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PROTECTION OF CREDITORS' RIGHTS IN ASSET DEAL

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Abstract. *The Civil Code of Lithuania re-established enterprise (business) as a self-sufficient object of civil rights and introduced several legal transactions with it, the so-called asset deals (sale-purchase of enterprise and lease of enterprise). Since every transfer of enterprise comprises the transfer (delegation) of debts to the new owner, the legal regulation on asset deals must be orientated to the protection of creditors' rights. However, the legal practice showed that the existing legal regulation regarding asset deals, in particular the mechanism of the protection of creditors' rights, is complex, and thus unappealing to legal practitioners. Therefore, this research focuses on an analysis of the legal regulation of the mechanism of the protection of creditors' rights applicable to asset deals and its impact on the civil turnover of enterprise as an object of civil rights. In order to thoroughly examine the problem of the efficient mechanism of the protection of creditors' rights, the national legal regulation is analysed in comparison to the legal systems of France, Germany and Russia.*

Keywords: *asset deal, sale-purchase of enterprise, lease of enterprise, protection of creditors' rights.*

Introduction

The Civil Code of Lithuania¹ (hereinafter referred to as—LCC) re-established enterprise (business) as a self-sufficient object of civil rights and introduced several legal transactions with it, the so-called asset deals, i. e. sale-purchase of enterprise and lease of enterprise. With the adoption of legal regulation in LCC regarding separate transactions with enterprise, the uncertainty of whether such regulation is proper and sufficient has arisen. The legal practice showed that the existing legal regulation on asset deals is complex, thus unappealing to legal practitioners, so the civil turnover of enterprises as proprietary complexes in Lithuania is almost inactive.²

Comparing the legal regulation of sale-purchase of enterprise and lease of enterprise with other types of sale-purchase and lease agreements, it is obvious that the provisions regarding the form, order of conclusion of contract and the protection of creditors' rights applicable to sale-purchase and lease of enterprise are rather strict. Accordingly, in legal practice, the parties often conclude sale-purchase or lease contracts of separate things and other assets instead of enterprise in order to avoid the application of the said imperative provisions.

However, due to the fact that every transfer of enterprise (asset deal) comprises of the transfer (delegation) of debts to the new owner, the legal regulation of civil turnover of the enterprise as a proprietary complex must be (and is) orientated to the protection of creditors' rights. Therefore *the purpose of this research* is to analyse the efficiency of the legal mechanism of the protection of creditors' rights applicable to asset deals carried out by the legal form of sale-purchase of enterprise and lease of enterprise, providing recommendations for further development in this field. *The subject matter of the research* is the legal regulation of the mechanism of the protection of creditors' rights applicable to asset deals and its impact to the civil turnover of enterprise as an object of civil rights. The research does not involve taxing and sponsorship aspects of the asset deals as these aspects do not fall under the field of civil law. Also, the research does not involve analysis of asset deals in the merger and acquisition field. Various scientific methods have been applied during the research in order to achieve the set purpose and to formulate conclusions. The main methods used in this research are: document (content of source), linguistic, systematic and critical analyses, historical, comparative, and teleological.

Apart from several narrow problem-orientated publications regarding separate transactions with enterprise (e. g. sale-purchase and mortgage of enterprise), until now the legal doctrine of Lithuania lacks a sufficiently profound analysis of peculiarities of asset deals. First of all, a significant scientific research on transfer of business performed by the Institute of Law in 2005 should be mentioned as it comprises of analysis of experien-

1 The Civil Code of Lithuania. *Official Gazette*. 2000, No. 74-2262.

2 On the 2nd of April 2010 institution administering the public registers in Lithuania in its answer to the query, how many transactions with enterprise have been registered since year 2001, indicated that there have been registered only six contracts of sale-purchase and lease of enterprise in Lithuania since year 2001.

ce of Lithuania and foreign countries in the field of business transfer.³ However this research focuses on analysis of asset deal in the context of business transfer environment, thus paying less attention to particular relevant theoretical and practical problems. Also other sources, such as publications by J. Kiršienė and K. Kerutis comparing share deal and asset deal as a mean of business transfer⁴; publication by E. Baranauskas analysing the possibility of enterprise mortgage in Lithuania⁵; doctoral dissertation by V. Bitė⁶ comprising a short comparative analysis of share and asset deals, are relevant to this research. The above-mentioned scientific sources and the problems they raise became the starting-point of this research.

Due to the scarcity of national law doctrine on the subject-matter, this research is mostly based on foreign scientific literature and researches. In Europe the approach to the enterprise as a proprietary complex is twofold: in the first group of countries (e. g. France, Italy and Russia) the law regulates the legal status and civil turnover of enterprises as self-sufficient objects, whereas in other countries (e. g. Germany, common-law countries) the legal status and civil turnover of the enterprises as proprietary complexes are not regulated by the law yet the transfer of enterprises is taking place. Considering the abovementioned, the problem of efficiency of the mechanism of the protection of creditors' rights analysed in this research is compared to the legal systems of France, Germany and Russia. The analysis of Russian in comparison with French legal system on the subject-matter is based on the works of such Russian legal scientists as E. A. Yershova, K. D. Ovchinnikova.⁷ The analysis of the German legal system on the subject-matter is based on the comparative research of business transfer by G. Picot.⁸

1. Protection of Creditors' Rights in Asset Deals

The buyer of the business can obtain the enterprise as an ongoing business by concluding sale-purchase or lease of enterprise agreement, the so called asset deal, or sale-purchase of share portfolio agreement, the so called share deal. The economic result of the transfer of the enterprise as a proprietary complex (asset deal) and share portfolio

3 Čepas, A.; Mačernytė-Panomariovienė, I.; Kiršienė, J.; Griškevič, L.; Lankauskas, M.; Želvys, A. *Europos Sąjungos ir kitų šalių patirties verslo perdavimo srityje analizė* [Analysis of the Practice of European Union and Other States in the Field of Business Transfer]. Vilnius: Teisės institutas, 2005.

4 Kiršienė, J.; Kerutis, K. Verslo perleidimas akcijų ar įmonės pardavimo būdu: teisinio reglamentavimo ir praktikos lyginamoji analizė [Transfer of Business by Share Deal and by Asset Deal: Comparative Analysis of Legal Regulation and Practice]. *Jurisprudencija*. 2006, 3(81).

5 Baranauskas, E. Įmonės įkeitimas [The Mortgage of Enterprise]. *Jurisprudencija*. 2002, 28(20).

6 Bitė, V. *Uždarosios bendrovės akcijų pardavimas, kaip verslo perleidimo būdas* [Sale of Shares of Closed Company as a Mean of Business Transfer]. Daktaro disertacija. Socialiniai mokslai, teisė (01 S). Vilnius: Mykolo Romerio universitetas, 2009.

7 Sufficiently comprehensive analysis of civil turnover of enterprise as a proprietary complex in Russia and foreign countries. For further information see: Ershova, E. A.; Ovchinnikova, K. D. *Predpriyatie (biznes) v sovremennom ekonomiko-pravovom oborote* [Enterprise (Business) in Modern Economic-Legal Turnover]. Moskva: Statut, 2006.

8 Picot, G. *Mergers & Acquisitions in Germany*. 2nd ed. New York: Juris Publishing, Inc., 2002.

(share deal) is the same, thus these both deals are qualified as means of business transfer. Accordingly in legal doctrine⁹ the peculiarities of asset deals are often analysed by comparing the asset deal to a share deal: these contracts differ by their subject-matter, parties, the order of conclusion and the legal consequences.

According to the provisions of Paragraph 1 of Article 6.402 of LCC, under the contract of purchase-sale of enterprise the seller transfers to the buyer as an object of property the whole enterprise or a substantial part thereof,¹⁰ i. e. the seller is the owner of the enterprise and the receiver of the paid price. Although under the contract of lease of enterprise the enterprise as an ongoing business is transferred to the lessee only temporarily, the lease of enterprise is also considered to be an asset deal whereas the lessee has rather wide-scope discretion over the leased enterprise.¹¹ Therefore asset deal (sale-purchase of enterprise and lease of enterprise) distinguishes by specific requirements applicable to its content, form and mechanism of protection of creditors' rights.

After every asset deal the enterprise is transferred to the buyer (lessee), but the seller (lessor) does not cease to exist, whereas after the performance of share deal the share portfolio of a company is transferred to the new shareholder, i. e. there is no transfer of enterprise as an ongoing business between two separate parties. Of course the conclusion of share deal also bears its peculiarities, for instance, the law limits the circle of potential buyers by providing that the present shareholders of the company have the right of pre-emption to acquire the sold shares (Paragraph 2 of Article 47 of Law on Companies¹²). After the conclusion of share deal the owners of the shares, but not the owner of the enterprise, will change while the enterprise is still owned by the same company.¹³

Having in mind that the economic result of the transfer of the enterprise as a proprietary complex and share portfolio is the same, sellers are inclined to choose less time and money consuming way, i. e. share deal. However asset deal is more beneficial to the buyer and the creditors due to the disclosure of information regarding enterprise transfer to the creditors, security of creditors' claims, the obligation of the seller to help the buyer to enter the market and liability for defects of the enterprise. Therefore in the following chapters the focus is on the existing national legal regulation regarding the protection of creditors' rights, for it is one of the most outstanding features of asset deal compared to other types of contracts.

9 For example, Čepas, A., *et al.*, *supra* note 3, p. 68.; Kiršienė, J.; Kerutis, K., *supra* note 4, p. 26.; Bitė, V., *supra* note 6, p. 36–43.

10 For comprehensive analysis of enterprise as a proprietary complex, its features and content see: Jakutytė-Sungailienė, A. *Įmonė kaip civilinių teisių objektas* [Enterprise as an Object of Civil Rights]. Daktaro disertacija. Socialiniai mokslai, teisė (01 S). Vilnius: Mykolo Romerio universitetas, 2010, p. 48–83.

11 For details on lessee's discretion over the leased enterprise see: chapter "Protection of Creditors' Rights in Lease of Enterprise."

12 Law on Companies. *Official Gazette*. 1994, No. 55-1046; 2000, No. 64-1914.

13 For comprehensive analysis of share deal as a mean of business transfer see: Bitė, V., *supra* note 6.

1.1. Protection of Creditors' Rights in Sale-Purchase of Enterprise

The core requirement of the protection of creditors' rights is an up-front disclosure of the intent to sell-purchase the enterprise. The creditors must be informed about the future transfer of the enterprise beforehand, because by the contract of sale-purchase of enterprise the seller transfers his debts to the buyer, i. e. the delegation of debts takes place, which takes effect only with the consent of the creditors (Paragraph 1 of Article 6.116 of LCC). The buyer must not later than twenty days before the conclusion of the contract notify in writing all creditors of the intended sale of the enterprise (Paragraph 1 of Article 6.405 of LCC). Thus the creditors are informed about the delegation of the debt and the change of the debtor, and the seller is motivated to promptly disclose to the buyer all known information regarding his debts to the creditors. Having received the notification of the intended transfer, the creditors *must* within twenty days from the date of receipt thereof notify the buyer in writing of the share and nature of their claims (Paragraph 2 of Article 6.405 of LCC). If the creditors perform this obligation in proper manner, the seller is able to stipulate the final price for the enterprise taking into account the amount of debts to the creditors. Then the buyer pays part of the price to the intermediary specified in the contract, who shall be charged to settle with the creditors, while the remaining amount is paid directly to the seller (Paragraph 3 of Article 6.405 of LCC). The seller and buyer of the enterprise are jointly liable for the actions of the intermediary, however, the buyer is liable only to the extent of the value of the purchased enterprise (Paragraph 3 of Article 6.406 of LCC), i. e. the buyer is not liable to the extent of other assets.

The intermediary, within twenty days from the day of payment of the price, draws up and sends to the creditors the deed of price distribution for the settlement of debts (Paragraph 4 of Article 6.405 of LCC). Unless the creditors protest the deed of price distribution, they are paid the share of the price proportionate to the amount of their claims (Paragraph 5 of Article 6.405 of LCC). In the event the creditors file objections to the deed of price distribution within twenty days from the receipt of the deed of price distribution, the intermediary *must* apply to the court for the determination of the priority of creditors and procedure of satisfaction of claims (Paragraph 6 of Article 6.405 of LCC). However the law does not establish any special procedure according to which the intermediary must apply to the court—action or non-contentious (unilateral) proceedings, therefore it is unclear who should be regarded as the plaintiff (the seller, the buyer or the intermediary). The procedural status of the intermediary is also unclear, for instance, is it possible to subsidiarily apply legal regulation regarding the legal status of bankruptcy administrator, etc. If the intermediary applied to the court in action proceedings, the process of sale-purchase of the enterprise would be prolonged. But on the other hand there is no legal regulation regarding summary proceedings in this case.

The above-mentioned complex mechanism, depicted in Figure, guarantees the protection of the creditors' rights, if it is performed duly. On the other hand, if the seller properly performs this sequence of actions, the creditors lose their right to raise claims to the seller or against the assets of the sold enterprise (Paragraph 7 of Article 6.405 of

LCC). However the creditors whose claims have been guaranteed by mortgage and have not participated in the allocation of the price by the intermediary or whose claims have not been fully satisfied, retain their rights in every respect.

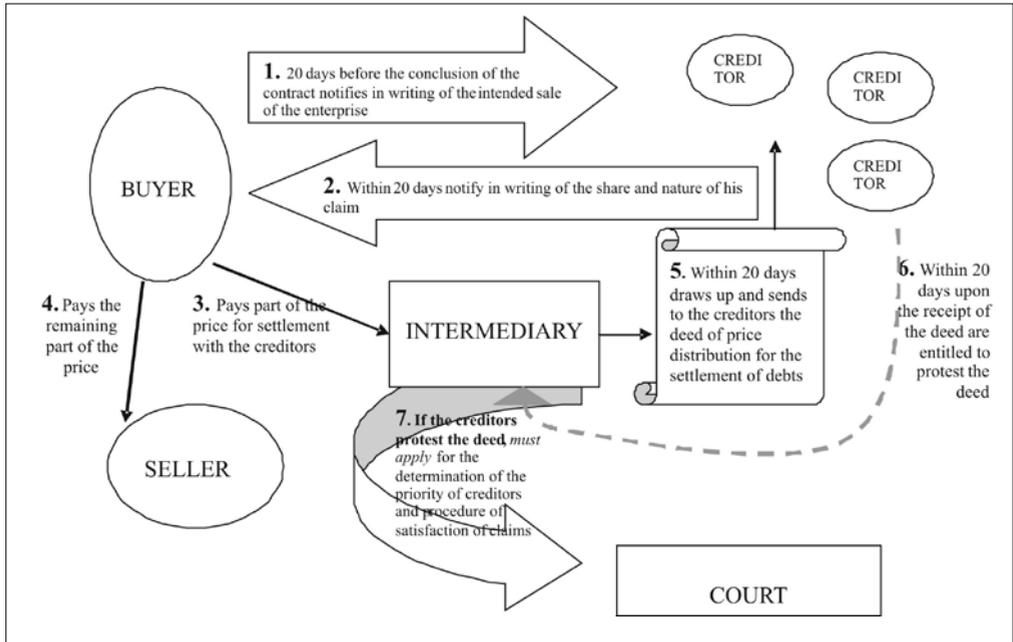


Figure. Protection of creditors' rights mechanism in sale-purchase of enterprise

Since such procedure of sale-purchase of enterprise is rather complex, the provisions of Article 6.405 of LCC provide the buyer of the enterprise with the possibility to buy the enterprise irrespective of the abovementioned procedure in these ways:

(i) The buyer can present to all creditors an acceptable security for the satisfaction of their claims (Paragraph 7 of Article 6.405 of LCC), e. g., mortgage, suretyship, guarantee;

(ii) The buyer is entitled not to inform the creditors about the sale-purchase of the enterprise, but in such case the fact of sale of the enterprise may not be set up against the creditors whose claims arose before the conclusion of the contract of the sale-purchase of enterprise (Paragraph 1 of Article 6.406 of LCC), and the creditors have the right to submit their claims directly to the buyer. (Paragraph 1 of Article 6.405 of LCC). In order to avoid these negative consequences the buyer can pay the price for the sold enterprise which is sufficient to allocate all the debts (Paragraph 1 of Article 6.405 of LCC).

Although the legislator obliges the buyer of the enterprise to fulfill rather many obligations regarding the protection of creditors' rights, but this also guarantees that the buyer shall stipulate the correct price for the sold enterprise taking into account all debts, and thus shall not undertake unknown debts and risks. On the other hand such complex mechanism of the protection of creditors' rights prolongs the period of conclusion and

performance of the contract incurring additional costs, thus is more suitable for transfer of medium and large business.¹⁴

It should be noted that the sale-purchase of enterprise is not completely new to the legal system of Lithuania. In interwar Lithuania the Law on Transfer of Merchant Enterprises (passed in year 1931)¹⁵ regulated asset deals emphasizing the protection of the creditors' rights. However the established mechanism of the protection of creditors' rights was less complex compared to the existing national legal regulation provided by LCC. The seller of the enterprise was also obliged to draw up a list of creditors indicating the precise amount of the claim, the address of the creditor and if the seller lacked such information this had to be indicated in the list (Paragraphs 1-2 of Article 2). The debts arising from the bills of exchange had to be indicated separately (Paragraph 3 of Article 2). The concluded list of creditors signed by both parties of the asset deal was deposited with the notary notarizing the contract, who was obliged within three days to inform in specific written form the creditors about the transfer of the enterprise indicating the sale price, its payment schedule and the amount of the creditor's claim (Paragraph 4 of Article 2, Paragraph 1-2 of Article 4).

Although the Law on Transfer of Merchant Enterprises (passed in year 1931) did not entitle the creditors to protest the list of creditors concluded by the parties to the asset deal, the protection of creditors' rights was ensured by other means: (i) the seller and the buyer of the enterprise were jointly liable for all *known*, i. e. indicated in the list of creditors, debts¹⁶ (Article 7); (ii) the creditor had the *pre-emption right* to satisfy his claims from the value of the sold enterprise prior to the buyer's creditors' claims which have arisen before the transfer of the enterprise (Article 16); (iii) the seller and the buyer of the enterprise were jointly liable for *all* debts if the creditors were not duly informed about the transfer of the enterprise (Article 9). On the other hand the Law on Transfer of Merchant Enterprises (passed in the year 1931) also established the protection of the rights of the buyer of the enterprise, whereas the creditors were entitled to file their claims to the buyer only within three years upon the transfer of the enterprise (in case of termless obligations) or the expiry of the term (in case of obligations with term) (Article 13). Thus the established mechanism retained the balance between the protection of creditors' rights and the protection of the parties' rights and did not turn the asset deal into a procedure of up-front allocation of creditors' claims.

Comparing the existing national legal regulation on the protection of creditors' rights applicable to the contract of sale-purchase of enterprise with foreign countries, it can be concluded that the Lithuanian legal regulation is especially tight and complex. For instance, in France the creditors are informed about the transfer of the enterprise accordingly: within ten days upon the conclusion and public announcement of the sale-

14 Kiršienė, J.; Kerutis, K., *supra* note 4, p. 28.

15 Law on Transfer of Merchant Enterprises. *Official Gazette*. 1931, No. 367-2504.

16 When the enterprise was transferred between close relatives the parties to the contract were jointly liable to the creditors for all and any debts, unless they proved that it was impossible to know about such debts (Article 8).

purchase agreement the creditors are entitled to protest the sale-price of the enterprise¹⁷, if it is insufficient to allocate the claims of the creditors; the protesting creditors must be provided with the notarized copy of the sale-purchase agreement of the enterprise; if the parties to the contract do not agree upon the sale-price acceptable to the creditors, this issue is solved in court applying rules of specific summary proceedings; the creditors are entitled to demand to put the enterprise to public auction in order to get higher sale-price; in order to guarantee the allocation of the protesting creditors' claims, the seller is obliged to pay a sufficient sum of money to a third party, who is obliged to settle with the creditors (intermediary); if the sale-price is paid without compliance to the said procedure, the seller and the buyer are jointly liable to the creditors (Articles L. 141–14 – L. 141–20 of the Commercial Code of France). It should be noted that according to the French legal regulation the claims of the creditors (debts) are not included into the content of the sold enterprise¹⁸, thus the creditors are informed about the transfer of enterprise only after the conclusion of the sale-purchase agreement providing that they are entitled to demand the allocation of their claims regardless of the immaturity of the term of the obligation.¹⁹

In Russia the protection of creditors' rights in asset deal is regulated by Article 562 of the Civil Code of Russian Federation:²⁰ either party to the contract of sale-purchase of enterprise has to inform the creditors about the intended transfer of the enterprise prior to the conclusion of the sale-purchase agreement; if the creditor protests the delegation of his claim to the buyer, he is entitled to demand the up-front performance of obligation, termination of contract and reimbursement of loses or to demand to acknowledge the part of the sale-purchase agreement void within three months; if the creditor was not informed about the transfer of the enterprise, he is entitled to demand the performance of obligation within one year upon the moment the creditor became aware of the transfer; the seller and the buyer of the enterprise are jointly liable to the creditors.

In Germany there are no special legal regulation regarding protection of creditors' rights in asset deal. If the seller wishes to transfer his debts to the buyer according to the agreement of sale-purchase of enterprise, he must comply with the general rules applicable to the delegation of debts concluding a three-party agreement (German—*dreiseitiges Rechtsgeschäft*). If the creditor does not consent to the transfer (delegation) of his claim to the buyer of the enterprise, such debt cannot be transferred, thus the risk that the asset deal fails arises. Therefore parties to the asset deal should anticipate the consequences of such situation or agree with the creditors on the transfer of the debts prior to the conclusion of asset deal. The scope of the buyer's liability for the transferred debts depends on the fact, whether the buyer continues to engage in the primary commercial activity of

17 In France the lessor of commercial premises is not entitled to protest the transfer of the enterprise, therefore the seller is not obligated to inform the lessor about the transfer of the enterprise including the right of lease of commercial premises (fr. *bail commercial*).

18 For detailed analysis of the content of the enterprise in France see: Jakutytė-Sungailienė, A., *supra* note 10, p. 52–53, 61–77.

19 *The French Commercial Code in English*. New York: Oxford University Press, Inc., 2008, p. 44.

20 The Civil Code of Russian Federation [interactive]. [accessed 2010-05-26]. <<http://law.edu.ru/norm/norm.asp?normID=1136961&subID=100039604,100039606,100040094,100040095,100040133,100035998#text>>.

the enterprise using the firm name of the seller: if the firm name of the seller is used by the buyer, the buyer is liable to the creditors to the extent of all his assets (not only the value of the bought enterprise); if the buyer uses a different name of the firm, the buyer is not liable to the creditors unless there is a sufficiently important cause for the liability to arise. The seller of the enterprise is subsidiarily liable to the creditors if the term of obligations expires within five years upon the transfer of the enterprise.²¹

Considering the mentioned legal regulation regarding the protection of creditors' rights in asset deal in foreign countries and interwar Lithuania, it should be agreed with the approach²² that the existing national mechanism of the protection of creditors' rights in the sale-purchase of enterprise is too complex and turning the sale-purchase of enterprise into the process of debt recovery, when application of mechanism alike to the one applicable in case of reorganization of juristic person (Article 2.101 of LCC) is sufficient. The balance between the protection of creditors' rights and rights of the parties to the contract would be retained and the civil turnover of the enterprise would be simplified, if the national legislator established that the creditors are entitled to request termination of the contract or performance of obligations before the expiry of the term as well as redress of damages, where this has been provided in the contract, and where there are grounds to presume that the performance of obligations may become more difficult due to transfer of enterprise and where, on creditors' request, the seller or the buyer of the enterprise failed to extend an additional guarantee for the performance of obligations.

Moreover considering the legal regulation on the subject-matter in the foreign countries, it can be concluded that the national mechanism of protection of creditors' rights is a mixture of Russian and French legislation. However the Lithuanian legislator while establishing such complex legal regulation has not taken into account the fundamental differences of the concept of enterprise in Russia and France.²³ Therefore, having in mind that in Lithuania as in Russia the debts of the seller are included in the content of the enterprise, the simplification of the mechanism of the protection of creditors' rights should involve the elimination of the intermediary's obligation to apply to court in order to determine the priority of creditors and procedure of satisfaction of claims, what also would eliminate the problem of the legal status of the intermediary in civil procedure.

1.2. Protection of Creditors' Rights in Lease of Enterprise

Apart from the sale-purchase of enterprise LCC establishes special legal regulation regarding the lease of enterprise (Articles 6.536 – 6.544 of LCC), under which the lessor transfers to the lessee into temporary possession and use for payment an enterprise as an ongoing business, while the lessee pays the payment of lease. Similarly as in case of

21 Picot, G., *supra* note 8, p. 34–35; 53–55; Ershova, E. A.; Ovchinnikova, K. D., *supra* note 7, s. 194–195.

22 Kiršienė, J.; Kerutis, K., *supra* note 4, p. 28.

23 Unlike in Russia, in France the debts of the seller are not included in the content of enterprise, thus the appointment of the intermediary to settle with creditors is logical. For more extensive analysis of the concept of enterprise in different countries see: Jakutytė-Sungailienė, A., *supra* note 10, p. 48–56; 61–77.

sale-purchase of enterprise, the lease of enterprise is regulated by special legal norms due to the peculiarities of its subject-matter and the process of conclusion and performance of this agreement: the lease of enterprise distinguishes by the process of indication of the content of the enterprise, the transfer of the enterprise, the protection of creditors' rights, etc. It should be noted that, notwithstanding the fact that under the lease of enterprise the enterprise is transferred to the lessee just for temporary usage, the lease of enterprise is considered to be one of the asset deals due to rather wide-scope discretion over the leased enterprise, for instance, the lessee is entitled without the consent of the lessor to sell, exchange, transfer for temporary use raw materials, stocks, manufactured products which are part of the leased enterprise, sublease them and transfer his rights and obligations in respect of those valuables under the contract of lease (Paragraph 1 of Article 6.540 of LCC); the lessee is entitled to operate the enterprise according to his own discretion and cover all expenses thereof (Article 6.541 of LCC), i. e. in fact, the lessee can act as the owner of the enterprise.

Article 6.537 of LCC regulates the protection of creditors' rights in lease of enterprise. Informing the creditors about the lease of the enterprise is compulsory because lease agreement comprises the delegation of debts which is effective only with the consent of the creditors (Paragraph 1 of Article 6.116 of LCC). Comparing the protection of creditors' rights applicable to the sale-purchase of enterprise with the one applicable to the lease of enterprise, it can be concluded that the latter is considerably less complex, since the intermediary appointed to settle with the creditors according to the deed of price distribution does not participate in the transfer of the leased enterprise. However the parties to the lease of enterprise are not entitled to avoid the established process of information of creditors by presenting to all creditors an acceptable security for the satisfaction of their claims like in sale-purchase of enterprise.

The lessor of an enterprise prior to the transfer of enterprise is obliged to notify in writing the creditors about the lease. The creditor is free to choose whether to give consent to the transfer of the debt, i. e. the law does not limit the discretion of the creditor in this case, whereas the creditor can demand the up-front performance of obligation without any sufficient cause. If the creditor has not given his consent, delegation of the debt shall be deemed not to have been effectuated (Paragraph 3 of Article 6.116 of LCC). The creditor who has not given to the lessor in writing his prior consent to the delegation of the debt, is entitled within three months upon the receipt of notification about the lease of the enterprise to demand dissolution of the contract concluded by the lessor or performance of that contract before the expiry of the term and reimbursement of damages. If the creditor has not been informed about the lease of the enterprise in accordance with the said procedure, he is entitled to file his claims within a longer period: one year from the moment when he became aware or should have become aware of the lease of the enterprise. The lessor and the lessee are jointly liable for the debts which were delegated to the lessee without the creditors' consent. Hence the success of the lease of enterprise depends on the good faith and honesty of the creditors, who are entitled to object the transfer of enterprise including the debts without any sufficient cause and thus can easily force the parties to the contract of lease of enterprise to satisfy

their claims prior to the expiry of the term irrespective of sufficient proof of the lessee's ability to satisfy the obligation in future.

The abovementioned national legal regulation regarding the process of information of creditors in the lease of enterprise and the liability of the parties is identical to the one established in Russia (Article 657 of the Civil Code of Russian Federation).²⁴ Whereas Articles L. 144–6 – L. 144–7 of the French Commercial Code establish even more simplified mechanism of the protection of creditors' rights in lease of enterprise: the local commercial court is entitled to decide whether the claims of the creditors should be satisfied prior to the expiry of the term, but only if the performance of obligations may become more difficult due to the lease of the enterprise. Furthermore the lessor is jointly liable with the lessee for the debts which have arisen after the transfer of the enterprise for the period of six months starting from the moment of public announcement of the lease.²⁵

Considering the abovementioned it can be concluded that the existing national regulation of the protection of creditors' rights in lease of enterprise also turns the lease of enterprise into a process of debt recovery, wherein the creditors are entitled to demand performance of obligations prior to their expiry of the term without any sufficient cause. Consequently, likewise in sale-purchase of enterprise, the creditors' rights in lease of enterprise can be duly protected applying the mechanism of protection of creditors' rights alike to the one applied during the reorganization of juristic persons (Article 2.101 of LCC), providing that creditors are entitled to demand the up-front performance of obligations only if the performance of obligations may become more difficult due to the lease of the enterprise and such risk cannot be eliminated by acceptable security for the satisfaction of their claims. Moreover such amended legal regulation would better correspond to the balance between the protection of creditors' and parties' to the contract rights and would simplify the civil turnover of enterprises as ongoing business.

In the event of the termination of contract of the lease of enterprise or the expiry of the lease term, the lessee is obliged to return the enterprise to the lessor in accordance with the rules applicable to the transfer of the enterprise to the lessee, i. e. the lessee prior to the return of enterprise is obliged to notify in writing the creditors about the return of the enterprise as provided in Article 6.537 of LCC. The preparation of the enterprise for the return, likewise the drawing up of the act of transfer-acceptance is the duty of the lessee to be performed at his own expense unless otherwise provided for by the contract. It should be emphasized that upon the expiry of the lease term, the content of the returned enterprise differs from the one at the moment of the conclusion of lease agreement, because the lessee was entitled to act as the owner of particular elements of the enterprise (such as raw materials, stocks, manufactured products). Consequently during the return of the enterprise the delegation of lessee's debts also takes place, whereas during the transfer of the enterprise to the lessee the lessor's debts were delegated to the lessee, i. e. the delegation of debts is reverse in the sense that it is diverse from the

24 The Civil Code of Russian Federation, *supra* note 20.

25 *The French Commercial Code in English*, *supra* note 19, p. 58.

primary delegation process. The key point in the return procedure is that the condition and the value of the enterprise does not radically differ from the condition and the value of the enterprise at the moment of conclusion of the lease agreement.

Conclusions

1. The legal regulation of asset deals (sale-purchase of enterprise and lease of enterprise) must be and is orientated to the protection of creditors' rights as during every transfer of enterprise as ongoing business the debts are transferred (delegated) to the new owner.

2. The existing national legal regulation of protection of creditors' rights applicable to asset deals in the form of sale-purchase of enterprise and lease of enterprise is too complex because it turns sale-purchase and lease of enterprise into a process of debt recovery, wherein the creditors are entitled to demand the up-front performance of obligations without any sufficient cause.

3. The creditors' rights in asset deals can be duly protected applying the mechanism of protection of creditors' rights alike to the one applied during the reorganization of juristic persons: the creditors are entitled to the up-front performance of obligations if (i) this has been provided in the contract, (ii) there are grounds to presume that the performance of obligations may become more difficult due to transfer of enterprise, (iii) on creditors' request, the parties to asset deal failed to extend an additional guarantee for the performance of obligations.

4. Considering that in Lithuania the debts of the seller are included in the content of the enterprise, the simplification of the mechanism of the protection of creditors' rights applicable to sale-purchase of enterprise should involve the elimination of the intermediary's obligation to apply to court in order to determine the priority of creditors and procedure of satisfaction of claims.

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KREDITORIŲ TEISIŲ APSAUGA ĮMONĖS KAIP VERSLO PERLEIDIMO SANDORIUOSE

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Santrauka. 2000 m. Lietuvos Respublikos civiliniame kodekse įtvirtinus atskirus sandorius dėl įmonės, kilo abejonių dėl šių sandorių teisinio reguliavimo tinkamumo ir pakankamumo. Teisinė praktika parodė, kad dabar galiojantis sandorių dėl įmonės perleidimo (įmonės pirkimo-pardavimo ir įmonės nuomos) teisinis reglamentavimas yra sudėtingas ir ne itin patrauklus teisininkams-praktikams, nes Lietuvoje įmonių, kaip turtinių kompleksų, civilinė apyvarta pagal galiojančią teisinį reglamentavimą beveik nevyksta.

Lyginant įmonės pirkimo-pardavimo ir nuomos sutarčių teisinį reglamentavimą su kitomis pirkimo-pardavimo ir nuomos sutarčių rūšimis, tampa akivaizdu, kad įmonės pirkimui-pardavimui bei nuomai taikomi griežtesni sutarties formos, sudarymo tvarkos ir kreditorių teisių apsaugos reikalavimai. Dėl to, kaip rodo teisinė praktika, šalys dažnai sudaro atskiro turto pirkimo-pardavimo arba nuomos sandorius, o ne įmonės pirkimo-pardavimo ar nuomos sutartį, taip išvengdami minėtų imperatyviųjų reikalavimų taikymo. Ekonominis rezultatas, perleidus ir įmonę, kaip turtinį kompleksą, ir bendrovės kontrolinį akcijų paketą, yra tas pats, tačiau įmonės pirkimas-pardavimas bei nuoma yra palankesni pirkėjui (nuomininkui) ir kreditoriams dėl informacijos apie įmonės (verslo) perleidimą atskleidimo jiems, jų reikalavimų užtikrinimo, bei pardavėjo (nuomotojo) atsakomybės prieš kreditorius masto.

Atsižvelgiant į tai, kad įmonės perleidimo metu visuomet vyksta skolininko pasikeitimas prievolėje, nes į įmonės sudėtį patenka įmonės turėtojo skoliniai išipareigojimai, įmonės pirkimo-pardavimo bei nuomos teisinis reglamentavimas turi būti orientuotas į kreditorių teisių apsaugą. Dėl to šio straipsnio tikslas yra nuodugniai ištirti kreditorių teisių apsaugos įmonės kaip verslo perleidimo sandoriuose teisinio reguliavimo efektyvumą, pateikiant rekomendacijas, kaip šį reguliavimą tobulinti.

Straipsnyje nagrinėjama problema iki šiol Lietuvos teisės doktrinoje beveik nenagrinėta, išskyrus fragmentišką atskirų sandorių, kurių objektas yra įmonė (pvz., įmonės pirkimo–pardavimą, įmonės įkeitimą), aptarimą, todėl, atliekant šį tyrimą, daugiausia remtasi užsienio autorių mokslo darbais ir tyrimais. Atsižvelgiant į tai, straipsnyje analizuojamas Lietuvoje galiojantis kreditorių teisių apsaugos mechanizmas lyginamas su Prancūzijos, Vokietijos ir Rusijos teisės sistemomis.

Straipsnio pabaigoje pateikiamos šios išvados: 1) įmonės pirkimo–pardavimo ir nuomos teisinis reglamentavimas turi būti ir yra orientuotas į kreditorių teisių apsaugą, nes įmonės perleidimo metu visuomet vyksta skolininko pasikeitimas prievolėje; 2) šiuo metu Lietuvos nacionalinėje teisėje įtvirtinta kreditorių teisių apsaugos schema, taikoma įmonės pirkimo–pardavimo ir nuomos atvejais, yra per daug sudėtinga, todėl įmonės pirkimas–pardavimas bei nuoma virsta skolų apmokėjimo procesu, nes kreditoriams suteikta teisė be jokio rimto pagrindo reikalauti priešlaikinio prievolių įvykdymo; 3) pirkėjo (nuomininko) ir kreditorių teisių apsaugai pakaktų juridinio asmens reorganizavimo atveju taikomo kreditorių apsaugos mechanizmo: kreditorius turi teisę reikalauti nutraukti arba prieš terminą įvykdyti prievolę, jei (i) tai numatyta sandoryje, (ii) yra rimtas pagrindas manyti, kad prievolės dėl įmonės perleidimo įvykdymas pasunkės, (iii) kreditoriui pareikalavus įmonės perleidimo sandorio šalys nepateikė priimtino bei atitinkančio reikalavimų įvykdymo užtikrinimo; 4) atsižvelgiant į tai, kad Lietuvoje skolos patenka į įmonės sudėtį, supaprastinant kreditorių teisių apsaugos mechanizmą, taikytiną įmonės pirkimo–pardavimo atveju, turėtų būti panaikinta tarpininko, paskirto atsiskaityti su kreditoriais, pareiga teismo tvarka nustatyti kreditorių skolų sąrašą.

Reikšminiai žodžiai: verslo perleidimas, įmonės pirkimas–pardavimas, įmonės nuoma, kreditorių teisių apsauga.

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