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**The realization of the pledge of shares of SCI or  
SARL**

In the context of granting a credit to a real estate civil companies («sociétés civiles immobilières – SCI») or alternatively to a limited liability company («société à responsabilité limitée – SARL») holding a property, lenders usually require a pledge of the shares («nantissement des parts») of that company, in addition to the Usual real estate security (mortgage, lien) taken on the real estate.

On the occurrence of a default of payment under the secured obligation, the question is how the pledging of shares of SCI or SARL can be exercised and within what time limit.

Ultimately, it is a matter of measuring the effectiveness of this precaution, in particular when this pledge is combined with a «pacte comissoire».

**Is the realization of pledging made easier by the «pacte comissoire» ?**

## **The prohibition of the CI provision "legitimizes the intervention of the Judge".**

According to the general principle of execution derived from article L. 311-3 of the Code of Civil Procedure (« Code de procédure civile»), the immediate execution clause (« clause de voie parée ») is prohibited.

The rule of prohibition of the immediate execution clause (« clause de voie parée ») is to claim void any clause, previously negotiated or concomitantly to proceed the granting of the credit, which would allow the creditor to be awarded shares outside the control of the judge.

Conversely, an immediate execution clause (« clause de voie parée ») negotiated after the granting of the credit is valid.

In other words, any clause intended to oust the forms of seizure to sell the debtor's property is prohibited.

At the same time, the legislation authorizes an allocation of shares by order of the court («attribution judiciaire des parts»).

**An allocation by order of the court («attribution judiciaire») and sale to a third party** - According to article 2346 of the Civil Code (« Code civil »), the creditor may order the sale of the pledged property in the court: this is the mechanism of " An allocation by order of the court («attribution judiciaire»)", which is the mechanism for the realization of common law articulated according to the rules of civil procedures of execution.

In parallel with the mechanism of an allocation of shares by order of the court («attribution judiciaire des parts»), the legislator finally moderated the intervention of the judge by introducing the mechanism of the « pacte comissoire» in the common law of the pledge (articles 2347 and 2459 of the civil Code) during the reform of 2006.

The « pacte comissoire » ) allows the allocation of the shares for the benefit of the creditor solely because of default of payment by the debtor, not without maintaining a mechanism of protection of the debtor under the control of the judge.

**« Pacte comissoire » and transfer of ownership to the creditor** - Thus, in order to accelerate the realization of the pledge, it may be appropriate to insert in the constituting document the pledging of shares of SCI or the pledge of shares of SARL, a "pact comissoire" on the basis of article 2348 of the civil Code, namely a "sui generis" convention under which the creditor has the right to be awarded the thing (here the shares) pledged for lack of payment under the secured obligation.

In the formation of this « pact comissoire », the prior consent of the other SCI partners to this pledge project will be obtained.

Similarly, it will be sought the consent of the SARL audit project which shall carry the approval of the cessionaire.

Some authors reconcile « with the concept of a contract of sale, the borrower committing to dispose of his property ».

The same authors also see by analogy a "giving in payment".

The sale to a third party may collide with the character *intuitu personae* which allows the partners to oppose the arrival of a third party to the capital: that is why the « pact comissoire » has a certain interest.

In any event, the realization of the pledge and the Comissoire Pact face a number of difficulties arising from the residual applicability of the law of Civil enforcement proceedings.

**The judge's residual intervention limits the effectiveness of the pledge :  
« Pacte comissoire » and the necessity of judgement.**

The realization of the «Pacte Comissoire» is slowed by the protective measures of ensuring that the creditor receives no more than his due.

This principle of "non-despoilment" of the debtor is recalled in articles 2347, 2348 and 2460 of the Civil Code (« code civile »).

On the one hand, the conventional allocation of shares must give rise to an estimation given by an independent expert.

The expert responsible for estimating the units may be appointed by mutual agreement by the parties, or by default by the judge.

On the other hand, if the value of the shares exceeds the amount of the secured debt, the creditor owes the debtor an amount equal to the difference between the value of the shares and the amount of the secured debt.

In the event of difficulty of carrying out the pledge, the judge may be seized by the debtor, and the liability of the negligent lender, see criminal, is not remote.

To guard against such a risk, it is difficult to see how the lender could avoid obtaining a court decision enforceable in order to carry out its pledge, at the risk of reverting to the common law of seizures.

Moreover, it is worth recalling that the rights of third parties must be respected: the realization of the Comissoire pact cannot play at the expense of the creditors holding a real right on the good against the beneficiary of the Covenant because they can invoke their right to suite.

**« Pacte comissoire» and collective proceeding** – An article L. 622-7, I of the Commercial Code («code commercial»), to which an article L. 631-14 refers, provides that the opening of a collective procedure is an obstacle to the conclusion and realization of the « pacte comissoire ».

The implementation of the Pact is therefore prohibited in all phases of the procedure, starting from the safeguarding to the judicial liquidation.

Of course, the pact reiterates its strength in the light of a pledge made by a third party to secure the debtor's debt, and provided that the pledged property is not included in the assets of the proceedings.

The risk of opening up a collective proceeding against the debtor does not seem to hinder the operation of the said Pact, if it is concluded and untied before the opening of the proceeding before the court.

**To sum up** - On the one hand, the realization of a pledge on the securities of a company holding a real estate does not allow to effectively or fully oust the litigation relating to the seizure of the real estate property as it results from the rules of the executorial rules of the Code of civil procedure (« code de procédure civile»).

On the other hand, and more generally, one can legitimately doubt the creditor's interest to carry out the said pledge with «pacte comissoire» and become the owner of real estate.

The risk would be for the lender to have to assume a litigation of the expertise, and in the end to bear the payment of the price of the real estate property, the taxation of the transfer of property, the expenses of the maintenance of the building, and the costs of the future sale which will be necessary for the recovery of the receivable, the distribution of the price to finally satisfy all the creditors.

In a nut shell, the sole purpose of the pledge of shares is to oblige the borrower to remain the owner of the holding structure of his estate assets throughout the credit term, and thus not to sell the shares of the company without the prior agreement of the creditor.

Thus, pledging is only a "deterrent" tool, and is closer to an effective form of "negative security" to materialize the borrower's commitment to retain its shares. In this only, the pledge effectively supplements the mortgage without replacing it.

The mortgage remains the "Queen of Security Interests": it will be carried out according to the rules of seizures and executions of common law, then substantially reducing the interest of the pledge.

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