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Financing and restructuring

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CASES AND TRANSACTIONS

Cementos Molins: sustainable financing

Cuatrecasas was legal advisor to Cementos Molins to optimize the financing structure of the group and companies in Spain through a syndicated loan linked to sustainability objectives.

Cementos Molins is a pioneer in the Spanish cement sector for signing this type of sustainable financing agreement, known as a sustainability-linked loan, which is linked to sustainability, more specifically to the reduction of CO_2 emissions, one of the group's strategic priorities.

The financing, for the value of €180 million with a five-year maturity, is made up of a loan of €40 million and a revolving credit facility of €140 million. This loan enables Cemento Molins to optimize the financing by reducing costs and extending maturity.

The entities financing the loan are CaixaBank (agent bank and coordinator), Banco Sabadell, BBVA, Banco Santander and HSBC.

Cementos Molins already applies reduced CO_2 emissions per ton of cement as one of its key indicators for its sustainability barometer.

Beachbox project: debt restructuring and hotel project financing

Following the direct lending financing transaction (leveraged buyout) entered into between the Beachbox group and Metric Capital Partners, to build a hotel and luxury villas in Ibiza, the Cuatrecasas team led the advisory service for the (i) restructuring of the 2017 debt, and (ii) granting of a new traditional bank loan for the project by Banco Bilbao Vizcaya Argentaria and CaixaBank. The transaction value was approximately €170 million.

The special features and great complexity of the technical aspects and the negotiation of the transaction lay with the double financing structure, i.e., direct lending and traditional bank financing.

This hybrid structure, increasingly present in the market, required special technical and negotiation efforts to align the interests of the investors of the Beachbox group, Metric Capital Partners, the Spanish banks and the hotel operator (Six Senses).

The transaction required multidisciplinary advice covering finance, corporate, real estate, administrative and tax aspects of Spanish law, and the documents were drawn up in line with the Loan Market Association's contractual standards.

Banco Cetelem and BNP Paribas Group: first securitization in Spain

Cuatrecasas advised BNP Paribas Group (lead manager and sole arranger) and Banco Cetelem (originator) on incorporating an asset-backed securities fund called "AUTONORIA SPAIN 2019, FONDO DE TITULIZACIÓN," whose underlying assets are made up of loans to individuals and legal entities to acquire new and used vehicles, for the amount of €1 billion, and which were admitted to trading on the Spanish Fixed Income Market.

The fund was incorporated under the new EU Prospectus Regulation and the new EU Securitization Regulation, and is the first securitization by Banco Cetelem, led by the BNP Group in Spain, to request the classification of "simple, transparent and standardised."

Banco Cetelem is a credit institution supervised by the Bank of Spain, fully owned by BNP Paribas Personal Finance, which is a fully owned subsidiary of BNP Paribas, specializing in personal loans and consumer credit.

CASE LAW

Non-application of Rome I Regulation to determine the law applicable to third-party effects of a claim in the event of multiple assignments of the claim

Under judgment C-548/18 of the First Chamber of the Court of Justice of the European Union ("CJEU"), of October 9, 2019 (ECLI:EU:C:2019:848), it has been established that article 14 Rome I Regulation on the law applicable to contractual obligations does not apply (directly or by analogy) to determine "the applicable law concerning the third-party effects of the assignment of a claim in the event of multiple assignments of the claim by the same creditor to successive assignees."

This material delimitation of Rome I Regulation and the corresponding legal consequences are understood better with a description of the facts. TeamBank and a Luxembourg national, a civil servant in Luxembourg domiciled in Germany, signed a loan agreement (March 2011) subject to German law and secured by the assignment of the attachable share of the individual's claims to wages and salary (including claims to the pension benefits, against the individual's employer in Luxembourg). Her employer was not informed of that assignment

Just three months later (June 2011), the debtor signer another loan agreement; this time with BNP. This second agreement established the assignment of the same claims the debtor already had against her employer in Luxembourg. Unlike what happened in the context of the first loan applied for, in this case, BNP (in line with Luxembourg law applicable to assignment contracts) informed the Luxembourg employer of the assignment.

Three years later (February 2014), insolvency proceedings were opened against the debtor in the German courts (Saarbrücken). The appointed trustee in insolvency received, from the debtor's employer in Luxembourg, a share of her salary, and deposited that amount with another German court (Merzig) due to the uncertainty regarding the identity of the preferential creditor (TeamBank or BNP). TeamBank and BNP brought, respectively, an action and a counterclaim before the regional court of Saarbrücken (Germany), requesting the lifting of the lodgment of the entire amount deposited.

To decide which of the two assignments was relevant for the lifting of that amount, the court had to first verify which law would be applicable to resolve the matter. If it understood that German law was applicable, the first assignment would be valid and preferred. However, if it considered that Luxembourg law was the applicable law, the second assignment would be the only assignment to consider—because it was the only assignment carried out correctly (it was the only assignment that met the requirement of notification/communication to the assigned debtor).

Given this context, the referring court faced the following dilemma: apply German law to the facts following article 10.4 Rome II Regulation (unjust enrichment) or apply Luxembourg law by application—even if analogical—of article 14 Rome I Regulation (remember that the relationship between assignor and assignee is governed by the law applicable to the contract between them, while the relationship with the debtor is governed by the law applicable to the assigned claim). Therefore, the referring court decided to raise the matter with the CJEU for a preliminary ruling as to whether, in this case, it could opt to apply article 14 of Rome I Regulation.

As we have already mentioned, the CJEU's answer was conclusive. Not even an analogical application of article 14 Rome I Regulation is possible in these cases. Basically, because that is how the European lawmaker wanted it. All the preparation for today's Rome I Regulation clearly shows that there was no agreement to include this matter in the material scope of the regulation. In fact, currently a text is being prepared to specifically regulate this matter: the Proposal for a Regulation on the law applicable to the third-party effects of assignments of claims (COM(2018) 96 final).

Article 4 of the proposal for a regulation states as a general rule that "the third-party effects of an assignment of claims shall be governed by the law of the country in which the assignor has its habitual residence at the material time". The reasons the lawmaker uses the assignor's habitual residence as the connecting factor are, according to the text, the following: its predictability; the fact that it coincides with the place where debtor has its center of main interests (criteria of connecting factor for insolvency); and its use also by the UNCITRAL Convention on the assignment of receivables.

By coincidence, the application of the current article 10.4 Rome II Regulation to these types of cases has led, this time, to application of the same law that would have been of application under today's proposal for a regulation: the law of the country where the assignor has its habitual residence. This does not mean that the proposal for a regulation should not become a regulation. On the contrary, after this CJEU judgment, the proposal for a regulation is clearly necessary.

Application of CJEU case law on monitoring abusiveness of accelerated repayment clauses in mortgage loans

In the Spanish Supreme Court's judgment 613/2019, of November 14 (ECLI:ES:TS:2019:3765), once again the CJEU case law is applied regarding monitoring the abusiveness of accelerated repayment clauses in mortgage loans in Spain and, particularly, that established in the CJEU judgment of March 26, 2019, C-70/17 and C-179/17 (ECLI:EU:C:2019:250) which we discuss in our First Quarter Finance and Restructuring Newsletter, 2019.

In this case, the financial institution declared the early maturity of the loan and started the foreclosure when the debtor (consumer) had not made four payments; it did this following a contractual clause that reproduced article 693.2 Code of Civil Procedure (in its valid wording then, before the amendments by Act 1/2013, of May 14, and Act 19/2015, of July 13) without adding any significant changes.

The Supreme Court also refers to its recent judgment 463/2019, of September 11 (ES:TS:2019:2761), in which it stated its opinion on the effects of the nullity of accelerated repayment clauses in mortgage loans and which we discuss in our Third Quarter Finance and Restructuring Newsletter, 2019. In particular, it refers to the fact that article 693.2 Code of Civil Procedure is a regulation under dispositive law while article 24 Act regulating credit agreements relating to immovable property is a regulation under imperative law.

The Supreme Court upholds that the fact that the contractual clause mentioned before respected the law valid when the mortgage loan was formalized does not prevent a declaration of nullity of the abusive clause. Therefore, it must be analyzed whether the controversial clause exceeds the consumer protection standards established in Supreme Court judgments 705/2015, of December 23 (ECLI:ES:TS:2015:5618) and 79/2016, of February 18 (ECLI:ES:TS:2016:626). To summarize, for an accelerated payment clause to exceed the mentioned standards, it must regulate the seriousness of the default on obligations in relation to the duration and amount of the loan, and must enable the consumer to avoid its application through redress.

Thus, the Supreme Court considers that the controversial accelerated repayment clause does not exceed the standards and that it includes an imposed and pre-stipulated condition, which seriously throws off balance the parties' position, in detriment to the consumer.

And in this way, the financial institution's claim was rejected; however, the Supreme Court highlights that, in line with the mentioned judgment 463/2019, of September 11 (ES:TS:2019:2761), the lender could demand the accelerated repayment of the contract in the future, not based on the controversial clause, but on the law, by meeting the requirements established in that resolution.

ADMINISTRATIVE DOCTRINE

Effects of securitization on registered mortgages

In its resolution of September 2, 2019, the Directorate General of Registries and Notarial Affairs ("DGRN") rejects the claim of cancellation based on expiry of a registered mortgage, due to settlement of the debt payment as a result of the assignment of the mortgage loan to an asset-backed securities fund. The mortgage loan in question had not reached its due date and was still in the period of payments and accrual of repayment installments.

In its handling of the case, the DGRN makes an interesting reflection on securitization transactions and the credit assignment regime under Spanish law.

The DGRN highlights that, under the law applicable to securitization, debtors are not required to give their consent or to be informed at any time of the incorporation or de-registration of their loans in or from an asset-backed securities fund.

Also, the lack of that notification to the debtor would have the effect—just as in the case of a general assignment of credits—that, until the notification takes place, the payments made by the debtor to the original debtor will release the debtor, and the new creditor (asset-backed securities fund) will not be able to claim them again.

On the other hand, the DGRN upholds that the assignment of a mortgage loan to an asset-backed securities fund is not in detriment to the debtor. The lack of notification of the assignment or lack of awareness of the securitization is also not detrimental to the debtor. The securitization also does not mean a payment by a third party that releases the debtor; the person paying acquires the right to start an enforcement procedure against the debtor. Therefore, there is no place for the cancellation of the obligation under the law, nor for the mortgage as an accessory right.

Also, as the notification of the assignment to the debtor is not a requirement for assigning credits, the registration of the assignment also does not have that notification to the debtor as a requirement for the assignment to be carried out.

The DGRN recalls that the CJEU issued judgments stating that credit assignments are neutral for the debtors as they do not involve new financial charges and only require the debtors to make the payments to a new creditor and that if national legislation does not establish the requirement of consent or notification to the debtor for the assignment, that absence is not subject to a monitoring of transparency or abusiveness.

Lastly, the DGRN clarifies that the automatic conventional cancellation of the mortgage only occurs when the cancellation of the *in rem* right is evident, not when it is unclear or controversial. And for there to be legal cancellation, the legal prescription period of the actions arising from the security, or the shortest period agreed in the deed, must have expired, counting from the date on which the total obligation secured by a financial collateral arrangement should have been met as indicated in the property registry.

Interpretation of the Code of Civil Procedure in relation to the limits on the award value in auctions with no bidders

In its resolution of July 26, 2019, the DGRN resolves that it is appropriate to register in the property registry the awarding in an auction with no bidders of an estate for an amount less than 50% of the appraisal value.

The DGRN provides a comprehensive interpretation of the law. In particular, it upholds that the correct interpretation of article 671 Code of Civil Procedure prevents the award from being made at a value less than 50% of the appraisal value, unless the guarantees arising from an analogical application of article 670.4 Code of Civil Procedure are moderated.

In fact, because article 670.4 Code of Civil Procedure regulates the award in an auction with no bidders, it enables the court clerk responsible for the enforcement, after hearing the parties, to resolve on the approval of the auction for an amount that possibly does not reach the 50% limit of the appraisal value and that does not cover the amount for which the enforcement was started, based on his or her assessment of the circumstances of the case.

Therefore, according to DGRN doctrine, it cannot be confirmed that the award in an auction with no bidders of estates that are not primary residences are limited to 50% of the appraisal value.

OTHER NEWS

Instructions by DGRN regarding the application of Act regulating credit agreements relating to immovable property

On December 20, 2019, the DGRN issued an instruction on how the registries and notaries must act when faced with queries regarding the application of Act 5/2019, of March 15, regulating credit agreements relating to immovable property ("LCCI").

In this extensive document, the DGRN handles many formal queries raised by the General Council of Notaries Public and by the Professional Association of Property and Commercial Registrars of Spain, as well as informal queries, relating to the application of LCCI by notaries and property registrars.

We highlight the following of the DGRN's conclusions based on their practical importance:

- In the case of loans involving an individual consumer acting as the borrower or guarantor where the purpose of the loan is to acquire or maintain property rights over land, or buildings or planned building work, the LCCI will apply regardless of whether that property is for residential use or other.
- Personal loan agreements for renovating and acquiring dwellings, both in the financing for acquisition and for renovation, are given a single consideration and are subject to LCCI.
- When the borrower is a legal entity and the guarantor or the non-debtor mortgagor is an individual, the LCCI would apply to the latter.
- In cases of active subrogation, the simple change of creditor, which does not in any way change the debtor's position, does not require the granting of information formalities imposed by LCCI.

Of special interest for crossborder transactions are the extra-territorial effects that the DGRN attributes to LCCI. Thus, regarding loans subject to foreign law with mortgage guarantees on property in Spain, the DGRN highlights that the legal effectiveness of the mortgage and its registry entry is governed by Spanish law and that its real effectiveness is subject to the requirements under Spanish law for establishing the mortgage. Based on that premise and after a detailed analysis of the applicable regulations under private international law, the DGRN concludes the following, among other matters:

- The LCCI requires the application of the principle of material and formal equivalence of the foreign document in relation to the Spanish document based on public order and due to imperative regulations. This means that the notary, Spanish or other, must check whether the document contains general hiring conditions and whether these have been deposited in the Registry of General Hiring Conditions in line with Act 7/1998, of April 13, on General Hiring Conditions. Property registrars will reject registration of contractual clauses that are contrary to imperative or prohibitive rules or that were declared null for unfairness in a Spanish Supreme Court judgment with the status of case law or of a

non-appealable judgment.

- The requirements of an imperative nature established in LCCI must be met, in that they are imperative to establish the mortgage, particularly the prior notarial deed of article 15 LCCI (or its equivalent), as well as all documents and information whose delivery and content is documented in that notarial deed, given that they are linked to a security right and therefore to registration and, if applicable, to enforcement.

- From a regulatory perspective, the lenders, abiding by the exceptions established in LCCI, must first register in the registry established in article 42 LCCI.

- Lastly, as the authorization of the notarial deed must be carried out by connecting to the financial institution's digital platform with the notaries and their electronic office, and that these are instruments formalized in other countries, the authorized deed must be analyzed from the perspective of equivalence of forms.

Despite the above, the DGRN concludes that the Spanish courts will be the final courts to verify the effective compliance of the rules on transparency monitoring, insertion of general conditions, and the prohibition of abusivess clauses in mortgage loans.

Bank of Spain guide on the registration of credit intermediaries and lenders

As we analyzed in our Legal flash of October 28, 2019, the Bank of Spain has published a document with frequent questions on application for registering credit intermediaries and lenders, who must register in line with Act 5/2019, of March 15, regulating credit agreements relating to immovable property ("LCCI").

This document, which can be accessed in the section "other information of interest" in the Bank of Spain's Virtual Office, was published, for the first time, on September 4, 2019, and has been updated since then, with the latest update (on the date of this newsletter) having been published on October 25, 2019.

One of the statements the Bank of Spain makes is that both entities granting real estate loans and buyers (assignees) of loan portfolios must register as lenders in the registry. Foreign institutions operating in Spain through a branch or under the regime of free service provision must also register.

In its Virtual Office, the Bank of Spain informs that the deadline for submitting registration applications ended on December 16, 2019. Credit intermediaries and lenders that were carrying out activities before the LCCI came into force must have submitted their applications before that date to be able to continue carrying out their activities until they obtain registration in the corresponding registry.

Reform process of interest rate benchmarks in Eurozone: implementation of new EURIBOR determination methodology

The transition process of interest rate benchmarks in the Eurozone toward risk-free rates ("RFRs") will continue to accomplish the provisions in Regulation (EU) 2016/1011 of the European Parliament and of the Council of June 8, 2016 (better known as the "Benchmarks Regulation"), whose transitory regime ended on January 1, 2020.

In the framework of that process and in relation to the EURIBOR, the implementation of the new hybrid methodology for the determination of EURIBOR has been completed, according to an announcement by the European Money Market Institute, the administrator of that interest rate benchmark, on November 28, 2019.

Equator Principles: new version

On November 28, 2019, the Equator Principles Association announced the launch of the fourth version of the Equator Principles (known as the EP4), in the framework of its annual meeting held from November 18 to 20 in Singapore.

The main new developments in this new version are a greater commitment regarding human rights, climate change, indigenous people and biodiversity. Also, the scope of application has extended to more project-type transactions.

The association provides information on this new version of the Equator Principles on its website.

For additional information on the contents of this newsletter, please contact Cuatrecasas.