

Pre-emption right and classes of shares

Madrid, February 2024

The Madrid Court of Appeal (MCA) has issued a ruling¹ regarding the pre-emption right in a company with two classes of shares, A and B, where (i) the majority shareholders (80 per cent) had only A shares that conferred dividend and liquidation preferences and (ii) the minority shareholder (20 per cent) had both A and B shares in a 50/50 proportion.

The company approved, with the minority shareholder voting against, a capital raise to be paid out in cash by issuing class A shares that could be subscribed by the shareholders in proportion only to the class A shares held by them. This led to a dilution of the minority shareholder, who, despite holding a 20 per cent of the capital, could subscribe only a 11.11 per cent of the new shares.

He filed a claim seeking the annulment of the capital raise on the grounds that his pre-emption right had been breached, as he should have been offered to subscribe a 20 per cent of the new class A shares.

The company contested that the capital raise had not caused any damage to him since, pursuant to the by-laws, class B shares did not entitle to any dividend or liquidation recovery except in the unlikely event that holders of class A shares would get back twice their investment.

The claim was upheld in the first instance and eventually by the MCA, which found that the minority shareholder should indeed have been granted the right to subscribe a number of new class A shares proportional to the par value of all his shares (both A and B) before the capital increase, in order to "maintain the *status quo*".

The MCA stated that, even if the minority shareholder was not entitled to any preference as to dividends or liquidation by virtue of his class B shares, the capital raise had affected his decision-making power in the company by reducing the percentage of his voting rights.

Finally, the MCA noted that some prominent scholars submit that the pre-emption right may be limited to new shares of the same class as those previously held, but on the condition that the by-laws so provide for, which was not the case.

¹ Judgment of the MCA 396/2023 dated 12 May 2023.