

TAG ALONG CLAUSES IN BY-LAWS: A RECENT RULING OF THE ITALIAN SUPREME COURT LIMITS THEIR ENFORCEABILITY

Italian case-law on tag along clauses in by-laws is relatively poor. Few precedents dating back to the 90s even questioned the validity of clauses in companies' by-laws requiring a selling shareholder to procure the joint sale of shareholdings held by minorities exercising the tag along right, as any shares transfer restriction with no time limits would have been deemed contrary to Italian law general principles. Nowadays, the validity of tag along clauses in companies' by-laws is widely admitted by notarial practice.

A recent ruling of the Italian Supreme Court (19 February 2018, No. 3951) went through a case where a majority shareholder of an Italian joint-stock company (società per azioni) transferred the bare ownership of its shares to a third party, reserving itself the usufruct and the voting rights. Pursuant to the company's by-laws, the remaining shareholders had a tag along right in case a third purchasing party would have come to hold the majority of voting rights in the shareholders' meeting as effect of purchase of shares or other convertible instruments. The minority shareholders claimed in court the enforceability of the tag along right in the relevant case, where the bare ownership of shares was transferred with no voting rights.

The Italian Supreme Court confirmed the first and second instance rulings stating that the tag along right is not applicable to such a case of share transfer. As the Supreme Court clarified, the principle of restrictive interpretation shall apply to any by-laws' provision providing for restrictions to share transfer, such as a tag along sale proceeding.

Therefore, bare ownership of shares cannot be treated as a convertible instrument, despite - in principle - the bare owner acquires full ownership by operation of law once the usufruct expires.

It is worth noting that the Supreme Court did not dispute the validity of tag along clauses in by-laws itself. Given the precedents mentioned above, alignment with notarial practice and scholars is a significant step-forward by case-law.

On the other hand, the decision leads to consider that by-laws should not simply reflect shareholders' agreements provisions, especially for restrictions on shares transfers. Although no doubt can be cast any longer on the validity of tag along clauses in by-laws, it is essential to clearly draw up the conditions for the tag along to apply - by including, for example, all desired types of transfer to which the clause should apply.

Attention shall also be paid to the relevant remedies. In case the joint sale is expressly set out as a condition to the transfer of shares by the obliged shareholders, the non-fulfillment of the tag along procedure is deemed to affect the validity of the transfer. Conversely, a breach by the selling shareholder of a general obligation to procure the joint sale of the other shareholders' shares may lead to a claim for damages, whilst the validity of the transfer should be not affected.