
# THE CHALLENGE BY CREDITORS TO THE RESTRUCTURING PLANS OF COMPANIES IN A PRE-BANKRUPTCY SITUATION. ANALYSIS AND CONCLUSIONS OF THE JUDGEMENT OF THE PROVINCIAL COURT OF PONTEVEDRA Nº 179/23, ON 10 APRIL 2023

***ABSTRACT:***

*This Newsletter aims to be a legal note that clarifies the concerns and uncertainties that the new scenario of the pre-bankruptcy institution is generating for professionals and/or entrepreneurs, which the recent bankruptcy reform approved by Law 16/2022, of 5 September, reinforces and provides a more detailed and stable legal framework. Specifically, our work focuses on analysing the challenge of restructuring plans and, with special attention, the recent Judgment of the Provincial Court of Pontevedra Nº 179/23, of 10 April 2023, which upholds the challenge brought by creditors to the Order approving the restructuring plan presented by a company in a pre-bankruptcy situation.*

## I. INTRODUCTION

Over the last few months, many authors have analysed and commented on the virtues and weaknesses of the new reform of the revised text of the Insolvency Act[1] *("Texto Refundido de la Ley Concursal" or TRLC)*. Without prejudice to the different analyses and approaches that each

[1] Law 16/2022 of 5 September on the reform of the consolidated text of the Insolvency Act, approved by Royal Legislative Decree 1/2022 of 5 May, which transposes Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019.

author has given to their articles, there is a common sentiment that welcomes and applauds the reform because it has come at the right time.

Currently, and it seems that this will continue in the short and medium term, we are in a financial and social scenario of great uncertainty at a global level, which will foreseeably lead to an economic recession that will directly and negatively affect the business fabric of Spain.

Well, in this context, the vast majority of authoritative voices have highlighted the wisdom of the new reform because it mainly provides the different parties with tools that allow them to find agile and effective solutions both in the pre-bankruptcy and bankruptcy framework in order to ensure the viability of a company immersed in a situation of current, imminent, or probable insolvency.

The aforementioned reform gives a relevant significance to the pre-bankruptcy institution, dedicating the second of its four books to it, with the main pillar being the restructuring plans, which replace the refinancing agreements.

These restructuring plans have some very noteworthy and innovative aspects, and without wishing to expand on them because this is not the purpose of this note, we consider it appropriate to list some of them, such as: (i) they may be approved without the consent of creditors and even of the shareholders, i.e. they will be binding for creditors and shareholders -in certain cases-; (ii) their purpose will be to modify the composition, structure and conditions of the assets and liabilities, and even the equity, even allowing the partial or total sale of the productive unit -that is, they may have liquidation effects-; (iii) they will have to be formalised in a public instrument; (iv) the general principle of validity of contracts is extended to more cases; (v) the plan may provide for the termination of reciprocal obligation contracts; (vi) the classification of creditors into different classes; (vii) the applicable majorities and "dragging" between classes horizontally and vertically, which will determine whether the plan is consensual -approved by all classes- or non-consensual -approved by a majority of classes-; (viii) the approval of the restructuring plan in certain cases: (a) when it is intended to impose the content of the plan on dissenting creditors or classes of creditors -and/or partners-; (b) when it is intended to terminate contracts in the interest of restructuring and (c) when it is intended to protect interim financing and new financing; (ix) the appointment of an expert, in the cases provided for in the reform; etc.

In short, we are facing a new pre-bankruptcy scenario in which the debtor has new tools and ample freedom to present a personalised and specific plan in order to project and justify the viability of the company.

Notwithstanding the above, the legislator has also provided creditors with certain legal "weapons" to safeguard their rights in the face of the broad freedoms that the reform grants the debtor, the most notable of which are: (i) confirmation of the formation of classes -article

625 TRLC ("Texto Refundido Ley Concursal")-; and (ii) the right to challenge the Order approving the restructuring plan -articles 653 and subsequent TRLC-.

Without prejudice to the particularities and relevant modifications that the new reform presents, in relation to restructuring plans, we consider that the cornerstone and object of major debates between debtors and creditors is class formation.

In this respect, a major role will be played by the Courts and Magistrates, who will have to deal with and restrict the formation of unjustified, anomalous, and contrived classes whose sole objective is to obtain the necessary quorum to approve the plan, without paying attention to and being concerned about the viability of society. In effect, and even being aware of the difficulty for judges and magistrates to put brakes and obstacles in the way of proposals that aim to save companies and jobs, they should not approve restructuring plans that form artificial, unjustified, and fraudulent classes of creditors that conceal an orderly liquidation for the sole and exclusive benefit of the shareholders.

## II. CHALLENGES TO THE RESTRUCTURING PLANS

The restructuring plans will be processed through the bankruptcy incident and will have to be challenged before the Provincial Court -article 653 TRLC-, an innovative issue which has caused problems in practice because the Lexnet system does not allow its presentation and, therefore, after making the appropriate consultation with the Courts and Magistrates, for the time being, and on an exceptional and temporary basis, the solution offered is to present the challenge via Lexnet as if it were a writ of summons. In any case, it is always advisable to consult the corresponding Provincial Court beforehand. In the event that several challenges have been filed, they will be processed jointly. The challenge will not have suspensive effects, and the judgement upholding the challenge will only have effects against the person who has challenged it, unless the judgement considers that there is a lack of concurrence of the necessary majorities or incorrect formation of classes, in which cases the judgement will render the plan ineffective - the scope of said ineffectiveness will never prejudice the rights acquired by third parties in good faith in accordance with mortgage legislation (article 661.3 TRLC).

The grounds for challenge are set out in articles 654, 655 and 656 TRLC and will depend on who is challenging the plan, as well as whether it is a consensual or non-consensual plan.

In the case of consensual or non-consensual plans, article 654 TRLC, in accordance with article 655 TRLC, lists the following common grounds that may be invoked by the holders of affected credits who have not voted in favour of the restructuring plan, which are:

1. That the requirements of communication, content and form set out in Chapter IV of this Title have not been complied with.

2. That the formation of the classes of creditors and the approval of the plan have not taken place in accordance with the provisions of Chapters III and IV of this Title.
3. That the debtor is not likely to become insolvent, imminently insolvent, or currently insolvent.
4. That the plan does not offer a reasonable prospect of avoiding insolvency and ensuring the viability of the company in the short and medium term.
5. That its claims have not been treated on an equal footing with other claims of its class.
6. That the reduction in the value of their claims is manifestly greater than what is necessary to ensure the viability of the company. In the case of an assignment of claims, it shall be presumed that this is not the case if the challenging creditor has acquired the claim at a discount greater than the reduction in value of the claim.
7. The plan does not meet the test of the best interests of the creditors.

In the case of non-consensual plans, and in those cases in which the affected credit holders have not voted in favour of the plan and belong to a class that has not approved it also for the following reasons listed in article 655 TRLC, which are:

1. That it has not been approved by the necessary class or classes in accordance with the provisions of section 1 of this chapter.
2. A class of claims is to hold or receive, in accordance with the plan, rights, shares or units with a value exceeding the amount of its claims.
3. That the class to which the contesting creditor or creditors belong will be treated less favourably than any other class of the same rank.
4. That the class to which the challenging creditor(s) belongs will hold or receive rights, shares, or interests with a value less than the amount of its (their) claims if a lower ranking class or members are to receive any payment or retain any rights, shares or interests in the debtor under the restructuring plan.
5. In case the plan affects public credit, that the debtor has failed to comply with the obligation to be up to date with its tax and social security obligations.

Particular mention should be made of the "4.", which regulates what is commonly known as the "absolute priority rule", according to which a dissenting class of creditors must be fully satisfied before a lower-ranking class can receive any payment or maintain any share in the capital under the restructuring plan or, *grosso modo*, that junior creditors are not paid before senior or higher-ranking creditors.

Notwithstanding the above, the legislator in Article 655.3 TRLC establishes the following exception: *"the approval of the restructuring plan may be confirmed, even if this condition is not met, when it is essential to ensure the viability of the company and the claims of the affected creditors are not unjustifiably prejudiced"*. Clearly, this exception is going to be the subject of arduous debates in the challenges because it is more than likely that most of the plans do not affect the shareholders in any way, who are considered junior credits, and the referred exception is subject to and conditioned by interpretable and subjective reasons.

In short, we are faced with a limited and specific challenge framework, but which is not free of debate and controversy, mainly for three main reasons: (i) the scope of the plan; (i) the rule of absolute priority; and (iii) disproportionality of the difference in treatment between creditors with the same ranking in insolvency proceedings. In other words, and in a very synthesised manner, due to the rupture or breakdown of one of the guiding principles of the insolvency proceedings "*par conditio creditorum*".

## III. ANALYSIS OF THE JUDGEMENT OF THE PROVINCIAL COURT OF PONTEVEDRA NO. 179/23, OF 10 APRIL 2023

In the context of the new scenario of challenges to restructuring plans, we will now analyse the main subject of this note, which is the analysis of the first decision of a Court of Appeals ruling on a challenge to an approved restructuring plan, in which we have intervened directly on behalf of one of the creditors affected and challenging the restructuring plan submitted by Xeldist Congelados, S.L.U. (hereinafter, "XELDIST").

### A. BRIEF BACKGROUND TO THE CASE

On 29 July 2022, XELDIST notified the opening of negotiations with creditors before the Commercial Court No. 1 of Pontevedra - as it could not be otherwise, within the framework of Royal Legislative Decree 1/2020, of 5 May -, being agreed by Decree of 9 September 2022 the opening of negotiations with creditors (hereinafter, "Pre-bankruptcy").

On 24 November 2022, XELDIST registered the restructuring plan proposed to the creditors before the notary Mr. Pablo Rueda Rodríguez-Vila (hereinafter, "Plan"), which was filed before the Commercial Court Nº 3 of Pontevedra, and which was published by Edict on the *website* of the Public Insolvency Register on 30 November 2022.

After only one day, on 2 December 2022, the Edict dated 2 December was published on the *website* of the Public Insolvency Register announcing that the Order had been issued. As a noteworthy aspect, it is worth mentioning that the Court did not publish the Order approving XELDIST's restructuring plan on the aforementioned website, as required by Article 654, paragraph 1 TRLC, and which we quote: *"Within fifteen days following the publication of the approval order in the Public Insolvency Register, the holders of affected credits who have not voted in favour of the restructuring plan approved by all classes of credits may challenge the order on the following grounds: [...]."*

The grounds put forward by the challenging creditors were various, some of a concrete and specific nature of the case and the creditor in question, of which we highlight the grounds for challenges that have been analysed by the Audiencia in the aforementioned judgment and which are transposed to any other case in general, which are:

- The anomalous and artificial formation of classes.
- The perimeter of affectation.
- Less favourable treatment than another creditor of the same rank.

Well, the Plan was mainly supported by the four (4) unipersonal classes: "Supplier Contributor", "Frigalsa", "Factor Energía" and "Vinova" -special mention deserves, for being the former partner-; and the "leasing" class composed of three (3) creditors -of which only two (2) voted in favour-, that is, six (6) creditors -who are not going to make any sacrifice for XELDIST, because they will collect 100% of their debt- decide the present and future of XELDIST. In order to be more graphic, according to the data provided in Annex I of the Plan, we detail the debt represented by the creditors who have voted in favour, compared to those who have not supported the Plan, being the same:

- Supplier Contributors: 548,319.55 euros. The creditor voted in favour of the Plan.
- Frigalsa: 224,718.55 euros. The creditor voted in favour of the Plan.
- Factor Energía: 639,120.77 euros. The creditor voted in favour of the Plan.
- Vinova -former partner-: 223,022.06 euros. The creditor voted in favour of the Plan.
- Leasing: 1.014.430,83 euros. Two creditors voted in favour, Vauxhall Leasing, S.L. and Crede Capital Group, S.L., which has a total credit of 1,015,159 euros.

In effect, with a basic arithmetic operation we obtain the following conclusions: 25% - that is, 2,649,611.76 euros - of the debt affected by the Plan decided and dragged along 75% of the debt affected by the Plan - that is, 10,425,308.15 euros -. Consequently, six (6) creditors who represent 25% of the debt affected by the Plan and who are going to collect 100% of their debt decide over the rest of the creditors who, among others, bear a reduction of 85% of their debt and a wait of six (6) years.

In short, from the above, and considering the treatment that the affected credits have received, we highlight the following:

- Suppliers: Alternative A: 50% discount and 6-year waiting period -with a 3-year grace period-; Alternative B: 20% discount and 60-month waiting period.
- Supplier Contributor: 0% discount and 60-month waiting period.
- Frigalsa: 0% discount and 12-month waiting period.
- Property Lessors: 0% discount and a waiting period until 31 December 2022.
- Financial creditors: 85% discount and 6-year waiting period - with a 3-year grace period

It is unquestionable that creditors sharing the same rank suffered different deductions and delays.

Likewise, and regarding the perimeter, the Plan did not affect creditors with debts of less than 1,000 euros, ICO (Official Credit Institute) and similar credits and public credits. Furthermore,

and focusing on the shareholders, it must be confirmed that the Plan does not affect them either, hence the absolute priority rule was called into question.

In short, in accordance with the provisions of articles 654 and 655 TRLC, there were sufficient reasons for the Court to uphold the breach of the aforementioned TRLC; the Court accepted as the only successful reason: *"Treatment less favourable than another creditor of the same rank"*, and, therefore, the aforementioned ruling has only affected the challenging creditors.

## B. MOST RELEVANT FUNDAMENTALS

### 1. REASON: ANOMALOUS AND CONTRIVED CLASS FORMATION

Broadly speaking, and considering the data set out above, the contesting creditors allege the infringement of the current regulations through the incorrect formation of classes. In addition, they allege a violation of Art. 623 TLRC in two specific cases, to quote literally:

> *a) The Classes "Energy Factor" and "Supplier Contributor" should not be two separate classes, but form a single class within the Class "Suppliers" because the interests of all creditors of those classes are common, their bankruptcy ranking being that of ordinary claims.*
>
> *b) The "Frigalsa" and "Leasings" Classes should not be two separate classes, but form a single class because they are both creditors with special privilege, without there being sufficient reasons to justify the separation into two classes.*
>
> *In this way, the 8 classes would be reduced to five in which only two classes would have voted in favour, so that the simple majority required for the approval of this non-consensual plan provided for in art. 639.1 TRLC would not be met.*

In contrast to the arguments put forward by the parties, which we have summarised, the Court considers that there are objective reasons that justify divergent and differentiated treatment between the different creditors - even if they share the same rank - and/or classes, taking into account the existence of strategic creditors that are vital for the continuity of the business activity. We highlight the following grounds of the judgement, which we quote verbatim:

> *27.- If the insolvency rank of a claim, in relation to the order of payment in insolvency proceedings (art. 623. 2 TRLC), and which is a reflection of that common interest to be included in the same class, refers to the legal position of the credit in relation to the expectations of collection in a situation of insolvency of the debtor, the exemplary and non-assessed cases, which justify the exception to the general rule, refer to elements that have little or nothing to do with the insolvency rank and, therefore, turn the concept of common interest into a concept with multiple meanings, without a clear prefixed legal criterion, without a clear prefixed legal criterion, convert the concept of common interest*

*into a concept of multiple meanings, without a clear prefixed legal criterion for its application to specific cases, becoming a widely elastic and flexible concept, under which multiple situations can be covered, with the only requirement being that the classification, separating credits of the same rank, must be based on sufficient reasons to justify it, which can be of the most varied nature, as long as it is based on objective criteria.*

*33.- But this criticism is not acceptable when, as in the previous case, we are faced with a separation of classes that obeys one of the optional criteria provided for by law, such as the different way in which this credit is affected by the restructuring plan in relation to the credits of its insolvency rank, Moreover, as the debtor itself argues, there are other objectively verifiable reasons that justify it, as this class was considered from the outset of the restructuring plan as a critical class for the survival of Hiperxel's business and the viability of the company. The aim of the restructuring plan was, from the outset, to bring in other suppliers in this class to supply the product needed for the Christmas campaign and to provide the minimum rotating stock for the rest of the year (see page 10 of the plan, where one of the objectives of the negotiations is expressly stated to be the 'generation and search for new strategic suppliers').*

*34.- [...] This divergent and differentiated treatment is based on an objective situation of dependence of these strategic creditors in order to be able to maintain the basic functioning of the business activity. [...] The difficulty of these concepts is to delimit the sufficient common interest that justifies the integration of credits in the same class, and vice versa. But it is difficult not to find the divergence of interests in the cases expressly provided for by the legislator. What is relevant is to avoid arbitrariness or fraud of law by means of "manipulation" of classes, [...]*

**2. REASON: PERIMETER OF AFFECTATION.**

In this case, the challenging creditors focus their allegation on the non-affectation of the financial institutions holding the ICO credits, as well as IBERCAJA, holder of a credit of 126,029.05 euros that would have a guarantee from AvalMadrid.

The Audiencia, in view of the novelty of the case, before basing its position on the matter, clarifies that the perimeter of affectation must be subject to judicial control.:

*[...] Judicial control over how the claims have been grouped to form the different classes presupposes a control over how this "perimeter of assignment" has been delimited and ensures that it responds to objective and sufficiently justified criteria. The only exceptions to the principle of the universality of the liabilities that can be assigned are public claims, labour claims, maintenance claims and non-contractual claims. [...] It can therefore be concluded that a correct formation of the scope of allocation must be examined in the context of the decision on the correct formation of the classes which, logically, would be*

*affected - as, possibly, would the majorities to approve or not approve the plan - if classes of credits that should form part of the liabilities affected were unduly excluded, as well as if credits were included in the formation of classes that should have remained outside the scope of allocation.*

In short, the Court states that the scope of the Plan is explained and justified and, furthermore, considers that in the case in question there are objective circumstances that justify the fact that the Plan does not affect financial credits guaranteed by third parties -ICO and Avalmadrid-, the personal guarantee being a sufficient and objective reason. Likewise, with regard to the ICO, the Court points out, accepting the arguments put forward by the debtor justifying the lack of time to negotiate, that: *[...] the novelty of the restructuring plans made it impossible to foresee whether, once these ICO credits were included in the perimeter within the category of "Financial Creditors", the public guarantee of the financial institutions would be harmed as that class would be "dragged" entirely, even if they had not voted positively for the plan*.

Obviously, the allegation regarding the ICO, in the current context, could not have been defended by the Audiencia, because some initial criteria or rules have already been established for the allocation of ICO credits in the restructuring plans.

In view of the effect of annulling the resolution approving the restructuring plan that causes the defect in class formation, special mention should be made of the following allegation made by the Court, and we quote verbatim:

> *44.- On another point, we must insist that not just any irregularity or violation in the formation of classes should determine the serious effect of the total ineffectiveness of the plan referred to in art. 661.2 TRLC. Defects in such class formation must imply an alteration in the result of the vote for the approval of the plan. If it is innocuous, it should not be taken into consideration. Art. 654.2° TRLC only refers to the fact that the formation of classes and the approval of the plan have not been carried out in accordance with the provisions of chapters III and IV, but art. 655.2.1° TRLC contemplates as a cause of challenge in non-consensual plans, that it is not approved by the necessary class or classes…*

Consequently, the Audiencia defends that if the defect in the formation of classes does not affect the result of the approval of the restructuring plan, the defect or error in question cannot be given an contestability effect that annuls the whole of the plan, the maintenance of which, as far as possible, obeys the principle of preservation of acts and transactions.

**3. REASON: LESS FAVOURABLE TREATMENT THAN ANOTHER CREDITOR OF THE SAME RANK.**

The challenging creditors invoke as a ground of challenge the one provided for in art. 655.2.3° TRLC: *That the class to which the challenging creditor or creditors belong will be treated less favourably than any other class of the same rank.*

In the case at hand, all the contesting creditors belong to the financial class, which is clearly the most prejudiced by the reductions and waiting period proposed in the Plan: a waiting period of six (6) years -with a three (3) year grace period-; and a reduction of eighty-five (85) per cent.

The Court, having made it clear in previous arguments that it approves of the differentiated and divergent treatment between creditors of the same rank, comes to reflect on this point on the place that the test of equity should have in accordance with the principle of not unjustifiably discriminating.

As an argument in defence of the aforementioned test of equity, the Court refers to the following principles as noteworthy: (i) the best interests of the creditors, i.e., the credits that are more prejudiced by the plan compared to a scenario of insolvency liquidation -art. 654.7° TRLC-; or (ii) the rule of absolute priority.

As the main argument of the contesting parties, we highlight, and quote verbatim:

> *50.- [...] The complainant submits that this principle of equal treatment does not admit of exceptions. A literal reading of the rule would justify such a position. In consensual plans, Art. 638.4 TRLC establishes as a requirement that claims within the same class be treated on an equal basis. In line with this requirement, the failure to respect this parity between classes (Art. 654.5 TRLC) is foreseen as a ground for objection. In addition to this rule of parity within the same class, for cases of non-consensual plans, this rule of parity and fair treatment of the credits that, forming part of a dissenting class, must not receive less favourable treatment than other credits included in a different class, but which correspond to the same rank, is insisted on.*

In support of the literal interpretation demanded by the challengers, the Court states the following, and we quote verbatim:

> *51.- [This is why equal, homogeneous treatment between claims of the same rank, whether or not they belong to the same class, could be considered as a principle that does not admit of any exception. In this way it is also configured as an insurmountable limit to the temptation to establish "manipulated classes", by means of an excessive formation of separate classes to contemplate a different treatment that causes inequality or lack of parity between credits of the same rank.*

Notwithstanding the above, it must be confirmed that the Spanish legislator has limited the exception to a specific case of the absolute priority rule in art. 655.3 TRLC in relation to art. 655.2.4 TRLC.

In effect, considering that we are dealing with a rule with a priori only one exception, the Court confirms that unjustified differences in treatment cannot be admitted, and we quote literally:

> *54.- However, not so much as an exception, but as a flexible interpretation of the rule we are examining, moderating its wording, in view of the purpose of the reform to facilitate the scope and validity of restructuring plans that favour the viability of companies, it could be argued that the rule does not merely refer to a mere assessment of different treatment, and in such a case, more unfavourable for the dissenting creditor of the dragged class, but rather that the rule is intended to protect against unfair discrimination between classes of the same rank, and should not treat unequally and unfairly those who are equal in rank. Unjustified differences of treatment are not admissible.*

Well, the Court insists that the differentiated treatment between creditors does not justify in any case the disproportionate and unjustified treatment, and, furthermore, it clarifies that the debtor cannot simply use the counterbalancing argument of the company's viability:

> *56.- However, different treatment that entails less favourable treatment for the dissenting creditor becomes unfair when it is disproportionate. Disproportionality cannot be measured in relation to the convenience or necessity of approving the plan in order to maintain the viability of the company, but must be based on the protection of the dissenting creditor's economic position in relation to the other creditors of the same rank, even if they are in different classes, due to a principle of justice in the economic distribution of the losses or cuts, so that the value of the restructuring is also distributed in a minimally equal manner..*

In this respect, and quite rightly so, the Court closes its argument with the following statement, and we quote verbatim:

> *A maximalist position that would allow any treatment, however disproportionate, on the grounds that it is unavoidable to improve the involvement of certain creditors in the plan, given the strategic position of their holders, in order to favour its approval with the approval of these creditors necessary for the continuity of the company, is not acceptable. It would turn other creditors, with a similar position according to their rank, into the real financiers of the restructuring, despite their opposition to the plan, when in reality they are the most prejudiced in the treatment of their claims. Their economic position is thus disproportionately, and therefore unfairly, affected. On the other hand, it would empty the limit requiring equal treatment between creditors of the same rank in art. 655.2.3 TRLC of its content.*

Finally, and ruling on the specific facts of this case, the Court concludes that the treatment of dissenting creditors in comparison with the rest of the creditors of the same rank -ordinary

creditors- violates the prohibition that entails the ground of challenge provided for in art. 655.3 TRLC. The Court based its decision, among others, on the following most important facts:

- There is an insurmountable disproportion between, for some ordinary creditors, reductions of 20% or 50%, and even in some cases without any write-off at all, plus waiting periods of between 4 and 6 years, and even in some cases without waiting periods, and the 85% write-off with a 6-year waiting period applied to financial creditors.
- The affected liabilities that vote in favour of the plan are just over 2,600,000 euros, while the creditors carried over are over 7,700,000 euros.
- Financial creditors are just over 3,300,000 euros, and the contested creditors, in particular, are just over 2,100,000 euros.

As the Court correctly indicates, and we quote: [...] *these data give an idea of the disproportion, not only with creditors of the same rank who do not suffer any reduction, and who with the formation of classes have been essential to reach the simple majority, but also with other ordinary creditors who, although they have not challenged the homologation, have not voted in favour of the plan, and who can choose between reductions of 20% and 50%, with waits of 5 or 6 years, respectively*.

As a counterpart to the Court's acceptance of the aforementioned plea, and given that it does not alter the effects of the judgment on the contesting creditors, we find that the Court considered it appropriate not to analyse and assess two other pleas which, in the opinion of this party, are of particular interest: (i) the infringement of the rule of absolute priority for the maintenance of all the rights of the shareholders, already in the best interests of the creditors for receiving less than in the event of insolvency liquidation; or (ii) for the debtor not being up to date with its tax and Social Security obligations.

## C. CONCLUSIONS

The Provincial Court of Pontevedra has handed down the first judgment resolving the challenges made to the restructuring plan of a company in a state of insolvency, not an easy task due to the major and innovative modifications introduced by the new reform of the Insolvency Act.

The judgement, whether or not one agrees with all or part of the grounds it sets out, is undoubtedly very well argued and well-founded, reasoning always on each of the motives and reasons on which it is based.

In the case at hand, the Court has emphasised and accepted the ground that the contesting creditors have been treated less favourably than other creditors of the same rank. Evidently, this is the most recurrent and objective plea, which finds its main defence in the requirement of equal, homogeneous treatment between credits of the same rank, whether or not they belong to the same class.

In our opinion, we believe that the ruling will determine and mark the path of the next restructuring plans, and, in particular, with regard to ensuring that there is no great disproportion in reductions and waivers between creditors of the same rank.

Entering into the assumptions scenario, and considering the present case, it is prudent to think that if the debtor had applied a similar reduction and waiting period between the "Suppliers" and "Financial" classes, the Court would not have admitted the aforementioned ground of challenge. Moreover, such an approach would not have affected the viability plan in the short and medium term because the proposed waiting period for the "Financial" class is six (6) years, the initial three (3) years being a grace period. In any event, it seems reasonable to consider that debtors in the present and future will take into consideration the arguments and grounds set out in the aforementioned Judgment, and, above all, with regard to parity and homogeneity in the reductions and waiting periods proposed to creditors of the same rank.

On another note, and as we have already mentioned, we would have liked and applauded the Audiencia to have pronounced, analysed, and assessed the rule of absolute priority. It will be quite interesting to know the Court's opinion on such a controversial issue, given that it directly affects the company's shareholders and is therefore a crucial part of the restructuring plans.
In conclusion, without prejudice to the fact that each case must be analysed on its own merits and isolated from the rest of the cases, we consider that the judgement in question will influence present and future restructuring plans due to the conclusions drawn therein. Nevertheless, we have considered it appropriate to write this brief legal note to respond to the first doubts that are being raised by the challenges to the restructuring plans and which we consider essential in order to make known how the new reform of the Insolvency Law affects them; given the current panorama of great uncertainty which, unfortunately, will result in the coming months in exponential growth due to the current and forthcoming socio-economic situation.

**By: Gonzalo Ruiz Gallego, Senior Counsel LILF**

******

**More information:**
Lupicinio International Law Firm
C/ Villanueva 29
28001 Madrid
P: +34 91 436 00 90
info@lupicinio.com