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Celsa: Completion of First Spanish Restructuring Plan; Led by Creditors

05 December 2023

At a Glance

The restructuring of Celsa Group closed on Friday 1 December, following the first-ever Spanish restructuring plan — filed one minute after midnight on the day the relevant legislation became effective, by the ad hoc committee of Celsa's financial creditors (representing c.70% by value of Celsa's debt (the AHC)). Kirkland advised the AHC.

The plan was fiercely contested by Celsa's family shareholders on multiple grounds, explored below. The Barcelona Court approved the plan on 4 September, comprehensively dismissing nearly all points of opposition and criticising Celsa's directors and owners for "manifest lack of collaboration and understanding". Ownership of Celsa Group now has been transferred to its financial creditors pursuant to the plan.

The restructuring plan procedure was introduced in Spain in September 2022 to comply with a European Directive requiring all member states to introduce preventive restructuring procedures. It is similar, in many respects, to the UK restructuring plan, incorporating class voting and the ability to bind dissenting classes ("cross-class cram-down"). The Barcelona Court noted this represents a paradigm shift in Spain: for the first time, creditors enjoy the power of initiative and are able to direct the restructuring procedure.

This is a decision of enormous significance in the Spanish restructuring market: the Barcelona Court described the case as "truly unique", given the confluence of "the enormous economic significance of the interests at stake, the novelty of the approval procedure, the bitter and long-standing dispute [between] the parties … [and] numerous other factors …".

The decision demonstrates it is possible for creditors to propose a Spanish restructuring plan without the debtor's consent. (This differs from the position in the UK, where the English Court has held that the consent of the debtor — or its insolvency practitioners — is required for the court to have jurisdiction to approve a restructuring plan.)[1] In a common-sense approach, the Barcelona Court effectively held that — when assessing compliance with legislative requirements — creditor-led plans should be held to a lower standard than debtor-led plans, in circumstances of manifest asymmetry of information. For creditor-led plans, the test is whether the hypothetical formal breach of some requirement disables the proposed plan.

There are multiple parallels between the Barcelona Court's approach in *Celsa* and the English Court's approach to valuation disputes and the appropriate share of post-restructuring value in UK restructuring plans such as *Virgin Active* and *Adler*. In essence, in both jurisdictions, the courts have grappled with competing valuation reports in a restructuring context and determined it is for those creditors who are "in the money" to determine the division of post-restructuring value. The court's preference for the "outside in" valuations (of the AHC's advisers) on *Celsa* contrasts with the English Court's preference for the detailed individual valuations conducted on *Adler* by the Adler group's advisers; whilst the facts of the two cases are of course very different, *Celsa* illustrates that evidence on behalf of existing management/shareholders is not always to be preferred over evidence on behalf of creditors.

Background

The AHC filed an application for a restructuring plan in respect of Celsa Group immediately upon the Spanish legislation becoming effective in September 2022, as noted. The group's existing debt and restructuring terms are summarised below. The AHC held c.89% of the convertible debt and c.90% of the jumbo debt.

Celsa's family shareholders opposed the restructuring at every stage, culminating in a seven-day trial in July 2023. The restructuring was also opposed by Kutxabank, a Spanish savings bank which was a lender of the "framework debt" (see below).

Restructuring Terms

Instrument	Treatment under the Plan

€1,160 million convertible instrument, maturing 30 April 2023 (separate classes for guaranteed element and non-guaranteed element)	Pro rata debt-for-equity swap (90% of post-restructuring equity)
€362.4 million pre-elevation "jumbo" debt (as above, separate classes for guaranteed element and non-guaranteed element)	Refinanced. Majority of debt re-instated with 5-year term-out. €450,000 exchanged for equity
€898 million elevated "jumbo" debt (as above, separate classes for guaranteed element and non-guaranteed element)	€184 million reinstated under new jumbo agreement; €188.4 million exchanged pro rata for 10% of the post-restructuring equity
€522.5 million "framework debt"	Refinanced

Decision

The Barcelona Court held as follows.

Ground of Challenge	***Judgment***
"Celsa Group is solvent": meeting all economic and financial obligations as they fell due, except for debt obligations which were disputed (namely the jumbo debt and the convertible instrument)	It was indisputable that the Group was insolvent to the extent that it could not repay overdue financial obligations. Reports from experts instructed by the shareholders unjustifiably excluded the financial debt. (The court likened this to a doctor who concluded that a patient was in very good health, as he presented excellent analytical results, when in fact the patient's heart had stopped working.) The court was disparaging of expert evidence which performed "accounting surgery" by

	"amputating" financial debt. The fact that the validity of such debt was disputed was irrelevant for the purposes of determining the Group's solvency.
Value of the Group considerably exceeded the debt — i.e., shareholders were "in the money" and creditors' valuation was unsubstantiated	Valuation reports on behalf of the shareholders suffered from "an insurmountable lack of precision" and did not correspond to the Group's historic performance, nor market forecasts, nor to market trends. The value of Celsa Group's shares was below the amount of the debt, in accordance with reports from an independent expert and experts instructed by the AHC (noting that the Group's debt was trading well below its nominal value and the Group could not find financing in the capital markets).
Plan did not ensure the viability of the Group in the short- to medium-term *Under Spanish law, a plan should offer a reasonable prospect of avoiding bankruptcy and ensuring viability in the short- and medium-term.*	The "viability requirement" did not require the detail of a traditional business plan, particularly for a creditor-led plan. Requiring the level of detail suggested by the challenging shareholders would effectively block creditors from proposing a plan without the debtor's co-operation. The proposed plan would eliminate the situation of current or imminent insolvency, entailing "a substantial financial improvement that clears the way towards viability". Whilst the shareholders had proposed alternatives to the restructuring (involving substantial haircuts for creditors), the current plan was the only possible instrument to ensure the

Group's viability, as the creditors had refused to accept the shareholders' proposals "for perfectly legitimate reasons".

Unfair distribution of post-restructuring value / failure of "best interests of creditors" test

Under Spanish law:

- *the formation of classes must conform to the ranking such classes would have in bankruptcy;*
- *a plan should not provide for a class of creditors to receive more than it is owed (this is a form of the 'absolute priority rule');*
- *a plan must pass the "best interests of creditors" test, i.e., creditors must be better off under the plan than in the event of liquidation; and*
- *non-voting creditors may challenge the plan if their debt is reduced significantly more than is necessary to ensure the debtor's viability.*

To determine whether a plan respects the absolute priority rule, it is necessary to determine the value of the underlying assets "with the greatest possible precision", based on the best empirical evidence available. The future benefits for creditors would necessarily derive from their management, not from the debt-for-equity swap.

Plan proponents are not obliged to offer the same conditions to all creditors of the same rank — only to respect the obligation to grant equivalent or non-discriminatory treatment to relevant classes. A debt-for-equity swap does not necessarily confer a better economic position than amending the terms of the debt. Whilst treatment of the different classes was not identical, it was "equal and manifestly balanced", since it respected parties' economic and legal positions.

The plan met the "best interests of creditors" test; the likely realisation for Kutxabank in a liquidation would be (if anything) much lower than the terms offered under the plan. The court rejected Kutxabank's complaint that it was being required to make a "disproportionate sacrifice", greater than was necessary to guarantee the Group's viability.

No ability for creditors to launch a plan; plan requires debtors' consent *Shareholders asked the court to refer this point to the Court of Justice of the European Union (CJEU)*	The court refused to make the requested referral to the CJEU: • it was satisfied beyond reasonable doubt that creditors could launch a plan; • the general rule is that the debtor's approval of a plan is not required (unless the debtor is an SME or a natural person); and • this permits the imposition of a plan both on shareholders and the debtor itself; to hold otherwise would be "completely incongruous".
Lack of right of appeal (for debtor) against the judgment confirming the plan *The Spanish legislation includes a "provision of prior contradiction" under which opposing stakeholders have the right to oppose a plan but no right of appeal.* *Again, shareholders asked the court to refer this point to the CJEU.*	Again, the court refused to make the requested referral to the CJEU, being satisfied beyond reasonable doubt as to the correct way to interpret the legislation and holding that the Spanish law was "fully compatible" with the relevant provisions of the European Preventive Restructuring Directive.
The plan did not comply with certain legislative requirements as to communication, form and content	Plans should be held to "rigorous and demanding" standards; information in the plan must be sufficient and adequate so that stakeholders can make a properly informed decision and exercise their legal rights. However, allegations of non-compliance that did not materially impact the approval process should fail.

	It was necessary to differentiate as to whether a plan had been proposed by the creditors or by the debtor, when assessing compliance with legislative requirements — i.e., there is no universal standard. A debtor-led plan would have needed to be more detailed (in certain respects), but the court was conscious that the company's executives had been "extraordinarily reticent" to provide information. The court also recognised, pragmatically, that the opposing shareholders had privileged access to information: *"any omissions that may have occurred — minimum in any case — have not limited access to that information at all".*

Additionally, Kutxabank raised issues of class constitution and whether it had been wrongly left out of negotiations (as the plan had been published, voted upon and submitted for the court's approval on the same day). The court held:

- it was legitimate for the AHC to present the plan to court with sufficient levels of support, without notice to Kutxabank: whilst a plan proposal must be communicated to all affected creditors, there is no notice period. (This contrasts with the English law approach, which generally requires at least three weeks' notice of the convening hearing); and
- it was perfectly lawful to bind Kutxabank to the restructuring against its will; "collective interests are absolutely superior to individual interests".

Other points of opposition were dismissed by the court, including:

- the legitimacy of a group-wide restructuring plan — the court held this was justified as the Celsa Group had behaved homogeneously since 2017; to hold otherwise would have been to create an artificial distinction;
- shareholders' allegations that the convertible instrument was a nullity — the court held the relevant instrument was approved by all those involved, both creditors and

debtors (and even if the instrument were invalid as alleged, that would not result in the non-existence of the relevant debt);

- lack of information in the plan about operational or employment-related measures — the court held this was acceptable given the plan implemented a purely financial restructuring;
- creditors had not attempted to enforce their rights through other legal channels — the court held this did not equate to an implicit standstill; the AHC's plan to capitalise their debt was well-known; and
- objections that acts contemplated by the plan were in breach of corporate law — the court observed that bankruptcy law caters for "emergency situations" and it was unsurprising that execution of a complex, non-consensual plan such as Celsa's would raise tensions with corporate law; the court held that where relevant laws in this area conflict, it should opt for an interpretation that does not block a restructuring plan.

Alternative Implementation Mechanism

The only area where the court found in favour of the opponents related to the inclusion of a mechanism to vary the structure and conditions of the restructuring plan if necessary, without further recourse to court (the independent restructuring expert was empowered to execute the alternative implementation structure). The court held that the court's approval must be limited to the terms of the plan before it and that the alternative implementation mechanism would have given the restructuring expert too much discretion.

Costs

The court did not make any order as to costs, i.e., each party must bear its own costs. (In the UK, in *Prezzo*'s recent restructuring plan, the court made no order as to costs; the court does not generally impose adverse costs orders where opposing stakeholders raise matters of proper concern, assisting the court in its scrutiny of the proposals.)

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1. *NGI Systems & Solutions Ltd v The Good Box Co Labs Ltd (in administration)* [2023] EWHC 274 (Ch) at [61] ↩

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- 29 November 2023 Speaking Engagement 2023 Distressed Investing Conference
- 22 November 2023 Award Turnaround, Restructuring & Insolvency Awards 2023

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