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ANALYSIS

Corporate & Commercial

Unanimous shareholders' agreements and dividends in specie

The Supreme Court and the Madrid Provincial Court, following established legal doctrine, have reiterated that a party to a unanimous shareholders' agreement acts in bad faith if he or she challenges a company resolution passed in compliance with said shareholders' agreement. In this case, the shareholders' agreement provided for the possibility of paying dividends in kind, and the contested resolution — which was passed by a majority at the shareholders' meeting — transferred certain real estate properties to one of the shareholders (with his consent) in payment of the dividend due to him.

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1. Introduction

§ 1. On 5 May 2015, all the shareholders of a private limited company entered into an agreement whose main purpose was to establish a roadmap for the gradual distribution of the company's assets and to bring about the dissolution of the corporate ties between the two family lines holding the capital. To achieve this objective, it was agreed, among other things, to distribute a significant portion of the profits earned from the company's business activities and from the sale of the company's assets.

§ 2. In June 2017, a general meeting was held at which a resolution was passed to pay a dividend from the profit for the financial year, partly in cash and (to one of the shareholders, with his consent) partly in kind (specifically, through the transfer of certain real estate properties). Subsequently, in June 2018, the shareholders in general meeting approved the accounts for the 2017 financial year and the appropriation of profit, ratifying the aforementioned interim dividend payment resolution.

§ 3. One of the shareholders (a signatory, as noted, to the shareholders' agreement) challenged the resolution regarding the interim profit distribution passed in 2017. The Business Court did not uphold the claim. The claimant lodged an appeal arguing, inter alia, that the contested resolution was in breach of the 2015 shareholders' agreement and that there was no express provision in the articles of association regarding the payment of dividends in specie. The Madrid Provincial Court (Twenty-Eighth Chamber) rejected the appeal in Judgment no. 81/2026, dated 5 March (ECLI:ES:APM:2026:3708), in which it held that the payment of dividends in specie did in fact comply with the provisions of the shareholders' agreement and that the agreement provided for the payment of dividends in specie (*see below*, section 3).

§ 4. The same shareholder also challenged the resolutions passed at the 2018 meeting. As is relevant for the purposes of this discussion, he argued that there was no provision in the articles of association regarding the payment of dividends in specie.

§ 5. The claim was dismissed at both instances (by the court in April 2021). Specifically, the Provincial Court, after stating that in companies limited by shares dividends are legally classified as a claim that is naturally monetary in nature, noted that they may be paid *in kind* when provided for in the articles of association or agreed upon unanimously. In this regard, it held that such an agreement existed to the extent that, according to its interpretation, the shareholders' agreement signed in 2015 by all the shareholders "implicitly provided for the payment of dividends in specie as a means of distributing the assets of the company in question through the plan accepted by all the shareholders in that agreement" (Madrid Provincial Court (Twenty-Eighth Chamber) Judgment no. 715/2022 of 30 September [ECLI:ES:APM:2022:12722]).

§ 6. The appeal on the grounds of a breach of procedure and the appeal in 'cassation' lodged by the contesting party were rejected by the Supreme Court in Judgment no. 674/2026 of 5 May (ECLI:ES:TS:2026:1980). In the part relevant

to our purposes, the aforementioned judgment held that the systematic interpretation of the shareholders' agreement made by the Provincial Court (which concluded that said agreement implicitly authorised the payment of dividends in specie) did not violate the provisions was not in breach of Article 1281(1) of the Civil Code. And, invoking its own doctrine, it noted that it is not permissible for a party who has entered into a shareholders' agreement to subsequently challenge a company resolution passed precisely in compliance with that agreement (*infra,* para. 2).

2. Supreme Court Judgment no. 674/2026 of 5 May

§ 7. As previously noted, the Supreme Court, when ruling on the challenge to the resolutions passed in 2018, held that the Provincial Court, in concluding that the 2015 shareholders' agreement implicitly authorised the payment of dividends in specie, had not breached Article 1281(1) of the Civil Code, and therefore rejected the second ground of the 'cassation' appeal (which was examined first).

§ 8. On this basis, it proceeded to rule on the first ground of the 'cassation' appeal, in which the appellant argued that the Provincial Court, by relying on this implied content of the aforementioned shareholders' agreement to deem the contested resolution valid, had contravened the legal doctrine regarding the unenforceability of shareholders' agreements.

§ 9. The Supreme Court, however, noted that case law has distinguished, in relation to challenges to company resolutions, between those based on the grounds that the resolutions in question do not comply with the terms of a unanimous shareholders' agreement and those concerning resolutions that have been passed in accordance with a shareholders' agreement but contradict the provisions of the articles of association. In this second case, in fact, it is essential to determine whether the contesting party's conduct, if bound by the shareholders' agreement, constitutes a breach of the requirements of good faith (see Supreme Court Judgment no. 300/2022 of 7 April [ECLI:ES:TS:2022:1386]).

§ 10. In this context, the precedent set by Judgment no. 103/2016 of 25 February (ECLI:ES:TS:2016:659) is particularly significant. In the case at hand, a company resolution was not challenged on the grounds that it violated a shareholders' agreement. Rather, the situation was one that could be viewed to some extent as the inverse scenario: a company resolution passed in accordance with a unanimous shareholders' agreement was contested on the grounds that it did not comply with the applicable corporate regime. The facts, summarised briefly, were as follows:

— The holder of certain shares reserved the right to vote as a usufructuary when transferring (by sale) the bare ownership of two separate blocks of such shares to his two children. It is important to note that the articles of association of one of the two companies were silent on the attribution of voting rights in the event of right of usufruct in the shares, while the articles of the other company merely provided that, in the event of right of usufruct, the status of shareholder would reside with the bare owner. Consequently, in both cases the suppletory legal rule applied: the exercise of voting rights would lie

with the bare owner (Art. 127(1), second para., of the Companies Act). It should also be noted that, given the equal number of shares held in full ownership by the children, the votes "retained" by the usufructuary father were decisive in resolving deadlock situations.

— In this scenario, one of the children contested certain resolutions passed in both companies, where the decisive vote was cast by the usufructuary father in accordance with the shareholders' agreements.

— And, under these circumstances, the Supreme Court concluded that contesting the company resolutions passed in accordance with the provisions of the shareholders' agreements (but in contradiction with the regime derived from the provisions — or rather, from the lack thereof — in the articles of association) was contrary to the requirements of good faith and constituted an abuse of rights, which resulted in the affirmation of the Provincial Court's judgment rejecting the appeal. In its reasoning, the Supreme Court explained that those who (along with the contesting party) were parties to a unanimous shareholders' agreement and constituted the sole shareholder base of the companies involved could legitimately rely on the claimant and signatory of the agreement to act in accordance with the rules established therein. By failing to do so, the claimant had acted in bad faith. Note, therefore, that the decision was not strictly based on the enforceability of unanimous shareholders' agreements, but rather on the need to act in accordance with the most basic good faith and to respect what had been agreed upon (see also Supreme Court Judgment no. 120/2020 of 20 February [ECLI:ES:TS:2020:507]).

§ 11. Returning to our case, Judgment no. 674/2026 noted that the appellant was a party to the May 2015 agreement, signed by all the shareholders, pursuant to which (according to the Court of Appeal's interpretation of that agreement, which was to be upheld) the contested resolution was passed (which, moreover, had been executed in the part that favoured the claimant, who was paid the dividend to which he was entitled). Consequently, and in accordance with the doctrine previously cited, the appeal lodged should be rejected and the Provincial Court's ruling against the appellant should be upheld.

3. Madrid Provincial Court Judgment no. 81/2016 of 5 March

§ 12. In its Judgment of 5 March 2016, the Twenty-Eighth Chamber of the Madrid Provincial Court clarified, first of all, that when Article 277 of the Companies Act (LSC) requires that the accounting records demonstrate the existence of sufficient liquidity for distribution when the payment of interim dividends is to be agreed upon, it is referring "exclusively to cases in which the advance is made through the delivery of cash" (the purpose of the provision is to prevent the company from disposing of assets to obtain such liquidity and thus avoid the risk of hasty and disadvantageous transfers made with the aim of advancing the distribution of profits). However, the Court notes that the aforementioned provision does not prohibit the delivery of assets in lieu of dividends (as

was in fact agreed at the 2017 general meeting) nor does it require that, in such a case, the company have liquidity to pay them.

§ 13. With regard to the main issue at hand, the Provincial Court agreed with the claimant and appellant that the articles of association did not in any way provide for the payment of dividends in specie. However, it noted that such payment is possible if the shareholders unanimously agree to it. And, most importantly, it found that the shareholders' agreement of 5 May 2015 (which, as we recall, was signed by all of them) did indeed provide for it.

§ 14. It should be noted that in this case, the Court stated on two occasions that the agreement *expressly* provided for the payment of dividends in specie (fifth legal ground, paras. 2 and 5), while in paragraph 6 of the aforementioned legal ground, it indicated that the shareholders' agreement *"implicitly* envisaged the payment of dividends in specie". This latter reference is consistent with the reasoning in Judgment no. 715/2022— of the same chamber — of 30 September (*supra*, § 5), which held that this authorisation was *implicit* in the agreement — seventeenth legal ground —, an interpretation later adopted by the Supreme Court in Judgment no. 674/2026 (*supra*, § 6).

§ 15. The Court also concluded that the fact that the articles of association were not amended to incorporate an express authorisation for the payment of dividends in specie was irrelevant for these purposes. In this regard, it noted that one cannot "ignore that, among the various reasons that lead shareholders to adopt these shareholders' agreements, is their keeping within the internal or hidden sphere, without transferring them to the articles of association".

§ 16. In my opinion, the most relevant point is that the Provincial Court held that the unanimity required for the valid agreement to pay dividends in specie in the absence of a provision in the articles of association does not necessarily have to occur at a general meeting. And that, in fact, in this case, it had been established by the signing by all the shareholders of the shareholders' agreement that (implicitly or explicitly) contained such a provision. The Court added that, *furthermore*, it would be contrary to good faith to invoke an alleged breach of the articles of association when the parties were bound by agreements "that expressly [*sic*] provided for the distribution of assets".

4. Comments on the payment of dividends in kind and the unanimous consent of the shareholders

§ 17. In my view, once it is accepted that the unanimous shareholders' agreement (expressly or implicitly) provided for the payment of dividends in specie, the solution reached by the Supreme Court in Judgment no. 674/2026 of 5 May (*supra*, para. 2) and by the Madrid Provincial Court in Judgment no. 81/2026 of 5 March (*supra*, para. 3) is substantially correct.

§ 18. Certainly, it can be agreed that the legal doctrine set forth in the Supreme Court judgments cited above (*supra*, §§ 9-10) was applicable in this case, according to which the conduct of a signatory to a unanimous shareholders' agreement who contests a company resolution

passed in accordance with said agreement may be considered contrary to good faith. Both the Supreme Court and the Provincial Court echo this doctrine in the judgments discussed.

§ 19. But I find it equally interesting to note that, in the two decisions indicated (I believe more clearly in that of the Provincial Court), the idea is also present that the validity of the resolution to pay dividends in specie, which was passed by a majority at the meeting, depended on the existence of a "unanimous agreement" (more precisely, the consent of all the shareholders) providing for this possibility. And this circumstance merits, in my view, a few brief reflections to complete the analysis of the judgments at hand.

It is contrary to good faith for a party to a unanimous shareholders' agreement to challenge a resolution passed in compliance with that agreement

§ 20. Although there is no provision in respect of dividends equivalent to the one set out for liquidating dividends in Article 393(1) LSC, it is reasonable to understand that a shareholder has the right (an individual right, not subject to majority decision) to be paid dividends in cash (Arts. 277 and 278 LSC seem to presuppose that this is the natural means of paying them). It could also be argued that shareholders who so consent may be paid the dividends to which they are entitled *in kind*. Indeed, in my opinion, it is highly doubtful that the law intended to grant each shareholder, considered individually, the right to veto other shareholders who so desire from being paid their dividend in kind. The existence of a "unanimous agreement" (see Art. 393(1) LSC), that is, strictly speaking, the concurrence of all shareholders' consent, would not — in my view — be strictly necessary for the dividend in kind to be paid to a shareholder who accepts this form of satisfaction of their claim (in short, the shareholders in general meeting could, by majority vote, agree to pay the share in kind to those shareholders who consent). However, such unanimous consent would obviously be necessary to agree to the payment of the dividend in specie (in whole or in part) to each and every shareholder.

§ 21. It is true, however, that this idea may raise certain objections when one considers the obvious risks that arise when, on the basis of a majority agreement, some shareholders are paid the dividend in cash and others are paid the dividend in kind (especially given the difficulty often involved in valuing the assets to be delivered and the possibility of violating the principle of equal treatment — Art. 97 LSC — by transferring to the shareholders given assets or rights a value greater than that which would correspond to them under the law and the articles of association). Therefore, bearing this issue in mind, it is common practice to regard the consent of all shareholders as necessary before a decision can be taken to pay dividends in kind (see Madrid Provincial Court (Twenty-Eighth

Chamber) Judgment no. 250/2020 of 19 June [ECLI:ES:APM:2020:6672] and the Directorate-General of Registries and Notaries' Decision of 30 July 2015 [Official Journal of Spain of 30 September]). This is the approach that underlies, it seems to me, the reasoning of the Provincial Court on this point and which we will take into account below.

§ 22. Indeed, without delving now into an in-depth discussion of whether or not the unanimous consent of the shareholders is necessary in this context (and without assessing whether the risks already mentioned — *supra*, §21 — sufficiently justify the requirement of such unanimity), it does seem possible to affirm that such risks will be significantly reduced if all shareholders consent to the payment being made in kind (regardless of whether some of the shareholders who have agreed to this possibility of payment of the dividend in kind prefer to exercise their individual right to be paid theirs in cash when the time comes). Note that we are not strictly referring to a unanimous decision stipulating that the shareholders must be paid the dividend (in whole or in part) in kind, but rather to a "unanimous agreement" (which may be adopted prior to the meeting called to decide on the appropriation of profits) providing for the possibility that some of them may be paid dividends in this form if they consent and the shareholders so agree in general meeting when the time comes.

§ 23. Well, once it has been established that all the shareholders consent to dividends being paid in kind, there should be no obstacle to the shareholders deciding by majority vote in general meeting to pay the dividend in this manner to those shareholders who accept it (and it should be recalled that, in our case, the shareholder in question agreed — he voted in favour of the relevant resolution — to receive real estate instead of cash). All of this is, of course, without prejudice to the remedies available in the event that the transaction ultimately materializes under conditions that violate the principle of equality among the shareholders by failing to offer all of them the opportunity to participate in the distribution in specie or by allocating to some of them assets or rights with a value exceeding the amount of the dividend to which they were entitled.

§ 24. This possibility of paying the agreed-upon dividends in kind may be reflected in the articles of association through a specific provision (which, in the Provincial Court's view, would require unanimity to be included in the articles). Or it may be established in a resolution passed (with the affirmative vote of all the company's shareholders, if the approach outlined above, §21, is adopted) at the same general meeting that decides on the appropriation of profits. However, there is also no obstacle to each shareholder expressing their individual consent outside the meeting, for example, as was the case, in a previously concluded unanimous shareholders' agreement (in which case each shareholder's expression of consent would not strictly constitute a vote, and thus the regime governing these specific declarations of intent would not apply). In this regard, the phrase "unanimous agreement" sometimes used (see Art. 393(1) LSC) should not be understood as restricted to a company resolution passed at a meeting following the collegial method, but rather to the existence of consent from all share-

holders. This is what — I believe — the Provincial Court means when it explains that "the unanimous decision does not necessarily have to be adopted at a general meeting and may have taken place through a unanimous agreement".

§ 25. A separate issue, as noted above, is whether the consent of all shareholders is actually required for the shareholders to approve in general meeting the payment of a dividend in kind to those shareholders who agree to it.