## A) Jurisprudence:

### *Ruling of the Supreme Court no. 9/2023, of January 11th, on challenging social agreements.*

The First Chamber of the Supreme Court issued on January 11th, 2023, its judgment no. 9/2023, which is relevant in terms of challenging corporate agreements by minority shareholders when there has been an abuse of the majority by deciding not to distribute dividends unjustifiably.

In this case, the General Board of the company had decided not to distribute dividends under the understanding that they did not have sufficient funds, since they had to face a guarantee granted within the framework of a refinancing agreement.

However, the Supreme Court has understood that the company's obligation, in its capacity as guarantor in the refinancing agreement, was already covered, since it had sufficient funds and, therefore, the company's decision not to distribute dividends was not justified.

Thus, our High Court clarified two important issues: (i) first, that the minority shareholder has the right to challenge corporate agreements, without prejudice to the existence of other possible and compatible remedies, such as the right to separate society and; (ii) secondly, that the estimation of the action to challenge the corporate resolutions must entail that the Court orders the company to distribute dividends (a power normally reserved exclusively for the Shareholders' Meeting), since, otherwise, they would be leaving the decision in hands of the majority partner.

### *Judgment of the Superior Court of Justice of Madrid no. 1/2023, of January 17th, on the nullity of an equity award.*

On January 17, the Civil and Criminal Chamber of the Superior Court of Justice of Madrid in its judgment no. 1/2023 upheld a claim for annulment of an award rendered within an equity arbitration.

In the procedure, the annulment of the award was requested, considering that the arbitrator made a mistake in resolving the dispute based on the non-existence of a document, as well

as for incurring in a serious error in calculating the days compensable and, in a subsidiary manner, annulment was requested on the grounds that the award had partially exceeded its limits by granting more days for indirect costs than those claimed.

On one hand, the Tribunal dismisses the claim for nullity because considers that the arbitrator has no obligation to give priority to specific documents or to carry out an individual assessment of them. In this sense, the ruling establishes that the action for annulment of an award cannot give rise to the ordinary jurisdiction to assess the merits of the matter, but that it is an exceptional mechanism aimed at preventing the awards from suffering from procedural defects and/or violate fundamental rights.

On the other hand, the Court of Justice of Madrid does uphold the subsidiary reason, considering that the arbitrator ruled on issues not submitted to his decision, having granted more than what was claimed.

***Judgment of the Court of Justice of the European Union in case C-312/21, of February 16th, 2023, which resolves three preliminary rulings regarding damages derived from unlawful jurisdiction raised by Commercial Court No. 3 of Valencia.***

The Court of Justice of the Union (CJUE) resolved on February 16th three harmful issues raised by the Mercantile Court No. 3 of Valencia in relation to a procedure in terms of claiming damages derived from the truck manufactures cartel cartel.

In first place, the Court asked whether article 394.2 of the Civil Procedure Law (LEC), which establishes that each party will pay the costs caused at its request and the common ones by half, is compatible with the right to full compensation of the injured party anti-competitive conduct included in European regulations.

The CJEU points out that article 394.2 of the LEC is not contrary to European Union law, since it does not make it practically impossible or excessively difficult to exercise the right to full compensation for damage suffered as a result of conduct contrary to competition, in a manner that the principle of effectiveness is not violated.

Secondly, the other two preliminary questions raised by the Court are related to article 17 of Directive 2014/104/EU (transposed into article 76.2 of the Competition Law), which establishes that the Member States shall ensure that national courts have the power to estimate the amount of damages, in case that the claimant has any prove of the suffered damages, but it could be practically impossible or excessively difficult to precisely quantify the damages on the basis of the available evidence.

With this in mind, the Court asked whether this power to judicially estimate the amount of damage could be affected in case the information between the parties were diminished, either because: (i) the plaintiff had access in the course of legal proceedings to the data on which the defendant's expert report is based to exclude the existence of damage; or (ii) the plaintiff directs his action against one of the participants of the cartel, jointly and severally responsible for the damages, but who did not commercialize the product or service acquired by the injured party in question.

The TJEU determines that none of the circumstances mentioned by the Court precludes by itself the power of judicial estimation of the amount of damage, but what is relevant is to verify if the two requirements provided for in article 17th of the Directive are met for such power to proceed. : (i) proof of the existence of damage; and (ii) that it is practically impossible or excessively difficult to quantify it accurately.

In this sense, el TJUE points out that the actions of the parties in the procedure and the use they may have made of the procedural tools available to them to reduce the existing information (access to evidence) must be taken into account. Thus, if the judge considers that the impossibility of quantifying the damage is a consequence of the plaintiff's inactivity, he could not replace such inactivity through his power to estimate the damage.

### *New doctrine on revolving cards: Judgment no. 258/2023 of the First Chamber of the Supreme Court.*

On February 15th, the First Chamber of the Supreme Court issued a plenary ruling on revolving cards.

On one hand, the Supreme Court guarantees the existing jurisprudence on the matter in terms of the "normal interest of money" that must be used to determine if the remunerative interest is usurious: the average interest applicable to the category in which a transaction is being challenged corresponds to. , that is, the average rate applied to credit operations through credit cards and *revolving* published in the official statistics of the Bank of Spain.

On the other hand, the Supreme Court develops its jurisprudence on the matter in relation to the following points:

- If the *revolving* card contract at trial is prior to 2010 (the date on which the average rates began to be published in the Bank of Spain's statistics), the Supreme Court clarifies that the comparison of the rate applied must be made with "the specific information closest in time", which is the average rate for 2010 for the aforementioned cards according to Bank of Spain statistics.

- If the contract is after 2010 and the interest rate applied is compared with the average rates included in the Bank of Spain statistics, it must be considered that such statistics do not analyze the APR, but the TEDR (effective rate of restricted definition), which is equivalent to the APR without commissions. Therefore, the published index can be supplemented with what corresponds to the commissions generally applied by financial institutions. However, the Supreme Court understands that, as the agreed interest must be "significantly higher" than the common market, the APR applied to the contract can normally be compared with the TEDR included in the Bank of Spain statistics.

- In response to the mass litigation on the matter and with the aim of providing legal certainty to operators in the market, the Supreme Court concludes that for this type of contract (*revolving card*) the interest rate applied will be considered usurious if it exceeds more than 6 percentage points of the average market rate.

## B) Legislative news:

***Law 2/2023, of February 20th, in which it regulates the protection of people who report on regulatory violations and the fight against corruption, which incorporates Directive (EU) 2019/1937.***

Law 2/2023 was published on February 21st transposing Directive (EU) 2019/1937 (*Whistleblowing Directive*) into our legal system. This law will enter into force 20 days after its publication, that is, on March 13th. However, there is a transitional regime so that companies can adopt the measures provided for in the standard. The period contemplates three months from the entry into force of Law 2/2023, except for private sector companies with 249 employees or less, in which they have a until December 1st, 2023.

The purpose of Law 2/2023 is to adequately protect natural persons who report actions or omissions that may constitute an infringement of European Union Law, or a serious or very serious criminal or administrative offense.

For this, an internal information channel (complaints channel) must be implemented, in which avoids reprisals against informants.

Those who are bound by Law 2/2023 are: (i) natural or legal persons with 50 or more workers; (ii) legal persons from the private sector that fall within the scope of application of the European Union in terms of financial services, products and markets, prevention of money laundering or terrorist financing, transport security and environmental protection *(included in parts I.B and II of the annex to the Whistleblowing Directive*); (iii) political parties, trade unions or business organizations and foundations that they may create, if they receive or manage public funds; and (iv) all entities that make up the public sector.

Among the obligations introduced by Law 2/2023, we highlight the need to provide clear and accessible information on the use of the internal information system, as well as to have a record book of the information received and the internal investigations carried out.

Likewise, they also highlight the protection measures for whistleblowers and the prohibition of reprisals.

Finally, we must note that the Independent Informant Protection Authority (A.A.I.) has been created, in which, among other functions, it will manage the external communication channel regulated in Title III and will process the sanctioning procedures and impose the sanctions for the infractions provided for in Title IX.

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