assignment clauses render receivables non-transferrable. This approach started to change around the end of the last millennium.

In 1994, the German legislator introduced a provision in the Commercial Code providing that transfers of certain receivables are valid even if the contract from which the receivables arise contains a non-assignment clause.[37]

The situation was similar in Austria, where the Supreme Court had already ruled in 1912 that non-assignment clauses render any subsequent assignment invalid. The Austrian legislator amended the ABGB in 2005, expressly providing that non-assignment clauses only have *in personam* effect.[38]

Changes have also been introduced in the United Kingdom. Following the Law Commission's *Company Security Interests Report*,[39] the Business Contract Terms (Assignment of Receivables) Regulations 2018 provides that non-assignment con-

[32] P. Gárdos, *Az engedményezésre vonatkozó szabályok…*, pp. 3–4.

[33] BDT2011. 2419.

[34] Supreme Court Pfv. 21.917/2010/6.

[35] For an overview of national and international law reforms relating to non-assignment clauses, see P. Gárdos, *Non-assignment Clauses as Obstacles to True Sale Securitisations*, "Hungarian Journal of Legal Studies" 2021, vol. 62(2).

[36] UCC § 9–406(d).

[37] Section 354a of the German Commercial Code. For a critical analysis, see K.W. Nörr, R. Scheying, W. Pöggeler, *Sukzessionen: Forderungszession, Vertragsübernahme, Schuldübernahme*, Tübingen 1999, p. 33; A. Bauer, *§ 354a HGB – eine geglückte gesetzgeberische Lösung eines rechtspolitischen Problems?*, Berlin 2001.

[38] Section 1396a of the Austrian Civil Code. See, e.g., M. Lukas, *(Neu-)Regelung des Zessionsverbots*, "Österreichiches Bankarchiv" 2005, vol. 199(6), pp. 68–79.

[39] The Law Commission, *Company Security Interests Report*, 2005, https://lawcom.gov.uk/document/company-security-interests-report (access: 9.1.2023).

tracts do not affect the assignability of receivables.[40] However, there are significant exceptions to this rule. For example, the rule does not apply where the supplier is a large enterprise or a special purpose vehicle, and contracts for financial services and derivatives contracts are also exempted.[41]

The newest legislative proposal dealing with non-assignment clauses is the draft UNIDROIT Model Law on Factoring.[42] The Model Law states, "A transfer of a receivable is effective notwithstanding any agreement between the debtor and a transferor limiting in any way a transferor's right to transfer the receivable".[43] The Model Law not only provides that non-assignment clauses do not make the receivables non-transferrable. It also states that a subsequent assignment, at least in effect, does not qualify as a breach of the non-assignment clause. "Neither a transferor nor a transferee is liable for breach of an agreement referred to in paragraph 1, and the debtor may not avoid the contract giving rise to the receivable on the sole ground of the breach. A person that is not a party to an agreement referred to in paragraph 1 is not liable for the transferor's breach of the agreement on the sole ground that it had knowledge of the agreement".[44]

The Hungarian legislator recognized that if the law acknowledges the third--party effects of non-assignment clauses, it will lead to the result that receivables on several markets become non-transferrable. One can argue that if this is in the interest of the parties, the law should not interfere.[45] Still, data seems to show that weaker parties cannot avoid such terms, typically incorporated in general terms.[46] As non-assignment clauses deprive creditors of an asset against which they can take out loans, legislative intervention may be justified.

The various drafts of the New Civil Code included different solutions for regulating non-assignment clauses. The first published draft stated that non-assignment clauses do not have any effect *vis-à-vis* third parties. Still, the assignor would be liable for the breach of such clause. Such breach, however, shall not give rise to the termination of the original contract and shall not impair the assignee's rights.[47] The second draft introduced a significant change. It provided that non-assignment clauses are null and void.[48] The explanation argued that the first draft's solution

[40] Regulation 2 of the Business Contract Terms (Assignment of Receivables) Regulations.

[41] Regulations 3–4 of the Business Contract Terms (Assignment of Receivables) Regulations.

[42] UNIDROIT 2022 Online Consultation Study LVIII A.

[43] Article 8 (1).

[44] Article 8 (2).

[45] See P. MacMahon, *Rethinking Assignability*, "The Cambridge Law Journal" 2020, vol. 79(2).

[46] See data referred to by the German legislator in Deutscher Bundestag, 12. Wahlperiode, Gesetzentwurf der Fraktion der SPD, Entwurf eines Gesetzes zur Änderung des Handelsgesetzbuches, Drucksache 12/7570, https://dserver.bundestag.de/btd/12/075/1207570.pdf (access: 9.12.2023).

[47] Section 5:167 (3) of the 2006 draft of the New Civil Code ("Polgári Jogi Kodifikáció" 2007, no. 9, p. 3).

[48] Section 5:177 of the 2008 draft of the New Civil Code.

"would not have had the desired effect, as liquidated damages or other sanctions would have discouraged the creditors from transferring their claim, and would have had the result that claims currently non-transferable remain non-transferable".[49] The promulgated version of the New Civil Code introduced a third solution. Instead of qualifying non-assignment clauses as invalid, the law provides that such clauses have no effect against third parties. In response to the concerns of the second draft, the New Civil Code provides that the debtor may not terminate the contract due to the assignment, and the debtor may not demand liquidated damages.[50] It is interesting to note that the market practice has not fully followed the legislation change. Although the new rule has been in effect since 2014, there are still general terms that include non-assignment clauses, which require the creditor's consent to the assignment.[51] Other general terms extend the same rule to the transfer of rights, and also state that the bank may not withhold such consent without reasonable grounds.[52]

The New Civil Code intends to balance the interests of the debtor and the assignor. Although legal literature has typically argued that the assignment does not burden the debtor's position, this claim is not entirely valid. For the debtor, the assignment could be a burden for several reasons. First, the debtor will have a legal relationship with a new creditor. This creditor may be guided by considerations other than those of the original creditor. Second, the change of creditor exposes the debtor to the risk of double performance. Finally, in the case of a large number of claims, or where claims are assigned in several instalments, the debtor needs to track the succession to know when the debt is due and to whom and to which address or account number he shall pay. To counterbalance the harsh rule on non-assignment clauses, the legislator introduced a new rule that provides that the assignor and the assignee are jointly and severally liable for the costs incurred by the assignee as a consequence of the assignment.[53] Although national laws typically do not contain such rules, a similar rule can be found, e.g., in Article 9.1.8 of the UNIDROIT Principles, which ensures that the debtor can claim compensation for the additional costs caused by the assignment either from the assignor or the assignee. The commentary on the UNIDROIT Principles refers to the example of

[49] P. Gárdos, *Assignment, Assumption of Debt and Transfer of Contract*, [in:] *Expert Proposal to the Draft of the New Civil Code*, ed. L. Vékás, Budapest 2008, p. 852.

[50] Section 6:195 of the New Civil Code.

[51] See, e.g., Erste Bank, Vállalati hitel-, kölcsön- faktoring és bankgarancia Ügyletek általános szerződési feltételei, 21.1.2019, https://gate.erstebank.hu/ebh_internet_hird_frontend/document/download?documentId=%7B26E47B60-785B-4647-9897-7DFC0A635437%7D (access: 9.1.2023), clause 15.13.

[52] See MKB Bank Nyrt, Üzletszabályzata a bankszámlák vezetéséről, a betétgyűjtésről és a kapcsolódó szolgáltatásokról, https://www.mbhbank.hu/sw/static/file/mkb.hu-sw-static-file-1__BBKSZ_fuggo_hatalyu_20210307_.pdf (access: 9.1.2023), clauses 7.4–7.5.

[53] Section 6:200 of the New Civil Code.

additional costs arising from changes in place of performance and assignments in several instalments.[54]

The New Civil Code significantly limited the effect of non-assignment clauses. In doing so, the legislator relied on the experiences of foreign laws. The explanatory notes to the first draft referred to Dutch law, the UNCITRAL Convention, and the UNIDROIT Principles.[55] The second draft also relied on Section 354a of the German Commercial Code and Section 1396a of the Austrian Civil Code. The almost one decade since the entry into force of the New Civil Code shows that the new rule has not caused problems in the market.

3. Notification of the debtor

The third provision this paper analyses is the notification of the debtor, the purpose of such notification, and its legal consequences.

The Old Civil Code provided that the debtor must be notified of the assignment;[56] the debtor can only perform to the assignee after notification.[57] The rule was both inaccurate and practically problematic. It was inaccurate as the Old Civil Code did not mean that the debtor must be notified. Under the Old Civil Code, if an assignment has taken place, the receivable transferred to the assignee, even if no notice was given to the debtor. The lack of notification had two consequences. First, the debtor may still have performed to the assignor. Second, the debtor had the right to set off claims, the legal basis of which existed at the time when the debtor was notified of the assignment. This second consequence explains why the rule was also impractical. The assignors and the assignees often wish to avoid the debtor learning of the new creditor. However, if the debtor is not notified, he/she will have the right to set off new claims, which is detrimental to the assignee.

Providing an overview of how the various jurisdictions regulate notification of the debtor would exceed the limits of the paper. Therefore, we will not focus on the solution of French and English law, as these systems follow significantly different transfer structures, making their notification rules less relevant.[58] German and

[54] UNIDROIT Principles of International Commercial Contracts 2016, https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf (access: 9.12.2023), pp. 312–313.

[55] 2006 draft of the New Civil Code ("Polgári Jogi Kodifikáció" 2007, no. 9, p. 6).

[56] Section 328 (3) of the Old Civil Code.

[57] Section 328 (4) of the Old Civil Code. This Code contained different rules based on whether notice was sent by the assignor or the assignee. If the debtor was notified by the assignor, the debtor can only perform for the assignee; in the case of a notification from the assignee, the debtor can demand proof that the assignment has been made. Failing this, he/she may perform only at his/her own risk to the person who acted as assignee.

[58] Article 1690 of the French Civil Code provides that the assignment is effective against third parties only if the parties notified the debtor or the debtor accepted the transfer in an authentic instrument. The detrimental effects of this notification rule were addressed by the *loi Dailly*, which in the case of

Austrian law treats notification similarly. Notification of the debtor is not required for the receivable to transfer to the assignee. The most important effect of notification is that after notification, the debtor can no longer discharge her obligation by performing to the assignor.[59]

The UNCITRAL Convention's rules on notification follow a more practical concept. Its starting point is that an assignment does not affect the rights and obligations of the debtor, including the payment terms contained in the original contract.[60] The Convention distinguishes between notice and payment instruction. A notification has two basic consequences. First, it determines the scope of set-off available against the assignee, as the debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received by the debtor.[61] Second, an agreement concluded after notification of the assignment between the assignor and the debtor that affects the assignee's rights is ineffective as against the assignee.[62] Under the Convention, "notification of the assignment" means a communication in writing that reasonably identifies the assigned receivables and the assignee.[63] If the notice includes a payment instruction, the debtor can only discharge her payment obligations by paying to the assignee. If the notice identifies the assigned receivables and the assignee but does not contain a payment instruction, the debtor shall continue to perform *vis-à-vis* the assignor.[64]

The New Civil Code builds heavily on the solution of the UNCITRAL Convention when it distinguishes between notification and payment instruction. The New Civil Code provides that the assignor shall, at the option of the assignee, notify the debtor of the assignment in writing, stating the fact of the assignment and the claim assigned, or deliver to the assignee the instrument of assignment specifying the assignee.[65] The notice does not affect the debtor's obligations. Its effects are

financial institutions eased this requirement. Section 136 of the Law of Property Act 1925 also required that the debtor is notified for the assignment to qualify as a legal assignment. The lack of notification did not lead to the invalidity of the assignment. If the assignment fulfilled the requirements of an equitable assignment, the assignee acquired the receivable. See M.P. Furmston, G.C. Cheshire, C.H.S. Fifoot, *Cheshire, Fifoot, and Furmston's Law of Contract*, Oxford 2007, p. 653.

[59] D. Looschelders, *op. cit.*, p. 471; H. Koziol; R. Welser, *op. cit.*, p. 117.

[60] Article 15 (1) of the UNCITRAL Convention.

[61] Article 18 (2) of the UNCITRAL Convention.

[62] Article 20 (2) of the UNCITRAL Convention. This rule is not without limits. The amendment is effective if the assignee consents to it, or if the receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification. See Article 20 (2) of the UNCITRAL Convention.

[63] Article 5 (d) of the UNCITRAL Convention.

[64] S.V. Bazinas, *Multi-Jurisdictional Receivables Financing: UNCITRAL's Impact on Securitization and Cross-Border Perfection*, "Duke Journal of Comparative and International Law" 2002, vol. 12, pp. 377–378.

[65] Section 6:197 (1) of the New Civil Code.

twofold. First, after notification, the amendment of the contract between the debtor and the assignor is ineffective against the assignee. Second, the debtor may assert against the assignee those defenses and counterclaims that the assignee had against the assignor on a legal basis existing at the time of the notification.[66]

The debtor must perform to the assignor until he/she receives a payment order specifying the identity of the assignee and the assignee's seat or, in the absence thereof, its registered office or, in the case of a natural person, his/her address. After that, the debtor shall perform following the payment instruction.[67] If the debtor pays the assignor after receiving a payment instruction, the assignee may demand performance from the debtor. This provision protects the assignee, but such protection is only useful if the debtor is still solvent. The New Civil Code further strengthens the assignee's position by providing that if the debtor pays to the assignor, the assignor must segregate the amount received and pay it to the assignee without delay. The assignor's creditors shall have no claim to such property.[68]

The Hungarian legislator analyzed the various foreign and international solutions and correctly identified the benefits of the UNCITRAL Convention's solution. The legislator adjusted the Convention's rules so that these fit smoothly among the rules on assignment.

4. Rights transferred with the assigned receivable

The last provision this paper will analyze is the scope of rights that are transferred automatically to the assignee together with the assigned receivable. This example will show that the Hungarian legislator failed to use the experiences of foreign laws and international instruments, which has led to uncertainties.

The New Civil Code provides that upon the transfer of the receivable, rights arising from a charge or surety securing the assigned receivable transfer automatically to the assignee. Furthermore, interest relating to the receivable is also transferred together with the receivable.[69] The rule seems straightforward in the sense that no other rights shall automatically transfer to the assignee. However, such a narrow interpretation, according to which the assignee has no rights other than those specified in the New Civil Code, does not seem acceptable.

A claim does not exist in itself. Every claim is subject to conditions, rights and obligations by law or contract. Let us take interest as an example. The New Civil Code provides that the assignee is entitled to an interest in the event of the debtor's default. However, default interest is only one of the legal consequences of the debtor's default.

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[66] Section 6:197 (2) of the New Civil Code.
[67] Section 6:198 (1) of the New Civil Code.
[68] Section 6:198 (3) of the New Civil Code.
[69] Section 193 (3) of the New Civil Code.

To give a few examples, in the case of the debtor's default, the creditor may be entitled to liquidated damages, replacement in the case of defective performance, and cancel the instalment facility in the case of a purchase in instalments. If interest automatically transfers to the assignee, why would these rights not transfer to the assignee?

Let us look at this question from the perspective of economic analysis. The correctness of the New Civil Code's rule depends on whether assignors typically transfer receivables to transfer purely the receivables but remain entitled and obliged to exercise all further rights arising from the underlying contract. The "correct" dispositive rule is the one that can reduce the parties' transaction costs in typical situations.[70] If the assignor wants to free himself as widely as possible from the burden of the relationship with the debtor without transferring his/her contractual position, the better rule is what allows the transfer of as many rights as possible. If, however, it is considered that the purpose of the rule is to ensure that only a closely related claim is transferred on assignment, then rights transferred automatically with the assigned receivable should be construed narrowly. Although this question calls for empirical research, it seems less typical that an assignor wishes to transfer only a single receivable.

This argument is in line in part with the solution of German law. Under the German Civil Code, the starting point is that the rights attached to the receivable are transferred to the assignee. Examples of such rights are the right to set a due date, the right to set a grace period, the right to choose and the right to determine the service.[71] It is uniformly held in the literature and case law that these rights belong to the creditor; therefore, they automatically transfer to the assignee in the same way as accessory collaterals. An independent assignment of these rights is typically not possible.[72] It also seems clear from the case law that the right to set a grace period under § 323 (1) BGB[73] and to enforce warranty rights arising from defective performance[74] are also transferred to the assignee. The situation is different, however, in the case of non-accessory or independent securities (e.g. *Sicherungsabtretung* and *Sicherungsübereignung*, i.e. assignments or transfer or ownership for security purposes)[75] and independent rights arising from the legal relationship, such as interest, penalty,[76] claims for damages,[77] pre-emption and

[70] For an overview and critique of this theory, see I. Ayres, R. Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, "The Yale Law Journal" 1989, vol. 99(1).

[71] J. Schürnbrand, *Gestaltungsrechte als Verfügungsgegenstand*, "Archiv für die civilistische Praxis" 2004, vol. 204(2); BGH NJW 1973, 1793, BGH JNW 1987, 2075, BGH NJW 2003, 1256, 1257.

[72] J. Schürnbrand, *op. cit.*, p. 181.

[73] BGHZ 114, 365.

[74] BGHZ 95, 253.

[75] R. Stürner, *BGB § 398 Abtretung*, [in:] *Bürgerliches Gesetzbuch*, ed. R. Stürner, München 2021, § 401 Rn 5.

[76] BeckOK BGB /Rohe. 60. Ed. 1.11.2021, BGB § 401 Rn. 9.

[77] R. Stürner, *op. cit.*, § 401 Rn 6.

repurchase rights.[78] These rights are not linked to the receivable and are, therefore, not transferred automatically to the assignee by the assignment of the receivable.

The UNCITRAL Convention, the UNIDROIT Principles and the Draft Common Frame of Reference contain very limited rules on the rights transferred to the assignee. The UNICTRAL Convention focuses on security rights, providing that a personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer.[79] The UNIDROIT Principles contain a single provision on this matter, which provides that the assignment of a right transfers to the assignee all the assignor's rights to payment or other performance under the contract in respect of the right assigned, and all rights securing performance of the right assigned.[80] The Draft Common Frame of Reference provides that the assignment of a right to performance transfers to the assignee not only the primary right but also all accessory rights and transferable supporting security rights.[81] The commentary states that rights to interest or to call for earlier payment, dependent personal securities and accessory proprietary securities fall under the scope of the rule.[82]

The legislator failed to analyze the solutions of other jurisdictions and international instruments. The international instruments fail to provide detailed rules on the rights that automatically transfer to the assignee upon assignment; therefore, these would not have been very useful. But the issues discussed in German legal literature could have shown the Hungarian legislator that the rule that only focuses on the transfer of rights arising from a charge or surety securing the assigned receivable and interest will not answer all relevant questions.

Surprisingly, the legislator amended this provision of the New Civil Code in 2023. Whereas the original rule provided that rights arising from a charge or surety securing the assigned receivable and interest transfer automatically to the assignee, the new rule is more flexible. It provides that the rights facilitating the performance and relating to the enforcement of the receivable, securities and interest transfer automatically to the assignee.[83] It seems clear that the legislator wanted to broaden the scope of rights that transfer to the assignee, however, the way how the new rule is formulated makes it very difficult to determine the scope of rights covered by the new rule. Whereas it is easy to establish that some rights fall into this category

[78] BeckOK BGB/Rohe. 60. Ed. 1.11.2021, BGB § 401 Rn. 10.

[79] Article 10 of the UNICITRAL Convention.

[80] Article 9.1.14 of the UNIDROIT Principles. It is interesting to note that the original draft of this provision included detailed rules on the transfer of accessory right, explaining how the right to interest and accessory securities transfer to the assignee (UNIDROIT 1999 Study L – Doc. 65, p. 9). This proposal was shortened after the Cairo meeting of the working party in 2000 (UNIDROIT 2000 Study L – WP.3, p. 21) and further rules were omitted in 2001 (UNIDROIT 2001 Study L – Doc. 69, p. 19).

[81] Section III. – 5:115 of the Draft Common Frame of Reference.

[82] C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *op. cit.*, pp. 1055–1056.

[83] Section 6:193 (3) of the New Civil Code, in force since 24 June 2023.

(e.g. the right to seek performance or the right to provide and extended deadline to the debtor), it seems that the law does not extend to other important rights, such as the warranty rights. Rights that relate to the receivable and not the underlying legal relationship, but which do not facilitate the performance or relate to the enforcement of the receivable, will not transfer to the assignee.

The new provision no longer lists the securities that transfer to the assignee upon the assignment of the receivable. Instead, the law simply refers to "securities". Although the official explanatory notes to the amendment state that this rule shall only cover accessory securities, this limitation is not reflected in the norm. It seems likely, therefore, that independent securities will also transfer to the assignee, contrary to the intention of the legislator. The new rule fundamentally calls into question the existing system of securities and thus creates fundamental legal uncertainty.

TRANSFER OF RIGHTS

Hungarian law distinguishes between rights and claims or receivables. Although neither the Old Civil Code nor the New Civil Code defined these terms, the latter category was typically understood as the *in personam* right to claim performance from the other party.[84]

The distinction between rights and receivables was relevant, as the Old Civil Code provided that claims were transferrable, whereas the Old Civil Code did not contain provisions that would have allowed the transfer of rights. The fact that the Old Civil Code provided no general rule on the transferability of rights has led to an interesting phenomenon. One could have thought that rights are not transferrable unless their transferability is provided by law. The regulation of several rights, indeed, followed this logic. For example, Hungarian law provided that emission allowances,[85] certain agricultural rights,[86] quotas for milk[87] and license rights of professional athletes[88] are transferable. However, the situation was far from clear, as other laws followed a different logic when they declared certain rights non-transferable. This legislative solution seems to have implied that rights are transferable in the absence of a legal prohibition. The Copyright Act[89] could serve as an example, providing that the author cannot transfer his/her moral rights.

[84] See, e.g., L. Vékás, *Bevezető rendelkezések*, [in:] *A Polgári Törvénykönyv magyarázata*, ed. Gy. Gellért, Budapest 2007, p. 28. The distinction is similar to the distinction in German law between *Forderungen* and other rights (*andere Rechte*). See, e.g., D. Looschelders, *op. cit.*, p. 2.

[85] Act CCXVII of 2012.

[86] Act XVII of 2007.

[87] Decree No. 14 of 2010 (II.23.).

[88] Act I of 2004.

[89] Act LXXVI of 1999.

The New Civil Code introduced a significant change in this respect. Influenced by Section 413 of the German Civil Code,[90] the New Civil Code provides that all rights are assignable unless the law excludes the transferability of the right or the nature of the right clearly implies non-transferability.[91] The rules on assignment apply *mutatis mutandis* to the transfer of rights. The new rule has led to a significant turn, as the transferability of rights became the general rule.[92]

Given the diversity of rights, the New Civil Code cannot determine which rights are non-transferable; this must be determined on a case-by-case basis. The starting point for the analysis is the legislator's intention that the New Civil Code should create the broadest possible scope for the transferability of rights.[93] It is, therefore, necessary to examine whether the right in question has any specific characteristics that clearly exclude transferability.[94]

TRANSFER OF CONTRACTS

1. Transferability under the Old Civil Code

The Old Civil Code did not contain rules on the transfer of contracts. Nevertheless, especially after the change of regime in 1989, with the development of market relations, tripartite transfer agreements appeared on the market, which the courts acknowledged. For example, the Supreme Court ruled in 2006 that "there is no legal impediment to the contracting parties and a third party agreeing, by way of a tripartite contract, on the succession of the complete contractual position of the buyer by way of assignment and assumption of debts, covering all rights and obligations in the entire contractual subject position".[95] The understanding that transfer of contract is possible under Hungarian law was further supported by the fact that the Parliament passed several acts which allowed the transfer of specific contracts.[96]

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[90] P. Gárdos, *Assignment*..., p. 856.

[91] Section 6:202 of the New Civil Code.

[92] This is not a unanimous view in Hungarian legal literature. As A. Menyhárd argues, the above-cited rule of the New Civil Code "is an empty rule, and it is correct to start from the premise that rights are transferable if their content, in accordance with the legal provisions and the supposed legislative purpose, implies that they are transferable". See A. Menyhárd, *Engedményezés, jogátruházás, tartozásátvállalás és szerződésátruházás*, [in:] *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja*, ed. A. Osztovits, vol. 3, Budapest 2014 p. 483.

[93] See Bill T/7971…, p. 604.

[94] For example, most family rights (such as maintenance rights) are clearly non-transferable under this test.

[95] BH2006. 409.

[96] See, e.g., Act CCXXXVII of 2013, Act LXXXVIII of 2014, and Act CXXXVIII of 2007. These all introduced rules on portfolio transfers.

2. Comparative perspectives on the transfer of contracts

The possibility of transfer of contract is generally recognized by the European legal systems without major difficulties, even though civil codes do not typically regulate the transfer of contracts. Those countries where the civil code or the act on obligations regulate the transfer of contracts follow a similar logic.

The Italian Civil Code provides by an express rule that the party leaving the contract and the party entering into the contract may agree to assign the contract with the consent of the party remaining in the contract, provided that the contract has not yet been performed.[97] The Code also stipulates that consent may be given in advance. In the case of advance consent, the transfer occurs when the party remaining in the contract is notified of the transfer.[98] The transfer of the contract results in succession. The surviving party may, however, decide that the party leaving the contract is liable for the debts of its successor.[99] The surviving party may also assert any objection arising from the contract against the new party. The surviving party may not raise any objections arising from its other relations with the party leaving the contract unless it expressly reserved those objections when it consented to the transfer.[100]

The Portuguese Civil Code also provides rules on the transfer of a contract, stating that it requires the prior or subsequent consent of the party remaining party to the contract. In the case of prior consent, the transfer of a contract takes effect upon notification or acknowledgment of the transfer.[101] An interesting provision is, however, contained in Article 426 of the Civil Code, which establishes that a party who withdraws from a contract has a warranty that the contractual position exists and is transferable at the time of the assignment. The predecessor in title is liable for the performance of the obligation only if it has expressly undertaken to do so. The rule on defenses is essentially the same as the rule in the Italian Civil Code described above.[102]

The Estonian Law on Obligations (*Võlaõigusseadus*), which entered into force in 2002, also regulates the transfer of contracts. It states that a party withdrawing from a contract may assign its contractual position with the consent of the party remaining in the contract.[103] The assignment of contract results in the succession of all rights and obligations of the predecessor in title.[104] The Law does not simply

[97] Article 1406 of the Italian Civil Code.
[98] Article 1407 (1) of the Italian Civil Code.
[99] Article 1408 (1) and (2) of the Italian Civil Code.
[100] Article 1410 of the Italian Civil Code.
[101] Article 424 of the Portugal Civil Code.
[102] Article 427 of the Portugal Civil Code.
[103] Article 179 (1) of the Estonian Law on Obligations.
[104] Article 179 (2) of the Estonian Law on Obligations.

provide that the rules on assignment and assumption of debt apply *mutatis mutandis*, but specifically lists the applicable rules.[105] The provision of the Dutch Civil Code is identical to the Estonian rule, except that the Dutch rule expressly refers to the fact that the parties are free to agree that certain rights or debts are not transferred to the party entering into the contract.[106] Similar rules can be found in the Slovenian Act on Obligations.[107]

3. Experiences of the New Civil Code

In light of the fact that the court practice has long accepted that by assigning all rights under a contract and assuming all debt, with a tripartite agreement, the parties can transfer the contractual position of a party, and that such a transfer was acknowledged in several European jurisdictions and the various international harmonization tools, introducing rules on the transfer of contract seemed to be a safe move by the legislator.

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.[108] The legal effect of the contract is that the new party acquires all the rights and is subject to all the obligations the old party had under the contract.[109] The assignee is not entitled to set off the assignor's claims against the other party, and the other party may also not set off claims it had against the assignor. However, there is one exception to this rule. The assignee can set off the assignor's claims relating to the transferred contract, and similarly, the other party can set off contract-related claims against the assignee.[110] The Code also provides rules on securities. All securities securing the assignor's rights transfer to the assignee automatically. As a mirror image of this rule, the securities securing the performance of the assignor's obligations cease to exist unless the provider of the given security consents to the transfer of the contract.[111]

Similar to the UNIDROIT Principles, the Code provides that the other party may give advance consent to the transfer. In such a case, the assignment shall take effect upon notification of the other party about the assignment.[112] When giving advance consent, the party may reserve the right to withdraw the consent.[113] It follows,

[105] Article 179 (3) of the Estonian Law on Obligations.
[106] Book 6 Article 159 of the Dutch Civil Code.
[107] Article 122–124 of the Slovenian Act on Obligations.
[108] Section 6:208 (1) of the New Civil Code.
[109] Section 6:208 (2) of the New Civil Code.
[110] Section 6:208 (2) of the New Civil Code.
[111] Section 6:208 (3) of the New Civil Code.
[112] Section 6:209 (1) of the New Civil Code.
[113] Section 6:209 (2) of the New Civil Code.

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.[114] The advance consent can only be withdrawn if such a right was upheld when the advance consent was given.[115]

The Code does not repeat the relevant rules of assignment and the assumption of debt. Instead, the Code provides that these rules apply *mutatis mutandis* to the assignment of contracts.[116]

After the New Civil Code entered into force, it was disputed whether the transfer of contract qualifies as legal succession or novation. After an unhelpful legislative provision,[117] and a similarly unhelpful decision from the Hungarian Constitutional Court,[118] the Curia issued a uniformity decision.[119] The Curia stated that the transfer of a contract means the transfer of all rights and obligations of the old party to the party entering the contract, which results in a legal succession, while maintaining the continuity of the legal relationship.

ASSUMPTION OF DEBT

The New Civil Code introduced some changes in the regulation relating to the assumption of debt, but these changes are less significant than the changes discussed above. This paper will, therefore, focus on one question only: who is involved in the assumption of a debt?

The question of how legal succession of debts is possible was heavily disputed in German law. Until the mid-19th century, legal succession in debts was not possible, and the replacement of the debtor was possible only by way of novation. The first model for the change of debtor was the so-called cumulative assumption of debt, which required the mere agreement of the old and the new debtor. But as the creditor was not a party to this agreement, it was inevitable that the old debtor also

[114] Section 6:209 (3) of the New Civil Code.

[115] Section 6:209 (4) of the New Civil Code.

[116] Section 6:210 of the New Civil Code.

[117] Section 53/C of the Act CLXXVII of 2013 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 of contract qualifies as novation.

[118] See decision no. 22/2018 (XI.20.) of the Hungarian Constitutional Court, in which the Court argued that the New Civil Code has not decided whether the transfer of contract qualifies as novation or legal succession (para. [71] of the decision), the Court also would not like to decide this question (para. [72] of the decision) and that the legislator has already explained that the transfer of contract qualifies as novation (para. [72] of the decision).

[119] Uniformity decision no. 7/2021 of the Curia. It is worth adding that uniformity decisions in general are interpretations of law binding on all courts (see Section 24 (1) c of the Act CLXI of 2011).

remained a party to the agreement.[120] Later, German law also recognized that if the creditor consented to the agreement between the old and the new debtor, the old debtor was released, and the new debtor remained the only debtor.[121]

The German Civil Code regulates two models for the assumption of debt. The first model requires the agreement of the new debtor and the creditor.[122] The second model is based on the agreement of the old and the new debtor and requires the creditor's consent.[123] The exact legal nature of the assumption of debt is disputed in German legal literature. Whereas the majority opinion is that the assumption of debt is a disposition (*Verfügungsgeschäft*), there are conflicting views concerning the subject of this disposition and who disposes of this subject. Is it the old or the new debtor disposing of the debt or the creditor's right?[124] The majority opinion seems to be that if the assumption of debt takes place between the creditor and the new debtor, the cooperation of the old debtor is unnecessary. The transaction is usually compared to a contract for the benefit of a third party. It remains disputed whether, following the rules of the contract for the benefit of a third party, the old debtor can object to such a transfer.[125] On the other hand, if the old and the new debtor agree about the assumption of debt, the agreement is treated as a disposition by not entitled parties. The argument, in this case, is that the old and the new debtor dispose of the creditor's right *vis-à-vis* the original debtor.[126]

The same question also arose in Hungary. Before the Old Civil Code, the assumption of debt took place with the agreement of the creditor and the new debtor.[127] Accepting that only the creditor and the new debtor are required for the

[120] B. Delbrück, *Die Übernahme fremder Schulden nach gemeinem und preußischem Recht*, Berlin 1853, pp. 3–12.

[121] B. Windscheid, *Singularsuccession*, [in:] *Kritische Überschau der deutschen Gesetzgebung und Rechtswissenschaft*, vol. 1, München 1853, p. 17.

[122] Section 414 of the German Civil Code.

[123] Section 415 of the German Civil Code.

[124] K. Larenz, *Lehrbuch des Schuldrechts*, vol. 1: *Allgemeiner Teil*, München 1987, pp. 603–604; H. Dörner, *Dynamische Relativität. Der Übergang vertraglicher Rechte und Pflichten*, München 1985, p. 180; D. Klimke, *Die Vertragsübernahme*, 2010, p. 77; D. Medicus, *Schuldrecht I. Allgemeiner Teil*, München 2005, p. 281; J. Lieder, *Die rechtsgeschäftliche Sukzession. Eine methodenpluralistische Grundlagenuntersuchung zum deutschen Zivilrecht und Zivilprozessrecht sowie zum Internationalen und Europäischen Privatrecht*, Tübingen 2015, p. 124; B. Delbrück, *op. cit.*, p. 16; T. Maurer, *Schuldübernahme: Französisches, englisches und deutsches Recht in europäischer Perspektive*, Tübingen 2010, p. 225.

[125] D. Looschelders, *op. cit.*, p. 477.

[126] *Ibidem*, p. 478. The minority opinion disputes the argument that the debtors dispose over the creditor's right. They argue that the subject of the disposition is the debt. According to this argument, the creditor's approval is required to ensure the creditor's right to choose her contracting party also at the time when the debtor's identity changes. See J. Lieder, *op. cit.*, pp. 126–129.

[127] See, e.g., L. Villányi, *A kötelem alanyai*, [in:] *A magyar magánjog. Kötelmi jog általános része*, ed. K. Szladits, Budapest 1941, p. 174.

assumption of debt seems to suggest that such a legal succession is irrelevant to the original debtor. However, that is not necessarily the case. As it is clearly formulated in a judgment from 1908, "exceptionally, the debtor's interest may be against the assumption of debt; therefore, an assumption contract concluded against the debtor's objection is void".[128]

This idea is also reflected in the UNIDROIT Principles. The UNIDROIT Principles provide two means for the assumption of debt: either an agreement between the original obligor and the new obligor or between the obligee and the new obligor.[129] The Official Commentary to the UNIDROIT Principles explains that in this latter case, if "the agreement provides that the original obligor is discharged, the agreement amounts to a contract in favour of a third party. Under Article 5.2.6, such a benefit cannot be imposed on the beneficiary, who may have reasons not to accept it. The original obligor may thus refuse to be discharged by the agreement between the obligee and the new obligor".[130]

Drawing on such experiences, the New Civil Code regulates three solutions under the title "Assumption of debt".

The first rule provides that a legal succession in the debtor's position requires a tripartite agreement. If the debtor and the creditor agree with a third party that this third party assumes the debtor's obligation *vis-à-vis* the creditor, the creditor may claim the performance only from the new debtor, and the old debtor is discharged.[131] The new debtor steps into the shoes of the old debtor, as the new debtor is entitled to all rights the old debtor had against the creditor under the contract.[132] As a consequence of the substitution of the original debtor, the securities are extinguished unless the party providing the security approves the change of the debtor.[133] Similarly to the UNIDROIT Principles, the New Civil Code also provides that the creditor may give consent in advance.[134]

The New Civil Code also provides two solutions that, from the original debtor's perspective, are similar to the assumption of debt, but from a legal perspective, these solutions do not lead to the discharge of the original debtor. The first rule provides that if a third party agrees with the debtor to assume the debtor's debt, the third party will be obliged to discharge the debtor's debt or put the debtor in a position to discharge her debt on maturity. This rule does not allow the creditor to claim the debt from the third party.[135] The second rule provides that if the debtor

[128] 3522/1909. M. D. IV. 39. (174).
[129] Article 9.2.1 of the UNIDROIT Principles.
[130] UNIDROIT Principles…, p. 334.
[131] Section 6:203 (1) of the New Civil Code.
[132] Section 6:203 (2) of the New Civil Code.
[133] Section 6:203 (4) of the New Civil Code.
[134] Article 9.2.4 of the UNIDROIT Principles.
[135] Section 6:205 of the New Civil Code.

and a third party conclude such an agreement and notify the creditor thereof, the debtor and the third party become jointly and severally liable for the performance of the debtor's obligation. In this case, the new party is entitled to all the rights the debtor has against the creditor under the contract. The third party is not entitled to set off any other claim of the debtor against the creditor.[136]

CONCLUSIONS

The rules pertaining to various aspects of the change of parties changed in several European countries. This paper analyzed two examples: the third-party effects of non-assignment clauses were limited, and rules on the transfer of contracts were introduced.

The Hungarian New Civil Code fits nicely into this trend. It introduced rules on non-assignment clauses, making it clear that such provisions do not make a subsequent assignment invalid, and furthermore rendered liquidated damages clauses and clauses enabling the debtor to terminate the contract in the case of an assignment null and void. However, to balance the harshness of this rule, the New Civil Code also recognizes that an assignment may lead to additional costs to the debtor. The Code, therefore, provides that such costs shall be reimbursed.

The Code also introduced rules on the transfer of contracts. Although the legislator merely codified the principles developed by the courts under the Old Civil Code, the new rules have still led to controversies. The Curia, in its uniformity decision, correctly clarified the situation, ruling that a transfer of contract qualifies as succession and not as novation, and therefore the new party steps into the shoes of her legal predecessor.

Apart from these examples, the paper showed how the Hungarian legislator took the experiences of foreign laws and international harmonization and unification tools into consideration. The New Civil Code was adopted in 2013 and entered into force in 2014. A decade is not enough to evaluate the New Civil Code's rules. However, based on the limited case law available so far, it seems that the new rules introduced as a result of this legal comparison were successfully implemented in Hungary.

[136] Section 6:206 of the New Civil Code.

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ABSTRAKT

Węgierski Kodeks cywilny wprowadził modyfikacje w zakresie zmiany stron. W artykule wykazano, że prawo porównawcze pomogło węgierskiemu ustawodawcy wprowadzić nowe przepisy odpowiadające na istotne potrzeby rynku. Autor wskazuje, jak uproszczenie systemu przeniesienia wierzytelności otworzyło przed stronami nowe możliwości oraz jak zmieniło się traktowanie klauzul o zakazie cesji w świetle zmian legislacyjnych w kilku państwach europejskich. Twierdzi się, że nowy węgierski Kodeks cywilny zapewnił właściwą równowagę pomiędzy interesami dłużnika i cedenta. W drugiej części artykułu wyjaśniono, że nowy Kodeks cywilny wprowadził istotną zmianę za pośrednictwem przepisu o swobodzie przenoszenia praw. W trzeciej części przedstawiono, jak nowy Kodeks cywilny wprowadził przepisy o przenoszeniu umów, wzorując się na rozwiązaniach kilku państw europejskich i na międzynarodowych instrumentach unifikacyjnych, a także omówiono wyzwania wynikające z tych przepisów.

Słowa kluczowe: kodyfikacja; zmiana stron; klauzula o zakazie cesji; przeniesienie wierzytelności; dłużnik; cedent; prawo porównawcze