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Restructuring and Insolvency

Newsletter

October 2025

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Index

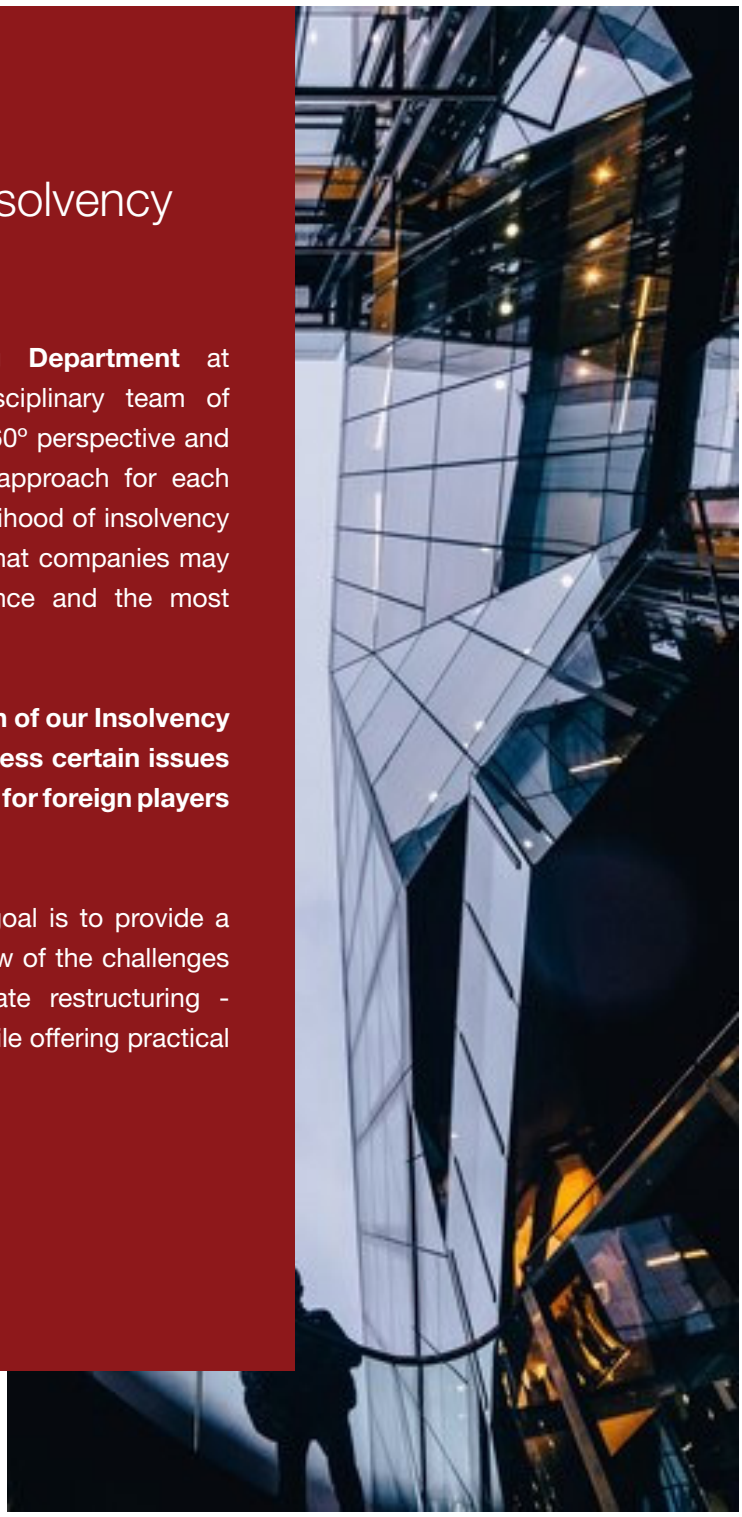
Restructuring and Insolvency

| Newsletter 2025 |

The **Insolvency and Restructuring Department** at Andersen is made up of a multidisciplinary team of specialized professionals who offer a 360º perspective and tailored advice, providing a strategic approach for each case. Our experts identify both the likelihood of insolvency and the different stages of insolvency that companies may face, delivering comprehensive guidance and the most appropriate solutions.

In this special English language edition of our Insolvency and Restructuring Magazine, we address certain issues of current relevance specially selected for foreign players in the Spanish market.

Through our regular publications, our goal is to provide a comprehensive and up-to-date overwiew of the challenges and solutions in the field of corporate restructuring - anticipating changes and challenges while offering practical tools with a specialized approach.



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New insolvency directive.
A unique opportunity

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On 20 March 2025, the European Parliament published its position on the Proposal for a Directive of 7 December 2022 on the harmonisation of certain aspects of insolvency law. Currently, the final text is still being negotiated within the Council of the European Union, although at the end of November 2024 a certain consensus could be reached on several of the matters included in the Proposal.

According to the explanatory memorandum of the Proposal for a Directive, the main reason for the aforementioned initiative is part of the Commission's priority of advancing the Capital Markets Union, this being a fundamental project for greater financial and economic integration in the European Union. Time has shown that the absence of harmonised insolvency regulations has been an obstacle to the free movement of capital within the European Union. If we are to promote the role that the European Union should play in the future, it is necessary to provide it with all the possible legal tools so that any company that is affected by insolvency proceedings knows the rules that must operate in order to be able to anticipate in time any inconvenience that may arise.

Currently, the rules on insolvency are quite fragmented, without there being unitary criteria in matters of special relevance. This inevitably leads to different results in the same event in each of the Member States. In this sense, one of the most critical aspects is the degree of efficiency in terms of the time it takes to liquidate a company and the value that can be recovered. There is nothing worse for a cross-border creditor than the uncertainty about the length of an insolvency proceeding and the degree of recovery it may have from the affected claim.

As is well reflected in the above-mentioned explanatory memorandum, low recovery values, lengthy insolvency proceedings and high costs of proceedings not only have an impact on the efficiency of a company's liquidation but are also a primary consideration for investors or creditors when determining the level of risk premium they expect to recover on an investment.

As has been demonstrated in recent times, the European Union remains vulnerable to any economic disturbance and difficulty that originates worldwide, such as the pandemic caused by COVID-19, the war in Ukraine, the inflationary period... If these or similar events were to recur in the future, more efficient and better harmonized insolvency rules would undoubtedly help the ability to absorb the economic consequences that might result. In addition, it should be noted that the absence of this greater convergence in the different insolvency regimes within the European Union will mean that the level of investment and cross-border business relationships would not reach the full potential they could.

Action at European Union level is therefore needed to create common insolvency regimes that encourage cross-border investment, eliminate the uncertainty generated by insolvency proceedings that drag on over time, and maximise the recovery value of creditors.

In this regard, the proposal for a Directive focuses on three key aspects related to insolvency law that need to be optimised to improve subsequent proceedings:

- Firstly, the recovery of the assets of the liquidated bankruptcy estate, the objective of which is none other than to maximise the recovery of the value of the insolvent company for creditors. It therefore introduces a minimum set of harmonised conditions for bringing actions to set aside and strengthens asset traceability by improving insolvency practitioners' access to bank account information, beneficial ownership information and certain national asset registers, including those of other Member States.

- Secondly, the efficiency of the procedures, mainly focused on the procedures for the liquidation of micro-enterprises, which we must not forget that in Spain they account for a very high percentage of the business fabric. The cost of ordinary insolvency proceedings for these companies is prohibitively high and the possibility of benefiting from a debt discharge would allow them to unlock the necessary entrepreneurial capital for new projects.

- Third, the predictable and equitable distribution of the recovered value among creditors. In this regard, requirements are introduced to improve the representation of creditors' interests in proceedings through creditor committees. This is complemented by greater transparency for creditors regarding the rules governing the priority of claims.

> "Harmonising insolvency frameworks across the EU is essential to build trust, attract investment and enhance economic stability."

Although we will have to keep an eye on the final steps of the proposed Directive and the final text that results from the parliamentary process, the truth is that certain aspects of the insolvency legislation will surely be improved that will allow the procedures to be more agile, there is more information for creditors and it is possible to maximise the recovery value of their claims. Once the Directive is finally approved by the European Parliament, it would be desirable for our country to incorporate it into its legislation as soon as possible, especially to harmonise certain aspects that, after the transposition of the previous Directive through Law 16/2022, are still conflicting, such as, among others, the prepack, the exemption from public credit in the procedures for the exoneration of unsatisfied liabilities.

Distressed M&A Opportunities under the Spanish restructuring framework

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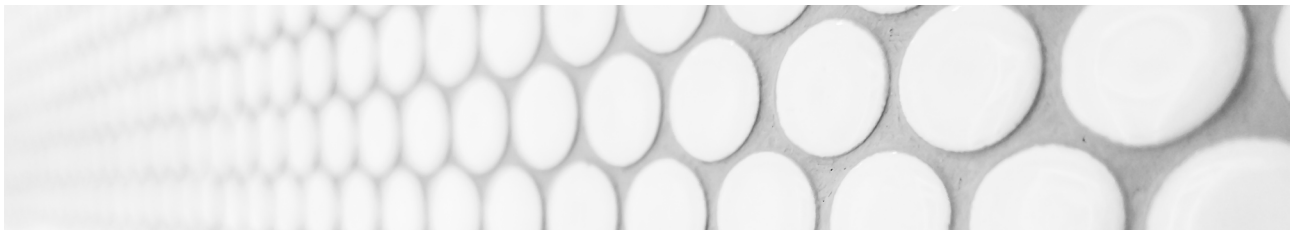
The 2022 reform of the Spanish Insolvency Act **("SIA")** has created a sophisticated framework offering compelling opportunities for distressed M&A transactions. Recent landmark cases demonstrate how this new legal regime enables creative deal structures, efficient debt-to-equity conversions, and flexible asset transfers—all with enhanced legal certainty. This positions Spain as an emerging hub for complex restructuring transactions.



Jurisdiction of Spanish Courts

Spanish courts lack jurisdiction to approve M&A restructuring plans involving distressed companies domiciled abroad, whose center of main interests (COMI) is presumed not to be located in Spain. However, certain structures may address these jurisdictional restrictions to enable Spanish courts to rule on restructuring and M&A transactions.

First, the distressed company may relocate its corporate seat to Spain. The transfer must occur several months before filing for court sanction of the plan (the SIA requires six months, but the 2015 European Insolvency Regulation reduces this to three months). Alternatively, an effective COMI transfer without relocating the corporate seat may be possible, provided evidence demonstrates that Spain satisfies the legal criteria for COMI relocation. That is, Spain must become the country where the distressed company conducts the administration of its interests on a regular basis and in a manner that is ascertainable by third parties.

Another option involves a hive-down of the distressed business into a Spanish wholly-owned subsidiary, allowing this subsidiary to file for the Spanish M&A restructuring plan. Alternatively, establishing a Spanish new parent company to control the foreign distressed company may permit both entities to file for a joint Spanish restructuring plan. This approach works in two possible ways:

- establishing that the foreign company's COMI is located in Spain because the parent vehicle's COMI is in Spain (which may be complex in practice); or

- applying the special forum under Article 755 SIA to confer jurisdiction on Spanish courts over foreign subsidiaries of a parent company whose COMI is located in Spain, provided that (i) filing by foreign subsidiaries is not published with the Spanish Insolvency Registry; (ii) the Spanish vehicle and foreign subsidiaries share common creditors affected by the joint Restructuring Plan; and (iii) Spanish jurisdiction over the foreign subsidiaries

is necessary to ensure successful restructuring negotiations, approval, and compliance with the Plan. This special forum was accepted in the Naviera Armas Codere and Ezentis restructuring cases but rejected in the restructuring of certain foreign subsidiaries of Grupo Losan.

These strategies must carefully consider additional circumstances, including: tax consequences arising from COMI transfer; recognition and enforceability of Spanish court sanctions abroad; potential constraints due to foreign public policy; the existence of intragroup security packages and common creditors; and the use of parallel restructuring tools under foreign law (for instance, refinancing English law debt instruments pursuant to the rule in Gibbs).

Share deals under Spanish M&A Restructuring Plans

In a share deal, the buyer acquires the shares or equity interests in the distressed company.

The SIA allows Spanish restructuring plans to provide for debt-for-equity swaps, enabling creditors to become shareholders in the distressed company in exchange for all or part of their claims. Debt-for-equity swaps strengthen the distressed company's net worth, as the capitalized debts, and sometimes prior losses too, are removed from the balance sheet. Change of control clauses are deactivated when the change results from a restructuring plan, providing a powerful tool for debt-for-equity swaps and loan-to-own strategies.

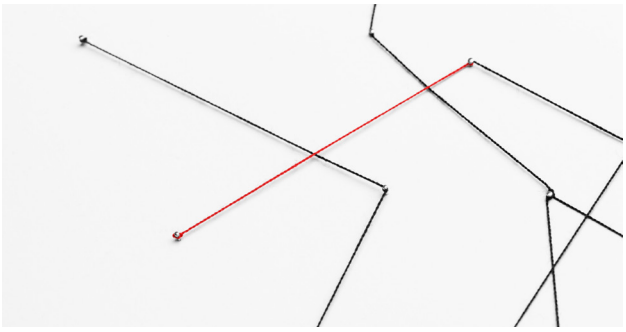
Share deals under Spanish restructuring plans may be consensual. The Telepizza restructuring provides a paradigmatic example, which combined a debt-for-equity swap that fully diluted former shareholders with the delivery of gifting warrants to the departing shareholders as an anti-embarrassment tool. This ensured a smoother transition and avoided dissenting classes that could have challenged the restructuring plan for breach of the absolute priority rule. The Codere restructuring also exemplifies the feasibility of consensual Spanish restructuring plans for complex cross-border situations involving corporate changes, debt-to-equity swaps, and compliance with intercreditor provisions under English law, which ultimately allowed bondholders to control the restructured Codere group.

Consensual share deals may also occur without debt-for-equity swaps, involving instead a restructuring of the distressed company's liabilities under a restructuring plan coupled with a subsequent sale of shares in the restructured company, as in the Puerto de Cuba-La Raza group restructuring. The viability plan supporting the restructuring plan is typically prepared by the buyer as the new shareholder upon closing.

Share deals may also be non-consensual but remain implementable since Spanish restructuring plans can be sanctioned and implemented without equity consent. Spanish courts typically permit circumvention of certain corporate formalities and grant restructuring experts extensive powers to manage the transition period and implement the restructuring plan, given the likely lack of cooperation from former shareholders and managers. Key cases decided in Spain include:

- Celsa restructuring: As former shareholders were deemed “out of the money,” the restructuring plan reduced share capital to zero before creditors capitalizing part of their debt. The SIA permits denial of pre-emption rights to former shareholders on new shares, resulting in their full dilution and removal as Celsa’s owners.

- Aldesa restructuring: The majority shareholder, who was the sole affected creditor under the single class approving the plan as creditor of a subordinated loan, crammed down the minority shareholder by approving multiple share capital increases without complying with special majorities in the bylaws and shareholder agreement, as permitted by the SIA.



- Rator Group restructuring: This case exemplifies a structured “loan-to-own” approach whereby an industrial company first purchased distressed debt from financial creditors, then converted that debt into new shares under a restructuring plan immediately following share capital reduction to zero, with no pre-emption rights for former shareholders, who were fully diluted, and ultimately aimed to merge the group into a single company controlled by the new investor.

- Finetwork restructuring: The borrower's main supplier (Vodafone) filed the restructuring plan to convert its claims against Finetwork into new shares, with Vodafone acquiring approximately 90% of shares and removing current management. Full effectiveness of corporate restructuring measures requires regulatory approvals from CNMC and Spanish foreign investment authorities before December 31, 2025, with automatic termination if approvals are not obtained. Although the court's approval of the plan may be challenged, the debt-to-equity swap took effect immediately, with challenges not suspending the plan's effects.

For non-consensual share deals to be feasible, the distressed company must not be an SME (which excludes companies belonging to corporate groups, as ruled in the Grupo Rator case). Unlike consensual plans with equity consent, cramming down equity is not possible in likelihood of insolvency scenarios. Therefore, the distressed company should be in actual or imminent insolvency. This requirement prevented a debt-for-equity swap in the first Hotel Beatriz restructuring case, as the court ruled *ex officio* that acceleration due to a change of control provision in the finance instrument was insufficiently clear to prove the borrower's insolvency (the lender subsequently filed a second restructuring plan through the pre-opposition process to have the insolvency question specifically heard and ultimately accepted by the court).

> Spanish restructuring plans turn debt into control and value for creditors, securing recovery."

A robust valuation is essential to convince the court that former shareholders were out of the money and may be crammed down by the plan. Creditors should file first for the restructuring plan. Creditors may also block the borrower's insolvency petition for one month to file the plan, provided they represent at least 50% of affected liabilities, thereby deactivating the “insolvency nuclear bomb” triggered by equity holders.

Asset deals under Spanish M&A Restructuring Plans

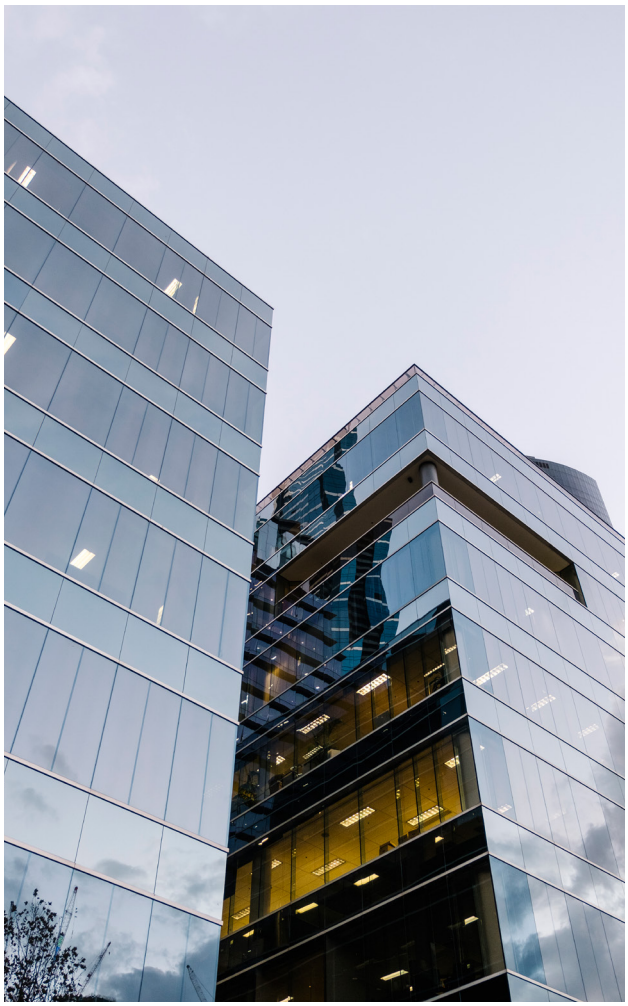
In an asset deal, the buyer acquires specific assets of the distressed company, such as property, equipment, or intellectual property, either individually or as a business unit. Asset deals allow buyers to select the most valuable assets while leaving behind unwanted liabilities, which may create clawback and liability risks if the seller subsequently becomes insolvent.

Spanish restructuring plans may provide a “safe harbor” for asset deals, offering greater legal certainty for buyers and ensuring business continuation as a going concern. Since the plan is approved by the distressed company’s creditors under legal majorities and sanctioned by the court, liability risk should be reduced. Furthermore, court sanction shields asset deals from future clawback actions in insolvency, provided liabilities affected by the plan represent at least 50% of the distressed company's total liabilities.

The SIA expressly mentions business unit transfers as potential content of Spanish restructuring plans. However, no consensus exists on whether plans involving business liquidation are permitted, even if sale under the restructuring plan is more profitable than sale in insolvency winding-up proceedings. For instance, the court rejected the Compañía de Phalsbourg (owner of Oasiz mall) restructuring because the plan essentially proposed orderly liquidation of a non-viable company's assets rather than genuine restructuring.

Although liquidation restructuring plans should be possible if they offer reasonable prospects of avoiding insolvency and ensuring short- and medium-term business viability, certain structures may facilitate asset deals within restructuring plans.

Examples include maintaining part of the business within the distressed company approving the restructuring plan to file a viability plan generating cash flow to service restructured debt under the new repayment schedule, together with the purchase price paid by the buyer (Olive Line case), or providing for the purchase price to be paid by the buyer through the assumption of the seller's refinanced debt (Alimentos el Arco case). Daorje restructuring exemplifies another sophisticated approach, providing for a hive-down and professional disinvestment programs of the new subsidiaries with predefined stages, timelines, and specific valuation thresholds leading to predetermined debt repayment scenarios, while shareholders retained business retention opportunities through alternative capital injections.



Other Advantages of the Spanish Legal Framework for M&A Deals

- **Great flexibility to structure and approve plans:** The SIA allows significant flexibility when designing restructuring plans. This includes the ability to tailor plans to the specific needs of distressed companies and their creditors. Restructuring plans may include provisions to resolve contracts in the restructuring's interest, cancel derivative contracts, and suspend or extinguish senior management contracts. The SIA also permits formation of different creditor classes based on common interests, as well as both inter-class and cross-class cramdown. The court process to approve restructuring plans is proving expedited and flexible, professionally managed by Spanish courts even when ruling on financial and valuation matters, gaining certainty as more sophisticated restructuring cases are ruled by Spanish courts.

- **DIP financing:** The SIA supports DIP financing, allowing distressed companies to obtain new financing during the restructuring process, both while negotiating the plan and upon approval to comply with it. DIP financing receives priority over existing unsecured debts, incentivizing new lenders or related parties to support restructuring by maintaining business operations and funding the restructuring process. DIP financing provided by new investors may therefore be incentivized.

- **Exclusivity:** Unlike M&A deals within insolvency proceedings (where competitive bidder selection is the general rule even in pre-packed deals), M&A restructuring plans allow buyer exclusivity. This avoids risks associated with stalking horse bids and may expedite the process, provide greater buyer certainty, and offer shareholders greater leverage by exchanging exclusivity for higher prices or earnouts. Conversely, purchasing a business under a restructuring plan may be more expensive than purchase in insolvency, potentially deterring certain buyers, particularly in share deals where buyers may assume all distressed company liabilities, including hidden or contingent liabilities, posing significant risks requiring extensive due diligence.

- **Gifting:** The Naviera Armas restructuring recently introduced the "gifting" doctrine, enabling creditors who convert debt into new equity to allocate a minor stake of received shares to former shareholders without breaching the absolute priority rule. If gifting becomes established in future practice, "handing over the keys" structures may be feasible even in non-consensual plans.

- **Security Holders' Exit Rights:** A critical aspect to consider in non-consensual restructurings involving secured creditors is the exit right conferred to secured creditors who voted against the Plan and belong to a class where dissenting votes outweigh favorable, since they may enforce their security within one month after the court sanction is published. Such right may be replaced by a cash payment of the collateral's value in 120 days. Collateral valuation, class formation and third-party releases may be therefore key to navigate this scenario.

Spain's restructuring framework now offers a robust platform for innovative M&A strategies. As case law continues to develop and market agents become more familiar with these tools, Spain stands poised to become a preferred jurisdiction for sophisticated restructuring transactions—offering both domestic and international investors powerful alternatives for executing strategic acquisitions of troubled businesses.

Gifting in Restructurings under Spanish Law

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Introduction

Gifting, in the context of corporate restructurings, refers to the voluntary allocation of value or benefits to creditor classes or stakeholders who would not otherwise be entitled to receive any distribution under the statutory priority rules.

Gifting is –or allegedly has been- present both in the English legal system and in the U.S. one for long, and has recently appeared in Spanish practice.

Gifting in the US legal system

Gifting in the US has taken two forms. The first of them is a "horizontal" gift: unequal gifts by a creditor to other creditors that are situated equally in the priority scheme. Vertical gifting, on the other hand runs from a higher-priority creditor to a low priority one, skipping a creditor who is situated between the giver and the recipient in the priority scheme.

Horizontal gifting was first introduced in the *WordCom* case in 2003 and was later consolidated in the *Journal Register Co. Case, of 2009.* Its latest development, the 2018 *Nuverra* case is of significant importance in the present day, as it will be commented on below.

Vertical Gifting was first admitted in the SPM Manufacturing Corp case, in 1993. As of today, its admissibility is heavily questioned, as a result of the Jevic case, which was issued by the Supreme Court of the U.S. in 2017. The trend initiated by this case continued in the *Friar* case in 2017, and in *Constellation Enterprises*. The main ground to

oppose vertical gifting under US law appears to be the breach of the absolute priority rule contemplated in section 1129 of the US bankruptcy code.

While the trend initiated by *Jevic* appears to prevent vertical gifting (even if the gift does not belong to the estate), whether horizontal gifting could still be admitted is a matter still open to debate. This is so due to the *Nuverra* case. The case was initially dealt with by the Delaware circuit courts in 2018. The resolution was appealed, and the appeal court rejected the appeal applying the equitable mootness doctrine, thus avoiding to address the merits of the appeal. Consequently, the *Nuverra* case resolution is firm, thus leaving a door open to gifting in the future (at least in its horizontal form) but there is no guarantee as to how courts may view the matter in the future.

Gifting in the UK

The *MyTravel* case (2004-2005) involved a case of gifting, although reached through a different route (a settlement to allow the sanction of the scheme). Later resolutions in respect of restructuring plans have followed a permissive approach to gifting, such as the *Virgin Active Holdings* case, *DeepOcean* and *Gategroup*. Other cases seem to have a more restrictive approach, such as Great Annual Savings Co. Ltd. In 2023.

The approach of the UK courts, compared to the approach followed by the US courts is more permissive, and the basic test applied by the courts to sanction a restructuring plan under Part 26A of the Companies Act 2006, is the "no worse off" test.

Gifting in the Spanish legal system

The Naviera Armas Case

In Spain, the issue as whether gifting could be admitted or not is very recent. In Spain there was not a proper restructuring framework until 2014, and such framework was primarily based on debt majorities and did not allow cross-class cramdown.

It was not until the enactment of Directive 2019/1023 and its local implementation by Act no. 16/2022 of 5 September 2022 when the restructuring framework changed from a majority-based system to a class-based one, and provided for the possibility to cram down entire classes of creditors whose claims could be argued to have no value.

In this new legal-framework, the first case of gifting did not take long to appear: the Naviera Armas group restructuring plan was presented for sanction at the Commercial Courts of Las Palmas in September 2023, and the sanction was confirmed by the Regional Courts (Audiencia Provincial) on 11 March 2025.

Among others, the Naviera Armas Group, its shareholders, and the majority bondholers entered into a lock-up agreement in August 2023, prior to the approval and sanction of a restructuring plan in relation to the group. Such agreement was executed pursuant to English law and detailed the different steps of the restructuring. Among other contents, it provided a reduction and reinstatement of share capital, whereby the existing shareholders would lose all their stake in the Company and be substituted as shareholders by the secured bondholders. Once the restructuring was concluded, the old shareholders would be allocated 6% of the share capital by the secured bondholders (plus the possibility of obtaining additional economic rights in certain circumstances).

There were four affected classes in the restructuring plan which, in a rough yet sufficient approach, could be described as follows:

- Secured debt, which included the secured bonds (and the bridge loan that was granted as a part of the transaction). According to the terms of the restructuring plan, this debt would be divided in two tranches:
  - Tranche A, which would be refinanced.
  - Tranche B, which would be partially converted in share capital and partially written off. As a result of the conversion into share capital of the debt, there would be a class B of shares amounting to 6% of the share capital holding company Bahía de las Isletas, S.L.
- Ordinary syndicated debt, which comprised the debt arising from the secured bonds in the portion not covered by the existing security. The restructuring plan provided that this class would be totally written off.
- Ordinary non-syndicated debt: which comprised the remaining ordinary credits. According to the restructuring plan, this class would be written off.
- Subordinated creditors. According to the restructuring plan, this class would be written off, like the ordinary credits.

As per the Lock-Up Agreement, the class B shares would be allocated to certain current shareholders, after their stake would have been eliminated completely as a result of the share capital reduction referred to above.

The situation above would be categorized, in U.S. terms, as a case of vertical gifting. Similarly to the US precedents, the objection was raised as if such a gift would breach the absolute priority rule, which is contemplated in Section 655. 2. 4 of the Spanish Insolvency Act (and which may be subject to exception in certain circumstances).

When solving this issue, the courts determined that there were two key issues to be addressed:

- Whether the gift is a part of the restructuring plan; and
- Whether the creditors who would be forced to a total write-off (the ordinary and subordinated creditors ranking between the secured creditors and the shareholders) were entitled to challenge the gift by the secured creditors.

The court decided that neither the gift was a part of the restructuring plan, nor were the creditors entitled to oppose the gift.

In the opinion of the courts, the contents of the plan are established by law and can only be: (a) the restrucutring transactions voted, (b) the extension of the effects of the plan, (c) the protection against clawback actions, and (d) the interim/fresh money financing. These contents are the ones that require sanction pursuant to Spanish law, and thus subject to the control by the court. The gift cannot be considered any of these contents, and consequently is outside the scope of analysis of the court. The gift is a bilateral agreement which may be challenged pursuant to the generally applicable rules of contracts at the competent courts, but not in the course of a decision over a court confirmation of a restructuring plan.

Additionally, the creditors whose credits would be totally written off according to the plan are not entitled to challenge the gift. The valuation of the group presented before the courts has evidenced that the credits held by the challenging creditors had no value. In these circumstances, admitting a claim by any holder of such credits would be admitting a claim over a certain value by a person who does not hold such value (nor any other) at all.

It was also alleged that performing a gift could be considered an evasion of the applicable law. It was argued that transferring value from the senior creditors to the initial shareholders by a separate agreement and subsequently after the restructuring could be viewed as a means to avoid the application of the absolute priority rule. Such rule would apply if the allocation of value was provided directly in the restructuring plan. The court determined that there were no legal grounds for such allegations since the reasons to oppose the sanction of a restructuring plan are a closed and exhaustive list, and an evasion of law was not specifically contemplated. Such allegation could be considered by the courts only in the case that it could be subsumed under one of the statutory grounds exhaustively provided by law.

Impact of the court resolution and additional considerations

The Naviera Armas Case has been well received by the legal community. However, there is also wide-spread opinion among the legal community that the

matter of the admissibility of gifting is not a closed matter. It is often said that the courts may have just have kicked the can down the road by stating that the gifting in this case was not a part of the plan, and consequently out of the scope of judicial review, thus leaving the issue unsolved.

In any event, and in the absence of other precedents, it appears clear that in any transaction where a gift to shareholders or other stake holders is envisaged, it would be advisable to follow the only existing precedent as closely as possible and thus:

> Gifting in restructurings must be carefully structured and timed, with practical safeguards in place, to ensure the plan's effectiveness and minimize the risk of legal challenges from affected parties."

- The agreement whereby the gift is granted should not be inserted in the text of the restructuring plan.
- The agreement should envisage that the gifting is performed after the accomplishment of the restructuring, if possible, when the benefited class has been totally eliminated pursuant to a share capital reduction or similar arrangement.
- Only creditors who are out of the money should be skipped.
- If at all possible, the agreement contemplating the gifting should be governed by a foreign law and subject to a foreign jurisdiction. This matter was not specifically addressed by the courts, but could make a difference if the creditors who are out of the money decide to challenge the agreement whereby the gift was agreed.

Recognition and enforcement of schemes of arrangement and section 27A plans under Spanish law

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Introduction

Under Spanish law the development of restructuring tools is extremely recent. Such development had a very modest commencement, with the notices of commencement of negotiations (5bis notices in 2009). With the passage of time they have reached a high degree of sophistication, comparable in certain aspects to the existing instruments in England and in the US. In this continuous development, the transposition of the EU Directive 2019/1023 (the "**Directive**"), by Act No. 16/2022 (the **"Transposition Act"**) has been decisive. The Transposition Act introduced, among others, a class-based approval system (rather than the majority based one), and cross-crass cram down.

In the aftermath of the 2008 crisis, the lack of ideal instruments to deal with financial crisis of companies outside bankruptcy proceedings all across continental Europe, jointly with the fact that the financial facilities incurred by the most prominent companies in the continent were frequently governed by English law (to have access to a broader market), led financial advisors and international firms to propose the use of schemes of arrangement as restructuring tools all across Europe.

From a Spanish perspective, the use of English schemes of arrangement provided for a solution in those early cases of restructurings of Spanish groups where, due to the absence of an intra-class cram-down mechanism and unanimous consent requirements, the real bête noire were the hold out creditors. In those cases, if the facilities were governed by English law and subject to the jurisdiction of the English courts, it would be possible to override the requirements of unanimous or reinforced majorities thus making the restructuring possible.

In those cases, the issue of the recognition and enforceability of the restructuring preformed in the UK was raised, and difficulties were soon found:

- The scheme of arrangement would not be subject to enforcement by means of the Brussels Regulation 44/2001, nor its substitute, Regulation 1215/2012, since it was not considered to be comprised in their scope, which were court resolutions outside insolvency or creditors compositions.

- Likewise, the scheme would not be included in the scope of the EU insolvency regulations (Regulation 1346/2000 and Regulation 2015/848). Conversely to (i) above, the exclusion the scope of the Insolvency regulations was found beneficial by the English legal community, since the COMI approach of such regulations would have probably disabled the use of schemes of arrangement as restructuring tools in restructurings of groups in EU member states.

- Finally, it was argued that, since a scheme of arrangement, although sanctioned by a court, had a primarily contractual matter, it could be considered a contract and, as such, given effect by Spanish courts. As we will see below, this specific argument, although very popular among lawyers and professors linked to international firms even today, is very questionable.

Despite the difficulties above, the reality is that schemes of arrangement well served their purpose, merely as a result of a purely practical situation: both the initial finance documents and those resulting from the scheme would be governed by English law and subject to the jurisdiction of the English Courts. Consequently, any dissenting creditor would have to claim its rights arising from the finance documents as originally drafted in England, where the scheme would be effective and such claim be dismissed. Of course this remedy was useless when affecting facilities that were not subject to English law and jurisdiction, or transactions not sizeable enough to justify the cost and effort of a scheme of arrangement.

The current situation

In the years that have elapsed after Brexit, several significant changes have occurred, which have changed the issue dramatically:

- As a result of the Brexit, any existing or future European instrument allowing for the recognition and/or enforcement of any scheme of arrangement or other restructuring arrangement would not be applicable in the UK.

- In addition to the existing schemes of arrangement, the Part 26A restructuring plans were introduced by the CIGA 2020 in the Companies Act 2006.

- The UK requested to become a party to the Lugano Convention, and was rejected by the EU.

- The Hague Covention 2019 on the Recognition and Enforcement of Foreign Judgements In Civil or Commercial Matters was ratified by the United Kingdom, and thus was binding for both the UK and Spain (the EU acceded to the Covention by means of Decision (UE)2022/1206).

- The Insolvency Directive was approved, and the Transposition Act was enacted. The latter, in addition to implementing way more advanced restructuring mechanisms, introduced a procedure whereby foreign pre-insolvency remedies could be effective.

As explained above, the application of EU instruments was not possible even prior to Brexit. Additionally, the 2019 Judgements Hague Convention excludes creditors' compositions from its scope of application, so schemes of arrangement and 26A restructuring plans are excluded. Consequently, the possible means of recognition of such English law instruments are as follows:

- No recognition at all. This would simply mean using UK restructuring instruments disregarding the possibility of recognition and enforcement, just as in the past, and with the limitations encountered.

- Recognition of the effects of a scheme or restructuring plan as a contractual instrument. As in the previous paragraph, this way to proceed is not new, and is based in considering the restructuring plan or scheme a contract and, as such, subject to the provisions of the Rome I Regulation. In very broad terms, the parties of a contract may choose the law applicable to it, and this freedom of choice shall apply even if the parties are not EU members. The scheme or plan should be deemed an agreement and, as such, enforceable in Spain if required pursuant to the general rules governing agreements.

In our view this argument is very questionable, whether we consider the schemes/restructuring plans a form of amendment to existing obligations or novations that terminate the finance agreements and substitute them for new ones:

- If we consider these instruments as amendments of pre-existing obligations, Article 13. (a) of the Rome Regulation shall apply. Pursuant to this article, the applicable law to an agreement comprises the amendments to such agreement. Under Spanish law neither a Scheme of Arrangement nor a 26A restructuring plan are contemplated as means to amend a pre-existing agreement.

- A novation substituting the existing obligations for new ones would need to qualify as a new contract for the Rome Regulation to be applicable. The concept of contract under the Rome Regulation implies entering voluntarily into obligations. Entering into a scheme of arrangement or restructuring plan under English law in respect of a Spanish group would only make sense if no unanimous consent among the lenders and other parties was achieved, so clearly several parties would not be entering into the agreement voluntarily, and the scheme or plan would not qualify as a contract.

- Enforcement of the scheme or plan pursuant to the procedure provided under Spanish law for non-EU member States. Spanish law provides for a specific procedure for the recognition of foreign insolvency proceedings, which also applies, to foreign preventive restructuring proceedings. Prior to following this path, the following aspects should be considered:

  - The procedures giving rise to the court resolution that is to be recognized must be functionally equivalent to the Spanish ones. According to the opinion of law commentators, the 26A plans would fulfill this requirement. As regards schemes of arrangement, only those aimed at a debt restructuring to avoid insolvency would fulfill this requirement.

  - An exequatur is mandatorily required. This exequatur requires, among others that the court or authority opening the procedure based its jurisdiction on any of the criteria provided for in the Spanish Insolvency Act or in a reasonable connection of an equivalent nature. In our view, this requirement should prevent recognition of procedures based alone on the applicable law to finance agreements or submission clauses. This is so because Spanish jurisdiction criteria in relation to pre-insolvency remedies are primarily COMI based and there are no equivalent criteria to governing law and/or submission to Spanish courts.

  - Interim measures may also be recognized, but will also require a separate exequatur. As an alternative, interim measures may be requested before the Spanish courts while the exequatur of the main procedure is still ongoing.

  - In general terms, the effects of the scheme or plan will be governed by the law it is expressed to be governed. Due to certain drafting issues, however, it is unclear if certain exceptions to this principle provided for bankruptcy proceedings will apply.

- To combine the application of English law governed instruments with domestic ones. Spanish law does not ban this possibility, and in fact there is a relatively recent precedent: the Lecta case, which implied a scheme of arrangement in England, and the sanction of the agreement before the Spanish courts as a restructuring agreement.

> "The Spanish legal system ensures effective recognition and enforcement for non-EU restructuring tools."

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