NEW SHAREHOLDERS' RIGHT OF WITHDRAWAL DUE TO A FAILURE TO PAY DIVIDENDS

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The purpose of the amendment is to harmonise companies' financial sustainability and minor shareholders' rightful aim of benefiting from the profits obtained by a company.

The LSC affords shareholders an abstract right to benefit from the company's earnings. However, that does not mean that dividends must be paid if the company turns a profit. In fact, companies are only obliged to pay out where agreed at the general shareholders' meeting (Articles 160.a) and 273 of the LSC), at which time a right to receive would be recognised in favour of the shareholders. Essentially, this legal arrangement grants majority shareholders the power to decide in favour or against apportioning the company's earnings by voting at the general meeting.

Article 348 bis was introduced into the LSC in 2011 in a bid to prevent potentially abusive conduct by majority shareholders, affording minority shareholders a right to withdrawal in the event that the general meeting passes a resolution against the payment of dividends. Nevertheless, the aforementioned article was widely criticised given the risk of impetuous acts by the shareholders claiming the payment of dividends. Under the original wording, where dividends were not paid, minority shareholders were able to compel the company to allow them to exit the company and obtain the value of their shares, irrespective of whether the decision not to pay dividends could be seen as oppressive or not.

The amendment of the article under Act 11/2018 seeks to maintain its original core by protecting minority shareholders without irreparable damage being caused to the company, but also to remedy some of its main technical defects.

A salient element of the new Article 348 bis is the non-mandatory nature of its provisions, as the shareholders are able to abolish or amend the regulation of the right of withdrawal in the company's bylaws. Such bylaw amendment would require approval from all the shareholders, unless the right to withdrawal is afforded to those who voted against the resolution in question.

In addition, the minimum profit amount to be paid as a means of avoiding the exercise of the right of withdrawal has reduced from one-third to 25% of the profit obtained in the previous fiscal year. This figure can be reached using a weighted average calculated across the last five fiscal years, hence the dividend pay-out may be lower during times of greater investment needs.

Another significant feature of the amendment is that the new right to withdrawal is afforded to shareholders of the parent company of a group where the general shareholders' meeting fails to agree a dividend pay-out of at least 25% of the consolidated profit for the previous fiscal year, provided that such earnings can be legally apportioned and positive results have been obtained over the preceding three fiscal years. This amendment covers the risk of the group's parent company preventing profit distributions in subsidiary companies, as this would in turn leave the parent company with no profits to distribute among its shareholders.

In essence, we are witnessing a necessary reform to protect the rights of the minority, albeit a detailed analysis of these provisions in action would have to be carried out. This amendment will not prevent the emergence of complex cases given that the article continues to overlook the company's financial situation and fails to set out certain aspects which may disadvantage the majority shareholders, such as restricting the earnings which may be apportioned by approving new statutory reserves.

Undoubtedly, the application of the new Article 348 bis will create a plethora of case studies which will have to be clarified and refined for use as case law precedents.

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