

Challenge of *negative* GSM's resolutions

Madrid, February 2025

The judgment of the Valencia Court of Appeal (VCA) commented in this note¹ is about whether and to what extent a minority shareholder can challenge the decision by the majority to not pass a resolution proposed by the former (the so-called *negative* resolutions).

The facts of the judgment are not unusual: two hostile groups within a family holding a 51% and a 49% of a company.

The majority had tried to expel the representatives of the minority from the board of directors, but the decision taken by the general shareholders' meeting (GSM) was annulled by a commercial court² on the grounds of *baith faith*.

Several months later the minority put forward for vote at a GSM several proposals of resolutions aimed, allegedly, at allowing them to effectively participate in the management of the company (including amending the bylaws to introduce the shareholders' right to a proportional directorship). The proposals were rejected by the majority.

The minority sought the annulment of the *negative* resolutions (i.e. those rejecting the minority's proposals) before the commercial court on the grounds that they entailed an abusive exercise of the voting right by the majority.

The court rendered a judgment dismissing the claim, which was confirmed on appeal because the VCA did not find the majority had abused their rights by rejecting the proposals made by the minority, as the latter's will to participate in the board of directors of a private limited company (*S.L.*) is not "a legitimate expectation deserving legal protection", especially in a situation of conflict.

What is most interesting about the judgment on the appeal is not the particular reasons why the VCA dismissed it, but the theoretical discussion the VCA made about the challenge of *negative* resolutions, which can be summarized as follows:

- the VCA notes that scholars and courts differ, but claims that in its view and generally speaking it is legally possible to challenge *negative* resolutions in broad terms, this to say not limited to those whose subject matter is required by the law or the bylaws (like the approval of the annual accounts);
- however, when the ground to challenge a *negative* resolution is not a violation of the law or the bylaws, but harm to the corporate interest or abuse by the majority, then "the admissibility of the challenge must be limited" in order "to preserve effectiveness of the corporate governance and respect for the democratic principle";
- if the challenge is upheld it is also possible that the very court *adopts* the positive resolution in question, to avoid that the only consequence of a successful challenge is the right to claim a compensation for damages from the majority and to avoid that a new GSM has to be held, where the same dispute could arise.

¹ Judgment 218/2024 of 24 of September 2024.

² The first instance judgment was confirmed by the VCA (judgment 248/2023 of 29 March 2023).