TRANSFER OF CONTRACTS IN CASE OF MERGER. WARRANTIES AND LOCATION

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Abstract

This article explores effects of the merger on the contracts that the companies involved in the restructuring operation. In the first section we analyze the general aspects regarding the effects of the merger operation on the contracts using arguments from the Romanian and foreign doctrine and jurisprudence. In the second section we investigate the consequences of the merger on the guarantee contracts from the perspective of the Romanian Civil Code, but also of the French regulations, presenting at the same time the position of the doctrine and the jurisprudence. The third section is dedicated to the effects of universal transfer operating in the case of the merger on real and personal guarantees. Section four deals with the legal regime of the lease, highlighting its intuitu personae character and the consequences of this character on the principle of universal transfer of assets, in case of merger. The last section is dedicated to the conclusions that aim to highlight the influence exerted by the principle of credit protection on the universal transfer of assets in the matter of mergers.

Keywords: *merger, universal transfer, lease, universal transfer of assets, surety, dissolution.*

JEL Classification: K22

1. Preliminaries

To note that the legal provisions that regulate the effects of the mergers do not include express provisions to regulate how the transfer of the contracts takes place.

Basically, the consent of the co-contractors of the company that ceases its existence as a result of the merger is not necessary as requirement for the transfer of the contracts to the company that is the beneficiary of the reorganization. No other special formalities are required except for those imposed by the merger process to achieve this transfer. The interested company with universal title that is beneficiary of the company that ceases its existence shall receive the contracts and continue their putting into practice.

Consequently, we consider that the transfer of the contracts shall be done similarly with other elements[3] of the patrimony transferred through merger. We can say that these contracts are the legal support of both the activity of the company and of its relations with physical and legal third parties.

The transfer of the contracts, in case of merger[4], takes place *automatically and lawfully*. The transfer takes place automatically as it is not conditioned by special formalities except for those imposed by the merger itself, and lawfully as this aspect is regulated by the law. Universal transmission that accompanies the merger of the companies cannot [5] be invoked as cause of *termination* of the contract. Thus, a co-contractor of the company that is the beneficiary of the merger cannot invoke the universal transmission as reason to terminate a contract that has been transmitted through merger. The caducity of the contract cannot be invoked either[6]because, as the doctrine says, caducity implies a valid legal act concluded that no longer can produce effects due to an event that occurred later.

There are no legal texts stipulating that a contract becomes outdated because the company that concluded it ceases its existence as a result of the merger. We also cannot consider that a contract belonging to the company that dissolves without liquidation as *outdated or perimated* as a result of

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[3] Bucharest Court of Appeal, 6th commercial section, Decision no. 1218 / 7.09.2011, irrevocable, not published in Hinescu A., *Fuziunea societăților*, Hamangiu, Bucharest, p. 73-75.
[4] Bastin V. D., *Les fusions et les scissions de sociétés*, J.-cl. Sociétés, fasc. 164-2.
[5] Wery P., *La théorie générale du contrat,* Rép. not., t. IV, Les obligations, Liv.1/1, Bruxelles, Larcier, 2010, p.984.
[6] Garron F., *La caducité du contrat,* P.U.A.M., 2000, p. 15.

the merger.

Although, in principle, the universal transmission as vehicle of merger is relatively simple, it raises certain questions. The first *problem is whether the contract is identical* with the one concluded between the „deceased" company and a third contracting party or arises from a new contract.

Another question relates to *the circumstances under which the contract will be put in practice.* In other words, if the initial requirements stay valid or not.

Considering that the patrimony is transmitted as it was at the moment when the merger took place, we appreciate as logical the answer according to which *the initial contract shall be put into practice*. This is the solution accepted by the French specialized literature. The French doctrine and jurisprudence[7] raised the issue of invoking the unpredictability in case of merger, as reply to the second question. **We consider** that the merger cannot be a reason to invoke unpredictability as most French courts pronounced[8], and we consider this solution to be applicable in the Romanian law, too.

2. Effects of the merger on the guarantee contracts

In the case of merger, the transfer of guarantees[9] should be the rule in order to apply the principle *accesorium sequitur principale.* On the other hand, to note that this rule operates in favour of one person who is not part to the guarantee contract. To note also that this transfer is accessory to the transmission of the main obligation.

In the French doctrine and jurisprudence[10], regarding the guarantees, they make the distinction between obligation of reimbursement (*obligation de reglement*) and obligations of coverage (*obligation de couverture*). The French Court of Cassation took over this distinction from the specialized literature and considers that the obligations of reimbursement are obligations with instantaneous performance arising together with the debts accepted by the main debtor. The coverage obligations are obligations with successive performance that arise at the moment when the guarantee contract is concluded.

The reimbursement obligation has patrimonial nature and it is not paid until the main obligation is paid. To mention that, from the moment when it arises, this obligation must be met. The coverage obligation operates between the appearance of the guarantee as a result of the conclusion of the contract and the moment when it is paid. Consequently, only the coverage obligation is susceptible[11] to be paid in the case of company merger. Regarding the coverage obligation, the merger is assimilated to the extinctive deadline, given the *intuitu personae* nature of the guarantee contract. On the contrary, the reimbursement obligation is not affected by the extinctive deadline. Thus, the transfer of the reimbursement obligation ensures a more efficient protection for the companies involved in the merger. In practice, we note that, in most cases, the guarantor, the creditor or the debtor are the absorbing company, so that the guarantees are maintained entirely both for the current debts and for the future debts.

The guarantees created by companies involved in the merger accompany the obligations[12] they undertook. In principle, the guarantees are accessory and they have the fate[13] of the obligations which they are attached to, so, if the obligations are transferred, it is logical that the guarantees follow the same evolution. Through merger, the subrogation of the debtor will take place, and not the novation of the debtor, so that the guarantees of the creditor do not disappear through merger. The absorbing company, newly created, shall inherit the obligations of the company that ceases its existence through merger.

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[7] Tallon D.V., *La révision du contrat pour imprévision au regard des enseignements récents du droit comparé* in Etudes à la mémoire d'Alain Sayag, Litec, 1997, p. 406.
[8] Cass.com.,31 mai 1988, Bull. civ. IV, n°189 ; R.T.D. civ.1989.71,
[9] Cristea S., *Capitolul V. Gajul* in Marilena Uliescu (coord.), *Noul Cod Civil. Studii şi comentarii-vol. III. Partea a II-a, Cartea a V-a. Contracte speciale. Garantii,* Universul Juridic Publishing House, Bucharest, 2015, p. 945-971.
[10] Cass.com., 29 June1982: D. S. 1983, p.360, note Mouly Ch.
[11] Cass.Com.,20 January 1987, J. C. P. G. 1987, II, 20844.
[12] Hinescu A., *Fuziunea societăţilor*, Hamangiu Publishing, Bucharest, 2016, p. 227.
[13] Cass. com., 22 January 1985: J. C. P. éd. G.1986, II, n°20 591.

3. Statute of the contracts of personal and real guarantee

The new Civil Code introduced[14] a legal definition of the personal guarantee in the provisions of art. 2280 in the New Civil Code (N. Civ. C.). In this article, the personal guarantee is a contract by which the guarantor, in relation to the creditor, undertakes the obligation of the debtor, if the latter does not meet this obligation.

The guarantor can undertake such an obligation[15]onerously of for free. The old regulation, namely the provisions of art.1652 of the Old Civil Code (Civ. C.), used the term bail for personal guarantee.

Any kind of obligation, irrespective of its concrete source or the owed performance, can be guaranteed. Generally, the obligations arising from the loan contracts are guaranteed. The guaranteed obligation must exist at present and be valid from the legal point of view at the moment when the personal guarantee contract is concluded according to the provisions of art.1653 para. (1) Civ. C. and 2288, para. (1) in the N. Civ. C. Exceptionally, future obligations can be guaranteed[16] like the ones affected by a requirement according to art.2288, para. (1) N. Civ. C.

The purpose of the personal guarantee contract is to guarantee the obligation of someone else. The guarantor is a subsidiary guarantor who must pay if the main debtor does not meet one's obligation as stipulated in the provision of art.1662 Civ. C. and 2293 the N. Civ. C. The guarantee has practical efficiency if the main debtor is not solvable when the creditor can act upon the guarantor of the subsidiary debtor. An issue in the foreign specialized literature is whether the company that is the beneficiary of the merger can use a guarantee contract concluded in favour of the company that ceases its existence. Related to this issue, we must also answer the question whether the changes in the legal state of the debtor involved in the merger causes the novation of the debt. The solution to this problem can be found in the provisions of art. 236-14 in the French Commercial code saying that the universal transmission of the patrimony is not novation in relation to the creditors of the company that ceases its existence.

To conclude, we can say that the modification of the legal state of the debtor involved in the merger does not cause[17]the novation of the debt. Through universal transmission, the company that is the beneficiary of the merger acquires all the liabilities and assets of the company that ceases its existence through concentration. The French jurisprudence does not retain such an interpretation and refuses to admit the automatic transfer of the guarantees to the absorbing company/created through merger. **We find,** therefore, that the French jurisprudence is contrary to the logic of universal transmission that accompanies the company merger.

In this respect, we can cite a decision of the French Court of Cassation of 6 March 1978. The legal status of a crediting company involved in a merger was analysed. The French Court of Cassation decided that, since a new legal entity results from the merger, the survival of the guarantee obligation for obligations arising after the merger cannot be accepted. In this respect, another decision of the French Court of Cassation stated[18] that, when the statute of subject of law of the debtor company ceases after a restructuring, the company can no longer be held liable for the obligations arisen after the merger.

To note, therefore, that the French jurisprudence decided that, when the legal personality of the guarantor is affected, this prevents the continuation of the guarantee contract. Such a jurisprudential solution is *worth criticizing since it questions one of the basics of the merger operation, namely the principle of universal transmission*. In such a logic, whenever the merger causes the creation of a new company or the dissolution of the beneficiary of the guarantee, the extinction of the guarantee takes place without the consent of the parties, that concluded the guarantee contract. From the point of view of the French jurisprudence, the merger attracts an extinctive effect

[14] Baias Fl. A., Chelaru E., Constantinovici R., Macovei I, *Noul Cod Civil. Comentariu pe articole*., C.H. Beck, Bucharest, p. 2221.
[15] Pop L., Popa I-F., Vidu S-I., *Tratat elementar de drept civil, Obligațiile*, Universul Juridic Publishing House, 2012, p. 779.
[16] Baias Fl. A., Chelaru E., Constantinovici R., Macovei I, *op.cit.*, p. 2231.
[17]Angheni S., Stoica C., Volonciu M., *Drept comercial*, C.H. Beck, Bucharest, p. 209.
[18] Damy V. G., *Le cautionnement et la transmission universelle du patrimoine*, Droit § Patrimoine, n°129, September 2004, p. 46.

upon the guarantees. A decision of the French Court of Cassation of 8.11.2005 stated that, in case of absorption of a company, the owner of a rented building who guaranteed the payment of the rent, the contract, shall be transmitted lawfully to the absorbing company. This decision and another decision of 6.12.2004 looked like a reorientation of the jurisprudence in this field, in the sense of accepting the transfer of the guarantee contracts without limitation of the guarantee to obligations arisen before the merger.

Later, the Court of Cassation returns to the old practice to limit the guarantee to obligations that arose prior to the merger. We can cite the decision of the French Court of Cassation of 30.06.2009.[19] The types of guarantees for which the guarantee obligations end are the future and the non-determined obligations. This aspect regards the main debtor, the creditor and the guarantor.

4. Effects of the merger on the lease

If the beneficiary of the use right is the absorbed company, the merger does not affect the existence of the lease contract. In such a case, the absorbing company shall acquire the capacity of lessee replacing the company that ceases its existence. The company newly created through merger, except[20] it is stipulated otherwise, shall replace the company for which the lease contract had been concluded in terms of rights and obligations arising from this convention.

Another aspect to analyze is the case where the merger contract includes a clause on the termination of the contract in case of merger.

In this case, *the first* solution would be that the lease contract cease since it represents the will expressed by the contracting parties. The *second* solution would be that this convention produces its effects after the merger, even if it is contrary to the express will[21] of the parties materialized in the clause that regards the end of the contract to the merger.

The company that ends its existence can have the capacity of lessor or lessee in the lease contract, whose object can be either movable or immovable assets. If the absorbed/integrated company has the capacity of lessor through the merger, the lease contract shall be transmitted lawfully to the company that is the beneficiary of the merger. In such a case, the lessee shall be notified about the new lessor.

In case the absorbed company has the capacity of lessee, the answer implies several aspects. Given the translative nature of the merger, we can consider that the lease contract is transmitted automatically to the company that is the beneficiary of the merger, similarly to the previous hypothesis. If the contract is concluded *intuitu personae* or it includes clauses that ban the lease, the transfer shall not take place automatically.

According to the provisions of art. 240 in the N. Civ. C., in case of contracts concluded *intuitu personae*, they do not cease their existence except for cases where the parties involved expressly stipulated otherwise or the preservation and the allocation of the contract is conditioned by the consent of the interested party.

In this case, we believe that the notification procedure must be complied with, as stipulated by the provisions of art.240 in the N. Civ. C. according to art.240, para. (2) if the preservation or the allocation[22] of the contract depends on the consent of the interested party, that party shall be notified or informed, as the case may be, through registered letter, to have that party express the consent within 10 working days since the moment of the notification of informing. To the extent to which the interested party does not reply within the deadline mentioned above, this shall be seen as equivalent to the refuse to preserve or to take over the contract as inheritor legal person. In the particular case of the merger, we consider the phrase inheritor legal person to be interpreted as the absorbing company

[19] Cass-com 30 June 2009 no 08-10709.
[20] In the sense that a lease contract has no *intuitu personae* nature, unless it is expressly stipulated as such, See Hinescu A., *op. cit.*, p. 250.
[21] Such a solution would reconcile the *intuitu personae* nature of the lease contract with the universal transfer of the patrimony of the absorbed company as stipulated by the provisions of art. 250 in the Company Law.
[22] Baias Fl. A., Chelaru E., Constantinovici R., Macovei I., *Noul Cod Civil. Comentariu pe articole*, C.H. Beck, p. 236.

or the newly created company.

5. Conclusions

We note that, in the French law, this aspect is analyzed rather in an economic perspective with the goal to ensure the best protection for the loan.

After analyzing the solutions in the French jurisprudence in this field, we note that they are based on three arguments.

The first argument relates to the fact that, upon the conclusion of the contract, clearly defined creditors and debtors are taken into consideration. The modifications caused by the merger are not taken into account upon the conclusion of the guarantee contract.

The second argument used to define these solutions that are contrary to the principle of universal transmission relates to the principle of relativity of the effects of the contracts consecrated in the Romanian legislation by art. 1280 in the N. Civ. C. and in the French legislation by art. 1165[23] in the French Civil Code (Fr. Civ. C.). The effects of the guarantee contract are considered to affect only[24] the parties that concluded it.

The third argument is based on the provisions of art. 2290[25] in the Fr. Civ. C. It is argued that a guarantee cannot exceed the limits it had when it was concluded. From this point of view, the merger is seen as a cause that generates an extension of the coverage of the guarantee contract.

We consider the arguments above-mentioned no longer valid in the Romanian law to motivate the blockage of the universal transmission of the patrimony which, in the case of the merger, takes place *ope legis*. Since the Romanian doctrine in this field is lacunary, we shall analyze in detail the reasons why we criticize the arguments of the French jurisprudence. One first finding after analyzing the jurisprudential solutions mentioned above is that they are contrary to the principle of universal transmission and they must be rejected as they lack basic logic.

Except for the case where the guarantee contract includes a clause that limits the coverage of the guarantee, the above-mentioned jurisprudential solutions cannot be justified. The first argument to counter the jurisprudential solutions that plead for the guarantees transfer is that they are contrary to the law as the law stipulates that the merger causes the universal transfer of the patrimony from the company that ceases its existence to the company that is the beneficiary of the merger.

Another argument that can be invoked to define the transfer of the guarantee contracts can be found in art.1692[26] in the Fr. Civ. C. According to this article, the sale or the lease of a debt shall include its accessories as well. The guarantees constituted for these debts are accessory in relation to the debt that they guarantee.

Since this principle applies to a debt sale, it will apply furthermore to the universal transfer of the patrimony caused by the merger.

The third argument that can be used to justify the guarantees transfer can be found in the principle of the compulsory force[27] of the contracts. Regarding the principle of relativity of the effects of the contracts, to note that, according to the law, it produces effects except for a few cases stipulated by the law. **We consider that** the universal transfer[28] of the patrimony is such an exception. We can say that there are no solid arguments to exclude the guarantee contacts from the transfer. **To conclude,** we believe that, through the merger, the transfer of the guarantee contracts in the patrimony of the company that ceases its existence takes place.

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[23] Les conventions n'ont d'effet qu'entre les parties contractantes ; elles ne nuisent point au tiers, et elles ne lui profitent que dans le cas prévu par l'article 1121.

[24] Cass. com., 17 July 1990: J.C.P. éd. E 1991.

[25] Le cautionnement ne peut excéder ce qui est dû par le débiteur, ni être contracté sous des conditions plus onéreuses. Il peut être contracté pour une partie de la dette seulement, et sous des conditions moins onéreuses. Le cautionnement qui excède la dette, ou qui est contracté sous des conditions plus onéreuses, n'est point nul: il est seulement réductible à la mesure de l'obligation principale.

[26] Celui qui vend un droit incorporel doit en garantir l'existence au temps du transport, quoi qu'il soit fait sans garantie.

[27] Beleiu G., *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, Universul Juridic, Bucharest, 2007, p. 196-197.

[28] Ibid, p. 209.

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