世纪商法论坛
21st Century Commercial Law Forum Report

清华大学商法研究中心○主办
Commercial Law Center of Tsinghua University

Corporate Restructuring: Theory and Practice

公司重组：理论与实践

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代 序

张勇健*

我们最高人民法院民事审判二庭与清华大学商法研究中心共同举办“21世纪商法论坛”第八届国际学术会议，探讨公司重组的理论和实践问题，对此感到非常高兴。

这次是我们民二庭与清华大学商法研究中心第二次共同举办国际学术会议。公司重组对于我们公司法在实践中的应用，有着十分重要的意义。特别是对于我们在司法审判中如何适用法律，如何正确地把握法律，如何正确地适用公司法来解决纠纷、处理好案件，有着十分重要的意义。

借此机会，我想简单给大家介绍一下我们最高法院民二庭现在做的一些有关《公司法》司法解释的情况。我记得上一次也是在这个地方给大家简单介绍了一下《公司法》司法解释的一些情况。我们的《公司法》司法解释是一个系列的司法解释，目前已经出台了《公司法》司法解释（一），那是在2006年4月公布的，内容是新旧公司法法律适用的衔接问题；《公司法》司法解释（二）是2008年5月公布实施的，主要内容是关于公司清算和公司解散的问题；我们现在正在着手草拟、征求意见的是《公司法》司法解释（三），内容包括公司的设立、出资、股东资格等一些问题。

在这部分我们已经完成了专家的意见征求，完成了法院系统的意见征求，我们还要向国家的有关机关、向法工委征求意见，计划是在2008年底、2009年初出台。下面我们还要着手出台《公司法》司法解释（四），内容主要是关于股东权保护问题，包括股东的知情权、股东的表决权、股东的红利分配权、股东的优先购买权等股东权保护问题。《公司法》司法解释（四）的条文我们已经草拟完成，即将进入征求意见的阶段，我们计划在2009年的上半年出台。应该说，在司法解释的草拟、制定过程中，我们也得到了学术界的大力支持和帮助，得到了专家学者的大力支持和帮助。我们的专家征求意见会邀请了国内的一些著名专家学者参与讨论，我们聆听了他们的意见，并且根据他们的意见作出了修改；而且在一些问题的调查、研究过程中，也得到了专家学者的帮助。清华大学法学院还承担了最高法院的一个课题，即关于公司人格否认问题的研究，是朱慈蕴教授主持的，研究报告对我们下一步就有关问题作出司法解释，提供了很好的理论支撑。这是关于司法解释的情况。

本次论坛的主题是公司重组问题。我们国家从20世纪70年代末开始进行经济体制改革，其中包括企业的改革。我国企业改革先后经历了政府放权让利、扩大企业自主权、企业承包经营、转换企业经营机制，以及近几年的建立现代企业制度等阶段。应该说，这样一些作为

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经济体制改革中重要内容的企业改制活动，有许多是在摸索中间进行的，其中有许多是不规范的，甚至也出现过一些问题，有的还导致了纠纷和诉讼。我们在2000年的时候，针对当时企业改制中出现的一些问题，制定了一个关于企业改制的司法解释，就一些问题如何进行规范提出了一些意见或作了一些规定。总结对这类案件的审判，我们发现在这类纠纷里面主要有两大类问题，一是企业改制或改组合同的效力问题，这个常常是纠纷当事人争议非常大的问题。为什么呢？因为在企业改组中有很多是国有企业，而国有企业的改制、国有企业股权的处置有许多特别的规定，比如，国有股权控股的企业，它要转让或出售的时候，必须经过一定的机关批准，必须经过评估，它在程序上有严格要求，它的宗旨在于防止国有资产流失。但是当纠纷出现时，我们发现当事人常常在这些程序上出现瑕疵，如没有履行审批程序，或者本来这样的企业应该是在省级人民政府有关机构作出批准的，但它仅仅在市一级机关进行了批准。那么，这些程序上的瑕疵对于合同的效力会产生什么影响？特别是改制行为已经进行了若干年之后，当事人对合同效力本身提出挑战，想把改制行为翻回到以前去行不行？这样的问题对于我们来说是非常头疼的，因为这样的案件牵涉很多当事人的利益，当事人很多，当事人利益非常重大。那么，就我们已经判处的一些案子而言，倾向性的观点是把程序问题作为合同生效的条件；在程序有瑕疵的情况下，如果当事人就合同效力发生争议的话，我们要责令当事人去弥补瑕疵，尽量维持这个合同，尽量维持改制或改组行为，以维护整个社会环境的稳定。这是一个问题，是我们在司法实践中的一种探索。

我们还常常碰到一个问题，即债权人和兼并人或者债务投资人的利益冲突问题，这也是常常令我们头疼的。比如，在兼并时，兼并方要审查被兼并方的财务资料，而被兼并方有意隐瞒了债务；那么在兼并完成之后，债权人来讨债的时候，它要对兼并后的新企业来主张权利，则对于兼并债务我们是保护债权人的利益还是维护兼并方的利益呢？这是一个冲突。像这种冲突的情形还有，兼并协议因在比较短的时间内出现了无法弥补的瑕疵而不得不解除的时候，或者说在兼并双方（合并双方）都自愿解除的时候，一个兼并协议被解除了，那么所有的法律关系是不是都恢复到原始状态去？问题在于，在兼并的时候，可能是以兼并方承担被兼并方原来的债务为条件的，或者反过来说，兼并方承担被兼并方的债务是以兼并为条件的，在这样的情况之下，如果所有法律关系回到之前的情况下，债权人提出异议，债权人说：兼并协议被解除，兼并协议即使被认定无效，但是兼并方当时承担债务的行为、承担债务的合同的法律效力仍然应当受到保护，这时又发生了债权人和兼并方的冲突问题。还有一种情况，所谓零对价接受资产，比如这样一个企业，一个债务人企业，它把大部分的优质资产转让给一个债务投资人，这是一个资产买卖行为，对价是什么呢？对价是承担相同数额的债务。这个资产值1千万，债务投资人承担1千万的债务，剩下的资产和其他债务就留在了原来的企业。就这个合同本身而言，没有什么毛病，意思表示真实，有等额的对价，但债权人来主张的时候，却发现原来债务人的原资产总额缩小了，资产到另外一个企业去了，这个时候债权人又向另外一个企业去主张权利，说拿走的那块资产上负担了其债务。这个时候，那个企业是否要对留在原来企业的那块债务承担责任呢？这又发生了债权人和兼并人之间的利益冲突。

现在，有关重组的案件比较多地发生在这些问题上。而要解决这些问题，我们认为法律依据现在还比较少，或者还比较难找。我们希望通过从学者专家那里听取宝贵的意见，取得理论支撑，把这些案件处理好。

“二十一世纪商法论坛”已经成功举行了七届，现在是第八届，也是我们最高法院民二庭第二次与清华大学商法研究中心共同举办，我们深感商法论坛影响越来越大、品位越来越高。作为论坛的主办方之一，我们深感欣慰。我们深信“二十一世纪商法论坛”这个良好的平台将对我国商法研究水平的提升起到积极的促进作用，也将为商事审判事业的发展和理论水平的提高起到积极的推动作用。

目　录

The Universal Succession as Technique of Corporate Restructuring: Efficiency and Limits

Alain Couret *

INTRODUCTION

Universal succession① is a basic technique used in order to carry out corporate restructuring deals. In French Law, for example, this principle applies to mergers, demergers, partial transfer of assets: assets and liabilities of the acquired (absorbed) or demerged entity are transferred to one or several new entities. In case of partial transfer of assets, liabilities related to transferor's assets are transferred with them.

Article L 236 -22 of *Code de commerce* entitles to subject partial transfer of assets to the merger system which results from articles L 236 -16 to L 236 -21 of *Code de commerce*. Theses articles provide that the operation leads to the universal succession of the absorbed company' social assets to the new company (in case of a merger), or to the universal succession of the area of operations brought by one of the companies to the other (in case of a partial transfer of assets to which the merger system applies).

It also applies in case of transfer of a company's property to its sole partner. This principle departs from the substantive law: normally in commercial law, the natural person who transfers her/his commercial activity only transfers her/his assets and remains debtor of liabilities. Therefore, it has an exceptional feature and couldn't be extended beyond the provisions of the law. Operations accompa-

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* Professor of Law at the Sorbonne University (Paris I), Director of the Financial Law Research Center Attorney at Law (CMS - BFL). The author really wants to thank experts who had kindly helped him, especially concerning points of comparative law: Maître Pierre - Yves Chabert et Maître Kimberly Murphy, attorneys at law the Paris office of Cleary Gottlieb, Maître Reinhard Damman, attorney at law at the Paris office of Clifford Chance, Miss Anastasia Sotiropoulou, demonstrator at the University of Luxembourg, Mr Zhou Quiang, preparing a Ph D at Paris I - Panthéon - Sorbonne University.

① About the universal transmission in restructuring operations, see Michel Jeantin "*La transmission universelle du patrimoine d'une société, les activités et les biens de l'entreprise*" Mélanges Jean Derruppe, Joly et Litec, 1991 n° 33 p. 299; Marie - Laure Coquelet《*La transmission universelle en droit des sociétés*》Thèse Paris X 1994; 《*La transmission universelle du patrimoine*》Dictionnaire Joly Sociétés 2001, Anne - Sophie Barthez《*La transmission universelle des obligations, Etude comparée en droit des successions et en droit des sociétés*》Thèse Paris I 2000; N. Morelli《*La portée de la transmission universelle dans les opérations de restructuration*》Thèse Nice 2005. F. Lagrange《*Nature juridique des fusions de sociétés*》Thèse Paris II 1999. Françoise Warembourg - Auque《*La succession aux biens d'une personne morale de droit privé*》Thèse Lille II 1977; Y. Cheminade《*La nature juridique de la fusion des sociétés anonymes*》RTD Com. 1970 p. 15; G. H. Martin《*La notion de fusion*》RTD Com. 1978 p. 269.

nied with a universal succession are not comparable to some basic operations which are quite similar because they have an original feature. Thus, when a legal act refers to the case of an assignment, it's not possible to use instead an operation (merger or partial transfer of assets) which involves a universal succession①: in deed, a merger does not consist of an addition of isolated assignments.

This universal succession principle, which French experts are familiar with, is also encountered widely in Europe and in the rest of the world②. Applied by the 3rd and 6th European directives ③, and by the 2005/56 Directive concerning cross - border mergers of joint - stock companies, it is extensively used by countries of continental Europe. But even before the implementation of directives, the universal succession principle has been established by German law (*Gesamtrechtsnachfolge*, *AktG* 1937 § 233 and s), by Italian law (Civil Code section 2501 and s), and by Dutch law (*Onder Algemene Titel*).

On the other hand, British law hardly uses this principle. The main principle is that contractual obligations and liabilities can not be transferred until the other party has consent to the transfer. Thus, the renewal of the contract must be made. The universal succession is achieved in this country by the means of a "scheme of arrangement" allowed by the court④. The scheme of arrangement needs to be approved by the majority of the target shareholders at an extraordinary general meeting, before being put before the court for the court's sanction.

The universal succession also characterizes merger operations in Canada⑤, and even more drastically than in France. In American law, the surviving corporation assumes all the rights, privileges,

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① Cass. com. 12 février 2008, Droit des sociétés Avril 2008 n° 74 obs. Renaud Mortier.

② International Encyclopedia of Comparative Law, Volume XIII Chapter 6, Section VII by Alfred Conard

③ 78/855/EEC concernant les fusions de sociétés et 82/891/CEE concernant les scissions de sociétés

④ According to articles 899 et 900 du Companies Act 2006, 《The court may》, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:

a) the transfer of the transferee company of the whole or any part of the undertaking and the property or liabilities of any transferor company;

b) the allotting or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

d) the dissolution, without winding up, of any transferor company;

e) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement;

f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.

⑤ Raymonde Crete and Stéphane Rousseau 《*Droit des sociétés par actions*》 Les Editions Themis 2002.

and liabilities of the merged corporation①. The principle of universal succession is expressly laid down in § 906 of New – York BCL②.

At last, as regards the PRC, section 175 of Company Act of the People's Republic of China seems to establish a universal succession principle. Section 175: *When companies merge, the claims and debts of the parties to the merger shall be transferred to the absorbing (acquiring) company or the newly formed company.*

Extensively established in many legal systems, the principle of universal succession seems nevertheless delicate. As aforementioned, it constitutes a departure from the common principles but it is the principle governing the matter of restructuring operations. The temptation to go back to the common law principles is strong and judges are actually used to achieve this attempt. Because of its universal feature, the succession conveys a flow of goods and chattels, rights, claims, often governed by specific rules. The dynamics of these specific rules tend to dispute with the dynamics of the corporate restructuring which demands simplicity and standardization.

Furthermore, being a principle extremely practical and which acts without discrimination, universal succession is likely to further frauds to claims of third parties through fraudulent schemes allowing the evasion of an asset from property. Can we imagine that a mere legal fiction gets to the point to harm the rights of third parties?③

Besides, the principle of universal succession which applies to corporate bodies has been developed on the basis of the one which applies to natural persons at the time of their death. From that moment on, judges will be under the temptation to reason about the universal succession in an anthropomorphic way and to apply to corporate bodies provisions which make more sense for natural persons (specially concerning the rules which apply to liability).

As a matter of fact, the basis of the principle is not necessary the same in these two cases. Concerning restructuring operations, the universal succession is more based on the idea of the continuation of the company④, rather than the idea of the continuation of a natural person. This idea of the continuation of the company allows facilitating the functioning of the mechanism.

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① See: Kling Nugent《*Negotiated acquisitions of companies, subsidiaries and divisions*》Vol. 1 – Law Journal Press 1 – 6 (3).

② Le principe figure également dans le § 259 du Delaware General Corporation Law. Les Tribunaux de l'Etat de Delaware ont décidé dans Western Airlines v. Allegheny Airlines, 313 A. 2d 145 (Del. Ch. 1973) que le principe des obligations de l'entité survivante est tellement profondément ancré dans la loi qu'il n'y ait même pas besoin d'acte législatif pour le consacrer. Cette déclaration de la part des Delaware Chancery Courts est importante car environ 70% des sociétés cotées aux Etats – Unis sont incorporées dans le Delaware.

③ Alexis Constantin《*L'application des clauses d'agrément en cas de fusion ou de scission: le poids des mots, le choc des principes*》, Bull. Joly 2003 § 12 p. 751.

④ Voir sur ce point les développements d'Anne – Sophie Barthez《*La transmission universelle des obligations*》Thèse Paris I 2000 p. 176 et s.

So, the matter is characterized by a permanent state of tension, as well as the fact that the principle tends to a weakening which make it loose its efficient technique of restructuring's feature.

That is the problematic we wish to explain here, on the basis of French law which is the one we know the better. The example of French law is also noteworthy considering the fact that this law has actually generalized the universal succession as a technique in favour of corporate restructurings: the process is even used for mere operations of partial transfer of assets which are *a priori* not really compatible with such a principle: this point will be clarified further.

Intuitively, we can assume that two different cases can be distinguished according to whether the operation leads to the disappearing of the initial holder of goods and chattels, rights and obligations or it doesn't affect its existence. In fact, in this last case, the presence of the former holder can lead to behaviours of deal makers or reactions of the legal system which are hardly imaginable in the first case.

I. Universal succession and disappearance of the company or companies holder (s) of goods and chattels and obligations

In principle, universal succession takes effect drastically. As a technique entirely focused on efficiency, it normally works cut and dried: goods and chattels, rights, obligations are transferred to the absorbing company or to the new company which results from the merger. The mechanism is quite simple and *a priori* strong as it suffers from no exception.

In this first case, it is logical that the principle develops its effects to the utmost since is not conceivable to proceed to a repartition, notably concerning liabilities, after the disappearance of the company (companies) which holds goods and chattels and obligations. But undoubtedly, it is a simplified vision of the matter. In deed, the universal succession remains the basic principle (A), but an erosion of it is observed (B).

A. The general principle of universal succession

The universal succession concerns the property of the absorbed (acquired) company, or of the companies which take part in the formation of a new company. Further, it can concern the property of the company which is dissolved in several units through the process of a demerger (split-off). Assets, as well as liabilities, are transferred. The universal succession does not imply the "*novation*" of the transferred obligations.

In a very concrete manner, this universal succession entails two series of consequences. On the one hand, exemptions of specific obligations (1°), on the other hand, the right for the entity which receive the property to benefit from entitlements (2°).

1° -Exemptions of specific obligations

A number of goods and chattels and rights are subject to a specific legal system of transmission

which is by the mechanism of universal succession. The recent case law gives us examples. As such, the transmission of a ship① is subject to specific rules which the universal succession makes unenforceable. Also, the transmission of debts is exempted from formalism whereas these debts should be subject whether to formalities of endorsement② or to the basic formality pursuant to section 1690 of Civil Code③.

2° – The benefit of entitlements

Recent French case law gives two examples particularly enlightening. The first concerns the crossing of disclosure threshold' statement. The absorbing company, as the assignee of the absorbed company, has not to renew the statement made by the absorbed company concerning the acquisition of shares transferred by the effect of the merger④. The second example lies within procedural benefits of the universal succession. In a decision dated 12th March 2008, the 3rd Civil Division of the *Cour de Cassation* pointed out that in order to determine the deadline granted to the creditor of a dissolved company to lodge an appeal to the Supreme Court against the transferee, it would be proper to take into account the period of time which has already run against the company of which the property is transferred⑤.

B. The trend to the erosion of the principle of universal succession

The expressions of this erosion are obvious and it will be easily demonstrated (1°).

In some cases, this erosion leads to a true dead end (2°).

1° – Signs of the erosion

In the recent era, the trends to depart from the universal succession principle are strong. The mechanism is a perfect tool of corporate restructuring through its simplicity and its encircling character. But, it often appears too much rustic, as sometimes it does not take into account the rights of third parties (a), or the interests of a deal maker (b), or even the general interest (c).

a. The safeguard of the rights of third parties

In many cases, universal succession affects brutally the rights of third parties, so case law had to

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① Cass. Com. 11 décembre 2007, RJDA 4/08 n° 429.

② 25 octobre 2007, n° 07 – 4353, 2ème ch.

③ Cass. Civ. 7 mars 1972, JCP 1972. 2. 17270 note Guyon, RDC 1972, 654 obs. Houin; Com. 1er juin 1993, RJDA 1993. 548, Defrénois 1993, 1210 note Le Cannu.

④ 26 mars 2008, arrêt n° 406 F – D; RJDA 6/08 n° 665; JCP E 24/04/2008 n° 1718 p. 27; Bull. Joly Stés 2008 p. 489 et s. note Paul Le Cannu. See on this matter: Catherine Maisonblanche《La fusion: les conséquences en matière de franchissement de seuils et de détention des droits de vote》RTD Fin. n° 2 – 2008 p. 91 et s. ; Thierry Bonneau《*Franchissement de seuils, privation des droits de vote et ayant cause*》in Mélanges Paul Didier, Economica 2008, p. 25 et s.

⑤ N° 07 – 15 – 278 n° 229 FS – PB, BRDA 8/08 n° 3,《LEDC》, n° 1 Juin 2008 p. 5 obs. Renaud Mortier; Bull. Joly Stés 2008 p. 477 § 102 note Paul Le Cannu.

restrain the consequences of the mechanism. As such, the third party as a debtor of an obligation of guarantee. The merger must not make the situation of the guarantor worse than it was originally : thus, the guarantor is obliged to pay for the debts existing at the day of the merger but has no obligation to pay for the future. However, in principle, in the event of an absorption – merger of the creditor, the guarantor remains obliged because there is no alteration in her/his/its situation. Likewise, the liabilities' guarantee clause is transferred to the acquiring (absorbing) company①.

So as for the third party entitled to the assent's procedure ("*droit d'agrément*")② . For example, the absorbed company has owned shares of a company of which nobody could be a shareholder without the prior assent's procedure: in this case, should it be considered that the absorbing company will substitute itself naturally to the absorbed company, or should it be considered that the company issuing shares is entitled to refuse the assent despite the universal succession? Case law has ruled in favour of the right to refuse the assent③.

Also as for a third party involved in a contract entered into "*intuitu personae*"④: concessionnaires, franchise, etc…. The Commercial Division of the *Cour de Cassation* considers that the transmission of these contracts could not be made without the prior assent of the contractual partner.

In two decisions dated 3rd June 2008⑤, the *Cour de Cassation* applies this solution, already retained in the matter of contract of commercial agency⑥, contract of franchise⑦ Whatever the matter is an absorption – merger (merger – acquisition) or a partial transfer of assets governed by the legal system of demergers (splitting – off), the transfer of the franchise contract supposes consequently, according to both decisions, the franchisee's assent.

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① N° 968 FS + P + B ; Bull. Joly Stés 2007 p. 1285 note A. Couret ; Droit et Patrimoine n° 171, Juin 2008 p. 106 obs. Didier Poracchia; Caussain, Deboissy, Wicker, JCP E 2008 § 4 p. 29; M. Dubertret《*Transmission à l'absorbante de la garantie de passif stipulée en faveur de l'absorbée en cas de fusion*》, Rev. Soc. 2007 p. 798.

② Isabelle Urbain – Parleani《*La fusion absorption à l'épreuve des clauses d'agrément. Le cas particulier de la transmission des droits sociaux détenus dans le capital d'une société tierce*》in Mélanges Yves Guyon《*Aspects actuels du droit des affaires*》Editions Dalloz 2003 p. 1061 et s. 5

③ 15 mai 2007 n° 722 F – D Eurofog/Safran, Bull. Joly 2007 n° 294 note Michel Menjucq et Albin Taste 3 juin 1986, Bull. Joy 1986 p. 757 § 223 – 1; 6 mai 2003, Bull. Joly Stés 2003 p. 812 § 172 et p. 813 § 173 et chronique Alexis Constantin p. 742 § 160 ; JCP E 2003 p. 1485 note M. Cohen; JCP G 2003 II n° 10181 obs. Béatrice Thuillier.

④ X. Jaspar et N. Metais《*Les limites à la transmission universelle du patrimoine : les contrats conclus 'intuitu personae' et les contraintes afférentes à certains biens*》Bull. Joly 1998 p. 447 et s. § 156. Matthieu Dubertret《*L'intuitus personae dans les fusions*》Revue des sociétés n° 4, 2006 p. 722 et s. ; Alain Viander《*Les contrats conclus intuitu personae*》Mélanges Mouly Tome 2, 1998, 193.

⑤ Com. 3 juin 2008, JCP E 03/07/2008 p. 916, BRDA 12/08 n° 1 p. 8

⑥ Cass. com. 13 décembre 2005, Bull. Joly Stés 2006 p. 591 et s. note Xavier Vamparys. Egalement 18 février 1997, Rev. Soc. 1998 p. 324 note P. Fortuit; CA Paris 7 novembre 1996, RTD Civ. 1998, 103 note J. Mestre

⑦ Voir l'ouvrage de Karim Torbey《*Les contrats de franchise et de management à l'épreuve du droit des sociétés*》, LGDJ 2002, Bibliothèque de droit privé, Tome 3 & 4.

To prevent judges from taking such attitudes, the lawmaker has sometimes erased the obstacles to universal succession. Thus, article L 145 -16 *of Code de commerce* lies down concerning commercial leases that "in case of a merger or a partial transfer of assets achieved according to the terms of article L 236 -22, the company resulting from the merger or the company which benefit from the asset is substituted to the one to which the commercial lease was granted to in all rights and obligations resulting from this lease".

Other laws hardly take into account the *intuitu personae* character of the contract. For instance, in American law, no restriction to the transfer of a contract does result automatically from its nature①. The contract must have stipulated the restriction to the transfer.

In French law, the reasoning is the opposite of the one aforementioned: it is possible by a stipulation of the contract to mention that the contract will be transferred in spite of the solutions of case law.

The advantage of the safeguard of the rights of third parties can perfectly be understood, but other techniques which would not reopen the whole debate of the universal succession could be imagined to reach this outcome. This solution is nowadays chosen by some foreign laws. In Belgium, the coordinated laws of 29 June 1993 in deed do not provide for any exception to the area of the universal succession at the time of an absorption - merger or a demerger (splitting - off). It encompasses thus as of right the contracts entered into *intuitu personae*. But simultaneously, it is provided for that the creditors are entitled to the judicial rescission of their agreement when it is proven that it has lapsed by disappearance of its purpose or its cause.

In the same state of mind, it could be referred to the companies checked by an auditor or to the case of absorption - merger of the company, holder of the mandate. The absorbing (acquiring) company carries on normally the mandate conferred to the absorbed (acquired) company. Nevertheless, the general meeting of the checked company can, by its first meeting subsequent to the absorption (acquisition), deliberate over the issue of the continuation of the mandate after having heard the auditor②.

b. The safeguard of a partner's interests to the deal

An excellent example is given to us in French law by the very recent Law on the Modernization of the Economy (LME) dated 4th August 2008. Till now the merger or demerger (splitting - off)

① Cf. Model Business Corporation Act Annotated adopted by the Committee on Corporate Laws of the Section of Business Law Volume 3, 2008 11 - 94 et les décisions de jurisprudence citées. Voir également : The effect of mergers on anti - assignment provisions in contracts : a case note on txo production co. V. M. D. MARK, 53 Baylor L. Rev. 489, 505 + (2001) HN : 11, 14, 17 (A. 2d); "*Effect of Corporate Reorganization on Nonassignable*" Contracts, 74 HARV. L. REV 393 (1960); BALLEW "*Assignment of Rights of the Disappearing Corporation in a Merger*" 38 BUS. LAW. 45 (1982).

② Article L 225 - 229 du Code de commerce.