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CASES AND TRANSACTIONS

CARLIT: SALE OF PORTFOLIO OF NON-PERFORMING LOANS ("NPLS")

Cuatrecasas, Gonçalves Pereira advised CaixaBank S.A. on selling an NPL portfolio known as "Carlit." This is the second sale of loans of this kind that the bank has carried out: last year it sold the Atalaya portfolio.

Carlit involves the transfer of an important portfolio of NPLs to foreign investors, aimed at reducing the bank's default rate.

This kind of transaction stands out for its technical and logistical complexity arising from the (i) numerous and ever-changing state and regional laws and case law on consumer protection, particularly when it involves selling loans to individuals; and (ii) significant amount of collateral and its distribution throughout Spain, in the case of loans for developers.

Carlit, and other transactions occurring on the market so far this year, e.g., Pirene, Corus, Tizona, Far, Ocean, Normandy, Firefox, Lane and Sil2, on which *Cuatrecasas, Gonçalves Pereira* advised the seller or the buyer, clearly show the Spanish bank's interest in cleaning up its balance sheets and international investors' interest in Spanish assets.

MASMOVIL BROADBAND, S.A.U.: ISSUE OF SENIOR GUARANTEED BONDS ON THE SPANISH ALTERNATIVE FIXED-INCOME MARKET ("MARF")

Cuatrecasas, Gonçalves Pereira advised MASMOVIL BROADBAND, S.A.U. on the issue on MARF of senior guaranteed bonds, named "Issue of MASMOVIL BROADBAND, S.A.U. simple bonds. July 2016."

The issue, valued at €30 million, with an interest rate of 5.75% and a term to maturity of eight years, is a bond project related to the "Hermes I" project, which is based on the acquisition of assets derived from the remedies of the Orange/Jazztel transaction, on the co-investment agreements related to Orange's own network, and on direct investment in FTTH fiber.

MASMOVIL BROADBAND, S.A.U. is part of the Masmovil group, the parent company of which is MASMOVIL IBERCOM, S.A.

EDV PACKAGING SOLUTIONS S.A.: APPROVAL OF CHANGES TO THE COMPOSITION AGREEMENT

Cuatrecasas, Gonçalves Pereira advised EDV PACKAGING SOLUTIONS S.A., a manufacturer of plastic packaging for the food sector, on changing its creditors composition agreement. The company was declared insolvent in 2008 and approved a composition agreement with its creditors in January 2010. After six years complying with the agreement, the company was no longer able to make the payments established for the end of 2015 under the agreement due to the lack of commercial and financial loans and a supply crisis of raw material. Therefore, the company requested changes to the composition agreement in line with the third transitory provision of Act 9/2015, of May 25, which allows changes to be made to unfulfilled composition agreements within two years of entry into force of the act, i.e., until May 27, 2017.

Commercial Court No. 1 of Barcelona (judgment 185/2016 of July 26, 2016) approved the requested changes to the agreement, which involved (i) a four-year extension of the grace period on the initial period established in the agreement, and (ii) changes to the payment calendar of the credits under the agreement. Regarding the requirements for approval of the changes to the composition agreement, the judgment states the following:

(i) For the purpose of quorum, it treats privileged credits as if they were ordinary credits in an analogical application of article 124.2 of the Insolvency Act, although those privileged credits were not affected by the original agreement.

(ii) The majority required for approval of the agreement is 60% of ordinary liabilities, concluding that the changes to the composition agreement do not exceed the limits in article 124.1 of the Insolvency Act, although the combination of the grace periods of the original agreement and of the changed one do exceed the limits.

LEGISLATION

NEW BANKING REGIME ON THE ACCOUNTING TREATMENT OF CREDIT RISKS

On April 27, the Banco de España approved Circular 4/2016, amending Circular 4/2004 on the financial information of credit institutions. The new circular is the greatest reform of Annex 9 of Circular 4/2004 to date. It completely reformulates it and contains guidelines for institutions on risk management.

Although the system's basic structure is the same, there are some significant changes. We highlight the following new developments:

(i) Credit institutions can use internal models for estimating hedging of a general nature.

(ii) Risk classification is redefined with the removal of the substandard category and the addition of a normal risk under special monitoring.

(iii) Statistical provisions are removed while general and specific provisions remain.

(iv) The "unique calendar" is replaced by many calendars depending on the type of borrower and the purpose of the transaction.

(v) The accounting treatment of insolvency, restructuring and refinancing loans is stricter, although the basic principles are kept in place: insolvency loans are always doubtful (or non-performing), and restructuring and refinancing loans cannot be reclassified as normal loans unless they meet the minimum criteria.

(vi) More details are provided about the requirement to restructure adjudicated assets.

ENTRY INTO FORCE OF ACT 3/2016, OF ANDALUSIA

On June 9, 2016, the Andalusian parliament approved Act 3/2016, of June 9, on protecting the rights of consumers and users when contracting loans and mortgages against housing.

The act aims to strengthen consumer protection in relation to these kinds of contracts in the pre-contractual phase and the post-signing phase. Regarding the pre-contractual phase, it establishes new preventive measures and requirements to ensure transparency of information. Regarding the post-signing phase, it (i) regulates obligations regarding the information to be provided to consumers and document conservation, e.g., it requires notification to the debtor of the loan transfer; and (ii) aims to foster dispute resolution through arbitration or mediation.

Act 3/2016 came into force on September 16, 2016, three months after its publication in the Official Gazette of Andalusia.

SUSPENSION OF APPLICATION OF ACT 24/2015, OF CATALONIA, IS UPHELD

The Constitutional Court's ruling of September 20, 2016 (BOE 1.10.16) upholds the suspension of the application of certain rules under Act 24/2015, of Catalonia, which was agreed on following the admittance to processing of the appeal of unconstitutionality filed by the government in relation to those rules.

Click on the link below to read our Legal Flash on the admittance to processing of this appeal:

Legal Flash | Suspension of the application of Catalan Act 24/2015, of July 29, on urgent measures to address the housing and energy poverty emergency

CASE LAW

EFFECTS OF THE RESOLUTION OF SINGLE-PERFORMANCE AND CONTINUING-PERFORMANCE CONTRACTS

In its judgment 500/2016 of July 19, 2016, the Supreme Court interprets article 62.4 of the Insolvency Act, regulating the effects of contract resolution during insolvency:

(i) In the case of continuing-performance contracts, the resolution does not affect the obligations met by both parties, as they have been taken care of through the correlative obligation. The rule establishes (i) discharging effects for payments agreed on but pending, (ii) cancellation of the contractual relationship, acknowledging the compliant party's credit right to any payments not met by the insolvent party, and (iii) a compensation when it is proved that damage arises from the insolvent party's non-compliance.

(ii) In the case of single-performance contracts—in the case studied, a sales contract—, payment is considered a single object, meaning that partial compliance does not meet the other party's correlative obligation. Therefore, resolution of a single-performance contract not only results in a discharging effect, but also involves restitution of payments received by both parties.

RESOLUTION OF AGENCY AGREEMENTS DUE TO DECLARATION OF INSOLVENCY

If an agency agreement is resolved due to the agent being declared insolvent, the business owner must compensate the agent for clientele if the requirements under the Agency Act are met (the agent brought new clients or clearly increased transactions with existing clients, and the previous activity is still beneficial for the business owner).

This confirms that agency, as an *intuitu personae* agreement, can be resolved based on declaration of insolvency (contrary to the general rule of article 61 of the Insolvency Act). We highlight that under article 26 of the Act on Agency Agreements, contract resolution is permitted if the other party is declared insolvent.

Judgment 457/2016 of July 5, by the Supreme Court confirms the appeal judgment.

In its appeal judgment of January 17, 2014, the Provincial Court of Madrid classifies as an agency agreement the business relationship (in relation to the promotion and marketing of mobile telephones) the parties had called "distribution agreement with exclusive relationship." It states that the business owner's reporting of the agreement because of the agent's declaration of insolvency does not deprive the agent of its right to claim compensation for clientele. In this case, the court considers proved that the agent's incompliance was not serious enough to prevent the agent from receiving compensation for clientele (particularly, interpreting the agreement, it considers that the closure of sales points did not breach the agreement) and that the requirements necessary for payment had been met.

DOCTRINE ON COMFORT LETTERS

In its judgment 424/2016 of June 27, 2016, the Supreme Court confirms its doctrine on the nature and legal regime of comfort letters (also known as sponsorship letters).

The Supreme Court upholds that a "strong" comfort letter implies a unilateral business structure with emphasis on obligation, aimed at establishing a relationship of obligation. This obligational effectiveness is subject to the letter clearly and unequivocally stating the obligational commitment (in terms of its content and other aspects, including duration) and that the creditor expressly or tacitly accepts it.

In this case, it is also considered important, when obligational effectiveness is being granted, that both sponsors acknowledge that the commitment established in the sponsorship letters was decisive for carrying out the sponsored financing transaction and that the sponsors controlled and managed the financed and sponsored party in their capacity as majority shareholders of the latter (not parent company).

The court confirms that both sponsors are jointly and severally liable given the decisive nature of the letters for the credit transaction considered as a whole and with the clear purpose of ensuring the proper closing of the transaction.

STANDSTILL OF GUARANTEE ENFORCEMENT DUE TO COURT-SANCTION IS NOT A DISPROPORTIONATE SACRIFICE

In judgment 297/2016 of September 22, 2016, by Commercial Court No. 6 of Madrid, the court rejects the appeal filed by a dissenting entity affected by a court-sanctioned refinancing agreement. The appeal argued the existence of a disproportionate sacrifice due to the standstill of the notarial enforcement of a pledge on shares already executed.

The court rejected the entity's claim, considering there were no objective circumstances to conclude that (i) the agreement was aimed at harming the enforcement; (ii) other enforcements received special treatment; or (iii) as a result of the standstill, the claimant's credit could be affected compared to other creditors with more solid guarantees. The standstill of the enforcement is a consequence of the agreement's modifiable obligational effect and of the rights to defense and claim, identical to that endured by other creditors with individual enforcement processes underway. The dissenting entity's credit is in the same category as other credits with enforcement underway and that are affected by a grace period remunerated with an increasing ordinary interest rate and the capitalization of unpaid interest arising from the previous refinancing. The standstill also ensures equal treatment of financial creditors given that it avoids disintegration of the insolvency estate and the hasty and uneconomic liquidation of the insolvent party's assets.

NEWS

PRELIMINARY ISSUE ON THE PRE-EMPTIVE BUY-BACK OF LITIGIOUS CREDITS UNDER ARTICLE 1535 OF THE SPANISH CIVIL CODE

In its writ dated February 2, 2016, the First Instance Civil Court No. 38 of Barcelona raised a preliminary issue to the Court of Justice of the European Union. In that writ, it requested the EU court to determine whether the business practice of assigning or buying credits without offering consumers the possibility to settle the debt by paying the assignee the outstanding amount is in line with EU law.

The Barcelona court indicates that article 1535 of the Spanish Civil Code, governing the preemptive buy-back of litigious credits, does not adequately protect consumers' interests because (i) its scope for application is limited, and (ii) it does not include cases of buying credits outside of court or in the enforcement stage.

The Court of Justice of the European Union's ruling will be especially relevant for the many transfers of portfolios of NPLs the banks have carried out recently to reduce their default rates, improve their liquidity and reduce costs.

OUR ARTICLES

Shareholders, directors and distressed investors: what hedge fund managers need to know about investing in Spanish restructuring, The Hedge Fund Law Report, BUIL ALDANA Ignacio, October 2016.

Click on the following link to article "Debt-for-equity swaps in distressed situations", BUIL ALDANA Ignacio, PERALES MELLADO Marcos; International Financial Law Review IFLR, September 2016.

Click on the following link to article "High-Yield Debt 2016: Spain", DE LA TORRE VISCASILLAS, Jaime, CRUZ ROPERO, Miguel; Getting the deal through, August 2016.

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