Right of First Refusal and Obligation to Sell: How to reconcile two interrelated contractual clauses?

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When shareholders have agreed to a right of first refusal alongside an obligation to sell under certain circumstances, it remains uncertain whether a shareholder who is obliged to sell must formally notify the other shareholders to allow them to exercise their right of first refusal.

Judgment of the Federal Supreme Court of 5 November 2024
Case Reference : 4A_379/2024

Facts

Albert (the "Plaintiff") founded C. AG (the "Employer"), which employed Benoît (the "Defendant"). In 2018, the Plaintiff, the Defendant as well as Ernest, Fabienne and Gaston (the "Other Shareholders") incorporated D. AG (the "Company"). Upon incorporation, the shareholders entered into a shareholders' agreement (the "SHA").

The SHA contained, among others, the following provisions:

- Right of first refusal (Section 3.2 of the SHA): if a shareholder intends to transfer its shares in the Company to another shareholder or a third party, the transferring shareholder must first offer them for sale to the other shareholders in writing. The non-transferring shareholders may exercise their right of first refusal within 50 days of receiving written notice, but only with respect to all the shares intended for transfer.
- Obligation to sell (Section 3.4.3 lit. d of the SHA): if the Employer terminates the employment of a shareholder of the Company, the terminated shareholder is obliged to sell their shares in the Company, with Section 3.2 of the SHA applying *mutatis mutandis*, granting the other shareholders a right of first refusal.
- Liquidated damages (Section 6 of the SHA): In case of breach of the SHA by a party, the other parties may claim liquidated damages in the amount of CHF 50,000.

On September 3, 2019, the Plaintiff and Gaston, acting on behalf of the Employer, terminated the Defendant's employment contract. On September 26, 2019, Gaston informed the Defendant that the Other Shareholders wished to acquire all of his shares in the Company for CHF 55,000. The following day, Gaston reiterated this by email, copying the Plaintiff. However, no sale was concluded at that time. On January 26, 2021, the Other Shareholders once again requested that the Defendant sell his shares. The transaction was completed on February 4, 2021 for a total of CHF 52,250.

On March 21, 2021, the Plaintiff accused the Defendant of breaching his notification obligation under Section 3.2 of the SHA and demanded payment of the contractual penalty of CHF 50,000 stipulated under Section 6 of the SHA. The Defendant refused to pay.

On May 17, 2021, the Plaintiff filed a claim before the First Instance Court of Zurich, requesting that the Defendant be ordered to pay him CHF 50,000 under Section 6 of the SHA. The First Instance Court dismissed the claim. The Plaintiff appealed to the Zurich Cantonal Court, which also rejected his claim.

He subsequently appealed to the Federal Supreme Court.

Issue

The Federal Supreme Court was asked to determine whether the Defendant was obliged to formally offer his shares for purchase to the Plaintiff following the termination of his employment contract.

Decision

The Federal Supreme Court upheld the Cantonal court's judgment and rejected the Plaintiff's appeal.

First, the Federal Supreme Court made a distinction between a right of first refusal and a pre-emption right. A pre-emption right grants its beneficiary the right to acquire ownership of an asset through a unilateral and unconditional declaration, provided the person bound by the pre-emption right sells the asset to a third party. A purchase agreement is entered into when the beneficiary exercises its right. Conversely a right of first refusal only creates an obligation to offer the shares to the beneficiaries of such a right before selling it elsewhere.

The Federal Supreme Court then elaborated on how a right of first refusal is generally applied. The right of first refusal typically arises when the offeror decides to sell its shares. Since the intention to sell is a private, mental act, the offeror must notify the beneficiaries of its intention to sell. If such notification is omitted and the beneficiaries are unaware of the event triggering a right of first refusal, the offeror may be held liable for breaching its notification obligation.

However, the parties to a share purchase agreement do not have to link the event triggering the right of first refusal exclusively to the intention to sell. On the contrary, they can determine that the right of first refusal will be triggered by other events, such as external factors. The occurrence of the right of first refusal, which only triggers the obligation of the offeror to notify the beneficiaries, must be distinguished from the actual sale of the shares, which typically occurs when the beneficiary accepts the offer.

In the case at hand, the Federal Supreme Court acknowledged that the SHA contained a right of first refusal under Section 3.2, as well as an obligation to sell under Section 3.4.3 lit. d. The obligation to sell was triggered by the termination of the Defendant's employment contract, which in turn triggered the purchase right of the other shareholders. The Federal Supreme Court found that the reference contained in Section 3.4.3 lit. d of the SHA to Section 3.2 of the SHA related solely to the modalities for exercising the right of first refusal, and not the intention to sell.

In this case, the right of first refusal was triggered by an external event – namely, the termination of the Defendant's employment contract – with the Plaintiff himself (together with Gaston) having signed the termination letter. The Plaintiff thus personally triggered the obligation to sell, and consequently the right of first refusal of the remaining shareholders, and cannot claim to have been unaware of the resulting obligation for the Defendant to offer his shares. The Defendant would only have been liable for failing to notify if the beneficiary had otherwise been unaware of the event triggering the right. The Plaintiff, however, was unable to demonstrate any advantage he would have gained from being formally notified of a fact already known to him.

In light of these considerations, the Federal Supreme Court upheld the Cantonal court's judgment and confirmed that the Defendant was not liable for breach of the notification obligation under Section 3.2 of the SHA.

Key takeaways

In the case at hand, the Federal Supreme Court substantially considered that a shareholder was not liable for liquidated damages despite failing to satisfy his duty to inform the other shareholders of the occurrence of a purchase option. This is due to the fact that the claimant shareholder was unable to demonstrate that he would have gained any advantage from having received such notification.

Comments

The solution reached by the Federal Supreme Court in this decision is convincing: the right of first refusal is not exercised in a vacuum but must be understood within the context of a particular case. While it is generally true that, as a rule, a shareholder's decision to sell its shares may not be obvious to the other shareholders, this is different when the other shareholders have expressly provided for specific events that entail an obligation to sell. In such cases, since the share sale is tied to a predetermined event, the other shareholders are able to exercise their right of first refusal without the need for a formal notification from the selling shareholder.

The pragmatic approach adopted by the Federal Supreme Court in the case at hand prevents the claimant from demanding payment of liquidated damages solely on the basis of a formal breach, without showing any actual disadvantage. Ultimately, this decision reflects the principle of good faith: a shareholder who deliberately refrains from exercising their right of first refusal, while already aware of the triggering event, cannot later claim they were prevented from exercising said right due to purely formal reasons.

This case highlights the risks associated with internal cross-references in contractual clauses. Although the solution reached by the courts could have also been reached by the parties through straightforward contractual interpretation, it is advisable to draft such cross-references with maximum clarity and precision in order to avoid disputes of this kind. , to avoid any potential disputes it would be preferable to draft such cross-references as carefully and precisely as possible.

Other sources presenting the case

Schmidlin Adrian, Vorhand- und Vorkaufsrecht in einem Aktionärsbindungsvertrag, *in* legalis brief 2024 Gesellschaftsrecht 16.12.2024.

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