18 Agosto 2021

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IBA Corporate Counsel Forum

Wednesday 18 August 2021

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Breach of the shareholders' agreement: which jurisdiction applies when a company is based abroad?

According to a recent judgment of the Italian *Corte di Cassazione*,[1] a dispute

arising from a breach of the shareholders' agreement by an Italian shareholder is subject to Italian jurisdiction even when the registered office of the company is located abroad under the rule of the defendant's domicile.

Shareholders' agreements in the Italian legal system

In the Italian legal system, the shareholders of a company may enter into shareholders' agreements to regulate their particular obligations regarding the corporate governance and business management of the company.

According to Italian law and case law, the company to which a shareholders' agreement refers is not a party to that contract. Indeed, the shareholders' agreement is formally and substantially distinct from the company's by-laws and its articles of association.

In other words, shareholders' agreements are not legally binding either on the company or on third parties. According to the general principle provided by Article 1372 of the Italian Civil Code, shareholders' agreements have binding effects only between the parties who executed them, and do not produce effects to the company, as well to any third party.

Consequently, shareholders' agreements are not enforceable against the company. Any act or contract adopted in breach of the shareholders' agreement shall remain valid among the parties and with respect to the company, but the other party of the shareholders' agreement may claim for damages compensation.

The rule of the defendant's domicile applies in the dispute resulting from a breach of the

shareholders' agreement

The *Sezioni Unite* of the Italian *Corte di Cassazione* has recently addressed the issue of the rule of jurisdiction applicable in the event of a dispute arising from a breach of the shareholders' agreement.

In the case under examination, the Italian shareholder of a foreign company based in Poland was sued before the Italian court by the other shareholder and party of the shareholders' agreement.

Previously, the Court of Appeal in Rome[2] had stated that the dispute should have been brought before the court of the place where the company has its registered office – ie, the Polish courts – under the principle of proximity between the object of the controversy and the court. According to that judgment, this special jurisdiction criterion is based on the rules of the Council Regulation (EC) no 44/2001 which permits certain derogations to the general rule of the defendant's domicile.

With judgment no 26984/2020, the Italian Supreme Court overturned the judgment of the Court of Appeal and ruled that the general criterion of the defendant's domicile is applicable in the case of a breach of the shareholders' agreement.

According to the Court, the exclusions to the general rule of the defendant's domicile should be interpreted restrictively because they introduce special derogations to the general rules of jurisdiction, which should instead be highly predictable and clear to grant legal certainty. For this reason, in the case of a dispute resulting from a breach of a shareholders' agreement, the rule of exclusive jurisdiction provided by Article 22 of the Regulation is not applicable.

According to Article 22, proceedings concerning 'the validity of the decisions of the company's organs' fall within the exclusive jurisdiction of the court of the Member State where the company has its registered office. Such a rule of exclusive jurisdiction is aimed at granting an efficient and predictable dispute resolution system by referring the disputes on the decisions of the company's organs to the court closest to the company, as defined according to the criterion of the location of the corporate registered office.

As mentioned above, shareholders' agreements are not enforceable against the company in the Italian legal system. This implies that a breach of the shareholders' agreement does not affect the validity of decisions and acts of the company's organs, provided that such decisions and acts are made in accordance with the law of the Member State where the company has its registered offices, due to the company being formally and substantially a third party to the shareholders' agreement.

Therefore, the *Sezioni Unite* excluded that a breach of a shareholders' agreement may also concern the 'validity of the decisions of the company's organs' as required by law to derogate to the general rule of the defendant's domicile.

In other words, the dispute resulting from a breach of the shareholders' agreement is only relevant in the relations between its parties and it does not involve the company. Hence, the jurisdiction does not follow the rule of the registered office of the company.

In the case at issue, the Italian *Corte di Cassazione* stated that the shareholder and company's sole director domiciled in Italy had been properly sued before the Italian court under the general principle that the jurisdiction is based on the defendant's domicile.

Conclusion

In light of judgment no 26984/2020 of the *Corte di Cassazione*, the settlement of a dispute resulting from the breach of a shareholders' agreement by the Italian shareholder and sole director of a foreign company falls within the Italian jurisdiction.

The nature and the effects of shareholders' agreements under the Italian law do not allow the application of the exclusive jurisdiction criterion, set forth by Article 22, to proceedings concerning a breach of a shareholders' agreement.

To ensure legal certainty, the rules of exclusive jurisdiction may not be interpreted extensively, as the parties must be able to predict which court is competent in the case of a breach of the shareholders' agreement. The need for clarity and predictability is the key factor that settles the jurisdiction according to

the general criterion of the defendant’s domicile.

[1] *Corte di Cassazione*, judgment no 26984/2020.

[2] Court of Appeal in Rome, judgment no 2932/2018.

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