

Legal succession in the framework of cross-border proceedings

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Baker & McKenzie International is een Zwitserse Verein waarvan vennootschappen over de gehele wereld lid zijn. In overeenstemming met de in de professionele dienstverlening gebruikelijke terminologie wordt met de term "partner" bedoeld personen die partner zijn van een dergelijke vennootschap of een daaraan gelijkwaardige functie bekleden. De term "kantoor" wordt gebruikt om te verwijzen naar een vestiging van een dergelijke vennootschap.

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A. Identification of problem

e.g. Belgian creditor (company Be) is suing a Slovenian debtor (company S) before the Belgian courts.

In the course of the proceedings the company S undergoes a number of corporate changes (e.g. through mergers and acquisitions) as a consequence of which it becomes company SPlus and is no longer being notified of procedural documents correctly (e.g. wrong address, different name,...).

Is a judgment obtained against the "original debtor" company S enforceable against the new debtor, company SPlus?

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A. General context: Legal succession:

B.1 Transfer of rights:

1) Singular succession / transfer:

- transfer of specific obligations (e.g. agreements);
- delegation, subrogation;
- accession;
- partition, distribution.

2) Universal succession / transfer ("ut universi"):

- merger, amalgamation;
- demerger, division;
- transfer of a branch of activity;
- contribution of a totality of assets;
- death, inheritance

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B.2 Change in capacity to act (in law):

- legal representation:
 - i. in the name and on the account of: proxyholder
 - ii. in own name but on account of: bankruptcy trustee

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A. Transfer “*ut universi*” between corporations – legal proceedings

Company S → legal succession (e.g. merger) → Company SPlus

POSSIBLE SITUATIONS:

C.1 Legal succession on claimant's side (active):

Company SPlus – claim → Company Be

Company SPlus has all interest in obtaining an enforceable title in which the right name is indicated.

C.2 Legal succession on defendant's side (passive):

Company Be – claim → Company SPlus

Company SPlus might want to keep its corporate changes silent in order to (at least passively) frustrate a creditor's efforts to obtain an enforceable title.

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C.3 Legal principles at stake

- Rights of defence - need to obtain an enforceable title against the right entity:
 - only enforcement against entity mentioned in judicial decision
 - state monopoly of violence
 - = debtor protection
- Procedural economy and risk allocation:
 - in the absence of a European measure of publicity (e.g. European corporate database), if a debtor omits to provide clarity regarding its legal identity, the procedural fall-out and risk should be allocated with the debtor
 - = creditor protection, anti-abuse

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C.4 Difficulties in cross-border application of principles

- 1) Procedural pitfall not regulated in European procedural law:

Creditor falls back on legislation of Member States which might vary significantly

- 2) Nature and consequences of the legal succession:

In spite of European Directives (Third and Sixth Council Directive re Mergers and Divisions of public liability companies) various *sui generis* legal operations exist in the Member States → difficulties for courts of other MS to fully understand all aspects and consequences

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- 1) Difficulty of facing legal issues in the course of enforcement based on arguments regarding proceedings in another MS:
 - a. notifications have not been sent to SPlus
 - b. arguments regarding the rights of the defence
 - c. enforceability of default judgment (against SPlus) might lapse after short period of time
 - d. resumption of case or other procedural formalities might have been necessary
 - e. ...

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C.5 The Belgian perspective

Resumption of case

Certain events automatically suspend the pending litigation (art. 815 Jud. C.):

- death of a party
- change of state: e.g. +18
- change of capacity: e.g. new owner of real estate property

In order for the case to be suspended, these events must be notified by the concerned party → as long as it has not been notified, no violation of the rights of the defence if notification do not reach the SPlus

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Do corporate operations like mergers necessitate resumption of case?

Lots of confusion: merger with dissolution ~ death of a party → Supreme Court: 4 January 2008:

In case the operation involves the **dissolution** of the original company, **no resumption** of case is needed: e.g. merger

In case the operation does **not involve the dissolution** of the original company, **resumption** of case is necessary: e.g. the contribution of a totality of assets

→ the nature and consequences of the corporate operation need to be examined

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Risk allocation lack of resumption

1) Up to the defendant to notify its corporate changes that would necessitate resumption of case → in the absence thereof, the case will not be suspended and no arguments regarding rights of the defence can be opposed by the defendant

2) Belgian case law states that if there is a change on the side of the claimant (active), the judge of the enforcement is competent to decide on any dispute regarding the further enforcement by such claimant (SPlus)

When the change occurs on the defendant's side (passive), the enforcement judge is not competent to authorize further enforcement against SPlus.

3) In the latter case, the judge on the merits needs to be seized, and through (short) proceedings ("*gemeenverklaring*", "*déclaration de jugement en commun*"), the title should be extended to the correct entity.

- the risk is divided over both creditor and debtor, but in essence the creditor only risks to lose time, while the debtor risks to lose its chances to adequate defence
- much confusion about the correct application of principles

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Resolution of the casus

- in case company S would notify its corporate change to SPlus, further to a merger, the case would not be suspended and no resumption of case would be necessary to obtain a title: the title will mention SPlus
 - in case company S would **not** notify its corporate change to SPlus, further to a merger, the case would not be suspended. Anyway, the case should **not** be resumed against SPlus:
 - however the title will not mention SPlus, and it will be necessary to go back to court. In principle SPlus cannot raise any more defences and the extension of the title should be a mere formality.
- The former company S was dissolved, so only SPlus remains as universal successor

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- in case company S would notify its corporate change to SPlus, further to the contribution of a totality, the case would be suspended until the case has been resumed by or against SPlus: eventually, the title will mention SPlus
 - in case company S would **not** notify its corporate change to SPlus, further to the contribution of a totality, the case would not be suspended although theoretically the case should be resumed against SPlus, a title can be obtained against S through proceedings that should be opposable to SPlus: the title will **not** mention SPlus though:
 - It will thus be necessary to go back to court (not the enforcement judge) in order to obtain that SPlus is mentioned in a judgment and the enforceable title is extended to SPlus
- The company S has not been dissolved so S would normally be interested in making sure the court is informed that the liability was transferred to SPlus.

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C.6 Cross-border perspective - *De lege ferenda*

- 1) Currently: not regulated → fall back on legislation Member States, which risk to be very divergent and lead to unequal treatment

For the sake of legal certainty and free movement of judgments, a European procedural standard would best be implemented (e.g. in Regulation 44/2001) to clearly define the obligations of cross-border (corporate) litigants undergoing legal changes, and allocate the risk in case of non-compliance as well as how the title can be extended to the correct entity if need be.

Forum for the judicial resolution of disputes?

e.g. : Proximity judge enforcement OR legal operation OR merits of the case

- enforcement judge in MS of enforcement / judge providing declaration of enforceability
- judge on the merits of the case BUT difficulty to understand nature and consequences of the legal operation
- judge in MS where the legal operation originated (if not in MS enforcement) BUT creation of third forum (merits - enforcement - legal operation)

- 2) European corporate database:

- language publications?
- presumption that all citizens are deemed to be aware of all publications?
- automatic transfer of right to enforce against SPlus?

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THANK YOU

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