Does the failure to fulfil a condition precedent result in the lapse of an entire Share Purchase Agreement?

VALENTIN KAUFMANN

In a dispute concerning a share purchase agreement and the interpretation of a condition precedent, the Federal Supreme Court held that the failure to obtain a building permit, stipulated as a condition precedent for payment of the final installment, led to the entire Share Purchase Agreement being void.

Judgment of the Federal Supreme Court of 5 August 2025
Case Reference : 4A_508/2024

Facts

A. (the "Seller") was the sole shareholder of company C. AG (the "Target Company") with seat in U. (Liechtenstein). The Target Company was the owner of an undeveloped parcel of land located in V. (Italy). In December 2010 the Target Company concluded a building contract with G. GmbH (the "General Contractor") to build on said land. In June 2012, the Seller concluded a Loan Agreement granting a CHF 300,000 loan in favor of the General Contractor, to be repaid using proceeds from the sale of 52.5 shares of the Target Company. In August 2012, the Seller concluded a Share Purchase Agreement (the "SPA") with B. AG (the "Buyer") for the sale of 52.5 shares for a total price of CHF 1,700,000 payable in three installments as stipulated in the following clause:

"2. Purchase price payment and transfer of shares

The purchase price shall be paid in full into a trust account to be designated by K._____, U._____ as soon as the latter confirms that it has received 52 shares from the seller for transfer to the buyer.

The purchase price shall be payable in three installments as follows:

CHF 400,000 three days after the signing of this agreement;

CHF 100,000 on October 31, 2012;

CHF 1,200,000 upon issuance of the building permit.

K._____ is instructed by the parties to transfer the 52 shares to the buyer against receipt and together with a copy of this purchase agreement as soon as the building permit has been issued. K._____ is instructed by the parties to transfer the 52 shares to the buyer against receipt together with a copy of this purchase agreement after receipt of the full purchase price in the trust account.

In addition, the parties shall notify the law firm L._____, W._____ by sending a duplicate copy of the contract that the half co-ownership share of the share previously co-owned by the seller has been transferred to the buyer and is therefore due to the buyer. Otherwise, there shall be no change to the current deposit.

3. Representations and warranties

The seller warrants that, at the time of the transfer of the shares, it is the owner with full power of disposal of the object of purchase in accordance with clause 1 and that, through this sale of the object of purchase, it will transfer unencumbered ownership thereof to the buyer. The seller makes no representations or warranties regarding the circumstances at the company"[1].

In August 2012, the Seller authorized the Buyer to pay the first installment by email as follows: CHF 300,000 paid directly to the General Contractor, the remaining CHF 100,000 were deferred by the Seller and could only be credited after an amendment to the Loan Agreement. Although the Seller had authorized only the first installment, the Buyer nevertheless paid the first two installments, CHF 400,000 in August 2012, and CHF 100,000 in November 2012, into a bank account held by the General Contractor.

In October 2015 the Seller formally requested in writing that the Buyer pay an allegedly outstanding amount of CHF 500,000. In March 2016, the Seller initiated debt enforcement proceedings against the Buyer in Appenzell Ausserhoden for

CHF 200,000,to which the Buyer filed an objection. In October 2016, the Court of First Instance granted provisional enforcement in the amount of CHF 100,000. The Buyer's appeal was dismissed in January 2017. In May 2017, the Buyer initiated a negative declaratory action in St. Gallen, seeking a declaration that the CHF 200,000 claim did not exist. In May 2018, the Buyer paid the Seller CHF 104,071.05 to prevent the initiation of bankruptcy proceedings. As a result, in July 2019, the Buyer amended her claim, seeking a declaration of non-existence for CHF 121,000 and filed a counterclaim requesting repayment of CHF 104,071.05. In the same year, the Target Company was declared bankrupt and subsequently removed from the Commercial Register of Liechtenstein.

In April 2022, the Court of First Instance partially upheld the Buyer's claim and found that the claim for CHF 200,000 from the SPA did not exist in the amount of CHF 21,000 and dismissed the remainder of the claim. The Buyer appealed this decision, and the Cantonal Court of St. Gallen upheld her appeal. The Cantonal Court found that the Seller's claim for CHF 200,000 did not exist in the amount of CHF 100,000 and ordered the Seller to repay CHF 104,071.05 to the Buyer.

The Seller subsequently challenged this decision before the Federal Supreme Court.

Issue

The Federal Supreme Court had to address the following two key issues:

- Whether the failure of the condition precedent affected the entire SPA, or only the final installment of CHF 1,200,000; and
- Whether the condition precedent, in the form of the issuance of a building permit could still be fulfilled.

Decision

The Federal Supreme Court first addressed the scope of the condition precedent. In particular, it examined whether the condition relating to the issuance of a building permit applied to the entire SPA or only to the final installment of CHF 1,200,000. To do so, it reviewed the contractual interpretation carried out by the Cantonal Court.

The Cantonal Court held that the clause had to be interpreted in light of the surrounding circumstances. It found that the Buyer's intention was to acquire the Target Company shares in order to benefit from the construction project once completed. Moreover, the amount subject to the condition, CHF 1,200,000– out of a total purchase price of CHF 1,700,000 constituted the majority of the consideration and was therefore of central importance to both parties. The Cantonal Court also took into account the contractual balance between the parties, noting that the shares were to be transferred only upon full payment of the purchase price. As a result, the Buyer had not yet derived any benefit from the SPA. Given that the building permit could no longer be obtained, because the Target Company had been removed from the Commercial Register of Liechtenstein, the final installment would never become due. Consequently, performance of the SPA would be suspended indefinitely, and the Buyer would never receive the 52.5 shares.

Considering all of these circumstances, the Cantonal Court concluded that the parties intended the condition precedent (namely, the issuance of the building permit) to be of such fundamental importance that, absent its fulfillment, the entire SPA would lapse.

The Federal Supreme reviewed the Cantonal Court's interpretation to determine whether it constituted subjective contractual interpretation (art. 18 SCO), or objective contractual interpretation according to the "*Vertrauensprinzip*" (art. 2 SCC)[2]. The Federal Supreme Court noted that the Cantonal Court sought to ascertain the parties' true intent, by considering that the Buyer intended to benefit from the construction project and that the amount subject to the condition precedent (CHF 1,200,000 out of a total purchase price of CHF 1,700,000) represented a substantial portion of the consideration, making the condition particularly significant for both parties. In relying on these elements, the Cantonal Court focused on the parties' actual will rather on how their declarations would be understood in good faith by a reasonable third party. Accordingly, the Federal Supreme Court held that the Cantonal Court had engaged in subjective contractual interpretation (art. 18 SCO). As this constitutes a question of fact, it is subject to review only for arbitrariness (arts. 95, 97 and 105 FSCA). The Federal Supreme Court found that the Buyer had failed to demonstrate any arbitrariness in this assessment and therefore dismissed the Buyer's claim on this point.

The Federal Supreme Court then turned to the question of whether the condition precedent could still be fulfilled. It noted that the Cantonal Court had found that the issuance of a building permit was no longer as the Target Company had been removed from the Registry of Commerce of Liechtenstein. The Federal Supreme Court confirmed this finding. Thus, the condition precedent had become objectively impossible to fulfill. As a result, the condition precedent failed due subsequent

impossibility (art. 153 SCO) leading to the lapse of the SPA. Consequently, no further contractual obligations remained between the parties, except for the restitution of benefits already conferred. The Federal Supreme Court therefore also dismissed the claim of the Seller on this point.

The Federal Supreme Court therefore upheld the Cantonal Court's decision and dismissed the appeal.

Key takeaways

This decision is noteworthy for several reasons:

- It highlights the tendency of lower courts not to clearly specify whether they carry out subjective or objective contractual interpretation. In such cases, the Federal Supreme Court must determine itself which method of contractual interpretation has been applied.
- It finds that a condition precedent formally linked to a specific obligation (such as an installment payment) may, in light of the parties' intent and the contractual context, affect the validity of the entire contract. Its failure may, therefore, lead to the lapse of the SPA as a whole.

Comment

The Federal Supreme Court did not engage in an extensive legal analysis but rather confined itself to reviewing whether the Cantonal Court had made an arbitrary assessment of the facts. Finding no arbitrariness, it upheld the lower court' decision. Nevertheless, the case raises several noteworthy issues.

The central question of this case concerns the scope of the obligations covered by the condition precedent (art. 151 et seq. SCO). Does it relate to the entire contract, or is it merely to the payment of the final installment? The Federal Supreme Court qualifies it as a *Vollzugsbedingung*, a type of condition commonly used in M&A transactions.[3] The Cantonal Court, whose reasoning was confirmed by the Federal Supreme Court, found that the condition precedent (i.e. the issuance of a building permit) applied to the entire SPA, even though, according to its wording, only the final installment of CHF 1,200,000 was expressly subject to it.[4] In support of this interpretation, the Cantonal Court observed that the amount subject to the condition represented the majority of the purchase price (CHF 1,200,000 out of CHF 1,700,000) and was therefore of decisive importance to the parties.

Between the conclusion of the contract and the fulfillment of the condition, the contract remains in a state of uncertainty. As a rule, parties mitigate this uncertainty by setting a deadline for the condition to be fulfilled. In the absence of such a time limit, however, the contract cannot be presumed to remain suspended indefinitely; instead, a reasonable duration for this interim period must be determined through contractual interpretation (art. 18 SCO).

In the case at hand, the parties did not stipulate any deadline for the fulfillment of the condition precedent relating to the issuance of a building permit. The Federal Supreme Court noted that the Target Company had been removed from the Commercial Register of Liechtenstein and no longer possessed legal personality. As a result, it was no longer capable of obtaining a building permit, and the condition could therefore no longer be fulfilled. The Cantonal Court adopted a pragmatic approach, observing that the contract was no longer capable of performance and that the 52.5 shares would never be transferred, given the failure of the condition precedent. The Buyer had therefore derived no benefit from the contract. If the condition had been interpreted as relating only to the final installment, the Buyer would have paid a substantial portion of the purchase price without ever receiving the shares. It was therefore consistent with the overall contractual balance to conclude that the condition precedent related to the

entire SPA. That situation constituted a case of subsequent impossibility (art. 153 sec. 2 SCO, art. 119 SCO) giving rise to restitution of performances already rendered under the rules on unjust enrichment (art. 62 et seq. SCO), as if the contract never existed.[5]

In summary, the Federal Supreme Court confirmed that, under the subjective method of contractual interpretation all relevant factual circumstances must be taken into account, including contractual economy and balance. In this case, an interpretation limiting the condition to a mere "performance" condition would have resulted in the Buyer paying several hundred thousand Swiss francs without ever receiving the 52.5 shares of the Target Company (which no longer existed), an outcome clearly at odds with the parties' presumed intent. For these reasons, the Federal Supreme Court upheld the Cantonal Court's decision and dismissed the claims of arbitrary assessments of facts.

While the outcome may be open to criticism, insofar as it departs from the literal wording of the SPA, it is consistent with

established Swiss jurisprudence which emphasizes the consideration of all surrounding circumstances and the overall contractual framework when applying the subjective method of contractual interpretation.[6] It is also in line with art. 18 SCO which requires that the true intention of the parties be ascertained "[…] without dwelling on any inexact expressions or designations they [the parties] may have used […]". Accordingly, the Court's approach appears well-founded.

---

[1] For further details, see the original clause in German:"2. Kaufpreiszahlung und Übergabe der Aktien […]".

[2] The objective interpretation according to the "Vertrauensprinzip" or "principle of trust" relies on how a declaration of intent should be understood in good faith.

[3] Meyer Mirjam, Rechtsrisiken und Rechtsrisikomanagement bei M&A-Transaktionen, *in* : ZStP – Zürcher Studien zum Privatrecht, p.199, 207.

[4] KG St-Gall, III. Zivilkammer, Nr. BO.2023.1-K3, 16.08.2024, E. 3.d).

[5] KG St-Gall, III. Zivilkammer, Nr. BO.2023.1-K3, 16.08.2024, E 4.

[6] ATF 144 III 93, consid. 5.2 ; TF, 4A_204/2025, 3.02.2026, consid. 5.