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Current legal background for enforcing the mortgages established over the shares of limited liability companies

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Enforcement over shares – controversial topic

Throughout time, the enforcement of mortgages established over shares generated many debates resulting from the lack of correlation of Company Law no. 31/1990 (the „**Company Law**”), on one hand, with the economic context, respectively the legal nature of limited liability companies regulated as a hybrid between partnerships and capital companies, and, on the other hand, with the New Civil Code and New Civil Procedure Code norms, which contain provisions concerning the possibility to establish and enforce the mortgages over shares.

Thus, until the quite recent amendments brought to the Company Law, there have been a series of arguments based on the provisions of the Company Law which determined the courts of law to reject the enforcement requests, and in the event that they however admitted the enforcement requests, the procedure was blocked before the Trade Registry which applied the rules from the voluntary transfer of shares and requested, by way of principle, a decision of the shareholders approving the share transfer to the adjudicators/buyers. In these conditions, the actual cases of (attempts to) enforce mortgages established over shares were extremely rare.

The Company Law provides clarifications

Some of the practical difficulties were generated by article 66 paragraph (2) of the Company Law that referred only to the possibility of creditors to seize and sale the shares of joint stock companies (and not the shares of limited liability companies), an argument of the theoreticians and practitioners supporting the idea that the shares of a limited liability company cannot be sold as result of an enforcement procedure. This argument was corroborated with *affectio societatis* (or otherwise said, the intention of the shareholders of a limited liability company to cooperate in order to carry out an economic activity) that implies, among others, the “impossibility” to compel the other shareholders to continue the partnership with a person that they did not priory approved.

Article 66 of the Company Law experienced a reconfiguration for the purpose of solving the controversies related to this subject. Thus, it was chosen the introduction of certain express provisions concerning the possibility of creditors to sale the shares of a limited liability company and to enforce the mortgages established over such shares under the terms provided by law, with the obligation of the directors of the respective company to provide the necessary documents and information for their evaluation and to facilitate their enforcement. We mention that this last aspect, the evaluation of the shares in lack of supporting documents, was a practical aspect that led in certain cases to the impossibility of continuing the enforcement procedure.

Separately, the applicability of the provisions related to the voluntary transfer of the shares of a limited liability company in case of enforcement of a mortgage established over such shares was also clarified: it will be necessary the approval of the shareholders representing at least three quarters of the share capital, “but only in what concerns the establishment” of the mortgage. According to the wording of the legal provision, one can consider that the approval of the shareholders in case of enforcement will not be necessary, but, considering



that there is no express provision to this extent, it remains to be seen the manner in which the legal provision will be applied by the Trade Registry.

The current form of the Company Law seems to have eliminated the previous controversies concerning the enforcement of mortgages established over the shares of a limited liability company and seems to have created the favourable legal background to enforce the mortgages, as long as their establishment was performed with the approval of the necessary majority of shareholders.

The enforcement of the mortgage overs shares

According to the New Civil Code, each time the debtor (in our case the shareholder that established a mortgage over the shares) fails to observe its obligations towards its creditor, the latter is entitled to enforce the shares.

As a general rule, the New Civil Code allows the enforcement according to the procedure provided either by the New Civil Code or by the New Civil Procedure Code. However, the provisions of the New Civil Code with respect to the enforcement of the mortgages exclusively refers to the mortgages established over tangible assets, while the shares are intangible assets. Therefore, we consider that the enforcement over shares shall be carried out according to the procedure provided by the New Civil Procedure Code, there not being actually a possibility for the creditor to choose a certain procedure.

To this extent, according to the New Civil Procedure Code, from a procedural point of view, the enforcement will commence by taking the following initial steps:

- i. the filing by the creditor of an enforcement request to the enforcement officer; and
- ii. the filing by the enforcement officer of a request to the relevant court of law for approving the enforcement proceedings.

The court invested with the enforcement request is also bind to verify: (i) the existence of a certain, liquid (*i.e.* expressed in cash) and outstanding receivable against the shareholder that established the mortgage and (ii) the existence of an enforcement title, respectively the mortgage agreement, prior to any ruling in favour of the admission of any enforcement request.

With respect to the sale of the shares within the enforcement procedure, the New Civil Code and the New Civil Procedure Code regulates two such modalities, namely: a) amiable sale – where, with the prior consent of the creditor - the debtor itself may proceed with the capitalization of the shares or b) forced sale – where the enforcement officer will try the sale within a public auction.

Even though the legal provisions are clear, it remains to be seen whether, in the current context of the Company Law, the enforcement of the mortgages over the shares established after the amendments brought to the Company Law will be successfully finalized.