

Change of control of JVs

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Five companies in the photovoltaic sector including AS, FS1 and HS participated in a joint venture called Parc Solar la Devesa, S.L. (Parc Solar) through a large number of SPVs each.

Parc Solar's purpose was to operate certain facilities relating to solar power generation and its by-laws imposed upon the shareholders (i.e. the SPVs) the *ancillary obligation* to contract the use of Parc Solar's facilities for their own businesses.

AS eventually sold its shares in all its SPVs to FS that in its turn sold them to its subsidiary FS1. As a result, FS1 became the controlling shareholder of the JV. These sales were never authorised by Parc Solar.

Under Spanish law, any sale of shares with *ancillary obligations* like those in Parc Solar must be authorised by the company. HS claimed that the sales to FS and eventually to FS1 entailed an indirect transfer of Parc Solar's shares and as such should have been authorised by Parc Solar's shareholders. For this reason HS sought the annulment of the sales before a commercial court, but its claim was dismissed.

HS appealed the decision before the Barcelona Court of Appeal (BCA) arguing that the sales of shares in the SPVs amounted to an indirect transfer of shares in Parc Solar and, therefore, should have been approved by the shareholders of the latter, as otherwise the legal requirement of the company's authorisation to sell shares with *ancillary obligations* would be fraudulently circumvented.

The BCA rejected the appeal¹ for the following reasons:

- The legal provisions applicable to the transfer of shares in Parc Solar could not be extended, as a rule, to the sales of shares of its shareholders that had no *ancillary obligations* attached to them. This is so even when the sale resulted in a change of control of Parc Solar. According to the BCA, restrictions on the sales of shares are exceptional and must be interpreted restrictively and in the case at hand Parc Solar's by-laws did not provide any rules dealing with indirect transfers of shares or with any specific balance of power between its shareholders.
- The sales challenged by HS could not be deemed fraudulent since HS failed to prove the intention to unduly avoid the applicable restrictions and nothing led to conclude that the framework agreed by the JV's shareholders was aimed at ensuring a specific balance between them.

¹ Judgment of the BCA 477/2023 dated 2 November 2023.

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The BCA ruling may be arguable in that it seems to make a too formal analysis of the *real business arrangement* between the parties to the JV as regards the shareholders' *status quo*. In the case at hand nothing had been agreed on that respect, but even so the BCA could have concluded (naturally, provided AS' submissions had allowed it) that because restrictions on the sales of shares held by SPVs are *per se* ineffectual the same restrictions should be deemed applicable to upstream sales of shares. In any case this judgment is a reminder of how important it is to regulate indirect change of control of JVs structured through SPVs.