

GREEN LIGHT FOR PUT OPTIONS AT A FIXED PRICE

The Italian Supreme Court (with ruling No. 17498 of 2018) ruled in favor of the validity of a put option providing for the right of a shareholder to sell its own participation for a price equal to the overall investment made in addition to a certain amount of interests agreed with the other shareholder.

Said decision overruled the previous judgement (Court of Appeals of Milan no. 636 of 19 February 2016) that had maintained the voidness of such an agreement due to the breach of Art. 2265 of the Italian Civil Code: if a shareholder is entitled to sell its participation at a price that allows him to recover all amounts invested, the same is in fact excluded from the risk of incurring in any loss, hence, its investment cannot be considered an equity investment since the shareholder does not bear any risk. Art. 2265 of the Italian Civil Code states that any agreement that excludes completely and constantly a shareholder from any participation to the losses or to the profits of the company is void (*patto leonino*).

In contrast, according to the Italian Supreme Court decision, Art. 2265 of the Italian Civil Code shall be intended to make reference only to agreements that bind also the company, whilst it does not apply to contracts executed among shareholders. Therefore, a transfer of the investment risk from a shareholder to another, by means of the creation of an obligation of the latter to keep the former fully harmless from any potential loss (or profit) connected to its equity participation, is not void per se: it must be assessed whether the shareholders' agreement has been executed not only to dodge the principle set forth by art. 2265 but for a reason that the Italian law system can protect.

The test of worthiness does not appear particularly burdensome, in the reasoning of the Supreme Court. In its decision, the Court states that any contractual arrangement - including this type of put option - that can be useful to support the company's business through the contribution of additional financial resources shall be deemed worthy of legal protection (pursuant to Art. 1322 of the Italian Civil Code). Such argument can be validly applied to shareholders agreements executed with a double purpose, both to welcome a new shareholder in the equity partnership and to allow the company to obtain additional financial resources. Granting a put option with a fixed price serves well the intention of existing shareholders that want to allow a financial shareholder to enter the partnership subscribing new shares. Moreover, the transaction has a double advantage for the company: the equity injection made by the financial partner increases the company's corporate capital thus making it more attractive for its stakeholders and the put option agreement ensures that the exit of the financial partner be made through a disbursement of a shareholder and not by the company.

Put options with a fixed price have a similar effect of certain equity financial instruments and of pledges on shares, which ordinarily cause a split between the business risk and certain decision-making powers; hence, since said instruments are admitted without uncertainties, this type of option shall be deemed valid as well, according to the Supreme Court.