

Penalties for Non-Delivery of Shares Under Shareholders Agreements - To what Extent Will the Exceptio Non Adimpleti Contractus Principle Protect a Shareholder?

The case: In 2001 X. (who was a consultant of V.A. AG) bought 700 shares in V.A. AG and signed a shareholders agreement (SHA) in accordance to which, among others, the leaving shareholder was obliged to offer his shares to the other shareholder. In case of an exit, the auditors of the company should calculate the share price in accordance with a formula set out in annex 3 to the SHA. In order to secure the shareholders' pre-emption right, the SHA also provided that any leaving shareholder not offering his shares to the other shareholder upon exit shall be obliged to pay a penalty of CHF 100'000. On 11 May 2007, X. terminated his consultancy agreement with V.A. with effect as per 30 November 2007. By letter dated 26 July 2007, shareholder Y reminded X. of his duty to offer his shares and indicated the share price would be calculated in accordance with the SHA and the purchase price would be remitted to X. at the end of August 2007. In January 2008, Y. sent a reminder to X. repeating that the shares were to be offered to Y. and enclosed a check in the amount of CHF 7'441 which he contended to be the amount of the appropriate share/purchase price. X. rejected the offer of Y. arguing that the share price calculation was not accurate, but in mid February he encashed the amount of CHF 7'441 on account of the entire purchase price. In August 2008 Y. provided a re-evaluation of the share price and requested X. to indicate his bank account details so that Y. could remit an additional amount of CHF 14'585. X. did not accept this offer.

On 21 October 2008, Y. filed a claim against X. with the court of first instance in Geneva requesting delivery of the shares against payment of the share price as well as payment of the penalty in the amount of CHF 100'000. By letter dated 13 November 2009, the auditors of the company sent a letter to the court indicating that the original calculation of the share price had been erroneous on various items and presented a new share price calculation. On 8 February 2011, the court rendered its decision in favour of Y. X. filed an appeal against this decision with the Cantonal court of Geneva which, with decision dated 11 May 2012, upheld the decision of the court of first instance, but reduced the penalty from CHF 1000'000 to CHF 25'000.

X. filed an appeal against the decision of the Cantonal court with the Swiss Federal Court.

The decision: The Federal Court analyzed the SHA and concluded, among others, that the parties had agreed that the leaving shareholder was to offer his shares to the other shareholder in exchange of/against payment of the purchase price calculated by the auditors (pursuant to the rules set out in the SHA). The Federal Court further concluded that article 82 of the Swiss Code of Obligations allows a debtor to withhold performance of his obligation if the counterparty does not perform his own obligation (*exceptio non adimpleti contractus*). The Federal Court confirmed that the SHA provided that the purchase price had to be calculated by the auditors in accordance with the formula set out in annex 3 of the SHA. It, then, concluded that if Y. had offered an irregular price, i.e. a price that had not been determined in accordance with the SHA, he had not fulfilled his own obligation vis-à-vis X. and X. would be entitled to withhold performance of his obligation, i.e. the obligation to deliver the shares.

The Federal Court had the competence to review the case on its merits *de novo*, but is bound, in respect of the facts of the case, to the findings of the Cantonal court which means it could not, by itself, assess whether or not the share price calculation had been accurate, i.e. in line with the formula set out in annex 3 of the SHA. In this respect, the Federal Court noted that in the court proceedings the auditors had admitted that when determining the share price they

had deviated from the contractually agreed formula and that the Cantonal court had disregarded the request of X. for a independent expertise about the accuracy of the share price calculation. Against this background, the Federal Court concluded that the Cantonal Court had acted arbitrarily when it had found that there was no reason to put into question the share price calculation performed by the auditors. Therefore, it set aside the Cantonal Court's decision and referred the case back ordering that the share price is to be calculated in accordance with the Federal Court's findings and instructions. The Federal Court further held that the question as to whether or not X. was to pay the penalty has to be determined later, i.e. when the Cantonal court has assessed whether or not the share price calculation and, thus, the share price offered by Y., where accurate.

Conclusion: It is not uncommon under shareholders agreements to secure a potential pre-emption right by foreseeing penalties to be paid in case of non-compliance with the pre-emption right. It is further quite common to agree that the share price shall be determined by the auditors or another party by applying a specific, contractually agreed, formula. Against the background of the decision of the Federal Court discussed, above a leaving shareholder may, in such circumstances, run the risk to be sanctioned and obliged to pay a penalty if he argues, in good faith, that the purchase price offered is not accurate and it turns out, at a later stage, that the price calculation was in compliance with the agreed formula.

Although the Federal Court confirmed that a leaving shareholder has the right to argue that the price calculation is not accurate and that the courts must duly take evidence on this question, it left open the question of the penalty and referred the case back to the lower instance court. The Federal Court's explanations allow, however, to conclude that the penalty will be due should it turn out, after a reassessment of the share price issue by the Cantonal court, that there was no mistake in the share price calculation. This leads to the conclusion that under any shareholders agreement which provides a similar rule the leaving shareholder bears a significant risk to being obliged to pay the contractually agreed penalty if he, even in good faith, challenges the share price calculation and withholds delivery of the shares as, if it turns out at alter stage that the calculation had actually been accurate, he may then have to pay the agreed penalty (and deliver the shares in exchange of the share price initially calculated/offered). This means that under such circumstances the leaving shareholder will have to consider handing over the shares even if he challenges accuracy of the share price calculation and then lodging a claim against the other shareholder for payment of the accurate price.

[Source: Swiss Federal Court, no. 4A_361/2012]