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Only the monetary value of the shares subscribed or acquired during the marriage by a spouse married under the regime of community of property is included in the community estate

Recalling the traditional distinction between rights associated with the capacity as shareholder (e.g. voting rights) on the one hand and monetary rights attached to shares (e.g. dividends) on the other hand, the *Cour de cassation* (French Supreme Court) recently ruled that only the monetary value of the shares of a *société à responsabilité limitée* (French limited liability company or hereinafter "SARL") subscribed or acquired by a spouse married under a regime of community of property is included in the community estate.

As such, at the time of division of the community estate, the shares cannot be subject to an in-kind division but must be entirely awarded to the shareholding spouse – who is the only one entitled to exercise the rights associated to such capacity as shareholder. Yet, the shareholding spouse must in turn pay half of the monetary value of the shares to his ex-spouse.

In the commented decision, a spouse married under the regime of community property acquired during the marriage had subscribed alone – during the marriage – to 250 shares of a SARL whose main corporate purpose was the operation of a hairdressing business. Such shares were subscribed at the time of a share capital increase.

At the time the community estate was divided between the spouses for the purpose of the divorce proceedings, the husband requested an in-kind division of the shares that were part of the community estate. Specifically, he requested that he and his ex-spouse be awarded 125 shares each. His ex-wife requested the cash-out division of the shares, meaning that all the shares would be awarded to her ex-husband who should in turn pay her a sum corresponding to half of the monetary value of the shares.

The Court of Appeals of Paris[1] held that the ex-husband who had subscribed to the 250 shares of the SARL was the sole holder thereof. As a consequence, he was to be awarded all of such shares and to pay to his ex-wife a sum corresponding to the fraction of the value of the shares to which she was entitled.

The ex-husband lodged an appeal and the First Chamber of the *Cour de Cassation*, in a decision dated July 4, 2012, upheld the appellate judgment and ruled that:

"*the husband, subscriber of the shares acquired during the marriage, was the only shareholder […], only the monetary value of these shares had become part of the community estate and […] for the purpose of the division of the community estate such shares could only be awarded to the spouse having the capacity as shareholder*".

The solution retained by the *Cour de Cassation* seems to apply to all companies whose shares are not negotiable, i.e.:

- *sociétés civiles* (non-trading partnerships);
- *sociétés en nom collectif* (general partnerships); and
- *sociétés en commandite simple* (limited partnerships).

This principle, even though recalled by the *Cour de Cassation* on numerous occasions[2], was widely criticized by French legal authors who considered that, pursuant to Articles 1424 and 1832-2 of the French Civil Code, the shares subscribed or acquired by a spouse married under the regime of community of property acquired during the marriage by means of common funds were necessarily to be viewed as community estate.

Articles 1424 and 1832-2 of the French Civil Code stipulate as follows:

- Article 1424: "*One spouse may not, without the other, transfer or encumber with rights in rem immovables, going concerns and business assets included in the community estate nor non-negotiable shares*".
- Article 1832-2: "*a spouse may not […] make use of the community estate in order to make a contribution to a company or acquire non-negotiable shares without the other spouse being informed thereof and proof of it being acknowledged in the relevant instrument. […] the capacity as member/shareholder* […] *is acknowledged, for half of the subscribed or acquired shares, to the spouse who has given notice to the company of his/her intention to personally become a member/shareholder*".

This position adopted by legal authors had also been confirmed by the Court of appeals of Lyon[3] that admitted the in-kind division of SARL shares registered in the name of a husband married under the regime of community of property, as per Article L223-13 of the French Commercial Code. Pursuant to this Article "*shares are freely transferable […] if the community estate is divided between the spouses*", unless otherwise stipulated in the relevant company's articles of association.

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[1] Court of Appeals of Paris, November 10, 2010, n°09/22464

[2] Commercial chamber of the *Cour de Cassation*, December 23, 1957; 1st Civil Chamber of the *Cour de Cassation*, December 22, 1969; Commercial Chamber of the *Cour de Cassation*, January 20, 1971

[3] Court of Appeals of Lyon, March 6, 1975