HOW THE CELSA CASE AFFECTS THE RESTRUCTURING MARKET

In recent weeks, there has been much discussion regarding the judgment handed down on 4 September 2023, by Commercial Court No. 2 in Barcelona, which resolved the judicial approval of the Celsa Group companies' debt (the "**Judgment**").

The Judgment's main message is clear: creditors can move forward a restructuring plan – without the debtor and against the will of its shareholders – and, in effect, take control of the capital.

That's the big headline. What we want to address here are its consequences, as the Judgment creates challenges and opportunities for shareholders and creditors. Here we will discuss the perspectives of both.

Key issues

- Beyond the Celsa Judgment: how will it affect the restructuring market?
- Challenges and opportunities for creditors and shareholders.
- The shareholder's position
- The creditor's perspective
- The search for negotiated solutions and the vital role of advisors.

THE SHAREHOLDER'S POSITION

The Judgment attributes no role to the debtor, when it is the creditors who submit a restructuring plan against its will. In such a case, the Judgment indicates, the dispute is settled between creditors and shareholders. It is up to the latter to defend their capital.

The risk of loss of capital only occurs under two circumstances: (i) that the company is at least in a situation of imminent insolvency and (ii) that the capital has no value (*out of the money*).

Starting with the latter requirement, the Judgment shows that the valuation of the company is a quagmire, on which the debtor cannot rely. Shareholders may be convinced that their capital has value, when the situation is radically the opposite; and expert assessments may differ radically, depending on what perspective they adopt. There is no room for certainty here.

On the other hand, in companies of a certain size, it is not uncommon for reports to appear revealing the loss of value of capital; this may be on the occasion of commercial transactions (mergers or acquisitions), of ICO-backed financing, or even when the annual accounts are drawn up. If the reality is that capital is out of the money, it will not be easy to hide it.

Therefore, the red line to be set by the debtor and the shareholders is the one derived from the first requirement: imminent insolvency. The message to them seems clear: resolve the situation before imminent insolvency. If, by forcing the deadlines, the debtor reaches that point (i.e., when the scenario of the impossibility of meeting obligations is within three months), then the creditors will have a new tool at their disposal.

When there is a debt instrument that accounts for most of the liabilities, it will be easy to establish the onset of imminent insolvency: three months from the repayment date (if it is a bullet loan) or three months from any significant maturity that cannot be met. From there on in, the debtor would be playing with fire.

For indebted companies of various kinds, the line of imminent insolvency will be difficult to draw. In practice, the debtor and its shareholders would do well to adopt a prudent position: a judge will most likely find that the existence of short-term maturities that the debtor cannot meet is sufficient to justify that scenario.

What can the debtor do to avoid reaching the point of imminent insolvency? On the one hand, not rush into negotiations (i.e., start working with its creditors sooner). Moreover, conclude agreements (standstill or lock-up) with a majority of creditors in time. But relying on such agreements is delicate. In the past, the support of a percentage of liabilities ensured the debtor a blocking minority. This is not always the case now; approvals have recently been approved with very little liability support, and, moreover, the fact that a minority of creditors submits an application for approval may dynamite the agreement.

THE CREDITOR'S PERSPECTIVE

The fears we have outlined, from the debtor’s point of view, are presented as opportunities if we change the perspective to that of creditors.

In practice, very few creditors intend to access capital, or are even willing to do so. Suppliers only expect to be paid for their supplies, and lenders make their calculations based on interest.

However, as the debtor's financial situation deteriorates, the protagonists change and creditors who have bought debt at a discount come onto the scene. And, among them, there might be profiles that have an interest in accessing capital (being nothing to blame on it). Previously, they could try to do so by lending with an *in-rem* guarantee (in particular, with share pledges or more complex structures) but now they have a new route: judicial approval.

As we have explained, access to capital is only possible in the event of imminent insolvency. Thus, a creditor with an interest in exploiting this formula will seek access to the liabilities of companies with short-term debt, or it may even be the creditor who will finance or refinance that debt. In both cases, the objective will be to oblige the debtor to choose between repaying or negotiating, under the threat of losing capital.

THE CONFLUENCE OF THE TWO PERSPECTIVES AND THE SEARCH FOR NEGOTIATED SOLUTIONS

The Judgment and, above all, the procedure that led to it (without taking into account what may follow it) confirm that taking control of a company by means of approval requires a great deal of effort from creditors and enormous attrition from debtors. In many cases, the extension of a situation of uncertainty such as that resulting from this type of litigation over time will destroy the business.

Shareholders have a strong incentive to reach an agreement with creditors. And, even if a deal involves a significant cost to creditors (the cost of sharing some residual capital or paying for it) it is usually worth doing, in order to avoid greater evils.

In this regard, it seems unlikely we will see more cases like Celsa in the future. Insofar as shareholders already know what can happen, they should be more likely to share capital with creditors without a court ruling; locking themselves in their castle until a judge comes to expel them no longer makes sense. Likewise, with creditors becoming more aware of obstacles and risks, it is only logical that they adopt a realistic approach. The value of the Judgment lies, to a large extent, in the precedent it sets, sounding a warning.

However, any negotiation requires a rigorous analysis of the scenario, by both sides. A deal will be impossible if shareholders insist on denying the true financial situation and the weapons available to creditors, or if the latter think that taking control will be a walk in the park.

The role of legal and financial advisors, presenting shareholders and creditors with the reality, will be critical if both of these expectations are to be aligned.

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