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French Supreme Court rules that the usufructuary is not a shareholder

It is clear that family-owned *sociétés civiles immobilières* (non-commercial property holding companies, hereinafter "SCI") are an inexhaustible source of litigation, particularly with regard to the rights of the usufructuary. The ruling handed down by the Third Civil Chamber of the *Cour de Cassation* (French Supreme Court) on February 16, 2022[1] provides another significant example of this as it was published in the Bulletin of the *Cour de Cassation*[2].

In the matter at hand, a SCI had been set up between two spouses and their three children. As a result of various company transactions, the spouses, who had become usufructuaries, asked the manager of the SCI, one of their daughters, by registered letter, return receipt requested, to prompt a deliberation of the shareholders concerning the removal of said manager and the appointments of co-managers. Arguing that the manager had remained silent, the spouses went to court to request the designation of a representative in charge of prompting the deliberation of the shareholders in order to rule on the removal of the manager and the appointment of co-managers. The trial judges held that this request was inadmissible on the grounds that "*it can only originate from a shareholder, a capacity that the spouses do not have as they simply hold a certain number of shares in usufruct*". The spouses then appealed to the *Cour de Cassation*.

The question asked to the Third Civil Chamber of the *Cour de Cassation* was therefore whether or not the usufructuary has the capacity as shareholder. In order to answer this question, the Third Civil Chamber sought the opinion of a Chamber specialized in corporate law, namely the Commercial Chamber, as allowed under Article 1015-1 of the French Code of Civil Procedure[3].

In its opinion issued on December 1, 2021, the Commercial Chamber set out the following reasoning:

> *"1. Pursuant to 578 of the [French] Civil Code, usufruct is the right to enjoy things of which another has ownership in the same manner as the owner, but on condition that their substance be*

preserved.

2. Pursuant to Article 39, paragraphs 1 and 3, of Decree No. 78-704 of July 3, 1978, in its applicable version, a shareholder who is not a manager of a non-commercial company may at any time, by registered letter, ask the manager to prompt a deliberation of the shareholders on a specific issue. If the manager opposes the request or remains silent, the requesting shareholder may, on the expiry of a period of one month from the date of his/her request, apply to the president of the First Instance Court, ruling in the form of summary proceedings, for the appointment of a representative to prompt the deliberation of the shareholders.

3. It follows from the combination of these texts that the usufructuary of shares cannot be recognized as a shareholder, this capacity belonging only to the bare owner, but that he/she must be able to prompt a deliberation of the shareholders on a question likely to have a direct impact on his/her right of enjoyment."

Unsurprisingly, the Third Civil Chamber of the *Cour de Cassation*, in its ruling dated February 16, 2022, reproduced word for word the reasoning developed by the Commercial Chamber in its opinion of December 1, 2021 and concluded that the spouses "*not having the capacity as shareholders and not having contended that the issue to be submitted to the general meeting had an impact on the right of enjoyment of the shares they held in usufruct, the Court of Appeals rightly found that their request for the appointment of a representative to prompt the deliberation of the shareholders was inadmissible*".

Specifically, the *Cour de Cassation* relied on Article 578 of the French Civil Code to deny to the usufructuary the status of shareholder. As a reminder, this Article stipulates that "*usufruct is the right to enjoy things of which another has ownership in the same manner as the owner, but on condition that their substance be preserved*". In order to settle the thorny question of the status of the usufructuary, the *Cour de cassation* therefore focused on the ownership of the shares: Only the ownership of the shares confers the status as shareholder; the usufructuary who merely has a right of enjoyment over these shares, which belong to another, is therefore not a shareholder.

However, the *Cour de cassation* then tempered this assertion by relying on Article 39, paragraphs 1 and 3, of the aforementioned Decree of July 3, 1978. The usufructuary is certainly not a shareholder, but he/she "*must be able to prompt a deliberation of the shareholders on a question likely to have a direct impact on his/her right of enjoyment*". While the usufructuary already had certain rights enshrined in Article 1844, paragraph 3, of the French Civil Code – in particular the right to vote on decisions concerning the allocation of profits and the right to take part in collective decisions – he/she now has a new right recognized by this ruling of the *Cour de Cassation*: the right to prompt a deliberation of the shareholders. This prerogative is nevertheless subject to a condition: the usufructuary must show that the issue for which he /she wishes to prompt a deliberation of the shareholders is likely to have a direct impact on his/her right of enjoyment.

The scope of this decision is important because the *Cour de Cassation* finally provides an answer to the

question much debated by French legal scholars as to whether or not the usufructuary of the shares of a company is a shareholder. Indeed, while the bare-owner's capacity as shareholder was no longer debated since a ruling of the *Court de Cassation* dated January 4, 2014, that of usufructuary had not yet been settled by French courts. This has now been done: the usufructuary is not a shareholder.

It should be noted that the meaning of the ruling of the *Cour de Cassation* may seem surprising. Indeed, experienced commentators anticipated, in view of the opinion issued by the Commercial Chamber, that the judgment handed down by the trial judges would be overturned for lack of legal basis in that "*the Bordeaux judges did not examine whether the deliberation in question was "likely to have a direct impact on [the] right of enjoyment" of the plaintiffs; in the event the judgment is overturned, the court to which the case would be remanded could be invited to do so*"[4]. The Third Civil Chamber finally proved their predictions wrong insofar as it dismissed the appeal on the ground that the spouses "*not having the capacity as shareholders and not having contended that the issue to be submitted to the general meeting had a direct impact on the right of enjoyment of the shares they held in usufruct, the Court of Appeals rightly found that their request for the appointment of a representative to prompt the deliberation of the shareholders was inadmissible*". For the Third Civil Chamber, it was up to the usufructuaries to demonstrate upstream that the issue to be submitted to the general meeting had a direct impact on the right of enjoyment of the shares they held in usufruct.

The "*direct impact*" criterion introduced by the *Court de Cassation* in this ruling is far from being unanimously accepted. Indeed, as some commentators have pointed out, this concept is vague[5] and open to various interpretations. It would therefore appear that litigation over usufructuary's rights has still a bright future.

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[1] Third Civil Chamber of the *Cour de Cassation*, February 26, 2022, No. 20-15.164

[2] As a reminder, rulings published in the Bulletin of the *Cour de Cassation* are landmark rulings

[3] The first paragraph of Article 1015-1 of the French Code of Civil Procedure stipulates that "*The Chamber of the Cour de Cassation to which the appeal is referred may request the opinion of another Chamber on a point of law that appertains to the latter's jurisdiction*"

[4] "*L'usufruitier n'est pas associé, mais…*", La Semaine Juridique Entreprise et Affaires No. 1, January 6, 2022, 1000, by Renaud Mortier and Nadège Jullian.

[5] "*L'usufruitier de parts sociales n'est pas un associé, mais est-il bien usufruitier ?*", La Semaine Juridique Edition Générale No. 9, Mars 7, 2022, 288, Julien Laurent.

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