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Nullity of a SPA due to a mistake on the value of the shares

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The Spanish Supreme Court (SC) recently handed down an interesting judgment[1] on a dispute between two minority shareholders regarding the validity of a sale and purchase agreement (SPA).

A company raised its share capital by issuing new shares with a subscription price of €30 each. This price was determined in view of the profits and the value of the company resulting from the accounting documents, verified by its auditor.

At or about the same time a minority shareholder (Gaselec) agreed to purchase a number of old shares from another shareholder (Covaersa) for a price of €29 each and both entered into a SPA.

Four months after the SPA, the company's auditor informed the board of directors that it had found significant errors in the accounting documents used to determine the new share's subscription price, namely that the profits were substantially lower and so was the value of the company. The company recalculated the new shares' subscription price accordingly (€12 instead of €30) and paid the difference (€18) back to those shareholders that had subscribed for new shares.

Gaselec then filed an action for nullity of the SPA given that it had purchased old shares at €29 each due to a mistake on their valuation.

The claim was dismissed by the first instance court for, in its view, any price is *relative* and depends on the parties' agreement and both the purchaser and the seller, as shareholders of the company, were in a position to know the shares' true value.

However, the Alicante Court of Appeals (ACA) overturned that decision, declared the nullity of the SPA and ordered Covaersa to return the price to Gaselec and the latter to deliver the old shares back to the former.

Covaersa challenged the ACA judgment before the SC, that confirmed a settled case-law according to which for a mistake to invalidate a party's consent to an agreement it must be *essential* and *excusable*. The SC found that Gaselec's mistake met these two requirements and thus confirmed the nullity of the SPA.

According to the SC:

(i) The parties to the SPA set the purchase price of the old shares contemporarily to the capital raise and by reference to the subscription price of the new shares, which had been determined by the company in light of the accounting documents verified by its auditor. However, four months later, those documents turned out to be wrong and the very company revised the new shares' subscription price and paid back the difference to the acquirers of new shares.

[1] SC judgment nº 395/2020, dated 1 July 2020.

Hence, it was clear that the parties had set the old shares' purchase price on a wrong basis.

(ii) At the time of entering into the SPA, the new shares' subscription price (by reference to which the parties had set the old shares' purchase price) seemed to be reasonably certain, for it had been *objectively* established by the company.

(iii) The mistake was relevant given that the new shares' subscription price had eventually been reduced from €30 to €12. Therefore, the purchaser would surely have not entered into the SPA had it not made such a mistake.

(iv) Finally, the mistake was *excusable*, as the SPA was entered into at or about the time when the share capital was raised and the purchaser had relied on the new shares' subscription price fixed by the company in light of *objective* information available at the time (accounting documents verified by its auditor). It is not reasonable to expect greater diligence from the purchaser in ascertaining the shares' value.

This SC judgment confirms that SPAs of shares are subject to the typical requirements of contract formation, i.e. free and informed consent not affected by an essential mistake not attributable to fault or lack of due diligence, in line with the codes of European contract law.