CUATRECASAS

Financing and Restructuring

First quarter 2019

April 2019

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CASES AND TRANSACTIONS

Colonial: sustainable loans

Cuatrecasas advised Inmobiliaria Colonial on negotiating and signing two bilateral sustainable loan agreements (green loans) with ING Bank and Caixabank. This kind of agreement includes a scale in the applicable margin that varies depending on the sustainability rating the specialized certified agency gives to the borrower. This way, the real estate portfolio's improved sustainability parameters helps reduce the interest rate applicable to the green loan.

These are the first green loans both banks have granted to a Spanish real estate agency, as they adopt this new trend in credit transactions, imported from the debt capital market.

Phoenix: financing renewable energy projects

We advised Forestalia group on one of the most important renewable energy projects implemented in Spain to date. JP Morgan, Banco Santander and Banco Sabadell provided the financing of the first phase of the Phoenix Project for the group to build ten wind farms in the autonomous region of Aragón, with a total of 342 MW of installed capacity.

The financing was completed with the equity contribution by Mirova, Engie (the project's international partners) and Forestalia itself, whose contribution completed the bank financing, bringing the total investment to approximately €400 million. GE Renewable Energy is the project's main technological partner, and it will be responsible for laying the foundations and installing the 91 turbines required to complete the construction of the farms, and the building companies Aldesa, Elecnor and Eiffafe will handle the civil engineering works.

Coordinating and advising on the different contracts involved in this project (financing, documents on the contribution of funds by partners, and project contracts) required several of the firm's teams working hard on this transaction that consolidates the firm's important presence in the renewable energy sector.

El Ganso: restructuring financial liabilities

Cuatrecasas advised the pool of banks (based on business percentage, we highlight Santander, BBVA and Sabadell) on a process to restructure the financial liabilities of Acturus Capital, S.L. (whose well-known trademark is "El Ganso"). The financing agreement, signed by over 80% of the holders of the company's financial liabilities and subject to court approval, establishes the conversion into loans of the different bilateral financial documents signed by the company, giving the loans equal treatment in the short- and medium term until their repayment. It also establishes the continuity of the guarantee lines required to maintain the company's priority points of sale. We highlight the new debt relief mechanism implemented with a different tranche, which is activated with the ordinary or special repayment of the sustainable debt tranche.

LEGISLATION

Act regulating credit agreements relating to immovable property

On March 16, 2019, Act 5/2019, of March 15, regulating credit agreements relating to immovable property ("Act 5/2019") was published in the Official Gazette of the Spanish State; it will come into force on June 16, 2019, three months after its publication. Although the main objective of Act 5/2019 is to transpose Directive 2014/17/EU of the European Parliament and of the Council of February 4, on credit agreements for consumers relating to residential immovable property, the lawmaker has taken a further step by introducing additional provisions aimed at "*strengthening the legal certainty, the transparency and the comprehension of contracts and their clauses, as well as the fair balance between the parties*" (Preamble II to Act 5/2019).

The scope of application of Act 5/2019 is limited to loan agreements granted by individuals and companies carrying out that activity professionally, when the borrower and the guarantor are individuals and the purpose of the agreement is the granting of mortgage loans (i) on residential immovable property, or (ii) whose purpose is to acquire or preserve the property rights on land and buildings constructed or to be constructed, provided the borrower and the guarantor are consumers.

We summarize below the most relevant developments in Act 5/2019:

- Accelerated repayment: this is imperative in Act 5/2019, with no margin for agreement to the contrary limiting this right of the lender. However, accelerated repayment will only take place when the payments due and unpaid equal (i) at least 12 months or 3% of the principal, if the default takes place in the first half of the term of the loan; or (ii) 15 months or 7%, if it takes place in the second half of the term of the loan. The lender must also have requested payment and have granted one month for compliance.

- Interest rate variations: The loan's interest rate cannot be modified to the borrower's detriment during the term of the agreement, unless there is a written agreement by the parties. Also, in transactions with a variable interest rate, it is not possible to establish a lower limit or floor of the interest rate.

- Default interest rate: it is also imperative and will be the remuneration interest rate plus three points, and it may not be capitalized.

- Distribution of expenses:

  (a) Appraisal: payable by the borrower.

  (b) Administrative management fees: payable by the lender.

  (c) Notary fees: the lender will assume the costs of the mortgage loan deed, and those that request copies will pay for them.

  (d) Registration in the registry: payable by the lender.

  (e) Transfer tax and stamp duty: in line with the applicable tax laws. Royal Decree Law 1/1993, of September 24, following its reform by Royal Decree-Law 17/2018, of November 8, considers the lender the taxpayer.

- Commission for accelerated repayment: this must be agreed on by the parties and can only be collected—without exceeding the amount of the lender's financial loss— in the following cases:

  (a) In variable interest rate agreements: if during the first five years of validity of the loan agreement, the lender's financial loss is reimbursed to the limit of 0.15% of the capital reimbursed early; and during the first three years, to the limit of 0.25% of the capital reimbursed early. There will be no commission for early repayment as of the fifth year.

  (b) In the case of novation of the applicable interest rate or subrogation that, in both cases, entails the application of a fixed interest rate instead of a variable rate during the rest of the contractual term: the lender's financial loss will be repaid with the limit of 0.15 % of the capital reimbursed early, during the first three years of the term of the loan agreement.

  (c) In fixed-interest loan agreements: the lender's financial loss will be repaid during the first 10 years, with the 2% limit; after this period, with the 1.5% limit.

- Transparency and checking compliance: Act 5/2019 establishes strict information requirements. We highlight the following:

  (a) The lender's obligation to submit two exhaustive information records about the mortgage product: European Standardized Information Sheet or ESIS, included in

Appendix I together with the instructions on how to complete it and the Standardized Warnings Sheet (FiAe).

(b) The obligation, when providing variable-rate loans, to inform in a separate document of the regular installments to be paid by the borrower in different scenarios of interest rate developments.

(c) Giving the notary public—appointed by the borrower to notarize the deed—the duty of (i) impartially advising the borrower free of charge, resolving any questions arising from the contract; and (ii) checking whether the deadlines and other requirements enabling the mentioned principle of material transparency to be considered met—particularly those requirements relating to contractual clauses of greater complexity or importance in the contract—concur when the loan agreement or mortgage credit is placed on public record.

(d) The impossibility to place the deed on public record if there was not enough documentary evidence of compliance with the information and transparency obligations imposed by law on the lender, or if the borrower had not requested advice from the notary public, at the latest, the day before the authorization of the deed of the mortgage loan.

- Loan-related sales: Act 5/2019 prohibits loan-related sales such as the obligation to buy certain products or services together with the loan, although it allows exceptions, e.g., taking out an insurance policy to meet the obligations under the loan agreement or damage insurance for the mortgaged property.

- Property loans in foreign currencies: the borrower is entitled to convert the loan in a foreign currency into another currency in line with the corresponding legal provisions. When requesting conversion, borrowers must opt for the following: (i) the currency in which the borrower receives most of his or her earnings or has most of his or assets which will be used to repay the loan, as indicated when the most recent solvency assessment was carried out in relation to the loan agreement; or (ii) the currency of the Member State where the borrower was residing on the date the loan agreement was signed or where the borrower was residing when he or she requested the conversion. Only non-consumer borrowers can agree with the lender on some kind of system to limit the exchange rate risk to which they are exposed under the loan agreement, instead of the right to convert the loan into an alternative currency. Noncompliance with the legal requirements will lead to the nullity of the multicurrency clauses in favor of the consumer borrowers, enabling them to request that the agreement be amended to consider that the loan was originally granted in the currency in which the borrowers receive most of their earnings.

- Out-of-court mortgage foreclosure: the appraisal requirement established in article 129.2 of the Spanish Mortgage Act is modified, and it requires that, to make use of this procedure, the value at which the interested parties appraise the property to use as the benchmark in the auction is not lower than the value stated in the appraisal (currently, it cannot be lower than 75% of that value).

- Registry: under the act, lenders other than credit institutions, financial credit establishments and the branches in Spain of credit institutions must register in a Bank of Spain registry. This requirement must be met before the institutions—and any transactions—can be registered in the commercial and property registries.

Regarding the transitional scheme, from the date the regulation comes into force, it will affect those loan and credit agreements that fall within its scope and have been signed after its coming into force, or previously when they are renewed or subrogated after that date. The regulation on accelerated

repayment will apply to contracts signed after the act comes into force, unless the debtor claims that the contractual provision is more favorable. However, the regulation will not apply to those terms to maturity that take place before the coming into force of the act, regardless of whether a mortgage foreclosure procedure has been started or suspended. The limits on the commission for accelerated repayment in the case of renewal and subrogation of variable interest rate loans that convert into fixed-rate loans for the remainder of the loan's validity will apply in any case, including agreements signed before the act comes into force.

The act contains certain tax measures referring to (i) transfer tax and stamp duty, particularly stamp duty (notarial documents) in transactions to set up a mortgage loan; and (ii) certain financial effects resulting from credit subrogation in the mortgage loans granted to individuals.

Regarding transfer tax and stamp duty, credit unions cannot apply the exemption established in Act 20/1990, of December 19, on the Tax Regime of Credit Unions, when in transactions to establish a mortgage loan they are the taxpayers. Regarding transactions to subrogate creditors in mortgage loans, there is a special rule on allocating the expenses incurred by the first lender (including transfer tax and stamp duty) when there are subsequent subrogations of the creditor.

Regional legislation

As in previous newsletters (see, for example, fourth quarter 2018 and second quarter 2018), below are new developments in regional legislation that may affect assignments of mortgage loan portfolios, securitization and real estate purchase and sale transactions . In this newsletter, we highlight developments in the autonomous regions of Catalonia, Valencia, Extremadura and Castile-La Mancha.

Catalonia

In judgment 13/2019, of January 31, 2019 (ECLI:ES:TC:2019:13), the Constitutional Court admits the counsel for the state's partial abandonment of the appeal regarding the social rent obligations, and declares unconstitutional the following articles of Catalan Parliament Act 24/2015, of July 29, on urgent measures for handling the urgent housing and energy poverty situation:

- Article 3 (regulating a simplified court procedure for solving over-indebtedness) for encroaching on the State's general powers in procedural law. It does validate the regulation of an out-of-court voluntary mediation procedure (article 2).

- Article 4 (allowing certain guarantors to settle liabilities when the debtor consumer has accepted that benefit in an out-of-court procedure resolving over-indebtedness) for establishing a certain regime of obligations for the guarantor that involves introducing new rights and obligations in the framework of private contractual relationships and which, therefore, regulates areas of action reserved for the exclusive powers of the State.

- Sole Additional Provision (establishing a right of first refusal enabling debtors to be released from their debt by paying the assignee the price agreed with the creditor for the assignment of the credit when the credit has been secured against the debtor's primary residence and the debtor is a consumer) for the same criteria applied to article 4 above, as this provision was a substantive regulation regarding the amount the debtor must pay to be released from the mortgage credit.

On March 8, 2019, Decree Law 5/2019, of March 5, on urgent measures to improve access to housing came into force, amending the following:

- Article 15.2 of Act 4/2016, of December, on the right to housing, to extend the administration's expropriation powers due to noncompliance

with the property's social function, regarding property located in certain areas and are registered, or are liable to be registered, in the Registry of unoccupied housing and occupied housing without a valid authorization. Now, under this act, the administration can expropriate not only temporary use but also ownership. Also, if the owner of the housing affected cannot prove within one month that the housing is occupied legally, (i) an expropriation procedure can be started, and (ii) the content of the right to property will be reduced to half of its value, with the difference corresponding to the expropriating administration. In a three-month period, the administration and the owner can agree on its acquisition or assignment of temporary use for social rent, in which case the expropriation procedure would end.

- Act 18/2007, of December 28, on the right to housing, which in section 1 of additional provision 24, establishes the creation of a registry of unoccupied housing and occupied housing without a valid authorization, to extend the obligation to housing owned by private companies in situations of abnormal use due to being permanently unoccupied or because the housing is part of an unfinished building with over 80% of the construction work completed, after over two years have elapsed since the maximum deadline for finishing the construction work.

- Article 158 of the Urban Planning Act approved by Legislative Decree 1/2010, of August 3, which includes a preferential acquisition right for the administration in cases of (i) privately-owned land reserved for subsidized housing in urban planning, and (ii) leased housing when transferred together with other housing and units that are part of the same building.

Valencia

On March 22, Act 6/2019, of March 15, by the Catalan regional government, amending Act 1/2011, of March 22, approving the statute of individual consumers and users in the autonomous region of Valencia, in guarantee of the right to information of individual consumers regarding securitization of mortgages and other credits, and regarding certain business practices, came into force, establishing the obligation to notify the debtor and guarantors of the assignment of a credit (mortgage or ordinary) to a securitization fund or a special-purpose entity or vehicle. The obligation is extended to the (i) assignment to third parties of debts taken out by consumers with other business and service entities and companies, and (ii) the assignment or replacement in pension, retirement and investment plans and funds.

The entity must notify the assignment by operation of law within 10 days . Notification includes the price of the transfer. In the case of transfers to investment entities the following must be notified: the total emission value by the assignor and the total purchase value by the assignee. The notification enables the debtor to discharge the credit right in line with the conditions and deadlines established by law.

Under the transitional scheme, financial institutions have three months to inform about all the credit assignments by individual consumers carried out before the coming into force of the act.

Extremadura

On February 27, Act 6/2019, of February 20, regulating the individual consumers statute of Extremadura, came into force, establishing the obligation for financial institutions to give written notice to their respective debtors of their intention to transfer their loans and mortgage credits to asset-backed securities funds.

Castile-La Mancha

On April 1, Act 3/2019, of March 22, regulating the individual consumer statute of Castile-La Mancha was published, establishing that any entities that transferred a mortgage or ordinary credit to an asset-backed securities fund must inform in writing of the assignment to the person with whom they would have signed the mortgage loan agreement or other kinds of loan, with a different guarantee or without a guarantee. The financial institutions must notify the assignment, transfer or securitization by operation of law when these are carried out or at the request of the interested individual consumer at any time.

CASE LAW

Monitoring abusiveness of accelerated repayment clauses in mortgage loans

In its judgment (Grand Chamber) of March 26, 2019 the Court of Justice of the European Union resolved the preliminary matters raised by the Spanish Supreme Court and by First Instance Court No. 1 of Barcelona regarding the scope of the declaration of nullity of accelerated repayment clauses in mortgage loan agreements with consumers.

Click the link to read our legal flash on this judgment:

Legal flash | Monitoring abusiveness of accelerated repayment clauses in mortgage loans. Judgment of CJEU (Grand Chamber) of March 26, 2019

Subordination of non-financial claims of group companies

In judgment 125/2019 of Friday, March 1, 2019 (ECLI: ES:TS:2019:621), the Spanish Supreme Court establishes that the claims of companies from the same group as the insolvent company will be subordinate, even if those claims are not loans or arising from instruments with a similar purpose.

We highlight that article 92.5 Insolvency Act establishes an exception to the subordination rule applicable to the claims of persons with a special relationship with the insolvent company, meaning that claims other than loans and instruments with a similar purpose to loans held by the shareholders, as mentioned in article 93.2.1 and 3 Insolvency Act, will not be subordinate.

In the case, it was debated whether a claim relating to rental income pending payment by the insolvent company to a company of the group should be classified as subordinated. The Supreme Court concluded that the creditor was a person with a special relationship with the insolvent company because both were companies of the same group and, therefore, the creditor's claim relating to rental income must be subordinate, although it was not of a financial nature. The Supreme Court concluded that the wording of the Insolvency Act does not allow in any case the exclusion of the claims of companies in the group from the general subordination rule. According to the Supreme Court, the rule in article 92.5 Insolvency Act is clear and precise; the exception is exclusively limited to the shareholders of the insolvent company (or shareholders also in other group companies) with the significant participation mentioned in articles 93.2.1 and 93.2.3 Insolvency Act, but does not apply to companies that are in the same group as the insolvent company. The Supreme Court does not admit the analogy as it considers that there is no loophole or similar reasoning.

Communication of privileged claims

In judgment 112/2019, of February 20, 2019 (ECLI: ES:TS:2019:521), the Supreme Court interprets that the privileged claims in the insolvency must be communicated as follows: "*communication of the amount paid until the date as a claim with a special privilege and the unpaid part as a contingent claim with no specific amount (until the contingency take place) and with the classification of special privilege.*"

Separate enforcement by Spanish Social Security of seized assets before insolvency

In judgment 90/2019, of February 13, 2019 (ECLI: ES:TS:2019:388), the Spanish Supreme Court interprets the effects of the declaration of insolvency on administrative enforcements and actions for recovery of debt against the debtor's estate as established in article 55 Insolvency Act.

Repeating its judgment 319/2018, of May 30, 2018 (ECLI: ES:TS:2018:2014), the Supreme Court highlights that article 55 Insolvency Act contains a general rule making it impossible to start individual enforcements or administrative actions for recovery of debt against the insolvent company's estate and to suspend those already started. Next, it highlights the exceptions to that general rule: excluded are administrative enforcement procedures in which enforcement proceedings were ordered before the declaration of insolvency if two requirements are met: one on the nature of the assets (assets that are not necessary for the continuity of the debtor's business activity), and a second temporary requirement (that the liquidation plan has not been approved).

In the case in question, the Supreme Court authorized the action for recovery of debt to continue, given that the Spanish Social Security ("TGSS") had, before the declaration of insolvency, seized vehicles that were not necessary for continuity of the business activity, and the liquidation plan had not been approved. However, the controversy arises in relation to the pronouncement of the first instance court's judgment—confirmed in appeal—obliging the TGSS to, once the assets have been realized, assign the funds obtained to the available assets in the insolvency proceedings. The Supreme Court confirms that the right to separate enforcement does not involve a collection preference, meaning that the order of preference of insolvency claims applies in these separate enforcements, whether labor court or administrative proceedings, started before the declaration of insolvency on the insolvent debtor's assets. However, the way to assert this preference is not by ordering the enforcing body—in this case, the TGSS—to assign the funds obtained through the enforcement to the available assets of the insolvency proceedings. Instead, the way to do this is by establishing third-party intervention with a paramount right whose legal basis corresponds exclusively to the insolvency administration. If third-party intervention with a paramount right is upheld, the funds obtained will not go directly towards payment of the preferential insolvency claims to the claim of the TGSS; they will be integrated into the insolvency assets so that, together with the other assets and rights, the creditors will be paid in line with rules governing insolvency.

Stamp duty on deeds novating mortgage loans

In judgment 338/2019, on March 13, 2019 (ECLI: ES:TS:2019:748), the Spanish Supreme Court rules on stamp duty on deeds novating mortgage loans in which not only the conditions referring to interest rate and term of loan are modified, but also other financial clauses.

Regarding the financial clauses included in the loan agreement that do not affect the interest rate or term of the transaction, the Supreme Court highlights that whether stamp duty applies will depend on whether those clauses meet the requirements in article 31.2 of the consolidated text of the Transfer Tax and Stamp Duty Act, particularly the registration requirements and on having the amount or valuable thing. Regarding deeds that, following this criterion, are subject to stamp duty, the taxable base will be equal to the financial content of the financial clauses whose modification is agreed.

Transfer tax on dations in payment

The Spanish Supreme Court has established case law regarding the taxable base for transfer tax in dations in payment of immovable property to the mortgage creditor.

The relevant judgments are judgment 94/2019 of January 31, 2019 (ECLI: ES:TS:2019:484) and

judgment 134/2019 of February 6, 2019 (ECLI: ES:TS:2019:481) in which the Supreme Court resolves two appeals filed by a credit institution against judgment by the High Court of Justice of Andalusia of November 9, 2017, and judgment by the High Court of Justice of Madrid of March 2, 2017, respectively.

Contrary to the argument put forward by the appellant credit institution, which considered that the taxable base of the transfer tax should be equal to the real value of the immovable property transferred, the Supreme Court establishes that the taxable base must be equal to the amount of the outstanding debt that is discharged under the dation in payment if the debt exceeds the real value of the immovable property transferred.

In the court's reasoning, it first analyzes the legal nature and commercial intent of the dation in payment: the bilateral agreement between the debtor and the creditor to discharge the mortgage debt pending payment in exchange for the transfer of the mortgaged immovable property.

Based on the above, it carries out a joint interpretation of articles 10 and 46.3 of the Consolidated Text of the Transfer Tax and Stamp Duty Act and confirms that the dation in payment is a bilateral legal transaction that comes under the scope, precisely, of the awarding of property in lieu of payment established in article 7.2 A) of the mentioned consolidated text as a tax event for transfer tax, and whose taxable base must be equal to the consideration offered by the bank in exchange for the awarding of the property in lieu of payment, and whose value is equal to the amount of the discharged mortgage debt

The court also bases its conclusion on the tax coherence principle, indicating that the dation in payment is a complete business act in which the awarding of the property to the creditor constitutes the true consideration for the settlement of the mortgage debt, and arguing that it is also necessary to apply this criterion from the perspective of transfer tax and stamp duty. It goes on to highlight that the settlement of the debt is an undeniable benefit for the appellant credit institution, because it constitutes a clear declaration of taxable economic capacity.

These Supreme Court judgments correct the case law of the high courts of justice of the autonomous regions and the administrative doctrine of the Directorate General of Taxation, both of which had considered that the taxable base in dations of payment should be equal to the real value of the immovable property transferred minus any charges reducing the value.

ADMINISTRATIVE DOCTRINE

Enforcement of mortgages on movable property

In its decision of December 21, 2018 (BOE 28.1.19), the Directorate General of Registries and Notarial Affairs ("DGRN") analyzes the application of the provisions in article 682.2.1 of Code of Civil Procedure ("LEC") to mortgages on movable property. Specifically, the DGRN examines whether the submission of an appraisal certificate for the mortgaged movable item can be required to prove that the auction price agreed on by the interested parties complies with the minimum limit of 75% of the official appraisal.

The controversy relates to the registration of a mortgage on photovoltaic panels and other similar equipment, which the Commercial Registry and Registry of Movable Property of Granada rejected because the appraisal certificate required under article 682.2.1 LEC was not submitted.

The DGRN interprets article 682.2.1 LEC and confirms the following: (i) the appraisal and the percentage limit are imposed in any case, regardless of the mortgaged object, and (ii) the appraisal can be carried out by a non-approved entity if the mortgage is not apt for covering an issue of mortgage securities.

Maritime mortgages: out-of-court enforcement and collateral liquidation

In its decisions of December 14 and 26, 2018 (BOE of January 3, 2019 and January 28, 2019, respectively), the DGRN analyzes the controversy relating to the validity of clauses on out-of-court sales and collateral liquidation included in deeds establishing maritime mortgages.

The DGRN confirms that a maritime mortgage can be enforced through an out-of-court sale if this has been agreed in the mortgage deed.

It is also confirms its support of the validity of collateral liquidation if there is an established procedure on how to appraise the mortgaged asset. Consequently, the DGRN admits collateral liquidation under which, in the case of non payment, the debtor must transfer the mortgaged ship to the creditor or the person appointed by the creditor, if the system agreed for appraisal guarantees that (i) the debtor receives an objectively real or reasonable price, and (ii) any third-party rights on the remainder of the price once the debt is paid are guaranteed (e.g., through a court or notarial deposit).

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