CHAMBER OF NATIONAL AND INTERNATIONAL ARBITRATION OF MILAN

Final award of 23 September 1997

Parties:	Claimants: Shareholders in Company X srl (Italy) Defendant: Company X srl (Italy)
Place of arbitration:	Milan, Italy
Published in:	Unpublished. Original in Italian
Subject matter:	– arbitrability of company law

Facts

Mr. A, Mr. B and Mr. C (the three shareholders) founded Company X srl (Company X), a limited liability company. The by-laws of Company X provided for arbitration of disputes according to the arbitration rules of the Milan Chamber of National and International Arbitration.

The three shareholders made payments to Company X in 1993, which were paid back in part in the same year, and in 1994. The receipts issued by Company X indicated in both cases that the sums were intended for its "financing", that is, according to the three shareholders, they were interest-bearing, refundable loans rather than payments on capital, which become an integral part of the company's capital.

The three shareholders subsequently sold the majority of the shares in Company X to Company Y. When the relationship between the three shareholders and Company Y deteriorated, the three shareholders donated their shares in Company X to their wives in June 1996. Alleging a right of pre-emption in favour of Company Y, Company X refused to register the transferral of the shares.

In November 1996, the three shareholders commenced arbitration at the Milan Chamber of National and International Arbitration, seeking reimbursement of the outstanding sums paid to Company X and registration of the transferral of the shares.

On the preliminary issue of jurisdiction, the arbitrators held that the dispute was arbitrable because a subject matter which is governed by mandatory provisions of law is not per se non-arbitrable.

On the merits, the tribunal held that the facts of the case led to the conclusion that the payments made in 1993 were payments which had become an integral part of Company X's capital and were thus non-refundable, whereas the payments made in 1994 were loans and should be repaid. The arbitral tribunal also held that, although Company Y had a right of pre-emption on shares sold, the three shareholders were entitled to donate their shares freely, and therefore directed Company X to register the transferral of the shares of the three shareholders to their wives. The part of the award deciding on the merits of the case is not reproduced.

Excerpt

[1] "Disputes concerning companies are undoubtedly capable of being the object of an arbitration agreement, the sole limit being, in this case too, Art. 806 CCP.[1]

[2] "According to [Art. 806 CCP], together with Art. 1966 CC,[2] disputes concerning rights which, 'by their nature or by express provision of the law, cannot be disposed of by the parties', that is, rights which cannot be waived, are not capable of being the object of a settlement, and are thus non-arbitrable. Hence, an arbitral clause can [only] cover rights which can be disposed of.[3]

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1. Art. 806 of the Italian Code of Civil Procedure reads:

   "The parties may have the disputes arising between them decided by arbitrators, with the exception of the disputes provided for in Arts. 409 [labour disputes] and 442 [disputes relating to compulsory social security and medical aid], those concerning issues of personal status and marital separation and those other disputes which may not be the subject of a settlement."

2. Art. 1966 of the Italian Civil Code reads:

   "In order to compromise, the parties must have the capacity to dispose of the rights which are the subject matter of litigation.

   A compromise is void if such rights, either by their nature or by express provision of the law, cannot be disposed of by the parties."

3. "See L. Salvaneschi, 'Nuove disposizioni in materia di arbitrato e disciplina dell'arbitrato internazionale', comment on the Law no. 25 of 5 January 1994, *Le nuove leggi civili commentate* (1995) p. 471, which refers to Cecchella in *Giurisprudenza sistematica di diritto processuale civile*, Proto Pisani ed. (1991) p. 1 et seq."

[3] "We must first clear the field of the misunderstandings which might arise between the notions of non-arbitrability and mandatory provisions. In our legal system, there are personal legal statuses which are disposable rights but have their origin in or are governed by mandatory provisions of law. A right may and shall thus be considered disposable also where its origin or contents are determined by a mandatory or public policy provision, not by a [mere] dispositive provision. It suffices to think, e.g., of the distribution of profits in joint stock companies: its mandatory character, in the light of third party interest in the conservation of the company's capital, is clearly beyond doubt, but it is also certain that the right to payment of the amounts owed on the basis of a decision of the shareholders' meeting may be the object of a settlement and may be arbitrated. We may also think of the provisions on prescription: prescription is mandatory but its effect is in the hands of the parties, who have the burden of raising the objection based thereon. Even in labour matters it is possible for the worker to waive some rights in part, within certain limits and if the required procedures are complied with; this is probably the reason why the legislator explicitly excluded the arbitrability of labour disputes (Art. 806 CCP).

[4] "We now come to the present case. It is beyond doubt that shareholders may legitimately finance the company through loans or payments, either payments on capital (or future capital increase) or sunk payments.... It is also certain that it is the parties, in their contractual autonomy, that freely decide whether to loan money [to the company] and/or make a sunk payment or a payment on capital.

[5] "Even if we consider that the subject matter at issue is regulated by mandatory provisions which establish requirements and limits for certain activities, there is no reason to hold that, as such, the qualification of the [nature of the] sum paid and the shareholder's right to it, even if it was paid on capital ... may not be waived or settled, just like, e.g., the shareholder's right to be paid for its share. In other words, there is no reason to find that the parties may not freely dispose of [these rights], even taking into account the mandatory provisions.

[6] "Nor can it be maintained, in the case at issue, that the right of the shareholders to the reimbursement of the sums paid may not be disposed of, on the assumption that this right violates provisions made to protect the general interest of the company, which trascends the interest of the individual shareholders. It is true that, according to the prevailing jurisprudence, 'in order to decide whether the dispute between company and shareholders may be the subject matter of an arbitration, it must be examined, in the individual concrete cases, ... whether the issues raised concern the individual interest of the shareholders or the interest of the company', in which latter case, it is said,

'arbitrability must be denied'.[4] However, this principle, which links the impossibility of disposing of a right and the notion of 'interest of the company' (often broadened to the more general notion of 'public interest' or 'collective interest') is not to be applied [only] because it is assumed that a general and further unqualified interest, which prevails over and transcends the interest of the individual shareholder, exists always and in any case. As, at least it is to be hoped, legal provisions always meet a public interest, this would be tantamount to saying that arbitration is never admitted.

[7] "As maintained by doctrine,[5] the impossibility to dispose [of a right] may not be inferred, always and in any case, from the public law nature of the interest concerned. A provision – either mandatory or of public policy – is needed to qualify that right as non-disposable.

[8] "The relevant cases decided until now by the courts differ from the present case. In particular, it must be stressed that the dispute at issue does not concern alleged irregularities in the balance sheet or book-keeping of Company X, a subject matter which jurisprudence and authors agree may not be referred to arbitration (although, paradoxically, it may be settled), because the legal principles to be followed in drafting the balance sheet may not be 'modified' by the parties.[6] It is true that the issue of the nature of the payments made by the shareholders affects the manner in which the same are listed in the balance sheet. However, the balance sheet is in casu a *posterius* in respect to the only issue submitted to the arbitrators, that is, the nature of the payments made and the existence of a right to reimbursement, which does not depend on the balance sheet. To reason differently would lead to inverting the logical relationship between the balance sheet and the reality which it represents.

[9] "The subject matter of the present dispute is thus solely the relationship between Company X and the three shareholders, concerning the individual situation of the shareholders and more precisely their alleged right – of which they can dispose – to a reimbursement of the sums paid.

[10] "It is in any case decisive that the [shareholders'] claim essentially concerns the qualification of the nature of the payments made by the shareholders in favour of Company X, a qualification which, by itself, may undoubtedly be disposed of by the parties in the exercise of their contractual autonomy."

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4. "Supreme Court no. 999 of 24 May 1965, Giustizia civile 1965, II, p. 1575; also, recently, Supreme Court no. 1739 of 18 February 1988, idem., I (1988) p. 1502; Supreme Court no. 2657 of 7 March 1995, *Le società* (1995) p. 1285; Court of First Instance, Milan, 3 October 1996, idem. (1997) p. 305."
5. "Teti, 'L'arbitrato nelle società', Rivista dell'arbitrato (1993) p. 302."
6. "Supreme Court no. 1739 of 18 February 1988, cited above; P.G. Jaeger, 'Appunti sull'arbitrato e le società commerciali', Giurisprudenza commerciale (1990) II, p. 219."