CUATRECASAS

Finance and restructuring

Second quarter 2020

July 2020

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CASES AND TRANSACTIONS

El Corte Inglés: financing with ICO guarantee facilities

Cuatrecasas advised El Corte Inglés on novating its revolving syndicated loan entered into in April 2020. This involved canceling the short-term positions of some institutions under it and subsequently renewing them by signing a new long-term syndicated loan for almost €960 million to meet the liquidity needs of the company and its group as a result of the economic impact of COVID-19.

This financing is secured by the Spanish State Finance Agency's ("ICO") guarantee facility, created under Royal Decree-Law 8/2020, of March 17, covering 60% of the principal.

The new financing is a milestone for the company, ensuring stable financing with longer terms.

El Corte Inglés did not have to offer securities to obtain the new facility, which is added to the €2 billion in syndicated financing taken out in February 2020 and the €1.3 billion of the revolving syndicated loan signed in April 2020 (reduced to €406 million under this transaction).

The banks participating in the refinancing are Santander, BBVA, CaixaBank, Sabadell, Bankia, Crédit Agricole, Kutxabank, Ibercaja, and Liberbank.

This financing transaction shows banks' confidence in the company after years of significantly reducing its debt and improving its financial position.

Vía Célere: promissory note program on MARF

Cuatrecasas advised Vía Célere on its debut on the Alternative Fixed-Income Market (MARF) with a promissory note program with a maximum outstanding balance of €100 billion.

It is the first company to join the MARF since the start of the COVID-19 health crisis, clearly showing Vía Célere's focus on this alternative market.

Participating in the program are PKF Attest Servicios Empresariales, S.L. (registered advisor); Banco Inversis, S.A. (payment agent); and CaixaBank, S.A. and Haitong Bank, S.A., Sucursal en España (placement entities).

The program will be in effect until June 26, 2021, and aims to diversify Vía Célere's sources of financing, thus obtaining greater flexibility in financing the group's working capital.

The promissory note program will enable the new issuer in this market to place promissory notes with maturities between three days and two years and nominal unit values of €100,000 flexibly with qualified investors for one year from the program's admission to the MARF.

Vía Célere is the parent company of a group specializing in residential development in all its phases, from acquiring land to delivering finished homes for sale to the public or residential rental.

Incorporation of CaixaBank Consumo 5, F.T. securitization fund

Cuatrecasas advised CaixaBank Titulización, S.G.F.T., as securitization funds manager, on incorporating the securitization fund "CAIXABANK CONSUMO 5, FONDO DE TITULIZACIÓN," whose underlying asset is non-mortgage-secured loans granted to Spanish residents for consumer financing. The bonds, worth €3.55 billion, were admitted to trading on the AIAF, Fixed-Income Market.

CAIXABANK CONSUMO 5, FONDO DE TITULIZACIÓN is one of the first funds incorporated in the context of the COVID-19 pandemic. Among other issues, it has grouped receivables arising from loans that are or can be subject to moratorium, whether a legal moratorium (under royal decree-laws 8/2020 and 11/2020) or a moratorium by agreement (Royal Decree-Law 19/2020 and sectoral

agreement led by the banking authority CECA, to which CaixaBank, S.A. has agreed in line with the European Banking Authority's ("EBA") guidelines).

CaixaBank Titulización, S.G.F.T., the fund manager, is 100% owned by the originator, CaixaBank, S.A., one of Spain's largest credit institutions in terms of asset volume.

Ercros: credit extension and factoring restructuring

In May 2020, Cuatrecasas advised a group of financial institutions led by Banco Santander on (i) refinancing and extending the Ercros Group's revolving credit facility, and (ii) restructuring various of the company's working capital instruments to achieve better performance.

A broad syndicate of Spanish and international credit institutions (including Banco Santander, BBVA, CaixaBank, Banco Sabadell, Targobank, Banco Pichincha España, Ibercaja, Deutsche Bank, and Crédit Agricole) participated in the transaction, consisting of: (i) refinancing and extending the existing revolving credit facility to €45 million; and (ii) restructuring the recourse factoring facility by replacing it with two factoring facilities (recourse and non-recourse) for a maximum aggregate amount of €102 million euros, as the non-recourse factoring is also covered by a CESCE insurance policy.

By extending the facility, Ercros has greater working capital for its ordinary activity and can broaden the use of its syndicated factoring instrument.

Ercros is a 100-year-old industrial company diversified in three areas of activity: chlorine products, chemical intermediate, and pharmacy.

Malpartida: project bond and admission to trading in Frankfurt

Cuatrecasas advised Viproes Energías Renovables, S.A. (Cyopsa-Sisocia Group) on a secured senior bond issue worth €31.95 million, at 2.744% per annum and maturing in 2040.

The issue, which follows the project bond structure, is governed by Spanish law and mainly aims to refinance the debt of the issuer, which operates a 10 MW photovoltaic plant in Malpartida de Cáceres (Badajoz).

The bonds issued have been admitted to trading on the Frankfurt stock exchange ("Quotation Board" segment).

LEGISLATION

Approval of consolidated text of Spanish Insolvency Act

The Official Gazette of the Spanish State of May 7 published Royal Legislative Decree 1/2020 approving the consolidated text of the Spanish Insolvency Act ("CTSIA"), consolidating and structuring Spanish insolvency law. It will come into force on September 1, 2020.

The Ministry of Justice has published a correlation table of the precepts of Spanish Act 22/2003 on Insolvency and those of the CTSIA.

The successive reforms of the Spanish Insolvency Act since it was enacted justified the need for a consolidated text and the government was authorized to consolidate, clarify, and harmonize insolvency law in May 2015 (under final provision eight of Spanish Act 9/2015, of May 25, on urgent insolvency measures), renewed in February 2019 (under final provision three of Spanish Act 1/2019, of February 20, on Business Secrets). The legal authorization allowed legal rules created at different times and generated from concepts not always aligned to be regularized (adjusted, regulated, or ordered), clarified (removing what stands in the way of noting the reality or explaining), and harmonized. The CTSIA does not simply reproduce the legal rules subject to consolidation with a better structure. It changes the

systematic application of the law and the literal wording of the texts to remove interpretation doubts.

We highlight some issues on the CTSIA below:

- It completely restructures and renumbers the Spanish Insolvency Act with 752 sections grouped in three books (Book I: insolvency proceedings; Book II: pre-insolvency law, and Book III: the rules of private international law).
- It incorporates the case law of Chamber One of the Supreme Court interpreting the Spanish Insolvency Act on suspending interest accrual, among other issues (article 152 of the consolidated text).
- It includes a legal definition of the concept of production unit, organizes the rules on disposing of production units, and explicitly acknowledges the insolvency judge's sole competence to declare the existence of company succession (article 221 of the consolidated text).
- It grants particular importance to pre-insolvency law, i.e., to alternatives to insolvency (communication of opening negotiations with creditors, refinancing agreements, and out-of-court payment agreements), to which it dedicates the second of the three books. The regulation on consecutive insolvency that can occur after a refinancing agreement or an out-of-court payment agreement completes it.

COVID-19: financial aid and main measures

Over these months we have been reporting on the main legal developments for companies regarding the measures approved by COVID-19. All our publications are available on our website in the section: Coronavirus Task Force.

In particular, in the framework of the government's "exceptional" legislation, it has approved a series of aid measures in the form of financing, liquidity, and industrialization support. See our legal flash titled "Financial aid during the COVID-19 health crisis" for more information.

For an executive summary of the main measures, see our legal flash: COVID-19: snapshot of Spain' legal measures.

The main insolvency measures were introduced by Royal Decree-Law 16/2020, which we summarize below:

- The insolvent debtor's obligation to file for insolvency is 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.
- As regards the obligation to wind up due to qualifying losses, losses corresponding to 2020 will not be taken into account 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.

CASE LAW

Classification of guarantor's credit with collateral

Supreme Court judgment of June 8, 2020, 262/2020 (ECLI: ES:TS:2020:1588), rules on a guarantor's credit secured with a mortgage against the insolvent party.

The Supreme Court concluded that:

- The rule that the guarantor subrogates in the least harmful credit for the insolvency (article 87.6 of the Spanish Insolvency Act) does not preclude the guarantor from compelling the debtor to issue additional collateral (in this case a mortgage). This collateral does not cover the credit of the financial creditors secured by the guarantee but is established by the main debtor in favor of the guarantor to secure the consequences if the guarantee is enforced, and so it cannot be affected by article 87.6 of the Spanish Insolvency Act. Consequently, in this specific case, the classification of the guarantor's credit as privileged is maintained.

- In line with the accessory nature of the guarantee (article 1826 of the Spanish Civil Code)), the creditor is not entitled to request interest accrued from the guarantor from when the main debtor is declared insolvent. Therefore, even if it has paid it, the guarantor cannot claim it back from the insolvent debtor. Thus, the accrual of that interest cannot be justified, as the guarantor sought, in the exception of article 59.1 of the Spanish Insolvency Act with regard to the interest covered by mortgage.

Syndicated financing in insolvency

In the framework of Reyal Urbis's insolvency, the Order of the Provincial Court of Madrid of May 29, 2020, approving the liquidation plan put forward by the insolvency administration with the following noteworthy conclusions is particularly interesting:

- The payment in insolvency liquidation proceedings must be made based on the credit rating granted to each type of credit granted in the insolvency and in the form established in article 692 of the Spanish Civil Procedural Act, excluding the rules on allocating payments under sections 1173 *et seq.* of the Spanish Civil Code.

- The syndicated loan carryforward rule (over 75%) is an exceptional rule to facilitate the refinancing or the agreement, which cannot be applied analogically to the liquidation. The opposite would entail (i) an alteration of the internal regime existing in the syndication agreement, and (ii) an encroachment on the rules agreed exercising the autonomy of the creditors' will without specific legal authorization.

  In its conclusion, the court refers to the established legal principles on the nature of syndicated loans: "Externally, in relation to the debtor, syndicated loans generate a series of joint obligations recognizing as many receivables as creditors comprising that syndicated loan. Internally, there is an agreement expressing the concurrence of wills between the creditors in that loan through the syndication agreement, establishing a series of rules on administering and using the receivables, and with respect to which some of those agreements are externalized to the debtor."

- Payments under liquidation must be made by the insolvency administration through the syndicated loan agent, as this is the agreement reached between its members, although the credits are individually recognized to each member of the syndicate. The irrevocable power of attorney granted to the agent in the syndication agreement remains in force and is enforceable on the debtor and parties related to it.

- The creditors, like any third party, can sell the insolvent party's mortgaged or pledged assets, which are offered or tendered. Consequently,

they can use their credit to bid to be awarded those assets in payment with no need for that option to be supported by 75% or more of the creditors.

Pledges on current account balances in insolvency process

Judgment 161/2020 of the Provincial Court of Madrid, of May 28, 2020, containing the established legal principles of Supreme Court judgment of March 13, 2017, 180/2017 (ECLI: ES:TS:2017:845), confirms the view that pledges on current accounts will only be extended to the balance on the date the insolvency is declared and not to subsequent balances. You can find a summary of that resolution in our Financing and Restructuring Newsletter for the first quarter of 2017.

We highlight, based on Supreme Court judgment of March 18, 2016 (ECLI:ES:TS:2016:1211), that this court had been accepting that pledges on future credits recorded in a dated document and arising from agreements or relations before the insolvency declaration, even if they arose subsequently, are not affected by insolvency.

However, distinction must be made between (i) future credits not existing when declaring the insolvency but arising from arranged agreements or legal relations existing before the insolvency was declared; and (ii) credits arising from agreements and legal relations whose defining characteristics are contained in the deed establishing the pledge, but are pending arrangement or have not yet arisen when the insolvency was declared, as the pledge on the latter is not unaffected by it.

In its judgment of March 13, 2017, the Supreme Court stated that the special privilege of article 90.1.6 of the Spanish Insolvency Act is recognized to pledges on future credits if, at the time insolvency is declared, the agreement had already been signed or the legal relationship generating the pledged future credits was already established, even if they were created after the insolvency declaration. Therefore, pledges that accurately determine the identifying characteristics of the future credits pledged will be considered privileged with no need for any supplementary act by the parties, i.e., with no need for a new agreement between the contracting parties (article 1273 of the Spanish Civil Code).

On the contrary, pledges on credits arising from agreements and legal relationships whose defining characteristics are recorded in the deed establishing the pledge but which are pending arrangement or have not arisen when the insolvency was declared cannot be considered unaffected by insolvency.

Therefore, the court understands that we are dealing with this latter case, as the account balances are from operating revenue, and that, therefore, the pledge cannot be extended to the balance following the insolvency.

The court also rejects the application of the financial securities regime of Royal Decree-Law 5/2005, on urgent reforms to drive productivity and improve public procurement.

It refers to the requirement to provide and check the financial securities and the specific significance in the case of pledges on cash deposits, which was interpreted by the CJEU's judgment dated November 10, 2016 (ECLI:EU:C:2016:851). You can find a summary of that resolution in our Financing and Restructuring Newsletter for the fourth quarter of 2016. It specifies that this requirement will be considered met when the beneficiary can effectively access the security if an enforcement event occurs. Consequently, the beneficiary of a security can only be considered to have these funds in his or her possession or under his or her control if the guarantor is prevented from using them. For that requirement, the parties agreeing that their signature entails a fictitious transfer of possession when formalizing the pledges would not be relevant.

Interim measures suspending enforcement of first-demand guarantees in the context of COVID-19

Order 204/2020 of Court of First Instance No. 17 of

Madrid, of March 26, 2020, adopted the interim measures suspending the enforcement of a first-demand guarantee granted in relation to a works agreement, and ordering the issuing bank to stop carrying out the enforcement request until the main proceedings are resolved. The order also ordered that the guarantee be deposited with the court along with a surety.

The measures were adopted during the state of emergency without the counterparty being heard, to protect the health of all the parties involved. To adopt it, in addition to the ambiguity in the grounds for requesting enforcement of the guarantee, the court considered the fact that its expiry was imminent and would occur during the state of emergency, with ordinary court proceedings suspended. In its decision, the court also considered the economic situation of the enforcing company and the total standstill of economic activity due to the COVID-19 pandemic, which impacts the risk of debt and, consequently, the incapability of repaying the enforced sum in the case of an unfavorable judgment.

Order 124/2020 of the Court of First Instance No. 3 of Zaragoza, of April 29, 2020, also suspended the enforcement of a first-demand guarantee with no hearing: in this case one issued in relation to a franchise agreement.

The order justifies adopting the measures given that, although it is possible that the dispute started before the declaration of the state of emergency and the consequent closure of business premises, it is "more than likely that the economic situation arising from closing establishments open to the public has had a notable impact on the contractual relationship between the parties." The judge does not know to what point the situation arising from COVID-19 has influenced the dispute but believes that "there is an evidential principle favorable to the requester based on the principles of contractual good faith and the *rebus sic stantibus* clause covering changes in circumstances amending an agreement, if they are so great that they significantly increase the risk of thwarting the purpose of that agreement (...)." The difficulties of continuing the requesting party's activity if the security were enforced were considered when adopting the measures.

Although it does not strictly deal with first-demand guarantees, we will also mention order 155/2020 of the Court of First Instance of Madrid, of April 30, 2020, adopting interim measures essentially suspending the maturity of principal and interest on a loan until 2021, preventing terminating the loan agreement and declaring its early maturity, and preventing securities associated with that agreement being enforced.

That resolution concludes that the borrower had been meeting the payment commitments and that it was the COVID-19 pandemic that caused the difficulties. Based on that, it states that "it is well established that the situation caused by the COVID-19 pandemic [has] led to a sharp fall in production and demand, and its sales have plummeted (...)." It also considers the limited possibility of obtaining supplies in the same conditions as before the crisis, as well as the impact on sales and orders, the temporary redundancy plan implemented by the company, and the loss of turnover. In fact, the order states that "the current situation has seriously affected the claimant's business model and the foreseeable and expected results in a normal situation," and it considers that "on a *prima facie* basis and without prejudging the substance of the matter all the requirements are met" to apply *rebus sic stantibus*. The resolution states that the possible risk to the company's survival if the measure is not adopted meets the requirement of danger in delay.

OTHER NEWS

EIB financing for SMEs

On April 16, 2020, the European Investment Bank's ("EIB") board of directors approved creating a €25 billion COVID-19 European guarantee fund to enable the EIB Group to increase its support to European businesses with up to €200 billion, focusing on SMEs.

To activate that support from the EIB Group, the guarantee fund must be formally established by the EU Member States representing at least 60% of the EIB's capital as shareholders assuming the necessary commitments, in the amount of €25 billion.

Regarding, in particular, Spain's role as a Member State in assuming those commitments, under additional provision three of Royal Decree-Law 21/2020, of June 9, on urgent prevention, containment, and coordination measures to deal with the health crisis caused by COVID-19, the general state administration is authorized to issue guarantees for a maximum amount of €2,817,500,000 in 2020 to cover the costs and losses in the financing transactions performed by the EIB Group.

The EIB's aid will be available when the threshold of commitments assumed by all the Member States representing at least 60% of the EIB's capital as shareholders is reached.

EBA: moratoria extension

On April 2, 2020, the European Banking Authority ("EBA") issued the "Guidelines on legislative and non-legislative moratoria on loan repayments applied in the light of the COVID-19 crisis." Under those guidelines, the payment moratoria (both legislative and non-legislative) had to have been applied before June 30, 2020. However, it was established that this period could be reviewed in the future based on the pandemic's evolution.

Thus, under the Guidelines issued by the EBA on June 25, 2020, amending the mentioned guidelines, the period initially established was extended to September 30, 2020.

For additional information, please contact Cuatrecasas.