



Lending and Secured Finance 2017 Spain

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

As it happened in 2016, the main trends in the Spanish financial sector are focused on keeping an active deleveraging activity by selling non-performing loan portfolios and distressed assets (including real estate assets) to international distressed and real estate funds. Likewise, refinancing and restructuring transactions, as well as corporate and acquisition transactions are increasing and, in particular, the hotel-based real estate sector is emerging.

On significant developments, it is worth mentioning that Spain experienced two government election processes in 2016, which certainly paralysed the expected legislative process in that year. Despite this lack of legislative activity, the Spanish banking regulation made substantial developments, taking significant steps to consolidate the banking sector. As such, the Bank of Spain (*Banco de España*) approved Circular 4/2016 on the financial information of credit institutions, which completely reformulates the guidelines for institutions on risk management. In a nutshell, such circular reinforces the accounting principles applicable to: (i) credit risk management; (ii) accounting classification of the transactions based on their credit risk; and (iii) the individual and collective estimations of provisions.

Furthermore, the European Court of Justice has ruled on the effects of the nullity of the so-called *floor clauses* (i.e., clauses setting a minimum interest rate for variable-rate mortgage loans) included in consumer mortgage loans, stating that this nullity (mainly arising from a lack of transparency) must have *ex tunc* effects (as of the date in which the loan was granted) and not as of the date of the first ruling of the Spanish Courts (dated May 2013).

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

It was a very good year in 2016 for the lending practice, where we have managed to solidify our experience in distressed debt and have continued strengthening our participation in many local and foreign financing transactions. Briefly, some significant 2016 lending transactions are:

- Corporate refinancing and debt restructuring processes: For some years now, we have been actively participating in debt refinancing and restructuring processes, involving large national and international companies from different sectors, which have required forming



multidisciplinary teams with a high international element. Some examples include our advice to certain Investment Funds in the restructuring of FCC and its homologation process (€4.528 billion), our participation in Madrid Highway Network (€4.58 billion), the restructuring of the San José group debt (€2.1 billion) and the Ibersotar group debt (€930 million) as well as the Comsa group refinancing (€719 million).

- Project and real estate finance: After several years of putting this advice “on hold” due to Spanish economic recession, we have become active again advising on transactions involving fresh money. Aside from advising in relevant projects in Spain of certain corporates like KKH, Hispania Activos Inmobiliarios, Meridia Capital, etc., we would like to remark that our clients are increasing their activity abroad, having participated in large cross-border transactions worldwide, including projects located in Peru, Chile, Algeria, Saudi Arabia and South Africa. Regarding Saudi Arabia, we would highlight our involvement as Spanish counsel to FIEM in the Sadara project, a \$19 billion transaction for the construction and operation of a petrochemical plant in Jubail.
- Distressed debt: We are one of the most specialised law firms advising on distressed debt transactions, acquisition of corporate debt, loan portfolios and restructuring debt processes. We have been chosen by major international and prestigious funds and have advised either the distressed/special situations funds (as a purchaser), or the financial institution (as a seller) in many significant deals. Among others, some recent transactions include advising on the sale of non-performing loans portfolio such as Project Carlit, Pirene, Corus, Tizona, Far, Ocean, Normandy, Firefox, Lane and Sil2, clearly showing the Spanish bank’s interest in cleaning up its balance sheets and international investors’ interest in Spanish assets.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes, subject to the restrictions of financial assistance (see question 4.1 below). In addition, although Spanish law does not provide for any specific obligation to justify a company granting a guarantee or security based on corporate benefit, it is advisable (and in some cases expressly required by law) for both the Management Body and the General Meeting of Shareholders to pass a resolution approving the transaction, referring to the corporate interest or benefit that the company granting the guarantee or security or the group as a whole will obtain through such transaction.

Finally, subject to certain case law and according to Section 71.2 of the Spanish Insolvency Act, the relevant guarantee constituted by a Spanish subsidiary in favour of its parent company might be challenged by a Spanish court if no consideration (*contraprestación*) is provided to such subsidiary, the mere allegation of the generic interest to the group not being sufficient.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Directors of a Spanish company have a duty of care towards the company and must act faithfully and loyally towards it. When there is an evident disproportion between the benefit for the company and the granting of collateral by the guaranteeing/securing company, often borrowers request that certain limitation language is included both in the collateral documentation and in



the corporate resolutions to minimise a potential liability risk for the Management Body of the company.

Additionally, in case of an eventual insolvency situation on the part of the company, there is a potential risk that the insolvency administrators might presume that the granting of collateral by the company could have resulted in the insolvency and allege that it is detrimental to the insolvency estate; in such case the Management Body could be held liable for its actions.

2.3 Is lack of corporate power an issue?

Yes, in Spain the agreements need to be executed by duly empowered representatives of the company, with sufficient corporate power to act on its behalf.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Usually, no governmental consents or filings are required to grant guarantees/security interests in Spain (see question 3.11 below).

Regarding internal corporate approvals, in general terms, any actions or activities which fall within the scope of the corporate purpose of the company are subject to fewer formalities. However, in case of private limited liability companies (*sociedades de responsabilidad limitada*), shareholders' approval may need to be obtained before carrying out certain transactions. In public limited liability companies (*sociedades anónimas*), despite not being mandatory, the shareholders' approval is also usually obtained. See also question 2.1 above in relation to corporate benefit.

Additionally, and taking into account the amendments in this field introduced by Law 31/2014 of 3 December, a disposal of an asset may occur in respect of an essential asset of the company (such as taking security over the essential asset), and in such case it is advisable to obtain the relevant shareholders' approval.

For the purposes of the above, an asset shall be deemed essential when the value of the transaction related to such asset exceeds 25% of the value of the assets included in the last balance sheet approved by the company.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No, although certain limitation language is included in case of disproportions (see question 2.2 above).

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange control regulations on the enforcement of a guarantee. However, Spanish Insolvency Law imposes an important restriction on lenders facing imminent or real insolvency of its debtors, as it renders unenforceable contractual early termination clauses solely based on a declaration of insolvency.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

The types of collateral most commonly used to secure financing transactions are generally classified into two main groups: (1) *in rem* security interests, the most common being (i) mortgage over real estate (*hipoteca inmobiliaria*), (ii) ordinary pledge over movable assets with transfer of possession (*prenda ordinaria*) (e.g., pledge over shares, over credit rights or over bank accounts), (iii) chattel mortgage (*hipoteca mobiliaria*), and (iv) non-possessory pledge over assets (*prenda sin*



desplazamiento de la posesión); and (2) personal guarantees, mainly being first demand guarantees (*garantías a primer requerimiento*).

The main difference between *in rem* security interests and personal guarantees is that, in the former, a specific asset secures fulfilment of the obligation, while in the latter, an individual or corporate entity guarantees fulfilment of the obligation. There are also material differences in proceedings for their enforcement and their treatment during insolvency (*concurso*) under the Spanish Insolvency Act.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Spanish law does not provide for a so-called “universal security” over the entire debtor’s assets. Nor does it generally admit the creation of a “floating” or “adjustable” lien or encumbrance, except for certain mortgages over real estate. Therefore, a security agreement is usually required in relation to each type of asset.

The creation of guarantees and security interests requires notarisation in order for them to be considered as an executive title (*título ejecutivo*) in an enforcement scenario. Notarial deeds (being either *pólizas notariales* or *escrituras públicas*) provide certainty of the date and content of the applicable document *vis-à-vis* third parties. Furthermore, some of these types of security interests are subject to compulsory entry on public registries, such as the Land Registry (*Registro de la Propiedad*) (e.g., real estate mortgage) or the Chattel Registry (*Registro de Bienes Muebles*) (e.g., mortgage on inventory or non-possessory pledge over assets), while such registration is not required for other collateral (e.g., ordinary pledge with transfer of possession).

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Real property is taken as security by means of a real estate mortgage (*hipoteca inmobiliaria*). Under Spanish law, real estate mortgages cover: (i) the plot of land and the buildings built on it; (ii) the proceeds from the insurance policies insuring such property; (iii) the improvement works carried out on the property; and (iv) natural accretions. Should the parties agree so, such mortgage may also include (i) movable items located permanently in the property, (ii) civil fruits, and (iii) due rents that had not already been satisfied.

Security over machinery and equipment can be created by means of a chattel mortgage (*hipoteca mobiliaria de maquinaria industrial*) or a non-possessory pledge (*prenda sin desplazamiento de maquinaria industrial*). The choice will depend on whether the specific asset meets certain legal requirements.

For both types of security, notarisation is necessary, as well as registration with the relevant public registry (see question 3.2 above).

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Security over receivables can be taken in two different manners: (i) by creating a possessory pledge (*prenda ordinaria*); and (ii) by creating a non-possessory pledge (*prenda sin desplazamiento de la posesión*) which may be registered in the Chattel Registry.

With respect to the possessory pledge over receivables, in order for the pledge to be perfected, notification to the debtor is required. However, and taking into consideration the commercial impact of the notification, sometimes the notice to the relevant debtors will only be given upon potential or effective default.

On the contrary, the non-possessory pledge (*prenda sin desplazamiento de la posesión*) does not require notification to the relevant debtor on the basis that the filing of such pledge with the relevant Chattel Registry would give it the necessary publicity *vis-à-vis* third parties.



Further to the above, those claims secured by a pledge over future receivables shall be considered privileged in an insolvency proceeding provided that, among other requirements: (i) the security interest is documented by means of a public deed (*escritura pública*) when it comes to ordinary pledges; and (ii) the security interest is formalised by means of a deed (*póliza notarial*) and is registered in the relevant Chattel Registry in case of a non-possessory pledge.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

The pledge over bank accounts is simply a pledge of the credit rights of the holder of the account *vis-à-vis* the bank, which should typically correspond to the account balance.

The formal requirements are identical to those that apply in the case of any other possessory pledge over receivables (notarisation is needed). Possession is transferred by notification to the depository bank. The creation of the pledge does not imply, unless otherwise agreed by the parties, the freezing of the accounts.

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes, collateral security can be taken over shares in companies incorporated in Spain. However, and by virtue of the *lex rei sitae* principle, such pledges should be always governed by Spanish law, not New York or English law. Exceptionally, creating a pledge under a law other than Spanish law might be considered, although enforcement proceedings will be longer and burdensome.

Perfection requirements for pledges over shares in Spain usually include: (i) endorsement of share certificates (if these have been issued); (ii) registration of the pledge in the relevant Registry Book of Shareholders or Shares, as applicable; (iii) registration of the pledge in the deeds of acquisition of the relevant shares; and (iv) in the event of shares represented by book entries (*anotaciones en cuenta*) and therefore, belonging to listed companies, registration of the pledge in the book entry register.

Further to the above, and according to Law 14/2013 of 27 September, on Support to Entrepreneurs and its internationalisation ("*Ley de Apoyo a los Emprendedores y su internacionalización*"), the relevant Registry Book of Shareholders or Shares, as applicable, shall be kept, updated and legalised by electronic means (enabling smooth and faster control of the relevant entries).

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes, Spanish law foresees a specific mechanism for creating security over inventory, which is the non-possessory pledge over inventory (*prenda sin desplazamiento de inventario*). As provided in questions 3.2 and 3.3 above, this type of collateral requires notarisation as well as registration in the relevant Chattel Registry.

However, it is also possible to create a security over inventory by means of granting a chattel mortgage over business (*hipoteca de establecimiento mercantil*), which will include not only the inventory, but the whole business.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes, it can be done, although always subject to the Spanish prohibition of financial assistance (see question 4.1 below) and certain corporate benefit issues (see question 2.1 above).



Aside from this, and considering the restriction in Spain regarding floating charges (see question 3.2 above), if the obligations to be secured arise from different types of credit agreements, the Spanish principle of integrity (by virtue of which a security interest can secure only a main obligation and its ancillary obligations, such as interest, costs, etc.) must be complied with, which in practice means that where two different main obligations are to be secured, two different security interests (over different assets or portions of the same asset) must be created.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notary fees are fixed amounts that vary according to the secured liability (approximately 0.03% of the secured liability), although in transactions with aggregate value higher than €6 million, they can be reduced if negotiated with the notary.

As regards security subject to compulsory entry on public registries (particularly mortgages and non-possessory pledges), in addition to registry fees (approximately 0.02% of the secured liability), some mortgages and certain non-possessory pledges (in particular, those which have been documented by means of a public deed (“*escritura pública*”) rather than a deed (“*póliza notarial*”)), also imply payment of stamp duty tax (varying from 0.5% to 1.5% of the secured liability – principal, interest and any related costs – depending on the Spanish region where the collateral is located). Stamp duty tax is not levied on ordinary pledges.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

As regards security documents that need to be filed within a public registry, the expected amount of time from the date the documents are notarised to the actual filing by the public registry is usually from two to six weeks, assuming the relevant security document was correctly drafted and no errors were found by the registry that need to be amended by the parties. As to related expenses, see question 3.9 above.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Regulatory or other consents with respect to the creation of security over real property or machinery would apply only in very limited cases, depending on the exact location of the asset, its nature and the parties involved (e.g. mortgage over administrative concessions).

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

In rem security interests securing a financing have, as a general rule and according to the Spanish Insolvency Act, the status of credits with special privilege. This privilege will be granted to claims arising under the credit facility as a whole, independent of the fact that it is of a revolving nature. Please see section 8 for a better understanding regarding the priority of such privilege.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

As explained in question 3.2 above, in Spain security interests are almost always notarised. To appear before a Spanish Notary, all parties must be duly empowered (they can act under powers of attorney, which in case of foreign entities, must bear an apostille in accordance with The Hague Convention or a legalisation from the relevant consulate or other competent body).

Signature in counterparts is not used in Spanish law governed agreements. It is worth mentioning that all parties that are signatories to a Spanish notarial deed must have a Spanish Tax Identification Number (*Número de Identificación Fiscal* or “NIF”), even for non-resident parties and



their non-resident attorneys (either individuals or entities), which must request such number before the Spanish Tax Authorities (*Agencia Tributaria*).

Additionally, the Spanish Anti-Money Laundering Law ("*Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo*"), requires certain disclosure obligations when executing transactions before a Spanish Notary Public (with certain exceptions, such as those for listed companies). In particular, individuals executing a public deed before a Notary Public on behalf of a company need to disclose the identity of the ultimate beneficial owner (*titular real*) of the company, which is:

- (i) the ultimate shareholder or shareholders (individuals) of the company, in the event there is a person holding (individually), directly or indirectly, a stake exceeding 25% in the share capital of this company; or
- (ii) the individual controlling, directly or indirectly, the management of such company.

In the event that no individuals hold such a direct or indirect stake or control, the directors/members of the management body of the company are to be regarded as the ultimate beneficial owners and need to be identified too.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

Generally, Spanish law prohibits funds being provided (whether by way of loans, guarantees or any other kind of financial support provided before or after the acquisition) by a target company to a third party so that the third party is able to acquire shares or quotas issued by the target company, or by any other company in the group to which the target company belongs.

Financial assistance is currently prohibited in Spain for:

- (a) *sociedades anónimas* (S.A.) (public limited companies): for their own shares or the shares of any direct or indirect parent company; and for
- (b) *sociedades de responsabilidad limitada* (S.L.) (private limited companies): for their own units and the units of any member of their corporate group.

The consequence is that, if financial assistance is deemed to have been provided, any such financial assistance will be null and void.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

Spanish law does not recognise trusts as a legal figure. Therefore, security trustees, although used in transactions where foreign lenders are involved, are seldom used for the Spanish security package. Instead, lenders tend to appoint an agent for the Spanish security, which would hold the Spanish security in its own name and on behalf of the other lenders.

It is possible for the security agent to enforce claims on behalf of the lenders and the other secured parties, as long as each party grants a notarised power of attorney to the security agent,



authorising it expressly to carry out the enforcement proceedings. However, authors and case law are inconsistent regarding the role of an agent acting on behalf of the syndicate of lenders upon enforcement.

5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

As stated in question 5.1 above, the appointment of an agent for Spanish security is usual market practice for cross-border financings.

5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

In Spain, debt is traded through assignment (*cesión*), and due to the accessory nature of security interests under Spanish law, any assignment of a participation in a secured financing agreement would entail the proportional assignment of the security interests created to secure the full and punctual satisfaction of such financing agreement.

However, for certain types of collateral (mainly those acceding to registers such as mortgages and non-possessory pledges), in order to be effective against third parties, the assignment of the relevant collateral must be notarised and registered with the relevant public registry.

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

In general, interest that Spanish borrowers pay for loans made to domestic lenders (other than financial institutions) is subject to 19% withholding tax in 2017. Likewise, interest income payable on loans made to non-EU tax residents is subject to 19% withholding tax, unless a lower rate applies under a tax treaty (treaty rates range between 5% and 15%). Interest payments to EU residents and EU permanent establishments (except those residing in tax-haven jurisdictions) are not subject to withholding tax (irrespective of whether payments are made to a financial institution or a company).

Second, proceeds of a claim under a guarantee or the proceeds of enforcing security are generally subject to withholding tax as if these payments were made by the borrower.

Since 2012, under the Spanish Corporate Income Tax Act, there have been some limitations to the deductibility of financial expenses:

- (a) Financial expenses derived from intergroup indebtedness are not tax deductible if the funds are used to make capital contributions to other group entities, or to acquire from other group entities shares in other entities, unless the taxpayer proves there are valid economic reasons for doing so.

Overall, financial expenses deriving from indebtedness used for any other reason are fully deductible, unless anti-abuse clauses apply.

However, since 1 January, 2015, interest paid for leveraged buy-out share acquisitions is not tax deductible unless some requirements are met:



- Indebtedness must be lower than 70% of the purchase price.
 - Indebtedness will be reduced proportionally in the eight years following the transaction by up to 30% of the mentioned price.
- (b) Net financial expenses (financial expenses minus financial income) exceeding 30% of the operating profit for the financial year are not tax deductible, with a minimum of €1 million deductible amount guaranteed. Net financial expenses that, by applying the 30% limit, are not tax deductible, may be deductible in the following financial years without a time limitation. If the 30% limit is not reached, the difference may increase the applicable limit for the following five financial years.
- (c) Interests paid on shareholder loans or participative loans granted by another company, which is part of the same group of companies under section 42 of the Spanish Commercial Code, are not tax deductible.

Additionally to the limitations set above, financial expenses, arising from transactions carried out between related parties, are not tax deductible when the interests paid are not taxed because of the application of different legal qualification under local regulations (i.e. when those interests paid are considered as dividends under the lender's local regulations).

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

As a member of the European Union, Spain benefits from free movement of capital within the EU, including exchange rate fluctuations and transaction costs. Therefore, Spain's EU membership represents a significant part of its foreign policy.

Additionally, Spain currently has more than 90 income tax treaties in force and a solid treaty network with Latin American countries that reduce or eliminate Spanish taxes payable to residents of treaty countries.

The main tax incentive is the Spanish international holding companies regime, ("ETVEs"), a well-established legal framework that has helped Spain become one of the most favourable jurisdictions in the EU to channel and manage international investments. ETVEs can benefit from an exemption on inbound and outbound dividends and capital gains provided several requirements are met. Since ETVEs are Spanish regular entities, they are treated like regular limited liability companies, thus benefitting from tax treaties signed by Spain and from EU Directives.

Under Spanish law, no relevant additional taxes apply to foreign investments besides those applicable to Spanish investors

6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to or guarantee and/or grant of security from a company in your jurisdiction?

No, under current Spanish Corporate Income Tax regulations, interest or fees paid to the lenders will not be subject to any withholding or deduction, provided that the lenders are lending entities or financial credit establishments entered on the special registries of the Bank of Spain and have their registered office in Spain, or entities resident in the European Union that have submitted certification of their tax residence.

None of the parties to a loan or guarantee and/or security from a company will be deemed as being domiciled, as being a resident or as having a permanent establishment in Spain solely because of entering into or performing its obligations under the above agreements.



6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

To obtain enforceability regarding third parties and benefit from summary proceedings (see question 7.3 below) a loan, a guarantee or a security document must be notarised and eventually registered (depending on the asset).

For more detailed information on notarial and registry fees and stamp duty tax, please see question 3.9 above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Most tax consequences do not differ as a result of the tax residency or applicable law of the borrower. Exceptionally, adverse tax consequences (documentation obligations) might arise when the borrower/lender is a tax resident in a tax-haven jurisdiction.

7 Judicial Enforcement

7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a “foreign governing law”)? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

Yes, courts in Spain recognise a foreign governing law in contracts in line with Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June, 2008, on the law applicable to contractual obligations (“Regulation Rome I”).

Regulation Rome I has *erga omnes* effects. Hence, whatever it is, the foreign law chosen to govern the contract is enforceable, irrespective of whether or not it is an EU Member State.

Spanish Courts will certainly enforce a contract governed by foreign law; however, the choice of the parties will not avoid the application of *ius cogens* provisions of Spanish law that cannot be derogated by agreement (public policy). Also, the content and validity of foreign law must be proved in the proceedings; if the foreign law is not proved, the court will resort to Spanish law.

7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a “foreign judgment”) without re-examination of the merits of the case?

A distinction must be made between judgments rendered in English courts or courts of EU Member States and judgments rendered in New York (“NY”) courts.

Regarding a judgment rendered in English courts, Council Regulation (EC) No. 1215/2012 of 12 December, 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Regulation Brussels I recast”), establishes that a judgment rendered in an EU Member State is to be recognised without special proceedings in any other EU Member State, unless the recognition is contested. Under no circumstances can the merits of a foreign judgment be reviewed. A declaration that a foreign judgment is enforceable is to be issued following purely formal checks of the documents supplied.

However, a judgment will not be recognised if: (i) the recognition is manifestly contrary to public policy in the EU Member State in which recognition is sought; (ii) the defendant was not served with the document that instituted the proceedings in sufficient time and in such a way as to



enable the defendant to arrange for his defence; (iii) it is irreconcilable with a judgment given in a dispute between the same parties in the EU Member State in which recognition is sought; (iv) it is irreconcilable with an earlier judgment given in another EU or non-EU country involving the same cause of action and the same parties; or (v) the judgment was adjudicated by a court lacking jurisdiction in case of exclusive jurisdiction.

Regulation Brussels I recast does not apply to a judgment rendered in NY courts. In the absence of a multilateral or bilateral treaty between Spain and the United States addressing the matter, under the recent Act 29/2015, on International Cooperation, final judgment rendered by US courts will have the same force as is given in the US provided that it complies with the requirements for its recognition set forth in article 46 of the Act on International Cooperation (*inter alia*, the judgement does not infringe Spanish public policy, the defendant has been properly served with the originating process, the matter is not subject to Spanish exclusive jurisdiction for certain matters, or is not in contradiction with a previous Spanish judgment). Once the exequatur is granted, the judgment can be enforced according to the rules set forth in the Spanish Civil Procedure Act.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

This depends primarily on whether the enforcement action is grounded on an executive title, such as public instruments (i.e. a public deed), or on an ordinary title, such as private contracts.

- a) Executive titles can be enforced directly, through summary proceedings, which consist of a swift procedure that should take between 6 and 12 months. Otherwise, the so-called ordinary proceedings, which inevitably lead to a decision which should be enforced through an enforcement proceeding, may take on average 15 months plus the 6 to 12 months of the enforcement proceeding.
- b) Enforcement of an English court decision will follow the same proceeding as explained in point a), given that the judgment will be recognised without special proceedings. Enforcement of a US judgment would require prior exequatur proceedings (it takes on average between six and nine months). Once the judgment has been recognised, enforcement will follow the same proceeding as explained in point a) above.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

Enforcement of collateral security is typically carried out through a public auction, in the context of judicial or notarial proceedings. For notarial enforcements see question 8.4 below. Additionally, the enforcement of pledges over credit rights may also be achieved through set-off or assignment of claims.

The rights derived from the relevant security can be judicially enforced either through declaratory civil proceedings or summary proceedings. The latter action is faster and more effective, while the former is costly and time-consuming. However, to start summary proceedings certain requirements must be met, particularly the determination of the due and payable amount in accordance with the Civil Procedure Act.

Once the court has published a date for auction, the debtor will only be able to object under limited circumstances, such as the prior extinction of the pledge, full payment of the secured obligation, or the existence of a material mistake.



Concerning the enforcement of pledges over shares, the Financial Collateral Directive was transposed in Spain by means of Royal Decree Law 5/2005, which sets forth a speedy proceeding that applies to obligations of a “financial” nature and which permits direct appropriation of the collateral by the creditor where the financial agreement expressly states so,

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

Generally there is no distinction between domestic and foreign entities when it comes to foreclosing Spanish security.

7.6 Do the bankruptcy, reorganisation or similar laws in Spain provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Bankruptcy declaration triggers an automatic stay of one year (unless the debtor gets the approval of a composition agreement or files for liquidation earlier). This automatic stay concerns secured creditors with collateral over assets that are necessary to continue the ordinary course (except security interests subject to the special regime on financial collateral).

During the stay, the bankruptcy officer may decide to treat the secured claim as an administrative expense (pre-deductible claims from the estate) in order to avert enforcement of the security interest.

This automatic stay can also apply if the debtor serves a “5 bis” notice, which enables the debtor to negotiate an out-of-court solution to financial distress in a four-month period. The stay of enforcement actions, which does not apply to public claims, lasts for a three- or four-month period (there are different criteria) and concerns assets that are necessary to continue the ordinary course. Yet any enforcement action conducted by holders of financial claims may be stayed if the debtor obtains a standstill supported by 51% of the financial claims. Security interests subject to the special regime on financial collateral escape this automatic stay in any event.

Lastly, if the secured creditor fails to enforce the security interest prior to liquidation (or reinstate the formerly stayed enforcement proceeding as a result of bankruptcy declaration), it may lose control over the collateral if the liquidation plan sets forth the sale of the business unit as a going concern. In exchange for losing control to enforce the security interest on a stand-alone basis, secured creditors obtain a portion of the price equivalent to the weight of the collateral in the estate. If that percentage of the price is less than the value recognised in the proceeding for the security interest, secured lenders that did initiate the enforcement proceeding prior to bankruptcy declaration, but did not reinstate it after the one year automatic stay, those lenders to have veto right as to the approval of the liquidation plan, unless 75% in value of the secured claims from the same class (financial, labour, public, commercial) were to consent to it.

Lastly, the Civil Procedure Act provides the moratorium on enforcement on the grounds of criminal procedure may halt the enforcement and performance of such agreements until the criminal court issues a final resolution in such proceedings.

On another front, the Civil Procedure Act provides a moratorium on enforcement on the grounds of criminal procedure which may halt the enforcement and performance of such agreements until the criminal court issues a final resolution in such proceedings.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes, Spain has been a party to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) since 1977, and it is therefore subject to recognition and enforcement of foreign arbitral awards in the terms established therein.



Given that Spain has not made any reservation to the New York Convention, its proceeding is applied to the enforcement of all arbitral awards, including those rendered in countries that did not sign the convention. The Spanish Arbitration Act specifically establishes that the exequatur of foreign awards will be governed by: (i) the New York Convention, without prejudice to the provisions of other, more favourable international treaties on the granting of foreign awards; and (ii) the proceedings established in the civil procedural system for judgments handed down by foreign courts.

Spanish courts will not re-examine the merits of the case. However, an arbitral award might not be recognised if certain requirements are not met (e.g. the arbitration agreement is not valid, irregularity in the composition of the arbitration authority or in the arbitral procedure, etc.). Furthermore, an award will not be recognised if the subject matter cannot be settled by arbitration in Spain or the recognition is contrary to the public policy of Spain.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Bankruptcy declaration triggers an automatic stay of one year (unless the debtor gets the approval of a composition agreement or files for liquidation earlier). This automatic stay concerns secured creditors with collateral over assets that are necessary to continue the ordinary course (except security interests subject to the special regime on financial collateral).

During the stay, the bankruptcy officer may decide to treat the secured claim as an administrative expense (pre-deductible claims from the estate) in order to avert enforcement of the security interest.

This automatic stay can also apply if the debtor serves a “5 bis” notice, which enables the debtor to negotiate an out-of-court solution to financial distress in a four-month period. The stay of enforcement actions lasts for a three- or four-month period (there are different criteria) and concerns assets that are necessary to continue the ordinary course. Yet any enforcement action conducted by holders of financial claims may be stayed if the debtor obtains a standstill supported by 51% of the financial claims. Security interests, subject to the special regime on financial collateral, escape this automatic stay in any event. Besides, public claims cannot be affected in any way by a “5 bis” notice.

Lastly, if the secured creditor fails to enforce prior to liquidation, it may lose control over the collateral, in which case it would get a portion of the price equivalent to the weight of the collateral in the estate. If the resulting price is lower than the value of the secured claim (ascertained pursuant to the law), at least 75% of the secured claims from the same class must consent to the liquidation plan that sets forth the sale of the business unit as a going concern. The claim comprising the difference between the resulting price and the value of the secured claim (the deficiency claim) will be classified as unsecured.

8.2 Are there any preference periods, clawback rights or other preferential creditors’ rights (e.g., tax debts, employees’ claims) with respect to the security?

Pursuant to compulsory priority rules, claims are divided into privileged, ordinary, and subordinated. Privileged claims, which are in turn divided into special privileged (secured) claims and general privileged claims (such as certain torts, tax, social security and employees’ claims), are given preferential treatment over ordinary claims, which in turn have preference over subordinated claims. A controlling principle is the equal treatment of creditors from the same class.



Administrative expenses (*créditos contra la masa*) have a cash flow privilege over claims (*créditos concursales*). In contrast to administrative expenses, claims can only be settled pursuant to a plan of reorganisation or with the proceeds arising out of liquidation (either piecemeal or, preferably, as a going concern business). Having said that, secured creditors may auction or repossess the collateral to apply the proceeds thereof to settle their claims (over which administrative expenses have no priority).

Acts or transactions beyond the ordinary course of business, entered into within two years prior to bankruptcy declaration, may be subject to clawback, so long as: (i) the debtor does not receive reasonably equivalent value in exchange; or (ii) certain creditors are preferred to others when the company is currently insolvent (i.e. unable to regularly pay its debts as they come due). The hardening period in both cases is two years.

The law sets forth certain rebuttable and non-rebuttable presumptions of transactions that are detrimental to the estate. There are also certain safe harbours (namely acts and transactions done within the ordinary course of business, and certain ring-fenced out-of-court solutions).

Actual intent or fraud is not required to bring a clawback action successfully. Yet in case of actual fraud the reach-back period is four years (and the action can be brought both within and aside from an insolvency proceeding). Moreover, fraud is a requirement to claw back security interests subject to the special regimen on financial collateral.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Governmental entities of any type (whether territorially based – such as national, regional, municipal authorities – or of a functional nature) are excluded from bankruptcy proceedings. However, companies directly or indirectly controlled by governmental entities are subject to general bankruptcy law.

Additionally, certain types of companies (such as insurance companies) are subject to specific insolvency regulations, although the composition, appointment and operation of the insolvency administration will still be regulated by general bankruptcy law.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes, out-of-court enforcement proceedings, available for certain types of security, are typically carried out by a Notary Public and take the form of a public auction. The terms and conditions of such auction are not entirely regulated in the law and hence they usually follow the provisions agreed by the parties in the relevant security document. Absent a specific agreement, the Notary Public also tends to follow equivalent provisions applicable to judicial enforcements.

In the case of security over bank accounts or listed securities, particularly when the secured obligation consists of cash settlement agreements or derivative contracts, secured lenders may appropriate directly and immediately the secured assets (or offset), without conducting a public auction. Equally, certain regional laws (such as Catalan law) expressly permit either private sales or, in the case of highly liquid security, appropriation by set-off.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

The submission by the parties to a foreign jurisdiction is valid, binding and enforceable in Spain:



- (i) in the case of submission to the courts of an EU Member State: in accordance with the provisions on *prorogation of jurisdiction* contained in Regulation Brussels I recast (*supra* 7.2), except in cases where the rules on exclusive jurisdiction of the Regulation are to be applied (in general, concerned with proceedings referred to: (a) *in rem* rights or tenancies in immovable property; (b) the validity of the constitution, nullity or dissolution of companies or other legal persons, or the validity of the decisions of their organs; (c) the validity of entries in public registers; (d) the registration of patents, trademarks, designs or other similar rights subject to deposit or registration; and (e) the enforcement of judgments);
- (ii) in the case of submission to non-EU foreign courts abided by conventions: in accordance with the applicable international bilateral convention; and
- (iii) in the case of submission to foreign courts not covered by conventions: in accordance with the Spanish Organic Law of the Judiciary such submission would be valid, unless the exclusive jurisdiction of the Spanish courts is violated (in general, the same cases described *supra* in (i) (a) to (e), with regard to Regulation Brussels I recast).

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

Under Spanish law, the waiver of sovereign immunity (either of jurisdiction or from execution) by a foreign state is legally valid and enforceable. The waiver may be explicit (by means of an international agreement, a written contract or a declaration, or written communication made within the proceedings, to the relevant tribunal) or tacit (as a result of certain acts on the side of the foreign state), in accordance with Spanish Organic Law 16/2015 of 27 October, 2015.

Absent the waiver of sovereign immunity, no asset owned or controlled by a foreign state and allocated to public and official (i.e., non-commercial) purposes can be seized or subject to enforcement proceedings in Spain. This includes assets: (a) used by the diplomatic missions or consular offices of the foreign state for the performance of their duties and functions (including bank accounts, with the exception of accounts exclusively used for commercial purposes); (b) used for military purposes; (c) of the central bank or similar monetary authority of the foreign state and used for the performance of their duties and functions; (d) forming part of the foreign state's cultural heritage or with scientific, cultural or historical interest (with the exception of assets offered for sale); and (e) official vessels and airships, exclusively attached to public services of a non-commercial nature.

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank *versus* a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

There is no need for foreign or local lenders or agents under a syndicated facility to be resident, licensed, qualified or entitled to do business in Spain to execute or enforce any rights in Spain under financing agreements or collateral agreements, provided that, in the case of foreign lenders (and where and if applicable), they are licensed, qualifies or entitled to do business in their jurisdiction of incorporation. Consequently, there is no material distinction between domestic and foreign creditors for the purposes of granting loans or security. In any case, foreign lenders



are subject to some formalities such as the obligation to obtain a Spanish tax identification number (*NIF*) (as explained in question 3.13 above).

11 Other Matters

11.1 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

Most of the relevant issues have already been covered in the previous [sections/questions](#). However, we take the opportunity to remark here that the Spanish Companies Act sets out the conditions under which a Spanish company (whether in the form of a public limited liability company (*sociedad anónima*) or in the form of a private limited liability company (*sociedad de responsabilidad limitada*) may issue and guarantee debt securities. According to those amendments, limited liability companies are now allowed (as opposed to the previous regulations in this regard) to issue and guarantee bonds and other securities that create or recognise debt, except for convertible instruments (i.e., securities which can be converted into equity).



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