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The exclusion of a shareholder of a SAS pursuant to a by-laws clause contrary to applicable public policy provisions is null and void

In a judgment dated July 9, 2013[1], the *Cour de Cassation* (French Supreme Court) has recalled that in *sociétés par actions simplifiées* (Simplified Joint Stock Companies or "SAS") a shareholder whose exclusion is contemplated may not be deprived of his right to participate in the decision and to cast a vote on the exclusion resolution (1).

On the very same day and in the very same case, the *Cour de Cassation* has specified that a by-laws provision that is contrary to the above principle can only be regularized pursuant to a unanimous decision of the shareholders of the SAS and in no circumstances by the judge[2] (2).

1. The shareholder of a SAS whose exclusion is contemplated may not be deprived of his right to participate in the decision and to cast a vote.

In this specific case, a shareholder of a SAS had been excluded pursuant to a collective decision of the shareholders without having been able to cast a vote, as per a by-laws provision that deprived him of this right. Claiming that this collective decision was invalid, the excluded shareholder initiated proceedings against the SAS and its President and sought the nullification of said decision.

The SAS and its President argued that **the President had invited the to-be-excluded shareholder to cast a vote, notwithstanding the existence of by-laws provisions to the contrary, and that this would have**

had in any event no impact whatsoever on the outcome of the deliberation given the number of voting rights held by the shareholder and the required majority.

Recalling that:

1. Pursuant to Article 1844§1 and §4 of the French Civil Code (i) "***Every shareholder has the right to participate in collective decisions and to cast a vote***" and (ii) "***the by-laws may only depart from this principle in the conditions provided for by law***";
2. Pursuant to Article 1844-10§2 of the same Code, "***any by-laws clause to the contrary is deemed unwritten***";

the *Cour de Cassation* ruled in favor of the excluded shareholder: since the exclusion had been decided upon on the basis of a by-laws clause that was contrary to a public policy provision and, therefore, deemed unwritten, the deliberation that resulted in the exclusion of the shareholder ought to be nullified and the excluded shareholder ought to be reinstated.

This outcome does not come as a surprise and is fully in line with a decision rendered by the *Cour de Cassation* in 2007[3]. Yet, the commented decision goes one step further as it specified the judge may not order the regularization of by-laws clauses deemed unwritten as per the abovementioned legal provisions.

2. A by-laws provision that is contrary to the above principle may only be regularized by a unanimous decision of the shareholders of the SAS.

Fully aware of this irregularity, the shareholders of the SAS had, subsequently to the exclusion decision, adopted by a majority vote a resolution amending the by-law exclusion clause and deleting the contentious provision.

The excluded shareholder then requested the judge to acknowledge that such a resolution required a unanimous vote of the shareholders, as per Article L.227-19 of the French Commercial Code[4], and that, consequently, it had not been validly adopted.

In response, the SAS and the President asked the judge to amend the by-laws provisions deemed unwritten.

The *Cour de Cassation* ruled again in favor of the excluded shareholder and held that "***The judge has not the power and authority to substitute himself to the corporate bodies by ordering the modification of a by-laws clause on the ground that such clause is contrary to applicable public policy provisions***".

These decisions confirm the need to promptly regularize by-laws exclusion clauses, most of which are often invalid in practice. In the event where the exclusion of a shareholder is a matter falling within the competence of the collegiality of shareholders, it could be envisaged – in order to avoid any deadlock situation – to transfer all or part of this power to a corporate officer or ad-hoc committee, depending on the grounds for exclusion that could be put forth. Yet, the difficulty lies in the necessity to secure the unanimity of the shareholders,

even if it is merely a question of regularizing/amending the relevant by-laws clauses, as recalled by the *Cour de Cassation*.

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[1] Commercial Chamber of the *Cour de Cassation*, July 9, 2013, n° 11-27.235.

[2] Commercial Chamber of the *Cour de Cassation*, July 9, 2013, n° 12-21.238.

[3] Commercial Chamber of the *Cour de Cassation*, October 23, 2007, n° 06-16.537.

[4] Article L.227-19 of the French Commercial Code stipulates that "*The by-laws clauses referred to in Articles L.227-13, L.227-14, L.227-16 and L.227-17 can only be adopted or amended pursuant to a unanimous decision of the shareholders*". It is precisely Article L.227-16 of the French Commercial Code that allows to provide in the SAS by-laws for the exclusion of a shareholder: "*In accordance with the conditions which they so determine, the by-laws may specify that a shareholder may be required to assign the shares he holds in the company.*"