Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 16(65) No. 2 – 2023
https://doi.org/10.31926/but.ssl.2023.16.65.2.17

THE CONCEPT AND LEGAL NATURE OF GOODWILL IN THE CONTEXT OF LAW NO 265/2022 ON THE TRADE REGISTER

Codruț N. SAVU[1]

Abstract: *In practice, the sale of goodwill is not straightforward because it involves the transfer of ownership of both movable and immovable property. The sale of goodwill, although governed by the rules laid down in the Civil Code, is a complex operation which requires compliance with and implementation of legal provisions in acts other than the Civil Code. If the goodwill forming the subject-matter of the contract of sale includes intellectual property rights and/or industrial property rights, one must take into account the rules laid down by the law specific to each right, which requires the conclusion of contracts of assignment, licence, etc., which must contain certain provisions on the terms of use, duration and extent of the assignment which is why it is necessary to have as much knowledge as possible of the legal nature of this complex legal institution of goodwill.*

Key words: *goodwill, trade register, de facto universality, professional assignment, business assets.*

1. Introduction

Goodwill has never enjoyed a unitary, compact legal regulation, although it represents an institution which is purely specific to commercial law, being mentioned incidentally in various normative acts specific to this matter.

Related to the aforementioned, before formulating a definition of goodwill we consider it appropriate to first do a brief review of the legal regulations that refer to the concept of goodwill.

Thus, according to art. 21 of Law no. 26/1990 on the trade register, currently repealed by Law no. 265/2022 on the trade register, in the trade register, mentions will be recorded regarding the donation, sale, lease or real security of the goodwill, as well as any other act which changes the entries in the trade register or which brings a company to a cease of goodwill. According to art. 41 para. (1) of Law no. 26/1990, (repealed by Law no. 265/2022) the acquirer of goodwill with any title shall be able to continue the activity under the previous company, which includes the name of a natural person

[1] *Transilvania* University of Braşov, codrut.savu@unitbv.ro, corresponding author

merchant or an associate of a family business, companies in collective name (SNC) or simple limited partnership (SCS), with the express consent of the previous owner or of his successors in rights and with the obligation to mention the quality of successor in that company.

Law no. 99/1999 on some measures to accelerate the economic reform in Title IV (currently repealed according to art. 230 lit. U of chapter X of Law no. 71/2011) provided in art. 10 para. 3 sentence II that if the good affected by the guarantee consists of a universality of movable goods, including goodwill, its content and characteristics will be determined by the parties until the date of establishment of the real guarantee. Although abrogated, the mentioned legal text provides an important characteristic of goodwill, namely that of being assimilated to a universality of movable goods, an aspect which is also partially valid in the current legislative context.

Then, by art. 20 para. (2) of Law no. 346/2004 on the stimulation of the establishment and development of small and medium-sized enterprises, the transfer of small and medium-sized enterprises was regulated, which also means the transfer of the enterprise, namely of goodwill to third parties. References to goodwill can also be found in the contents of Law no. 287/2009 on the Civil Code.

Thus, according to art. 340 lit. c) of the Civil Code, "The following are not deemed community property, but the private property of each spouse: goods used for the exercise of the profession of either spouse, if they are not elements of a goodwill that is part of the community of property".

Under the marginal name "Usufruct of the goodwill", art. 745 of the Civil Code provided that "In the absence of contrary provisions, the usufructuary of goodwill may not exercise ownership of the property forming such goodwill. If items in this property are made use of, the usufructuary has the obligation to replace them similar ones of equal value".

Also, in the matter of private international law, in the assumption that the applicable law (*lex voluntatis/electio juris*) has not been chosen by the parties, art.2638 Civil Code provides: (1) "In the absence of choice, the law of the State with which the judicial document is most closely connected shall apply …(2) Such connections shall be deemed to exist under the law of the State in which the debtor of the characteristic provision of services, or where applicable, the author of the act has, at the time of the conclusion of the act, as the case may be, their habitual residence, goodwill or registered office.

After the entry into force of Law no. 287/2009 on the Civil Code, a first legal definition of goodwill was regulated through the provisions of art. I point 2 of G.E.O. no. 88/2018 which, in art. 5 para. (1) of Law no. 85/2014, introduced, inter alia, point 73 whereby goodwill was defined as representing "the set of movable and immovable, tangible and intangible assets - brands, companies, emblems, invention patents, - used by an economic operator in order to carry out his activity".

2. Doctrinal Definition of Goodwill

Although the literature is very rich in definitions and characterisations of goodwill, we will limit ourselves to a few of them, mainly those expressed in the legislative context imposed by Law no. 287/2009 on the Civil Code.

Thus, in a first theory (Cărpenaru, 2016, p. 96), goodwill has been defined as "a set of movable and immovable, tangible and intangible assets that a trader allocates to the conduct of a commercial activity, with the aim of attracting customers and, implicitly, (of) obtaining profit".

In a second theory (Piperea, 2012, p. 55), goodwill was defined as "a set of tangible or intangible assets which the trader uses to carry on his business".

We define goodwill as a type of universality of fact, consisting of tangible and/or intangible movable and/or immovable property which a trader allocates, as a common purpose, to the pursuit of the economic activity constituting the operation of a commercial enterprise.

We should not draw the erroneous conclusion that goodwill represents the company's assets or a division of these assets because the company itself is not confused with the operation of the company, more specifically with the systematic pursuit of organised economic activity, since all the assets making up the de facto universality are intended for this activity.

3. Legal Nature of Goodwill. Presentation of the Main Doctrinal Theories

Over the years, various theories have been put forward on the legal nature of goodwill, which is why, for pragmatic reasons, we will limit ourselves to the current ones, i.e. those expressed in the context of the new Civil Code, which we will list in chronological order.

Thus, in a first doctrinal theory (Piperea, 2012 p. 55), it was stated that “in view of the provisions of Article 541 NCC, we could say that goodwill is a de facto universality, constituted by the merchant by allocating a group of assets to the exercise of trade” which "is not to be confused with assets of professional assignment” (. ...), goodwill being “a mass of assets (including rights), whereas assets assigned to a trader are a division of the trader's assets, a fraction of a legal entity (made up of assets, rights and obligations) belonging to the trader”.

In a second theory (Nemeș, 2015, p. 59), contrary to the above, it was considered that "based on the current situation of the regulations applicable to the matter, the conclusion to be drawn is that the legal nature of goodwill is that of an asset of professional assignment, which means that “for situations in which the special laws do not regulate certain aspects relating to goodwill, the rules applicable to professional assets will be used”.

In a third theory (Cărpenaru, 2016, p. 101), similar to the previous one, but still in antithesis with the first theory, “the concept of goodwill and that of assets of professional assignment refer to the same reality: the assets allocated to the conduct of commercial activity, with everything related to this activity”, the author referring to "the legal definitions of the two concepts" and concluding that “in the light of these legal provisions, as a legal nature, goodwill is an asset of appropriation, i.e. a fraction of the assets of the natural or legal person assigned to the conduct of commercial activity”, stating that “the provisions of the Civil Code on assets, as well as those cited above, make it inaccurate to classify goodwill as a de facto universality”.

3.1. Critique of the theory of assets of professional assignment (business assets)

The legal nature of goodwill cannot be based on professional assets, as will be argued below. The provisions of Article 31 para. (2) of the Civil Code stipulate that assets may be divided or assigned only in the cases and under the conditions provided for by law, the said legal provisions being mandatory.

The opinion that supports the thesis of the assets of professional assignment bases its arguments on the definition provided in art. 2 lit. j) of the G.E.O. no. 44/2008 according to which the assets of assignment are “the assets within the assets of the entrepreneur, representing all the rights and obligations assigned, by written declaration or, as the case may be, by the establishment agreement or by an additional act thereto, to the exercise of an economic activity”.

Indeed, with reference to Art. 31 para. (2) of the Civil Code, the provisions of Art. 2 lit. j) of the G.E.O. no. 44/2008 expressly regulate both "a case" and "the conditions" in which an asset of assignment may be constituted, but the argument in support of the legal nature of goodwill is incomplete for the reasons hereunder. The definition refers only to professional traders who are natural persons, and does not cover the legal nature of the goodwill of professional traders who are legal persons, whose constituent elements are laid down in Article 187 of the Civil Code, one of which is their own assets (general assets) and not the assets of the estate.

In the case of legal entities governed by Law No 31/1990 on companies, a law of a special nature compared with the Civil Code, there is no legal provision establishing the possibility for these companies to set up a patrimony of assignation, and Article 31(1)(a) of the Civil Code does not provide for the possibility of setting up a patrimony of assignation. Article 31(2) of the Civil Code allows for the creation of assets of an assigned nature only in the cases and under the conditions laid down by law.

Of course, under Article 31 para. (3) of the Civil Code, a company with legal personality may constitute trust assets and may be a settlor, as provided for in Art. 776 para. (1) of the Civil Code, but the legal status of trust assets is different from that of assets of an assignation, hence Art. 31 para. (3) of the Civil Code makes express reference to the creation of trust assets in accordance with the provisions of Title IV of Book III of the Civil Code, namely trusts.

Lastly, another argument which contradicts the thesis of the legal nature of the business assets is precisely the impossibility of including in the instrument set up such an asset as certain intangible assets pertaining to goodwill, such as the clientele and the commercial goodwill, which the supporters of this thesis recognise by analysing them as part of the goodwill.

3.2. Goodwill has the legal nature of a de facto universality

We believe that the theory (Piperea, 2012 p. 55), based on the provisions of Article 541 of the Civil Code, according to which goodwill has the legal nature of a de facto universality, is correct because it corresponds to current legislative requirements, as we shall argue below.

According to Art. 31 para. (1) of the Civil Code, the patrimony includes all rights and obligations that can be valued in money and that belong to a natural or legal person, and according to para. (2), the patrimony may be subject to division or appropriation only in the cases and under the conditions laid down by law. Paragraph (3) defines the assets of assignment as trust assets, constituted in accordance with the provisions of Title IV of Book III, those assigned to an authorised profession, as well as other assets determined by law.

It can be seen that the assets are made up of components of asset containing all the rights that can be valued in money and liability items containing all the obligations that can be valued in money.

From this point of view, it has been stated in the doctrine that "the existence of liability items makes the estate a legal entity, with a regime independent of that of its component elements, which distinguishes it from factual universalities".

In practice, assets are a legal universality (*universitas juris*) because they comprise the totality of both rights and obligations, whereas goodwill is a factual universality (universitas facti) because it comprises a group of goods and rights without comprising the trader's debts, i.e. his liabilities.

The assets of the trader are nothing more than a distinct group of assets, a division of the assets, i.e. a fraction of the *universitas de jure*, which comprises not only assets/rights but also liabilities.

In contrast to the universality of rights, i.e. the patrimony and the divisions/assets/assets of professional assignment, Article 541 of the Civil Code defines the de facto universality as (1) "all the assets belonging to the same person and having a common purpose according to that’s person will or by law", and (2) "the assets that forms a de facto universality may, together or separately, be the object of separate legal acts or relations".

It follows from the provisions of Article 541 of the Civil Code that, in order to be in the presence of de facto universality, two conditions must be cumulatively met: (i) the property must belong, as a whole, to the same person; (ii) the property must have a common purpose, conferred either by person’s will or by law.

However, goodwill is a set of assets belonging to the same person and having a common purpose which is channelled by the will of the person in the pursuit of economic activity.

On the other hand, Article 541 of the Civil Code refers only to goods, from which it follows that the de facto universality lacks the liability items of the patrimony (universality of rights), since goodwill contains only goods and rights, which is why it cannot be accepted that goodwill is a patrimony of professional assignment, since the latter comprises not only rights but also obligations.

The *de facto* universality of goodwill constitutes and explains the legal basis for legal acts (donation, sale, lease, mortgages) relating to goodwill, which must be listed in the trade register. In this regard, Art. 541 para. (2) of the Civil Code provides that "the assets that form a de facto universality may, together or separately, be the object of separate legal acts or relations", a legal provision which is not expressly found in relation to the legal universality, i.e. the (general) assets or the assets of professional assignment.

The universality of the assets also explains the situation of acts of legal disposition of the assets, which also include immovable property, which requires separate legal acts to be concluded, and the legal basis is Article 541 para.(2) final sentence of the Civil Code, according to which the (immovable) assets that form the de facto universality may be the object of separate legal acts.

Although goodwill is made up of several assets, movable and/or immovable, tangible and/or intangible, it is regarded as a unitary whole/entity which can only be legally founded on the basis of the de facto universality, since each of the assets of which it is composed retains its individual legal status (*ut singuli*), the legal basis also being found in the provisions of Article 541(2) of the Civil Code, which allows for the assets that form the de facto universality to be the subject, together or separately, of separate legal acts or relations.

The theory of the de facto universality explains and justifies the existence of intangible elements, such as clientele and commercial goodwill, as being part of the goodwill, since they cannot be included in the constitutive documents of a business asset for the simple reason that they are not regulated by law and are justified from the point of view of the economic emolument of the business, which is why they would remain outside the goodwill if they were not qualified as intangible elements of the whole of the de facto universality.

Finally, as already mentioned, de facto universality also explains the existence of goodwill belonging to professional traders who are legal persons, in the context in which Art. 31 para. (2) of the Civil Code allows for the creation of business assets only in the cases and under the conditions laid down by law and, if we refer to Law no. 31/1990 on companies, it does not provide for any such case.

To sum up, the de facto universality, the legal basis of which is Article 541 of the Civil Code, confirms in a generic way the unitary structure of the assets (elements) making up the business assets and, at the same time, preserves the individuality of each individual asset (element).

References

Carpenaru, S.D. (2016). *Tratat de Drept Comercial* [Romanian Commercial Law Treatise]. Bucharest: Universul Juridic.

Nemes, V. (2015). *Drept Comercial.* [Commercial Law]. Bucharest: Hamangiu Publishing.

Piperea, Ghe. (2012). *Drept Comercial. Intreprinderile in reglementarea din Noul Cod Civil* [Commercial Law. Companies in the Regulation of the New Civil Code]. Bucharest: C.H.Beck Publishing.