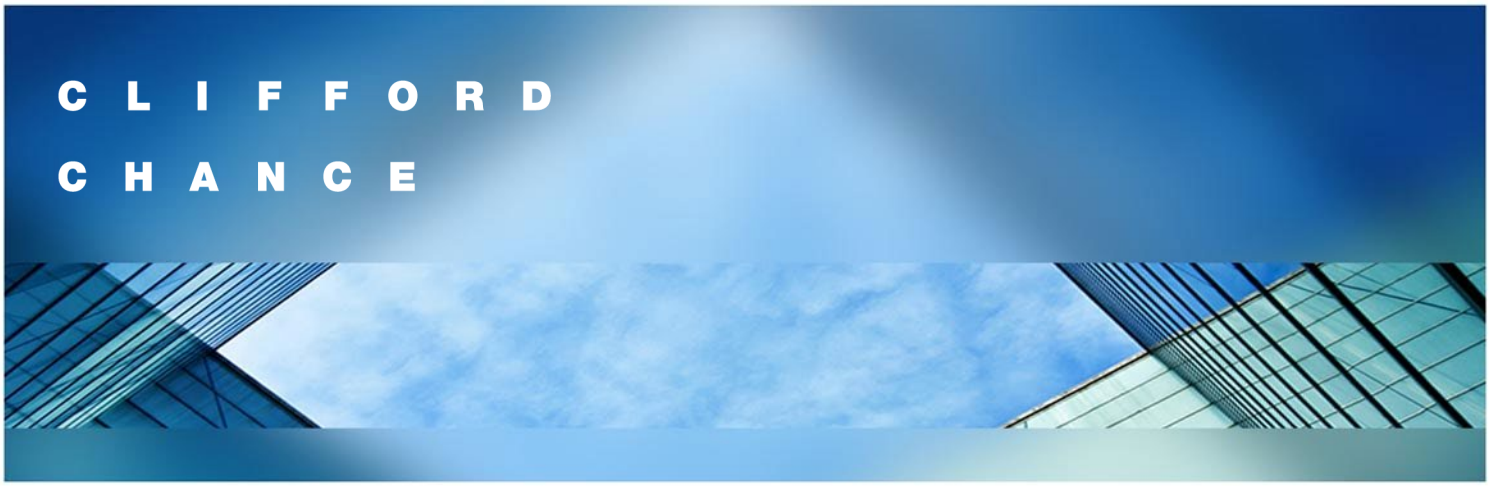

COURT APPROVAL OF SPANISH RESTRUCTURING PLANS: A CHANGING TREND

Spanish courts, which had initially applied a "flexibility principle" when reviewing restructuring plans submitted for court sanction, are now being more rigorous in the application of the legal requirements.

The impact of these developments mean that debtors looking to restructure need to ensure that they take timely advice when they encounter financial difficulties. Restructurings are still very much possible, but debtors should not expect the same degree of flexibility as in the past. For creditors concerned about a potential restructuring and the impact on their rights, it is even more important that they take steps positively to assert their rights. The good news is that the more uniform approach by the Spanish courts will provide greater certainty and predictability for all stakeholders involved in a Spanish restructuring.

Key issues

- When debtors try to push the limits of the law, the restructuring plan can be rejected
- Courts adopting a uniform approach when reviewing restructuring plans: objective criteria must be applied
- Formation of classes, what was becoming quite arbitrary for the purposes of cross class cram down, is being more rigorously examined
- Future viability, as a legal requirement

The new regulation on court approval (*homologación*) of restructuring plans, entered into force in Spain in September 2022. In the months following the reform we witnessed a number of court decisions in which highly flexible criteria were being applied, with the aim of facilitating restructurings. In light of this flexibility, some debtors sought to push the boundaries to the limit.

Artificial creation of creditor classes

Debtors on several occasions worked with a minority of creditors to form classes which enabled the approval of restructuring plans which relied upon cross-class cram down. The best-known cases were Xeldist Congelados, S.L., Das Photonics, S.L., J. Vilaseca, S.A.U., and Alimentos El Arco, S.A.

The courts are now scrutinising more carefully the restructuring plans put to them for approval. It is now increasingly common for plans that do not clearly meet all of the legal requirements to be rejected on the court's own initiative, or for challenges made by dissenting creditors after the plan has been approved to be upheld.

Scope of the restructuring plan

The courts are establishing an increasingly uniform approach to the scope (*perímetro*) of restructuring plans. According to the Insolvency Act, the applicant (usually the debtor) can determine which liabilities it wants to restructure. This starting point had given rise to debate as to whether judicial control could be exercised in this regard, or whether the debtor could, at its own discretion, decide which liabilities to restructure and which would be left intact, being paid in full outside the scope of the restructuring plan.

The leading case is the Judgment of 23 July 2024 from Barcelona Commercial Court No 11 (Move Art Mission, S.L.), which rejects an arbitrary approach to the scope of the restructuring plan. While the court acknowledges some creditors can be left out of the restructuring plan, it states that such a decision requires "sound justification in this regard", applying objective criteria.

Formation of creditor classes

The courts are also reviewing more rigorously the criteria applied when forming creditor classes. Under Spanish law, as a general rule, creditors of the same rank in a formal insolvency must form a single class for the purposes of a restructuring. The only departure from this rule is when the liabilities do not share a substantially common interest. The Ruling of 6 March 2024 from Seville Commercial Court No 2 states that the law requires that there be "sufficient reasons" justifying the formation of different classes; that is, the lack of substantial commonality in the creditors' interest.

Indeed, in the context of non-consensual plans in which a majority of classes may bind dissenting classes, some debtors resorted to multiplying classes by applying subjective criteria. In the case of Naturchar, S.A., no fewer than eight creditor classes were posited, based simply on the nature of the different supply agreements (e.g. packaging, machinery, professional services). The Judgment of 30 July 2024 from the Almería Commercial Court upheld the challenges brought against the plan, on the grounds that the origin of the liabilities is not sufficient as a criterion for forming different classes.

A similar case occurred in the restructuring of the Ecolumber group, where a company had formed a senior class based on securing a creditor with a pledge after the negotiation commencement notice, and another class of ordinary liabilities, separate from the rest of the unsecured liabilities, based on the fact of the claims having originated from a share sale and purchase. The Judgment of 16 October 2024 from the Barcelona Court of Appeal upheld the challenges, on the grounds of improper formation of classes.

We have also witnessed some attempts to use interim financing, granted prior to the court approval, to create a class which helps the debtor reach a majority of classes in number. The restructuring plan of Inmobiliaria San José, S.A. shows how a debtor who has the support of only one class of creditors (consisting of creditors connected to the debtor), while all external creditors are against it, can try to push a plan through simply by creating a third class corresponding to the financing that a creditor has agreed to provide in the context of the restructuring plan. The Ruling of 23 January 2025 from Barcelona Commercial Court No 5 declined to approve the plan.

The result was the same for the restructuring plan of Import Export Marlina, S.A.: in its Judgment of 21 March 2024, Murcia Commercial Court No 2 rejected the plan, finding that the debtor had formed a class (which it considered interim financing; a supplier who had agreed to postpone future payments) to artificially obtain the class majority required by law.

Reasonable expectation of viability

One basic premise that the courts now demand in the context of court approvals is that the restructuring plans create a reasonable expectation of the future viability of the company (its success need not be certain, but there must be at least a fair probability of success).

This criterion has led to the rejection of plans which openly targeted liquidation rather than business continuation (Judgment of 28 October 2024 from Madrid Commercial Court No 14 – Compañía de Phalsbourg, S.L., and Ruling of 20 November 2023 from Madrid Commercial Court No 12 – Industrias Bianchezza, S.A.U.) and plans that do not demonstrate future viability (Ruling of 20 December 2024 from Jaén Commercial Court No 1 – Aceites Naturales del Sur, S.L., and Judgment of 23 November 2024 from San Sebastián Commercial Court No 1 – Transbiaga Transportes Especiales, S.L.).

Conclusion

For debtors and creditors alike the importance of seeking timely advice on the restructuring plan process and understanding the approach of the courts, will be crucial in achieving a successful restructuring.

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