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A SHA kept in the drawer and estoppel

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A recent ruling issued by the Spanish Supreme Court (SSC)[1] resolved a dispute between two siblings who were shareholders in a number of companies.

On 1 April 2004 both signed a shareholders' agreement (SHA) that provided for, inter alia, qualified majorities for the shareholders or the board of directors, as applicable, to take decisions on certain reserved matters.

More than ten years later, on 26 March 2015, one of the siblings (Mr Eugenio) filed a claim against the other (Mr Felipe) seeking the termination of the SHA due to the latter's alleged serious breaches regarding the decision-making procedures agreed in the SHA. Mr Eugenio argued that Mr Felipe had taken decisions contrarily to the provisions of the SHA and claimed damages amounting to over EUR 6 million.

The first instance court confirmed that Mr Felipe had breached the SHA on several occasions, but dismissed the claim, since it found that *both* parties had *always* neglected the provisions of the SHA and the claimant had never requested the defendant to comply with them until 2015. In the court's view this behavior meant that Mr Eugenio had "accepted, even tacitly, the management carried out by Mr Felipe".

Mr Eugenio filed an appeal before the Barcelona Court of Appeal (BCA) that was also dismissed. Both courts based their decisions on the statements of several witnesses (the general director, the CFO, the legal and tax advisors, etc.), who confirmed that the two brothers had always worked independently within their respective areas, not submitting their decisions to the board of directors or their disputes to the advisory board, and had never requested the fulfilment of the SHA prior to 2015.

The BCA's judgment was appealed by Mr Eugenio before the SSC alleging, among other grounds, that the fact that both brothers had neglected or breached the provisions of the SHA did not mean that the parties had agreed to render it ineffective.

However, the SSC confirmed that the BCA's decision was consistent with the case law regarding estoppel, which is one of the most relevant expressions of the principles of good faith and legitimate expectations.

The SSC thus considered that the lack of fulfilment of the SHA for more than ten years -the parties had always acted as if they had never signed it- was a "conclusive act" that "unequivocally" meant that the parties had not wanted to stick to the SHA and created the legitimate expectation that the SHA "lacked any real effect to govern the life of the company".

[1] Judgment of the SSC 674/2023 dated 5 May 2023.

It is not unusual that contracts are signed but not put into practice (often because their terms are too complicated, rigid or burdensome). The longer they are neglected the more likely it is that their provisions lose effect or even are replaced by what the parties have actually been doing for a long period (sometimes inconsistently). This only creates uncertainty as to the terms that govern their relationship when things turn sour. Thus, it is far more sensible to sign simpler and practicable agreements, even at the expense of a, theoretically, better, full-fledged set of rules.