RESTRUCTURING TOOLS IN THE UNITED KINGDOM AND IN SPAIN

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ABSTRACT: Comparative analysis of the restructuring tools available for Spanish companies to restructure its debt under the laws of both England and the Kingdom of Spain, focusing on the English scheme of arrangement, the restructuring plan and the Spanish homologation of a refinancing agreement (*homologación judicial de un acuerdo de financiación*).

KEYWORDS: restructuring, Brexit, scheme of arrangement, restructuring plan, homologation, centre of main interest, insolvency, creditors, challenges.

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I. INTRODUCTION

This article analyses restructuring tools available for Spanish companies in order to restructure their debt under the laws of both England and the Kingdom of Spain. In particular, this article sets out the following matters: (a) first, the main features of the English law scheme of arrangement and its use by Spanish companies so far; (b) second, the main features of the English law restructuring plan which came into force in 2020 and how this differs from a scheme of arrangement; and (c) third, a comparison between the English law scheme of arrangement and restructuring plan processes and the Spanish homologation (*homologación judicial de acuerdos de refinanciación*) ("**Homologation**").

[1] The content of this article reflects, solely and exclusively, the work performed by the authors, and it shall not extend to Latham & Watkins LLP nor, in any case, be considered as an advice.

II. RESTRUCTURING TOOLS IN THE UNITED KINGDOM

1. Scheme of Arrangement

1.1. Main features

A scheme of arrangement is statutory procedure set out under Part 26 of the Companies Act 2006 which allows a company to make a compromise or arrangement with its creditors or members, or any class of them. It is a flexible tool which may be used by a company restructure its debt in a manner which would otherwise require a higher consent threshold from its creditors under the terms of their debt instrument (typically this would include amendments such as the extension of the maturity date or to interest rates or the conversion or exchange of debt into new debt or equity instruments).

It may be used by both English and foreign companies provided that the English courts are satisfied there is a sufficient connection to the English jurisdiction and the scheme will likely achieve its purpose. This does not necessarily require a company to have its centre of main interests ("**COMI**") in England or Wales which has allowed numerous foreign companies and businesses to use a scheme of arrangement in order to restructure their debt, including a large number of Spanish entities as summarised in section 0 below.

1.2. General process

The general process for a scheme of arrangement is as follows:

- there is an application to the English courts for an order summoning meeting(s) of the relevant class(es) of creditors or members to vote on the proposed compromise or arrangement, which is considered at a court hearing;
- following the granting of such order by the court, the company will notify the relevant creditors or members of the meeting(s), together with an explanatory statement setting out the terms of the scheme;
- the meeting(s) of the relevant classes of creditors or members will then take place where they will vote on the proposed compromise or arrangement (where the thresholds specified below need to be met for each meeting);
- following the successful vote of each meeting, there will be a further court hearing where the court will be asked to sanction the scheme of arrangement, which is in the court's discretion. The English courts will sanction a scheme of arrangement if there is sufficient connection with the English jurisdiction and the scheme will likely achieve its purpose (discussed in further detail below); and
- once sanctioned, a scheme of arrangement will become binding on all creditors or members subject to the scheme, including any creditors or members of that class which did not attend the meeting or dissented.

1.3. Key considerations

Key considerations in relation to a scheme of arrangement include:

- **Class composition**. A scheme of arrangement requires the favourable vote of each class of creditors or members. Each class should be limited to “persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest”[2]. This does not necessarily mean that lenders in different tranches of debt should be in a separate class for the purposes of a scheme, and in order to determine the class composition there will need to be analysis of such creditors’ or members’ existing rights, proposed rights under the scheme and rights in the event the scheme were not to go ahead (which is commonly an insolvency procedure for a company in distress and the company will carry out a liquidation analysis for this purpose). The Courts will consider all rights accumulatively to determine whether creditors should be placed in a separate class but differences such as maturity dates or interest rates have been found not to necessarily fracture a class.
- **Voting thresholds**. The scheme requires the approval of (a) at least 75 per cent. in value of each class of creditors or members; and (b) a majority in number of each class of creditors or members, in each case, present (in person or by proxy) and voting at the meeting in order to be successful. As previously noted, the benefit is that this is typically a lower threshold than under the relevant debt documentation to amend key money terms (e.g. maturity dates, interest rates, form of the instrument).
- **Sufficient connection**. There are various ways to demonstrate a sufficient connection to the English jurisdiction in order for the English courts to sanction a scheme. Having English law as the governing law of the debt is sufficient in itself, however, it this is not possible foreign debtors have also been able to demonstrate the connection by: (a) a shift in the foreign debtor’s COMI to England; (b) the accession of an English co-issuer which is the entity that proposes the scheme of arrangement; or (c) an English guarantor assuming the applicable liabilities as a primary obligor through a deed of contribution and is the entity that proposes the scheme of arrangement.
- **Recognition**. In addition to demonstrating a sufficient connection to the English jurisdiction, the English courts will need comfort that the scheme will likely achieve its purpose prior to sanctioning a scheme. Where the scheme has a foreign aspect or relates to foreign business, it will need to be demonstrated that the scheme will be enforceable in the relevant jurisdiction. Following the UK’s withdrawal from the European Union, the Brussels Regulation no longer applies and so schemes of arrangement are not automatically recognised in the European Union. While there may be potential to rely upon the Lu-

[2] Sovereign Life Assurance Co v Dodd [1892] 2 Q.B. 573.

gano Convention in the future (if the UK accedes) as a basis of recognition, parties are currently limited to (a) in the case English law governed documentation, the Rome I Regulation and potentially the Hague Convention (provided that there is the exclusive jurisdiction of the English courts for all matters); and (b) private international law.

- **Fairness**. The court has discretion not to sanction a scheme of arrangement on the grounds of "fairness". The court will determine whether a scheme is fair for each class of creditors by considering whether honest and intelligent member of such class might reasonably approve the scheme. In this context, it is helpful for the company to produce the analysis to show how a creditor may be better off under the scheme rather than the relevant alternative where the scheme were not to proceed.
- **Corporate procedure**. A scheme of arrangement is not a formal insolvency process and there is no requirement for the company to be insolvent in order to propose a scheme. This means that it may avoid triggering counterparty termination rights under commercial contracts (although a contract review exercise should be carried out to confirm) and the company can largely avoid the negative press that comes with insolvency.
- **No moratorium.** It is important to note that because the scheme of arrangement is not an insolvency procedure, its proposal does not trigger any moratorium or standstill against creditors' enforcing their rights and request the compliance of the debtors' obligations under the finance documents[3]. It is therefore common practice for lock-up agreements to be entered into prior to the proposal of a scheme of arrangement, where among other things, the requisite majority of the creditors forbear from exercising their rights under the finance documents that would be triggered as a result of the proposal of the scheme of arrangement.

1.4. Application of scheme of arrangements by Spanish companies

Set out below is a summary of the Spanish companies which have used an English scheme of arrangement to restructure their debt:

- **La Seda de Barcelona (2010)[4]:** La Seda restructured its EUR 600 million syndicated facility through a scheme of arrangement, where it was determined that there was a sufficient connection to the English jurisdiction because the facility was governed by English law and subject to the exclusive jurisdiction of the English courts and the group had operations and employees in the UK.

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[3] PULGAR EZQUERRA, J.; *Preconcursalidad y reestructuración* empresarial. Acuerdos de refinanciación y acuerdos extrajudiciales de pago; 3rd Edition, La Ley, Wolters Kluger, p. 155.

[4] La Seda De Barcelona SA, Re [2010] EWHC 1364 (Ch).

- **Metrovacesa, S.A. (2011)[5]:** the Metrovacesa scheme of arrangement is another example of the courts determining that there is sufficient connection by virtue of the loan facility being governed by English law. The restructuring included the amendment of the loan facility into both a 5 year tranche linked to the group's rental assets and a 10 year tranche linked to the group's land and development business as well as a debt for equity swap.
- **Cortefiel, S.A. (2012)[6]:** Cortefiel, together with its Luxembourg co-borrower under an English law facility agreement, each proposed a scheme of arrangement in respect of its debt under the agreement in order to "amend and extend" the terms of its debt. There were five tranches of debt, three of which had been drawn by Cortefiel, however, there were only two classes of creditors for the purposes of the scheme, with the revolving credit facility and term loan B viewed as one class. The court accepted these classes notwithstanding the margin increases being different and the extension of the maturity of the loans being for different periods. As with the previous examples, the sufficient connection was satisfied by virtue of the debt being governed by English law.
- **Orizonia (2013)[7]:** The scheme of arrangement included an initial debt write-off of almost 90% and a capital injection of 15 million euros to finance the acquisition of Globalia. Around 85% of Orizonia's secured bank lenders approved the reorganization in a single creditors' meeting followed by the English court sanctioning the scheme[8].
- **Codere (2015)[9]**: Codere. S.A. is the ultimate holding company of the Codere Group with the group's finances at the time included two series of New York law governed notes, issued by, among others, Codere, S.A. and Codere Finance, S.A. (a subsidiary of Codere, S.A.). In order to demonstrate a sufficient connection to England, Codere, S.A. acquired an English special purpose vehicle (Codere Finance (UK) Limited), which acceded to the notes as a co-issuer and was the company that proposed the scheme. The courts were satisfied that there was a sufficient connection given that the company was an English company with its COMI in England, a large percentage of the creditors had submitted to the English jurisdiction, the trustee and security trustee in respect of the notes performed their functions in England and the intercreditor agreement (which the notes were subject to) was governed by English law.

  A second scheme of arrangement was sanctioned by the court on 6 October 2020 in respect of a further debt restructuring of the com-

[5] Metrovacesa SA [2011] EWHC 1014 (Ch).

[6] Cortefiel SA, Re [2012] EWHC 2998 (Ch).

[7] Iberotravel Vacations v Orizonia Destination Management, Re [2013] EWHC 756 (Ch).

[8] DENGLER, J. (2019), "Debt restructuring in the UK and Spain: Is the grass still greener on the other side?". Norton Journal of Bankruptcy Law and Practice, 28 (5), pp. 39-41

[9] Codere Finance (UK) Limited, Re [2015] EWHC 3778 (Ch).

pany[10]. While the single class proposed by the scheme was originally challenged by a dissenting creditor ultimately this was unsuccessful and withdrawn.

As at the date this article is written, Codere is in the process of implementing a further restructuring of its debt, which depending upon the level of support achieved may be implemented through a further scheme of arrangement, a restructuring plan, a consent solicitation to the noteholders or an exchange offer.

— **Lecta (2020)**[11]: Lecta's scheme of arrangement, which was sanctioned on 28 January 2020, entailed (among other things) the release of EUR 600 million senior secured notes due in 2022 and 2023, in exchange for[12]: (a) new EUR 200 million senior secured notes due in 2025; (b) new EUR 95 million junior unsecured notes; and (c) the equity in the group. In order to demonstrate a sufficient connection, Lecta acceded an English company as a co-issuer of the notes which proposed the scheme of arrangement and the governing law of the debt was amended to be English law.

In addition, certain Spanish subsidiaries of the group[13] also filed for Homologation in Spain ("*homologación judicial*")[14]. The homologation ruling was issued on 16 April 2020[15] and the court declared that: (i) the transactions contemplated under the master refinancing agreement and the new *in rem* security interests would be protected from any potential clawback action in a future insolvency of these entities; (ii) the new money provided benefits from the privileges set out in the Spanish Insolvency Act for new income (*nuevos ingresos de tesorería*); and (iii) those creditors capitalizing their claims will not be considered as specially related persons (*personas especialmente relacionadas*) as a consequence of the restructuring.

— **Obrascon Huarte Laín, S.A. (OHL) (2021):** OHL implemented a scheme of arrangement where its existing notes were exchanged into new notes in order to deleverage its balance sheet through the reduction of cash pay interest and the extension of maturities. This was the first scheme of a Spanish company following the UK's withdrawal from the EU and was sanctioned on 15 April 2021. It was demonstrated that there was a sufficient connection given that the debt obligations were governed by English law and the court received

[10] Relevant announcement (*hecho relevante*) disclosed by Codere, S.A., dated 5 October 2020.

[11] Lecta Paper UK Ltd, Re [2019] EWHC 3615 (Ch).

[12] VAN CALSTER, G. (2020): "Lecta paper. Scheme of arrangements in the Brexit transition period, and the Brussels IA elephants in the room continue to be undisturbed". *GAVC Law*. (Available at: https://gavclaw.com/2020/04/13/lecta-paper-scheme-of-arrangements-in-the-brexit-transition-period-and-the-brussels-ia-elephants-in-the-room-continue-to-be-undisturbed/).

[13] The entities that filed for Homologation in Spain were Torraspapel, S.A.U., Torraspapel Distribucion, S.A.U., Cogeneración Sant Joan, S.L.U. and Cogeneración Motril, S.A.U.

[14] ELISEI, C. (2020), "Case closed: Lecta — a tale of two restructurings and two schemes". *Debtwire*. (Available at: https://events.debtwire.com/debtwireweek/case-closed-lecta-a-tale-of-two-restructurings-and-two-schemes).

[15] Ruling issued by the Commercial Court no 1 of Madrid 117/2020, dated 16 April 2020.

expert evidence that it was likely that the scheme would be recognised in Spain under the exequatur procedure set out in Article 41 of Spanish Law 29/2015 and alternatively pursuant to Article 12(1)(d) of the Rome I Regulation (given that the notes are governed by English law).

2. Restructuring Plan

The restructuring plan has been introduced in June 2020 pursuant to the Corporate Insolvency and Governance Act (2020) as an alternative restructuring tool to a scheme of arrangement for a company in financial difficulty.

2.1. Main features

The restructuring plan is a statutory procedure set out under Part 26A of the Companies Act 2006 and follows the framework of a scheme of arrangement but with a number of key differences. This new restructuring tool has four key elements which distinguish it from a scheme of arrangement: (i) the relevant company must be in financial difficulty in order to propose a restructuring plan; (ii) the company has the ability to disenfranchise “out of the money” creditors; (iii) there is no numerosity test; and (iv) it is possible to cram-down or cram-up creditors.

Given that this tool has only been recently introduced, the caselaw is still developing on a number of the key features on the restructuring plan as outlined below. As at the date of this article, no Spanish company has implemented a restructuring plan, although Codere, S.A., as explained in Section 0 above, is considering its implementation.

2.2. Comparison with the English scheme of arrangement

See below a summary of the main features of restructuring plans compared to a scheme of arrangement. We have set out first the common features between restructuring plans and schemes of arrangement and second the key differences between the two processes:

Key common features:

— **Court oversight**. Both procedures are supervised by the English courts. The process for restructuring plan is the same as for a scheme of arrangement, however, the court will consider additional criteria as part of the initial convening hearing.

— **Class composition**. The same test and caselaw for determining class composition applies to both restructuring tools.

— **Sufficient connection**. Both procedures provide for a wide and flexible jurisdictional test based on the “sufficient connection” rather than the COMI of the debtor as discussed above regarding a scheme of arrangement. This provides the restructuring plan with the jurisdic-

tional reach and flexibility which we have become familiar with for the highly successful scheme of arrangement. While the English courts may accept jurisdiction on the basis of the same sufficient connection test, there are differences in recognition outlined below.

— **Intra-class cramdown.** Both restructuring tools provide for the cram down of dissenting creditors within a class which has obtained the necessary voting threshold (subject to the exclusion of certain debts arising during a moratorium), however, the restructuring plan goes further as discussed below.

Key differences:

— **Financial difficulty requirement**. While a scheme of arrangement is available to companies regardless of their solvency position, the restructuring plan is only available to companies in financial difficulty. The conditions that a company needs to satisfy in order to propose a restructuring plan are:

Condition A: The company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern; and

Condition B: A compromise or arrangement is proposed between the company and: (i) its creditors, or any class of them; and/or (ii) its members, or any class of them; and the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the affect of, any of the financial difficulties referred to in Condition A.

— **Voting thresholds**. While the voting threshold of at least 75% in value of those present and voting in a class remains the same for both schemes of arrangement and restructuring plans, there is no separate numerosity test for a restructuring plan (i.e. a restructuring plan does not require a majority in number of each class (present and voting) to approve the plan).

— **Disenfranchisement of a class**. A class of creditors or members can be excluded from voting in the restructuring plan entirely if the court is satisfied that none of the members of that class has a genuine economic interest in the company.

— **Cross-class cram-down/cram-up.** One of the key features of the restructuring plan compared to a scheme of arrangement is that the restructuring plan allows for cross-class cram-down or cram-up of both creditors and shareholders. This means that it is not necessary to meet the voting approval threshold for each class in a restructuring plan and follows a number of foreign processes, most notably Chapter 11 in the United States (although unlike Chapter 11 there is no "absolute priority rule" for a restructuring plan). In order to cram-down or cram-up a class, the restructuring plan: (a) must be approved by at least one class who would receive payment or have a genuine economic interest in the company in the event of the "relevant alternative"; and (b) the class to be crammed down or up should be no worse off than in the "relevant alternative", subject to the court's

absolute discretion to sanction the plan. The "relevant alternative" is whatever the court considers would be most likely alternative in the event that the plan is not sanctioned and the company will need to provide evidence as to what this is.

The cram-down feature of the restructuring plan has been used twice as at the date of this article, under the DeepOcean restructuring[16] and the Virgin Active restructuring[17]. Given that the ability to permit the cram-down or cram-up of a class is in the court's discretion, it will need to be considered as part of the court's decision whether the restructuring plan is "just and equitable" (see below).

— **"Just and equitable"**. In exercising its discretion to sanction a scheme of arrangement, the court will consider the "fairness" of the scheme as outline above. The test for a restructuring plan, however, is slightly different in that the court must consider whether the plan is "just and equitable". The test is a negative one where it needs to be considered whether refusal to sanction is appropriate on the grounds that the plan is not just and equitable. Part of the considerations for this will include whether a dissenting class of creditors is to be crammed down or crammed up as part of the restructuring plan, and if so questions as to whether the class is out of the money and better off under the restructuring plan compared to the relevant alternative will be highly relevant.

— **Recognition**. As noted above, while the scheme of arrangement and restructuring plan have the same sufficient connection test to determine jurisdiction, the recent decision in the Gategroup restructuring[18] held that a restructuring plan is an "insolvency proceeding" for the purposes of the Lugano Convention (which is not the case for a scheme of arrangement). This means that the restructuring plan would not be able to rely on recognition in this manner (in the event that the UK acceded to the Lugano Convention) and it is likely that it would also not be able to rely on the Hague Convention as a method of recognition either. Therefore, the potential routes for recognition of a restructuring plan in foreign jurisdictions would be limited to (a) in the case English law governed documentation, the Rome I Regulation; and (b) private international law. This would need to be considered on a deal specific basis, particularly considering the cross class cram-down mechanisms for creditors and members available under the restructuring plan which may be contrary to local law and policy in certain overseas jurisdictions.

— **Possibility to submit competing restructuring plan proposals**. A scheme of arrangement may only be proposed by the relevant scheme company, however, there is the ability for creditors, shareholders and other parties to submit a restructuring plan. Given the level of disclo-

[16] DeepOcean 1 UK Ltd [2020] EWHC 3549 (Ch).
[17] Virgin Active Holdings Ltd & Ors, Re [2021] EWHC 1246 (Ch).
[18] Gategroup Guarantee Ltd, Re [2021] EWHC 304 (Ch).

sure required, however, we expect that restructuring plans will continue to be a company-led process.

Provided that there is sufficient certainty that a restructuring plan will be recognised in the relevant jurisdictions for a foreign debtor, this tool provides a clear alternative method for a foreign company in financial difficulty to restructure its debts where there may be substantial benefits in proposing a restructuring plan over a scheme of arrangement as outlined above.

III. DIFFERENCES OF UK RESTRUCTURING TOOLS VERSUS SPANISH HOMOLOGATION

In 2011, the former Spanish Insolvency Law[19] was amended by means of Law 38/2011[20], of 10 October, amending Law 22/2003 in order to introduce, *inter alia*, the possibility to homologate by the court a refinancing agreement (*homologación judicial de acuerdos de refinanciación*).[21]

See below a summary of the main differences compared to the English restructuring tools summarised in Section 0 above.

1. COMI vs. sufficient connection test.

In order to file for Homologation in Spain, all entities affected by this process must have their respective COMIs in Spain.

However, as discussed above, in order to pursue a scheme of arrangement or a restructuring plan, the criteria to be taken into account is the "sufficient connection" test. This more flexible approach is highly relevant for cross-border debt restructurings involving large company groups with subsidiaries incorporated in multiple jurisdictions.

2. Creditors affected by the restructuring.

Homologation can be used to cram-down creditors holding "financial claims", expressly excluding claims held by public entities[22], labour claims

[19] Formerly, Law 22/2003, of 9 July (*Ley 22/2003, de 9 de julio, concursal*).

[20] Law 38/2011, of 10 October, amending Law 22/2003 (*Ley 38/2011, de 10 de octubre, de reforma de la Ley 22/2003, de 9 de julio, Concursal*).

[21] For simplification purposes, we have not included in this article a description of the main features of Homologation.

[22] However, pursuant to Whereas (52) of the EU Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks ("**Directive 2019/1023**"), when public creditors have a privileged status under national law, Member States could provide that the plan cannot impose a full or partial cancellation of the claims of those creditors. As explained by PULGAR EZQUERRA, J., p. 662, this entails a contradiction, as public creditors can be affected by the restructuring, but certain effects can be limited. Therefore, each Member Estate will have a range of discretion in relation to this matter when transposing Directive 2019/1023 (and this may affect the Spanish Homologation). In addition, article 1.5 of Directive 2019/1023 does not refer to public claims among the claims excluded from the scope of application (including, *inter alia*, labour claims and claims arising from tortious liability.

and trade creditors[23]. Creditors holding non-financial claims can voluntarily accede to the homologated refinancing agreement, but they cannot be crammed-down by operation of law.

Both restructuring plans and schemes of arrangement can be used to compromise claims of creditors other than financial creditors including, *inter alia*, suppliers, tax authorities and pensions liabilities.

3. Restructuring options. There is no pre-defined list of the types of compromises or arrangements that a scheme of arrangement or a restructuring plan may entail, which makes each a flexible tool to implement restructurings.

Conversely, the Spanish Insolvency Act contains a list of effects that may be imposed to dissenting financial creditors pursuant to a Homologation. Notwithstanding this, certain Spanish courts are progressively interpreting this list and considering that in certain circumstances, certain effects not expressly contemplated therein can be imposed.

This has been the case in the restructurings of Bodybell[24] and Eurona[25]. In these restructuring transactions, the Spanish courts applied the so-called “special majority rule”, which applies to syndicated financial instruments. Pursuant to this rule, if lenders representing 75% of a syndicated financial instrument subscribe a homologated refinancing agreement, all the syndicated lenders are deemed to have entered into the agreement.

Pursuant to this rule, certain courts and Scholars consider that the effects that are not expressly contemplated under the Spanish Insolvency Act[26] can be applied to all members of a syndicate, given that all members of such syndicate would not be technically crammed down and they would be treated as consenting creditors.

4. Grounds to challenge.

Under a Homologation, dissenting and non-participating financial creditors have fifteen (15) business days from the publication of the court order homologating the master refinancing agreement to challenge such ruling. The grounds of appeal shall be limited to (i) the lack of the majorities required by the Spanish Insolvency Act; and (ii) the existence of a disproportionate sacrifice. Although the concept of disproportionate sacrifice has been slightly

[23] Pursuant to Directive 2019/1023, Member States can decide to cram-down trade creditors when transposing this regulation (see Whereas 16, 22, 24 and 30). Therefore, this may affect the current regime of the Homologation.

[24] Ruling issued by the Commercial Court no 11 of Madrid 760/2015, dated 20 October 2015.

[25] Ruling issued by the Commercial Court no 12 of Madrid, 436/2019, dated 29 November 2018.

[26] Pursuant to the Spanish Insolvency Law, these effects are: (i) maturity extensions for up to ten years; (ii) haircuts (no cap has been established); (iii) conversion of debt into equity; (iv) conversion of debt into profit participation loans of up to 10 years, convertible obligations, subordinated loans, payment in kind (PIK) facilities, or in any other financial instrument with a ranking, maturity and features different to the original debt; and/or (v) assignment of assets or rights as total or partial repayment of debt.

clarified by the Spanish Insolvency Law[27], it is still a vague concept that provides a wide level of interpretation to Spanish judges.

One of the most recent and controversial rulings on successful challenges to a Homologation is the Pescanova case[28], where the court qualified the main creditor of the group as a specially related person (*persona especialmente relationada*)[29] and subordinated its claim against the group. On such basis, as subordinated claims are not taken into account in order to determine if the relevant majorities for Homologation are satisfied, the judge considered that the majorities required pursuant to the Spanish Insolvency Act were not satisfied and left without effects the homologated refinancing agreement.

Provided that the formalities of a scheme of arrangement or a restructuring plan have been followed and the English court has accepted the composition of the classes and it has jurisdiction, the sanction of a scheme of arrangement or a restructuring plan is in the discretion of court. As discussed above, in exercising its discretion, the court will consider whether (a) in the case of scheme of arrangement, it is fair and (b) in the case of a restructuring plan, it is just and equitable, and dissenting creditors have the ability to make submissions to the court at the sanction hearing in this regard. Once sanctioned by the English court, however, there is no ability to challenge the scheme of arrangement or restructuring plan and it will be binding upon all creditors subject to the scheme of arrangement or restructuring plan.

IV. CONCLUSIONS

Each of the instruments analysed in this article has its own advantages and drawbacks. While the scheme of arrangement and the restructuring plan provide for more flexibility for a debtor looking to restructure its debt (e.g., including the flexible restructuring options, the sufficient connection requirement and, ability to cram-down non-financial creditors, flexible restructuring options), Homologation offers insolvency clawback protection and does not raise any recognition issues for Spanish companies.

When the Homologation was a very recent instrument in Spain, Spanish large corporations used to apply for the scheme of arrangement to restructure its debt. However, as of the date of this article, Spanish courts have over 10 years of experience since the Homologation was introduced in the Spanish

[27] According to the current version of article 619 of the Spanish Insolvency Law, the judge will consider that there is disproportionate sacrifice if: (i) creditors in the same or a similar position are treated differently; or (ii) unsecured creditors could obtain a higher recovery in a liquidation scenario than pursuant to the homologated refinancing agreement.

[28] Ruling 00017/2021, of 17 January, of the Commercial Court of Pontevedra.

[29] The creditors alleged that this creditor (Abanca, S.A.) should be considered as a specially related person on the following grounds (*inter alia*): (i) it had the ability to appoint and remove the majority of the members of the Board of Directors; and (ii) it held a shareholding stake exceeding 10% of the share capital of the debtor. However, there is a rule in the Spanish Insolvency Act whereby this subordination cause does not operate if the moment when the credit rights arose were prior to the date the relevant creditor received the equity. Notwithstanding this, in the Pescanova ruling, the judge considered that the claim should be subordinated regardless of the moment the equity was received.

Insolvency Act. During this period, they have become familiar with this matter, so the applications for Homologation have increased since 2014.

Notwithstanding the above, the current scenario may be altered in the coming months as a result of: (i) the transposition of Directive 2019/1023, which contemplates, among other measures, the possibility to implement a cross-class cram down and compromise the claims of public creditors and trade creditors; (ii) future case law on recognition in Spain of restructuring plans and schemes of arrangements following the UK's withdrawal from the European Union; and (iii) new restructuring figures tools created introduced by other Member States (i.e., such as the new Dutch restructuring plans which came into force on 1 January 2021).

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