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Financing and restructuring

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CASES AND TRANSACTIONS

"Aguascalientes" and "Andalucía": financing of two photovoltaic plants in Mexico

The team of lawyers in our Mexico City office advised OPDEnergy, a company specialized in developing renewable energy projects, and its project companies in Mexico, on obtaining the financing granted by Sumitomo Mitsui Banking Corporation (SMBC) to build, operate and maintain two photovoltaic power plants in Mexico: Andalucía (106.5 MWp), located in Coahuila de Zaragoza state, and Aguascalientes (37.7 MWp), located in Aguascalientes state.

The financing agreements, worth a total of $86 million, are governed by New York State law. Under Mexican law, two irrevocable trust agreements concerning management, guarantee and source of payment were incorporated to manage and control the flows arising from the operation of those projects, as well as other in rem guarantees.

The energy generated by the two plants will mainly be used to supply homes, thus contributing to social development in Mexico and improving its energy mix.

These plants come under the set of projects awarded in the framework of the second renewable energy auction held in Mexico in 2016.

Mexico is currently a strategic market in the renewable energy sector.

Intrum group: multijurisdictional financing transactions

Cuatrecasas advised the Intrum group, an international debt collection and credit management group, on several multijurisdictional financing transactions carried out in 2019.

We highlight our advice to (i) Skandinaviska Enskilda Banken AB (publ) in February 2019, regarding the financing of €275 million subject to UK law that was granted to Intrum AB (publ) and Lock Topco AS to refinance the group's existing debt; and (ii) a bank pool on the revolving credit facility agreement for SEK 2.220 billion signed in July 2019, with Lock AS and Intrum AB (publ) as debtors and Swedbank AB (publ) as the agent, to be used, among other purposes, as a backstop for a bond issue worth SEK 4 million that Intrum AB (publ) carried out in August 2011.

Cuatrecasas advised on the implementation of a complex guarantee structure to cater for the commercial agreements between the parties, as well as coordinating the different jurisdictions involved in the financing, applying both Spanish and global templates.

This guarantee structure, complex from a technical, legal and commercial perspective, enabled the refinancing of the Intrum group's existing debt, as well as the group's growth and investment in new assets.

Issue of structured covered bonds

Cuatrecasas advised Unión de Créditos Inmobiliarios, S.A. E.F.C. on (i) incorporating the asset-backed securities fund "FONDO DE TITULIZACIÓN, STRUCTURED COVERED BONDS UCI," whose underlying assets are made up of covered bonds; and (ii) the first issue of the fund's securitized bonds worth €500 million, which were admitted to trading on the Spanish Fixed Income Market ("AIAF").

Unión de Créditos Inmobiliarios, S.A. E.F.C. is a financial credit institution supervised by the Bank of Spain, indirectly owned by Banco Santander, S.A. (50%) and BNP Paribas, S.A. (50%). It specializes in granting mortgage credits to individuals in Spain and in Portugal.

NISEKO: sale of nonperforming loan portfolios ("NPLs")

Cuatrecasas advised CaixaBank, S.A. on the Niseko transaction involving the transfer of various

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important NPL portfolios to several foreign investors.

In the framework of this transaction, we carried out an exhaustive due diligence process on the credits making up the different portfolios, as well as a detailed analysis of the ever-changing court doctrine, of Spanish general civil law and of Spanish regional law regarding credit assignment.

We highlight the technical and logistical complexity of these kinds of transactions due to the number of collateral securities, their distribution throughout Spain, the involvement of elements from foreign jurisdictions, and the changes in the legal nature of a portfolio's assets occurring from the start of the sales process and until the transaction is completed.

These kinds of transactions come under the EU's strategy for reinforcing the Economic and Monetary Union, particularly concerning the EU guidelines on reducing risk in the European banking system, aimed at helping financial institutions to perform their essential role in financing the economy and supporting its growth.

Match: acquisition of NPL portfolios

Cuatrecasas advised Marathon Asset Management on (i) the Match transaction, involving the acquisition of NPL portfolios from Bankia, S.A., with an approximate nominal value of €450 million; and (ii) the subsequent financing of that acquisition.

Cuatrecasas was involved in an intense negotiation of the sales contract for the portfolios. The advice also covered the hiring of a servicer to manage the portfolios in the future. In coordination with the servicer, Cuatrecasas analyzed the legal issues arising from some of the assets in the portfolios.

The technical and logistical complexity of these kinds of transactions required the Cuatrecasas team to go one step further.

The high number of similar transactions on which we have worked shows the great interest by foreign investors in these kinds of assets on the Spanish financial market.

Pestana group: issue and admission to trading of green bonds in hotel sector

Cuatrecasas advised Grupo Pestana - S.G.P.S., S.A., a leading company in the Portuguese hotel business, on the issue and admission to listing of green bonds.

This transaction marks a milestone in the growing sustainable financial market, as it is the first issue of green bonds in the hotel industry in the world, carried out in line with the "Green Bonds Principles" of the International Capital Markets Association.

The bonds, which have a six-year maturity, were admitted to listing on the multilateral Euro MTF (multilateral trading facility), managed by the Luxembourg stock exchange. Axesor classified both the bonds and the issuer as BBB.

The bonds issue was of great interest to international investors, with demand tripling the target amount, which led the issuer to increasing the issue to €60 million.

The transaction was led by Banco Bilbao Vizcaya Argentaria (as the sole lead arranger) and by the environmental consultant DNV.G.L.

This transaction enabled the Pestana group to diversify its financing and to obtain funds it will use to refinance two new and innovative, sustainable hotels in Portugal: Pestana Troia Eco Resort and Pestana Blue Alvor.

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CASE LAW

Right to buy back disputed debts during enforcement of court decision

In judgment 464/2019, of September 13, 2019 (ECLI:ES:TS:2019:2811), the Supreme Court (the "SC") applies its case law to the interpretation of article 1535 Civil Code regarding the concept of "disputed debt" and dismisses the claim to exercise the right to buy back disputed debts as exercised by the debtor of the loan granted; a claim that had been upheld in previous cases.

In the case at hand, before the assignment that led to the action to buy back the disputed debt took place, a non-appealable judgment had been issued for the creditor, which led to enforcement of the court decision, in which an agreement was reached to pay the debt in installments.

Given this specific procedural situation, the SC considers that the loan is not disputed, because its existence, enforceability and amount had already been established in the non-appealable judgment when the assignment was carried out.

The SC considers a "plus" that reinforces its decision the fact that the parties had reached an agreement about the payment installments of the debt, which the parties were complying with. Therefore, there was also no dispute regarding the enforcement of the non-appealable judgment.

Monitoring the abusiveness of accelerated repayment clauses in mortgage loans

In judgment 463/2019, of September 11, 2019 (ES:TS:2019:2761), the SC stated its opinion on the effects of the nullity of accelerated repayment clauses in mortgage loans, in line with what the Court of Justice of the European Union resolved in its judgment of March 26, 2019, C-70/17 and C-179/17 (ECLI:EU:C:2019:250), and subsequent orders dated July 3, 2019, regarding the request for a preliminary ruling brought before court.

The SC's judgment reinforces the legal certainty of financing transactions involving mortgage guarantees: it protects the mortgage creditor's right to enforce the guarantee including in cases in which the accelerated repayment clause could be considered abusive and, therefore, null, because it allows its replacement by the mandatory accelerated repayment regime under law, currently established in article 24 of Act 5/2019, regulating credit agreements relating to immovable property. Access the following legal flash to read more about the SC's judgment:

Legal flash: Monitoring the abusiveness of accelerated repayment clauses in mortgage loans

Financial assistance and nullity of promissory notes issued to pay for shares

We consider interesting judgment 362/2019 by the Madrid Court of Appeals (Section 28) of July 12, 2019 (ECLI: ES:APM:2019:6740) because it states its opinion on the scope of the effects of nullity in the case of infringement of the prohibition on financial assistance. It explains, as a general rule, that the nullity does not extend to the business of buying shares, and that it exclusively invalidates the transaction in which the financial assistance was established (it refers to SC judgment 541/2018 of October 1, 2018). It gives the example of financial assistance in the form of a company granting a loan to a third party, in which the loan would be null but not the share purchase, which would continue to be valid.

In the specific case, a Spanish private limited company financially assisted a third party to buy all of its shares: the price of €360,000 is paid with 60 promissory notes worth €6,000 each issued by the company to the seller with monthly maturity over five years. The buyer shares the responsibility for payment of the promissory notes. The company is declared insolvent, and the insolvency administration enforces an action to annul the transaction based on noncompliance with the prohibition on financial assistance. Both at lower

level and at appeal stage, the courts declare null only the business of financial assistance (i.e., the payment of the price of the shares directly by the company to the seller through the promissory notes). The seller is sentenced to return the amount collected and the pending promissory notes, so that there is only recourse to the buyer.

Actions in framework of refinancing that do not convert financial institution into de facto director

In judgment 1473/2019 by the Barcelona Court of Appeals (Section 15), of July 24, 2019 (ECLI:ES:APB:2019:9584), the court rejects the insolvent party's claim to subordinate the credit recognized to a financial institution due to it being a de facto director, in line with article 92.5 of the Insolvency Act, in relation to article 93.2.2 of the same legal text.

In that case, the credit challenged resulted from a refinancing transaction of a loan to the insolvent developer to build and develop several buildings; that credit had been recognized in the framework of the insolvency proceedings as a specially privileged claim and, in the provisional list of creditors drafted by the insolvency administration, as an unsecured claim.

In line with the judgment, the court of appeals highlights that, due the lack of a definition for de facto director in the Insolvency Act, it is necessary to check the case law relating to the Spanish Companies Act. The court particularly refers to judgment 447/2011 by the Barcelona Court of Appeals (Section 15), of November 16, 2011 (ECLI:ES:APB:2011:13140), developing the concept of de facto director and establishing the characteristics of the de facto director, namely:

- autonomy or lack of subordination to a corporate body, and
- the regularity, permanence and continuity of the exercise of a director's functions.

The judgment also mentions that the SC has highlighted the trend in law to not subordinate the credits of the financial institutions that contribute to the refinancing of the debtors at risk of becoming insolvent, which is seen in the successive reforms of the mentioned article 93.2.2 of the Insolvency Act (SC judgment 224/2016 of April 8, 2016 ECLI:ES:TS:2016:1502).

The court considers that the actions carried out by the financial institution are inherent to a refinancing transaction and do not convert the financial institution into a de facto director that acts autonomously to carry out the pending financed works and the selling of the buildings. The court particularly refers to the following actions:

- the granting of the developer loan,
- the subjection of the availability of the loan to meeting certain milestones or degrees of execution of the works,
- the decision about which invoices are paid based on the degree of execution of the works and the provision of certificates,
- the review of the conditions of the development contract and of the development's refinancing,
- the requirement by the financial institution of new appraisals of the construction works and their effects on the availability of the loan,
- the imposition by the financial institution of a work project manager, and
- the imposition of a company to sell the buildings.

Based on the above, the court of appeals considers that this case did not present the conditions or the requirements to consider the financial institution a de facto director, thus confirming the ruling on the appealed judgment.

Application to bank account pledges of special protection under financial collateral regime during insolvency

In the framework of insolvency proceedings, in judgment 331/2019, of June 21, 2019 (ECLI:ES:APM:2019:5961), the Madrid Court of Appeals (section 28) carries out an interesting application of the Court of Justice of the European Union's ("CJEU") doctrine, as observed in judgment of October 10, 2016 (Case C-156/15) (ECLI:EU:C:2016:851) which resolves the request for a preliminary ruling regarding the financial collateral regime under Directive 2002/47/EC of the European Parliament and of the Council of June 6, 2002, on financial collateral arrangements, incorporated into Spanish law by Royal Decree Law 5/2005, of March 11, 2005, on urgent reforms to boost productivity and improve public procurement ("RDL 5/2005").

The mentioned CJEU judgment, which we discussed in our Financing and restructuring newsletter of fourth quarter 2016, resolved several requests for preliminary ruling relating to Directive 2002/47/EC, which until then had been under debate in relation to doctrine and case law.

Of the matters considered, the CJEU judgment clarified the circumstances for considering met the requirement of "providing" the financial collateral, established under Directive 2002/47/EC (and in article 8, section 2 of RDL 5/2005), when that financial collateral consists of funds deposited in a bank account. Meeting that requirement would enable the financial collateral to benefit from the special financial collateral regime under Directive 2002/47/EC and, therefore in Spain, under RDL 5/2005.

To summarize, the CJEU interpreted that the requirement of "providing" financial collateral is considered met, meaning that the taker of financial collateral consisting in funds deposited in a bank account can enforce that collateral in line with Directive 2002/47/EC, when it has "control" of the deposited funds, which would be the case if the account holder was prevented from disposing of those funds.

In the case in question, the insolvency administration sought the rescission of collateral, including two pledges over credit rights arising from two of the insolvent party's bank accounts respectively, under the protection of article. 71.3.2 of the Insolvency Act, based on the mentioned collateral guaranteeing pre-existing obligations or new obligations replacing the pre-existing ones. The insolvency administration also claimed that RDL 5/2005 would not apply to the pledged collateral object of the lawsuit because it did not meet the mentioned requirement of "provision" and therefore, would not receive the special protection under RDL 5/2005 for actions aimed at rescinding or challenging article 71 of the Spanish Insolvency Act. That protection is only not applicable when the insolvency administration can prove that creditors granted the financial collateral in a case of fraud (article 15, section 5 of RDL 5/2005).

The Madrid Court of Appeals rejected the insolvency administration's claim and confirmed that the requirement of a "provision" was met, given that the pledge policies contain a clause for transfer of title that is complemented by a prohibition to dispose of the pledged amount without the secured creditor's written consent.

In addition, the court rejects the claim that the granting of the financial collateral is detrimental in the terms established in article 71.3.2 of the Insolvency Act and, excluding the latter, considers that the possible fraudulent activity does also not apply because fraud by creditors must be understood as knowledge of the harm caused. The court clarifies that that "awareness of fraud" cannot consist only in knowledge of the debtor's insolvency. It would also be necessary for the creditor to be aware that the transaction was not sufficient to relaunch the company and that it would help the creditor to have a better position in inevitable insolvency.

Subordination of participatory loan in insolvency

In judgment 523/2019 of June 14, 2019 (ECLI: ES:APM:2019:7050), the Barcelona Court of Appeals (section 28) states its opinion on classification of a credit arising from a participatory loan.

A creditor filed an incidental insolvency proceeding claim challenging the list of creditors, claiming that the credit recognized in its favor arising from a participatory loan agreement with a mortgage guarantee should be classified as a specially privileged claim due to it being guaranteed with a property mortgage and not classified as subordinated which the insolvency administration had done. The commercial court rejected the claim and upheld the classification of subordinated. The Barcelona Court of Appeals also rejected the creditor's appeal. The court of appeals argued that the parties agreed on the express submission to the regime for participatory loans under Royal Decree Law 7/1996 ("RDL 7/1996"). Therefore, in line with postponement of credits established in article 20 of RDL 7/1996 and that established in article 92.2 of the Insolvency Act, the credit must be classified as subordinated.

The Barcelona Court of Appeals uses a criterion that is contrary to judgment 162/2017 by the Madrid Court of Appeals of March 24, 2017 (ECLI: ES:APM:2017:142), which we summarize in our Financing and restructuring newsletter of October 2017, based on the following considerations:

- RDL 7/1996 expressly establishes the subordination of credits arising from participatory loans. The lender is in a special position and a similar one to that of the shareholders, which justifies the lender's express agreement to postpone its credit in favor of the ordinary creditors. The parties are aware that they are using a mechanism that, by law, involves subordination of their credits.

- The regime for the subordination of participatory loans also applies in insolvency. The entry into force of the Insolvency Act did not expressly or tacitly repeal the regime under RDL 7/1996.

- It would not make sense that, outside of insolvency, the payment of the credit arising from a participatory loan would be placed behind the ordinary creditors and that, within insolvency proceedings, it would improve their position ahead of these.

OTHER NEWS

Reform process of interest rate benchmarks in Eurozone: recent developments

The transition process for interest rate benchmarks in the Eurozone to become risk-free rates or RFRs is making fast progress, to meet the forecasts established in Regulation (EU) 2016/1011 of the European Parliament and of the Council of June 8, 2016 (better known as the "Benchmarks Regulation"), expected to come into force on January 1, 2020.

Below we mention the latest events relating to EURIBOR and EONIA, interest rate benchmarks that are essential for the Spanish financial market.

- EURIBOR: The Financial Services and Markets Authority ("FSMA") authorized the European Money Market Institute ("EMMI") as the administrator of EURIBOR on July 2, 2019, as required under article 34 of the Benchmarks Regulation.

  This authorization allows financial institutions supervised by the EU to continue using EURIBOR in the future.

  According to EMMI, this authorization also confirms that the new hybrid methodology of calculation of EURIBOR developed by EMMI is robust, resilient and transparent.

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- Regarding EONIA, the transition to the Euro short-term rate ("€STR," formerly called "ESTER") has recently started.

  €STR is an interest rate based exclusively on transactions. On October 2, 2019, the European Central Bank ("ECB") published the €STR for the first time, reflecting trading activity on October 1, 2019.

  €STR is published on the ECB's website at 8:00 a.m. CET on each TARGET2 business day.

  The ECB has published a Q&A guide about the new €STR rate.

  The new methodology for calculating €STR was also implemented on October 2, 2019.

  The newly calculated EONIA is the €STR plus a spread on every TARGET2 business day in which €STR is published.

  EONIA will be discontinued on January 3, 2022, after the Benchmarks Regulation comes into force.

Responsible and sustainable financing

On September 22 and 23, 2019, the document titled *"Principles for Responsible Banking"* was presented at the General Assembly of the United Nations.

The principles, drafted by a group of 30 founding banks together with the UN Environment Programme's Finance Initiative, establish the global framework for a sustainable banking system.

Several other documents were published, including the document titled "*Key steps to be implemented by signatories*", containing more detailed information for the effective implementation of the principles.

The UN has also made available a *FAQs* document about the principles.

In addition, the Equator Principles are in a revision process. On June 24, 2019, a draft for consultation of the new version of the Equator Principles was presented. The organization intends to launch the new version at the end of 2019.

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

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