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Shareholders' right to information

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In this note we comment on a judgment by which the Barcelona Court of Appeal (BCA) upheld a lower court's declaration of nullity of certain resolutions of a company due to a breach of the minority shareholder's right to information[1].

The board of directors of a renewable energy company with two shareholders owning a 51% and a 49% of the capital called a shareholders' meeting with an agenda that included (i) the dissolution of the company, (ii) the removal of the directors and (iii) the appointment of a liquidator.

The minority shareholder requested certain information from the board of directors before the meeting, including the reasons for the company's dissolution and the *curriculum vitae* of the person to be appointed liquidator, but the request was rejected and the proposed resolutions were passed with sole vote of the majority shareholder.

The minority shareholder sought the annulment of the resolutions before a commercial first instance court, which upheld the claim on the grounds, among others, of a breach of its right to information.

The majority shareholder challenged the judgment before the BCA, submitting that (i) the Spanish Companies Act (SCA) allows the dissolution of a company by the "mere will" of the majority of the share capital, without providing any "justification" or "prior information" (article 368[2]), and (ii) it took the decision in good faith, in consideration of the fact that the minority shareholder was "unfairly" competing with the company and, therefore, had a conflict of interests.

The BCA found that the information of which the minority shareholder had been deprived was essential for the "adequate exercise" of its voting right. According to the judgment, the minority shareholder was "entitled to know" on what basis the company was to be dissolved and the "profile" of the proposed liquidator.

The BCA confirmed the annulment of the company's resolutions notwithstanding they would have been passed "even if the [minority] shareholder's right to information had been respected", since the vote of the majority shareholder (51%) was enough. It noted that the SCA only requires, in order to challenge a resolution because of a breach of the right at hand, that the requested information is essential for the "reasonable exercise" of the voting right by an "average shareholder" (article 204.3.b) and, thus, it is irrelevant "whether the outcome would have been different in the absence of the infringement".

It is noteworthy that the so-called *test de resistencia*[3] does not apply in cases like the one at hand, in which the right to information is at stake.

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[1] BCA's judgment 1118/2024 of 5 November 2024.
[2] Article 368 SCA provides that "a company may be dissolved by the mere decision of the shareholders' meeting with the requirements laid down for the amendment of the by-laws".
[3] Pursuant to this test the undue participation of certain persons in the meeting or the invalidity or miscalculation of certain votes do not lead to the annulment of the resolution except when the presence of said persons was essential for the holding of the meeting or the votes in question were necessary to reach the majority (article 204.c and d SCA).