"Why should Restrictive Clauses be applicable in Cases of Forced Selling of Limited Liability Company Shares?"

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1. In many European countries, one of the most complex and widely discussed issues addressed by legal systems with respect to forced selling of limited liability and public limited company shares is the impact of possible statutory restrictions on transfers[2]. Thus, while some authors deny the applicability of such provisions (as a possible avenue for commission of creditor fraud)[3], others support their validity (on the basis of prevention of possible fraudulent actions affecting interests protected by restrictive causes)[4].

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[2] This debate has arisen in several European countries. For an in-depth study of the problem, see my monograph, Troncoso Reigada, M., *Transmisión forzosa de acciones y participaciones de S.L. y cláusulas restrictivas*, Civitas, Madrid, 2004.

[3] See, in German doctrine, ULMER, E., *Festschrift Schmidt-Rimpler*, pp. 264-265; SCHOLZ, F., *Kommentar*[4]§15 Rdn. 84-85, pp. 228-229; GOTTSCHLING, H., *GmbH Rdsch.*, 1953, p. 21; UHLENBRUCK, D., *DB*, 1967, pp. 1928-1929; HUECK, A., in BAUMBACH, A.-HUECK, A., *Aktiengesetz*[13], §68, Rdn. 7, p. 200; BAUMBACH, A., HUECK, A., *GmbH-Gesetz*[13], §15 6B p. 87; MOHRBUTTER, J.-MOHRBUTTER, H., *Handbuch*[2], p. 315; KOSSMANN, H., *BB*, 1985, p. 1364; ULMER, P., *ZHR*, 1985, p. 39; WINTER, H., *Scholz Komm.*[9], §15 Rdn. 179, pp. 868-869, Rdn. 185, p. 873. In Italian doctrine, MILILLO, D., *Foro it.*, 1952, I, cc. 1299-1300; ANGELONI, V., *Riv. dir. comm.*, 1955, I, pp. 101 *et sequentes*.; BUCOLO, F., *Pignoramento*, pp. 144-145; RIVOLTA, G. C., *Società*, pp. 239-241; BONSIGNORI, A., *Espropiazione*, pp. 58-63 (and subsequent references); GORLA, G., *Società*, p. 105; CANTILLO, M.-CATURANI, G., *Sequestro*, pp. 85-86; MILONE, L.-LOPS, P., *Dir. fallimentare*, 1985, I, pp. 473-474; COTTINO, G., *Società*[3], p. 698. In Spanish doctrine, SÁNCHEZ GONZÁLEZ, J. C., *Sociedad de responsabilidad limitada*, I, pp. 736-738, p. 753; FERNÁNDEZ Del POZO, L., *Sociedades Limitadas*, p. 150; CARLÓN SÁNCHEZ, L., *Sociedades de Responsabilidad Limitada*, p. 297; see also, more recently, PERDICES, A., *Cláusulas*, pp. 51, 250 and 251 and 290-291.

[4] See, in German doctrine, MÜNZBERG, W., *Stein/Jonas Zivilprozeßordnung*[21], §822 Rdn. 2, p. 908; LUTTER, M., *Kölner Kommentar*[2], §68 Rdn. 22, p. 838; FISCHER, R., *Aktiengesetz Grosskommentar*, §61, Anm. 20, p. 386; BARZ, H., *Aktiengesetz Grosskommentar*[3], §68 Anm. 14, p. 522; LUTHER, M., *Aktiengesellschaft*, p. 67; HEFERMEHL, W.-BUNGEROTH, E., *Aktiengesetz Kommentar*, §68 Anm. 152, p. 387; BORK, R., *Festschrift Henckel*, p. 29; WIESNER, G., *Aktiengesellschaft*[2], §14 Rdn. 22 p. 97; EHLKE, M., *DB*, 1995, p. 566; OBERMÜLLER, W., *NJW*, 1962, pp. 852-853; DEMPEWOLF, G., *NJW*, 1963, pp. 1343-1344; BRUNS, R.-PETERS, E., *Zwangsvollstreckungsrecht*[3], p. 197).
In Italy, this position has been held by VIVANTE, C., *Trattato*, n. 669, p. 389; ASCARELLI, T., *BBTC*, 1953, I, p. 310; NEGRO, F., *Indisponibilità*, pp. 122-131 and 140; GATTI, S. , *Riv. dir. comm.*, 1973, II, pp. 43-45; FRÈ, G., *Società*[5], p. 256; and by the *Corte di Cassazione* in its sentence of 1-IV-1895, see *Foro Italiano*, 1895, cc. 883-884.
For France, see MOREAU, A., *Société*[2], I, núm. 330, p. 429 and III, núm. 329, p. 199.
In Spanish doctrine, see PEDROL, A., *RDPriv.*, 1949, II pp. 727 and 739; DE SOLÁ CAÑIZARES, F., *Tratado*, p. 148, ID., *ADC*, 1951, p. 50); MADRIDEJOS SARASOLA, J., *RDPriv.*, 1955, pp. 273-274;

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In my opinion, a solution must be found in which prosecution of creditor fraud co-exists with respect for the rights scheme. As a general rule, this solution would call for applicability of restrictive clauses to cases of forced selling, regardless of whether such statutory provisions are viewed in terms of *order* or *alienation.*

2. From the standpoint of *order* (in other words, the impact on future legal relations established through actions that determine the legal configuration of shareholders' property), these clauses can be challenged only insofar as they exceed the general limits established by the body of law in such cases, for example, prodigality. What should be stressed here is that such clauses should never be challenged on the grounds that they may constitute creditor fraud in light of the absence of an essential criterion of fraudulent conduct: the prior existence of creditors[5]. Consequently, from the perspective of *order*, arguing that such restrictions are inapplicable in the name of creditor protection (which is the position of the majority of legislators and doctrine) is a glaring conceptual error.

As if the foregoing were not enough, this is not the only objection that can be raised against the position adopted by such authors. The valuation-related inconsistencies introduced into the system by their approach must not be overlooked.

In this regard, and with respect to cases in which investment in shares subject to restrictive clauses is a question of order, advocates of inapplicability of the clauses plainly appear to ignore two fundamental principles. First, the one enshrined in the old Latin axioms *nemo dat qui non habet* and *nemo plus juris transferre potest quam ipse habet*[6]*,* which mean that shareholders cannot (voluntarily) assign – and therefore cannot

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BOLÁS ALFONSO, J. [*et al.*], *Sociedad de responsabilidad limitada*, pp. 269-270, GIRÓN, J. *Sociedades Anónimas*, p. 234; FERNÁNDEZ-BALLESTEROS, M. A., *Ejecución forzosa*, p. 301, ID., *Comentarios*, p. 2873.

[5] Proof that fraud can be committed, initially, only against pre-existing creditors rests on two facts:
On the one hand, the principle, broadly established in continental law, that as a rule a debtor's liability extends to his entire property; in German law, for instance, *Unbeschränkte Vermögenshaftung* (see as representative, KRAMER, E., *Münchener Kommentar*[%], Rdn. 47 p. 26); in Italian law the principle is known as *principio di universalità della responsabilità patrimoniale* (see, as representative, TROIANO, S., *Comentario*, p. 3070); and in Spanish law as *principio de la responsabilidad patrimonial universal* (see DÍEZ-PICAZO, E., *Fundamentos*[4], pp. 123-124); this liability refers to present and future property (explicitly, for instance, in art. 2740 of the Italian Civil Code [A debtor is liable with all his present and future property for the performance of his obligations] and art. 1911 of the Spanish Civil Code), but not "past" property (owned by the debtor at one time but no longer in his possession when the obligation was contracted) which, obviously, is excluded therefrom (see, for instance, in Spanish doctrine DE CASTRO, F., *RDPriv.*, 1932, p. 210, note 73).
On the other hand, marginal considerations aside, these are the only creditors who have the legal capacity to make use of the main instrument available to defrauded creditors by many European bodies of law: *actio pauliana* (acción pauliana (Sp.), Action paulienne (Fr.), paulianische Anfechtungsklage (Ger.), azione revocatoria (It.); see, for instance, in Spanish doctrine, PUIG PEÑA, F., *RDPriv.*, 1945, p. 481; ID., *Compendio*, pp. 245 and esp. 260-261; PRIETO COBOS, V., *Acciones civiles*, pp. 819 and 820-821; CASTÁN TOBEÑAS, J., *Derecho Civil*, t. III1[13], p. 295; ROCA SASTRE, R.-ROCA-SASTREMUNCUNILL, L., *Derecho Hipotecario*[8], Tomo II, p. 658.

[6] V. CACHÓN CADENAS, M. J., *Embargo,* p. 134; FERNANDEZ-BALLESTEROS, M.A., *Ejecución forzosa*, p.

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forcibly sell – rights to which they are not entitled. Hence, their shares are subject to certain restrictive clauses; *the stakeholders have neither shares that are restriction–free nor shares subject only to other restrictions.* Therefore to flout the rights scheme is tantamount to absurdly and magically enabling subjects to forcibly sell something that they cannot voluntarily transfer because it does not form a part of their equity. The execution process would therefore have some sort of thaumaturgic power. Second, from the perspective relevant to this study, parties who have no creditors may dispose of their property as they see fit[7]; there is no obligation to remain solvent in the future. Rather, it is incumbent upon potential creditors (i.e., what in German doctrine is known as *Gebot des eigenen Interesses*) to ascertain the credit-worthiness of the person to whom they intend to extend credit. Hence, contending that restrictive clauses are not applicable in such cases entails allowing creditors to externalize rather than bear the burden of the consequences of risky action for which they and they alone are liable. For example, this would make risk-taking creditors immune to the consequences of failing to take due precautions or extending credit without first checking whether there are restrictive clauses.

In short, insofar as order is concerned, the existence of such restrictions should be challenged openly where they exceed the general limits of the body of law. In the context addressed here, this would be when restrictions are designed to be applied only in the event of forced selling (or in a series of circumstances including forced selling, provided the other items are included as "padding") depriving the creditor of the value of the shares in the debtor's possession. In such cases, they would be null and void for want of any (objective) cause[8].

3. Viewed, on the contrary, in the context of *alienation* (in other words, as debtor behaviour that affects pre-existing legal relations), restrictive clauses should for the present intents and purposes be challenged only where their application in cases of forced selling(*rectius*, their existence) constitutes creditor fraud, which is not always the case. As in the foregoing discussion relating to order, this would of course exclude cases in which they are established exclusively for forced selling or other analytically

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301; Id., *Comentarios*, p. 2873.

[7] Inasmuch as doctrine advocates, in respect of a person incurring an obligation, that "the debtor has absolutely no duty, vis-à-vis the creditor, to maintain his property and even less to administer it in the creditor's interest" (see, for instance, in Spanish doctrine, the well-known opinion of DE CASTRO, F., *RDPriv.*, 1932, p. 221), this same premise should be upheld *a fortiori* with respect to those who transfer their property prior to incurring any obligation.

[8] In other words, these clauses should be treated in the same way as statutory clauses that envisage the amortization of shares cost-free or for a sum lower than the real value, only where the cause for amortization is a seizure. For the nullity of this type of clause, see FISCHER, R., *GmbH Rdsch.,* 1961, p. 25; ROWEDDER, H., *GmbHG,* §15 Rdn. 84, p. 377; ROWEDDER, H.–BERGMANN, A., *Rowedder/Schmidt-Leithoff GmbHG,* §15 Rdn. 147, pp. 565-566; MOHRBUTTER,J.–MOHRBUTTER, H., *Handbuch,* p. 316; KLAUSS, H.–BIRLE, J., *GmbH,* p. 106; STÖBER, K., *Forderungspfändung,* Rdn. 1617, p. 868; BLOMEYER, A., *Zivilprozeßrecht,* §65 II, p. 300; KLAUSS, H.–KLAUSS, H. J.–BIRLE, J., *GmbH,* Rdn. 249, p. 129; RAISER, T., *Kapitalgesellschaften,* Rdn. 54, p. 525-526; SCHOLZ, F., *Kommentar zur GmbHG,* 4. Aufl., 1960, §15 Rdn. 84, p. 229; UHLENBRUCK, D., *DB,* 1967, p. 1929; SUDHOFF, H., *Familienunternehmen,* pp. 484 and 485; MEYER-LANDRUT, J., *GmbHG,* §15, Rdn. 54, p. 234; WIECZOREK, B.–RÖSSLER, G.–SCHÜTZE, R., *Zivilprozeßordnung,* §857, D II C, p. 239 and H III b 1, p. 245; SCHULER, H., *NJW,* 1961, p. 2281, KORT, M., *GmbH,* §28, Rdn. 25, p. 482; SUDHOFF, H., *GmbH,* p. 457; NOACK, W., *Kommunal-Kassen Zeitschrift,* 1978, 1, p. 11.

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identical circumstances to prevent creditors from obtaining the actual value of the shares.

Indeed, contrary to what many authors seem to believe[9], by-law restrictions on transfers that are also applicable to forced selling need not necessarily constitute fraud. The two conditions that define fraud for these intents and purposes are (1) the presence of a creditor before the alleged act is committed (a condition that is met by definition insofar as this discussion assumes alienation) and (2) a decrease in the debtor's equity. Disregarding other perhaps more controversial circumstances (such as cases where the shares subject to restrictions may not be worth less than those that are restriction-free such that the introduction of provisions of this nature would entail no decrease in equity[10]), there are instances where no decrease in debtor equity ever occurs. For example, when debtors acquire cost-free shares that are subject to restrictive clauses. In such cases, account is taken of the restrictive clauses to which the shares are subject before they are included in the debtors' equity. Even where the existence of such restrictions lowers the value of the shares, the debtors' equity does not decline because the shares are received in exchange for no consideration whatsoever. Therefore creditors of beneficiaries of cost-free acts must never be able to object to or demand anything (in particular the non-application of restrictions on forced selling), for no fraud is committed.

Moreover, there is the fact that the theory that such clauses cannot be used against creditors also introduces valuation-related inconsistencies in the system. Given the absence of fraud, this is not the criterion that prevails in other instances where goods subject to transferability restrictions, effective *erga omnes*, are added to the debtor's equity during the life of the credit. One example would be the receipt by a debtor of a donation consisting in real property subject to a prohibition on alienation; the solution proposed here would clearly generate inequality[11].

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[9] See in Italian doctrine, FRAGALI, M., *BBTC*, 1958, I, p. 465; CANDIAN, A., *Intorno*, p. 91; SPATAZZA, G., *Società*, pp. 361-362; BUCOLO, F., *Pignoramento*, pp. 144-145 and 151. In Spanish doctrine, see PERDICES, A., *DN*, 1993, pp. 339-340; ID., *Tratando*, p. 556; ID., *Cláusulas*, pp. 252 and 292); GALLEGO SÁNCHEZ, E., *Homenaje a Sánchez Calero,* pp. 3508-3509); TARRAGONA COROMINA, M., *AAMN*, p. 99; SÁNCHEZ GONZÁLEZ, J. C., *Sociedad de responsabilidad limitada*, I, p. 736 and, implicitly, p. 748; CABANAS TREJO, R.-CALAVIA MOLINERO, J. M. (Coord.), *Ley*, pp. 124-125; RECALDE CASTELLS, A., also argues along these lines in *Comentarios*, pp. 626 and 631; see also YANES, P., *Sociedades Anónimas*, p. 1170.

[10] The existence of such cases is disputed. While most doctrine considers shares subject to restrictions to be worth less than unrestricted shares (see ASCARELLI, T., *BBTC*, 1953, I, p. 311, PEDROL, A., *RDPriv.*, 1949, II, p. 719, UHLENBRUCK, D., *DB*, 1967, p. 1928 – who even quantifies the discount at twenty per cent -; FISCHER, R., *GmbH Rdsch.*, 1961, p. 24; WIEDEMANN, H., *NJW*, 1964, p. 284), a fair number of authors argue the contrary (see KIRCHNER, C., *manuscript*).

[11] In both cases, transfer restrictions are effective *erga omnes* and both are placed on the public record. Why, then, should they be honoured in one case but not in the other, when the existence of fraud is not implicit in either? In another vein, note that in such cases it is also not feasible to maintain that "applicability entails a decrease in the creditor's property-based security" for, inasmuch as the shares were added to the debtor's assets subject to such restrictions, by definition, the debtor's property never experienced any decline in value. This stands as proof that such "security" never existed.

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What perhaps will prove most surprising to many, however, is that inapplicability of restrictive clauses should not be admitted even where their inclusion unquestionably constitutes fraud. The reason for rejecting inapplicability of such restrictions, even where forced alienation is claimed by previously existing creditors and the debtor's assets are shown to have declined, is the absence of any justification for failing to use general remedies against creditor fraud, specifically *actio pauliana*[12], and resorting instead to other instruments[13]. Furthermore, use of this remedy[14] would obviate objections that may be levelled against inapplicability of restrictive clauses in these cases of fraud: (a) debtor insolvency is not required for its use, (b) there is no deadline for execution, (c) no provision is made for third party "right of excussio", and (d) it leaves the door open for possible tortious operations, in this case involving fraudulent overruling of restrictive clauses[15]. All these objections lead to aberrant discrimination with respect to other cases of fraud, introducing yet another valuation-

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[12] Acción pauliana (sp.), Action paulienne (fr.), paulianische Anfechtungsklage (ger.), *azione revocatoria* (it.)

[13] Solutions proposed in other countries are likewise rejected here for that very reason. One such solution would separate administrative rights from economic rights, in which the latter would be conveyed to the creditor. This device, proposed by French doctrine (see ROUSSEAU, J., *Traité*, No. 289, pp. 254-255, in connection with No. 268, p. 238; ESCARRA, J.-ESCARRA, E.-RAULT, J., *Traité,* No. 389, p. 443, and subsequent references; HOUPIN, C.-BOSVIEX, H., *Traité*[6], No. 1571, p. 692 also appear to support this approach), was defended by some Spanish authors subsequent to the 1951 Companies Act (see PEDROL, A., *RDPriv.*, 1949, II, p. 729, who maintained that, in the event of a clause of consent, without authorization the creditor would be able to draw on the equity only) and the 1953 Limited Liability Companies Act (see DE SOLÁ CAÑIZARES, F., *Tratado*, p. 147; ID., *ADC*, 1951, p. 51). *Lege* lata, this is the solution applied to the forced buyer by Swiss law in the event of forced selling of entailed shares; indeed, Art. 685c Abs. 2 OR 1991 provides that: «Beim Erwerb von Aktien durch Erbgang, Erbteilung, eheliches Güterrecht oder Zwangsvollstreckung gehen das Eigentum und die Vermögensrechte sogleich, die Mitwirkungsrechte erst mit der Zustimmung der Gesellschaft auf den Erwerber über».

[14] In Spanish law, unfortunately, only one author appears to have supported this possibility with respect to limited company shares. This occurred in a text prior to the 1951 Companies Act (see PEDROL, A., *RDPriv.*, 1949, II, pp. 739 and 746; however, this did not prevent the same author from accepting the solution whereby the creditor would be entitled to economic rights); this is the approach adopted by MADRIDEJOS SARASOLA, J., *RDPriv.*, 1955, p. 274, with respect to shares in limited liability companies.

Some Italian authors also appear to lean in this same direction FRÈ, G., *Società*[5], p. 257.

Indeed, its use is possible to the extent that, pursuant to well-established doctrine, this remedy can be wielded against any act in law performed by the debtor (see in Spanish law, DÍEZ-PICAZO, L., *Fundamentos*, II[5], pp. 735-736; GARCÍA AMIGO, M., *Comentario*, p. 70; ORDUÑA MORENO, F. J., *Acción*, p. 156; FERNÁNDEZ CAMPOS, J. A., *Fraude*, pp. 160-161), including corporate contributions (the Spanish Supreme Court Sentence of 9-II-1961, *Rep. Aranzadi* 325, alludes to the latter as the object of remedy of revocation).

[15] This objection aims to show that the remedy consisting in non-application of restrictive clauses in forced transfer opens the door to other types of fraudulent action, in this case on the part of a shareholder whose shares are transferred in connivance with third parties to the detriment of the interests protected by the clauses. In other words, failure to apply the restrictive clauses, rather than preventing creditors from being defrauded (a circumstance that, as discussed above, is not always present) or defending creditors' interests (for, if the debtor is solvent, the rest of his property will suitably cover such interests) may, rather, enable the debtor, with the aid of other individuals, to defraud such interests. In other words, the actual outcome is exactly the opposite of the intention.

This final objection to the non-application of restrictive clauses in forced selling has been mentioned by other European authors. See ASCARELLI, T., *BBTC*, 1953, I, p. 310; HEFERMEHL, W.-BUNGEROTH, E., *Aktiengesetz Kommentar*, §68 Anm. 152, p. 387; BARZ, H., *Aktiengesetz Grosskommentar*[3], §68 Anm. 14, p. 522; BORK, R., *Festschrift Henckel*, p. 29.

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related inconsistency into the system. This can be verified by focusing on the objection that possibly merits the greatest attention: the non-requirement of insolvency, using "requirement" in its broadest sense, namely "requisite for proceeding". This would mean that restrictive clauses could be rendered null even where the debtor is solvent.

It goes without saying that it would be aberrant to deem irrelevant such a fundamental circumstance as debtor solvency. The foregoing is aggravated by what appears to be legal folly: implementation of a solution such as inapplicability in cases where not only the third parties jeopardized by prosecution of the fraudulent act have in all likelihood nothing to do with either the debt or the fraud. Indeed, they may have no *animus defraudatoris* or even the duty to be aware of the fraud, which many authors regard to be requisite for its existence. Moreover, such prosecution nearly certainly impacts an infinitely larger number of persons (beneficiaries of restrictive clauses, such as corporations, shareholders and third parties) than in other instances of fraud. (Compare the number of people affected with the number of third parties affected, for instance, by the severance of a bill of sale involving creditor fraud.) For that reason alone and on the grounds of elementary prudence, fraud committed under the cover of restrictive clauses should be the last to be persecuted.

4. The analysis of restrictive clauses in terms of both "acts of order" and "acts of alienation" can lead to only one *conclusion*: rejection of a solution that has received broad support from many European authors and legislators, namely, inapplicability of restrictions, because, in addition to the conceptual objections against it, this solution introduces substantial valuation-related inconsistencies into the body of law.

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