

M&A. Sale of the business unit of an insolvent company. CPs

Madrid, October 2021

The Spanish Supreme Court (SSC) has ruled on the waiver by the purchaser of a non-fulfilled CP¹.

The Spanish company Daga, which for decades had been operating in the market under certain well-known trademarks licensed by its shareholders, was declared insolvent.

Before the approval of Daga's liquidation plan, the Italian company Tenacta purchased the trademarks from Daga's shareholders through a SPA that laid down several CPs that should be met prior to completion, including (i) termination of the current licensing agreements (which had no expiry date and provided for a 2 per cent royalty) on the ground of Daga's prior breach to pay some royalties, (ii) entering into new licensing agreements with the eventual acquirer of Daga's business unit under certain terms and conditions (namely a 4-year term and a 7 per cent royalty) and (iii) no MAC.

The SPA between Daga's shareholders and Tenacta provided the right of the latter to terminate the contract if the CPs were not fulfilled by 28 February 2014.

Daga's liquidation plan, approved by the insolvency court on 3 February 2014, included new licensing terms and conditions different from those provided in the SPA (8-year term and 6 per cent royalty).

On 3 April 2014 Daga's business unit was sold to a third party (Penta) in a competitive process in which Tenacta took part. On the same date Tenacta notified Daga's shareholders that it was still interested in acquiring the trademarks and therefore waived the non-fulfilled CP, but the latter replied that the SPA had been terminated precisely due to the non-fulfilment of the CPs.

Tenacta then requested a first instance commercial court to order Daga's shareholders to transfer the trademarks and pay damages. The court upheld the claim and the Court of Appeal of Barcelona confirmed its decision.

Daga's shareholders filed an appeal before the SSC on the grounds that, according to the Civil Code and settled case-law, the non-fulfilment of a CP extinguishes the obligation to which it relates (namely the obligation to transfer the trademarks) and that CPs cannot be waived after their long stop date. The SSC dismissed the appeal, *inter alia*, for the following reasons:

¹ SSC judgment 462/2021 dated 29 June 2021. We have omitted certain aspects and nuances of the judgment.

- (i) The non-fulfilled CP was set out in the interest of Tenacta, so that it would not be obligated to complete the acquisition of the trademarks if they were licensed on terms different from those agreed in the SPA.
- (ii) Pursuant to the SPA, Tenacta was entitled to waive the CPs and, thus, to request completion of the transaction despite the non-fulfilment of them.
- (iii) Tenacta had the right to waive the CPs not only before the long stop date but also when they became unfulfilled.

This judgment shows the extreme importance of the legal technicalities relating to certain contractual terms and conditions (including CPs) that may seem straightforward and that do not necessarily work the same way they do under, say, English or US laws. This is particularly so in deals intermingling M&A and insolvency legal matters.