

Use of intermediary(ies) within the meaning of Article L. 642-3 of the French Commercial Code

The sale of all or part of corporate assets is an important step of the judicial liquidation of a company as such sale is designed to ensure the survival of activities that are capable of being operated independently and save the associated jobs on the one hand, and to settle the company's liabilities on the other hand.

Wherever the bankruptcy court considers that such a sale may be envisaged, it authorizes the continuation of the business activities and sets the deadline by which purchase offers must be filed.

To avoid fraudulent sales, Article L. 642-3 of the French Commercial Code prohibits the corporate officers of a company placed in judicial liquidation to file such an offer, either directly or through an intermediary.

In a decision dated March 8, 2017, the *Cour de Cassation* (French Supreme Court) provided for the first time a definition of the concept of “use of intermediary(ies)” within the meaning of the aforementioned Article.

Pursuant to Article L. 642-3 of the French Commercial Code:

“No debtor, no de jure or de facto manager of a corporate body placed in judicial liquidation, no parent or

relative, including up to the second degree, of the managers or the individual debtor, no person having or having had the status of controller during the insolvency/bankruptcy proceedings is permitted, directly or through an intermediary, to file an offer.

[...]

Any instrument entered into in breach of the provisions set forth in this Article shall be declared void at the request of any interested party or the Public Prosecutor [...]."

In a decision dated March 8, 2017^[1], the *Cour de Cassation* provided for the first time a definition of the concept of "use of intermediary(ies)" within the meaning of the aforementioned Article.

In that specific case, the company Mia Electric was placed into judicial receivership and then into judicial liquidation respectively in February and March 2014.

During the auctioning of the corporate assets ordered by the bankruptcy judge, the company SCI Les Roseaux was awarded a production line as well as other tangible and intangible assets that it planned to subsequently resell to the company Mia Génération whose President and shareholder were corporate officers of Mia Electric.

The Public Prosecutor initiated summary proceedings and successfully sought the suspension of the sale. It then summoned SCI Les Roseaux and requested the court to order the nullification of the purchase offer filed by the latter.

The trial judges granted the request of the Public Prosecutor and SCI Les Roseaux consequently appealed to *Cour de Cassation* and argued *inter alia* that:

- Neither the shareholders nor the corporate officers of SCI Les Roseaux were corporate officers of Mia Electric;
- The mere fact that SCI Les Roseaux intended to resell the purchased assets to a company in which the corporate officers of Mia Electric were respectively President and shareholder was insufficient to establish the existence of a fraud.

The *Cour de Cassation* dismissed the appeal, upheld the judgment handed down by the Court of Appeals of Poitiers^[2] and gave a very large definition of the concept of "use of intermediary(ies)" within the meaning of Article L. 642-3 of the French Commercial Code:

"But the use of intermediaries within the meaning of Article L. 642-3 of the French Commercial Code means the intervention of a legal entity that disguises, in any manner whatsoever, the participation of the corporate officers of the debtor company in the acquisition transaction; having found that the assets acquired by SCI Les Roseaux did not fall within the scope of its corporate purpose, [that SCI Les Roseaux] did not have the financial resources to fund the transaction and that a resolution of the general meeting of shareholders [of SCI Les Roseaux] authorized it to sell the acquired assets to a third party, it is in its full discretion that the Court of

Appeals, without ruling on the existence of a fraud by SCI Les Roseaux, concluded that there had been a use of intermediary between the company that was awarded the assets [SCI Les Roseaux] and the corporate officers of the debtor company [Mia Electric], noting inter alia that these corporate officers were respectively President and shareholder of Mia Génération, on behalf of which the purchase offer had in fact been filed, and by doing so, it has legally justified its decision”.

As such:

- The use of intermediary(ies) within the meaning of Article L. 642-3 of the French Commercial code means the intervention of a legal entity that disguises, in any manner whatsoever, the participation of the corporate officers of the debtor company in the acquisition transaction;
- The use of intermediary(ies) is sufficient to entail the nullity of the purchase offer, without it being necessary that fraud be established.

[1] Commercial Chamber of the *Cour de Cassation*, March 8, 2017, F-P+B+I, n° 15-22.987.

[2] Court of Appeals of Poitiers, May 26, 2015.

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