

French Constitutional Council confirms that exclusion clauses included in the by-laws of French sociétés par actions simplifiées are compliant with the Constitution

Pursuant to the first paragraph of Article L. 227-16 of the French Commercial Code, *“In accordance with the conditions which they so determine, the by-laws may specify that a shareholder may be required to sell the shares he/she/it holds in the company.”*

The second paragraph of Article L. 227-19 of the French Commercial Code, in its version applicable since July 21, 2019^[1], stipulates that the exclusion clauses referred to in Articles L.227-18 *“can only be adopted or amended pursuant to a unanimous decision of the shareholders, in the manner and under the conditions provided for in the by-laws”*.

These provisions have been the subject of much debate in the legal literature, both with regard to their relationship with the second paragraph of Article 1836 of the French Civil Code (pursuant to which *“in no circumstances may the commitments of shareholder be increased without his/her/its consent”*) and with regard to their conformity with the property right guaranteed by the French

Constitution^[2].

In a recent decision issued on December 9, 2022^[3], the French Constitutional Council ruled on the conformity of these provisions with the French Constitution.

In the case at hand, the by-laws of a *société par actions simplifiée* (simplified joint-stock company) stipulated that only the persons having the status of employees/corporate officers/company's representatives could be shareholders, and that if any shareholder no longer had this status, the president of the company was to convene the extraordinary general meeting of shareholders so that it could decide on the exclusion of the relevant shareholder.

Pursuant to these by-laws, the general meeting of shareholders excluded a resigning employee.

The latter summoned the company before the commercial court, claiming that the decision of the general meeting of shareholders that decided on the forced sale of his shares was null and void.

In additional submissions, the resigning employee filed four applications for a preliminary ruling on the issue of constitutionality of the first paragraph of Article L. 227-16 and the second paragraph of Article L. 227-17 of the French Commercial Code with regard to Articles 2 and 17 of the Declaration of the Rights of Man and of the Citizen of 1789 (the "*Declaration of 1789*") that guarantees property right.

In its October 12, 2022 decision^[4], the *Cour de Cassation* (French Supreme Court) held that the contentious provisions were applicable to the dispute, that they had not yet been found to be in conformity with the French Constitution and that they were of a serious nature. It, therefore, referred the applications to the Constitutional Council.

In its December 9, 2022 decision, the Constitutional Council acknowledged the conformity of these provisions with both Article 2 and Article 17 of the Declaration of 1789.

Pursuant to Article 17 of the Declaration of 1789, "*since the right to property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid*".

According to the Constitutional Council, the sole purpose of the contentious provisions of the French Commercial Code "*is to allow a société par actions simplifiée [simplified joint-stock company] to exclude a shareholder pursuant to a clause included in the by-laws. While it follows that a shareholder may be forced to sell his/her/its shares, they do not, therefore, entail a deprivation of property within the meaning of Article 17 of the Declaration of 1789.*"

Since the application of Article 17 was rejected, there was no need to demonstrate either the justification of the alleged infringement by public necessity or the existence of a just and prior indemnity.

Consequently, according to the Constitutional Council, the constitutionality of the contentious provisions could only be assessed in the light of Article 2 of the Declaration of 1789 that defines property right as one of the natural and imprescriptible rights of Man.

The Constitutional Council, therefore, limited itself to verifying the existence of a public interest reason justifying the alleged infringement of property right and its proportionality to the aim pursued.

The existence of a public interest reason

Until the entry into force of the so-called “Soilihi” Law of July 19, 2019^[5], exclusion clauses included in the by-laws of *sociétés par actions simplifiée* (simplified joint stock companies) could only be adopted or amended with the unanimous consent of the shareholders.

Since the entry into force of this Law on July 21, 2019, and as per Article L. 227-19 of the French Commercial Code, the by-laws must determine the majority that is required to adopt or amend such clauses.

Since an exclusion clause no longer has to be adopted or amended with the unanimous consent of the shareholders, the applicant argued in its additional submissions that a shareholder may be required to sell his/her/its shares pursuant to an exclusion clause in the by-laws to which he/she/it has not consented, which allegedly entails the unjustified infringement of his/her/it property right.

In its December 9, 2022 decision, the Constitutional Council did not endorse the applicant’s interpretation.

It held that *“by allowing a société par actions simplifiée [simplified joint-stock company] to force a shareholder to sell his/her/its shares, the legislator intended to guarantee the cohesion of its shareholding and thus ensure the continuation of its activity.”*

It based its argumentation on the preparatory works for the “Soilihi” Law of July 19, 2019 and recalled that *“by providing that the adoption of, or amendment to, an exclusion clause may be decided without obtaining the unanimous consent of the shareholders, [the legislator] also intended to avoid deadlock situations that might result from the relevant shareholder’s objection to such a clause.”*

The public interest reason relating to the necessary *“continuation of the company’s activity”*, on which the December 9, 2022 decision is based, is not a new concept in the line of decisions of the Constitutional Council.

Indeed, it was on this same basis that it held, in a decision issued on of August 5, 2015^[6], that Article L. 631-19-2 of the French Commercial Code, pursuant to which majority shareholders may be forced to sell all or part of their shareholding interest to persons who have undertaken to implement the proposed recovery plan of the company, met the requirements of proportionality and was, therefore, in conformity with the French

Constitution.

Similarly, in a decision issued on October 7, 2015^[7], it held that the mechanism for the forced sale of the shares of a managing shareholder provided for by Article L. 631-19-1 of the French Commercial Code did not constitute a manifestly disproportionate infringement of the property right of the shareholders or equity owners.

The proportionate nature of the infringement of the property right

In order to rule that the infringement of the property right was not disproportionate, the Constitutional Council relied on three arguments.

Firstly, it recalled the established case law of the *Cour de Cassation*, according to which the decision to exclude a shareholder may only be taken as per a procedure provided for in the by-laws, must be based on a reason stipulated in the by-laws, must be in the company's corporate interest, must be consistent with public policy, and must not be abusive^[8].

Secondly, it explained that *"the exclusion of a shareholder gives rise to the repurchase of his/her/its shares at a sale price determined, as per Article L. 227-18 of the [French] Commercial Code, in application of the terms and conditions provided for in the company's by-laws, or, if the by-laws do not provide for such terms and conditions, either by an agreement between the parties, or by an expert appointed under the conditions provided for in Article 1843-4 of the [French] Civil Code."*

Thirdly, it specified that *"the decision to exclude a shareholder may be challenged by the relevant shareholder before a judge, who must then ascertain the reality and seriousness of the reason given for the exclusion. The relevant shareholder may also challenge the sale price of his/her/its shares."*

In conclusion, the decision issued on December 9, 2022 by the Constitutional Council was welcome since it put an end to the debate related to the constitutionality of exclusion clauses included in the by-laws of a *société par actions simplifiée* (simplified joint stock company).

However, special attention should still be paid to the implementation of such clauses as they remain challengeable according to the case law of the *Cour de cassation*.

[1] Date of entry into force of the Law on the simplification, clarification and modernization of corporate law (also known as the "Soiilhi Law").

[2] See, in particular:

L. Godon, SAS : *les incidences de la loi du 19 juillet 2019 de simplification, de clarification et d'actualisation du droit des sociétés* : Rev. sociétés 2019, p. 723.

R. Mortier et alii, *Simplification du droit des sociétés - La loi Mohamed Soilihi article par article (2e partie)* : Dr. sociétés 2019, étude 14.

A. Couret, *Les clauses d'exclusion dans les SAS : sortir d'un débat en voie d'enlisement* : D. 2019, p. 2188.

D. Martin and M. Carosso, *L'exclusion d'un associé d'une SAS après la loi de simplification du droit des sociétés*, JCP E 2020, 1091.

[3] Decision No. 2022-1029 QPC, December 9, 2022

[4] Commercial Chamber of the *Cour de Cassation*, October 12, 2022, No. 22-40.013

[5] Law 2019-744 of July 19, 2019 Law on simplification, clarification and modernization of corporate law

[6] Decision No. 2015-715 DC of August 5, 2015

[7] Decision No. 2015-486 QPC of October 7, 2015

[8] Commercial Chamber of the *Cour de Cassation*, July 13, 2010, No. 09-16.156; Commercial Chamber of the *Cour de Cassation*, March 20, 2012, No. 11-10.855

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