Restructuring plans. Taking the principle of minimal judicial intervention to the extreme

(2013-2024: 100 notes on arbitration, litigation (corporate, joint ventures, M&A, capital markets, finance and antitrust), restructuring and insolvency)

Madrid, September 2024

(This is our 100th note. We started writing these notes to keep ourselves abreast of judicial and arbitration developments, inform about legal issues and keep in touch with our clients, colleagues and friends.

We are very grateful to our readers for reading our notes and their feedback and for encouraging us to keep producing them.

Ours are modest notes although we spend a considerable amount of time selecting the issues we want to discuss and trying to make them practical and concise. The editorial discussions we hold every month have proved very formative to all in our team.

In the years ahead we will probably see more disputes about the subject matters of our notes, namely company law (directors' duties and liability, shareholder activism, shareholder abuse, JVs), market abuse and public takeovers, finance, antitrust private actions, insolvency and restructuring plans.

We look forward to keeping counselling on and handling these types of matters and writing about them.)

The judicial sanctioning of restructuring plans under the Spanish Insolvency Act (IA) is based on the "principle of minimal judicial intervention"[1], pursuant to which the court must sanction a plan unless the requirements provided for by the IA are "manifestly" not met on the face of the documents submitted by the applicant[2]. Some courts are taking this principle to the extreme[3].

An example of this trend is ruling 71/2024 of 5 February of the commercial court 1 of Córdoba, which sanctioned a restructuring plan with five classes of claims (secured, ordinary and subordinated financial claims, claims held by a supplier and shareholders' PPLs) that was approved by the last two[4] despite the following:

---

[1] Preamble to the law 16/2022 of 5 September that amended the IA.

[2] Article 647 IA.

[3] Some first instance courts have considered (see, for instance, ruling 238/2023 of 30 May of the commercial court 13 of Madrid) that, "except in manifestly gross and blatant cases of violation of the law or public policy, the judge must sanction the plan", notwithstanding the right to challenge it before the court of appeal.

[4] Representing around 33% of the affected claims and less than 1.4% of them if excluding shareholders' claims.

- The court noted that the plan lacked "clarity", "precision" and "order", to the point that it was difficult to know "what [it was] really about" and warned that this could cause "problems of interpretation" (for example, as regards guarantees).

- The court found that, although the expert had certified that the two classes of creditors approving the plan were *in the money*[5], his analysis was flawed, as it was not based on the IA's ranking of claims. However, the court considered that the expert's "error" was "perfectly understandable" due to the unclear wording of the law and noted that the plan could always be challenged before the corresponding court of appeal on the grounds that the classes of creditors that approved it were not in fact *in the money*.

- For a plan to be sanctioned it must at least be foreseeable that the company will not be able to regularly meet its obligations falling due within two years (*probable insolvency*)[6] and the court found that this requirement "must be examined in a very lax manner and almost taken as met *a priori*".

Plans approved by creditors that hold a meaningless percentage of the debts are also a source of perplexity and debate.

An example can be found in ruling 166/2024 of 19 February of the commercial court 1 of Oviedo, which sanctioned a restructuring plan with three classes of claims (suppliers' claims and ordinary and subordinated financial claims) that was approved by one of them (the suppliers) representing only 2.75% of the affected claims.

The judicial sanctioning of plans approved by such slim percentages of claims is being facilitated by the margin of discretion granted by the IA regarding class formation[7] and the rule that a single class of creditors that are *in the money* can approve a plan[8].

Restructuring plans that do not affect creditors in general but are used by the majority to dilute the minority shareholders or release the company from its obligations towards them are also problematic.

It is worth mentioning ruling 238/2023 of 30 May of the commercial court 13 of Madrid (case *Torrejón*), which refers to a hospital company with two shareholders holding 89.47% and 10.53% of the capital that, pursuant to a shareholders' agreement, in 2011 granted the company a subordinated loan of more than EUR 100 million that fell due in December 2022.

In April 2022 the company borrowed EUR 21,5 million from its majority shareholder to meet urgent cash requirements and eventually fully repaid it, only a few days before the maturity of the subordinated loan. However, it did not, even partially,

[5] According to article 639.2º IA, a restructuring plan can be sanctioned if approved by a single class of creditors that, based on a valuation of the company as a going concern, would presumably receive some payment in case of insolvency proceedings.

[6] Articles 638.1º and 584 IA.

[7] Articles 623 *et seq* IA.

[8] Article 639.2º IA.

reimburse the subordinated loan and filed a restructuring plan that was sanctioned by the court.

As there was a single class of creditors consisting of the two shareholders, the vote of the majority shareholder was sufficient to approve the plan, which essentially provided that repayment of the subordinated loan would be deferred until 2039.

The minority shareholder challenged the plan before the Madrid Court of Appeal (MCA) on the grounds, *inter alia*, that both shareholders (i) should not have been included in the same class of creditors, as they had no "common interest"[9] since one "abusively" and "fraudulently" imposed the plan on the other, and (ii) did not receive an "equitable treatment"[10], as the company paid EUR 21,5 million to the majority shareholder, but nothing to the minority shareholder, shortly before the approval of the plan.

The MCA dismissed the challenge[11], among others, for the following reasons:

- Imposing one's own majority does not *per se* amount to civil fraud, since the extension of a restructuring plan to minority creditors that have not voted in favour of it is "an effect expressly provided for in the law".

- The two shareholders clearly had a common interest, even though their "positions" were "asymmetrical", for they were both shareholders of the debtor company, their claims resulted from the same loan and both would have had the same ranking in case of insolvency.

- They had not been treated inequitably, as the restructuring plan only referred to their claims resulting from the subordinated loan and affected them in the same way. The EUR 21,5 million claim paid by the company to the majority shareholder was left outside the perimeter of the plan, which can be defined "at the discretion" of those submitting the plan.

---

[9] Article 623.1 IA.

[10] Article 638.4º IA.

[11] Judgment 131/2024 of 23 April.