



A contract may be terminated if specific performance depends on a third party

Judgment of the Supreme Court, 5 June 2014, case 318/2014

Background

Two companies entered into a pre-agreement under which one of them agreed to build a parking facility in a plot of land of its property and to sell it to the other one after the construction. The other party agreed to buy the parking facility. After signing this pre-agreement, the City Council denied the license to build the parking facility, thus frustrating the operation. In this situation, the buyer sued the seller, requesting specific performance. The seller requested the court to declare that the pre-agreement had to be annulled because specific performance was impossible, given that the City Council did not allow to build the parking facility in its land.

Material difficulties vs. specific performance

In first instance, the Lower Court accepted the position of the seller, stating that contracts the performance of which is confronted with a material difficulty can be assimilated to those which cannot be fulfilled because of force majeure. Under this reasoning, the Court concluded that the seller could terminate the contract because of the extraordinary difficulties it was facing.

On appeal, the Provincial Court considered that such extraordinary difficulty did not exist, because the seller could have built the parking facility by buying from the City Council the adjacent lot of land, or by carrying out a new zoning plan subject to the approval of the City Council. The Provincial Court understood that any of

those two options would have allowed to comply with the pre-agreement.

Force majeure and depending on a third party

The Supreme Court revokes the judgment of the Provincial Court by considering that, although performing the obligations under the pre-agreement was not impossible, because the seller could build the parking facility under any of the two options mentioned above; such performance was extraordinarily difficult, because both options relied on the will of a third party, in this case the City Council. Additionally, the court also states that the seller could not be obliged to follow any of those options, because they were not contemplated in the pre-agreement.

The Supreme Court, therefore, ruled in favour of assimilating situations where performance faces extraordinary difficulties to situations of force majeure, but on the other hand, it also alerts on the importance of what has been specifically agreed. If the pre-agreement had stated that the seller was obliged to develop a zoning plan or to look for other options in the event that it could not obtain the licenses to build in its plot of land, the Court would have probably ruled in favour of forcing the seller to comply with these provisions.