

Two new rulings on financial assistance

Madrid, October 2023

The Burgos and Barcelona Courts of Appeal (BuCA and BaCA) have recently handed down two rulings on the prohibition of financial assistance¹.

The first one² refers to a capital raise approved with the sole vote of the majority shareholder (51 per cent) where the contribution was a claim by him³ against the company. He subscribed for the new shares at their nominal value (i.e. without paying any premium) and the minority shareholder's stake was diluted from 49 to 0.1 per cent. She challenged the share capital increase and the BuCA found that:

- (i) The nominal value at which the majority shareholder subscribed for the new shares (EUR 1 per share) was well below their fair value (EUR 571 per share). Had the new shares been subscribed for at their real value, the minority shareholder's stake would have been diluted to 14 instead of 0.1 per cent.
- (ii) With some exceptions⁴, the SCA does not require the subscription value of new shares to be equal or close to their real value, but only that it is not lower than their nominal value.
- (iii) Nevertheless, a corporate resolution to issue new shares with a subscription value far below their real value, as in the case at hand, is not only (a) detrimental to the company's interest, but also (b) contrary to the prohibition of financial assistance, since it is "undisputed" that the company is providing financing to the subscribers in an amount equal to the difference between the real value of the shares and their subscription value.

The finding of this judgment is arguable in our opinion, for in a case like this it does not seem the company is providing any type of financial assistance, as the advantage obtained by the shareholder who acquires new shares at a price below their fair value comes at the expense of the other shareholders. The appropriate remedy against this type of transactions is not, in our opinion, an action based on unlawful financial assistance, but a challenge of the capital raise itself provided there are reasons to claim it has been abusively imposed by the majority shareholder to its own benefit and to the unjustifiable detriment of the other shareholders⁵.

The second ruling⁶ refers to a company (Portamar) that granted a personal guarantee and a mortgage aimed at guaranteeing a bank loan granted to another company

¹ According to articles 143.2 and 150.1 of the Spanish Companies Act (SCA), a company cannot advance funds, grant loans or guarantees or provide any kind of financial assistance for the acquisition of its own shares or the shares in any company belonging to its group.

² Judgment of the BuCA 47/2023 dated 13 February 2023.

³ Strictly, a claim by a company wholly owned by him.

⁴ For instance, exclusion of pre-emptive rights.

⁵ Article 204.1 of the SCA.

⁶ Order of the BaCA 69/2023 dated 29 May 2023.

(Conundrum) for the acquisition of shares in Portamar. This is a classic example of unlawful financial assistance.

The borrower defaulted and the bank claimed payment from Portamar as guarantor, that eventually filed a court claim against Conundrum (not against the bank) seeking a declaration of nullity of the mortgage and the personal guarantee.

A commercial court of Barcelona dismissed the claim because Portamar could not have been ignorant about the unlawfulness of the transaction, as it granted the mortgage and the personal guarantee (estoppel).

The BaCA reversed this finding and reminded that any party to a null and void transaction, such as one tainted by unlawful financial assistance, is entitled to seek a judicial declaration of its nullity and that the doctrine of estoppel does not apply in such cases.

However, the BaCA did not uphold the claim, but declared the first instance proceedings null and void as from the preliminary hearing, because Portamar had not sued the bank despite the clear interest it had in the lawsuit as mortgagor and beneficiary of the personal guarantee.