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## Institution of the contract transfer in the light of model law acts

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The transfer of a contract is a legal structure that allows you to transfer to the third party the rights and obligations of one of the existing parties to the contract. Nowadays, only a few European legal orders have decided to regulate this institution explicitly. In other cases, the admissibility of performing this activity is derived from the principle of freedom of contract. The problem of the widespread functioning of this structure in the absence of relevant standards has been noticed by the creators of numerous model law projects, the PECL Principles, Draft Common Frame of Reference and UNIDROIT Principles. Each of these soft law acts contained at least a rudimentary regulation of the transfer of contract, which was clearly separated from the structure of debt assumption and assignment of debt.

**Keywords:** *transfer of contract; PECL; DCFR; UNIDROIT; soft law.*

### Introduction

The transfer of contract is a legal structure that allows the rights and obligations of one of the parties of the obligation relationship to be transferred to the third party. As a result of this action, the new entity becomes a party to this relationship in place of its predecessor, which is released from its previous obligations. Although the scope of use of this institution is very extensive, only a few national orders have decided to regulate this issue directly<sup>1</sup>, while in others this activity is carried out on the basis of the principle of freedom of contract (e.g. in the Polish legal system).

Regardless of the individual national regulations (as well as in case they are missing), the need for separate regulation of the institution of transfer of contract has been recognized by the authors of successive projects for the unification of European civil law. Difficulties in carrying out cross-border legal transactions only by means of the debt assumption and assignment of debt or residual regulations concerning the change of the party to the obligation have contributed to intensified work on the unification of the law of obligations in this area. Due to the widespread implementation of subjective transformations in liability relationships, especially in professional trade, attempts were made to

synchronize the law, among others by introducing the institution of transfer of contract clearly separated from the commonly functioning debt assumption and assignment of debt.

The Principles of European Contract Law (PECL), the Draft Common Frame of Reference (DCFR) and the UNIDROIT Principles deserve special attention. Although these projects do not constitute sources of law in the public – law sense, they consistently address the issue of subjective transformations of the contractual relations. Each of them also notes that the dynamic development of the market forces the introduction and separate regulation of the construction of the change of a party to the contract, which should constitute a uniform legal act. At the same time, its effects cannot be equated with those achievable in connection with a joint debt assumption and assignment of debt.

### 1. The Principles of European Contract Law (PECL)

The Principles of European Contract Law<sup>2</sup> were the first serious manifestation of the drive to harmonize European contract law. They were published by the Commission on European Contract Law (also known as the Lando Commission) in several parts: the first in 1995. (Titles 1 and

<sup>1</sup> Among European legal systems mentioned can be Art. 1406 – 1410 of the Italian Civil Code, Art. 424 – 427 of the Portuguese Civil Code, Art. 6.159 of the Dutch Civil Code and recently also Art. 1216 of the French Civil Code.

<sup>2</sup> The Principles Of European Contract Law, available at: <https://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/>.

6 to 9), the second in 2000. (Titles 2 to 5), the last one in 2002. (Titles 10 to 17)<sup>3</sup>.

The institution of transfer of contract was regulated in the third part of the PECL, i.e. Article 12:201<sup>4</sup>. According to the wording of this provision, a party to a contract may, by agreement with a third person, transfer rights and obligations arising from the contract to that third person, with the result that it becomes a party to the contract in its place. Such a subjective change becomes effective if the debt assumption and assignment of debt party agrees to withdraw from the legal relationship of the existing party (Article 12:201.1 PECL). To the extent that the assignment of a contract entails a debt assumption, Chapter 11 applies and, to the extent that an assignment of debt takes place, Section 1 of this Chapter applies (PECL Article 12:201(2))<sup>5</sup>.

This standard, therefore, makes a clear distinction between the acts of debt assumption and assignment of debt and the construction of a replacement of the existing party to the obligation. The commentary to this article also makes it clear that the transfer of contract is not a usual combination of a debt assignment and a debt assumption, i.e. a simple sum of claims and correlated debt. It is a separate, homogeneous legal act that results in the transfer to a new entity of the entire legal situation of one of the parties to the contract<sup>6</sup>.

The effectiveness of the transfer of rights and obligations to the third party was dependent on the ceded contractor's consent, which may also be given in advance. In the case of disagreement, only the debt assumption to a third person and acceptance of the obligation to perform certain duties in place of the existing contractual party is possible. However, this configuration never has the effect of releasing the original debtor from its liability to its original counterparty.

At this point, it is also worth noting the content of Article 12:101<sup>7</sup> of the PECL, which regulates the assumption of debt

on the basis of the PECL Rules, and under Article 12:201 of the PECL should also be applied when changing a party to the contract. According to the wording of Article 12:101(2) PECL, the creditor's consent to perform the debt assumption may also be given in advance. What is important is that this provision does not prohibit the consent given for the future to be also a blank consent. In other words, the creditor may also agree to the assignment of debt if the person of the new debtor is not known to him and will only be defined in the future. The effectiveness of such consent is then dependent only on the creditor being notified of the fact that the new debtor is taking over the debt<sup>8</sup>.

Although the regulation provided for in the PECL Principles is very residual and to a significant extent refers to the provisions on debt assumption and assignment of debt, it undoubtedly emphasizes the need for separate regulation of the institution in question due to its great importance for practice, especially in mergers and acquisitions and in the case of long-term contracts (e.g. rental, lease, employment contract). The definition proposed in Article 12:201 of the PECL is also consistent with the way in which this institution is seen in most European national legislations as a legal transaction allowing rights and obligations to be transferred to a third party, with the consent of the creditor. In the explanatory memorandum to this article, the Rule Makers stress that the proposed construction should not be confused with the novation. The latter leads to the expiry of the existing relationship and the creation of a new one in its place, while the debt assumption allows a third party to join a legal relationship still in progress<sup>9</sup>.

It is also worth noting that the PECL Principles allow the remaining party to agree to transfer of contact in blanc. This solution is interesting because in many national orders it is considered unacceptable, including in domestic civil law<sup>10</sup>. Typically, this is a consequence of such a ban under the debt assumption laws<sup>11</sup>.

### Draft Common Frame of Reference

Creating a project called The Draft Common Frame of Reference<sup>12</sup> was another attempt to bring together the civil law systems of individual European countries. Established in 1999, the European Civil Code Study Group and the Acquis Group were the successors of the Lando Commission, and

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*substitution takes effect only when the creditor is given notice by the new debtor of the agreement between the new the original debtor*".

<sup>8</sup> O. Lando, E. Clive, A. Prum, R. Zimmerman, *Principles of European Contract Law, part III*, The Hague 2003, s. 125; also in: E. Wieczorek, *Zasady Europejskiego Prawa Umów*, Gdańsk 2005, p. 95 - 96.

<sup>9</sup> O. Lando, E. Clive, A. Prum, R. Zimmerman, *Principles of European Contract Law, part III*, The Hague 2003, p. 134.

<sup>10</sup> P. Drapała, *Zwalniające przejęcie długu*, s. 103; P. Drapała in: *Prawo Zobowiązań – część ogólna, System Prawa Prywatnego*, A. Olejniczak (red.), part 6, Warszawa 2018, p. 1478; judgment of the Court of Appeal in Rzeszów, December 19, 2013, file ref. no.I ACA 491/13, Legalis no.895078.

<sup>11</sup> See Civil Code Art. 519.

<sup>12</sup> Draft Common Frame of Reference, Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Outline Edition, Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Munich 2009.

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<sup>3</sup> W. Kurowski, *Przekształcenia podmiotowe stosunku zobowiązaniowego – uwagi na tle Zasad Europejskiego Prawa Umów (PECL) z uwzględnieniem projektu Common Frame of Reference in: Zaciąganie i wykonywanie zobowiązań. Materiały III Ogólnopolskiego Zjazdu Cywilistów.*, E. Gniewek (red.), K. Górńska (red.), P. Machnikowski (red.); Warszawa 2010, p. 201 and following

<sup>4</sup> Art. 12:201 PECL: "a party to a contract may agree with a third person that that person is to be substituted as the contracting party. In such a case the substitution takes effect only where, as a result of the other party's assent, the first party is discharged. (2) To the extent that the substitution of the third person as a contracting party involves a transfer of rights to performance ("claims"), the provisions of Chapter 11 apply; to the extent that obligations are transferred, the provisions of Section 1 of this Chapter apply", O. Lando, E. Clive, A. Prum, R. Zimmerman, *Principles of European Contract Law, part III*, The Hague 2003.

<sup>5</sup> Translation of the provision based on the text of J. Beldowski and A. Kozioł published in *Kwartalnik Prawa Prywatnego* 2006, no. 3, p. 881.

<sup>6</sup> O. Lando, E. Clive, A. Prum, R. Zimmerman, *Principles of European Contract Law, part III*, The Hague 2003, p. 135, also in: W. Kurowski, *Przekształcenia podmiotowe stosunku zobowiązaniowego – uwagi na tle Zasad Europejskiego Prawa Umów (PECL) z uwzględnieniem projektu Common Frame of Reference*, p. 210 – 211.

<sup>7</sup> Art. 12:101 PECL: "a third person may undertake with the agreement of the debtor and the creditor to be substituted as debtor, with the effect that the original debtor is discharged. (2) A creditor may agree in advance to a future substitution. In such a case the

the PECL Principles were to be the starting point for further work. The project, which was completed in 2008, however, never got a normative form, remaining permanently a set of standards of a soft law nature<sup>13</sup>.

The content of Section 3 of Chapter 5 of this Act, entitled Transfer of contractual position, is relevant to the subject matter of the study. It is made clear from the outset that this structure applies only to cases of voluntary entry into a party's existing position and not to the transfer of rights and obligations by law<sup>14</sup>.

According to Article 5:302 of the DCFR, a contracting party, with the consent of the other contracting party, may, by agreement with the third party, transfer to it the rights and obligations arising from the contract, with the result that it becomes a contracting party in its place (Article 5:302(1) of the DCFR). The consent of the remaining party may also be given in advance. The effectiveness of the transfer of rights and obligations is then conditional upon notification thereof (Article 5:302(2) DCFR). To the extent that transfer of contract entails an assumption of debt, the provisions of Section 1 of this Chapter apply and, to the extent that an assignment of debt takes place, the provisions of Section 2 of this Chapter apply (Article 5:302(3) of the DCFR)<sup>15</sup>.

The commentary on this provision largely coincides with that developed for the regulation of transfer of contract in the PECL Rules. Once again, it is pointed out that the new entity joins the whole legal situation of the existing entity and not only assumes debt and correlated obligations<sup>16</sup>. As J. Lachner points out, the discussed activity covers not only the original liability relationship but also the entire legal situation of the party created because of subsequent changes, e.g. by concluding an annex<sup>17</sup>.

The consent of the other contracting party is also required for this action. However, it is explicitly stated in the article that the consent may be given for the future, with the proviso that the effectiveness of taking over the agreement is then dependent on notifying the ceded contractor of the action. There are no objections to the prior consent taking the form of blank consent<sup>18</sup>. Such a solution is accepted

under the provisions on the debt assumption (Article 5:203(2) DCFR).

The reference to the rules governing the debt assumption and assignment of debt (Art. 5:302(3) DCFR) also remains valid. However, J. Lachner's position is not fully convincing that the application of these provisions should only take place adequately<sup>19</sup>. While the UNIDROIT Principles explicitly indicate the nature and scope of the reference, Article 5:302(3) of the DCFR simply states that the remaining provisions of this chapter should apply to the unregulated extent. Bearing in mind the residual nature of this regulation, it seems more justified to take the view that the authors' intention was to simply refer to the provisions regulating the assignment and assumption of debt.

Outside the scope of the regulation, however, were the effects of this activity. While Article 12:201 of the PECL makes it clear that the unavoidable consequence of a third party taking over the contract is to relieve the existing party from liability, Article 5:302 of the DCFR is silent in this respect. It results only from the wording of the commentary to this provision that, as a result of the assumption of the contract, the existing debtor may be completely relieved of his liability or be held liable in the event of the new debtor's default. However, in the case of a transfer of contract, the existing party and its successor cannot be held jointly and severally liable for the non-performance of an obligation. The authors of the project clearly point out that although such a formation of the relationship is obviously permissible under the principle of freedom of contract, it cannot be seen as a transfer of contractual position<sup>20</sup>.

However, it should be agreed with J. Lacher that the activity in question has a dispositive character. Only in such a case, it will have the power to result in a new entity replacing the existing contractor, at the same time releasing the latter from liability towards the other party to the contract<sup>21</sup>.

Although this regulation is still incomplete, it undoubtedly shows that, in the opinion of successive European groups of experts the institution of transfer of contract is so important for practice that a separate regulation of this activity becomes justified. Once again, the explanatory memorandum to the DCFR also points to the widespread use of this structure in business (mergers and acquisitions) and in the transfer of long-term contracts. It is also stressed, as in the commentary to the PECL Rules, that this activity must not be confused with the novation, which always implies the expiry of the existing legal relationship and the creation of a new one in its place<sup>22</sup>. A certain shortcoming of this regulation remains undoubtedly the lack of regulation of the effects of this subjective change. The way the responsibility of the outgoing party is shaped may significantly affect the attractiveness of this institution for trading and the scope of its use in practice.

<sup>13</sup> J. Rajski, *Nowy etap rozwoju europejskiego prawa prywatnego, Kwartalnik Prawa Prywatnego* 2006, no. 1, s. 113; J. Lachner, *Przejście praw i obowiązków wynikających z umowy wzajemnej na gruncie projektu wspólnego systemu odniesienia i w prawie polskim, Transformacje Prawa Prywatnego* 2010, no. 1, p. 91.

<sup>14</sup> Art. 5:301 DCFR: "this Section applies only to transfers by agreement".

<sup>15</sup> Art. 5:302 DCFR "to the contractual relationship, that that person is to be substituted as a party to the relationship. (2) The consent of the other party may be given in advance. In such a case the transfer takes effect only when that party is given notice of it. (3) To the extent that the substitution of the third person involves a transfer of rights, the provisions of Section 1 of this Chapter on the assignment of rights apply; to the extent that obligations are transferred, the provisions of Section 2 of this Chapter on the substitution of a new debtor apply".

<sup>16</sup> Ch. von Bar (ed.), E. Clive (ed.), H. Schulte – Nolke (ed.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR). Full version*, p. 1124.

<sup>17</sup> J. Lachner, *op. cit.*, p. 96.

<sup>18</sup> Ch. von Bar (ed.), E. Clive (ed.), H. Schulte – Nolke (ed.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR). Full version*, p. 1105.

<sup>19</sup> J. Lachner, *op. cit.* p. 97.

<sup>20</sup> Ch. von Bar (ed.), E. Clive (ed.), H. Schulte – Nolke (ed.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR). Full version*, p. 1125.

<sup>21</sup> J. Lachner, *op. cit.*, p. 96.

<sup>22</sup> *Ibidem*; J. Lachner, *op. cit.*, p. 95.

### UNDRUIT Principles of International Commercial Contract

The UNDRUIT principles<sup>23</sup> are chronologically the oldest of the acts of international law discussed here, as the original version was published as early as 1994. However, it did not contain a regulation on the institution of transfer of contract, which was added only in connection with the extension of that act in 2004. The construction of the transfer of contract is now governed by Chapter 9 of the UNDRUIT Principles, Section 3 of which is entitled Assignment of contracts. Article 9.3.1. and following standardize the broadest and most comprehensive institution of all the international instruments referred to here. UNDRUIT's subsequent editions (2010 and 2016) have not changed the provisions on the assumption of a contract from their earlier version. Importantly, the UNDRUIT Principles apply only if the parties agree to subject the agreement in question to the rules of the applicable law<sup>24</sup>.

According to Article 9.3.1 of the PICC, the term assignment of a contract should be understood as a transfer of rights and obligations from one person to another person<sup>25</sup>, which can be made in any form<sup>26</sup>. The authors of the UNDRUIT Principles also make a clear distinction between the situation of taking over an active or passive part of an obligation and the situation of one of the contracting parties entering the whole legal situation. Excluded from the scope of this regulation are also cases of joining another entity under special rules (ex lege), especially in the case of a transfer of the whole company (Article 9.3.2 PICC)<sup>27</sup>.

The assignment of a contract for its effectiveness requires the consent of the remaining party. Until it is expressed, the activity remains unsuccessfully suspended, and the outgoing contractor and a third party may freely modify the content of the agreement or withdraw from it<sup>28</sup>. The consent of the remaining party to the contract may also be granted for the future. In this case, however, the effective transfer of contract depends on notifying the other party of this fact, unless the other party becomes aware of the act in another way (Articles 9.3.3 and 9.3.4 of PICC). Moreover, consent must not only concern the transfer of rights and obligations but also the application of the UNDRUIT

Principles. Failure to agree to any of these elements results in the ineffectiveness of the contract transfer<sup>29</sup>.

The method of regulating the liability of the current debtor and his successor towards the other party to the contract deserves attention. In this scope, the presumption of joint and several liability of these entities has been established, unless the outgoing party is released from liability by its current contractor or its liability is not limited to that of a subsidiary nature in the event of not executing or improper execution of an obligation by a new entity (Article 9.3.5 PICC). Interestingly, the ceded entity may also shape the liability of the original contractor in a different way for each obligation resulting from a given contract. It can therefore relieve the applicant party from responsibility for the performance of certain services while making it jointly and severally liable for the performance of others. The declaration of the assigned entity in this respect may be submitted in any form, with the proviso that the burden of proof regarding the release from liability or its limitation is borne by the outgoing party, and therefore it is in its interest to obtain this declaration in writing<sup>30</sup>.

The above solution appears to be quite remarkable against the background of other model law regulations and national regulations. It is also difficult to get rid of the impression that the introduction of the presumption of joint and several liability of the outgoing party and the new counterparty will see some sense in this institution. In most of the cases, the existing counterparty will be willing to transfer its contractual position to a third party at the price of freeing itself from existing obligations. The introduction of joint and several liability for existing obligations therefore significantly reduces the attractiveness of this solution from the point of view of the outgoing party, for whom transferring of the contract becomes like debt assumption.

Although this regulation is undoubtedly the most comprehensive and relatively fully regulates the institution of transfer of contract, the authors have still not managed to avoid the reference to the provisions on the debt assumption and assignment of debt, with the proviso that their application is to be carried out appropriately, not directly. However, the referral was limited only to the defenses and the impact of the subjective change on previously established collateral (PICC Articles 9.3.6 and 9.3.7). Therefore, the ceded entity may defend itself against any allegations that it may have raised against the original contractor, and the new entity may use all the rights and allegations vested in its predecessor. Any security that has previously been established to secure the assigned claim remains in force. On the other hand, those established in order to secure the contract performance offered by the outgoing entity fall, unless it has not been released from liability to its original contractor.

Except for the quite controversial definition of the liability regime of the party arising in connection with the taking over of the contract, the regulation provided for in the UNDRUIT Principles may constitute an important guideline when introducing provisions regulating the transfer of the contract into national legal systems. Its great advantage is its comprehensiveness, which allows you to avoid the proper

<sup>23</sup> UNDRUIT Principles of International Commercial Contract, available at: <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>.

<sup>24</sup> W. Kurowski [.:w] *Międzynarodowe Prawa Handlowego, System Prawa Handlowego*, W. Popiołek (red.), part 9, Warszawa 2013, p. 765.

<sup>25</sup> Art. 9.3.1 UNDRUIT Principles 2016: "Assignment of a contract" means the transfer by agreement from one person (the "assignor") to another person (the "assignee") of the assignor's rights and obligations arising out of a contract with another person (the "other party").

<sup>26</sup> F. Mazza, *Commentary on the UNDRUIT Principles of International Commercial Contracts (PICC)*, S. Vogenauer (ed.), New York 2015, p. 1145.

<sup>27</sup> *Official Comment to UNDRUIT Principles*, Rome 2016, p. 340 - 341.

<sup>28</sup> F. Mazza, *Commentary on the UNDRUIT Principles of International Commercial Contracts (PICC)*, S. Vogenauer (ed.), New York 2015, p. 1148.

<sup>29</sup> *Ibidem*.

<sup>30</sup> F. Mazza, *op. cit.*, p. 1150 - 1151.

application of the provisions on the debt assumption and assignment of debt.

### Summary

The scope of using the change of party to the obligation under the contract is very extensive, in particular in the case of permanent (e.g. rental, lease) or long-term contracts (e.g. electricity sales contract). This institution is also commonly used in the case of loan or credit agreements or when selling an enterprise. Its importance is noticeable primarily in economic transactions, where it allows you to shorten the time necessary to finalize the project and save transaction costs related to subsequent transformations. The entry of a new entity into an already existing legal relationship also makes it possible to avoid repeating certain legal procedures (e.g. obtaining a license).

The above-mentioned issues were also noticed by the creators of individual projects, for whom the need to distinguish the act of transfer of the contract was obvious. Due to the importance of this institution for practice, its application may not be based solely on the provisions governing the debt assumption and assignment of debt. The structure of these two activities is not uniform, which causes numerous problems in the case of the joint application of both groups of provisions. The situation is further complicated by the fact that in most continental legal orders the admissibility of transferring rights and obligations to a third party is derived from the principle of freedom of contract. The functioning of this activity in trade is therefore based only on the statements of the doctrine and jurisprudence, which are very often not very transparent and difficult to use in international transactions.

It should also be noted that the projects consistently advocated the primacy of the unitary concept that defines the transfer of contract as a uniform legal act. Each time, the construction of translational succession was also used. The subjective change always takes place within the existing legal relationship, and the third party enters the entire legal situation of the current party to the contract. It is also consistently and firmly emphasized that the institution of transfer of contract should not be confused with a novation, which always results in the termination of the existing relationship and the creation of a new one with changed content.

The Polish legislator has not decided so far to introduce separate provisions regulating the structure of taking over a contract, limiting itself in this scope only to regulations concerning the debt assumption and assignment of debt. However, under the applicable civil code, there are also cases of the so-called statutory transfer of rights and obligations, which have virtually the same effect as a contractual change of the party to the obligation. This possibility is mentioned, among others on the occasion of an agency contract, lease or cultivation contract. The construction, although not named directly, also occurs in regulations outside the code, e.g. in insurance law and company law.

A proposal to introduce a residual regulation concerning the amendment of the contract party also appeared during the works on the amendment of the contract law. Although the new version of the Civil Code has not been finally adopted, it remains to be hoped that sooner or later work in this area will be resumed and the postulate to introduce statutory regulation of transfer of contract will not only be maintained but even extended.

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