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ПЕРЕВЕДЕННЯ БОРГУ ПРИ РЕОРГАНІЗАЦІЇ ГОСПОДАРСЬКОГО ТОВАРИСТВА

Анотація. *Стаття присвячена дослідженню співвідношення конструкції переведення боргу як способу заміни осіб у зобов'язанні та реорганізації як форми припинення господарського товариства. Зважаючи на законодавчі акти, автор зробив висновок про наявність сингулярного правонаступництва під час ліквідації господарського товариства. Критерієм розмежування ліквідації та реорганізації запропоновано вважати наявність або відсутність виключно універсального правонаступництва. Наявність універсального правонаступництва при реорганізації визначається умовою, яка унеможливлює застосування в означеному випадку конструкції переведення боргу. Автор звертає увага на відсутність усталеної позиції національних судів щодо можливості застосування конструкції переведення боргу в межах реорганізаційної процедури. Розглянуто основні доктринальні підходи та підходи національних судів до співвідношення реорганізації як форми припинення господарського товариства та конструкції переведення боргу. За результатами проведеного дослідження зроблено висновок про неможливість застосування конструкції переведення боргу у правовідносинах. Встановлено, що необхідність застосування до правовідносин, які виникають у процесі реорганізації господарського товариства, конструкції sui generis, яка б передбачала перехід боргу за наявності універсального правонаступництва, визначається недостатньо обґрунтованою.*

Ключові слова: правонаступництво, кредитор, загальні збори, особа-правонаступник.

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ПЕРЕВОД ДОЛГА ПРИ РЕОРГАНИЗАЦИИ ХОЗЯЙСТВЕННОГО ОБЩЕСТВА

Аннотация. *Статья посвящена исследованию соотношения конструкции перевода долга как способа замены лиц в обязательстве и реорганизации как формы прекращения хозяйственного общества. Учитывая законодательные нормы, автор сделал вывод о наличии сингулярного правопреемства во время ликвидации хозяйственного общества. Критерием разграничения ликвидации и реорганизации предложено считать наличие либо отсутствие исключительно универсального правопреемства. Наличие универсального правопреемства при реорганизации определено условием, исключающим применение в данном случае конструкции перевода долга. Автор обращает внимание на отсутствие устоявшейся позиции национальных судов относительно возможности применения кон-*

струкции перевода долга в пределах реорганизационной процедуры. Рассмотрены основные доктринальные подходы национальных судов к соотношению реорганизации как формы прекращения хозяйственного общества и конструкции перевода долга. По результатам проведенного исследования сделан вывод о невозможности применения конструкции перевода долга в правоотношениях, возникающих в процессе реорганизации). Установлено, что необходимость применения к правоотношениям, возникающим в процессе реорганизации хозяйственного общества, конструкции sui generis, предусматривающей переход долга при наличии универсального правопреемства, определена недостаточно обоснованной.

Ключевые слова: правопреемство, кредитор, общее собрание, человек-правопреемник.

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TRANSFER OF A DEBT IN COMPANY REORGANIZATION

Abstract. *The article focuses on debt transfer as a legal construction and reorganization as a type of termination of a company ratio. The Author suggests that the guideline of a company liquidation and reorganization is universal succession. Universal succession resulted from reorganization is proposed as a condition which excludes application of a debt transfer construction. Debt transfer and reorganization ratio encouraged to consider from the perspective of need for a creditor's consent providing. In particular, there is a need for creditor's consent under the debt transfer procedure. And there is no named rule under the procedure of reorganization. The Author described main doctrinal approaches and national judicial interpretations regarding reorganization as a type of termination of a company and debt transfer legal construction. The study found that application of a debt transfer construction under the reorganizational legal relations is not possible. A need for application of a sui generis legal construction, which stands on necessity of application of a creditor's consent under the reorganizational procedure, is defined as ill founded.*

Keywords: succession, creditor, general meeting, legal successor.

INTRODUCTION

In compliance with Part 1 Art. 104 of CC of Ukraine [1], a legal entity shall terminate as a result of reorganization or liquidation. The criterion of distinguishing between reorganization and liquidation shall be the existence or absence of legal succession at termination [2, c. 12–13; 3, c. 168; 4, c. 373; 5, c. 25].

Reorganization as a form of termination of a company envisages transfer of rights and obligations of a legal entity to its legal successors. It is succession, which is defined as the basic element of a legal construction of reorganization [6, c. 39].

Along with that, certain legislative norms give the grounds for making a conclusion about the availability of singular legal succession at the time of liquidation of a company. First of all, it is referred to Art. 609 of CC of Ukraine, Part 3 of Art. 205

of CC of Ukraine [7], Art. 56 of Law of Ukraine "On companies with limited and additional liability" [8] and Art. 95 of Law of Ukraine "On restoring solvency of the debtor or recognizing him as a bankrupt" [9].

Respectively, it is expedient to consider the existence or absence of universal succession exclusively as the criterion of distinguishing between liquidation and reorganization.

The author stated that the existence or absence of universal succession at reorganization of a company has an essential practical importance. Thus, the existence of universal succession at reorganization excludes the possibility of application of debt transfer construction in the above-mentioned case [10, c. 107]. It is worth considering division between reorganization and debt transfer through the prism of the necessity of obtaining consent of the creditor. Particularly, debt transfer envisages consent given by the creditor, while at reorganization only a notification of the creditor is required. In law – enforcement practice quite multiple are cases of identification of reorganization procedure with debt transfer, which preconditions the necessity of obtaining the creditor's consent for performing the procedure of termination.

The judicial practice in this regard is not quite established, as well. The above-stated underlines timeliness of the topic of this article. The possibility of application of debt transfer construction to legal relationships arising at the time of termination of companies in the form of reorganization was the subject – matter of scientific research performed by O. I. Agapova [11], O. V. Bakulina [6], S. S. Dukanova [10], O. P. Kibenko [12], P. O. Pysemskyi [13], O. Stepanenko [14].

1. MATERIALS AND METHODS

The methodology of legal science is defined as the system of principles and methods of organization and carrying out theoretical – cognitive legal activity in the field of researching public and legal reality, as well as teaching about this system. In this work, for analysis of debt transfer at establishing a company, general scientific methods were used, same ones as used for studying a certain group of objects of the same kind, dependency, subordinance and interpenetration.

An important place in the structure of methodology of legal science is taken by its theories and conceptual and categorical framework. The legal theory, if it is used for studying public and legal phenomena, turns to the scientific method, the peculiar features of application of which are defined by peculiar features of the theory, its designate purpose, functions, and the conceptual framework. The theory playing the role of the method of scientific knowledge allows explaining public and legal phenomena, reveal and study their new properties, forecast evolvement of phenomena. Owing to scientific methods three approaches to the interrelation of reorganization as a form of termination of a company and debt transfer construction has been defined.

As well, for more detailed studying of the raised question, the author analysed of legislative acts. Taking into consideration norms of Art. 609 of CC of Ukraine, Part 3 Art. 205 of CC of Ukraine, Art. 56 of Law of Ukraine "On companies with limited and additional liability" and Art. 95 of Law of Ukraine "On restoring solvency of the debtor or recognizing him as a bankrupt", the author made a conclusion about the existence of singular legal succession at the time of liquidation of a company.

It has been established that division between reorganization and debt transfer was suggested to be considered in terms of the necessity of the creditor's consent. Particularly, debt transfer envisages the availability of such creditor's consent, and in case of reorganization just notification of the creditor is required. Under the results of the carried out study the conclusion was made about the impossibility of applying debt transfer construction in legal relationships arising in the process of reorganization, which, in the author's opinion, is confirmed by:

1. Different legal nature of norms regulating transfer of debt obligations;
2. Different grounds for arising of obligations of the subjects of legal relationships;
3. The existence of universal succession at termination of a legal entity by means of reorganization;
4. General principles of corporate rights (such as own will of a legal entity, management rights of the respective legal entity belonging to its bodies on the grounds of Part 1 of Art. 97 of CC).

2. RESULTS AND DISCUSSION

The analysis of doctrinal approaches and judicial practice gives the grounds for distinguishing between three approaches to the interrelation of reorganization as a form of termination of a company and debt transfer construction:

(1) the need of application to legal relationships arising in the process of reorganization of a company, debt transfer construction;

(2) the impossibility application debt transfer construction y legal relationships arising in the process of reorganization;

(3) the need of application to legal relationships arising in the process of reorganization of a company, specific legal construction (construction *sui generis*), which is not debt transfer, but, along with that, envisages giving the creditor's consent to reorganization.

Let's consider the above-mentioned approaches.

(1) The need of applying Art. 520 of CC of Ukraine, according to which the debtor under the obligation can be replaced by another person (debt transfer) upon the creditor's consent only, unless otherwise envisaged by law, at carrying out reorganization of a company, is quite often mentioned in judgements of national courts.

Particularly, the Supreme Economic Court of Ukraine (hereinafter – the SECU) in its Order of 26th March 2013 in the case No 5011-74/6564-2012 [15] stated that defining one limited liability company (hereinafter – LLC) as the legal successor of rights and obligations of another LLC in liabilities with the plaintiff, actually means replacement of the debtor under liabilities to the plaintiff.

In the above-mentioned Order the SECU also stated that LLC – legal successor did not provide proper and acceptable evidences of the creditor's consent to replacement of the debtor by means of reorganization.

So, according to the above-mentioned legal position, at approving the separation balance sheet it is required to obtain a written consent from each creditor of a company, which made decision about reorganization according to the procedure envisaged by Art. 520 of CC of Ukraine.

Within the context of the above-mentioned we shall state that certain scientists define reorganization as unilaterally binding legal act [16; 17]. To support this position B. P. Arkhipov states that all legal relationships at reorganization arise on the grounds of respective legal documents (contracts) of companies. Reorganization as a complex legal fact consists of a number of consecutive legal facts. The final legal act in the above-mentioned legal composition is fulfilment of the reorganization contract under conditions defined in the resolution of the competent body of the company.

We shall mentioned that B. P. Arkhipov defines reorganization legal acts, first of all, as acts, the subject – matter of which is the property complex, and in view of that (by characteristics of the subject – matter), they are similar to sale-purchase contracts and property complexes lease contracts. So, such legal documents have dualistic nature, which manifests, on the one hand, in realization of the principle of legal succession between subjects (reorganizing companies), and on the other hand – it refers to succession of a special object – property complex.

Scientific literature [18] also studies the problem of acknowledging reorganization of a legal entity invalid, and, respectively, in this case, – the possibility of application of norms regulating acknowledgement of invalidity of the legal document.

The author notes the fact that the above-stated position regarding acknowledgment of reorganization through a legal document has the purpose of resolving certain practical problems within the limits of reorganization procedure. It is difficult to agree with the above-mentioned approaches to defining reorganization because of the following reasons.

Firstly, in case of determining reorganization as a legal act, two types of legal succession within the limits of one legal procedure occur simultaneously: singular and universal one. The said above is inconsistent with "classical" understanding of reorganization as a type of termination of a legal entity, which is mediates by universal succession exclusively.

Secondly, determination of the reorganization procedure as a legal act does not correspond to the generally accepted in civil law approach to defining the legal nature of resolutions of management bodies of a legal entity.

Thirdly, determination of reorganization as a legal act is based on understanding of a legal act as intentions, and not actions, which does not correspond to Part 1 of Art. 202 of CC of Ukraine, and does not take into account will-based characteristic of a legal act, which envisages achieving a specific result, purposive character of an action being the subject- matter of a legal act. At determining reorganization as a legal act only legal characteristic is taken into account, which is reduced to arising, changing or termination of civil rights and obligations [6, c. 28].

In scientific literature it is expediently noted that in case of determining the reorganization procedure as a legal act, establishment and liquidation of a legal entity shall also be placed into the category of legal documents, which does not correspond to the established understanding of the above-mentioned legal categories in the modern civilistic doctrine [6, c. 32–33].

(2) The opposite legal position is set forth in the Order of the SECU of 30th March 2017 in the case No 909/504/16 [19].

In this case the subject-matter of the claim constituted demands of the bank to acknowledge the Resolution of the general meetings of members of LLC on termination of a company by means of division as invalid. Claims of the bank were based on the fact that legal entities, which will be established as a result of division as legal successors of rights and obligations of LLC to be terminated actually is replacement of the debtor under liabilities towards the bank.

Refusing to satisfy such claims, the SECU, among others, gave the following arguments:

1. LLC – legal successor established as a result of division shall bear subsidiary liability for obligations of a legal entity, which was terminated, which was transferred to such legal entity – successor according to the division balance sheet;

2. If legal entities – successors, which were established as a result of division, are more than two, they shall bear jointly such subsidiary liability;

3. The transfer act and division balance sheet shall be approved by members of a legal entity or the body, which made decision about its termination, except for cases established by law and shall contain provisions on succession regarding property, rights and obligations of a legal entity being terminated by means of division, in respect to all its creditors and debtors, including obligations objected by the parties;

4. Breach of the above-mentioned requirements shall be the reason for refusal from carrying out state registration of legal entities -successors;

5. Resolution of the general meetings of members of a company on termination by means of division prior to state registration of legal entities -successors have binding nature just for members of the company, which the bank does not belong to;

6. Division of the company and replacement of the debtor under the obligation are notions independent and different by essence, which are regulated by different legal norms.

The SECU also noted that at division there is a transition of a part of the legal entity's property, rights and obligations to the newly established company, and in case of replacement of the debtor there is only debt transfer exclusively in the existing binding relationships.

It shall be noted that in this case the court not only did not apply the general norm of Art. 520 of CC regarding debt transfer, but also cancelled the status of a "third person" of "legal entities -successors of the company being terminated by means of division. Thus, in the cited court resolution it is stated that the bank referred to norms of Part 3 Art. 9 of Law of Ukraine "On mortgage" [20], according to which the mortgagor can alienate the subject of the mortgage upon the consent of the mortgage holder only. However, in case of division property, rights and obligations are transferred to the legal successor – legal entity established as a result of division, and not to third persons.

The SECU came to the similar conclusion in its Order of 14th December 2016 in the case No 922/863/16 [21], also not having applied norms of Art. 17 of Law of Ukraine "On pledge" [22] and Part 2 Art. 586 of CC, according to which the pledge holder's consent is required – and the plaintiff in this case had the status of the pledge holder – for issuing shares of the joint- stock company and their further conversion. The SECU drawn attention to powers of the general meetings of shareholders regulated by Art. 159 of CC and Art. 32 of Law of Ukraine "On joint-stock companies" [23], and emphasized that the general meetings of shareholders can resolve any matters of activities of the joint- stock company on the grounds of Part 1 Art. 33 of Law of Ukraine "On joint-stock companies". The SECU also stated that the plaintiff did not refer to any norm of law, which would give the right to the non-member of the joint- stock company to interfere with procedures of the general meeting. The SECU came to the similar conclusions in its Order of 12th December 2016 in the case No 910/31409/15 [24] stating that there are no evidences of rights of the creditor under the facility contract in the claim concerning acknowledgement of the invalidity and cancellation of the resolution of shareholders recorded in the minutes of the general meeting of shareholders of the joint-stock company and non-application of Art. Art. 520, 586 of CC and Art. 17 of Law of Ukraine "On pledge".

This position is largely supported in legal science [6, c. 30–33; 10, c. 107].

The following arguments can be mentioned to support the impossibility to apply debt transfer construction in legal relationships arising in the process of reorganization: *(1)* different legal nature of norms regulating transfer of debt obligations; *(2)* different grounds of arising of obligations in the subjects, who entered into legal relationships; *(3)* the existence of universal succession at termination of a legal entity by means of reorganization [25, c. 33]. In opinion of O. R. Kibenko, the absence of the need to obtain consent from each of creditors of a legal entity to debts transfer is one of characteristics of reorganization. Thus, general norms of civil law regarding replacement of the debtor under the obligation shall not be subject to application at carrying out reorganization (*reorganization procedure envisages simplified order of replacement persons under the obligation*) [26, c. 193].

Back in the end of the 19th century P. O, Pysemskyi wrote that the least of all creditors can influence the wish of shareholders to terminate the company, even in case when fulfilment of obligations towards them is related to its existence. The company is not obliged to be in existence – same as any contract it can be terminated by its members [13, c. 207].

The SECU came to the similar conclusions in its Order of 30th March 2017 cited above [19]. In opinion of the judicial panel, the plaintiff did not substantiate the right of the non-member of the company to interfere with activities of the general meeting of members of this company by means of giving instructions and making various decisions at the general meetings (including decision about division). We can affirm that reorganization may include such legal fact as the amalgamation contract. At the same time, the existence of such legal fact cannot serve as sufficient grounds for determining the reorganization procedure as a legal act. Thus, norms regarding the invalidity of legal documents, norms defining rules of replacement persons under the obligation and the like shall not be applied to legal relationships arising in the process of reorganization [6, c. 33].

(3) O. I. Agapova suggests application of construction *sui generis* to the studied legal relationships. Particularly, she suggests using the expression *"debt transfer"*. Under the term *"debt transfer"* shall be understood debt transfer as a result of universal succession at reorganization of a legal entity on the grounds of law. In such case reorganization shall be acknowledged as a legal fact evoking debt transfer. With that, the creditor's consent to such "*debt transfer*" is not required as the creditor can intervene with it. The creditor is entitled to demand termination or early fulfilment of obligations and compensation for damages. The fact of not lodging such demands by the creditor shall mean his actual consent to debt transfer [11, c. 10–11, 91–92].

In the author's opinion, carrying out of reorganization shall not be considered in the plane of will and will expression of creditors of a legal entity, which members made decision on reorganization. In this case transfer of rights and obligations of such legal entity shall be carried out on the grounds of law. Under such conditions, mechanisms of protection of rights of creditor's are established by current laws, particularly Art. 107 of CC of Ukraine.

Within the context of the stated above, the author referred to the logic principle known as "Occam's razor": *everything shall be simplified till it is possible, but not further than that*.

Thus, we can state that there is no need of implementation of a new legal construction (by the example of "*debt transfer*").

In case of norms regulating debt transfer, which are the element of the obligation law, extending to the category "transfer of rights and obligations", there is the risk of mixing the above-mentioned civil and legal categories, which, certainly, will affect the process of administration of law.

CONCLUSIONS

The carried study gives the grounds for making the following conclusions:

1. Division between reorganization and debt transfer shall be considered through the prism of the need of obtaining the creditor's consent. Particularly, debt transfer envisages the existence of the creditor's consent, while at reorganization just notification by the creditor is required.

2. Analysis of scientific approaches and judicial practice gives the grounds for distinguishing three approaches to interrelation of reorganization and debt transfer: (1) the need of application of debt transfer construction to legal relationships arising in the process of reorganization of a company; (2) the impossibility of application of debt transfer construction in legal relationships arising in the process of reorganization; (3) the need of application of a specific legal construction to legal relationships arising in the process of reorganization of a company, which is not debt transfer, but, along with that, envisages giving the creditor's consent to reorganization.

3. The impossibility of application of debt transfer construction in legal relationships arising in the process of reorganization is confirmed by: (1) different legal nature of norms regulating transfer of debt obligations; (2) different grounds of arising of obligations for the subjects entering into legal relationships; (3) the existence of universal succession at termination of a legal entity by means of reorganization; (4) general principles of corporate rights (such as own will of a legal entity, management rights of the respective legal entity belonging to its bodies on the grounds of Part 1 Art. 97 of CC).

4. The need of application of construction *sui generis* to legal relationships arising in the process of reorganization of a company envisaging debt transfer in case of the existence of universal succession is not considered as enough substantiated.

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