The (not totally clear) effects of judicial resolutions sanctioning refinancing arrangements

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Last February, the Barcelona Court of Appeal ruled on whether the judicial decision sanctioning a refinancing arrangement under the 4th Additional Section (**4th AS**) of the Spanish Insolvency Act (**SIA**) qualifies as an enforcement order or *título ejecutivo.*

This is one of the first decisions rendered on refinancing arrangements and in addition it gives some relevant, although not completely clear, indications as to the effects of court-sanctioned refinancing arrangements.

In broad terms, a *título ejecutivo* constrains the court to verify that the formal requirements set out by the law for bringing this type of claim are met. If they are, the court shall order enforcement. No allegations are admitted as to the merits of the claim. The debtor is entitled to bring ordinary proceedings to discuss the merits, but this does not stop enforcement.

Back in July 2013, the Spanish group CELSA entered into its second refinancing arrangement, which was supported by the required majority of its financial creditors and thus judicially sanctioned. As a result, a five year extension or *espera* was imposed in respect of all financial claims, including those of the eight dissenting creditors.

One of the companies of the CELSA Group benefiting from such refinancing (Barna Steel, S.A.) brought an action against one of the dissenting entities (Liberbank) asking for judicial enforcement of the refinancing arrangement. It alleged that Liberbank was not allowing Barna Steel, S.A. to make new withdrawals under the factoring agreement and that amounted, in practice, to a breach of the extension or *espera* contemplated in the refinancing arrangement.

The first instance commercial court found that, when it comes to factoring agreements, an *espera* entails by definition the obligation to allow new withdrawals (probably, given the revolving nature of the factoring facility). It also found that a court decision sanctioning the refinancing arrangement is enforceable *per se*.

The matter was then brought before the Barcelona Court of Appeal, which revoked the enforcement order of the commercial court.

The Court of Appeal found that a judicially-sanctioned refinancing arrangement does not qualify as a *título ejecutivo.* Only those documents expressly considered by the law as such are enforcement orders, and neither the SIA nor any other legal provision confers that legal nature to judicial resolutions sanctioning refinancing arrangement.

The Court of Appeal also found that dissenting creditors cannot qualify as obligors under the refinancing arrangement, but merely as "affected parties". They have the legal duty to put up with the *espera,* but this does not mean that the debtor has the right to request new withdrawals.

The court said –and this is probably the most relevant but the less clear part of the decision- that such a right could derive from the original financing agreement between the two parties, but not from the refinancing arrangement, especially when the latter does not contemplate that right on the side of the borrower and the corresponding obligation on the side of the lender. The Court went on, if the dissenting lender breached the financing agreement, then it could be sued by the debtor under ordinary judicial proceedings.

Finally, the Court of Appeal said it is clear that a refinancing arrangement can impose "negative" obligations upon dissenting creditors, namely the obligations not to demand payment of the debt when an extension has been imposed and not to file for insolvency.

However, according to the Court of Appeal, it is not clear that a refinancing arrangement can impose "positive" obligations, like keeping the financing revolving facilities open, accepting the discount of new accounts payable, etc.

The decision of the Barcelona Court of Appeal leaves ample room for discussion about an issue like this, which is key for dissenting lenders.