Company resolutions reached with invalid votes

A partial explanation follows of Article 204(3)(d) of the Spanish Companies Act, a subarticle that has gone almost unnoticed in scholarly writings and case law, to the extent that it is unclear what connection exists between votes and resolutions in the context of a declaration of invalidity.

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Article 204(3)(d) of the Companies Act provides that "contesting of [company] resolutions based *on the invalidity of one or more votes* is appropriate [where] the invalid vote was decisive for the attainment of the required majority". According to the last paragraph of Article 204(3), "once the claim has been filed, the issue of the essential or decisive nature of the grounds for contest [...] shall be raised as an incidental matter for preliminary ruling".

- **Commentary**

§ 1. On the basis of the wording and spirit of the transcribed provision, it could be inferred that the *invalidity* of the vote must have been (judicially) declared or established before the voting results are

announced, and that such declaration or establishment cannot take place either during the proceedings to contest the resolution or, even less so, at a later time.

§ 2. However, this initial impression would be incorrect. The *declaration of invalidity* of the vote may have taken place *a*) before the announcement of the result; *b*) before the drafting and approval of the minutes; *c*) before or after the extinguishment period provided for in Article 205 of the Companies Act starts to run; *d*) in the same proceedings in which the contest of the resolution is heard, and e) after a final and conclusive judgment rejecting the contest has been handed down or the extinguishment period for contesting the resolution has lapsed.

§ 3. The fact that Article 204(3) *in fine* only refers to the incidental dispute concerning the relevance of the vote does not mean that the question of the validity of the vote cannot also be discussed in the main proceedings. It is clear that, as has already been established in case law, the contest proceedings under Article 207 of the Companies Act may be joined to an action for a declaratory judgment concerning a resolution countering the successfully-contested resolution; and the case law of the Supreme Court states without a shadow of a doubt that a claim contesting a (positive or negative) resolution to withhold earnings may be joined to a claim seeking a court-ordered resolution whose content is the payment of dividends.

§ 4. The above must also be understood as implied by the rule of law, because the *invalidity* of the vote is a requirement of standing, ordinarily discussed when analysing the merits of the case. When constructing the factual requirement of Article 204(3)(d), it is clear that the claimant bears the burden of proving the factual requirement (here, the 'invalidity') of the vote, which is as much a part of the cause of action and substance of the proceedings as the proof of 'best interest of the company' or 'abuse of rights' in Article 204(1) or the 'incorrectness' of information in Article 204(3)(b).

§ 5. One could object to this (false) joinder that only the company has standing to be sued in contests of resolutions (Article 206(3)), while there may be other *involved* parties or counterparties to the vote. But this is not the case. Even where *invalidity* stems from malicious intent on the part of the company or a shareholder or it is the result of unlawful intimidation, no one is a counterparty to the vote, which is a unilateral legal transaction receivable by the company, which is also not a counterparty, but has standing by being the "producer" of the company resolution. There is no contracting counterparty that could be considered to have standing to be sued.

§ 6. Consequently, *invalidity* is a legal characterisation that cannot be declared by the chair of the meeting who announces the voting results (cf. Article 102(4) of the Registry of Companies' Rules) or at the time the minutes of the meeting are approved. This is worth noting because it is contrary to the view of German systematic jurists that the *invalidity* of a vote must be *declared* when the result is announced, with the consequence that votes without effect must not be counted and, if they are counted, the resolution itself is contestable. See, for example, Ph. Maximilian Holle, *Der privatrechtliche Beschluss*, 2024, p. 102 and *passim*.

§ 7. This does not mean that a declaration of *invalidity* must be obtained before the announcement of the result and the minutes, but rather that *invalidity* cannot be established by the announcement or by the minutes. If obtained before and this (relevant) vote is improperly counted in the announcement, the resolution is contestable. However, if it is not obtained before, so that there is no counting error, the resolution may still be contested, at least until the lapsing of the extinguishment period set out in Article 205 of the Companies Act, provided that the vote has been declared invalid by a court prior to the contest claim.

§ 8. The validity or *invalidity* of the vote can only have taken place *under Spanish law by means of a final and conclusive judgment establishing or declaring* the *invalidity* of the vote, which may be the same judgment declaring the invalidity of the company resolution pursuant to Article 204(3)(d). We do not consider it possible for invalidity to be a legal predicate that can be achieved by means of a transaction (with the company or with a third party) or by means of a *revocation* of the vote, i.e., a unilateral declaration of the invalidity of the voting transaction cannot be made with a simultaneous revocation of the vote. The foregoing may be debatable, but it creates the least uncertainty under the regime for contesting resolutions.

The isolated contesting of a vote does not constitute a preliminary issue under Article 43 of the Civil Procedure Act in proceedings to contest a resolution

§ 9. Contesting or invalidating one or more votes is not conditional on whether or not those votes were relevant to the production of the resolution. The resilience test applies to resolutions, but not to votes. A vote may be contested *civilly*, even if the resolution can no longer be contested because it passes, *a priori*, the resilience test, i.e., the lack of causality of the vote in the resolution.

§ 10. There are four types of reasons why a vote may be invalid: first, the vote is absolutely void because it is unlawful, because it contravenes a prohibition on voting, because it was cast by a person without entitlement or by a representative without authorisation, or because it constitutes a sham consented to by the company; second, the vote is contrary to the duty of good faith (duty of loyalty) [*see* Barcelona *Audiencia* (Fifteenth Chamber) Judgment of 27 July 2015]; third, the expression of the shareholder's will did not fulfil (or did so only imperfectly) the factual requirement that such expression be recognisable as a vote; and fourth, the vote, as a unilateral legal transaction, is voidable due to error, fraud, intimidation or lack of capacity to act on the part of the shareholder (nowadays only minors). All these categories are highly problematic because our system of laws lacks a legal regime for the *invalidity* of *inter vivos* unilateral legal transactions. I would particularly draw attention to the fact that the 'intoxicating influence' that leads to *invalidity* (fraud, simulation, fear, turpitude) could have as a counterpart another shareholder, a third party, or the company itself (represented by its

directors). This complicated issue will not be delved into in this paper, and we assume that the *invalidity* judgment has the enforceability of *res judicata* and that such *res judicata* extends to the company as the *principal* of the resolution, even if it is not the producer or counterparty of the vote.

§ 11. The isolated contesting of a vote does not constitute a preliminary issue under Article 43 of the Civil Procedure Act in proceedings to contest a resolution.

§ 12. There is no decisive technical or legal reason for this assertion, but for reasons of rationality it must be held that a judicial declaration of *invalidity* of the vote that has been made after the lapsing of the period to contest under Article 205 of the Companies Act cannot affect the validity of the resolution. However, this does not prevent proceedings for invalidating the vote from taking place and continuing beyond the period set out in Article 205, even if the validity of the resolution is not affected. There may be valid reasons (and not just reputational ones) why a shareholder may be interested in obtaining a declaratory or constitutive judgment determining the *invalidity* of their vote, or of the vote of another shareholder!

§ 13. Whether the action to invalidate a vote is declaratory or constitutive, it is subject to a limitation period that is not the extinguishment period of Article 205 of the Companies Act, but neither is it that of national contract law. This is a 'personal' action within the meaning of Article 1964 of the Civil Code and is subject to a limitation period of five years, even in the case of a declaration of absolute *invalidity*.

§ 14. The *invalidity* of the relevant vote or votes does not necessarily mean that the resolution is in breach of public policy for the purposes of Article 205. However, it does not exclude this in principle either. And, if this is the case, we will have a situation in which the judicial declaration of *invalidity* of the vote may occur at any time (within its limitation period) and will necessarily affect the resolution if a judgment has not already been handed down, with the enforceability of res judicata, declaring the validity of the agreement, the latter being highly unlikely, because the judgment to have res judicata enforceability for the company will not, almost by definition, have had as its subject matter the dispute over the *invalidity* of the vote and will not be affected by Article 222(3)(III) of the Civil Procedure Act.