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DOTTORATO DI RICERCA IN DIRITTO DEGLI AFFARI

ABSTRACT

*Acquisition of company shares and clauses of guarantee:
contractual profiles of civil law and common law*

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The contract of transfer of company share is surely among the contracts for whose improvement asked for a long and articulated economic negotiation between the surrender and the seller to define the price of transfer and the formality of payment of the same, especially in the transfers effected among non belonging subjects to the same category and, therefore, not you predestine at the interest of an only economic subject.

The theme of the guardianship of the buyer in the transfer of company shares has been being for years to the centre of the attention of the doctrine and the jurisprudence and continuous, still, to arouse perplexity despite the numerous firm points reached within the years.

In the international practice the protection of the investment in the buy-out of company or branch of this is generally submitted to a series of contractual clauses commonly denominated representations and warranties.

Among the recurrent clauses mostly that protect the buyer in the contracts of transfer of social shares they are signalled particularly:

- clauses of guarantee, related to the transferred share and to the characteristics of the company which refer;
- clauses of management, related to the corporate management in the interval of time that intervenes among the stipulation of the contract and the moment in which the same improves him and it begins to produce effects;
- clauses of access, that allow at the buyer to view books, bookkeeping writings, corporate fit and every useful information to define the real situation corporate situation;
- clauses of price, necessary obviously to fix one of the principal elements of the contract of transfer of shares.

Such contractual clauses are characterized by the degree of synthetic or analytic of the represented situations, from the different techniques of adjustment of the correspondent one and anticipated indemnity and, finally, from the different

conventional procedures to reach in rapid times to a definition of the controversies between the seller and the buyer.

The principals affairs protected by the representations and warranties essentially refer to the results of the property situation that the seller normally furnishes at the buyer in which are listed and quantified the active and passive elements of the company or of the branch of it, let alone on the express attribution to load of the before every burden or risk in order to the groundlessness and inherent passive coming up to facts or antecedent actions to the closing and that they had to verify him and to be reported within a period predetermined, for instance within the terms of prescription of the checks or the actions abstractly taking all the actions.

The seller, therefore, using such clauses able to pour again on the surrender the risk and the responsibility concerning to a series of circumstances that of done they determine both the decision to acquire the company both the correspondent one.

The clauses of guarantee are primarily elaborate contractual models in the arrangements of common law to provide for the limited presence of norms that they protect the position of the seller in the operations of acquisition; in these arrangements, in fact, contracts of transfer of shares are predisposed with minute clauses of representations and guarantees that abstractly cover nearly every susceptible circumstance with to influence on the consistence and on the reality of the investment.

In our arrangement, instead, in which a different juridical tradition is in force, the layout of the contracts of transfer of single shares or firm in his/her complex broadly influenced by a carrying system of legal guarantees (artt. 1478 ss, 1578 ss c.c.) and of natural effects (for instance, artt 1376 and 2556 ss c.c.) destined to interfere on the regulating content of the contract.

Not always, for, he proceeds to detailed an operating analysis of the clauses of representations and guarantees in the regulation of the affairs in the area of the particular arrangement individualized by the regulating law of the contract and, therefore, not rare to individualize overlaps of plans (legal and conventional)

source, obviously, of application uncertainties that can also create contrasts with exact binding dispositions of the same arrangement.

From the comparison among the formulation of the doctrine and the jurisprudence is easily to realize that in the next future we continue to discuss some guardianship of the buyer of social quotas (or actions), especially in the case of divergence among contractual program and concretely resulted reached.

Skimming through the repertoires of jurisprudence, in fact, the feeling is had that worry us to safeguard with great attention the seller of social shares by the acceptance of different appointments from those descending from the typical contract of sale, while the remedies to guardianship of the buyer of social share in practice almost never come granted [action of annulment of the contract for error of the buyer (artt. 1428 ss c.c.) or for conclusive malice of the seller (art. 1439 c.c.); action of reimbursement of the damages for incidental malice of the seller (art. 1440 c.c.); resolution of the contract for vices or lack of the essential qualities with deed of sale (art. 1490 and 1497 c.c.); resolution of the contract for the theory of the presupposition; resolution of the contract for delivery of *aliud pro alio* (art. 1453 c.c.); rescission of the contract for lesion (art. 1448 c.c.)].

Such appeals of the buyer of company shares is rarely been welcomed by the judges because of the difficulty to acquit charge probative, this to show the essentiality and the recognizable mistake, the artifices and the deceptions used by the seller, the guarantees released by the seller on the consistence of the social patrimony, the presupposition of the contractual tie, not suitable for the quotas or actions delivered to satisfy the waiting of the buyer.

Other remarkable problem is, then, the possible quantification of the damage suffered by the buyer. In such sense, the art. 1440 c.c. (action of reimbursement of the damages for incidental malice of the seller) it represents of certain the most effective common remedy by law, but it is sure that the check of the refundable damage is particularly complex for the difficulties in the property and financial evaluation of the enterprise object of the transfer of the shares and, not from last, for the possible change of the performances negotiate them some parts in case of

not coincidence among the damage suffered by the buyer with the property to lose the balance of the performances.

And, also when such remedies have been granted, happens not there in consequence of an evaluation conducted in general terms, but founding itself on the peculiarity of the single concrete cases, for instance when the social share coincided with the underlying sources or perch object of transfer it was the whole company capital or because the company it was analytically well only titular of a described in the stock contract of trading.

Despite the objective difficulties of guardianship of the buyer through the juridical institutes by law common, in to analyze the clauses of guarantee in the sale of company shares, we are surely underlined as the more interesting elements they are suitable in recent sentences that, in comparison with a jurisprudence more consolidated, they still create a debate in doctrine a lot of access around the guardianship of the buyer of quotas or social actions in case of divergence among contractual program and concretely resulted reached.

This debate among the most careful doctrine is fed by the fact that according to note recent jurisprudence, in relief that the access from the buyer of a company share to whatever forms of guardianship he remains in conclusion subordinate to the existence of one some guarantee around the property consistence of the society, it is surely necessary to appraise with attention if such guarantee must expressly be lends or if its subsistence can draw him for implicit.

In fact, some recent pronunciations would seem to also reaffirm the possibility to hold subsisting a guarantee on the social patrimony when the same one expressly is not anticipated from the parts and this with the purpose to protect the trust of the buyer of good faith.

Insofar, in the search the principal clauses of guarantee will be examined in the actions of acquisition of company shares, submitted buy the Italian juridical order, with the objective however to proceed: to a careful analysis of the specific affairs of the buyer to be protected; to a precise knowledge of the tools of legal protection granted by the order; to the border of integration allowed the parts; to

the precise limits over which such legal tools result unfit to protect these same affairs; to the combination among effects negotiate them and effects natural specifications with clauses linking again and comparative analyses of the principals juridical profiles in the arrangements of *civil law* and *common law*.

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