CUATRECASAS

Financing and restructuring

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CASES AND TRANSACTIONS

Nueva Pescanova case: challenges upheld and revocation of court approval of refinancing agreement

For the first time, on January 19, 2021, a commercial court upheld an appeal against the court approval of a refinancing agreement that extended its effects to third parties. This pioneering judgment in Spain agreed to revoke the initial court approval, with which the refinancing entered into by Nueva Pescanova would only have effect with those creditors that had also signed the agreement (principally, an institution that owned nearly 75% of the financial liability and 80% of the share capital).

Cuatrecasas defended the plaintiffs' interests, who were notified about the refinancing agreement via the entity's website, without prior knowledge of the agreement nor its content and effects.

The judgment handed down by Commercial Court No. 1 of Pontevedra, sets a crucial precedent to be considered in any debt restructuring, especially as regards analyzing how to calculate majorities to approve a refinancing agreement. It reinterprets the concept of the person closely related to the debtor in the pre-insolvency stage and considers that the vote of its main creditor—a shareholder owning 80% of the share capital and empowered to appoint most of the members of the board of directors—could not be used to calculate the majorities necessary to approve and then extend effects to the dissenting creditors.

Thus, the court considers that greater restrictions must be placed on persons related to the debtor to avoid them deciding the conditions in which a company can or cannot be refinanced, and forcing these conditions on the other creditors, as the effects of the agreement extend to them as well. Consequently, the court gives a purposive interpretation of the condition of "insider" as being one of the debtor's partners or shareholders, and states that the financial liabilities that a shareholder acquires from a debtor will not be calculated once their control percentage in the company exceeds 10%.

Transaction "Annie": Sale of performance-linked loans to consumers

Cuatrecasas advised fund manager AnaCap Financial Partners on transaction "Annie," involving the purchasing from Bankia of an extensive credit portfolio from several sales points and earmarked for financing motor vehicles and medical treatment.

In the context of this transaction, Cuatrecasas conducted the initial negotiations with the bank and advised on the nature of unsecured performing loans, as well as on designing a system migration plan for Bankia to the service provider chosen by the investor.

The transaction involved an exhaustive negotiation of loan management and migration matters as they were performing loans granted to consumers. It also required an analysis of the relevant aspects in this type of transaction of the so-called "linked credit" and the possible scenarios that would result from any breach by the service provider or seller of the contract linked to the loan.

"Albariño" project: indirect securitization of NPLs and REOs

Cuatrecasas advised Oaktree Capital on a securitization of real estate assets worth €678 million. This transaction is the culmination of a disinvestment process that Oaktree Capital started with four portfolios of NPLs and REOs.

Bond issuer Retiro Mortgage Securities DAC has issued class A1, A2, B, C, D1, D2, D3 and E notes, which have been admitted to trading on the Global Exchange Market of Euronext Dublin. The class A1 notes have been assigned a "BBB-" credit rating by S&P Global Ratings, "A" by DBRS, and "BBB+" by Scope. The class A2 notes were rated as "BBB" by DBRS, and "BBB" by Scope. And the class B notes were rated as "BB" by DBRS, and "B-" by Scope.

Morgan Stanley & Co. International PLC acted as arranger and lead manager.

Transaction "Higgs": sale of *NPLs*

Cuatrecasas advised Banco de Sabadell on transaction "Higgs," involving the sale to a project company of fund manager Lone Star of an NPL portfolio granted to consumers, in a bilateral negotiation process.

This substantial portfolio has a nominal value of approximately €760 million. The affected real estate assets are located throughout Spain. Bearing in mind these factors, we highlight that the preparation, negotiation and completion of the necessary documents to sign the transaction was completed in barely a month. The first of two planned closures took place on March 31, 2021.

This transaction has helped Banco de Sabadell to close financial year 2020 with a considerable reduction of its NPL ratio, in line with the EU strategy to reinforce the Economic and Monetary Union.

Capital Energy: financing a wind farm

Cuatrecasas advised Capital Energy on signing an agreement with Banco Sabadell worth €26 million to finance the 50-MW Buseco wind farm (Asturias, Spain).

The project finance has a 16-year minimum term, which can be extended to 18 years. The financing is divided into two tranches: an initial tranche of approximately €22 million and a second tranche of approximately €4 million, subject to the signing of a power purchase agreement with a buyer with an investment-grade credit rating.

The renewable energy project is expected to be operating in the first half of 2022. The 10 wind turbines at the Buseco wind farm will generate 129,000 MWh of clean energy and offset over 51,600 tons of carbon dioxide annually.

NEENAH: financing to acquire the Itasa Group

The Cuatrecasas offices in New York, San Sebastián, Madrid and Mexico City advised Neenah (NYSE: NP) on acquiring the Itasa Group from Magnum Capital and other minority shareholders, and on the financing of the acquisition.

The Itasa Group manufactures high quality release liners and is a global reference in the siliconized liner market with production plants in Spain, Mexico and Malaysia.

Financing the acquisition has meant a $250-million increase of the loan agreement entered into in 2020 by Neenah and several of its group's companies with certain financial institutions as lenders and JPMorgan Chase Bank as administrative agent.

LEGISLATION

COVID-19: Key aspects for companies, financial institutions and funds

Since March 2020, we have been reporting on the main legal developments affecting companies regarding the measures approved as a result of COVID-19. For an executive summary of the main measures, see our legal flash:

COVID-19: Key aspects for companies, financial institutions and funds

Exceptional measures have continued to be adopted in recent months, among which we highlight the following:

- **New COVID-19 direct aid facility** with a purpose-determined nature (payment to suppliers, creditors and fixed costs) for businesses whose activity is listed in the Annex to Royal Decree-Law 5/2021, and which will be managed by the autonomous regions.

- Measures for making **loans with a public guarantee more flexible** (extending the terms or converting them into participating loans retaining the public guarantee) and financial aid to reduce the principal, the requirements for which will be established by Resolution of the Council of Ministers.

- **New company recapitalization fund** managed by the Spanish Development Finance Institution (COFIDES) for medium-sized enterprises.

- New **restrictions on dividend distribution:** Companies benefiting from aid specified in Royal Decree-Law 5/2021 cannot distribute dividends in 2021 or 2022, or increase the remuneration of senior management for two years. Previous regulations also imposed restrictions (e.g., companies implementing an ERTE), making it advisable to ensure no restrictions apply before distributing dividends.

- Among other **insolvency measures**, the suspension of the obligation to file for bankruptcy is extended until December 31, 2021, and amendments to court-sanctioned refinancing agreements is allowed until December 31, 2021, even if a year has not yet passed since they were approved.

- Public limited companies can hold **shareholders meeting exclusively online** throughout the whole of 2021. This option was already available to private limited companies, and boards of directors were allowed to be held online and to adopt resolutions in writing and without holding a meeting until the end of 2021.

- Until December 31, 2022, listed companies and those whose shares are trades on BME Growth can use a new type of short-form prospectus, the **Recovery Prospectus**, for secondary offerings of shares.

Developments in the European framework for securitization: Regulation (EU) 2021/557 and Regulation (EU) 2021/558

Regulation (EU) 2021/557, of March 31, 2021, and Regulation (EU) 2021/558, of March 31, 2021, were published on April 6, 2021, and entered into force as a matter of urgency three days after the date of publication. They amended two regulations, respectively: (I) Regulation (EU) 2017/2402, of December 12, 2017 (the "**Securitization Regulation**"), and (ii) Regulation (EU) 575/2013, of June 26, 2013 (the "**CRR Regulation**").
The reform aims to maximize the capacity of institutions to lend and to absorb losses related to the COVID-19 pandemic, introducing specific measures to support economic recovery in response to the crisis.

Securitization Regulation. Regulation (EU) 2021/557 amends the following aspects of the Securitization Regulation:

- Removal of certain regulatory obstacles to the securitization of non-performing exposures ("NPEs"). Among other developments, it establishes that on measuring the material net economic interest, the non-refundable purchase price discount must be considered.

- Adaptation of the simple, transparent and standardized ("STS") framework to synthetic securitization. The STS regulation is divided into three sections. Section 1 now only centers on traditional securitizations; section 2 continues applying to ABCP transactions; and new section 2 bis applies to non-ABCP synthetic securitization transactions. The EBA has until October 10, 2021, to submit the corresponding draft Regulatory Technical Standards.

- Introduction of certain transparency requirements related to sustainability factors. This amendment applies to securitization where the underlying exposures are residential loans or auto loans or leases. The draft Regulatory Technical Standards must be prepared by July 10, 2021.

- Amendment to sizing risk retention. A new provision has been added to article 6, requiring risk retainers to take fees which may in practice be used to reduce the effective material net economic interest into account when sizing the risk retention for their transactions.

CRR Regulation: The CRR Regulation is amended by Regulation (EU) 2021/558 as follows:

- Implicit support to synthetic securitization. A new paragraph is added to article 248 of the CRR Regulation, under which the exposure value of synthetic excess must be determined taking into account a series of new factors. The EBA has until October 10, 2021, to prepare the draft Regulatory Technical Standards.

- Amendment to the calculation of the attachment points and detachment points of synthetic securitization. A new paragraph is added to article 256 of the CRR Regulation, concerning the adjustment originator institutions are required to make.

- Treatment of NPEs. Article 269a is added, setting a minimum risk weight to the senior securitization position in an NPE securitization. It also includes a formula to calculate expected losses.

Brexit. Finally, we draw attention to the fact that, as this regulation did not enter into force before the end of the Brexit transition period (December 31, 2020), it will not be included in British laws on securitization unless the United Kingdom chooses to replicate this regulation in its national laws

CASE LAW

A 10-year maximum waiting period in compositions

In judgment 181/2021, of March 30, (ECLI:ES:TS:2021:1208), the Spanish Supreme Court ("TS") established case law on the maximum waiting period that can be agreed on in composition proposals, which must not exceed 10 years.

The majority rules provided under article 124 of the Insolvency Act ("LC") do not mention extraordinary majorities where compositions include a waiting period exceeding 10 years (article 124 requires a 50% majority for waiting periods of less than five years and 65% for waiting periods of between 5 and ten years). Therefore, the parties to compositions cannot agree on waiting periods exceeding 10 years. Article 317 of the consolidated text of the Insolvency Act ("TRLC") confirms this criterion and expressly refers to the 10-year limit for waiting periods.

Clawback of set-off payments

TS judgment 170/2021 of March 25, 2021 (ECLI:ES:TS:2021:1084) concludes that claim set-offs by insolvent companies can be revoked. Below is an outline of the court's arguments:

- Set-offs are voluntary acts by the insolvent company. The debtor or creditor to whom set-offs are requested must expressly or tacitly accept the basis for the set-off.

- Set-offs are unjustified payments that are detrimental to the insolvency estate. Exceptionally, these payments may not qualify as justified if they breach the *par conditio creditorum* principle (i.e., creditor equality). This occurs in the case at hand for the following reasons: (i) at the time of the set-off, the company's insolvency was already known; (ii) the companies belonged to the same group with a single managing director; (iii) there had been a previous assignment of claims between the corporate group to trigger the set-off; and (iv) the claims set off from the insolvent company's liabilities were subordinated.

Concept of control in insolvency proceedings

According to TS judgment 113/2021 of March 2, 2021 (ECLI:ES:TS:2021:761)-, a sports association

controlling the appointment of members to a company's governing body would be exercising "control" within the meaning of article 42 of the Commercial Code ("Ccom"), for the purpose of insolvency proceedings. In line with its judgment 190/2017 of March 15, (where control was exercised by a natural person), the TS repeats the following argument: in insolvency proceedings, to consider that a corporate group exists, the controlling entity need not be a company bound to consolidate accounts with the insolvent company. If there is control within the meaning of article 42 Ccom, it does not matter whether it is exercised by a natural person or an entity.

The TS thus concludes that the creditor company is an entity closely related to the insolvent association and its claim qualifies as subordinated.

Classification of claims held by a joint and several debtor

In its judgments 111/2021 (ECLI:ES:TS:2021:762) and 112/2021 (ECLI:ES:TS:2021:763) of March 2, 2021, the TS examines the classification of a salary claim held by an entity who has paid the claim as a joint and several debtor.

According to the TS, the obligation to the insolvent company's employee arises from a legal provision (article 42.2 of the Workers Statute defines the subcontracting employer as the guarantor). After paying the secured claim, the guarantor can seek payment from the main debtor claiming subrogation in its rights or repayment.

If it claims subrogation, even if payment occurs after the insolvency proceedings, the classification of the claim will remain unchanged, regardless of the effect provided in article 87.6 LC (current article 263.2 TRLC) on classification of claims. The case law provides for the same solution if the guarantor claims repayment. Payment by a guarantor in place of the insolvent company does not create a new claim arising after the insolvency proceedings. Therefore, the claim remains an insolvency claim.

Even if the guarantor pays the secured claim after the declaration of the insolvency proceedings, if the claim had become payable before (as in the case at hand) it remains an insolvency claim. But if the claim had become payable afterwards, it would be a claim against the insolvency estate.

Classification of claims held by exiting shareholders

The TS recently ruled on the classification of claims held against the insolvent company by a shareholder exiting before the company filed for bankruptcy where the shareholder has not yet been compensated for its stake in the company. See judgments 4/2021, of January 15, 2021 (ECLI:ES:TS:2021:3), 46/2021, of February 2, 2021 (ECLI:ES:TS:2021:259), and 64/2021, of February 2, 2021 (ECLI:ES:TS:2021:380), on the same insolvent company.

The TS states that the shareholder's right to compensation for its stakes arises on receipt by the company of the shareholder's exit notice and concludes that the exiting shareholder's claim is a subordinated insolvency claim because (i) on receipt of the exit notice by the company, the exiting shareholder qualified as a person closely related to the debtor; (ii) the exit notice was previous to the declaration of insolvency proceedings; and (iii) the claim is equivalent to a financing transaction for the company, since it entails recovering the shareholder's investment.

Early maturity of mortgage loans in declaratory proceedings

We refer to TS judgment 39/2021 of February 2, 2021 (ECLI: ES:TS:2021:233), declaring the early maturity of the entire mortgage loan in declaratory proceedings based on legal grounds, thereby upholding the lender's claim.

In this case, debtors cannot be considered consumers because, although they secured the loan with their home, they took out the loan to finance their professional activity. The Supreme Court applied the case law it established in judgment

432/2018 of July 11, 2018 (ECLI: ES:TS:2018:2551), in which it stated that the remedy of termination established under article 1124 CC does apply to loan agreements when the borrower defaults on its obligations. For more details on this important judgment, see our Financing and Restructuring Newsletter November 2018.

The TS states that loan agreements can be terminated if the borrower defaults on material obligations, e.g., capital repayment in installments or payment of the agreed loan interest. To assess whether a breach is material, the TS relies on the standards of article 24 of Act 5/2019 of March 15, governing real estate loan agreements as guiding criteria. In this case, the debtors' breach amply fulfills these standards.

Sale of production units with assets subject to special privilege

In its judgment 694/2020 of December 29, 2020 (ECLI:ES:TS:2020:4406) the TS confirms that, under article 214 del TRLC, the sale of assets subject to special privilege as part of production units requires consent of the preferential creditor entitled to separate foreclosure if (i) the transferred assets or rights are unsecured, and (ii) the part of the price allocated to these assets or rights covers the security. There being two or more affected creditors, consent from those representing 75% of the affected liabilities is sufficient.

In the case at hand, the commercial court had not classified the claim as a preferential claim subject to special privilege. The affected creditor appealed against the classification and a decision was pending when the production units were sold. Consequently, consent was not obtained by the time of the sale. According to the TS, the purchaser of the production unit knew about the circumstances and should have considered them when submitting its offer. The TS also argues that (i) the creditor not objecting to the production unit's sale does not mean that the creditor consented to it; and (ii) even if the claim had been classified as a preferential claim subject to special privilege after the purchase of the production unit, this classification would still be enforceable against the purchaser because the creditor had not given its consent.

Claims arising from participating loans are subordinated

In its judgment 2504/2020 of November 24, 2020, the Barcelona Provincial Court (ECLI:ES:APB:2020:11733) concludes that claims arising from participating loans should qualify as subordinated due to the reasons set out below.

Although Article 20 c) of Royal Decree-Law 7/1996, of June 7 ("RDL 7/1996"), governing participating loans, refers to "ordinary creditors," this wording should not be limited to the ordinary order of preference governed by articles 1921 *et seq.* of the CC, and it would make no sense that claims arising from participating loans be generally subordinated to ordinary creditors' claims except in insolvency proceedings.

The Barcelona Provincial Court recalls that RDL 7/1996 remains applicable, since it is not mentioned among the rules affected by sole repealing provision of the previous LC, nor does the LC tacitly repeal it. Article 281.1.1 of the current TRLC also supports the court's position and expressly classifies claims arising from participating loans as subordinated claims under agreement.

One of the parties requested that that these claims not be classified as subordinated if the parties so agreed, but the court ruled out this possibility.

Securitization funds are the creditors of securitized claims in insolvency proceedings

In its judgment 683/2020 of September 30, 2020, the Navarra Provincial Court (ECLI:ES:APNA:2020:777) examines which entity should be listed as creditor in a mortgage-secured claim assigned to an asset securitization fund.

Subject to the legislation applicable at the time of setting up the fund, the transfer of claims to the

fund qualified as an assignment of claims that was "full, unconditional and for the time period remaining until maturity." However, the assignor remains the custodian of the assigned claims, thus having legal standing to bring a mortgage foreclosure action.

The court considers that in the absence of similar insolvency rules granting extraordinary preferential creditor status to the assignor, and as it did not find sufficient similarities between the position of (i) parties bringing a mortgage foreclosure action; and that of (ii) creditors in insolvency proceedings, mortgage market legislation cannot apply by analogy to insolvency proceedings.

The court concludes that the securitization fund, through its management company, should be listed as creditor of the securitized claim.

Rescission of payments subject to agreements with the sole shareholder not recorded in the ledger

In its judgment 604/2020 of November 18, 2020, the Pontevedra Provincial Court (ECLI:ES:APPO:2020:2139) revokes payments by the insolvent company to its sole shareholder because the agreement giving rise to them was not recorded in the ledger or the annual report.

Article 16(1) of the Spanish Companies Act ("LSC") requires that any agreements between the company and its sole shareholder be recorded in the ledger and individually included in the annual report. According to the court, non-fulfillment of these obligations prevents sole shareholders from objecting to the rescission of payments arising from these agreements, since there would be no proof of the purpose of these payments to the sole shareholder or of any compensation showing that the agreements were for payment. The court also rules that presumption regarding payments made to a person closely related to the debtor (which are considered detrimental for the insolvency estate) cannot be rebutted if there is no record of the agreements evidencing the absence of damage.

ADMINISTRATIVE DOCTRINE

Mortgage cancellation without the privileged creditor's consent

Under Resolutions of February 5 and February 11, 2021 of the General Directorate of Legal Certainty and Public Registration ("DGS"), a mortgage can be canceled without the consent of the privileged creditor in insolvency proceedings if the judge considers that the creditor has been sufficiently involved in the insolvency proceedings.

According to the DGS, when a court requires cancellation of registered entitlements, public registrars can verify compliance with the legal requirements safeguarding the rights of parties with registered entitlements. However, public registrars cannot examine the merits of court orders requiring a mortgage cancellation. In these two cases, insolvency courts stated that these requirements were fulfilled, and their court orders specifically mentioned that privileged creditors had to be notified.

Stamp duty on deeds of release for co-debtors in mortgage loans

The Directorate General for Taxation ("DGT") has published its responses to tax consultations of November 23, 2021 (V3397-20), and October 19, 2020 (V3116-20). The DGT has rectified this criterion, adjusting it to recent TS case law (see judgment 521/2020 of May 20 (ECLI:ES:TS:2020:1103), as analyzed in our Financing and Restructuring Newsletter July 2020).

The DGT now considers that public deeds releasing co-debtors from a mortgage-secured loan are subject to stamp duty as applicable to property transfers.

The DGT adds that the taxable person will be the party requesting execution of the public deed. The taxable base will be equal to the total mortgage liability from which the co-debtor is released, i.e.,

the outstanding capital plus interest and any other mortgage debts.

To prevent tax contingencies, this administrative criterion should be taken into account in any refinancing or restructuring transactions covering mortgage debts and releasing debtors.

OTHER NEWS

Guide and recommendations for the sale of production units in insolvency proceedings (Barcelona and Madrid)

The Barcelona and Madrid commercial judges, the latter in cooperation with the Madrid Bar Association and the Professional Association of Economists, Registrars and Commercial Advisors, have published two non-binding documents sharing the rules that their members will apply in the sale of production units before and during insolvency proceedings: the "Barcelona commercial court guidelines on pre-packaged insolvency"(January 20, 2021) and the "Best practice guide for the sale of production units" (January 22, 2021).

The guide's recommendations provide the necessary tools to (i) establish the production unit's aggregate assets and liabilities, and (ii) calculate the company's value in the market, and it also suggests the information that should be given to potential purchasers promoting publicity and free competition. In the document, the Madrid commercial courts commit to applying an expedited procedure to process the petitions for insolvency proceedings including a winding-up plan and binding offers to purchase production units.

The Barcelona commercial judges' guidelines go one step further and provide for appointing an expert before the insolvency proceedings. The expert will (i) assist the debtor in finding purchasers and assessing offers, and (ii) monitor the procedure's publicity, transparency and competition conditions. The expert will be appointed insolvency practitioner in the consecutive insolvency proceedings.

For additional information, please contact Cuatrecasas.