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## A problematic judgment about a drag along clause

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The Madrid Court of Appeal (MCA) rendered a judgment dismissing a claim by a minority shareholder that disagreed with the execution of a drag along clause by a majority of the shareholders[1]. Although the judgment is not entirely clear as to the facts, it seems they were as follows.

The shareholders of CIF entered into a shareholders' agreement (SHA) with a drag along clause whereby shareholders holding 51% or more of the equity were entitled to have the other shareholders accept an offer to purchase 70% or more of the shares provided the price was at least 6xEBITDA less the net financial debt resulting from the last financial year.

A shareholder made an offer to purchase 80.33% of the shares[2] at a price allegedly compliant with the drag along clause and supported by a valuation report by a well-known accounting firm. Shareholders holding 55.65% accepted the offer and exercised the drag along right, but the claimant alleged that, according to the valuation report by another well-known accounting firm, the price was substantially lower than that resulting from the drag along clause due to several errors made by the first accounting firm. However, he appeared before the notary public and sold his shares, stating his disagreement with the price.

He then sued the shareholder that had made the offer, but not the 55.65% shareholders that had accepted it and exercised the drag along right, submitting that the correct valuation of the company was some € 2.7 million higher than that used to determine the offer price. The relief sought by the claimant was a compensation of the difference between the right price pursuant to the SHA and the price he had received or, failing that, the nullity of the transfer of shares.

The defendant submitted any offeree is entitled to reject an offer but cannot obligate the offeror to increase the price. He added that, as the claimant considered the offer price did not comply with the drag along clause, he should have rejected the offer and "assumed the consequences", but selling his shares and eventually suing the offeror was an inconsistent behaviour (estoppel).

The first instance court dismissed the claim, basically, for the same reasons alleged by the defendant. It also found that the claimant should have brought the action, rather than against the offeror, against the 55.65% shareholders that required him to sell his shares to the offeror by exercising the drag along, for any hypothetical damage suffered by the defendant was attributable only to them.

The first instance judgment was challenged and the MCA dismissed the appeal.

[1] Judgment 42/2024 of 2 February.
[2] The judgment says in a different section that the offer was for 100% of the shares.

According to the MCA, the offeror, even though he was a shareholder, had no obligation to offer the price resulting from the drag along clause because he did not drag anybody. Only those shareholders receiving and accepting the offer were entitled to request the sale by the other shareholders and thus only they can be held liable for a hypothetical breach of the SHA.

The MCA went on saying that claimant's behaviour had been inconsistent in that he "accepted to be dragged" and sold his shares at the offer price and subsequently brought the action for a violation of the drag along clause.

Finally, the MCA found that even the action seeking the nullity of the transfer should have been brought against the 55.65% shareholders for it was based on the allegedly unlawful exercise of the drag along right by them.

It seems to us that the decision of both the first instance court and the MCA is not completely satisfactory, possibly, because we are missing important points of fact or law, given the lack of clarity of the judgment as to the facts, the terms of the SHA and the claimant's submissions.

We are not convinced by the argument that because the defendant was the offeror he could not be held liable if, as submitted by the claimant, the price offered was indeed substantially lower than that provided for by the drag along clause. The reason is that the defendant was part of and bound by the SHA and seemingly had acted in concert with the 55.65% shareholders triggering the drag along. Should this have been the case, he would have been obligated to make an offer in accordance with the drag along clause.

Nor are we entirely persuaded by the estoppel argument, as it seems the claimant believed in good faith he had to accept the offer and make his position clear at the time of selling his shares, as he did.

In any case, it seems clear that the claimant should also have sued the 55.65% shareholders that accepted the offer and activated the drag along.