

The Transfer of Going Concern in Italy: Who Pays the Trade Debts?

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ABSTRACT: Article 2560, paragraph 2, of the Italian Civil Code sets forth a specific regulation of the trade debts in the context of the transfer of a going concern. Such provision of law seems apparently clear. However, case law and the scholars show that its actual applicability has raised several issues over the years. This paper examines some of these issues, especially focusing on the interpretation followed by the majority of case law, with the specific aim to give, once for all, some guidelines to the practitioners.

KEYWORDS: *Going Concern; Trade Debts; Transfer; Italy*

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1. INTRODUCTION. ARTICLE 2560, PARAGRAPH 2, OF THE ITALIAN CIVIL CODE

According to Italian Law,¹ a going concern is the complex of assets organized by the entrepreneur for the sake of performing a certain business activity.² The Italian Civil Code contains certain provisions that, setting forth a derogation to the general principles of civil law, aim at favouring the transfer of going concerns.

In this respect, the transferee of the going concern automatically steps into the commercial agreements pertaining to the going concern, with the exclusion of those agreements having a “personal nature” (therefore, in a derogation of general principles of civil law, it is not necessary to request to each third party contractor the consent to the assignment of the relevant agreements); the assignment of receivables pertaining to the going concern becomes effective towards all the third party debtors since the registration of the transfer of the going concern with the Company’s Register (therefore, again in derogation of the general principles of civil law, it is not necessary to notify to each third party debtor the transfer).

A special regulation has been set forth also in relation to trade debts pertaining to the transferred going concern. This paper will specifically focus on this topic.

According to Article 2560 of the Italian Civil Code, the transferor is not released from the trade debts pertaining to the transferred going concern that have incurred prior to the transfer, unless the creditors have given their consent. However, if the creditors have not released the transferor, the latter will not be the only entity liable for such debts.

According to Article 2560, paragraph 2, of the Italian Civil Code the transferee becomes jointly liable with the transferor for the trade debts

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¹ See CODICE CIVILE [C.c.] [CIVIL CODE] art. 2555.

² The scholars (see, e.g., GIAN FRANCO CAMPOBASSO, *MANUALE DI DIRITTO COMMERCIALE* [COMMERCIAL LAW MANUAL] 138 (4th ed. 2007)) and case law (see, e.g., Tribunale amministrativo regionale (TAR) Lombardy Milan, 24 Marzo 2011, n. 786, point out that the going concern is characterized by: (i) a group of tangible (or intangible) assets; (ii) to which the entrepreneur give an unitary purpose.

pertaining to the transferred going concern, provided however that such debts are recorded in the mandatory accounting books.³

Consequently, by operation of law, the liability of the transferee is “added” to the liability of the transferor. The rationale of the above provisions is to assure the creditors that their receivables will not be prejudiced by the transfer of the going concern. The transferor might indeed transfer the going concern to an entity whose net worth is not enough to pay all the debts. In order to avoid such risk, Italian law provides, on the one hand, that the transferor is not automatically released from the debts; and, on the other hand, that also the transferee becomes liable. However, in order to lay down a protection in favour of the transferee (otherwise the transfer of going concern would be excessively burdensome for transferees), Italian law states that the transferee becomes liable only for those debts that have been recorded in the mandatory accounting books (and not also for the other debts not included in such books).

Indeed, the transferee, when purchasing a going concern, should be made aware of the precise amount of the debts it will become liable for.

Article 2560, paragraph 2, of the Italian Civil Code seems apparently clear. However, case law and the scholars show that the actual applicability of the provision at stake has raised several issues over the years.

³ Please note that art. 2560 of the C.c. applies neither to labour debts nor to tax debts. To such other debts apply other specific regulation. As far as labour debts are concerned, according to art.2112 of the C. c., the transferor and the transferee are jointly liable for all the receivables that the employees had at the time of the transfer of the going concern. Consequently, the transferee is liable for the labour debts, regardless whether such debts are recorded with the mandatory accounting books or not and even if the transferee was not aware of such debts (CAMPOBASSO, *supra* note 2, at 157). The aim of such regulation is to lay down a higher standard of protection for the employees (CAMPOBASSO, *supra* note 2, at 157). As far as tax debts are concerned, according to art. 14 of D.Lgs. n. 472/1997, G.U., the transferee is jointly liable with the transferor for any taxes and penalties due in connection with violations committed in the fiscal year in which the transfer of the going concern has occurred and the two preceding fiscal years as well as for any taxes and penalties issued and claimed in the same period even if related to violations committed in previous fiscal years. Such joint liability is however subject to the following restrictions: (i) it arises only if the transferor does not pay the taxes and penalties; (ii) the overall amount to be paid cannot exceed the value of the transferred going-concern; (iii) the transferee is jointly liable with the transferor only for the tax liabilities resulting from an certain certificate that is issued by the tax authority as of the date of transfer of the going-concern. According to the jurisprudence of the Italian Supreme Court (see e.g., Decision, 13 Luglio 2017, n. 17264) the afore-mentioned art. 14 of D.Lgs. n. 472/1997, G.U., is a “special provision” with respect to art. 2560, ¶12, C.c..

In light of the above, the aim of this paper is to briefly point out the outcome of the interpretation of Article 2560, paragraph 2, of the Italian Civil Code, in order to give, once for all, some guidelines to the practitioners.

More in detail, this paper will deal with the issues of: (i) the sharing of the liability for trade debts pertaining to the transferred going concern between the transferor and the transferee; (ii) the requirements for the joint liability of the transferee; (iii) the case in which the transferor is transferring not the whole going concern but only a business unit and did not keep separate accounts regarding the trade debts pertaining such business unit to be transferred.

2. THE SHARING OF THE LIABILITY FOR TRADE DEBTS PERTAINING TO THE TRANSFERRED GOING CONCERN BETWEEN THE TRANSFEROR AND THE TRANSFEE

As a preliminary remark, it is worth noting that Article 2560, paragraph 2, of the Italian Civil Code, does not specify if through the transfer of the going concern the trade debts are automatically transferred from the transferor to the transferee. Article 2560, paragraph 2, of the Italian Civil Code provides only that the transferee becomes jointly liable with the transferor for such debts.

The issue consists in understanding if, according to the interpretation of Article 2560, paragraph 2, of the Italian Civil Code, the debts remain upon the transferor or, by operation of law, are automatically transferred upon the transferee.

The consequences of one approach or the other are material.

If the debts are automatically transferred from the transferor to the transferee, should the transferor pay the creditors, it will have a right of recourse against the transferee.

However, if the debts are not automatically transferred from the transferor to the transferee (consequently, the debts remain upon the transferor), should the transferee pay the creditors, it will have a right of recourse against the transferor.

The first approach was followed in the past by some case law.⁴ However, currently the majority of case law and the scholars follow the second one.⁵

It has been clarified, indeed, that the joint liability provided for by Article 2560, paragraph 2, of the Italian Civil Code, consists in an assumption of liability by operation of law (*accollo ex lege*),⁶ whereby, though the debts remain upon the transferor, in order to lay down a further protection in favour of the creditors, the transferee also will become liable for such debts. As a consequence, should the transferee pay the creditors, the transferee shall have a right of recourse against the transferor (on the contrary no right of recourse can be exercised by the transferor that has paid the relevant debts).⁷

It is worth specifying that according to case law and scholar's interpretation of Article 2560, paragraph 2, of the Italian Civil Code, the latter sets forth a regulation that is mandatory exclusively towards the creditors.

Consequently, the transferor and the transferee may derogate the above provision in their internal relationship and expressly agree that all or some of the debts will be transferred from the transferor to the transferee and/or the transferee will be liable for all or for some of the debts.

Such an agreement, however, will be enforceable only in the relationship between the transferor and the transferee, but not towards the third party creditors, which are always entitled to ask the payment of the debts both to the transferor and the transferee.

3. THE REQUIREMENTS FOR THE JOINT LIABILITY OF THE TRANSFEREE

According to Article 2560, paragraph 2, of the Italian Civil Code, the joint liability of the transferor and the transferee operates upon occurrence of one

⁴ See Corte di Cassazione (Corte Cass.) (Supreme Court), 15 Febbraio 1979, n. 1001; see also Corte Cass., 25 Luglio 1979, n. 3723.

⁵ See, e.g., Corte Cass., 22 Dicembre 2004, n. 23780; Corte Cass., 3 Ottobre 2011, n. 20153; Corte Cass., 30 Giugno 2015, n. 13319; GIORGIO CIAN & ALBERTO TRABUCCHI, COMMENTARIO BREVE AL CODICE CIVILE [BRIEF COMMENT TO THE CIVIL CODE] 3363 (2014, 11th ed.).

⁶ Colombo, *L'azienda [The Company]*, in III TRATTATO DI DIRITTO COMMERCIALE E DI DIRITTO PUBBLICO DELL'ECONOMIA [COMMERCIAL LAW AND PUBLIC ECONOMY LAW TREATISE] 159 (Francesco Galgano ed., 1979); CIAN, TRABUCCHI, *supra* note 5, at 3364.

⁷ See Corte Cass., 22 Dicembre 2004, n. 23780.

requirement: the trade debts pertaining to the transferred going concern need to be recorded in the mandatory accounting books. As pointed out, the requirement is necessary in order ensure that the transferee is made aware of the precise amount of the debts it will become liable for.

In this respect, the mandatory accounting books article 2560, paragraph 2, of the Italian Civil Code references are those books identified by article 2214 of the Italian Civil Code, *i.e.* the journal (*libro giornale*), the inventory ledger (*libro degli inventari*), and any other accounting entries required by the kind and the size of the company. As far as joint-stock companies and limited liability companies are concerned, the main mandatory accounting document required by these kind of companies are the financial statements of the transferor.⁸

According to the majority of the case law and the scholars, the registration of the debts with the accounting books is mandatory for the sake of the applicability of the joint liability according to Article 2560, paragraph 2, of the Italian Civil Code.⁹ In this respect, as the provision must be interpreted restrictively¹⁰ (and, consequently, only to the mandatory accounting books shall be made reference) it is excluded that the joint liability of the transferee may occur for those debts resulting through other sources, and regardless of the actual knowledge that the transferee may have had of such debts.¹¹ By way of example, it has been even excluded that the transferee might be liable in respect to debts resulting from the V.A.T. registers.¹²

⁸ See TAR Catanzaro, 17 Dicembre 2013, n. 1162; see also Tribunale (Trib.) (ordinary court of first instance) Bari, 3 Febbraio 2014.

⁹ See Corte Cass., 26 Settembre 2017, n. 22418. As far as scholars are concerned, please see Tullio Ascarelli, *Corso di diritto commerciale* [Commercial Law Course] 352 (3rd ed. 1962); Angelo De Martini, *In tema di debiti relativi all'azienda ceduta* [In terms of debts related to the sold company], RIVISTA DEL DIRITTO COMMERCIALE [J. COM. L.], fascicolo [issue] 11- 12, 385 (1952); Colombo, *supra* note 6, at 147.

¹⁰ See Corte Cass., 10 Novembre 2010, n. 22831.

¹¹ See, *e.g.*, Corte Cass., 30 Giugno 2015, n. 13319; Corte Cass., 10 Novembre 2010, n. 22831; Corte Cass., 3 Aprile 2002, n. 4726; Corte di Appello (App.) (ordinary court of appeal) Milano, 8 Marzo 2014, Società, 2014, 1001; Trib. Milano, 19 Aprile 2012, in Pluris; CESARE RUPERTO, LA GIURISPRUDENZA SUL CODICE CIVILE [THE JURISPRUDENCE ON THE CIVIL CODE] 3586 (2005); CIAN, TRABUCCHI, *supra* note 5, at 3364. More in detail, case law has pointed out that it is upon the creditor to give evidence of the registration of debt in the mandatory accounting books, see in this respect, Corte Cass., 20 Giugno 1998, n. 6173; Trib. Milano, 6 Novembre 2012, Dejure.

¹² See Italian Supreme Court, March 3, 1994, no. 2108. GIORGIO CIAN & ALBERTO TRABUCCHI, CODICE CIVILE E LEGGI COLLEGATE [CIVIL CODE AND RELATED LAWS] 4521 (2016).

Please note, in this respect, that it has also been held that the transferee is not liable for the debts if the transferor has not kept the mandatory accounting books.¹³

In light of the above, if a debt pertaining to the transferred going concern does not result from the mandatory accounting books, the transferee will not be liable for such debt.

4. THE CASE IN WHICH THE TRANSFEROR DID NOT KEEP SEPARATE ACCOUNTS REGARDING THE TRADE DEBTS PERTAINING TO DIFFERENT BUSINESS UNITS

All the above principles would apply in case of transfer of a going concern. However, what happens if the transferor is not transferring the entire going concern but only a business unit?

The issue may be particularly material when the transferor has not kept separate accounts in respect to the various business units. In such an event, what should be the extent of the liability of the transferee?

The issue has been specifically addressed by the Italian Supreme Court in the decision June 30, 2015, no. 13319. In the case under the examination of the Italian Supreme Court, the creditor requested to the transferee the payment of a supply performed to the transferor before the transfer of the business unit. Though the debt arising out of said supply did not pertain to the transferred business unit, the Court of Appeal of Trieste, in the previous instance of the proceedings, held that the transferee was liable pro-quota also for such debt, as the transferor did not keep separate accounts for each business unit.

The Italian Supreme Court has overruled the decision of the Court of Appeal of Trieste, confirming, also in case of transfer of a business unit the principles examined above.

More in detail, the Italian Supreme Court has expressly pointed out the rationale under Article 2560, paragraph 2 of the Italian Civil Code, which is to

¹³ CIAN, TRABUCCHI, *supra* note 5, at 3364.

lay down a protection for both the third party creditors and the transferee, but not for the transferor.

Again, the Italian Supreme Court stressed that, as far as the creditors are concerned, the transfer of the going concern from a more reliable company to a less reliable one may cause a detriment to the guarantees of the creditors to have their receivables fulfilled; and, as far as the transferee is concerned, the transferee must always be put in the condition to be precisely aware of the amount of debts it will become liable for.

In order to comply with the rationale of Article 2560, paragraph 2 of the Italian Civil Code in respect to the protection of the transferee, it is necessary that also in case of transfer of a business unit, the transferee is liable only for those debts that, according to the mandatory accounting books, pertain exclusively to the transferred business unit. Consequently, the transferee will be liable neither for the debts that though registered with the mandatory accounting books do not specifically pertain to the transferred business unit, nor pro-quota for those debts that pertain to the overall management of the company.

In other words, if the transferor did not keep separate accounts, the transferee will be jointly liable, according to article 2560, paragraph 2, of the Italian Civil Code, only for those debts that through the examination of the mandatory accounting books it is possible to ascertain that they pertain to the transferred business unit.¹⁴

We agree with the approach followed by the Italian Supreme Court.

Such an approach is fully consistent with the principles arising from the interpretation given by the majority of the case law and the scholars of Article 2560, paragraph 2, of the Italian Civil Code.

Moreover, a different approach would cause more uncertainty in defining the extent of the liability of the transferor. Such liability would depend on the accuracy of the transferor, whether it has duly kept separate

¹⁴ Also scholars have followed the approach of the Italian Supreme Court. See CIAN, TRABUCCHI, *supra* note 5, at 3364; Roberto Caspani, *Responsabilità del cessionario per debiti inerenti al ramo d'azienda trasferito* [Liability of the assignee for debts relating to the transferred business unit], 43 GIURISPRUDENZA COMMERCIALE [COM. JURIS.] 1012 (2016); Colombo, *supra* note 6, at. 152.

accounts or not. In this scenario, the transferee that is purchasing the business unit from a transferor that has not kept separate accounts would be in worse conditions than the transferee that is purchasing the business unit from a transferor that has kept such separate accounts. Considering that the aim of Article 2560, paragraph 2, of the Italian Civil Code is to lay down a protection for the transferee, such an approach would not be acceptable.

Consequently, also in order to avoid possible (and unfair) disparity between transferees, the approach followed by the Italian Supreme Court should be welcomed.

5. CONCLUSIONS

In order to draw our conclusions on the issues examined in this paper, we can point out what follows: (i) the transfer of going concern does not automatically imply the transfer of the trade debts incurred prior to the transfer: such debts remain upon the transferor and, consequently, should the transferee pay any of such trade debts, the transferee shall have a right of recourse against the transferor (of course, unless the transferor and the transferee have expressly agreed, by means of a specific provision, that the transferor is also selling to the transferee the trade debts. In such an event, however, it is worth noting that the transfer of the trade debts is not occurring automatically, but by means of an express understanding between the parties); (ii) the transferee becomes jointly liable only for those trade debts that have been recorded in the mandatory accounting books: such a requirement is mandatory and the liability of the transferee is excluded in respect of those debts that may eventually result through other sources (and regardless of the actual knowledge that the transferee may have of such debts); (iii) the above principle would also apply when only a business unit is transferred and, therefore, the transferee shall be liable only for those trade debts that, according to the mandatory accounting books pertain exclusively to the transferred business unit. Consequently, if the transferor has not kept a separate account in respect of the business unit, the transferee will be liable neither for the debts that

though registered with the mandatory accounting books do not specifically pertain to the transferred business unit, nor pro-quota for those debts that pertain to the overall management of the company.

The above is the output emerging from the current case law and the majority of scholars. Time will tell if such principles will be also confirmed in the years to come.