| Chapter XV |

Assignment

1. General considerations

Obligation in its classical sense has always been perceived as a more or less intense personal relationship that appears on the one side as a personal right to claim (receivable), and from the other as a duty to render performance (debt). Obligation is defined by its participants and content.[1] Accordingly, it is common for a legal system to recognize changes in the participants and the content of the obligation.[2] Changes in participants can concern either the creditor, the debtor, or both. Assignment represents a change in the participants of the obligation and can in general be found in two forms: assignment of the receivable and assignment of the contract (containing all receivables, debts, and other obligations and duties of one party to the contract). While assignment of the receivable is concerned only with a change of the creditor, assignment of contract is concerned with a change on the part of both creditor and debtor. In addition to assignment of a contract, the theory recognizes assumption of debt and other similar methods as means of changing the person of the debtor.[3]

1 Zimmermann, 1990; 1992, pp. 1, 6–7. The notion of obligation also has other meanings e.g., in English, the word obligation can refer only to one's duties and not to one's rights. For the sake of simplicity, we will not address this ambiguity here.
2 For example, Articles 1375–1410 of the ABGB.
3 See e.g., Chapter 9 of the UNIDROIT Principles 2016, Chapter 5 of the DCFR, or (Von) Bar and Clive, 2009, p. 1028.

Hulmák, M., Balliu, A., Menyhárd, A., Tomczak, T., Veress, E., Dudás, A., Hlušák, M. (2022) 'Assignment' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 505–537. https://doi.org/10.54171/2022.ev.cliece_chapter15

The roots of obligations can be traced to Roman law, specifically to the infringement of one's property sphere (the first primitive forms of obligation stemming from a delict), and has developed over centuries of Roman civilization to reach a form similar to the one known today.[4] In the early days of Roman law, a receivable was seen as an integral part of the exclusive legal relationship of a creditor and a debtor. Therefore, in classical Roman law, there were no legal means by which an obligation or its parts (receivable or debt) could be transferred from one person to another.[5] The development of society, the growing complexity of economic relations, and considerations of economic utility have gradually induced an alteration in the view of obligation as a purely personal relationship between creditor and debtor and a tendency to look upon it, and more specifically on the receivable, as on a transferable legal good comparable to tangible assets.[6] Therefore, Roman law in its late stages (during Justinian's era) recognized the possibility of assignment of a receivable in its true sense, i.e., as a complete transfer of receivable from the original creditor to the new creditor.[7] After the fall of the eastern Roman Empire, while trying to reinterpret Roman law, the glossators returned to the dogmatic approach typical of classical Roman lawyers: The obligation is strictly personal and the receivable is not by its nature intended to be subject to transfer.[8] This view prevailed with more or less significance until the late 19th century.[9] Nevertheless, modern civil codes (e.g., CC, BGB, ABGB) all without exception recognize the possibility of assigning a receivable,[10] and more than that, some European civil codes even recognize the possibility of assigning a contract as a whole.[11]

The legal notion of assignment commonly refers to assignment of a receivable, more specifically to the assignment of receivables by contract. Under most jurisdictions, a creditor (as assignor) is free to dispose of his or her receivable by a contract by which he or she transfers such a receivable or part of it to a third party regardless of the debtor's consent.[12] An assignment of a receivable can also be achieved by other means recognized by a given legal system. For instance, a legal system may include statutory rules setting out that a receivable automatically passes to a third party in case this third party performs the debt instead of the debtor.[13] This is called 'legal subrogation'.[14]

4 Mousakaris, 2012, pp. 183–185.
5 Zimmermann, 1990; 1992, p. 59.
6 Zimmermann, 1990; 1992, p. 59.
7 Zimmermann, 1990; 1992, p. 63. See also Mousakaris, 2012, pp. 276–277.
8 Zimmermann, 1990; 1992, p. 63. See also Raber, 1989, pp. 177–179.
9 Zimmermann, 1990; 1992, p. 64.
10 See Article 1321 etc. of the Code Civil, Article 398 etc. of the BGB, or Article 1392 etc. of the ABGB.
11 For example, Article 1216 of the Code Civil, Article 1406 of the Codice Civile, or Article 6:159 of the Dutch Civil Code.
12 For example, Article 398 etc. of the BGB or Article 1392 etc. of the ABGB.
13 For example, Article 268 (3) of the BGB.
14 See Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16, Article 15.

Even though the trade in receivables (factoring, etc.) is as important for the development of economy as is trade in tangible assets, the analogy between the two categories fails under several aspects. The most important one is the fact that tangible assets exist in the outside world regardless of human will, while receivables are no more than a legal construct usually arising as a manifestation of a common will of two or more persons, i.e., from a contract. Therefore, while the transfer of a tangible asset does not usually interfere with any legal interest of a third party (with several exceptions), the assignment of a receivable always interferes with the legal status of the debtor. That is because the debtor inadvertently finds himself or herself in a contractual or other obligational relationship with another person with whom he or she has never, or would never have concluded a contract or otherwise interacted, and to whom he or she is now obliged to pay his or her debt (in the place of his or her former creditor).[15] The assignment of a receivable thus represents in general terms an exception to the principle that the contract may only have *inter partes* effects, since the legal status of the debtor (a third party to the assignment) changes as a result of the agreement between the assignor and the assignee.

This specific nature of receivables precludes the mechanical application of the rules relating to the transfer of tangible assets to receivables and to some extent justifies a special approach. Individual national legislators thus consider very thoroughly which receivables shall be assignable and which not. For example, the national legislator may exclude from the scope of assignable receivables those that lapse upon the debtor's death (*intuitu personae*—strictly personal—obligations).[16] As a result, the scope of assignable receivables may vary in different jurisdictions. Moreover, even if the receivable is included in the scope of assignable receivables, individual legal systems usually allow for the debtor to agree with the creditor on a special clause prohibiting the creditor from assigning the receivable, usually referred to as an anti-assignment clause or *pactum de non cedendo*.[17] However, individual legal systems differ as to the effects of such a clause and the legal consequences of its breach. In general, three basic approaches to this problem can be traced. The first views anti-assignment clauses as a simple contractual agreement with *inter partes* effects, the breach of which only gives rise to the debtor's claim for damages.[18] The next two approaches both understand the anti-assignment clause as an agreement having *erga omnes* effects. They differ in the consequences of the breach of the anti-assignment clause where one associates with its breach invalidity of the assignment agreement,[19] the other only an ineffectiveness of assignment itself.[20] It is worth noting that the issue of the

15 Stoyanov, 2017, pp. 9–19.
16 For example, Article 1393 of the ABGB.
17 For example, Article 399 of the BGB.
18 For example, Article 6 (1) of the Convention on International Factoring, Ottawa, 1988 or Article 9 (1) of the UN Convention on the Assignment of Receivables in International trade.
19 That is for example the Austrian approach. See Decision of the Austrian Supreme Court of February 7, 1968, Ref. No. 5 Ob 12/68.
20 For example, Article 11:301 of the PECL.

effect and consequence of breach of the anti-assignment clause is very controversial and there is no consensus in legal theory and literature on how this issue should be properly regulated to fairly consider the interests of all persons concerned (mainly the creditor, the debtor, and the assignee).

Moreover, the same problems are reflected regarding other contractual clauses, such as, e.g., the no set-off clause or the arbitration clause. One must ask to what extent they should be binding on the assignee and what role good faith should play in the conclusion reached.

Individual legal systems may also vary as to the moment from which the assignment of a receivable legally occurs. In some legal systems, the assignment of a receivable legally occurs at the moment of conclusion of a valid and effective assignment agreement. Subsequent notification to the debtor only has relevance in making the assignment effective toward that debtor.[21] In other legal systems, the assignment of receivable will not legally occur until the moment the debtor is duly notified of such assignment even though the valid and effective assignment agreement is already in place.[22] Debtor protection is in fact one of several crucial points here. His or her position should remain the same. Legal orders provide the debtor with different means to achieve this aim, e.g., the right to perform to the assignor in some cases or the right to set off any receivable extant vis-à-vis the assignor against the assignee.

The legal notion of assignment of contract refers to a specific agreement by which one party to the contract transfers its whole contractual position (all its receivables, debts, and other obligations and duties) to a third party.[23] The introduction of the possibility of assigning a contract as a whole is not something surprising in some legal systems, for it is the logical outcome of the millennia-long development of the law of obligations, such that the obligation has developed from a strictly personal relationship by which the parties were bound together to more loose relationship placing emphasis on the proprietary nature of the obligation and therefore allowing assignment of receivable to a third party. The assignment of the contract as a whole represents the culmination of this historical development.

The parties are free to choose their contractual partner, to enter upon their free will into such a contract, and to formulate its content. Obviously, for it to have any meaning, the parties must be bound by such an agreement. Therefore, as a general rule, none of them may, e.g., change the contract's content, assign the contract to another person, or terminate the contract without the agreement of all participants to the contract. This is a natural consequence of the *pacta sunt servanda* rule, an old principle of Roman law, well established in all modern legal systems.[24] It is difficult to imagine the assignment of contract without the consent of other contractual parties as a general rule, as it would jeopardize the whole system of obligational law. Therefore,

21 Such is, e.g., the case of German Law, Article 398 etc. of the BGB.
22 Such was, e.g., the case in French law at the time of adoption of the Napoleonic Code Civil from 1804; see its Article 1690.
23 See e.g., Article 9.3.1 of UNIDROIT Principles 2016.
24 (Von) Bar and Clive, 2009, p. 58.

legal systems allowing the assignment of contract as a rule make such assignment subject to the consent of other parties to the contract.[25]

2. The Czech Republic

2.1. Assignment of a receivable

The assignment of a receivable is permitted under Czech law and is regulated primarily in §§ 1879–1887 of the CzeCC. The general principle is that every receivable (either present or future) is assignable unless 1. it lapses upon the debtor's death (i.e., with the exception of claims for damages); 2. it is a receivable the assignment of which would cause a change in the content of the receivable to the detriment of the debtor (this will be the case mainly where the specific scope of performance depends on the particular creditor, e.g., the sculpture of a person or custom-made works); 3. the assignment is prohibited by an anti-assignment clause; 4. the receivable stems from public law;[26] or 5. the assignment is prohibited by statutory law in other special cases. The creditor is also allowed to assign a set of receivables, whether present or future, if such set of receivables is sufficiently determined, in particular with respect to receivables of a certain kind arising at a particular time, or various receivables arising from the same legal cause.[27]

Among all the exemptions from under the assignability of receivable, the anti-assignment clause is the most subtle. Since the adoption of the CzeCC, the discussion in legal theory and literature regarding even the most basic questions related to the anti-assignment clause, i.e., to whom the effects of the clause should extend (*inter partes* or *erga omnes*) or what the consequences of its breach should be, remain unsettled. These questions are yet to be addressed by the Czech Supreme Court. Regarding the question of the effect of the anti-assignment clause, the predominant view is that it operates with *erga omnes*, not just *inter partes* effects.[28] More problematic is the issue of legal consequences of breach of the anti-assignment clause. There are currently two main approaches to interpretating this issue. One associates the breach of the anti-assignment clause with the invalidity of the assignment agreement (either nullity or voidability),[29] the other only with the ineffectiveness of the assignment of receivable itself (while maintaining the validity of the assignment agreement).[30]

The question of effects on any third party (especially the assignee) concerns also other contractual clauses, e.g., the no set-off clause, a prohibition on the pledging of

25 See e.g., Article 6:159 of the Dutch Civil Code.
26 Petrov et al., 2019, p. 2009. See also Hulmák et al., 2014, p. 222. See the decision of the Czech Supreme Court Ref. No. 20 Cdo 501/2016 and No. 29 Cdo 4474/2011.
27 CzeCC, § 1887.
28 See e.g., Remeš, 2016, pp. 39–45; Zvára, 2015, pp. 316–323; Petrov et al., 2019, p. 2010; Bezouška, 2015b, pp. 381–390.
29 See e.g., Remeš, 2016, pp. 39–45; Zvára, 2015, pp. 316–323; Petrov et al., 2019, p. 2010.
30 See e.g., Bezouška, 2015b, pp. 381–390; Balliu, 2021, pp. 381–391.

receivables, or the arbitration clause. The answer to that question is primarily contingent on the legislator's decision. For instance, an agreed prohibition on the pledging of receivable is effective vis-à-vis third parties only if the prohibition is recorded in a register of pledges or if the third party was aware (or ought to have been aware) of its existence.[31] On the other hand, unless otherwise agreed between the creditor and the debtor, an arbitration clause always binds an assignee regardless of his knowledge about its existence.[32] In some cases, there is no clear decision on the part of the legislator as to what the effect of a certain clause on a third party should be. This is true in the case of the no set-off clause. As the question of the effects of the no set-off clause on the assignee has never even been addressed by the general courts, this issue is therefore yet to be resolved.

Under Czech law, the assignment of a receivable occurs (unless otherwise agreed) simultaneously with the conclusion of a valid and effective assignment agreement. From this very moment, the assignor ceases to be the legal owner of a receivable and the ownership is transferred to the assignee. By assigning a receivable, an assignee also acquires the accessories and rights associated with the receivable, including any security.[33]

As the assignment of a receivable represents, in general, an exception to the principle that the contract has only *inter partes* effect, since the legal status of the debtor (third party) changes as a result of the agreement between the assignor and the assignee to which he or she is not a party, the Czech legislator adopted several measures to protect the debtor. First, the assignment is effective vis-à-vis the debtor only after the debtor is informed about its occurrence by the assignor or after the assignee proves to the debtor that the assignment took place. Moreover, if an assignor has assigned the same receivable to several persons, only that assignment of which the debtor first became aware is effective against the debtor.[34]

Even after the assignment, the debtor retains defenses against the receivable that he or she had at the time of the assignment (e.g., defense in the form of set-off). Mutual receivables that a debtor had against the assignor may also be invoked by the debtor against the assignee, even where they were not yet due at the time of the assignment. However, she must notify the assignee of the receivables without undue delay after becoming aware of the assignment. If a debtor acknowledges that a receivable against a fair assignee is genuine, he or she is obliged to satisfy it as his or her creditor, i.e., has no objections he or she would have against the assignor.[35]

Even after the assignment of receivable legally occurs, the assignor may enforce the satisfaction of the receivable against the debtor in his or her own name and on the

31 CzeCC, § 1309 (2). It is however unclear, and the legislator does not provide any explicit answer as to what the consequences of breach of the agreed prohibition on pledging of a receivable should be.
32 The Czech Act on Arbitration, § 2 (5).
33 Hulmák et al., 2014, p. 222.
34 CzeCC, § 1882.
35 CzeCC, § 1884.

account of the assignee provided he or she was requested to do so by the assignee. If the assignment of a receivable has already been notified or proved to the debtor, the assignor may enforce the receivable if he or she proves the consent of the assignee, and the assignee does not enforce the receivable himself or herself. The benefit for the assignee to let the assignor enforce the receivable on his or her behalf is that the debtor may invoke against the receivable only the mutual receivables (counter-performance) that he or she has against the assignor, not his or her receivables that he or she has against the assignee.[36]

2.2. Assignment of the contract

The assignment of contract is allowed under Czech law and is regulated primarily in §§ 1895–1900 of the CzeCC. Unless excluded by the very nature of the contract (i.e., articles of association), either party may, as an assignor, transfer his or her rights and duties under a contract or part thereof to a third party if the assigned party consents to it and if the contract has not yet been fully performed.[37] Where a continued or periodic performance is envisaged under a contract, the contract may be assigned with effects in respect of the part of the contract that has not yet been performed.[38]

Assignment of a contract becomes effective against the assigned party upon its consent. If such consent was granted in advance, the assignment of the contract against the assigned party becomes effective when the assignment of the contract is notified to that party by the assignor or proved to it by the assignee.[39]

When the assignment of a contract becomes effective against the assigned party, the assignor becomes liberated from any duties to the extent of the assignment.[40] Pursuant to § 1899 of the CzeCC, the assigned party may prevent these consequences by declaring, with respect to the assignor, that it refuses the assignor's liberation. In that case, the assigned party may require the assignor to perform in case the assignee fails to fulfill the duties assumed. This is obviously a very problematic concept. The whole point of the assignment is to change the person of one of the parties to the contract. Thus, the former party should no longer have anything in common with the debts and receivables arising out of the contract, even more so when one takes into consideration the need for the express consent of the assigned party to it. Fortunately, § 1899 of the CzeCC is not mandatory, and it can be assumed that the parties will usually opt out of its provisions.

The assigned party retains all the contractual defenses against the assignee. The assigned party shall retain all other defenses that it had against the assignor if such retention is reserved in the contract or in the consent to the assignment of the contract.[41]

36 CzeCC, § 1886.
37 Petrov et al., 2019, p. 2034.
38 CzeCC, § 1895.
39 CzeCC, § 1897.
40 CzeCC, § 1899.
41 CzeCC, § 1900.

3. Hungary

3.1. Assignment of claims

A claim, provided it is assignable, is a marketable asset of the right-holder that is transferable and chargeable. Where the title to the assignment is based on a contract, the legislation provides for two contractual elements in the assignment: the title and the assignment. The title is created by the contract for transferring the claim, which gives rise to a right to require the assignee to transfer the claim, that is, the assignment. The obligation to transfer the claim is governed by the rules applicable to sale,[42] or in case it is gratuitousness, to donation,[43] which shall apply accordingly. If the assignor does not perform the contract (i.e., fails to assign the claim) despite his or her contractual obligation, the assignee may claim performance of the obligor according to the rules of delay of performance. The assignment of the claim is a juridical act consisting of both the performance of the obligation to assign and the act of assignment resulting in the transfer of the claim. Assignment as such is a contract, but its legal effect is not to create an obligation but to transfer the claim and thus to bring about a change in the person of the creditor. As the assignment is also a contract, it is governed by the rules on the formation and validity of contracts. The idea of the legislator was to provide the same structure for assignment as for transfer of movable assets via the distinction between the contract, which creates the obligation as well as the title, and the delivery, which is a juridical act of performance as well as of transfer of that title.

The two logical elements of an assignment, the contract of assignment and the assignment as an act of transfer, do not necessarily have to follow each other in time in this order. The HunCC does not make the validity of a contract of assignment or of an assignment subject to a written formality. The assignment transfers the rights deriving from the pledge, security, or surety securing the claim to the assignee and also provides for the transfer of the interests. The assignment of a claim transfers both the interest on the claim and the interest on late payments to the assignee, whether due before or after the assignment. However, the parties may agree that the assignor assigns only the principal amount of the claim but not the interest receivable, or vice versa. An assignment is a specific subrogation of the legal position of the obligation. However, it is not a subrogation in the contract underlying the claim, but only in the claim arising from the contract. Therefore, the assignment of a contractual claim does not affect the existence of the contract between the original parties, and the other rights of the parties under the contract (e.g., the right of unilateral termination of the contract) remain with them.

Existence of the claim at the time of assignment is not required. Claims that would arise in the future may also be assigned, but the law requires that the legal

42 HunCC, § 6:215.
43 HunCC, § 6:235.

relationship from which the claim stems must exist at the time of assignment. Claims that qualify as personal ones cannot be assigned and are therefore unmarketable. The personal nature of the claim must be assessed on the basis of the nature of the legal relationship giving rise to that claim. Thus, even if exceptionally, even monetary claims can be qualified as personal. A claim for *solatium doloris*,[44] e.g., is not assignable because of the personal nature of inherent rights, but a claim for restitution of unjust enrichment is assignable even if the enrichment resulted from interference with such rights.[45] Nor may claims for damages in connection with criminal proceedings[46] and claims arising from entitlement to social security and pension benefits[47] be assigned. Claims arising from a public administrative law relationship should also not be deemed assignable, but it was a normal practice of tax authorities to sell claims that proved to be uncollectable.

The stipulation not to assign, that is, the *pactum de non cedendo*, is a legal instrument similar to the prohibition of alienation and encumbrance. A clause excluding the assignment of a claim is ineffective against third parties. That is, assignment can be performed with a legal effect, although it will be a breach of contract. Between the original contracting parties, the assignor shall be liable for any damages caused by the prohibited assignment to any other contracting party. Liability for damages is not an efficient remedy due to the problems of proving loss resulting from the violation of such an obligation. That is why parties try to create incentives for the other party not to breach this duty by stipulating a contractual penalty or other repressive sanctions. The legislator, however, attempted to prevent the parties form adopting such solutions. Any clause in the contract that provides for the right to terminate the contract in the event of such a breach or that provides for the obligation to pay a penalty shall be null and void.[48] The idea behind this controversial solution was that although such clauses should not be prohibited entirely, in order to support the marketability of claims it should not be allowed for the parties to create impediments to banning assignments. So far, it has not been tested in court practice whether, and if so to what extent liquidated damages clauses are enforceable in this context. The legal effect of the transfer of the creditor's position (that is, the debtor's release from his obligation only upon performance to the assignee) is conditional on the instruction issued to the debtor to perform (performance order). The performance order has the legal effect that the debtor can only validly perform toward the assignee with the effect of discharging his or her obligation. The change in the status of the assignee of the obligation becomes effective toward the debtor with the performance order.

44 *Solatium doloris* is a specific sanction provided as a consequence of unlawful interference with the rights inherent to persons introduced by the 2013 recast of the HunCC. It is functionally equivalent to non-pecuniary damages, which are no longer to be awarded under Hungarian private law.
45 HunCC, § 2:51 (1) e).
46 Supreme Court, BH 2000 No. 197.
47 Supreme Court, BH 1983 No. 361.
48 HunCC, § 6:195.

The debtor may assert its defenses and set off the counterclaims that he or she would have vis-à-vis the assignor toward the assignee if such claims and defenses had arisen against the assignor on a legal basis that already existed at the time of the notification of the assignment. The debtor may be notified of the assignment either by the assignor or by the assignee. The notification of the debtor fixes the claim in the relationship between the debtor and the assignee. If the assignor and the debtor agree to modify the contract on which the claim is based or the assignor waives the claim against the debtor, this agreement is effective and enforceable between the assignor and the debtor but not vis-à-vis the assignee.

3.2. Assignment of rights

The HunCC defines the assignment of rights as a dual transaction system similar to the assignment of claims, in which the source of the obligation to assign the right is the contract assigning the right, which also gives the title to the right assigned. The transfer is itself the performance of an obligation arising from the contract, which is also a contract. The transfer, as a contract having legal effect, results in a change in the person of the holder. The rules on assignment also apply to transfer in other respects. The marketability of the underlying rights and its limitations are primarily determined by the content of the legal norm granting that certain right. The possibility and the limits of transferability of negotiable rights must therefore be determined by the legal rules that create and designate the subject-matter right in question, and in part by the case law that must determine their transferability. The marketability of a subject right depends on the interpretation of the legal rule that creates, protects, and defines the content of that right.

Thus, it has to be assumed that the rights granted by the HunCC are negotiable if their transferability is not excluded by law or the nature of the right. The transferability of rights provided in family law and the law of succession is precluded by their personal nature, the transferability of rights arising from a contractual relationship is precluded by their relative (*in personam*) structure, and in the area of rights *in rem*, the only limited right *in rem* permitted by law to be transferred is a specific form of pledge under the rules governing separate pledges. Rights of use are not transferable. The transferability of rights relating to the operation of legal persons is excluded because of their organizational nature and relative structure.

3.3. Transfer of contractual positions

The transfer of a contract makes it possible for the parties to change the identity of the contracting parties by tripartite agreement of the parties concerned, while maintaining (continuing) the contract originally concluded. The transfer of contract is a contract between the party leaving the contract, the party remaining in the contract, and the party entering the contract, whereby all the rights and obligations of the party leaving the contract are transferred to the party entering the contract. Thus, the party that enters the contract becomes the successor in title to the party that leaves the contract. The transfer of a contract necessarily implies a change in the positions

of the parties as both beneficiaries and obligors of the obligations arising from the contract.

The transfer of a contract changes the essential content of the original contract (i.e., the identity of the contracting party). Succession to the contractual position, and thus recognition of the continuity of the legal relationship, shall not have the effect of infringing on the rights of any third parties. Thus, for example, the transfer of the contract for the sale of an asset subject to a right of first refusal creates a new situation for the holder of the right of first refusal, whose right shall be re-opened by the transfer, and who must therefore be notified of the transfer. If the contract is a transaction subject to the approval of a third party or to an official authorization, or if the contracting party requires such approval or authorization in order to acquire rights under the contract, this will again require the obtaining of such authorization or approval as a result of a change in the contractual position.

4. Poland

4.1. Overview

Polish law does not recognize the general institution of a transfer of contract (assignment of contract).[49] The PolCC established different rules regarding the change of a creditor[50] and the change of a debtor.[51]

Therefore, a person who wants to obtain the result of a contract assignment is obliged to follow the appropriate rules included in these two sections of the PolCC.[52] This chapter hereinafter will focus mainly on *stricto sensu* assignment, i.e., the assignment of receivable by contract.

4.2. Legislative basis

As was noted above, the change of a creditor is regulated in Articles 509–518 of the PolCC. The creditor may, without the debtor's consent, transfer a receivable to a third party (assignment) unless that would be contrary to law, a contractual stipulation, or the nature of the respective obligation. The assignment of a receivable transfers to the assignee all the rights related to the receivable, in particular a claim for outstanding interest.[53]

Notably, Article 517 § 1 of the PolCC states that the provisions on assignment shall not apply to receivables connected with a bearer instrument (*document na okaziciela*)

49 The possibility of assigning a contract as a whole. See Radwański and Olejniczak, 2010, p. 367.
50 PolCC, Articles 509–518.
51 PolCC, Articles 519–525.
52 Radwański and Olejniczak, 2010, p. 367. As shown in the literature, only in reference to some special legal relationships has the PolCC indicated events that may lead to joint transfer of the receivable and the debt. See Radwański and Olejniczak, 2010, p. 367, and for example PolCC, Article 678.
53 PolCC, Article 509.

or with an instrument transferable through endorsement (*document zbywalny przez indos*).[54]

4.3. General rule and exceptions

Quite obviously, the PolCC also recognizes the possibility of assigning a receivable. As a rule, a creditor is free to dispose of his receivable by a contract. However, three important exceptions to this rule exist: First, if such a juridical act would be contrary to law; second, if the nature of an obligation makes a certain receivable non-transferable; and lastly, if there is a contractual stipulation that prohibits an assignment.

The first exception refers to all the situations where there is a special provision that prohibits an assignment of certain types of receivables. For example, according to Article 595 of the PolCC, the right to repurchase (*prawo odkupu)* is non-assignable under Polish law. The situation is identical in the case of the life annuity (*prawo dożywocia*).[55] An assignment contract regarding a non-transferable receivable shall be seen as null and void.[56]

The second exception refers to the nature of an obligation. This exception is quite vague under Polish law. However, it is often indicated that strongly accessory receivables[57] or strictly personal ones are non-transferable.[58] More specific examples can be found in the literature and case law.[59] An assignment contract regarding such a receivable will usually be seen as null and void.[60]

The last exception refers to the *pactum de non cedendo.* Under Polish law parties to a contract may not only totally exclude transferability of a certain receivable but may also make such a transfer subject to the debtor's consent or limit it in many different ways.[61] The dominant view is that the elaborated clause would have an effect toward third parties.[62] It would transform the receivable into a non-transferable one.[63] In such a case the debtor's consent is required to validly assign the receivable.[64]

4.4. Assignment of future receivables and disputed receivables

Article 509 of the PolCC only contains rules regarding (extant) receivables. Therefore, the question may arise whether it is possible under Polish law to assign future ones. The long-standing rule established by the Polish Supreme Court is that future

54 For more about the non-applicability of the PolCC, Articles 509–516 to securities, see Zawada, 2018, p. 1395.
55 See PolCC, Article 912. For other examples see Zawada, 2018, pp. 1400–1401.
56 Zawada, 2018, p. 1401.
57 Like those resulting from a surety agreement.
58 Radwański and Olejniczak, 2010, p. 370.
59 Zawada, 2018, pp. 1402–1403.
60 Zawada, 2018, pp. 1403 and 1421.
61 Radwański and Olejniczak, 2010, pp. 370–371 and the judgment of the Polish Supreme Court, 25.03.1969 r., III CRN 416/68, LEX No. 967.
62 Radwański and Olejniczak, 2010, p. 370; Zawada, 2018, pp. 1403–1404.
63 Zawada, 2018, p. 1403.
64 Zawada, 2018, p. 1404.

receivables may be transferred as long as the transferred receivable is appropriately indicated and described in the assignment contract.[65] However, the notion of 'future receivable' is heavily disputed in the Polish legal literature.[66]

On the other hand, there is little doubt that it is possible to transfer contested receivables.[67]

4.5. Form of the assignment and of pactum de non cedendo

The PolCC as a rule does not require any special form in reference to an assignment contract.[68] Therefore, a receivable can be validly transferred even orally. However, if the receivable is evidenced in writing, the transfer also shall be evidenced in such a way.[69] Failure to meet this requirement does not lead to nullity of the assignment but may have evidentiary consequences.[70]

If the receivable was evidenced in writing, *pactum de non cedendo* is only effective toward an acquiring party if the instrument (*pismo*) mentions such a restriction, unless the potential assignee knew of the restriction at the time of the assignment.[71]

There are also no obstacles for the parties to a contract to reserve a special form regarding any potential assignment of rights resulting from such agreement.[72]

4.6. Moment of the assignment

Under Polish law, as a rule, the assignment occurs at the moment of conclusion of a valid and effective assignment agreement. No consent of the debtor is required.[73] Notably, Article 510 of the PolCC indicates that the situation may be different if a special statutory provision states otherwise or the parties to the contract agreed differently.[74] Exceptional cases where the parties 'agreed differently' are elaborated in the literature.[75]

4.7. The situation of the debtor

As mentioned, Polish law does not make the validity of the assignment dependent on the debtor's consent. That does not mean that the debtor is not protected under Polish law. Besides the fact that he or she should now render performance to a different

65 Resolution of the Polish Supreme Court, 19.09.1997, III CZP 45/97, LEX No. 31693.
66 Zawada, 2018, p. 1406 and the literature invoked there.
67 Zawada, 2018, p. 1406.
68 In reference to some exceptions, see Zawada, 2018, pp. 1416–1418.
69 PolCC, Article 511. Under Polish law the requirement of 'evidenced in writing' is not equivalent to a 'written form.' The receivable may be evidenced in writing even if there is no signature of a party. See, for example, the resolution of the Polish Supreme Court, 6.07.2005, III CZP 40/05, Legalis No. 69516. However, it seems that a different view also presents itself. See Zawada, 2018, p. 1405.
70 See Radwański and Olejniczak, 2010, p. 369.
71 PolCC, Article 514.
72 Compare Radwański and Olejniczak, 2010, p. 370.
73 Radwański and Olejniczak, 2010, p. 370.
74 More broadly Zawada, 2018, pp. 1411–1412.
75 See Zawada, 2018, pp. 1419–1421.

creditor, his or her situation should not change, especially to his or her detriment.[76] First, until the assignor informs the debtor about the assignment, the performance made to the former creditor is effective toward the assignee, unless at the moment of the performance the debtor knew of the assignment.[77] Thus, even if the notification of the debtor is not a condition of a valid assignment, it may be important to better protect the assignee's interests. We note that an assignor may inform the debtor about the assignment even orally.[78]

Second, Article 513 § 1 of the PolCC states that the debtor is entitled to use any defenses against the assignee that he or she had against the assignor at the time of becoming aware of the transfer.[79] The Polish Supreme Court stated that the debtor may retain even such a far-reaching right as withdrawal from the contract after the assignment.[80] Furthermore, Article 513 § 2 of the PolCC, to protect the debtor, modifies set-off rules by stating that the debtor may set off the assigned receivable with his own receivable toward the assignor even if his or her receivable becomes due after he or she received a notification of the assignment.[81]

Lastly, the debtor's good faith is also protected in another way. According to Article 515 of the PolCC, if the debtor who received a written notification from the assignor rendered performance to the assignee, the assignor (former creditor) may invoke toward the debtor the assignment's nullity or defenses resulting from its legal basis (e.g., a sales contract) only if they were known to the debtor at the time of rendering performance.[82] The issue is important since under Polish law the assignment contract is a causal agreement.[83] Additionally, it should be noted that the assignee is not protected by good faith. Thus, he or she will not obtain the receivable if it did not belong to the assignor.[84] This does not change the conclusion that the debtor will be released from his obligation if he or she performed in accordance with the rules described in the cited paragraph.

76 Radwański and Olejniczak, 2010, p. 372.
77 PolCC, Article 512. Further in the article, it states that the provision shall apply accordingly to other juridical acts between the debtor and the previous creditor.
78 Zawada, 2018, p. 1431.
79 Quite obviously a debtor may also raise defenses based on the general rules. See Zawada, 2018, pp. 1437–1438.
80 See the judgment of the Polish Supreme Court, 8.4.2009, V CSK 423/08, LEX No. 503613.
81 However, as the second part of Article 513 § 2 of the PolCC states, this does not apply if the debtor's receivable against the assignor becomes due later than the transferred receivable. As indicated in the literature, the aim of this restriction is to prevent a situation in which the debtor withholds the performance until his or her receivable becomes due. See Radwański and Olejniczak, 2010, p. 342.
82 According to the second part of Article 515 of the PolCC this provision applies accordingly to other juridical acts between the debtor and the assignee, such as an act regarding exemption of debt. See Radwański and Olejniczak, 2010, p. 373.
83 See Article 510 of the PolCC and Radwański and Olejniczak, 2010, p. 369. Very broadly on this topic, see Zawada, 2018, pp. 1413–1414.
84 There are only very minor exceptions to this rule. Radwański and Olejniczak, 2010, p. 371.

4.8. Related rights

According to Article 509 § 2 of the PolCC, the assignment of a receivable transfers to the assignee all the rights related to the receivable. The issue whether all related rights will always follow the receivable is controversial under Polish law, especially since there are doubts as to how the term 'related rights' shall be understood.[85] For example, the Polish Supreme Court stated that the rights closely related to the assignor will not transfer to the assignee on the basis of Article 509 § 2 of the PolCC.[86] In the same judgment the Court stated that the security right in the form of collateral transfer of real estate ownership will not transfer to the assignee together with the secured claim.[87] Such statement was made despite the view sometimes presented in the literature that all the security rights should transfer to the assignee unless otherwise stated by the parties.[88]

4.9. Liability of the assignor

Art. 516 of the PolCC states two rules regarding the assignor's liability (in the meaning of warranty). First, he or she is liable toward the assignee for the fact that he or she is the holder of the receivable. If the 'transferred' receivable did not exist, the assignor would be liable for the 'legal defects' of the receivable.[89] Second, as a rule, the assignor is not liable for the solvency of the debtor at the time of the assignment. He or she may, however, incur such warranty insofar as he or she assumed such liability for insolvency.[90]

4.10. Legal subrogation

Article 518 of the PolCC, i.e., the last article in the section regarding the change of a creditor, refers to legal subrogation as quite broadly understood. A third party who renders the performance owed by the debtor to the creditor acquires against the debtor the receivable that has been performed up to the amount of the performance that has been made: 1. where he or she pays someone else's debt, for which he or she was personally liable or that he or she guaranteed with some asset; 2. where he or she enjoys a right over which the performed debt has priority; 3. where he or she acts upon the debtor's consent to enter into the creditor's rights—the consent of the debtor should, under pain of nullity, be expressed in writing; and 4. where such subrogation is provided for by specific provisions.

85 The dominant view is that the notion should be understood broadly. See Zawada, 2018, p. 1442.
86 Decision of the Polish Supreme Court, 21.03.2013, II CSK 396/12, LEX No. 1324263.
87 Decision of the Polish Supreme Court, 21.03.2013, II CSK 396/12, LEX No. 1324263.
88 See Radwański and Olejniczak, 2010, p. 371. For reference to further controversies regarding the afore-mentioned decision of the Polish Supreme Court, see Tomczak, 2021, pp. 58–60. It is important to note in reference to some security rights that the sole assignment agreement is not enough to automatically transfer them; instead, for example, an entry in the appropriate register may be required. See Zawada, 2018, pp. 1425–1426.
89 For more on this topic, see Radwański and Olejniczak, 2010, pp. 371–372.
90 Zawada, 2018, pp. 1425–1430.

The above is important, since if none of the situations described in 518 § 1 of the PolCC occurs, legal subrogation cannot take place. Thus, as a rule, a third party may have only a claim based on the institution of unjust enrichment.[91]

5. Romania

The creditor's claim constitutes an active element of his or her assets (his or her so-called patrimony), of which the creditor may dispose for the purposes of its transfer. Obligations may be transferred, according to the provisions of the RouCC, by assignment of a claim, by subrogation, and by the assumption of a debt.[92] In this context, we analyze the assignment of a claim.[93]

All claims, whether certain and matured or uncertain and future, which have as their object an individually determined asset or fungible assets (such as money), or any other obligations to do or to give, may be assigned. This capacity to be assigned does not originate from the debtor's consent but from a mandatory rule of current Romanian civil law that recognizes the free circulation of claims.[94] In general, all claims are transferable. As a first exception, claims that are declared non-transferable by law cannot be assigned. Also, a claim for other performance than payment of money (it is unspecified whether this rule also refers to foreign currencies or just Romanian legal tender) can be assigned only if the assignment does not make the obligation substantially more onerous. Second, the assignment can be prohibited or limited by the assignor's agreement with the debtor by means of an inalienability (in this case non-assignment) clause. This clause is valid, but, according to the RouCC, it becomes unenforceable in three situations:[95]

- if the assigned debtor has consented to the assignment, where the clause no longer has any effect because the debtor, by accepting the assignment, waives the benefit of the clause,
- the non-assignment clause is ineffective if the prohibition is not expressly mentioned in the document establishing the claim and the assignee did not know and should not have known of the existence of the prohibition at the time of the assignment (in this situation, the law protects the assignee in good faith),
- in the last but most important case, the prohibition has no effect where the assignment of the claim relates to a sum of money. Thus, the legislator imposes the assignability of monetary claims even if the creditor and debtor have included an inalienability clause in the contract (the legislator does so because it wishes to protect the security of the 'civil circuit,' i.e., the interest of creditors).

91 Radwański and Olejniczak, 2010, p. 374.
92 For a comprehensive analysis, see Almășan, 2018.
93 RouCC, Articles 1566–1586.
94 Vivante, 1934, p. 131.
95 Veress, 2020, p. 256.

A claim to a sum of money may be assigned in part (partial assignment). A claim for a consideration other than a sum of money may be assigned in part only if the obligation is divisible and the assignment does not make it substantially more onerous for the debtor to perform it to the assignee. In the case of a partial assignment, the assignor and the assignee are paid in proportion to the amount of the claim that each of them holds. This rule applies accordingly to assignees who jointly acquire the same claim. Future claims may also be assigned.

The assignment of a claim is not a type of contract in itself but generally denotes the operations by which claims are transferred from the assignor to the assignee. The specific legal means of assignment of a claim is a special contract, such as a contract of sale, exchange contract, or even donation. In this respect, the assignment of a claim is regulated separately in order to determine the common legal regime for the assignment (transfer) of a claim, but this legal regime is supplemented by the special regime of the contract through which the assignment is made. Thus, if the assignment is for consideration, the legal provisions on the assignment of the claim are supplemented accordingly by those governing the contract of sale or, where appropriate, by those governing any other legal transaction under which the parties have agreed to perform the service consisting in the assignment of a claim (e.g., the exchange contract).

The assignment of the claim becomes effective against the assigned debtor by notification or acceptance. If the assignment of the claim becomes effective by notification, this shall require a written notice of the assignment, on paper or in electronic form, stating the identity of the assignee, reasonably identifying the assigned claim, and requiring the debtor to pay the assignee. Notice may be given by both the assignor and the assignee. Where the assignee gives notice of assignment, the debtor may require the assignee to provide written proof of the assignment. Pending receipt of such proof, the debtor may suspend payment. The communication of the assignment shall be ineffective if written proof of the assignment is not communicated to the debtor.

The other way the assignment becomes effective against the assigned debtor is for the assignment to be accepted in writing with a definite date. Acceptance is the only way in which the assignment becomes enforceable against the debtor if the claim is essentially linked to the person of the creditor, in which case it is not sufficient to achieve effectiveness by notification. In other cases, the two means by which the effectiveness of the assignment may be achieved are alternative. These formalities are essential because the debtor is only obliged to pay the assignee from the moment the assignment becomes effective against him. Before acceptance or receipt of the notification, the debtor can only discharge the debt by paying the assignor.

The main effect of the assignment is the transfer of the claim from the assignor to the assignee. The assignee becomes a creditor toward the assigned debtor. The assignment of the claim transfers to the assignee all the rights that the assignor has in relation to the assigned claim, namely also the rights of security and all other rights attached to the assigned claim. However, without the consent of the collateral provider, the assignor may not transfer possession of a pledged asset to the assignee.

If the collateral provider objects, the pledged asset shall remain in the custody of the assignor.

In the case of an assignment for consideration, the claim shall be transferred at nominal value, irrespective of the amount of the price paid by the assignor. The assignment of the claim takes effect between the assignor and the assignee as soon as the agreement is concluded, even before the formalities prescribed for effectiveness toward the debtor have been completed. The assignee may claim whatever the assignor receives from the debtor, even if the assignment has not been made effective against the debtor.

According to the Romanian High Court of Cassation and Justice, where the claim that was the subject of an assignment contract was extinguished by judicial set-off (between the assignor and the assigned debtor) after the conclusion of the assignment, the court action for declaring the assignment contract null and void should be rejected. The existence of the claim is examined at the time of the conclusion of the contract. The fact that the subject matter of the assignment disappeared after the conclusion of the contract is irrelevant.[96] Of course, the assignor must warrant the existence of the claim. In the present case, the assignment of the claim was valid, as the court correctly stated. The assignee should not have sought an affirmation of nullity by the court but rather should have sought to enforce the warranty obligation of the assignor (considered in Romanian law as being granted 'for eviction,' that is, for privation of a right as a result of judicial action against the predecessor in title).

In this context, it is also necessary to consider the assignor's legal obligations toward the assignee: a warranty for the claim's existence and the solvency of the assigned debtor, and a warranty for eviction. In the case of the warranty for the claim's existence, a distinction must be made between assignment for consideration and gratuitous assignment.

In the case of an assignment for consideration, the assignor has a legal liability toward the assignee (legal warranty) for the claim's existence in relation to the date of the assignment without, however, being liable for the solvency of the assigned debtor.

The regime of the legal guarantee may be aggravated by the agreement of the parties. In the case of a first-degree aggravation clause, the assignor expressly assumes the obligation to guarantee the solvency of the debtor assigned. If the assignor has expressly undertaken to guarantee the assigned debtor's solvency, it shall be presumed, in the absence of a stipulation to the contrary, that only the solvency at the date of the assignment has been taken into account. The second-degree aggravation clause presupposes that the obligation to provide a guarantee is also assumed in respect of solvency after the date of assignment. If there is such an aggravation clause, the assignee, if he or she does not receive payment from the assignor because of the insolvency of the assigned debtor, is entitled to a refund of the assignment price plus the costs incurred in connection with the assignment.

96 II Civil Section, Decision No. 494 of March 8, 2016.

In the case of a first-degree aggravation clause, the assignor is, of course, not obliged to return the assignment price and costs if he or she can prove that the insolvency of the assigned debtor occurred after the assignment of the claim. In our view, the legal rule limiting the assignor's liability to the assignment price and costs is mandatory, and the aggravation clause imposing the assignor's liability for the nominal value of the claim if the assignment took place at a price lower than that value is null and void.

A specific situation arises if the assignor was aware of the insolvency of the debtor assigned at the time of the assignment. In this case, the legal provisions regarding the liability (legal warranty) of the seller of bad faith for hidden defects of the goods sold are applicable *mutatis mutandis*.

In the case of gratuitous assignment, the assignor shall by law, in the absence of any stipulation to the contrary, not even guarantee the claim's existence at the time of assignment.

Regarding the assignor's liability for eviction, this liability is applicable both in the case of assignment for consideration and in the case of gratuitous assignment. The assignor is liable for eviction if, by his own act, whether alone or in conjunction with the act of another person, the assignee does not acquire the claim or is unable to enforce it against third parties. The extent of the assignor's liability shall be determined according to the legal provisions relating to the liability of the bad faith seller for hidden defects in the goods sold.

Assignment of a contract[97] is not to be confused with the assignment of a claim, as the two legal institutions have their own rules and clearly defined distinctive characteristics.[98] Assignment of a contract is a new institution regulated by the provisions of the RouCC.[99] Significant differences between the assignment of a claim and the assignment of a contract emerge. In the case of assignment of claims, rights are transferred, but the assignment of a contract transfers an entire contract, or, more precisely, a contractual position (with specific rights and obligations). From the legal nature of the assignment of claims it follows that the assignee only enters into the assignor's rights and not into the assignor's obligations. Assignment of a claim does not require the consent of the debtor assigned, whereas assignment of a contract requires such consent from the assigned party, even though consent to the assignment of the contract may be given in advance (through a transferable contract clause). In the case of assignment of the contract, the assignor is released from his or her obligations toward the assigned party from the moment the substitution takes effect vis-à-vis the latter (perfect assignment). If the assigned contracting party has declared that it shall not release the assignor (imperfect assignment), he or she may enforce the contract against that assignor should the assignee fail to perform its obligations.

97 RouCC, Articles 1315–1320.
98 For further details, see Veress, 2020, pp. 261–263.
99 RouCC, Articles 1315–1320.

6. Serbia, Croatia, Slovenia

6.1. Serbia

The SrbLO regulates assignment (*ustupanje potraživanja*) in the part pertaining to the change of subjects in an obligation, at the very end of the article containing general provisions. It specifies that a creditor can transfer to a third party his or her claims against the debtor, except those whose transfer is prohibited by statute, *intuitu personae* claims, and claims that due to their nature are unsuited to being transferred.[100] Claims from certain contracts, such as a contract of mandate, a contract for works, or a contract for maintenance, are unsuitable to assignment.[101]

In addition, an agreement on the assignment of a claim has no legal effect toward the debtor if the assignment has been excluded by the agreement of the initial parties or if the assignment is contingent on the debtor's consent.[102] This rule has been subject to criticism because it does not take into account whether the assignee acted in good faith.[103] By assignment the creditor's accessory rights are also transferred to the assignee, such as the right to priority collection of the claim, mortgage, pledge, claims against a surety, claims for interest, and contractual penalties.[104] The object of the pledge may however be transferred into the possession of the assignee only if the pledgor consents. Otherwise, it remains in the possession of the assignor, who keeps it on behalf of the assignee.[105] It is presumed that the assignment comprises all due but unpaid interest as well.[106]

Following the traditional logic of the law of obligations, according to which it is irrelevant to the debtor to whom he or she is indebted but it is not irrelevant to the creditor who the debtor is, the SrbLO explicitly prescribes that the validity of the assignment does not depend on the debtor's consent. However, the creditor has a duty to notify the debtor about the assignment.[107] The legal relevance of the notification is to inform the debtor to whom the performance of the obligation should be directed. A performance to the assignor before the notification on the assignment discharges the debtor from liability for non-performance, provided he or she acted in good faith, that is, he or she was not aware of the assignment.[108] The issue of notification of the debtor gains special importance in the case of multiple assignments. In that case the claim to request performance belongs to the creditor who notified the debtor first, or who requested the performance first.[109]

100 SrbLO, Article 436 (1).
101 Stanković in Perović, 1995, p. 840.
102 SrbLO, Article 436 (2).
103 Tešić, 2012, p. 176.
104 SrbLO, Article 437 (1).
105 SrbLO, Article 437 (2).
106 SrbLO, Article 437 (3).
107 SrbLO, Article 438 (1).
108 SrbLO, Article 438 (2).
109 SrbLO, Article 439.

The SrbLO does not specify a formal requirement for a contract on assignment. According to the prevailing opinion in the literature, the form of the underlying contract determines the form of the contract by which assignment occurs. If the underlying contract is consensual, so is the contract on assignment. Conversely, if the underlying contract is formal, the assignment must also be concluded in the same form.[110] As a matter of fact, this applies only to claims arising from contract.

The SrbLO clearly differentiates the legal effects of the assignment between the debtor and the assignee from those between the assignor and the assignee. In terms of the relationship between the debtor and the assignee, the SrbLO specifies that the assignee may exert the same rights against the debtor to which the assignor was entitled at the time of the assignment.[111] Conversely the debtor is entitled to raise all objections against the assignee that he or she was entitled to raise against the assignor, if these existed prior to the date at which he or she gained knowledge of the assignment. As a matter of fact, the debtor may also raise objections against the assignee that are not related to the assigned claim.[112] Regarding the relationship between the assignor and assignee, the law differentiates two categories of assignment, taking into account the scope of the assignor's warranties. In general, the assignor warrants merely that the claim exists at the time of the assignment, provided the assignment is for consideration.[113] Consequently, if the claim is assigned by a gratuitous transaction, the assignor benefits from no warranties. However, the parties to the assignment can also agree that the assignor warrants the collectability of the assigned claim (*del credere assignment*). Even so, the scope of this liability is always restricted to the consideration that has been paid by the assignee for the assigned claim.[114] Any agreement of the parties specifying a stricter liability of the assignor shall be considered null and void.[115]

Finally, the SrbLO differentiates three special types of assignment. The first is the assignment that has the purpose of performing the assignor's debt toward the assignee by assigning the claim, entirely or in part (*ustupanje umesto ispunjenja*). This is nothing less than a special case of *datio in solutum*. The claim of the assignee is considered satisfied by the mere fact of assignment, entirely or in part, depending on the value of the claim assigned.[116] The second type is when the assignor assigns the claim for the purpose of collecting it from the debtor (*ustupanje radi naplaćivanja*). In this case the claim of the assignee toward the assignor is considered satisfied not at the time of the assignment, but only when the assignee receives actual performance from the debtor.[117] In both cases the assignee is obliged to transfer to the assignor all

110 See, for example Stanković in Perović, 1995, p. 839; Radišić, 2008, p. 375.
111 SrbLO, Article 440 (1).
112 SrbLO, Article 440 (2).
113 SrbLO, Article 442.
114 SrbLO, Article 443 (1).
115 SrbLO, Article 443 (2).
116 SrbLO, Article 444 (1).
117 SrbLO, Article 444 (2).

benefits received from the debtor beyond the assigned claim, or part thereof.[118] The third is the assignment of a claim for the purpose of securing the assignee's claim toward the assignor (*ustupanje radi obezbeđenja*). In this case, the assignee manages the claim with due diligence and collects payment from the debtor. If in the meantime the assignor performed his or her obligation toward the assignee, the latter confers all benefits received from the debtor to the assignor. If, however, the assignor did not perform, the assignee transfers the benefits received from the debtor, but in the value reduced by the value of his or her claim toward the assignor.[119] This third type is qualified as a fiduciary assignment.[120]

Aside from assignment regulated in the part pertaining to general rules of obligations, the SrbLO explicitly regulates the transfer of contract, for which it uses the term 'assignment of contract' (*ustupanje ugovora*). By such agreement, a party to a contract transfers his or her complete contractual position to a third party, that is, all the rights and duties arising from the contract. Since this agreement necessarily leads to a change of the debtor, the consent of the other contracting party is required.[121] The consent may be given in any form except in the case of formal contracts, where the consent is to be granted in the same form that is prescribed for the validity of the contract.[122] This is another case of the application of the principle of parallelism of formalities. Concerning the legal consequences regarding accessory rights, warranties of the transferor and objections that the transferee may raise against the other contracting party, the SrbLO prescribes similar rules to assignment of a claim and assumption of a debt.[123]

6.2. Croatia

The HrvLO took over the rules on assignment of claim (*ustup tražbine*) from the former federal law on obligations verbatim.[124] Only the systematization of the rules changed: The rules on the assignment of claims, like the rules on other cases of change of subjects in an obligation, have been removed from the end of the general part of the former federal law on obligations into the chapter preceding the general rules of contract law in the HrvLO. One terminological change of lesser importance has been implemented. The designation of the second special type of assignment has been modified from 'assignment for collecting the claim' into 'assignment for the purpose of performance' (*ustupanje radi ispunjenja*).[125]

Recent Croatian legal literature also considers assignment a consensual contract, but if the claim arises from a contractual obligation, the assignment must be

118 SrbLO, Article 444 (3).
119 SrbLO, Article 445.
120 Pajtić in Pajtić, Radovanović and Dudaš, 2018, p. 164.
121 SrbLO, Article 145 (1).
122 SrbLO, Article 145 (3).
123 SrbLO, Article 145 (4) and Articles 146–147.
124 HrvLO, Articles 80–89.
125 HrvLO, Article 88 (2) and (4).

concluded in the same form as the basic contract.[126] There are, however, authors who regard assignment in all cases as a consensual contract.[127]

Likewise, the rules on the assignment of contract also remained intact in terms of their content. However, they have been removed from the part of the former federal law pertaining to the legal effects of bilateral contracts into the chapter comprising various cases of change of parties to an obligation.[128] Only the designation of the legal institution changed. Instead of 'assignment of contract,' which was its name in the former federal law, it bears the designation 'transfer of contract' (*prijenos ugovora*). The literature points out that the new designation is more appropriate, since the word assignment can cause confusion because the same word is used for the assignment of claims.[129]

6.3. Slovenia

The SvnCO took over verbatim most of the rules on assignment of claims (*odstop terjatve*) and transfer of contract (*prenos pogodbe*) from the former federal law, whereby their systematization also remained intact: The assignment of claim is regulated in the chapter pertaining to change of parties to an obligation, at the very end of the first part of the SvnCO comprising the general part of the law of obligations,[130] while the assignment of contract remained regulated by the rules pertaining to legal effects of bilateral contracts.[131]

Concerning the rules on assignment, however, a major novelty may be identified. Whereas the former federal law, just like the SrbLO, prescribes that an assignment contrary to the parties' agreement prohibiting it is without legal effect against the debtor, the SvnCO explicitly specifies that such an assignment has no legal effect at all.[132] Such a general sanction of nullity may be considered too strict.[133] For this reason, the SvnCO envisages two exceptions. On the one hand, the SvnCO specifies that if, at the time of the assignment, a document has been produced evidencing the existence of the claim but that does not prohibit the transfer, the assignment shall be effective if the assignee did not know and was not under a duty to know of the prohibition of the transfer.[134] By this rule the SvnCO protects the legal interest of the assignee who acted in good faith. On the other hand, if the debtor and the creditor in relation to a claim from a commercial contract have agreed that the creditor will not be allowed to assign the monetary claim to another, the assignment is nevertheless effective. In that case, the debtor is released from his or her obligation even if he or she performs

126 Gorenc in Gorenc, 2014, p. 140.
127 Klarić and Vedriš, 2014, p. 445.
128 HrvLO, Articles 127–129.
129 Gorenc in Gorenc, 2014, p. 198.
130 SvnCO, Articles 417–426.
131 SvnCO, Articles 122–124.
132 SvnCO, Article 417 (2).
133 The Commentary of the SvnCO does not consider this change from the rules of the former federal law justified. Juhart in Plavšak, 2021.
134 SvnCO, Article 417 (3).

it to the assignor of the claim.[135] By this rule the SvnCO accommodated the rules to the realities of commercial transaction, where claims are regularly assigned by creditors in large numbers.

7. Slovakia

7.1. Overview

Slovak law recognizes only the assignment of a claim (*postúpenie pohľadávky*), but not the assignment of the entire contract. However, the assignment of the entire contract could be achieved to some extent through other instruments.[136]

As regards the assignment of a claim itself, its regulation is contained in § 524 et seq. of the SvkCC. This regulation applies to both commercial and non-commercial relationships.

7.2. Prerequisites for assignment

According to § 524 of the SvkCC, a written agreement between the new and old creditor (assignor and assignee) is required for the assignment to be valid; the debtor's consent is not required. With the assigned claim, its accessories (interest, default interest, etc.) and all rights related to it are transferred to the assignee. However, according to the literature[137] and case law,[138] this does not apply if the assignor and the assignee have agreed that the accessories or related rights do not pass on to the assignee.

7.3. Non-assignable claims

The SvkCC provides for certain exceptions where assignment is not possible.[139] First, a claim that is extinguished by the death of the creditor at the latest cannot be assigned, such as a claim for compensation justified by the pain and suffering endured. Nor can a claim be assigned if the content of the claim would be altered by a change of the creditor. According to case law, such a situation involves an assignment that would worsen the debtor's position;[140] however, such a worsening cannot occur if the claim is monetary.[141] Furthermore, a claim against which enforcement cannot be sought, e.g., a claim against social benefits received by the debtor up to a certain amount, cannot be assigned. Also, public law claims of the state cannot be assigned to private entities.[142] A doubtful issue is the assignability of

135 SvnCO, Article 417 (4).
136 E.g., assumption of debt (*prevzatie dlhu*) under SvkCC, § 531 (1).
137 Sedlačko, 2019.
138 R 34/1999.
139 SvkCC, § 525.
140 Supreme Court of the Slovak Republic, case No. 4 Cdo 105/2000.
141 Supreme Court of the Slovak Republic, case No. 4 M Obdo 2/2011.
142 Sedlačko, 2019.

a claim whose assignment would violate the protection of information, e.g., medical confidentiality.[143]

The SvkCC specifically stipulates that a claim cannot be assigned if the assignment would contradict the law or an agreement with the debtor.[144] According to both the literature[145] and the case law,[146] an assignment agreement that contradicts the agreement with the debtor is null and void. This means that there was no assignment of the claim and therefore no change of creditor occurred.

7.4. Effects of the assignment agreement

In Slovak law, an assignment agreement is by its very nature a contract by which rights are disposed of, i.e., the conclusion of the agreement directly results in the assignment (transfer) of the claim without the need for any further juridical act, unless the parties agree otherwise. Although the assignment must be notified to the debtor, the assignment is already effective upon conclusion of the contract.[147]

7.5. Protection of the debtor

Given that the assignment of a claim changes the creditor without the debtor's consent, the SvkCC ensures in several ways that the debtor's position is not worsened by the assignment.

First, the debtor may, pursuant to § 526 (1) of the SvkCC, continue to perform his debt to the original creditor (assignor) with the effect of extinguishing the obligation until the assignment of the claim is notified to him or her, or until the new creditor (assignee) proves the assignment of the claim to the debtor. On the other hand, if the assignor notifies the assignment to the debtor, according to case law[148] the debtor is not entitled to examine the validity of the assignment. Of course, the assignment must concern only a claim whose assignment is not prohibited under § 525 of the SvkCC.[149]

Another mechanism by which protection is provided to the debtor is his or her right to oppose the assigned claim by invoking any objection that he or she could have invoked against the assignor at the time of the assignment.[150] This includes, for example, the objection of the statute of limitation.

In the same way, the debtor may, pursuant to § 529 (2) of the SvkCC, claim a set-off of his or her claims against the assignee, if such claims are compatible with set-off (even if not yet due) and existed against the assignor at the time when the assignment of the claim was notified or proved to the debtor. However, he or she must notify the

143 According to Csach, 2015.
144 SvkCC, § 525 (2).
145 Sedlačko, 2019; Fekete, 2018.
146 R 46/2009.
147 Sedlačko, 2019; according to Csach, 2009a.
148 R 119/2003.
149 Sedlačko, 2019.
150 SvkCC, § 529 (1).

assignee without undue delay; otherwise his or her right to set off the claims will be extinguished.[151]

7.6. Protection of the assignee

Given that the debtor may still discharge the debt to the assignor after the assignment (until the assignment is notified or proved to him or her) and that he or she may still—even after notification of the assignment—set off his or her claims against the assignor to extinguish the assigned claim, it may happen that the assigned claim is extinguished without the assignee being satisfied. Therefore, the SvkCC protects the assignee to a certain extent.

If the assignment is for consideration, then according to § 527 (1) of the SvkCC, the assignor is liable to the assignee both for the existence and for the duration or extinction of the claim (*verum nomen*). Thus, if the claim does not exist, or if it did exist but has been extinguished by performance to the assignor or by set-off of the claim against the assignor, then the assignor is liable to the assignee. The law does not stipulate the content of this liability. There are several opinions in the literature, e.g., that liability for existence of the claim is a liability for damages,[152] or a liability (warranty) for defects,[153] and that liability for the duration (extinction) of the claim is based on a claim analogous to claims for unjust enrichment[154] or on a separate claim *ex contractu*.[155]

As for the liability for enforceability of the assigned claim (*bonum nomen*), according to § 527 (2) of the SvkCC, the assignee guarantees for the enforceability of the claim only if he or she has undertaken to do so in writing and only to the extent of the consideration received with interest.[156]

8. Concluding remarks

8.1. Overview

All jurisdictions analyzed, without exception, recognize the economic importance and benefits of the free circulation of claims and therefore as a rule allow the creditor (assignor) to transfer (assign) his claim by a contract to a third party (assignee) without the debtor's consent. Some jurisdictions even go beyond that to recognize the possibility of assigning the contract as a whole or of achieving a similar result through different legal instruments (see below). It seems that all the compared jurisdictions do not consider assignment a specific type of contract beside, say, a purchase or a donation agreement, but rather as a specific operation by which the claims are transferred from the assignor to the assignee.

151 Sedlačko, 2019.
152 Fekete, 2018.
153 Sedlačko, 2019; Hlušák, 2020.
154 Sedlačko, 2019.
155 Hlušák, 2020.
156 For further details see Hlušák, 2020.

8.2. Scope of assignable claims

All jurisdictions have free assignability of claims as a rule, while regulating specific exceptions to this rule by narrowing the scope of assignable claims. These exceptions usually aim to protect the debtor or other interests (either public or private) that the respective legislator deems worth protecting.

In all jurisdictions, a claim is not assignable if it is explicitly prohibited by statute. Under some jurisdictions (the Czech Republic, Romania, Slovakia), it is explicitly stated that the claims are unsuited for assignment if they would alter the claim's content to the detriment of the debtor. The intensity of the consequent change in the content of the claim necessary for that claim to be considered non-assignable differs from jurisdiction to jurisdiction. While under Czech law any notable change of the content of the claim to the detriment of the debtor leads to such a claim being non-assignable, Romanian law requires for the same effect that the obligation become substantially more onerous for the debtor.

It is common throughout the jurisdictions at hand to exclude personal claims from the scope of assignable claims. Some jurisdictions have an explicit statutory prohibition on the assignment of personal claims (e.g., Serbia, Croatia, Slovenia, and Hungary). Other jurisdictions like the Czech Republic, Slovakia, or Poland achieve similar results indirectly by either prohibiting the assignment of claims that lapse upon the creditor's death (the Czech Republic and Slovakia) or by prohibiting the assignment of claims if doing so would be contrary to the nature of the obligation, while including personal claims in this category (Poland).

Some jurisdictions allow the assignment of a future claim or a set of future claims. For example, Czech, Polish, Romanian, and Hungarian law all allow the assignment of future claims, provided they are sufficiently determined. In the case of Czech law, it is sufficient to identify the future claims by either their current or future legal cause or by specifying the type of claims and the time period in which these claims are to arise. On the other hand, Hungarian law strictly requires a legal cause extant at the time of the assignment for a valid assignment of future claims.

There are also various other types of claims that the respective legislator has excluded from the scope of assignable claims. For example, a restrictive approach to the assignability of claims stemming from public law is common throughout the compared jurisdictions.

The greatest diversity is—unsurprisingly—seen in the solutions taken to the problem of anti-assignment clauses. The difference is not only as to the effect of the anti-assignment clause (*inter partes* or *erga omnes*) but also regarding the consequences of breaching such a clause. In most cases the anti-assignment clause has *erga omnes* effects (the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, Romania, Poland). The anti-assignment clause has only *inter partes* effects under Hungarian law, where the only sanction for breaching such a clause is liability for damages. Not only that, Hungarian law even prohibits and declares null and void any clause that would provide for the right to terminate the contract or to request payment of penalty claim in the event of breach of the anti-assignment clause. The Hungarian approach strongly supports

free circulation of claims with all its economic benefits, but might be perceived as somewhat radical and ignorant of the legitimate interests of the debtors.

In the case of Romanian, Slovenian, and Polish law, there are few exceptions to the general *erga omnes* approach to the anti-assignment clause. Under Romanian law and, in Slovenian law also insofar as commercial claims are concerned, the anti-assignment clause has only *inter partes* effect if the claim is a monetary one. The aim is obviously to protect the free circulation of assets. Another exception is in cases where the anti-assignment clause is not expressly mentioned in the document establishing the claim and the assignee did not know and should not have known of the existence of the anti-assignment clause, thus protecting the good faith of the assignee (such is the case of Romanian, Slovenian, and Polish law). Regarding the second exception, one must ask to what extent the good faith of the assignee can be derived from such a document when it is not reliable evidence of the actual content of the legal relationship or even of its existence at the time of the assignment of claim.

The most common consequence of the breach of the anti-assignment clause in jurisdictions following the *erga omnes* approach is the assignment agreement being null and void or voidable (Slovakia, Slovenia, Poland, Romania), or assignment as such being ineffective against the debtor while keeping the assignment agreement valid (Serbia or Croatia). In the case of Czech law, there are still unfinished discussions as to whether the breach of the anti-assignment clause should result in the assignment agreement being null and void or voidable, or simply in assignment being ineffective vis-à-vis the debtor, as is the case of Serbian and Croatian law. There are of course also other subsidiary consequences, such as liability for damages.

8.3. Subject matter of the transfer

Under all the compared jurisdictions, the assignment of a claim transfers not only the claim itself but also the accessories such as interest or default interest and all rights related to the claim, including its security such as mortgages and pledges. Obviously, accessories and related rights are transferred to the assignee together with the assigned claim provided there is no different agreement between the assignor and the assignee (e.g., Slovakia, Hungary).

Usually, once the claim with a pledge as its security is assigned, the possession of the object of pledge passes to the assignee without any need for the pledgor's consent. That is only logical when one considers that the assignor has opted out of the creditor-to-debtor relationship and has usually no more interest in the pledge securing someone else's claim. Nevertheless, under Serbian, Croatian, Slovenian, and Romanian law, the possession of the object of pledge does not pass to the assignee unless the pledgor provides its consent to doing so.

8.4. Form of the assignment

The formal requirements for the assignment agreement differ in individual jurisdictions. In some cases, there are no formal requirements at all, meaning that the assignment agreement can be concluded in writing, orally, or in any other form deemed

admissible by the respective jurisdiction (for example, Hungarian or Czech law). In other cases, the assignment agreement must be compulsorily concluded in written form (see the Slovakian subchapter above). A specific solution can be found in Serbian or Croatian law, where the literature concludes that the form of the assignment agreement follows the form of the underlying contract.

The purpose of a written or firmer requirement of form is unclear. If it is to protect the debtor, then such protection is already sufficiently provided by other means, e.g., by the duty to notify the assignment to the debtor (see below). If it is to protect the assignor's creditors, then they can usually satisfy their own claims from the renumeration paid by the assignee, since the assignment agreement is usually a contract for pecuniary interest, or, in the case of gratuitous contracts, through the court declaring the assignment agreement ineffective vis-à-vis the creditor in some cases.

8.5. Moment of the assignment

Under all compared jurisdictions, the assignment of claim occurs simultaneously with the conclusion of a valid and effective assignment agreement unless the parties agree otherwise. From this very moment, the assignee is the rightful owner of the assigned claim. The subsequent notification to the debtor is relevant not for the transfer of ownership but for the assignment to become effective against the debtor (see below). Therefore, if the debtor discharges the debt by payment to the assignor before the assignment became effective against him or her, the assignee may have a claim against the assignor for whatever he or she received from the debtor based on unjust enrichment.

8.6. Protection of the debtor

The general principle underlying regulation of the assignment of a claim under all jurisdictions at hand is the protection of the debtor, whose position should not change due to the assignment of the claim.

Under all these jurisdictions, the assignment becomes effective vis-à-vis the debtor only after the debtor is notified of the assignment. It is also common in these jurisdictions that the notification can be made either by the assignor or the assignee. However, in the latter case the assignee is usually required, beside the notification itself, to prove the assignment to the debtor (e.g., Romania, the Czech Republic, Slovakia). Until the assignment becomes effective against the debtor, he or she is free to perform his or her debt to the original creditor (assignor), with the effect of extinguishing the obligation.

In some jurisdictions, the notification also has a special purpose in case of multiple assignments, resting in the fact that only the assignment that has been notified to the debtor first shall have effects vis-à-vis the debtor (e.g., Serbia, Croatia, Slovenia, the Czech Republic).

There are generally no formal requirements for the notification, so it may be done in any form deemed admissible by the relevant jurisdiction, with the exception of Romanian law, which requires a written form. Unusually, Romanian law also

regulates other means for the assignment to become effective against the debtor through the written acceptance of the debtor.

Under Slovakian law, the legislator also seeks to protect the creditor by taking away the debtor's right to examine the validity of the assignment if the assignment is duly notified by the assignor. The rationale behind this solution is that the debtor will discharge his or her debt by performing to the notified assignee even if the assignment agreement is invalid, and should therefore not consider such agreement's validity. However, this is already achieved by the notification when the debtor is discharged if he or she performs to the notified person (assignee), regardless of the validity of the assignment agreement. On the other hand, there are cases where a debtor has a justified interest in having the assignment agreement declared null and void.

The debtor is commonly also protected under the jurisdictions at hand by retaining all the defenses against the claim (e.g., invoking set-off or the statute of limitations) that he or she had at the time the assignment became effective against him or her. It is also common in these cases to modify the set-off rules so as to allow the debtor to use for the set-off all outstanding claims against the assignor, even if they were not yet due at the time the assignment became effective against the debtor (for details see, e.g., the Slovakian, the Czech, and with certain exceptions the Polish subchapters).

8.7. Protection of the assignee

In all the compared jurisdictions, if the assignment is for consideration, the assignor might be liable for legal or factual defects of the assigned claim. Analogously to tangible assets, the assignor should be primarily liable for defective performance if the attributes of the claim do not correspond to the agreed ones. However, it seems that individual jurisdictions (except for Czech law) are not explicitly concerned with this kind of liability. Instead, they all deal with the assignor's liability for existence of the claim at the time of the assignment (in the Slovakian case also for the duration of the claim) or for the solvency of the assigned debtor (or also 'collectability of the assigned claim'); in some cases, it is still under discussion whether this kind of liability should be considered liability for damages, for unjust enrichment, or for defective performance (Slovakia).

It seems that while liability for the claim's existence is automatic under all the compared jurisdictions (unless agreed otherwise), liability for the debtor's solvency needs to be explicitly stipulated except in Czech law, where even such liability is automatic. Either both or one of these liabilities (usually the liability for the debtor's solvency) is commonly capped up to the amount of consideration paid by the assignee, including, in some cases, interest or other costs (Slovakia, the Czech Republic, Serbia, Croatia, Slovenia, Romania). What is worth mentioning is that it is not possible under some of these jurisdictions to agree on stricter liability than what is regulated by statutory law, and agreement to the contrary would be considered null and void (e.g., Serbia, Croatia, Slovenia).

In the case of gratuitous assignment of a claim, the assignor is either not liable at all for existence and defects of the claim or for the debtor's solvency (collectability of the claim), or is liable only under special rules and to a very limited extent.

8.8. Assignment of contract

Most of the compared jurisdictions recognize not only the assignment of claim but also the assignment of contract (the Czech Republic, Serbia, Croatia, Slovenia, Hungary, Romania), which they obviously make subject to the consent of the assigned party. In other cases, similar results can be achieved by combining assignment of all the claims with assumption of all the debts under the contract (Slovakia, Poland).

Usually, the assignor should be released from its obligations arising out of the contract at the moment the assignment of the contract becomes effective against the assigned party. However, under both Czech and Romanian law, the assigned party can declare that it does not release the assignor from its obligations and as a result can request the assignor to perform obligations under the contract should the assignee fail to do so.

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