

Challenge of GSMs' resolutions, good faith and duty of loyalty

Madrid, May 2021

A commercial court of Valencia has handed down an interesting judgment¹ regarding the dismissal of one of the three joint directors of a company by a general shareholders' meeting (GSM) that was called only by the other two directors and, hence, formally infringing the provisions of the Spanish Companies Act (SCA) pursuant to which GSMs shall be called by all the company's joint directors. It is important to mention that the three directors were the only shareholders of the company (each holding one third of the share capital).

The dismissed director filed a claim challenging the GSM's resolution on the ground, among others, that the GSM had not been called in compliance with the legal requirements. The court, however, dismissed the challenge.

The court found that it was clear that the provisions of the SCA had been breached since the GSM had not been called by all the joint directors. Nevertheless, based on Spanish case law², it concluded that the breach was not material, but merely formal, and thus could not be used as a ground of the challenge.

Specifically, the court found that the dismissed director had repeatedly requested the other directors to call an immediate GSM with a specific agenda and this showed unequivocally that he had agreed to the call of a GSM that was finally made by the other two directors, although he had not formally signed it and despite the fact that the points of the agenda were not entirely those proposed by him.

The court noted that the dismissed director was not actually challenging the resolution passed by the GSM due to a breach of the rules applicable to GSMs' calls, but rather because he disagreed with one of the items that the other two directors had included in the agenda (namely his dismissal).

Finally, the court considered that the behaviour of the dismissed director entailed a breach not only of his duty of loyalty as a director, but also of his obligation of good faith as a shareholder³, since his right to challenge the GSM's resolution had been exercised abusively.

This judgment reflects the growing trend of courts not to confine the analysis of disputes among shareholders to legal formalities but to take into account the overriding principle of good faith and its ramifications.

¹ Judgment of the commercial court No. 3 of Valencia dated 6 October 2020.

² According to the Spanish case law mentioned in the ruling, in private limited companies with several joint directors, the company's external representation may be exercised by two of them, but the internal managing functions (including the call of GSMs) must be carried out jointly by all of them, unless otherwise provided in the by-laws. Nevertheless, according to this case-law, directors who do not formally call a GSM may show their agreement by "unequivocal conclusive acts"; for instance, by attending the meeting and not objecting to its call or agenda; in cases like these the call is deemed valid.

³ The court pointed out that the internal relationship between the shareholders of a company must be examined from a contractual perspective and, therefore, in light of the general rules on contracts, including the principle of good faith.