

## **Shareholders' abuse, refinancing and convertibles**

Madrid, February 2023

Abuse by majority shareholders is one of the most common grounds for challenge of corporate resolutions by minority shareholders.

Recently, the Spanish Supreme Court (SSC) and the Barcelona Court of Appeals (BCA) have handed down two judgements dealing with this issue,<sup>1</sup> but resolving the disputes differently.

The SSC judgement is *a new chapter of the Pescanova saga*.

In June 2015, two years after the declaration of its circa €3 billion insolvency, Pescanova incorporated a company called Nueva Pescanova that acquired Pescanova's assets and part of its liabilities. As a result, 20% of Nueva Pescanova was held by Pescanova and 80% by its financial creditors.

To avoid insolvency, Nueva Pescanova entered into a refinancing agreement in 2016 whereby a relevant part of its financial debts were to be capitalized or, alternatively, partially written-down. Pescanova held non-financial claims *vis-à-vis* Nueva Pescanova and was offered both alternatives, which it refused altogether. The refinancing agreement was judicially sanctioned, but Pescanova's claims were not affected by it.

Nueva Pescanova's GSM agreed to capitalize the financial debts and increase its share capital. As a result, Pescanova's stake in Nueva Pescanova was reduced from 20% to 1.65%. Pescanova challenged the GSM resolutions arguing they were abusive since there were alternatives that would have enabled Pescanova to keep its 20%.

The SSC found that the resolutions were not abusive because they addressed a legitimate need of the company, namely implementing the refinancing agreement judicially sanctioned; given this, the majority shareholders could go for the option most favorable to them, even when there were alternatives less burdensome for the minority shareholders.

The BCA, on the contrary, did find abusive a resolution passed by a start-up (Midas Clean) in relation to its financing through several convertible loans.

In 2021, Midas Clean's GSM decided to convert into shares its convertible loans and certain claims of two companies that were controlled by its sole director and major shareholder.

While these two companies were allowed to capitalize their claims at par, the convertible lenders could only convert theirs with a substantial premium. This

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<sup>1</sup> Judgement of the SSC 3/2023 dated 10 January 2023 and judgement of the BCA 1655/2022 dated 17 November 2022.

resulted in the majority shareholder indirectly obtaining a reinforced controlling majority.

The convertible lenders challenged the GSM resolution on the grounds that it was abusive because a preferential treatment to the majority shareholder had been given without any justification.

The BCA upheld the claim because the *only* possible explanation of the different treatment between creditors was benefiting the majority shareholder to the convertible lenders' detriment.

The Midas Clean case seems to be a rather conspicuous case of abuse by the majority shareholder. In any event, had the refinancing agreement judicially sanctioned in Pescanova's case not existed, it is logical to assume the SSC would have found Nueva Pescanova's GSM decision abusive and decided the dispute similarly to Midas Clean.