CUATRECASAS

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Finance and Restructuring

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Content

Cases and transactions

Solaria: Issue of project bonds on the Spanish Alternative Fixed-Income Market ("MARF")

Cuatrecasas advised Grupo Solaria PLANTA SOLAR PUERTOLLANO 6, S.A.U, operator of a 9.9 MW photovoltaic plant in Fuenmayor (La Rioja) on issuing senior secured project bonds with the name "*Senior Secured Notes PSP6 February 2017*."

The issue was structured as a project bond valued at €45,100,000 and with a maturity date of December 2037.

This fixed-income transaction has optimized the issuer's financial structure and will reinforce Solaria's financial position, enabling it go ahead with its strategic investment and growth plan with greater security. The funds of the issue were used to restructure the issuer's existing debt under the terms established in the issue's informative document.

The issue, which was successfully sold to qualified national and international investors, was included for trade on the MARF.

Three Hills Capital Partners: Investment in Pelostop

Through a multidisciplinary team, we advised Three Hills Capital Partners ("THCP) on its first transaction in Spain, which involved investing in Pelostop, a leading laser hair-removal company with headquarters in Barcelona.
The transaction was financed as follows: 80% by THCP's second fund and 20% by Es Vedra Capital Advisors.

The investment was made via a combination of debt and equity to acquire a 12% stake in the company. The capital contribution will help reinforce Pelostop's resources to implement its expansion plan.

Legislation

European account preservation order

On January 18, 2017, Regulation (EU) No. 655/2014 of the European Parliament and of the Council, of May 15, 2014, establishing a European Account Preservation Order procedure to facilitate crossborder debt recovery in civil and commercial matters, came into force in Spain and the other EU Member States (excluding the UK and Denmark).

This regulation establishes a new bank account preservation order preventing the transfer and withdrawal of funds impeding or making it more difficult to carry out the subsequent enforcement of a claim against the debtor (this is optional, as creditors can continue to use any other procedure under their national law to have an equivalent measure applied).

This preservation order can be requested before obtaining a judgment, court settlement or enforceable public instrument or afterwards; however, in the first case, the requirements will be greater. The debtor will not be notified or have a hearing in any of the two options until after the order has been issued.

The preservation order can only be requested in civil and commercial matters relating to crossborder issues (with certain exceptions, including property rights derived from the matrimonial property scheme, wills and succession, credits with a debtor against which insolvency or arbitration proceedings have been started).

The latter requirement applies when the (i) bank accounts for which the order is being requested are located in a Member State other than the Member State of the court ordering the preservation, or (ii) the creditor resides in a Member State other than the Member State of the court to which the request has been made.

Therefore, the regulation has a wide scope of application, covering, for example, a preservation order requested in Spain by a Spanish creditor for a Spanish debtor or for a debtor from another Member State in relation to accounts held outside of Spain. It would also apply to a preservation of accounts in Spain ordered by a judge in Spain when the requesting creditor resides in a different Member State.

In general, creditors that have not obtained a judgment, court settlement or enforceable instrument, they must provide a guarantee for the order to be granted. Only as an exception will the court waive the guarantee. When the creditor requesting the order has already obtained a judgment, court settlement or enforceable instrument, the court can order the measure without requesting a guarantee, unless it considers it necessary given the circumstances of the case.

We highlight that the regulation also establishes the possibility of requesting information about the debtor's accounts.

This regulation is supplemented by Commission Implementing Regulation (EU) 2016/1823 of October 10, 2016, establishing nine forms (I to IX) referred to in Regulation (EU) No. 655/2014 of the European Parliament and of the Council, of May 15, 2014.

Regulations protecting mortgage debtors

Several regulations, one state and two by autonomous regions, have reinforced the protection of mortgage debtors and the right to housing. Below we summarize the main aspects of these regulations:

- Royal Decree-Law 5/2017: extends the eviction moratorium under Act 1/2013, broadens the criteria for determining especially vulnerable groups, reviews the Code of Good Practices of Royal Decree-Law 6/2012, and introduces measures aimed at recovering property. For more details, see our Legal flash.

- Act 2/2017 by the Autonomous Region of Valencia: establishes, among others, (i) the right to lease with the option to buy in relation to housing awarded to a financial institution, a real estate subsidiary or an asset management institution in mortgage foreclosure proceedings against individuals at risk of social exclusion, and (ii) an expropriation procedure for the right of usufruct of the home when the parties do not apply the mediation process established by law or have not entered into the lease agreement with option to purchase mentioned in point (i).

- Act 4/2016 of Catalonia: establishes a voluntary mediation procedure with creditors for over-indebted consumers, authorizes public administrations to carry out compulsory temporary expropriation for use of empty dwellings for social-renting purposes, and it establishes the (i) obligation to offer individuals at risk of exclusion who have lost their homes as a result of dation-in-payment agreements, mortgage foreclosure or eviction the option to rent that primary dwelling; and (ii) the power of the administration to expropriate the right to use for rehousing purposes.

Case law

Rescission of intragroup contextual guarantees

The insolvency administration requested an insolvency rescission action over a mortgage granted by the insolvent company in guarantee of two loans a credit institution had granted to its mother company. It was proved that the mother company had, on several occasions, guaranteed loans or credits granted to the insolvent company by different credit institutions.

The insolvency administration's action was rejected in all instances. The Spanish Supreme Court's judgment 213/2017 of March 31, 2017 (ECLI: ES:TS:2017:1223) resolves the cassation appeal and also rejects the clawback action on the mortgage granted by the subsidiary to the mother company. The Supreme Court refers to the doctrine laid down in its judgment 100/2014, of April 30, 2014 (ECLI: ES:TS:2014:1954), which is the reference judgment for clawback actions in insolvency of intragroup contextual guarantees, and whose doctrine has been reiterated by all previous judgments resolving these matters (judgments 290/2015, of June 2; 289/2015, of June 2; 294/2015, of June 3; and 295/2015, of June 3). Under the above judgment:

- Unless the contrary is proved, establishing a contextual guarantee granted at the same time as the guaranteed credit will be understood to be equivalent to granting the credit and, therefore, onerous: the creditor grants the credit because of the third party' guarantee.
- When considering the application of the insolvency rescission, it must be assessed on a case-by-case basis whether there was any capital gains (direct or indirect) in the guarantor's assets justifying the granting of the guarantee.

In the case at hand, the Supreme Court concluded that (i) the insolvent company had granted a contextual guarantee for the two loans to its mother company by a credit institution, and (ii) taking out the mortgage was justified by the guarantees that the mother company had granted and continued to grant during that time to enable the subsidiary to access external financing. Specifically, as it had been proved, during that time, the insolvent company that had been guaranteed by its mother company received financial credit of almost €4 million; the credit that the subsidiary had guaranteed with the mortgage guarantee for which the clawback action was requested was approximately €800,000. Therefore, the advantage or benefit lay in that the mother company also made it possible for the insolvent company to obtain external financing.

In judgment 387/2016 of November 18, 2016, of the Madrid Court of Appeals (section 28)(ECLI: ES:APM:2016:15903), the court heard the appeal filed by a credit entity against a judgment of the commercial court declaring the rescission of the guarantees (deposit and credit rights pledge over an administrative concession for a transport service) granted by the insolvent company in guarantee of a credit granted by the credit entity to a company of the insolvent company's group. Based on the Supreme Court's case law mentioned earlier, the court of appeals concluded that the challenged transaction did not create any advantages (direct or indirect) for the insolvent company that guaranteed the credit transaction of another company of the same group and from which the insolvent company did not receive any capital gains. Thus, the court confirmed the insolvency rescission of the guarantees.

Pledges over future credit rights

The Supreme Court reaffirms its criterion regarding the resistance of pledges over future credit rights in insolvency proceedings, confirming that these kinds of guarantees have a special privilege under article 90.1.6 of the Insolvency Act, including under its wording before Act 40/2015, provided that at the time of the insolvency declaration the agreement had already been entered into or the legal relationship, the source of the pledged future credit rights, was already established.

The court's judgment also thoroughly analyzes the different credits that were pledged by a public limited sports company to determine whether they existed when insolvency was declared and considers that:

- The credits consisting of income tax returns from the tax authorities arise from a pre-existing relationship if the tax event leading to the returns occurred before insolvency was declared.
- The credits derived from operation of the units on the stadium's ground floor will resist insolvency if the operation agreements were signed before insolvency was declared.
- The economic rights arising from the club's acts of disposal of players' federative rights will be considered to have existed before the insolvency if the legal transactions were completed before insolvency was declared.
- The rights arising from the assignment of audiovisual rights will be considered to have existed before the insolvency declaration if the agreements from which they arise were signed before insolvency was declared.

We refer to the Spanish Supreme Court's judgment 180/2017 of March 13, 2017 (ECLI: ES:TS:2017:845).

Alternative solutions in composition agreements

Commercial Court No.1 of Santa Cruz de Tenerife approved a composition agreement whose proposal had been agreed unanimously by the creditors' meeting without objection, removing one of its clauses that, in summary, granted privileges to creditors that, before the first payment, submitted a third-party offer to acquire the insolvent company's property (not related to its activity) subject to certain requirements. These creditors would obtain an advance payment at the time of the sale with an additional debt relief of 5% up to the price of the property (the remaining credits would be subject to the general debt relief and payment by installments under the composition agreement). The court understood that the clause breached the principle of *pars conditio creditorum.* The insolvent company appealed the commercial court's judgment, and the provincial court of appeals upheld the appeal, approving the composition agreement in full given the lack of objection and adhering to the principle of *favor convenii*. However, a creditor affected by the composition agreement, that had not objected to it, filed a cassation appeal claiming that a composition containing special situations had been approved without meeting the quorum requirements under article 125.1 of the Insolvency Act (majority of common liabilities required for approval of the composition agreement and the same for liabilities not affected by the special treatment).

In its judgment 178/2017 of March 13, 2017 (ECLI: ES:TS:2017:178), the Supreme Court rejected the cassation appeal, considering that the mentioned alternative clause in the composition agreement, which applied to all creditors, did not (i) entail the creation of privileges or preferences not covered by law or (ii) grant "special treatment" in the terms established in article 125.1 of the Insolvency Act,

which would require approval by the mentioned double majority system.

In the judgment, the Supreme Court warns that an alternative clause that, in principle, appears to be applicable to all creditors could hide a special treatment applicable only to some creditors given their characteristics. In these cases, the approval requirements (double majority) would have to be met to avoid fraud.

Lastly, the court specifies that (i) the commercial court's decision to amend the composition agreement (removing one of its clauses) is not in line with the Insolvency Act, which, in these matters, (ii) grants judges the role of "supervisor of legality." Therefore, if the judge considered that the composition agreement breached a provision of the Insolvency Act, he or she should not have approved it.

Non-rescissory nature of guarantees granted in a refinancing agreement

The issue of the resistance of several guarantees granted in a refinancing agreement that met the requirements under the Fourth Additional Provision of the Insolvency Act in line with the wording in Royal Decree-Law 3/2009 is raised before the Spanish Supreme Court. The commercial court declared ineffective the pledge of current accounts and the mortgage on the machinery that secured the refinancing agreement, and it ordered a refund of the pledged current account's balance that the financial institutions had withdrawn after the insolvency declaration to enforce the pledge. The provincial court of appeals upheld the appeal, considering that the agreed refinancing and the guarantees securing it were protected by the Fourth Additional Provision of the Insolvency Act, and ruled in favor of the defendants.

In addition, the Supreme Court considered that (i) the rescissory action was not appropriate in this case because it had been proved that the refinancing agreement met the requirements of the Fourth Additional Provision of the Insolvency Act, and (ii) the independent expert's report that accompanied the agreement met the requirements under that provision for obtaining protection against insolvency rescission.

We highlight that, under the wording of the previous Fourth Additional Provision of the Insolvency Act, an independent expert was responsible for monitoring the justification of the asset sacrifice *a priori*. It also analyzed, as did the provincial court of appeals, the deviation in the viability plan given that some creditors refused to apply the debt relief established in it, and considered it not relevant.

The court also rejected the insolvency administration's claim that the insolvency judge's resolution regarding the challenge of the list of creditors, which denied recognition of the special privilege for the creditors guaranteed by the pledge, was connected to the decision regarding the rescissory action filed. It also reaffirmed that the pledge of current accounts is a legal concept admitted by the court and that, in this case, it was a financial guarantee that, under Royal Decree-Law 5/2005, requires fraud by creditors for a rescissory action in insolvency to take place, which the insolvency administration did not claim or prove.

We refer to the Spanish Supreme Court's judgment 93/2017 of Wednesday, February 15, 2017 (ECLI: ES:TS:2017:845).

Appointing members of boards of directors and *de facto* directors

On the board of directors of a company that was declared insolvent in 2013, a credit entity had, by agreement, reserved the appointment of one of the 13 members of the board. Until 2005, the entity itself had held the position in its own name; afterwards, the position had been held by individuals linked to the entity by an employment relationship. When the credit ientity was classified as a subordinate creditor in the insolvency, given its condition as a *de facto* director, it requested a change of that classification. The judgment 450/2016 of the Madrid Court of Appeals (sect. 28) of December 23, 2016 (ECLI: ES: APM:2016:17642) admitted this change. The following are the arguments against the classification:

- The mere appointment of a member of the board of directors under a shareholders agreement does not turn the shareholder in question into a *de facto* director.
- The employment relationship between the shareholder and the member of the board does not imply that classification.
- The necessary assignment or supplanting of the management duty to the shareholder institution was not proved.
- It is also relevant that the institution had only reserved one of the 13 director positions, as this alone did not guarantee certain influence.

To sum up, the court rejected the claim of abuse of law in the appointment of employees, which would have sought to avoid the classification of *de facto* director when it became a creditor. In any case, the dismissal had taken place eight years before the insolvency declaration; this is more evidence against the alleged (not proved) abuse of law.

Calculating majorities for court-sanctioned refinancing agreements

In its decision 16/2017, of February 9, 2017, the Commercial Court No. 8 of Barcelona confirmed the criteria followed by judgment 286/2016 of the Commercial Court No. 10 of Barcelona, of November 29, 2016, on calculating the majorities required under the Fourth Additional Provision of the Insolvency Act for approving a refinancing agreement. Therefore, it ruled that, to calculate majorities, only the liabilities affected by the refinancing will be considered.

The court-sanctioned refinancing agreement also includes the carrying out of acts enforcing the refinancing, including turning certain subsidiaries into public limited companies to be able to place those companies' guarantee system under Royal Decree-Law 5/2005, granting new guarantees, and transferring assets for disinvestment to the financial institutions and third parties.

Doctrine by the Directorate General of Registries and Notarial Affairs ("DGRN")

ECO appraisal in mortgage transactions

Under the current wording of article 129 of the Mortgage Act and article 682.2 of the Code of Civil Procedure, it is necessary to obtain and submit with the mortgage deed an appraisal of the mortgaged property carried out "in its case" under Act 2/1981, of March 25, regulating the mortgage market, to be able to access the direct and out-of-court mortgage enforcement procedures.

The appraisal requirements are established in the rule implementing that act, Royal Decree 716/2009, of April 24 and in Order ECO/805/2003, on the rules for appraising property and rights for certain financial purposes. Under these regulations, an approved appraisal entity must carry out the appraisal.

This requirement that the appraisal must be carried out in line with the mortgage market regulations means that the mortgage loan can be securitized and used as a guarantee for mortgage bonds. However, if a mortgage loan is not "apt" for the mortgage market, this should not be an obstacle to accessing the procedural enforcement channels recognized under mortgage law. This is how the DGRN interprets this matter. In its resolution of September 14, 2016 (BOE 5.10.16), it clarifies the cases in which the appraisal is required to comply with the mentioned mortgage market regulations, thus giving meaning to the wording "in its case" in article 129 of the Mortgage Act and article 682.2 of the Code of Civil Procedure. The DGRN confirms that in mortgage loans granted by institutions other than those defined in the scope of the subjective application of Act 2/1981 (mainly banks and savings institutions, among other types of financial institutions mentioned in article 2 of Act 2/1981), the appraisal can be carried out by an institution other than one of the approved. In these cases, institutions or individuals that offer appraising as part of their professional services can carry it out.

Registering rights over aircraft

As a result of several incidents occurring in the process for registering financial lease agreements for three aircraft in the Property Register, the DGRN provides an interesting summary of the system for registering rights over aircraft in Spain in three similar decisions issued on December 20, 2016 (BOE-A-2017-248, BOE-A-2017-249 and BOE-A-2017-250).

After informing about the specific rules regulating the registration of rights over aircraft, the DGRN explains the scope of the two corresponding registries. The registries have different purposes and are completely independent, although they are interconnected:

- Aircraft Identification Registry: limited to administrative scope; aircraft must have a registration identifier to be able to be registered in the Property Register.

- Property Register: (first section) registration of ownership and taxes on aircraft and ships; strictly legal scope. This register is also considered the national "access point" for the information required for international registration, as set out in the Convention on International Interests in Mobile Equipment, made in Cape Town on November 16, 2001.

The DGRN also states that, first, civil owners must register the aircraft in their name in the Aircraft Identifier Registry and, next, in the Property Register if qualified to do so.

After this first registration in the Property Register, which must be a registration of ownership, owners must register various rights, including in the case in question, the financial lease, which is not considered an in rem right.

Based on the dual registration system mentioned above, registration of a financial lease, which the person requesting the registration in the two files object of the resolution intended, would not be possible unless the aircraft were already registered in the Property Register. Also, the financial lease agreement could not be used as a registration deed because under article 180 of the Commercial Registry Regulation, which is valid provisionally, the first ownership registration must be carried out in relation to *"the construction entity's delivery or sales*

contract in conjunction with the administrative certificate of its identifier."

Other documents of interest

Suspension of mortgage foreclosures

Following the preliminary rulings by the First Division of the Supreme Court on the possible consideration as abusive of certain early termination clauses (ruling of February 8, 2017, appeal 1752/14 - ECLI: ES:TS:2017:271A-), several provincial courts of appeals have adopted non-jurisdictional agreements unifying criteria. These agreements consider it appropriate to temporarily suspend all consumer-related mortgage foreclosures in relation to which the abusive nature of an early termination clause is being debated, until the Court of Justice of the European Union resolves the preliminary rulings.

To date, the courts of appeals of Madrid, Barcelona, Castellón and Asturias have adopted this position (in the case of Asturias, the suspension also applies to procedures referring to the nullity of the default interest clause); and in its ruling of February 24, 2017, the First-Instance Court No. 32 of Madrid has suspended the foreclosure it was processing based on the agreement reached by the Madrid Court of Appeals.

Later, in ruling of March 16, 2017 (ECLI:EU:C:2017:227), the European Court rejected the Supreme Court's request to process the application for the preliminary ruling mentioned earlier through an expedited procedure. Therefore, it is likely that the suspension of mortgage foreclosures will continue for several months.

Our articles

Pre-insolvency column: Spanish homologation proceedings - questions and (some Still open) answers, ARA TRIADU, Carlos; BUIL ALDANA, Ignacio, Global Restructuring Review, May 2017.

Spain: Spanish Schemes of Arrangement, VALENCIA GARCÍA, Fedra; BUIL ALDANA, Ignacio; DE LUISA MAÍZ, Íñigo; PERELLÓ SCHUMANN, Global Restructuring Review, May 2017.

International debt restructuring: can other jurisdictions compete with London and New York?, BUIL ALDANA, Ignacio, Global Restructuring Review, March 2017.

Click on the following link to article "New regulations affect NPLs", CAUSAPE, Beatriz;TORRECILLA BARANGE, Laura, International Financial Law Review, IFLR March 2017.

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