CUATRECASAS

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CASES AND TRANSACTIONS

El Corte Inglés: refinancing and credit transactions to handle COVID-19 crisis

In February 2020, Cuatrecasas advised the El Corte Inglés department store chain on refinancing its debt with the backing of 24 Spanish and international banks. The new financing, of €2 billion represents, a turning point for the company.

The investment-grade agreement improves the previous conditions, making them more flexible while ensuring stable financing with longer terms, lower costs and no guarantees.

Cuatrecasas also advised the company on obtaining a €1.3 billion credit facility granted by 14 Spanish and international financial institutions. This financing has a one-year term and is based on a revolving line of credit.

El Corte Inglés did not have to provide guarantees to obtain the new financing, which is added to the €2 billion in financing granted in February, when the group obtained €900 million in long-term loans and a €1.1 billion line of credit to cover its working capital needs.

This financing transaction shows the confidence banks have in the company, which for years has been reducing its debt and improving its financial situation.

The following banks participated in the €1.3 billion credit facility: Santander, BBVA, CaixaBank, Sabadell, Bankia, Kutxabank, Ibercaja, Liberbank, Cecabank, BNP, Crédit Agricole, Société Générale, Goldman Sachs and Commerzbank.
The transaction, led by Banco Santander, CaixaBank, BBVA, and BNP, includes an interest rate of Euribor+1.25% which, given the current market situation COVID-19 has created, is almost double the rate agreed on for the line of credit granted in February.

Gestamp: syndicated refinancing

Gestamp, a multinational Spanish firm specializing in designing, developing and manufacturing highly engineered metal components for the automotive industry, has renegotiated its syndicated financing, which now stands at €1.39 billion. Thanks to the advice of Cuatrecasas, that debt's maturity was extended to 2025 and its financial terms were improved.

The new financing has two tranches: one for €325 million as a line of credit and the other in the form of a loan, increased by €200 million so the company can respond to unexpected events, refinance its debt, and maintain some margin for continuing growth.

The bank syndicate includes both Spanish and international institutions, including Bank of America, Bankia, Barclays, BBVA, BNP, Deutsche Bank, Banco de Sabadell, Société Générale and UniCredit.

Elecnor: financing energy projects in Mexico

Cuatrecasas advised Bankia on financing Elecnor's construction of energy projects in Mexico.

Teams from our corporate finance, and tax practices in Mexico and Spain advised Bankia on the financing granted to Elecnor to build a high-voltage line and several electrical substations in the Mexican states of Baja California and Guanajuato. This took place through an assignment of credit rights arising from construction contracts signed with Mexico's Federal Electricity Commission in the "Pidiregas" modality (Productive Long-Term Infrastructure Projects).

Project Summer: financing to buy Kantar shares

Cuatrecasas participated in the financing transaction for Bain Capital's purchase of 60% of Kantar. Kantar is one of the world's leading

companies in market studies, research and data analysis. It was originally owned by the WPP advertising group, which maintains a 40% interest in Kantar following the sale.

The financing consisted of two high-yield bond issues (secured and unsecured) for a total of €1.48 billion, along with bank financing of €725 million and $980 million.

The bond issues were implemented under New York law and the bank financing under English law, in line with Loan Market Association (LMA) contractual standards.

The institutions participating in the transaction that Cuatrecasas advised on aspects of Spanish law (along with Paul Hastings LLP as lead counsel) include Bank of America Merrill Lynch, Barclays, Credit Suisse, Deutsche Bank, Goldman Sachs, Mizuho, Morgan Stanley, Natwest, Nomura, RBC, and HSBC, who were the arrangers and initial purchasers of the bonds.

The Kantar financing transaction started in the summer of 2019 and was completed in April 2020, with two of the group's Spanish companies participating as additional guarantors.

The International Financial Law Review gave the bond issues its 2019 "Deal of the Year" award in the high yield category (IFLR Europe awards 2020: winners announced).

COVID-19

Impact on financing transactions

In our legal flash entitled "COVID-19: Its impact on financing transactions," we presented a full, up-to-date legal analysis on the COVID-19 health crisis' impact on contractual lending relationships and the fixed-income capital markets, under the "exceptional" laws issued by Spain's central government and some of the measures imposed by the European Union and its financial supervisors.

Financial aid

Also in the context of those "exceptional" laws, Spain's central government approved financial aid measures in the form of financing, liquidity, and industrialization support.

For more information, consult our legal flash entitled "Financial aid during the COVID-19 health crisis."

Insolvency measures

Of the many exceptional measures approved under the recent Royal Decrees-Laws to mitigate the effects of the COVID-19 health crisis (particularly Royal Decree-Law 8/2020, Royal Decree-Law 11/2020, and Royal Decree-Law 16/2020), we highlight the following insolvency-related measures:

- Insolvent debtors' obligation to file for insolvency has been suspended until December 31, 2020.
- Court-sanctioned refinancing agreements can be amended, even if a year has not elapsed since the previous approval.
- The obligation of debtors undergoing insolvency to file a request for liquidation if they are unable to fulfill the composition agreement approved to facilitate amendments (the so-called *reconvenio*) has been suspended until March 14, 2021.
- In proceedings filed until March 14, 2023, financing granted by closely related parties or financing in which they have been subrogated after paying would not be subordinated, but rather considered ordinary credits.
- Preference is given to certain procedural issues, such as the acquisition of production units.
- Regarding the obligation to wind up due to qualifying losses, losses corresponding to 2020 will not be considered to ascertain whether the company has grounds for dissolution. Moreover, we assume that the assessment of the grounds for dissolution due to qualifying losses can only be carried out on determining the financial result of 2021.

For more details, please refer to our Legal Flash on RDL 16/2020 For more details, please refer to our legal flash on RDL 16/2020: main legal consequence for companies.

CASE LAW

Control of unfairness of variable interest rate clauses linked to Spain's savings banks mortgage rate index (IRPH)

In its judgment of March 3, 2020 (ECLI:EU:C:2020:138), the Court of Justice of the European Union ("CJEU") handed down its decision on the preliminary ruling request submitted by First Instance Court No. 38 of Barcelona, on the potentially unfair nature of clauses in consumer mortgage loan agreements linking variable interest rates to the Spanish savings banks mortgage rate index (IRPH).

The CJEU concluded that the national courts must review the transparency of these clauses.

It also ruled that if such clauses are declared void, a national court can replace the affected reference index with another applicable legal index, provided it would be impossible for the mortgage agreement to remain valid after eliminating the disputed clause and if voiding the full agreement would expose the consumer to especially harmful consequences.
For more details on this relevant CJEU decision, consult our legal flash of March 2020 entitled "Monitoring abusiveness of variable interest rate clauses linked to Spain's savings banks mortgage rate index (IRPH for Savings Banks)."

Credit card interest rates: Wizink case

In its judgment 149/2020 of March 4, 2020 (ECLI:ES:TS:2020:600), the Spanish Supreme Court dismissed the appeal by Wizink Bank, S.A., upholding annulment of a revolving credit card agreement because its high interest rate violated Spanish Act of July 23, 1908, on annulment of usurious loan agreements.
The Supreme Court held that under that act, a revolving credit card agreement with an annual percentage rate of 26.82% is usurious, requiring voiding of the corresponding agreement.

The court also points out the possibility for control over stipulated interest rates to take place via the control of contents and transparency, which are part of the control of general terms and conditions for consumer contracts.

For more details on this relevant Supreme Court decision, consult our legal flash entitled "Supreme Court judgment 149/2020 on interest rate applicable to revolving credit cards."

Right to set aside assignment of litigious credit claims; section 1,535 of Spanish Civil Code

A lender (the "Bank") granted various mortgage loans to Hotel Blanco Don Juan S.L. (the "Hotel"). In 2014, the Hotel sued the Bank, seeking annulment of the loan agreement clauses limiting downward adjustment of the agreed- ordinary interest rate (the "floor clause").

In June 2015, the Bank jointly assigned the receivables from 91 loans (including the Hotel's) to a fund (the "Fund") for approximately €283 million. When the Hotel was notified of this, it sued the Bank and the Fund. Citing section 1,535 of the Civil Code, it invoked its "right to set aside" in relation to "the litigious credit claims assigned."

The first instance court ruled in favor of the action against the Fund but dismissed the action against the Bank. The Provincial Court of Appeals dismissed the Fund's appeal. The Fund then filed an appeal to the Supreme Court, arguing that the credit claims assigned were not litigious for the purposes of section 1,535 of the Civil Code because in the lawsuits challenging the floor clauses, "the existence and the enforceability of the respective loans are not in dispute, and the assignor entity [the Bank] does not act as a claimant in those cases (but

rather as a defendant)." In its judgment 151/2020, of March 5, 2020 (ECLI: ES:TS:2020:728), the Supreme Court upheld that appeal.

The Hotel cited Supreme Court judgment 149/1991, of February 28, 1991 (ECLI: ES:TS:1991:1137) to support its argument against the position (referred to by the Supreme Court as the "restrictive thesis") that for a credit claim to qualify as litigious, the corresponding lawsuit must be challenging its existence or enforceability. Instead, the Hotel asserted that litigious loans should also include those subject to "any other [lawsuit] disputing their nature, scope, amount, modalities, terms and conditions, or adjustments," including any related to a floor clause.

After reviewing the case law (Supreme Court judgments 690/1969, of December 16, 1969; 976/2008, of October 31, 2008 (ECLI:ES:TS:2008:5693); 165/2015, of April 1, 2015 (ECLI:ES:TS:2015:1420); 464/2019, of September 13, 2019 (ECLI:ES:TS:2019:2811), the Supreme Court summarizes the requirements for credit claims to be considered litigious for the purposes of section 1,535 of the Civil Code, which include that the "content or subject matter of the legal action must be one seeking a declaratory ruling confirming the credit claim's existence and enforceability ..." (also stating that section 1,532 of the Civil Code excludes situations of joint and mass assignment). Therefore, the Supreme Court opted for the narrow interpretation.

After explaining the provision's origin in Roman law, the Supreme Court states that the grounds for its inclusion in the Civil Code are "to discourage lawsuit speculators (who could acquire litigious credit claims from the claimant at a low price, then claim those receivables from the defendants)" and to "reduce litigation" ("decreasing lawsuits"). Although this is not a setting aside where a buyer is contractually replaced, it is still given that name based on its analogous and functional similarities, "because of the restriction imposed on free disposal by the holder of the credit claim, subjugation of the 'setter aside' to the terms the holder or assignor of the assigned loan or credit claim has agreed on with the assignee, and the fixed period for its exercise (article 1,524 Civil Code)," and because of the procedural requirements to ensure payment of the price by the assignee.

The Supreme Court then emphasizes that "the general rule under our legal system is one of free transferability of all rights and obligations, unless there is agreement otherwise" (article 1,112 Civil Code), meaning that the assignee becomes the holder of the credit claim "with the same contents the assignor creditor had, ..." and "can claim the entirety of the receivables assigned by the assignor, regardless of the price paid ..." In view of this, the "setting aside for litigious credit claims" is an exception that requires a strict interpretation. The Supreme Court also discusses the special nature of article 1,535 Civil Code, emphasizing among other arguments its "institutional proximity" to setting aside a sale by contractual replacement of the buyer by a third party, which is also narrowly interpreted.

After again explaining the origins and supporting grounds for the provision, the Supreme Court argues that "the socio-economic context of the time in history when it arose" is very different from the current context existing after the crisis, which has led to an "intensive process of restructuring and reinforcement of the financial system's resources." In that context, joint assignment by lenders of receivables from distressed loans or loan portfolios, often to foreign investment funds, represents an effort to improve the lender's liquidity, financial ratios, and default rates, and to reduce provisions and management costs, which are all purposes that differ from those of article 1,535 of the Civil Code. Granting any debtor suing its creditor the right to such setting aside "regardless of the existence or lack of grounds ..." would also contradict the rationale of "decreasing lawsuits," because it would instead encourage litigation.

Based on these considerations, the Supreme Court confirms that the concept of a litigious credit claim refers to one that "has been the subject of a legal action by its holder seeking declaration of its existence and enforceability, which is disputed or denied by the defendant, requiring the issuing of a judgment that cannot be appealed to rule on whether it exists and is enforceable." This means

that to generate the right under article 1,535 of the Civil Code, the lawsuit referred to in Supreme Court judgment 149/1991, of February 28, which involves the nature, terms and conditions, or other adjustments to the loan, would have to "also involve the very existence or enforceability of the obligation."

This is not the case, because the litigation disputes a floor clause which, if declared void would not affect "the survival or enforceability" of the other obligations under the loan. Moreover, and although not considered a determinate fact, the Supreme Court points out that, in its lawsuit relating to floor clauses, the Hotel brought its claim against the Bank, with no evidence that the Fund had taken on the Bank's standing to be sued, a situation the court holds does not correspond with the factual circumstances covered by article 1,535 of the Civil Code.

Contextual guarantees

Next we will discuss Supreme Court judgment 63, of February 3 (ECLI:ES:TS:2020:304).

The insolvency administrators brought a rescissory action to challenge acts of disposal by the insolvent party, in the form of a series of guarantees granted over time to secure the debts owed by various other debtors to the same creditor.

Although there was no corporate group relationship between the insolvent guarantor and those debtors, the Supreme Court applies its case law on contextual guarantees because the case involves guarantees granted to secure the debts of others.

The presumption of loss to the asset pool established in article 71.2 Spanish Insolvency Act, which applies to disposals in the absence of consideration, therefore does not apply. This is because if the guarantees are treated as upstream guarantees, the direct or indirect benefits the insolvent guarantor could gain from them means they were not granted in the absence of consideration.

However, it is still appropriate to analyze whether the asset pool suffered a loss, and therefore whether there was a breach of article 71 Insolvency Act, along with analysis of the case law on assessment of "justified sacrifice" in cases where guarantees are granted to third parties in exchange for consideration.

On this point, the Supreme Court holds that granting the final guarantees would bring with it an unjustified sacrifice for the asset pool, as they did not release the guarantor from liability for the first guarantees (to the contrary, the guarantor's liability was increased). Therefore, it upheld the rescissory action.

Liability for debts and payment by guarantor

In this section, we will discuss the Supreme Court judgment 22/2020, of January 16, 2020 (ECLI:ES:TS:2020:24).

The judgment concerns a corporate debt taken on in 2005 and later paid (in 2007) by a guarantor when the company had already produced a cause for its dissolution. The guarantor brings a liability claim for debts against the company's director (under article 367 Spanish Companies Act), arguing that its credit claim from repayment of the guaranteed debt arose after the cause for dissolution.

The matter at issue is how to determine when the debt being claimed by the guarantor against the company arose: whether when the bank granted the guaranteed credit facility to the company (in 2005) or when the guarantor repaid the principal creditor (in 2007), after the company had already produced the cause for its dissolution.

The Supreme Court holds that the guarantor's credit claim against the company arose when the guarantee was established (2005), before the cause for dissolution, not when the principal creditor was repaid for the guaranteed debt (2007). The fact that a director that breaches his duties on dissolution becomes liable under article 367 Spanish Companies Act does not mean that the guarantor's

right to claim payment from the debtor company produces a new corporate debt, "but instead, the existing debt persists, even if now the guarantor is the one with standing to sue in relation to it."
The final paragraphs of the judgment are dedicated to an argument that this is the solution that best agrees with the treatment given in a debtor's insolvency proceedings to a debt with a third-party guarantee (article 87.6 Insolvency Act). The court holds that if a guarantor makes payment for a loan after the declaration of insolvency, this does not give rise to a new credit claim against the asset pool. Instead, it simply causes replacement of the creditor with the guarantor as holder of the credit claim.

Corporate resolutions in context of syndicated financing

Here we will discuss judgment 885/2019 of the Provincial Court of Zaragoza (5th Section) of November 8 (ECLI:ES:APZ:2019:2208), concerning company resolutions passed in the context of syndicated financing.

This dispute relates to a challenge to a board resolution, by which majority approval was obtained for the syndicated financing requirements of the corporate group's five-year strategic business plan. That plan had already been approved by the general shareholders meeting.

The group's cash management was centralized with that company, which was the borrower for a significant amount of syndicated financing taken out to refinance the debt of the group's companies included in the financing perimeter (guarantors for the financing as well as potential beneficiaries), and to finance their industrial investments and corporate needs.

The claimant, a board member that passed the resolution, alleges that the board breached article 160(a) and 160(f) Spanish Companies Act, by passing resolutions on matters reserved for the general shareholders meeting, also breaching specific provisions of the bylaws setting limits on alienating corporate assets and selling the shares of subsidiaries (also reserved for the general shareholders meeting).

In the judgment, the Provincial Court includes an interesting reflection on the scope of the reform to the Companies Act produced by Spanish Act 31/2014, of December 3, amending the Companies Act to improve corporate governance. It addresses the procedures and authorities of the board of directors and general shareholders meeting, and regarding the latter, it reinforces its role and expands its authorities to reserve certain corporate transactions for its approval that, by their relevance, have effects similar to structural modifications. Due to those effects, the shareholders can decide on matters that significantly affect ownership of the assets because (i) they are transactions of such magnitude that they exceed the scope of ordinary management, or (ii) there is a risk of the shareholders losing their authorities or participation rights, profoundly affecting their interests.

This means that certain transactions that are business-related rather than corporate in nature and that, in principle, would be subject to the authority of the board of directors (as the company's management body) would become reserved for the general shareholders meeting instead.

As part of its argument, the court highlights transactions or business affecting "essential assets" described in article 160(f) Companies Act. It points out that the act does not define that concept, but only establishes a quantitative threshold.

The intention of that rule is to reserve for the general shareholders meeting decisions on extraordinary business matters outside the ordinary, normal course of business, or that exceed or depart from the company's corporate purpose (as a characteristic example, transfer of business activities to a subsidiary), creating clear risk for the company.

The court holds that the concept of "essential assets" raises uncertainties in relation to the most relevant legal doctrine, adding that there appears to

be agreement that the quality of being essential refers, as a minimum, to operations equivalent to a structural modification, or that affect the company's corporate purpose or lead to the company's liquidation.

The court makes the following arguments when denying that the financing, although substantial, falls within the scope of article 160(f) Companies Act:

- The financing is not an "asset" according to the basic accounting definition.
- The financing does not involve acquisition or alienation of physical or immaterial elements (but instead, obtainment of liquidity to carry out the company's corporate purpose).
- The financing does not present a clear and obvious risk of transforming the company (to the contrary, it responds to an urgent need to refinance the company's debt and enhance its competitiveness).

Therefore, in this case, the board of directors did not overstep its authorities by approving the group's shared refinancing plan.

Regarding the restrictions on dividend distribution included in the financing agreement, the court holds that although this is a typical condition for financing of that nature, it did cause overstepping of the board's authorities because the authority to allocate earnings is reserved for the general shareholders meeting (articles 160(a) and 164 Companies Act). On this aspect, the court agrees with the director's arguments and rules partly in favor of the claim, partially voiding the board's resolution.

ADMINISTRATIVE DOCTRINE

Doctrine of Central Economic-Administrative Tribunal on in-kind payment of debts using real estate

The resolution issued by Spain's Central Economic-Administrative Tribunal on January 21, 2020 (RG 4835/2016/00) concerns determination of the taxable base for the Spanish property transfer tax and stamp duty in its modality taxing property transfers for consideration, in circumstances where real estate is used for in-kind payment of debts after a partial write-down. The resolution applies the Supreme Court's case law from, among others, its judgment of January 31, 2019 (appeal 1095/2018). That ruling holds that when the debt's amount exceeds the effective value of the property transferred, the taxable base must be established based on the outstanding amount of the mortgage debt repaid via the transaction.

However, although the cases analyzed in the Supreme Court judgments involve situations where such in-kind payment occurs with a tacit discharge of debt, the tribunal seems to go further by applying that case law to a situation where a write-off expressly occurs before the repayment in kind.

Mandatory default interest rates under Real Estate Loans Act

Next, we will discuss the resolutions issued by Spain's Directorate General of Legal Certainty and Certifications on December 5 and December 19, 2019, published in February and March 2020, respectively.

In both cases, mortgage loans were granted with a default interest rate set as 2% added to the ordinary interest rate, i.e., below the additional 3% established in article 25 Spanish Act 5/2019 of March 15, governing real estate loan agreements (the "Real Estate Loans Act") and article 114.3 Spanish Mortgage Act.

The directorate argues that applying the default interest rate specified in the Real Estate Loans Act is mandatory under its article 3, also pointing out that its article 25.2 states that "no agreement to the contrary is permitted." This shows that, in contrast to the general freedom established in the Spanish legal system to contract within the limits of the law, in this case, the lawmakers have opted to make an

exception for default interest rates, to prevent disputes about the transparency or fairness of the corresponding clauses.
The directorate acknowledges that based on a literal and functional interpretation of Article 28.3 of European Union Directive 2014/17/EU of February 4, 2014, the Spanish legislation could have instead established a cap on the default interest rate applied by lenders while still allowing lower rates to be set for consumer borrowers.

OTHER NEWS

Amendment to regulations on "Catalonia pledges"

On May 1, 2020, an amendment to Book Five of Catalonia's Code of Civil Procedure came into force in relation to certain articles regulating pledged collateral.

We refer to article 180 of Catalonia Regional Act 5/2020 of April 29, on physical, financial, administrative, and public-sector measures, and measures creating the tax on installations affecting the environment.

The most relevant change consists of permitting repledging of an asset already pledged. Under the previous wording of article 569-15 of Book Five, successive pledging of assets was prohibited, unless taking place in favor of the same creditors with distribution of the pledge liabilities. The new wording has removed those restrictions.

Extension of eviction moratorium: Royal Decree-Law 6/2020

On March 11, Spanish Royal Decree-Law 6/2020 of March 10, adopting urgent economic and public health measures ("RDL 6/2020") was published in the Official Gazette of the Spanish State. It establishes a series of urgent measures on economic matters and protection of public health, some of the most important, because of their impact on mortgage debt transfer transactions and banking litigation, are those extending the eviction moratorium established in Spanish Act 1/2013 of May 14, on measures enhancing protection of mortgage debtors, debt restructuring, and social rent ("Act 1/2013").

RDL 6/2020 came into force on March 12, 2020, extending the moratorium on evicting families from their primary residence until May 2024, for families in the situations of special vulnerability established in Act 1/2013. This is a special temporary measure for protecting mortgage debtors in situations of special vulnerability.

The moratorium started with entry into force of Spanish Royal Decree-Law 27/2012 of November 15, on urgent measures to enhance protection of mortgage debtors, and since then it has been extended under a series of successive laws.

RDL 6/2020 also expands the measure's scope of application. We highlight that until now, the measure affected any in- or out-of-court mortgage enforcement process where a creditor or creditor's representative had been awarded the primary home of persons in such situations of vulnerability, and who meet the economic requirements established in that same Act (which have also been modified as explained below). RDL 6/2020 now establishes that the awards affected can be those granted to the creditor or to any other individual or company.

Consequently, in all awarding processes of the primary residence of a debtor covered by Act 1/2013, eviction will be prohibited while the moratorium is in effect. Instead, it can only take place once the moratorium is lifted in line with article 675 and associated articles of the Spanish Code of Civil Procedure.

RDL 6/2020 also expands the definition in Act 1/2013 of those in a situation of vulnerability who can benefit from the eviction moratorium, to include single-parent families with one dependent child.

Finally, RDL 6/2020 increases the maximum limit on a family's income, which is used to determine

vulnerability when applying the public multiple-effect income indicator) based on the number of children and whether a single-parent family is involved.

OECD's Transfer Pricing Guidance on Financial Transactions

In February 2020, the Organisation for Economic Co-operation and Development (OECD) published a document entitled "Transfer Pricing Guidance on Financial Transactions."

The document contains guidelines on transfer prices for financial transactions, including intra-group loans, cash pooling, financial guarantees, and derivatives.

This document has been published in response to specific actions contained in the 2015 Action Plan on Base Erosion and Profit Shifting (known as BEPS), and it solidifies application of the arm's length principle to these types of financial transactions.

Spanish tax authority's position in insolvency cases

Spain's Tax Authority (AEAT) has published a document on its website entitled "*La posición de la AEAT en los procesos concursales*" ("AEAT's Position in Insolvency Cases"). It explains its position in relation to various aspects of insolvency procedures, as it is often one of the creditors of insolvent debtors.

For additional information, please contact Cuatrecasas.