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Rights of Minority Shareholders

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National Report of Spain

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INTRODUCTION

A shareholder without voting strength or power to influence decision making on his own it's considered a minority shareholder. To be a minority shareholder could be tricky when it comes to protect your investment and its fruits. To avoid abuses from the majority, rules to protect minorities have been put in place in many jurisdictions. As for example, shareholder's agreements, the right of minorities to appoint a Director or other officers, rights to sell or buy shares at a fair value, the right to convene general assembly's, the right to get information from the management, etc.

Somehow, these rights may get in conflict with a fast decision making capability, impairing the management or the majority shareholders, which in turn may be a form of abuse from the minorities.

Therefore we would like to find out how these minority rights are handled in different jurisdictions.

1. Current scenario at your jurisdiction:

1.1. How and to what extent are *minority shareholders* protected in publicly and privately held corporations in your country, either as to legal or firm level protection?

The Royal Decree Law 1/2010, dated July 2, 2010, which restated the Spanish Capital Companies Act (hereinafter, the "**Companies Act**") does not provide a specific instrument to protect the minority shareholders other than the exit and subsequent payback to the oppressed shareholder ("in game rule") established by article 346 and those following of the Companies Act contrary to what occurs with the Anglo-Saxon legislative system. However, minority shareholders can have other types of remedies such as derivative suits executed as a purely compensatory mechanism (equivalent roughly to social responsibility actions).

Paradoxically, in the event of the manager's conviction for the damage caused to the corporation, it would not be translated in an improvement of minority shareholders' situation due the compensatory funds would be reimbursed to the corporation and would still remain controlled by the managers appointed by the majority.

For instance, the determination of what constitutes an oppressive conduct to minority shareholders can be made from two fundamental perspectives. The first addresses the issue from the viewpoint of the majority and conceives the oppression either as a violation of the principle of abuse of rights established by article 7 of the Spanish Civil Code (hereinafter, the "**Civil Code**"), or as any other conduct that exceeds the equal treatment of the shareholders as established by article 97 of the Companies Act.[1] Contrary, the second viewpoint addresses the issue from the perspective of the minority shareholders arguing that if there is oppression to the minority shareholders' expectations then it can be considered an injury. Thus, article 97 of the Companies Act enacts a mechanism that enforces companies to abolish all kinds of anti-takeover mechanisms and avoid transactions that do not treat all shareholders equally.

Despite the fact that most decisions as to the functioning of companies are made by the majority, this system is effectively limited by the prohibition of arbitrary arrangements involving unequal treatment for shareholders who are in the same situation. The standard of "equal treatment" (always as proportional to the capital held) also contributes to the collaboration of all shareholders in the pursuit of the interest of the company, helping to avoid corporate misconducts and competitive intra-company strategies that allocates company resources for private benefits at the expense of other shareholders.

[1] ***Article 97***. *Equal treatment All partners or shareholders whose relationship with the company are identical shall be treated equally thereby.*

This should not, however, be constructed as some sort of formal parity between the different types of shareholders. It simply implies that the company must dispense equal treatment to shareholders who are in identical situations. For instance, the creation of quotas or shares conferring different rights (non-voting shares, privileged shares, etc.) is perfectly compatible with the principle of equal treatment because equality endures within each different class of quotas or shares.[2] As example, article 495 of the Companies Act establishes a minimum quorum of three percent of the total share capital to certain decisions adopted by the publicly listed companies.[3]

Moreover, Companies Act enables certain mechanisms *ex post* to challenge the oppressive decisions of the companies' directors. Accordingly, a company may take legal actions against any director when: a) the director committed a breach of duty, b) such breach of duty was designated as culpable, and c) such breach of duty caused quantifiable damage to the company. Thus, an action for liability requires an express agreement reached by the general shareholders' meeting, even if the matter is not on the agenda.

However, it is possible that the majority of shareholders may be reluctant to sue the directors that caused such breach of duty. Therefore, the Companies Act has responded to this concern by permitting a shareholder o shareholders, which individually or collectively hold interests, by authorizing them to request the general shareholders' meeting, to bring an action for liability in defense of the corporate interest. In case the general shareholders' meeting has not been duly scheduled, the

[2] ***Article 94****. Diversity of rights 1. The rights attributed to partners or shareholders by stakes and shares shall be the same, subject to the exceptions provided for in the act. Stakes and shares may afford different rights to their holders. Shares associated with the same rights form part of the same class. When a class is divided into several series, all shares in any given series shall have the same par value. 2. The creation of stakes and issue of shares attributing privileges over ordinary stakes and shares shall be subject to the procedures laid down to amend the by-laws.*

[3] ***Article 495****. Definition 1. Listed joint stock companies are companies whose shares are traded on an official secondary securities market. 2. In all matters not covered herein, listed companies shall be governed by the provisions laid down for joint stock companies, in addition to any other regulations that may apply.*

individuals affected, that represents at least a five percent of the total share capital or three percent in publicly listed companies, may directly exercise a corporate action for liability when it is based on a breach of the duty of loyalty, without necessity of submitting the decision to the general shareholders' meeting. If the complaint is successful, in whole or in part, the company will be required to reimburse the injured for the damages incurred, within the limits contemplated in article 394 of the Civil Procedure Act 1/2000 of January, 7.

This does not change the nature of the action for liability. The resulting compensation will still be paid to the company, not to the shareholders who pursued the damage restitution. As a consequence, minority shareholders have few incentives to initiate a litigation procedure and this special right is only exercised under very exceptional circumstances (changes in the company's management, etc.). Nonetheless, any shareholder can also bring an individual action against a company's director that caused, by means of unlawful acts, direct harm. Precisely, article 204 of the Companies Act lays out a list of all resolutions adopted by the general shareholders' meeting which are susceptible to challenge.[4] These are decisions which are contrary to the Law, to the company's by-laws, or to the company's meeting regulation; decisions which damage the interest of the company to the benefit of one or more members or third parties; and decisions that, although not causing damage to the company's assets, are imposed in an abusive manner by the shareholders' majority (in its own interest and to the unjustified detriment of other shareholders).

While resolutions contrary to public order may be challenged by any shareholder, director or third party, all other resolutions require a minimum percentage of capital

[4] ***Article 204****. Decisions subject to challenge 1. Corporate decisions that are contrary to law or the by-laws or detrimental to corporate interests to the benefit of one or various partners or shareholders or of third parties shall be subject to challenge. 2. Decisions that are contrary to law shall be null and void. The others decisions referred to in the preceding paragraph shall be annullable. Corporate decisions that are withdrawn or superseded may not be challenged.*

representation in the case of shareholders and the demonstration of a legitimate interest in the case by third parties.

Contrary, board of directors' resolutions, are only challengeable by directors and shareholders representing one percent of capital, within a period of thirty days of becoming aware thereof, provided that a year has not elapsed since their adoption.

Finally, under certain circumstances shareholders have a right to exit the company, cancelling their membership and reclaiming the invested amount. Unless a company has issued registered shares with restricted transferability, the possibility of selling one's shares seems, a priori, a fair replacement for the lack of cancellation rights as long as there is a liquid market for those shares. Companies Act, nonetheless, has not only provided for legal mandatory exit rights in private limited companies, but also in public companies, listed and unlisted; protecting shareholders against possible losses and stock market uncertainty.

These rights belong to all shareholders and do not require a minimum percentage of capital for their exercise. Even though, it is the minority shareholder who will usually benefit from this protection when the majority adopts decisions of particular importance that affect the essence, object or configuration of the company itself.

The relevant regulation can be found in the Law on Structural Changes 3/2009 of March 31, 2009 ("**LME**"), as well as in the Companies Act. As such, shareholders not voting in favor of the corresponding resolution will be entitled to withdraw from a company in the following circumstances:

a. Replacement or substantial amendment of the corporate purpose. The mere extension of the corporate purpose will not be regarded as a replacement or substantial amendment (STS 196/1996 of 18 March).
b. Extension of the duration of the company.
c. Reactivation of the company.
d. Creation, amendment or early releases from the obligation to render ancillary performances, absent a contrary provision in the articles of association.
e. Amendment of the rules for transfer of shares in private limited companies.

Shareholders voting against the corresponding resolutions will be entitled to withdraw from a company in the following cases:

a. Involvement in a cross-border intra-community merger the resulting company of which will have its registered office in another Member State.
b. Takeover by a European company with registered office in another Member State.
c. Formation of a European holding.
d. Transformation of the company. The withdrawal will be automatic in the case of shareholders who by operation of the transformation acquire personal liability for the company debts and did not vote in favor of the resolution.
e. Transfer of the registered office abroad.

In addition, an exit right can also be established by the bylaws themselves in accordance with the provisions of article 347 of the Companies Act.[5] In order for such a right to be validly constituted, the by-laws' articles must establish the manner of proving the existence of the grounds for withdrawal, as well as the method and term

[5] ***Article 347***. *Causes for exit in the by-laws 1. The by-laws may establish causes for exit other than provided in this act. In such event, they shall determine the procedure for accrediting existence of the cause and for exercising exit rights as well as the term for doing so. 2. Amendment or removal of the provisions in the by-laws on the causes for exit shall be subject to the unanimous consent of all the partners or shareholders.*

for the exercise thereof. The amendment or disapplication of these grounds for withdrawal will require consent of all shareholders.

1.2. Do they have in essence real choices, or are the ones that are in the hands of the dominant group, either managers or major shareholders, or are they restricted to those that do not challenge the majority power, representing the status quo?

Minority shareholders do not have any beneficial treatment by means of its size. However, they can adopt certain agreements with the rest of the shareholders, outside the scope of the by-laws that regulates the relationship between shareholders. Specifically, shareholders agreements become the only method to protect the minority shareholders.

Shareholders' agreements are those private agreements made and signed by some or all members of the company that will regulate the internal relations between them, or between them and the Company, in order to determine and specify the legal provisions and statutes that affect the members of such private agreement.

There are different types of shareholders agreements that are clustered according to their content and how this content affects the Company. So we can distinguish three main groups:

a) Agreements that merely regulate the internal relations between the shareholders without the intervention of the company.

b) Agreements arranged like the above without any intervention from the Company which is binding on the signatory shareholders in order to do some kind of action to the company that is beneficial to it.

c) Finally, there are a type of agreements in which the purpose of them is to determine the organization and functioning of the company's management bodies.

This sort of contracts frequently contains clauses relating to the company organization some of which refers to the appointment of individuals elected by the minority shareholders' as members of the board of directors. Consequently, shareholders agreements are appropriate to reinforce the position of the minority shareholders both in publicly and privately held corporations.

1.3. Has the law and precedents of your country evolved in ways that increase *minority shareholders* ability to defend against expropriation by those in control (misuse of assets, reallocation of profits, transfer pricing, etc.) ?

Not in a way of increase of the rights of the minorities shareholders. Please refer to answer 1.1.

1.4. Is the legal dimension the prevalent one in the Corporate Governance (CG) atmosphere, or is the firm level CG the common manner to protect minorities?

Please refer to answer 1.1.

1.5. What is the role of ownership concentration in the protection of the minority?

Please refer to answer 1.1.

1.6. Is benchmarking used as a mechanism for minorities to select the country or firm better suited to risk profile and protection from rights deprival?

Under Spanish legislation there is not a specific mechanism for minority shareholders that allow them to select the country or firm that better suites the risks profile and protection from rights deprival. Consequently, minority shareholders are free to choose the firm they would prefer for the prevention from rights deprival.

1.7. Is the formation of group dynamics among dispersed shareholders working in your country?

Please refer to answer 1.1.

1.8. What is the role of market liquidity in the *minority shareholders* exit option?

Market liquidity does not affect the voluntary exit of the minority shareholders because in case the rest of the shareholders do not acquire its shares, would be the corporation who will acquire the shares of the minority shareholders that wants to leave.

Moreover, one of the key issues in the exit process or forced sale of the minority shareholders is the establishment of a mechanism and a valuation method in case of the absence of an agreement between the parties on the question. Thus, the primarily mechanism introduced by the Companies Act is the fair value of the shares or quotas at the time of shareholder's exit.

However, in case of failure of an agreement on the fair value of the shares or quotas shall proceed to evaluate them by an auditor other than the one auditing the company's accounts in accordance with article 353 of the Companies Act.[6]

In this connection, there were numerous resolutions of the Directorate General of Registries and Notaries analyzing the definition of fair value of the shares or quotas. Therefore, it has been established since 1990s that the fair value of the shares or quotas cannot be determined exclusively by the mere book value and it is necessary to consider other generally unaccounted intangibles matters (unless they have been acquired for consideration).

Finally, the determination of a pricing is an imperative aspect and cannot be discretionally determined by the by-laws or by the shareholders agreement.

For more information about the exit mechanism please refer to the answer stated at question 1.1.

1.9. Have legal reforms in your country given tools to majority to use compliance as an instrument to somehow "legalize" minority expropriation?

All shareholders of a company have the right to leave the company by means of an exit mechanism. For more information about the exit mechanism please refer to the answer stated at question 1.1.

[6] ***Article 353***. *Valuation of the partner's or shareholder's stakes or shares 1. In the absence of an agreement between the company and the partner or shareholder on the fair value of stakes or shares, the identity of their appraisers, or the procedure to be followed for their valuation, these holdings shall be valued by an auditor other than the company's auditor. Such expert shall be designated by the mercantile registrar serving the place where the company's registered office is located, at the behest of the company or of any of the partners or shareholders owning the stakes or shares to be appraised. 2. Where shares are listed on an official secondary market, the value shall be the average quotation price for the last quarter.*

2. Looking forward at your jurisdiction:

2.1. What is the way to avoid *minority shareholders* from suffering mayor shocks, -if applicable in your country- due to restrictive visions as to minority rights, without falling into abuses of minority rights? Is it possible to harmonize both?

All shareholders' conduct, regardless of their portion at company capital, must be guided by principles of fairness and good faith. Nevertheless, certain rights granted to minority shareholders under Spanish law run the risk of being used in an opportunistic manner which could gravely compromise the interest of the company and the normal operation of corporate bodies. In this respect, particular attention should be paid to the potential abusive exercise of certain minority rights such as the unjustified challenge of corporate resolutions (by shareholders representing at least one percent of the company capital), the opposition to agreements necessary for company survival or even the judicial request for the compulsory winding up of the company.

As Spanish legislation does not provide specific remedies for this type of scenario, we would have to resort to the application of the general doctrine on abuse of rights under article 7 of the Civil Code. This article provides that rights will be exercised pursuant to bona fide exigencies and that all acts or omissions which, (i) by the intention of their author, their objective, or by the circumstances under which they are carried out, (ii) obviously exceed the normal limits to the exercise of a right, (iii) thereby causing damages to third parties; will give rise to an obligation to indemnify. Court practice has helped to establish the guidelines for the application of this article which could prove useful in the avoidance of falling into abuses of minority rights.

Nevertheless, the use of 7 of the Civil Code is exceptional and restricted to the systematic abuse of the individual or minority rights attributed to shareholder *ex lege* with a manifestly illegal purpose or intent to harm the company interest (STS of

February 10, 1992). Furthermore, the act or omission in question has to have a substantial effect on the organization leading to the existence of a blocking control or effects on functional areas of the company to the detriment of the social interest.

The countermeasures for this type of abuse are provided for in the subsequent paragraph of article 7 of the Civil Code. The abuse of rights gives rise to compensation for damages. However, in addition (or as an alternative) to the appropriate compensatory damages, the company should possess other mechanisms of protection against such conduct. In accordance with court practice, article 7(2) of the Civil Code authorizes the adoption of legal or administrative measures to prevent the persistence of the abuse, including the revocation of the affecting right. Whilst this is fully applicable to all active conduct of a minority shareholder in abuse of his or her rights, its application to "negative conduct" (abstention or vote against a necessary agreement) is problematic. The nullity of votes exercised in abuse of rights does not authorize the court to integrate or supplement "social will" when the legal or statutory regime requires the vote of a certain amount of the company capital for the approval of a decision in the general meeting.

Nor does the regime of exclusion of shareholders provide for the possibility of excluding from the company the shareholder who adopts an abusive attitude. Nothing prevents, however, that this cause be incorporated into the company by-laws as a mechanism to prevent shareholders abuse by terminating the relationship in the company contract.

To conclude, this is the only current way to avoid falling into abuses of minority rights. It is, however, unsatisfactory due to its restrictive requirements, insufficiency of remedies and *ex-post* nature. In order to harmonize a greater protection of minority shareholders with the safeguard of the interest of the company as a whole, more

mechanisms preventing this abuse should be put into place. In particular, it would be useful to have more *interim* measures available, under which the court could evaluate the urgency by adopting certain decisions (i.e. the financial necessities of the company in light of the failure to adopt capital increases or structural transformations).

2.2. Is *minority shareholders* activism taking place in your country, and to what extent?

Associations of minority shareholders in Spain are a relatively new phenomenon. Whilst other European countries possess a rich history of minority shareholder activism and powerful associations with a great capacity for initiative and action, this form of collaboration in Spain is quite recent. On February 7, 2005 the Spanish Association of Minority Shareholders of Publicly Traded Companies (AEMEC) was founded with the purpose of providing minority shareholders with a suitable means for the effective exercise of their rights and interests. This institution's activity is recognized by the "*Comisión Nacional del Mercado de Valores*" (CNMV) and is directly involved in the transparent and good development of corporate governance.[7] It serves as an instrument, channel or forum of debate for increasing the participation of minority shareholders in the life of companies and fomenting stock-holder activism above and beyond the annual general meetings.

[7] The Comisión Nacional del Mercado de Valores (CNMV) is the agency in charge of supervising and inspecting the Spanish Stock Markets and the activities of all the participants in those markets. It was created by the Securities Market Law, which instituted in-depth reforms of this segment of the Spanish financial system. Law 37/1998 updated the aforementioned Law and established a regulatory framework that is fully in line with the requirements of the European Union and favor the development of European Stock Markets.

The purpose of the CNMV is to ensure the transparency of the Spanish market and the correct formation of prices in them, and to protect investors. The CNMV promotes the disclosure of any information required to achieve these ends, by any means at its disposal; for this purpose, it uses the latest in computer equipment and constantly monitors the improvements provided by technological progress.

Whereas this association has undoubtedly constituted a "step in the right direction", minority shareholders activism in Spain is still not taking place on a large scale. This could be due to a variety of reasons, socioeconomic (agency problems, arm's length approaches, capital structure, etc.) or otherwise. A possible source of disincentives, purely legal in its nature, is the list of requirements that voluntary associations of shareholders must satisfy for the purposes of representation at the meeting of listed companies and the exercise of other rights. Such voluntary associations must be compromised of at least ten members and may not include shareholders with interests greater than 0.5 percent of the voting capital of the company. They will be formed by public deed and registered in the Spanish Commercial Registry, having to keep accounts as provided in the Commercial Code for capital companies. The registration in the Spanish Commercial Register together with the presentation of its financial statements and related audit, seem excessive as regards to the nature of this type of entity that does not possess any property and that, according to the regulations of the association itself, is nonprofit.

2.3. What is the trend in your country for the protection of *minority shareholders*?

It is difficult to point out what is the main legislative trend in Spain regarding the minority shareholders protection. However, recently the Spanish Supreme Court ruled in favor of the minority shareholders denying the validity of certain transactions carried out by the majority shareholders of a company that pursued the divesting of some key elements to another company of the same group.[8] This decision prejudiced the company where the minority shareholders are part of it. As a consequence, the Supreme Court ruled in favor of the minority shareholders by preventing the majority to deprive the company's assets discretionally. Although the legality of the transaction

[8] Spanish Supreme Court sentence dated September 23, 2014.

conducted by the company, the Supreme Court has considered the transaction integrated into an operation that pretended the company's asset-stripping by a majority shareholders' discretionally decision.

2.4. What is the impact of the Sarbanes-Oxley Act (SOX) in your country, as a canon to regulate domestic capital markets and CG?

At the time of promulgation of the Sarbanes-Oxley Act, Spain was experiencing high economic growth, an expansion of its capital markets and a consequent transition to greater reliance on equity financing. Corporate Enron-like scandals in Spanish markets had to be avoided at any costs. This concern was reflected through new regulations enacted during the post-Act period and whose main objective was to increase disclosure obligations and governance standards.

The first of these was the Law 44/2002 of 22 November on Measures to Reform the Financial System. This Law contained additional transparency requirements especially in relation to insider trading, permitting investors to observe transactions that take place within the company. It also imposed the requirement on firms to have an audit committee, and developed in great detail the relevant information to be communicated to the market, containing prohibitions on share price manipulation. In order to guarantee effective compliance with such rules, it increased the power of the CNMV with the ultimate aim of reinforcing investor protection.

The so called "*Aldama Report*" was also published, establishing guidelines similar in content to the rules contained by the Sarbanes-Oxley Act.[9] It highlighted the importance of independent external directors, the supervision of internal audits, and

[9] Report regarding the promotion of transparency and security in markets financial and listed companies

financial analysts to disclose conflict of interests. Regrettably, they constituted mere recommendations whose enforcement was left to market forces.

Two new requirements were introduced one year later through the Law 26/2003 of 17 July on the Reinforcement of Transparency in Publicly Listed Companies. These requirements were: (1) the annual preparation and publication of a report on Corporate Governance and (2) the maintenance of a website providing relevant information for shareholders (contact, structure of share capital, investor's calendar, dividends, bylaws, auditing report, management report, financial statements and annual report, general shareholder's meetings and agreements, internal code of conduct, etc.).

Further details on the preparation of the Corporate Governance annual report and the minimum mandatory content of corporate websites were soon developed through the Circular 1/2004 of 17 March, issued by the CNMV (which later developed in 2006 a Unified Code of Corporate Governance), and the Ministerial Order ECO/3722/2003.

Although the Unified Code of Corporate Governance and the Aldama Report are of voluntary character, companies' management is bound to explain any inconsistency or deviation from the level of compliance required by the recommendations contained wherein.

To conclude, the Sarbanes-Oxley Act had a substantial indirect impact in Spain through the enactment of new regulations increasing investor protection, reliability of financial reports and transparency of information provided by firms.

2.5. Do you think it advisable to rescue the concept of "Popular Capitalism", as defined in the fifties by the great jurist Joaquin Garrigues, in view of the present circumstances regarding status of minorities?

The "Popular Capitalism", as defined by Professor Joaquín Garrigues, assumes that corporations are composed by a large and diverse number of shareholders, whose only interest lies in making profits, completely ignoring the management of the corporation. These shareholders do not require having a specific knowledge or any technical skills regarding the corporation operative. Mostly, they only need to have the economic resources to become shareholders of the company.

However, this circumstance is an opportunity in favor of the minority shareholders with the appropriate technical skills that have an interest in the corporation's growth and therefore in the management thereof. Nevertheless, today, such management shall be subject to the final approval of the majority shareholders.

Finally, we consider that liberalization of the freely entrance of shareholders in corporations has developed a great enrichment not only economic but in technical knowledge to the people becoming part of the corporations as shareholders. Therefore, we do not consider interesting to return to the old system because it would be an impoverishment of the Spanish companies and a competitive disadvantage compared to the other companies globally.

2.6. What should be the role of minorities as to the flaws of executive pay packages that reflect structural problems in underlying governance agreements, as pointed out by Lucian Bebchuk, Harvard Law Professor ?

Mr. Bebchuck has pointed out, among other aspects, the idea of transparency in the payment of executive compensation. Often corporate boards set up payments guided exclusively by the shareholders' interests and operate as an arm's length extension to the shareholders who appointed them. In this context, the salary of the managing

directors has been subject of much public criticism, which intensified following the corporate governance scandals that began erupting in late 2000's. Therefore, many management bodies have employed compensation arrangements that do not serve shareholder's interest.

As previously stated in question 1.1 minority shareholders can challenge certain resolutions adopted by the majority shareholders. Concretely, article 206 of the Company's Act establishes that "*corporate resolutions may be challenged by any of the administrators, third parties demonstrating a legitimate interest and those that became members prior to adoption of the resolution, provided that, individually or collectively, they represent at least one percent of capital. The By-laws may reduce the indicated percentages of capital and, in any event, the members not achieving that percentage will be entitled to compensation for the damage caused to them by the challengeable resolution.*"

Therefore, minority shareholders will have the responsibility to challenge any resolution adopted by the majority that goes against the company. Thus, Spanish legislation establishes a statute of limitations of one year to challenge majority shareholders resolution.[10]

3. Precedent cases at your jurisdiction:

3.1. Please report some recent judicial cases regarding *minority shareholders* issues.

Supreme Court (Civil Chamber, Section 1st), No. 377/2012 of 13 June

[10] ***Article 205 Company's Act. Prescription of the Challenging Action.*** *1. The action challenging corporate resolutions will prescribe after one year, unless it challenges resolutions that by their circumstances, basis or content are contrary to public in which case the action will not expire or prescribe. 2. The prescription term will be computed from the date of adoption of the resolution if it was adopted at a members or board of directors meeting, and from the date of receipt of a copy of the minutes if the resolution was adopted in writing. If the resolution was registered, the prescription period will be counted from the date the registration may be opposed.*

The board directors of the Iwer Navarra, S.A. (the "**Company**") called the shareholders to a general shareholders' meeting, which Agenda was related with the Company's management review, the approval of the annual accounts, the result's application and other questions.

Once published the prior notice, the next day, five shareholders –the appellant among others- (with more than 5% of the shares), requested to complete the Agenda with three more bullets. The Company's board decided not to add them neither to publish them.

The general shareholders' meeting was celebrated with 91.39% of assistance and 90.28% voting in favor of the agreements.

The minority shareholders claimed against the Company requesting the nullity of the celebrated general shareholders' meeting.

The appellant argued the inappropriateness of declaring invalid the General Meeting because of the following arguments: 1) what was intended by the plaintiffs was to request information in a non-adequate procedure and not only a complement of the agenda; 2) the subjects which were interested information were completely different on the contained in the agenda; 3) the publication of notice could damage the Company's interests; 4) All the shareholders were well informed in different moments; and 5) the nullity declaration affects to agreements which are not related with the additional content.

The Supreme Court ruled as follows:

- <u>The minority's right to fill the Agenda of the called general shareholders' meeting</u>

The Companies Act gives the qualified minority (with a minority % of shares) the right to add some content to the Agenda in one or more bullets, with the form and term established, punishing the omission of the "complement" with the nullity of the general shareholders' meeting.

- The contents of the supplementary notice and the right to information

  It is not possible to limit the minority's right to add more bullets in the Agenda, also when they have the final purpose to obtain information from the Company, information which is not related with the other bullets of the Agenda.

- The contents of the supplementary notice and the relationship with the agenda

  The content of the supplementary notice has not necessary be related with the previous content, the new bullets can be what the minority want, and moreover when they have relation with the other decisions of the general shareholders' meeting.

- The contents of the supplementary notice and harmful information

  The Company has to provide the requested information by its shareholders always less the case it damages the Company's interests, in which case neither could be deny when it is requests by a 25% of shareholders (and without prejudice of an exercise in an abusive way of the right).

Supreme Court (Civil Chamber, Section 1st) No. 512/2010 of 21 July

The claimant is a minority shareholder (33% of the shares), which decided to claim Bolso Milano S.L. (the "**Company**") with the purpose to impugn some corporate agreements (approval of the annual accounts; approval the result of implementation of the 1997 exercise; the dissolution of the company and the appointment of the sole

liquidator). The claim is based on the argument that the minority shareholder asked to the commercial registry to appoint an accounting auditor, at Company's expenses, to proceed to review the annual accounts of the previous exercise, which had to be approved in a general shareholders' meeting. The commercial registry accepted the request and the Company did not bring any action against the Decision. However, the Company did not provide the auditor with the necessary documents to be able to conduct the Company's auditing.

The defendant argued that the auditing could not be made because the Company had not enough funds to pay the services of the accounting auditor, moreover the general shareholders' meeting had to be taken in order to avoid the responsibility in case to not call the General Shareholder's Agreement, because the Company had to be called in two (2) months since the dissolution cause was arisen, and the report could be made and finished after the general shareholders' meeting. Finally, the defendant argued that the minority shareholder requested the auditing incurring in abuse of his rights.

The Supreme Court ruled as follows:

- <u>The necessary call of the general shareholders' meeting to decide about the dissolution</u>

  The minority shareholder has the right to request a Company's auditor. This right was denied by the Company by not providing the necessary documentation to the accounting auditor. The Supreme Court highlights the severity of the Company's acts due the denied right produced a lack of important information about the patrimonial situation of the Company, and has implications on whether to proceed with the dissolution of the Company.

- The information right pretends to give firsthand information about the current Company's situation, and this is one of the principal shareholder's rights. From this information the shareholder can build an accurate knowledge of the different decisions and to decide coherently.

- Article 250(2) Companies Act gave the right to the minority shareholders, in the case that the Company has not the obligation to audit their accounts, to request to the commercial registry the appointment of an accounting auditor. The denial of this right it is simply a violation of the information right, what means necessarily the complete nullity of the decisions of the general shareholders' meeting.

Supreme Court (Civil Chamber, Section 1st) No. 663/2008, of 3 July

The judgment focuses on whether an agreement on the Company's accounts is valid before the auditor's report had been issued, designated after the general shareholders' meeting but before its filing by the Commercial Registry by the request of the minority shareholder.

The general shareholders' meeting approved the annual accounts although not have an auditing report. The Company requested to some accounting auditors to make an accounting of the annual accounts, and the auditors did not reply the request. The claimant did not exercise his information right in any moment. The minority shareholder did not assist to the general shareholders' meeting although he was notified personally about it.

The Supreme Court refuses the claim with the determination to get the nullity of the decisions of the general shareholders' meeting because the due to the abuse of right of the claimant (the minority shareholder). The Supreme Court "rejects the challenging

attitude that has no more objective than unnecessarily impede the normal development of the Company's life. There is an abusive exercise when it manifestly exceeds the "normal limits on the exercise of a right", which has to deduct of the claimant's intention."