CUATRECASAS

NEWSLETTER I FINANCE AND RESTRUCTURING

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CASES AND TRANSACTIONS

Comsa: debt restructuring

PSA Financial Services Spain: establishing an asset-backed securities fund

Emesa: subscribing a collar equity swap

LEGISLATION

Proposal for an EU Directive on restructuring and second chance

Exit right due to no dividend distribution: end of the suspension of art. 348 bis of the Spanish Companies Act ("LSC")

CASE LAW

Delimitation of objective scope of RDL 5/2005 and conditions for applying to financial collateral over bank accounts

Concept of *in rem* security and extraterritorial effects of insolvency proceedings

Non-rescissory nature of structural changes involving transfers (mergers and spin-offs) in insolvency proceedings

Challenge of court-sanctioned refinancing agreements: financial collateral, percentages and disproportionate sacrifice

Powers of attorney granted abroad and judgment of equivalence

OUR ARTICLES

Attracting FinTech – second thoughts

Investing in distressed debt in Europe: the TMA handbook for practitioners

Spanish Commercial Real Estate Finance and CMBS in Spain

Spain: Renewables restructuring trends

CASES AND TRANSACTIONS

COMSA: DEBT RESTRUCTURING

Cuatrecasas advised the engineering and infrastructure group led by COMSA CORPORACIÓN DE INFRAESTRUCTURAS, S.A. on restructuring its financial debt of €719 million with a bank syndicate of eight credit institutions.

Following this restructuring, the group's long-term debt has been refinanced until June 2021, and the lines of credit to finance its working capital will be granted so it can continue with its plan to expand internationally. In addition, a debt tranche of €250 million automatically convertible into 50% of the head company's capital has been established.

This transaction involves the group's second round of financing; the first round was in 2013, and *Cuatrecasas* was also the advisor. Since then, the group has carried out several disinvestments aimed at reducing its debt. In line with the terms of the new debt restructuring and the group's business plan, it will continue to disinvest in non-core assets, enabling it to repay a large part of its debt by 2021.

PSA FINANCIAL SERVICES SPAIN: ESTABLISHING AN ASSET-BACKED SECURITIES ("ABS") FUND

Cuatrecasas advised PSA FINANCIAL SERVICES SPAIN, E.F.C., S.A. on (i) establishing the AUTO ABS SPANISH LOANS 2016 asset-backed securitization fund, and (ii) issuing asset-backed notes worth €726,200,000 on the Fixed Income Market ("AIAF").

This is the first ABS fund whose assets are made up of loans and credits granted by PSA Financial Services Spain, E.F.C., S.A. to individuals to acquire new and used vehicles.

PSA Financial Services Spain, E.F.C., S.A. belongs to the PSA Peugeot Citroën group, which has over 200 years of experience in manufacturing vehicles and is currently made up of three brands with distinct personalities: Citroën, Peugeot and DS. Since October 2015, it is an investee company owned by Banque PSA Finance, S.A. (50%) and Santander Consumer Finance, S.A. (50%).

EMESA: SUBSCRIPTION OF COLLAR EQUITY SWAP

Cuatrecasas advised EMESA CORPORACIÓN EMPRESARIAL, S.L. on subscribing a complex financial derivative in the form of a collar equity swap with underlying shares listed on the Paris stock exchange.

The derivative is aimed at limiting the risk of the value of the listed shares' fluctuating, in the framework of Citibank group's acquisition, financed by the group itself.

The transaction was subject to UK law and was carried out under the ISDA Master Agreement.

LEGISLATION

PROPOSAL FOR AN EU DIRECTIVE ON RESTRUCTURING AND SECOND CHANCE

On November 22, 2016, the European Commission published the Proposal for a directive on preventive restructuring frameworks and second chance. Once the proposed directive has gone through the legislative process, EU Member States will have two years to transpose it into their national legislation.

The proposal is divided into three main blocks: (i) preventive restructuring frameworks, (ii) second chance for entrepreneurs, and (iii) measures to increase the efficiency of restructuring and insolvency procedures.

The European Commission bases this proposal (which is in line with Commission Recommendation of March 12, 2014) on the need (i) for greater harmonization for improved operation of the common market, (ii) greater certainty for international investors in relation to credit rating, and (iii) to improve the restructuring of viable businesses.

EXIT RIGHT DUE TO NO DIVIDEND DISTRIBUTION: END OF SUSPENSION OF ART. 348 BIS OF THE SPANISH COMPANIES ACT ("LSC")

On January 1, suspension of the application of art. 348 bis LSC ended; under this article, the shareholders of private and public limited companies are entitled to exit the company if, in any corporate year (from the fifth year following the company's registration in the commercial registry), the ordinary shareholders' meeting does not agree to distribute a minimum of one-third of the legally distributable income derived from carrying out the corporate purpose. If that case, shareholders' individual exit right, entitles minority shareholders to exit the company and recover their investment at a reasonable value under the procedure established in the LSC.

Since its introduction in the text of the LSC, this right has been criticized for several reasons (mainly because it could give rise to additional financial difficulties for companies in financial trouble), leading the lawmaker to questioning the provision and postponing its application twice without repealing it. The last time was through the First final provision of Act 9/2015 (originating from Royal Decree Law 11/2014), which extended its suspension until December 31, 2016.

For practical purposes, reactivating this right from January 1, 2017, means that the exit right due to failure to distribute dividends can be exercised from the first ordinary shareholders' meeting in the first six months of 2017 (foreseeably in June) at which application of 2016 income is approved, and it is agreed to not distribute dividends under the terms provided in art. 348 bis of LSC.

The important financial consequences of exercising this right for the company assets, the many questions arising from a literal interpretation of the provision and, particularly, the need to harmonize the practical effects of applying it with the possible signing of financing agreements entered into by the company make it advisable to analyze the real impact of reactivating this right for companies.

CASE LAW

DELIMITATION OF OBJECTIVE SCOPE OF RDL 5/2005 AND CONDITIONS FOR APPLYING TO FINANCIAL COLLATERAL OVER BANK ACCOUNTS

Judgment of the Court of Justice of the European Union of November 10, 2016 (Case C-156/15) (ECLI:EU:C:2016:851) has resolved several issues relating to Directive 2002/47/EC of the European Parliament and of the Council, of June 6, 2002, on financial collateral arrangements, incorporated into Spanish law by Royal Decree Law 5/2005, of March 11, on urgent reforms to boost productivity and improve public procurement, which, to date, have been a focus of debate in doctrine and case law:

a) As regards the scope *ratione materiae* of the regulation, the judgment has applied a broad interpretation of the terms "relevant financial obligations" and "obligations which give a right to cash settlement" used in Directive 2002/47/EC. It interprets that these expressions refer to any obligation that gives a right to cash settlement (including ordinary pecuniary debts the account holders may have with their bank, which is the case in this judgement).

b) Also, the Court of Justice of the European Union upholds that for the collateral taker to be able to use the collateral under Directive 2002/47/EC, it must have control of the deposited monies, which will occur if the collateral provider is prevented from disposing of them.

c) The judgment highlights that the system under Directive 2002/47/EC will only apply to monies deposited in the collateral provider's account before the starting of insolvency proceedings.

CONCEPT OF *IN REM* SECURITY AND EXTRATERRITORIAL EFFECTS OF INSOLVENCY PROCEEDINGS

Article 5 of EC Regulation 1346/2000 on insolvency proceedings contains an exception to the principle applicable to main insolvency proceedings and to the law of the Member State where the proceedings were opened. This exception is established for rights *in rem* and, under it, the validity and scope of the rights *in rem* must be determined under the law of the Member State where the secured assets are located.

In its judgment of October 26, 2016 (Case C-195/15) (ECLI:EU:C:2016:804) for a preliminary ruling by a German court in the framework of insolvency proceedings opened in France, the Court of Justice of the European Union established that the concept of "*in rem* rights" for the purposes of article 5 is determined by the national law of the Member State where the secured assets are located, meaning that it is not an autonomous or harmonized concept. Therefore, the grounds, validity and scope of the rights *in rem* must be analyzed based on the corresponding national law.

However, the court clarifies that, although article 5 does not define the concept of "rights *in rem*," it does define, through a number of examples, the requirements that the concept of "rights *in rem*" of the national law must meet for the exception to be applicable.

The court understands that the concept of "rights *in rem*" for the purposes of article 5 must be interpreted restrictively (given that it is an exception), while ensuring the effectiveness the exception. Regarding the proceeding for which a preliminary ruling was requested, the court confirms that this concept was included in a German national regulation under which credits relating to property taxes constitute a tax lien on the property and, in relation to those credits, the owner must accept enforcement of the property. Also, the court does not consider relevant whether the right *in rem* relates to the public or private sector or whether it relates to commercial or other transactions.

NON-RESCISSORY NATURE OF STRUCTURAL CHANGES INVOLVING TRANSFERS (MERGERS AND SPIN-OFFS) IN INSOLVENCY PROCEEDINGS

In the Spanish Supreme Court's judgment of November 21, 2016, no. 682/2016 (ECLI:ES:TS:2016:5136), the Civil Chamber of the Supreme Court confirms the non-rescissory nature of structural changes of companies involving transfers (in this case, a partial spin-off).

Before declaring insolvency, a private limited company spun off its property leasing business activity to another private limited company. The insolvency administration carried out a rescissory action for the transfer of ownership of the property through the partial spin-off to be rendered ineffective. Both the first-instance and the appeal court rejected the claims of the insolvency administration. The Supreme Court also rejected the cassation appeal.

The Supreme Court uses the following arguments to confirm the non-rescissory nature of the spin-off:

- Nature of insolvency rescission and its impact on the case. A clawback action (art. 71 LC) is of a rescissory nature; it is an action of functional ineffectiveness that presupposes that the act is valid but that can be challenged based on the harmful effects for third parties (the creditors in the insolvency proceedings).
- By means of an action for rescission in insolvency, it is possible to challenge a bilateral contract or one payment or obligation generated by that contract (see Supreme Court judgment of October 26, 2012, no. 629/2012, ECLI:ES:TS:2012:7265). However, it is not possible to make this distinction in the case of a partial spin-off, because the split company transfers a block of assets to the beneficiary by universal succession, meaning that this transfer is a consequence of the spin-off and not a separate or subsequent act. Therefore, it is not possible to carry out an action for rescission in insolvency on the assets transfer and leave the spin-off itself unharmed.

- Resistance of structural changes involving transfers to the insolvency rescission. Art. 47 of the Structural Changes Act ("LME") regulates the regime for challenging structural changes involving transfers, e.g., mergers and partial spin-offs. For legal certainty reasons, the article restricts to the maximum the possibility, once the merger or spin-off has been registered, that it can be declared ineffective, meaning that nullity is only possible based on an infringement of the rules for carrying out each structural change and is subject to an expiry period of three months. This affects any action aimed at rendering the structural change ineffective, including insolvency rescission. The LME is a special regulation compared to the general regulations governing the ineffectiveness of legal business, both in and outside of insolvency. Thus, the Supreme Court concludes that the partial spin-off is excluded from the acts of disposal that can be subject to insolvency rescission.

- Protecting the rights of third parties. The fact that structural changes involving transfers cannot be challenged affects actions aimed at rendering them ineffective but does not prevent the application of other remedies aimed at protecting the rights of the shareholders or certain creditors that have been unlawfully sidestepped. The action to be carried out, in the case of insolvency, would be aimed at obtaining a compensation equivalent to the credits evaded with the spin-off. Without prejudice to it being a collective action carried out by the insolvency administration, and that the amount obtained is assigned to the insolvency estate, the amount claimed would be relative to the credits unlawfully evaded that would necessarily have existed before the spin-off.

CHALLENGE OF COURT-SANCTIONED REFINANCING AGREEMENTS: FINANCIAL COLLATERAL, PERCENTAGES AND DISPROPORTIONATE SACRIFICE

Commercial Court No. 2 of Seville (judgment of October 24, 2016, no. 507/2016) and Commercial Court No. 10 of Barcelona (judgment of November 29, 2016, no. 286/2016) have resolved the challenges filed against the court-sanctioned refinancing agreements of two listed companies under the protection of the Fourth additional provision of the Insolvency Act.

Below we indicate the main issues covered in these judgments in relation to challenges of court-sanctioned refinancing agreements:

a) *Limitation of the grounds for challenging*. Insolvency Act limits the grounds for challenging to these two: (i) the existence of the percentages required by the Fourth additional provision of the Insolvency Act, and (ii) the disproportionate nature of the sacrifice imposed.

   Therefore, it is not possible to claim (i) application of the special insolvency regime for financial collateral governed by Directive 2002/47/EC and Royal Decree-law 5/2005, (ii) a possible conflict of interest of certain creditors, or (iii) that the agreement is not related to a viability plan or that its conclusions are not reasonable or feasible.

b) *Calculating the majorities required for judicial approval and the extent of the effects*. The courts understand that:

   (i) The percentages established in the Fourth additional provision of the Insolvency Act must be calculated only in relation to the financial liability being refinanced.

   (ii) In contracts subject to a syndicate agreement, there is a positive clustering effect if the majority required by the Insolvency Act is reached (75% of the liabilities affected by the syndicate agreement or a majority lower than that

established in the agreement). It is understood that all creditors have voted in favor of the refinancing agreement as if it were a single credit and that, therefore, the possibility to challenge judicial approval is prohibited.

c) *Financial liabilities*. This concept is delimited as follows:

   (i) Liabilities must be in line with the concept established in the Spanish Accounting System, meaning they are considered financial liabilities when, based on the financial circumstances, they entail an obligation to deliver cash or another financial asset.

   (ii) The following items are excluded from this concept and cannot be included in the calculation, nor will they be affected by the extent of the effects:

   - Contingent credits.
   - The non-available part of the credit lines and similar mechanisms.
   - Guarantees not executed.
   - Guarantees including a waiver of the benefits of *excussio*, provided the main debtor does not fail to meet its obligation.
   - Deferred tax assets.
   - Adjustments due to accrual.

d) *Disproportionate sacrifice for the dissenting creditors*. The conclusions are as follows:

   (i) Disproportionate sacrifice for the dissenting creditors is considered to occur when creditors in the same situation are treated differently or when preferred creditors suffer higher losses than creditors of a lower category.

   (ii) Assessment of the proportionality of the sacrifice must be carried out exclusively based on the specific measures established in the refinancing agreement, without considering interest or external incentives outside of those measures.

   (iii) The voluntary exclusion of the effects extension from credits with securities *in rem* for their total amount (including the part not covered by the security) represents a disproportionate sacrifice given the unequal treatment of the creditors which, by law, must be treated equally.

   (iv) The debtor's possible insolvency cannot be included in the concept of disproportionate sacrifice, nor is it grounds for requesting judicial approval of the refinancing agreement.

e) *Securities in rem valuation*. Valuation reports will only be required when it is necessary to delimit the part of the credit that, as it is not covered by the security *in rem*, will not be affected by the extent of the effects.

f) *Applicable law*. Court-sanctioning of the refinancing agreement entails the imperative subjection to the effects of a different contract, and not an amendment of the original contract, that must be governed by the law of the place where the original contract was entered into. Foreign law cannot be considered when determining the legal nature of the affected credits.

g) *Standing to challenge*. Creditors that challenge the agreement cannot claim revocation of its effects for the other non-signing creditors that have not challenged the agreement because they lack standing to do so.

h) *Number of judicial approvals*. Creditors can request court-sanctioning of a refinancing agreement in relation to a debtor that had already requested the court-sanction of another agreement in the same year.

POWERS OF ATTORNEY GRANTED ABROAD AND JUDGMENT OF EQUIVALENCE

On October 5, 2016, the Official Gazette of the Spanish State published the resolution of September 14, 2016, on the sale of a property not

being registered in the property registry because the sufficiency of a power of attorney granted by the buyers before a notary public of Liverpool was questioned by the property registrar. According to the Directorate General of Registries and Notarial Affairs ("DGRN"), there must be a "judgement of equivalence" of duties between the foreign civil servant and the Spanish notary public, i.e., the foreign notary public must carry on duties equivalent to those of the Spanish notary public regarding authorization of the notary document.

We are familiar with several DGRN resolutions (27.2.14, 23.2.15 and 5.3.15) with similar content. In these, a Spanish notary public considers the capacity of a representative acting with foreign powers of attorney sufficient, and the DGRN rejects the appeal against the denied registration because, among other reasons, of lack of an "judgment of equivalence" of the foreign document in relation to Spanish public documents. The foreign document or power will only pass this judgment if, in the same way as a Spanish document, it is authorized by the person in its country of origin that has the authority to attest documents, and the authorizing person attests and guarantees the identity of the grantor and that person's capacity to carry out the act or related business. The resolution mentioned here includes a development: the DGRN states specifically that in the notary systems of the English-speaking world "*the notary public does not issue judgments on capacity of those appearing before him or her and cannot be considered equivalent*."

We disagree with this statement by the DGRN and, in fact, the Commission for Private International Law of the Association of Registrars has stated that "*the notaries public of England and Wales often grant a public document that is perfectly equivalent to the public document in Spain.*"

OUR ARTICLES

Click on the following link to article "Attracting FinTech – second thoughts", MÍNGUEZ, Fernando; CANTA, Jorge; International Financial Law Review IFLR, February 2017.

Investing in distressed debt in Europe: the TMA handbook for practitioners, BUIL ALDANA, Ignacio; CAUSAPÉ, Beatriz; COTTA, Cristóbal; MÍNGUEZ HERNÁNDEZ, Fernando; DE LUISA, Íñigo; PERELLÓ, Andrea; RODRÍGUEZ, Rebeca; RUBIO, Íñigo; VALENCIA, Fedra, November 2016.

Spanish Commercial Real Estate Finance and CMBS in Spain, DE LUISA, Íñigo; DE LA TORRE, Jaime; ORIA, Borja; in *"Commercial Mortgage Loans and CMBS: Developments in the European Market"*, October 2016.

Click on the following link to article "Spain: Renewables restructuring trends", DE LUISA, Íñigo; VIDAL, David; International Financial Law Review IFLR, October 2016.

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