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THE CONTRACT FOR SALE OF COMPANY

It is a type (absolute) business according to the Section 261(3) CC. The contract for sale of company[1] became a standard contract type in the Czech contractual business law. During its conclusion it is needed to proceed in a qualified way and not superficially.

The legal regulation (the provisions of Sections 476–488a CC) of the contract for sale of company has many cogent norms in comparison with other contracts enumerated in the Commercial Code (see Section 263 CC). The cogent norms can not be changed with an agreement of contractual parties (the cogent norms are Sections 476, 477, 478, 479(2), 480, 483(3), 488, 488a CC). The contract must correspond with the basic provision (it means the Section 476 CC. This basic provision was considered as a cogent one thanks to the cogent norm Section 269(1) CC, in fact the basic provision was mediated as a cogent one before the harmonisation amendment, today the cogent character of the provision is clear from Section 263(2) CC).

Pursuant to Section 476(2) CC the contract for sale of company must be in writing. The written form is also obligatory for conclusion of the contract (before the harmonisation amendment we considered the provision of Section 476(2) 2 CC as a cogent one with regard to Section 272 CC). Nowadays the cogent character of the provision is also stated in Section 263(2) CC. A cogent character has each of the provisions which state an obligatory written form (see Section 263(2) 2 CC). It is in force for the report according to Section 483(1) CC, too.

The Basic Provision

According to Section 476 CC the seller covenants to pass the company to the purchaser and to transfer the ownership of the company to him and the purchaser

1 K. Marek, Smlouva o prodeji podniku a smlouva o nájmu podniku ve Obchodněprávní smlouvy, Brno 2004, 320 p. and the literature cited in the book.

covenants to take over seller´s obligations connected with the company and to pay the purchase price.

The purchase price is not the essential part of the contract. The essential part is only the obligation to pay the price. But the agreement about the price is very important.

The essential parts of the contract – besides the identification of the contractual parties:

- the obligation of the seller to pass the company to the purchaser;
- the obligation of the seller to transfer the ownership of the company to the purchaser;
- the identification of the company;
- the obligation of the purchaser to hand over the seller's obligations;
- the obligation of the purchaser to pay the purchase price.

The question – What is the company? – is answered in the provision of Section 5 CC.

The harmonization amendment did not change the provision of Section 5(1) CC which defines the company for the purpose of the Commercial Code. The company means an assembly of material, personal and immaterial components of business. Components of the company are also things, rights and other assets which belong to the businessman and serve the business or should serve this purpose.

On the other hand, the provision of Section 5(2) CC was changed with the harmonisation amendment and nowadays it states that the company is a mass thing. Its legal mode is governed by the regulation about things in a legal sense. The scope of special laws connected with real estates, things of industrial property and of other intellectual property, automobiles, etc. is applied, if they are components of the company.

In the case of the contract for sale of company a whole company must be passed (or a part of the company according to Section 487 CC). The Supreme Court of the Czech Republic rendered the judgment No. R 30/97 in the same meaning. Pursuant to the judgment the essential parts of the contract for sale of company are stated in Section 476(1) CC and the contract must contain the parts if it is the contract type

which is regulated by the relevant provisions[2] (the judgment can be used even if the basic provision was changed).

It is recommendable to accept these amendments, according to witch changes of the contract for sale of company must be in writing (to avoid any questions in respect of Section 272(2) CC)

In our opinion, de lege ferenda it is better to omit the provision of Section 272 CC. Then the civil legal regulation will be applied according to Section 1(2) CC and the contract can be changed only in writing. The text of Section 272(2) CC can also be edited in the following sense – the written form will be chosen by contracting parties only (the form will not be stated by the Code).

It must be remembered that if the component of the company which is the subject of the contract for sale of company is real estate (as is often the case), the declaration of will of the parties must be probably on the same document (according to the cogent norm Section 46(2) Civ.C. used in compliance with Section 1(2) CC). The real estate will be identified including data from the land register.

Besides the exact identification of the contractual parties and the exact identification of the subject of the contract for sale of business, other essential parts of the contract are the obligation of the seller to pass the company to the purchaser and to transfer the ownership of the company, the obligation of the purchaser to take over seller's obligations connected with the company and the obligation of the purchaser to pay the purchase price.

The fact that the Commercial Code contains the contract type of the contract for sale of company can not restrain the contractual parties if they demonstrate their will to solve the situation either, e. g. to conclude more partial contracts or to conclude an unnamed contract in case it is not possible to define the essential parts of the contract.

In a certain case a contract or contracts need not cover a whole company. Then there is an agreement that the identified subject of the contract will be transferred.

2 To the essential parts of contract (and other questions connected with the contract for sale of company) see also K. Eliáš, a kol. Kurs obchodního práva, Obchodní závazky, Cenné papíry, Praha 1996, p. 228, in the 2nd ed. 1999 p. 234 etc. K. Eliáš, Obchodní zákoník, Praktické poznámkové vydání s výběrem judikatury od roku 1900, Praha 1998, p. 521 etc. I. Pelikánová, Komentář k obchodnímu zákoníku – 4. díl., Praha 1997, p. 291 etc. S. Plíva, Smlouva o prodeji podniku, text z tzv. Karlovarských právnických dnů ze dne 22. 11. 1994 v Praze. I. Štenglová, S. Plíva, M. Tomsa, Obchodní zákoník – komentář, Praha 1996, p. 570, 5th ed. 1998 p. 804 etc., 6th ed. 2001 p. 1291 etc. To the contemporary essential parts of the contract for sale of company and other questions see, among other things, I. Štenglová, S. Plíva, M. Tomsa, Obchodní zákoník, Komentář, Praha 2005, p. 1187, etc. J. Dědič, a kol. Obchodní zákoník, Komentář, Praha 2002, p. 3474, etc. J. Husar, Pravna regulacia integracie verejnej moci do podnikania, Kosice 2007. J. Suchoza, Slovenske obchodne pravo, Banska Bystrica 1998.

Considering the principle of the Commercial Code – contractual freedom – it is not stated that contractual parties must use the contract type in a certain situation. Parties must not proceed in conflict with other legal provisions and evade the law or proceed out of accord with the principle "bonos mores".

If the subject of contract is the company, we think that conclusion of the contract for sale of company is better. It is rational to use the provisions of the contract type in the Commercial Code in a quite difficult contractual process.

What is the company (respectively the part of the company which is sold) and what is the subject of sale must be clear. The essential part of the contract is the obligation to pay the purchase price. The basic provision does not state the obligatory agreement about the price. The statement of the price or its way of stating is, in our opinion, needed. Section 482 CC envisages the way of stating the price instead of quoting the price.

The identification of the company including its obligations often refers to other document, or enclosure of the contract. It is recommended to identify obligations (excluding small ones) including guarantee obligations and to sign document – enclosure by the contractual parties.

We accede that the contract for sale of company is valid if it contains the essential parts, it means the identification of the company or its part which is sold even if the obligation identification was not done.

The obligation to transfer the ownership of the whole company as a mass thing is not the same as the ownership transfer of things which are components of the company. This ownership of movables is transferred to the purchaser on the day of efficiency of the contract according to the cogent norm Section 483(3) CC[3].

The ownership of real estate is transferred very often. The transfer must respect the cogent norm – the ownership of real estate is transferred from the seller to the purchaser with its deposit in the land register (see Section 483(3) CC).

In general an approval of companion or general assembly of the company is required in case of transfer of the company or in case of transfer of the part of the company. The relevant legal provisions must be applied, too (Section 67a CC). It is because of security of partners and creditors and information backup for partners´ decisions.

3 I. Štenglová, S. Plíva, M. Tomsa, Obchodní zákoník, Komentář, Praha 2001, p. 1292 and in other editions of the commentary.

The Act No. 256/2004 Coll. states the cases in which the company or the part of the company can be transferred only with the approval of the Czech National Bank.

If it is the transfer of the company in so called "big privatization", the Act No. 92/1991 Coll. is used.

In the case of sale of the company (or the part of the company) by administrator, the special Act No. 182/2006 will be applied from the 1st January, 2008.

Responsibility for Damage

According to Section 486 CC the purchaser has a right to a moderate discount from the purchase price corresponding to the missing or damaged things. If the missing things or the ascertainable damage were not stated in the report according to Section 483(1) CC, the right to discount can not be conceded in legal proceedings unless the seller knew about them at the time of hand – over.

These effects come into being in case of ascertainable damage during the run of the company if the damage is not announced in an immediate delay after their recognition or the damage could be found out with a professional care but not later than six months after the day of effectiveness of the contract (Section 482 CC). Section 428(2) and Section 439 are applied analogically (see Section 486(1) CC).

The purchaser has a right to back out of the contract, if it is not possible to run the company identified in the contract and the damages announced in time are irremovable or the seller did not remove them in an additional time which is stated by the purchaser. Section 441 CC is applied analogically (see Section 486(2) CC).

The purchaser can set up a claim to the purchase price discount in case of transferred obligations which were not stated in account records on the day of effectiveness of the contract (Section 482 CC). It is not applied if the purchaser knew about them at the time of a conclusion of a the contract (Section 486(3) CC).

The legal damage is governed by Sections 433 – 435 CC. If the ownership of real estate which is the component of the company is not transferred and the seller did not remove the damage in an additional time stated by the purchaser, the purchaser can back out of the contract (see Section 486(4) CC).

Section 486(5) CC states that the rights according to the above mentioned provisions do not effect the right of recovery. Section 440 CC is applied analogically.

In the publication Barešová, E. – Baudyš, P.,[4] *the judgment of the Regional Court Plzeň, No. 15 Ca 446/94 from the 31st November, 1995 about rescission of the contract for sale of company is cited: The legal title for ownership deposit in deposit proceedings is the contract. The report note only registers the existing real rights, its effectiveness is only for register. The rescission of contract is one–way legal act. The legal effects of the rescission of contract is governed in Section 349(1) CC. It is stated that the contract is finished with the rescission of contract. The legal effects of the rescission of contract come into effect when the declaration of will is delivered to the other contractual party. According to Section 349(1) CC the rescission of contract can not be cancelled or changed without the consent of the other contractual party. According to Section 351(1) CC all rights and duties are extinguished with the rescission of contract; the extinguishment comes into being by operation of the law. The land register has duty only to register the extinguishment, the report note has a register sense but not a legal making sense. If the land register cancels the ownership, it will get over its competence and its decision will be void.*

The provision of Section 486 CC is a dispositive norm. The purchaser has a right to a moderate discount from the purchase price corresponding to the missing or damaged things according to par. 1.

If the missing things or the ascertainable damage was not stated in the report of take–over, the right to discount can not be conceded in legal proceedings unless the seller knew about them at the time of passing the thing. Besides the damage about which the seller knows there is also ascertainable damage during the run of the company.

In the case of the damage that can be ascertainable during the run of the company, the effects are the same as in the above mentioned damage if the purchaser did not announce it to the seller in an immediate delay after its recognition or the damage could be found out with a professional care but not later than six months after the day of effectiveness of the contract.

The responsibility for damage is analogical to the responsibility for damage in breach of contract of purchase. The seller is responsible not only for damage of material things but for each damage of a thing, it means damage of components of the company and damage of the company as the entity. The provisions of the contract of purchase are applied analogically (Section 428(2) CC).

The analogical application of the contract of purchase is also for the discount from the purchase price (refer to Section 439 CC).

4 E. Barešová, P. Baudyš, Zákon o zápisech vlastnických a jiných věcných práv k nemovitostem, komentář, Praha 1996, p. 268.

According to Section 486(2) CC the purchaser can back out of the contract if it is not possible to run the company identified in the contract and the damage announced in time is irremovable or the seller did not remove it in an additional time that is stated by the purchaser (the provision of the contract of purchase Section 441 is applied analogically).

The purchaser can back out of the contract if the ownership of real estate which is the component of the company is not transferred and the seller did not remove the damage in an additional time which is stated by the purchaser (see Section 486(4) CC).

Streszczenie

Forma prawna przedsiębiorstwa – rozumianego jako zbiór rzeczy i praw – jest uregulowana przepisami dotyczącymi rzeczy w znaczeniu prawnym. Szczególne uprawnienia dotyczące nieruchomości, własności przemysłowej, własności intelektualnej, pojazdów itp. wchodzą w skład przedsiębiorstwa i w przypadku jego sprzedaży przechodzą w całości na nabywcę (sprzedaż może dotyczyć wyłącznie przedsiębiorstwa jako całości). Przy zachowaniu odpowiednich przepisów, do przeniesienia prawa własności przesiębiorstwa wymagana jest zgoda wspólników lub zgromadzenia ogólnego spółki.