The Lending and Secured Finance Review

Third Edition

Editor
Azadeh Nassiri

The Law Reviews

THE

The Lending and Secured Finance Review

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For further information please email
Nick.Barette@thelawreviews.co.uk

THE LENDING AND SECURED FINANCE REVIEW

THIRD EDITION

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Azadeh Nassiri

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SPAIN

Ángel Pérez López, Pedro Ravina Martín and Blanca Arlabán Gabeiras[1]

I OVERVIEW

Following years of financial turmoil, the Spanish economy has been recovering steadily. GDP growth exceeded expectations in 2016. Economic activity expanded by 3.2 per cent, well above the euro area average. As a result, the Spanish government has recently increased Spain's growth forecasts to 3 per cent for 2017 and 2.6 per cent for 2018. Yet, Spain, like other European Union Member States, faces both political and financial challenges in the near future. Deleveraging the private and public sectors and achieving higher productivity are still priorities. Although unemployment has significantly decreased since the crisis, at 17.7 per cent of the workforce, it remains one of the highest among the Western economies. Likewise, the vote of the UK to leave the European Union opens a door to unknown risks (and perhaps potential opportunities) that will need to be addressed in due course as the negotiations between the UK and the EU progress.

Spanish banks have benefited from Spain's economic recovery, as well as from access to liquidity and low funding costs, which have facilitated new lending activity. According to the surveillance visit to Spain carried out by the staff of the European Commission and the European Central Bank in April 2017, overall, the Spanish banking sector meets the regulatory capital requirements and the quality of the banks' assets has strengthened.

However, Spanish banks – like international banks – continue to be exposed to the consequences of Brexit, pressures of increasing regulation, low interest rates and increased competition. To tackle these challenges, further integration and measures to improve capitalisation are expected. A topical example is Banco Popular, which after several unsuccessful attempts to raise capital or sell the bank in the market, faced a liquidity crisis. On 7 June 2017, pursuant to the resolution scheme set forth in Regulation (EU) No. 806/2014 of 15 July 2014, the Single Resolution Board resolved to transfer Banco Popular to Banco Santander for the price of €1, after ordering the write-down of all existing shares (Common Equity 1) and the Additional Tier 1 instruments, and the conversion of its Tier 2 instruments into new shares. Likewise, the Fund for Orderly Bank Restructuring (FROB) has given the green light to the merger of two state-owned banks, Bankia and Banco Mare Nostrum.

Although the non-performing loan ratio has decreased, Spanish banks, including the Spanish 'bad bank' (SAREB), which holds the most distressed assets previously owned by the bailed-out institutions, have continued to be very active in selling loan portfolios and

1 Ángel Pérez López and Pedro Ravina Martín are partners and Blanca Arlabán Gabeiras is a senior associate at Uría Menéndez Abogados, SLP. The authors thank David López Pombo and Violeta Pina Montaner for their contribution to the tax section.

distressed real estate assets. In 2016 alone, banks sold portfolios with an outstanding value of more than €15 billion. A similar volume of NPL deals (if not higher) is expected in 2017, with a large number of assets from Banco Popular on sale.

Refinancing and restructuring transactions have continued to play an important role. Benefiting from the review of the Spanish insolvency law in 2014 and 2015, we have seen significant deals closed or still in process (among others, Abengoa, Isolux (now subject to insolvency proceedings), Cementos Portland Valderrivas and Codere).

Meanwhile, M&A activity and corporate lending have increased. According to Thomson Reuters, in 2016 the total volume of loans originated by Spanish banks was approximately €59.2 billion. Although this figure is lower than the previous year, the nature of the transactions differs, as several corporates have refinanced their respective debts to improve their financial terms. The most active sectors have been construction, energy and services. Amongst the largest corporate lending transactions, the following are worth noting: ACS (€2.35 billion), Acciona (€2.2 billion), Ferrovial (€1.25 billion), refinancing of Iberdrola (€2.5 billion) and Gestamp (€1.125 billion). Telefónica also undertook two refinancings of its debt (in the amount of €3 billion and €2.5 billion, respectively). Other companies that have been successful in negotiating improved terms are Metrovacesa, FCC and Merlín Properties, among others.

In 2015, a number of reforms were introduced by the government to stimulate the use of non-banking funding. Among other things, significant restrictions that had been part of the Spanish bond market for a very long time were removed and legal frameworks governing other sources of funding were significantly revised (securitisations) or introduced for the first time (crowdfunding). Since then we have seen a number of high-yield debt issuances by Spanish companies and the development of the Spanish debt market suitable mainly for small and medium-sized enterprises (SMEs).

II LEGAL AND REGULATORY DEVELOPMENTS

In recent years, one of the main aims of Spanish legislators has been to amend the Spanish insolvency law in order to introduce mechanisms that incentivise out-of-court restructuring and facilitate a fresh start both for companies and individuals. Groundbreaking amendments have been approved since 2012 in pursuit of this goal. Since then, the Spanish insolvency system has been gradually introducing tools that (1) allow companies to delay the insolvency filing for four months once they communicate to the courts that they are negotiating a composition or refinancing agreement with their creditors; (2) protect creditors from clawback risk if the refinancing agreements comply with certain requirements; and (3) facilitate the cramming down of dissenting creditors if the refinancing agreements obtain the sanction of the court (sometimes known as '*homologación judicial*'). Further technical amendments were approved in 2014 and 2015 in respect of refinancing agreements (including changes to the methodology for the valuation of secured claims to determine the part of the claim that can be subject to cramdown) and composition agreements (incorporating some principles already foreseen for the refinancing agreements).

A brand new set of rules was introduced to protect individuals, who having undergone an insolvency proceeding that has been completed, are unable to meet all outstanding liabilities. Under the new scheme, known as 'fresh start', subject to a number of conditions and formalities, the individual could be released from his or her outstanding liabilities. Likewise, a new regime applicable to out-of-court settlement for payments was enacted in

2015. This out-of-court mechanism allows individuals (including entrepreneurs) and small enterprises to apply for debt relief. The out-of-court settlement is based on the appointment of an insolvency 'mediator', who will convene a meeting between the debtor and its creditors with the aim of agreeing a revised repayment plan.

The above could be further modified in the short term if the proposal for a consolidated text of the Spanish Insolvency Law, which has been recently made by the Spanish General Codifying Commission, comes into force. This proposal has been criticised by some of the most reputed Spanish scholars, who understand that the Commission has exceeded its remit (the proposal not only provides for a consolidated text of the Spanish Insolvency Law, it also introduces some important amendments to the Spanish insolvency regime).

Meanwhile, at a European level, the progressive development of the legal framework applicable to credit entities has steadily continued. In 2014 and 2016, Spain transposed new European directives on the solvency, supervision, restructuring and resolution of credit entities. The Bank of Spain has recently published a draft bill to amend the accounting regime applicable to credit institutions, to implement IFRS 15 and 9. Both should take effect on 1 January 2018. These changes will require credit institutions to make provisions for expected impairments rather than actual impairments and is likely to have a significant impact on all banks. Furthermore, a new set of rules has also been approved to facilitate the restructuring of Spain's rural savings banks (*cajas rurales*), which represent approximately 6 per cent of the Spanish banking system and which are the last remaining unreformed institutions following the comprehensive restructuring of the Spanish banking sector undertaken since 2012.

Recent consumer-friendly court rulings present further challenges for Spanish banks. In December 2016, the European Court of Justice ruled that 'floor clauses' (clauses that set a minimum interest rate for Spanish mortgage contracts) were unfair to consumers. Controversially, the ruling was made with retroactive effect, and a significant volume of mortgage contracts executed prior to the ruling are affected. Similarly, the Spanish Supreme Court in its judgment of 23 December 2015 declared null and void the clauses that impose all the expenses of creation of mortgages to the client. This ruling has been followed by other courts and is also to have a significant impact on Spanish banks in the near future. An out-of-court complaint system has been created in order to reduce judicial costs for consumers and banks and to release the burden of an increasing number of claims from the administration of justice. Finally, it is expected that the mortgage law will be amended in the coming months to implement the provisions of Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immoveable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010. A first draft of the new law has been published by the government.

III TAX CONSIDERATIONS

The main corporate tax chargeable on interest and other amounts receivable under a loan is corporation tax, which applies to the entire income obtained by the taxpayer. Interest received should therefore be included with all the other income generated by the lender. Interest must be included within the corporation tax base when accrued. The accrual principle for tax purposes follows International Financial Reporting Standards rules. The general corporation tax rate is 25 per cent (30 per cent for credit institutions).

Borrowing costs are deductible expenses for corporation tax purposes. Borrowing costs include interest of any kind, transaction costs and other similar expenses, and may be deducted when accrued. Nevertheless, tax deduction of interest is contingent upon some limitations, namely:

a Interest from participating loans in which the lender and the borrower are members of the same group of companies are not deductible.

b Interest from loans in which the lender and the borrower are members of the same group of companies are not deductible if the funds borrowed are used to buy shares, the seller being an entity who is also a member of the group of companies, unless the taxpayer proves that the transaction has valid economic reasons.

c Net interest that exceeds 30 per cent of the operating profit is not deductible. Net interest means the excess of financial expenses over financial income. Operating profit is calculated in a similar way to earnings before interest, tax, depreciation and amortisation. Net financial expenses that have not been deducted can be carried forward with no time limit, but are subject to the threshold of 30 per cent of the operating profit of each fiscal year. This limitation is not applicable to, *inter alia*, credit institutions or insurance companies.

d The deductibility of interest from loans used to acquire shares would be generally limited to 30 per cent of the EBIDTA of the acquiring company. However, this limitation should not apply: (1) in the tax year in which the acquisition is executed to the extent that the acquisition is financed with a maximum debt of 70 per cent of the acquisition price; and (2) in the following tax years, should the loan be reduced, proportionally, on an annual basis within the following eight years, until the debt is 30 per cent of the acquisition price.

Interest paid is generally subject to withholding tax at the rate of 19 per cent.

Withholding taxes applied on interest payments to taxpayers who are residents of Spain are refundable from the corporate tax of the recipient. In addition, some interest payments to Spanish residents are exempt from withholding tax, for instance:

a interest paid to entities that are exempt from corporation tax (e.g., the Kingdom of Spain, its political subdivisions and its administrative agencies, the Bank of Spain);

b loan interest paid to banks and some other financial institutions;

c loan interest paid to securitisation funds; and

d interest paid between entities belonging to the same tax consolidation group.

Withholding taxes levied on the payment of interest to taxpayers who are resident abroad are not refundable, but there are some exemptions from withholding tax:

a interest paid to European Union residents are exempt; and

b interest paid to non-EU residents who are residents in a double tax convention jurisdiction may, under the applicable convention, benefit from withholding tax reductions or exemptions.

The granting and negotiation of loans and credits as part of an economic activity is a supply of services subject to but exempt from value added tax. No other taxes are due upon the execution of a corporate loan.

Mortgages are subject to stamp duties ranging between 0.5 per cent and 1 per cent (depending on the Spanish region where the mortgaged asset is located) on the total amount

(i.e., principal, interest, default interest, etc.) secured by the mortgage. It may, therefore, be the case that the total stamp duty ranges between 1 per cent and 1.4 per cent of the principal amount of the secured loan.

The assignment of loans or credits secured by a mortgage is generally subject to stamp duty, unless made in a private agreement (i.e., a document not having access to the Land Registry). This is why it is not uncommon in the Spanish market that mortgaged credits are assigned in private documents and notarised upon the borrower's default (hence when there is a need to enforce the mortgage).

In 2013, the United States and Spain entered into an intergovernmental agreement (IGA Model 1A) to provide for the implementation of the US legislation commonly known as the Foreign Account Tax Compliance Act (FATCA). FATCA requires financial institutions outside the US (FFIs) to report certain information on US account holders to the US tax authorities. If those FFIs fail to report the required information (non-participating FFIs), then a punitive 30 per cent tax would be withheld on, *inter alia*, their US source income.

The Loan Market Association (LMA) published and subsequently amended a template investment grade facility agreement, including FATCA provisions that are generally used in cross-border transactions and by Spanish lenders and borrowers. In summary, the FATCA provisions include:

a FATCA-defined terms;
b the obligation of providing FATCA information (that is, mainly, whether the parties are exempt from FATCA meaning they are not non-participating FFIs); and
c FATCA gross-up clauses.

The gross-up obligation varies depending on who should be protected from FATCA withholding. However, it is now market practice that borrowers should not make additional payments in the event of FATCA withholding because it only arises when the lender is a non-participating FFI, this is to say, the risk of FATCA withholding is essentially one that can be mitigated by the lender. In addition, when the transaction requires a paying agent, it is common to include provisions stating the resignation of the agent because of the risk of FATCA withholding when the agent becomes a non-participating FFI. Therefore, the practice in Spain does not differ substantially from that followed in other jurisdictions.

IV CREDIT SUPPORT AND SUBORDINATION

Financing transactions governed by Spanish law are frequently secured by security interests and guaranteed by personal guarantees that will generally only be enforced by the security agent (to avoid partial foreclosures by any creditor). As the legal concept of the security trust does not exist under Spanish law, the agent will need to prove that it has been duly and expressly empowered[2] to carry out this enforcement.

i Security

The following security interests can be created under Spanish law.

2 The power of attorney will need to be notarised and, where appropriate, apostilled or legalised.

Pledges

Pledges are created over moveable assets and possession over the collateral must be transferred to the pledgee.

Standard pledges include:

a pledges over shares; and
b pledges over credit rights (e.g., those arising from the balances in bank accounts, operational agreements, insurance policies or hedging agreements).

Real estate mortgages

Real estate mortgages are created over any real estate property, and must be executed in a public deed before a notary public and registered with the Land Registry where the asset is located. Real estate mortgages generate significant costs and taxes.[3]

Spanish law provides for the possibility of creating a floating mortgage, which is a security interest created over a specific real estate asset to secure an indefinite number of liabilities up to a maximum cap. Floating mortgages can only be granted in favour of financial institutions and public authorities (and in the latter case, exclusively to guarantee tax or social security receivables). The floating mortgage deed must include a description of the actual or potential secured liabilities, the maximum mortgage liability (which will cover all the obligations without allocating mortgage liability to each of them), the term of the mortgage and the method of calculating the final secured amount and payable balance.

Chattel mortgages and pledges without displacement

Chattel mortgages can only be created over:

a business premises;
b cars, trains and other motor vehicles;
c planes;
d machinery and equipment; and
e intellectual and industrial property.

There is a specific type of mortgage for ships (naval mortgage). The chattel mortgage must be executed in a public deed before a notary public and registered with the Moveable Assets Registry.

Pledges without displacement can only be created over:

a harvests;
b harvest from agricultural plots;
c animals on plots;
d harvesting machinery;
e raw materials in warehouses;
f merchandise in warehouses;
g art collections; and

3 These costs include: (1) stamp duty (described in Section III, *supra*); (2) notarial fees; and (3) land registrar fees. The calculation base for these costs is the total amount secured by the mortgage.

h credit rights held by the beneficiaries of administrative contracts, licences, awards or subsidies, provided that this is permitted by law or the corresponding granting title, and over receivables (including future receivables) not represented by securities and not qualifying as financial instruments.

Pledges without displacement must be executed in a public deed or public policy before a notary public, and registered with the Moveable Assets Registry.

Except for pledges without displacement over credit rights and inventories, these security interests are seldom used in Spain mainly because:

a the pledgor or the mortgagor would not be able to sell the relevant assets without the pledgees' or the mortgagees' consent, respectively;

b most of the assets that can be mortgaged with a chattel mortgage (mainly those that are not moveable) can be covered by a real estate mortgage if expressly agreed to by the parties in the real estate mortgage deed; and

c in most cases, those assets that cannot be covered by a real estate mortgage are not valuable enough to warrant the cost of creating the chattel mortgage.

Financial guarantees

Financial guarantees are those that secure the fulfilment of principal financial obligations. Although the meaning of this expression was subject to disagreement among scholars, the most common construction is that obligations pursuant to almost any financing document can be secured by these financial guarantees. Financial guarantees can consist of cash or securities and other financial instruments and certain types of credit rights held by credit institutions. Therefore, the collateral could be made up of shares issued by public limited liability companies – although this is argued by some scholars as regards shares in non-listed companies – and credit rights arising from the balances in bank accounts.

This type of security interest (1) may benefit from a separate enforcement if the debtor becomes insolvent, and (2) as regards pledges over shares, can be foreclosed by a private sale (not in a public auction, as is the general rule under Spanish law) conducted by the depository of the shares or by the pledgee's direct appropriation of the shares, breaching the general Spanish law principle under which any form of foreclosure of a security agreement that permits the holder of the security interest to directly and immediately acquire the secured asset is not allowed.

ii Personal guarantees

Normally, the borrower's shareholders and each of its subsidiaries provide, to the extent permitted by law (specifically, the financial assistance prohibition and conflict of interest restrictions), first demand guarantees or other types of personal guarantees in respect of the fulfilment of the obligations assumed by the borrower under the financing documents.

A personal guarantee may be created by agreement between the creditor and the guarantor or by operation of law. In order to facilitate the enforcement of a personal guarantee against a Spanish company, a settlement clause establishing the method of calculating the outstanding debt is usually included.

Under Spanish law, a guarantor cannot be obliged to pay the beneficiary of the guarantee until all the debtor's assets have been realised. This benefit for the guarantor does not apply in the following cases:

a if the guarantor has waived the benefit;

b if the guarantee is joint and several;
c if the debtor is declared insolvent; or
d if the debtor cannot be sued in Spain.

Additionally, a guarantor may raise against the creditor all the exceptions and defences corresponding to the debtor and which are inherent to the debt.

First demand guarantees, which are not regulated by law, are abstract and independent from the main obligation, creating a primary liability on the guarantor, and are not subject to the debtor's assets being realised. Lenders usually request that all personal guarantees created under the finance documents be first-demand guarantees.

iii Priorities

Security interests are governed by the principle *prior in tempore potior in iure* (i.e., security created earlier has priority over that created later). With respect to real estate mortgages, chattel mortgages and pledges without displacement, priority is determined by the date and time on which they are registered with the public registry, which is deemed to be the date (and time) on which the relevant document for registration was submitted. With regard to ordinary pledges, which are not registered in any public registry, priority is determined by the date (and time) on which possession is transferred. However, Spanish law allows creditors to agree on the priority of pledges and real estate mortgages. Therefore, creditors can agree that all the credits have the same priority or a creditor can decide to cede its priority in favour of another.

Pursuant to the Spanish Insolvency Act, in the context of bankruptcy proceedings, credit rights secured by security interests will benefit from a special privilege up to the value of the collateral. The creditor is generally considered an ordinary creditor in respect of the excess.[4]

iv Subordination

Notwithstanding this, classifying a bankruptcy credit as subordinated credit would entail extinguishing any security granted in the creditor's favour (and, as a result, any special privilege to which the creditor may be entitled). Under Spanish law, subordination can be triggered *ex lege* or *ex contracto*.

Contractual subordination in Spain is in line with international practice. The contractual provisions in this regard are similar to those of other jurisdictions.

Spanish insolvency law refers to a category of subordinated claims, which entails the subordination, by operation of law, of certain claims to the prior payment by the insolvent debtor of all ordinary claims. These subordinated claims include, among others, the following:
a claims that are not notified by the creditors to the insolvency trustee in a timely manner;
b claims that are contractually subordinated to all remaining claims of the debtor;

4 In the context of bankruptcy proceedings affecting Spanish companies, creditors will be divided into two categories: bankruptcy creditors and creditors against the insolvency estate. The list of creditors against the insolvency estate is a closed one and includes expenses incurred in the proceedings and essential basic expenses for the debtor to continue in business (e.g., salaries, utilities), and such creditors will be paid before any uncharged assets are distributed to the bankruptcy creditors. The claims of bankruptcy creditors may be classified as privileged, ordinary and subordinated. Privileged claims may, in turn, be deemed specially or generally privileged.

c claims for interest; and
d most importantly, all rights against the debtor held by legal or natural persons who qualify as 'specially related' to the debtor. This category includes, among others, shareholders with a stake of 10 per cent in the insolvent entity (5 per cent if it is a listed company) when their credit right arose, formal directors or shadow directors, and companies of the insolvent entity's group.

There is also a rebuttable presumption that any person who acquired a credit against the insolvent debtor from any of those related parties within a two-year period from the commencement of the bankruptcy proceedings is also a related party for insolvency law purposes.

Lastly, in accordance with a recent court ruling, a general reference to the regime applicable to profit participation loans (*préstamos participativos*) (which are deemed equity for capital impairment tests set out in the Spanish Companies Law) would not suffice to ensure its subordination in insolvency scenarios. Therefore, it is highly advisable to clearly state in this type of loan that it would be subordinated to the remaining creditors in any event.

V LEGAL RESERVATIONS AND OPINIONS PRACTICE

The standards applicable to the issuance of legal opinions in Spain are not very different from those applicable in other jurisdictions. In pure lending transactions, legal opinions are usually issued by counsel to the lenders or arrangers, except when capacity opinions are requested from counsel to the borrowers. This also applies in plain vanilla bond issuances. On the contrary, in high-yield bond transactions it is usual that legal opinions are issued both by counsel to the arrangers or initial purchasers and counsel to the issuer. Limitations apply to disclosing legal opinions to third parties other than the initial addressees. Disclosure without reliance may be permitted in some cases (e.g., if required by law or a court order, or to auditors or rating agencies on a need-to-know basis). Exceptionally, disclosure with reliance is permitted during the syndication of the loan, but this is normally restricted to a very short time frame and is subject to limitations and restrictions (including a requirement for the disclosing entity to notify the opinion provider of such disclosure).

Below is a description of the main issues and most frequent legal reservations in practice in Spain.

i Corporate benefit

Directors of Spanish companies have a general duty to act loyally and diligently, in compliance with the applicable law, and in the best interests of the company.

It is not always easy to prove that providing security or guarantees in the context of a group financing is in the best interests of a company. Any analysis of this circumstance is ultimately factual.

Accordingly, corporate benefit should be analysed on a case-by-case basis considering, among other things, the structure of the group, the nature and amount of the guarantees provided, the purposes of the financing and the direct and indirect consideration received by the relevant guarantor. With regard to downstream guarantees, corporate benefit may be easier to prove. However, courts have always been more suspicious about upstream or cross-stream guarantees.

ii Clawback

According to the Spanish Insolvency Act, any action taken or agreement reached in the two years preceding the declaration of insolvency of a company can be rescinded by the court if the receiver can prove that the action or agreement was 'detrimental to the insolvency estate'. The term 'detrimental' is not defined and has been construed rather broadly by the courts. The Spanish Insolvency Act also provides for certain circumstances in which a detriment to the insolvency estate is presumed to exist. Among others, unless proven otherwise, the granting of security in respect of preexisting or refinanced debt is presumed to be detrimental to the insolvency estate. Moreover, debt prepayment (with some exceptions in secured loans), gifts and other benefits for no consideration are automatically presumed to be detrimental.

However, the Spanish Insolvency Act provides some safe harbours for the refinancing of existing debt, which is protected from clawback risk subject to compliance with specific formalities and majority thresholds, which differ depending on whether or not the refinancing agreement has been subject to court sanction.

iii Financial assistance

Under Spanish law, companies are generally prohibited from providing financial assistance. Breaching this prohibition could entail both liability for directors and the nullity of the transaction in which the financial assistance was provided.

How acquisition finance transactions have been structured to comply with the restrictions on financial assistance (other than creating separate debt tranches) is to implement a debt push down through a forward merger. As from 2009, however, a specific regulation applies to forward mergers whereby if two or more companies merge and any of them has received financing within three years prior to the acquisition of a controlling stake in, or essential assets of, any of the companies that are part of the merger, some protective measures apply. Among others, directors must issue a report justifying the merger and an independent expert must issue a fairness opinion confirming that the transaction is reasonable and that there has been no financial assistance. This provision has been subject to much debate, especially in relation to the scope and effects of the report issued by the independent expert.

iv Security trustee and parallel debt

Spanish law does not recognise the concept of a 'security trustee' who is the beneficial holder of and enforces the security package on behalf of the lenders from time to time. Thus, legal title over a security interest must be held by the creditor of the secured facility.

Furthermore, any parallel debt governed by Spanish law is unlikely to be considered valid, since under Spanish law contracts and obligations are only valid and enforceable if they are based on a valid and legitimate reason.

In view of the above, lenders will need to provide a notarised and (in the case of foreign lenders) apostilled power of attorney in favour of the security agent to enable it to lead a coordinated enforcement process on behalf of all the lenders.

v Acceleration

In the Spanish market, the decision to accelerate loans and enforce security is usually a last-ditch effort once all other alternatives such as debt restructuring have failed. However, Spanish courts have traditionally been reluctant to uphold loan acceleration and subsequent enforcement of security if the default is not deemed to be material. In this regard, as a

requirement for the enforcement of mortgages, at least three principal instalments (or any other such amount that entails default on payment for a period of at least three months) must be outstanding.

VI LOAN TRADING

The assignment of a lender's participation under a facility agreement governed by Spanish law may be carried out by:

a assigning the credit rights, which would result in transferring to the assignee the credit rights held by the assignor against the borrower (but not the contractual obligations assumed by the assignor *vis-à-vis* the borrower); or

b assigning the contractual position under the agreement to any third party, and thus the relevant rights and obligations.

Hence, assigning the contractual position under an agreement would be relatively similar to a novation under English law, as it entails the transfer of both rights and obligations and the subrogation of the assignee to the contractual position of the assignor. However, the previous contractual relation needs not to be terminated.

No specific formalities need to be complied with for an ordinary transfer to be effective between the parties. However, under Spanish law, the transfer date must be certain and unambiguous for it to be fully effective *vis-à-vis* third parties and to guarantee the assignee that any payment made by the debtor to the assignor will not release the former from its obligations *vis-à-vis* the assignee. Therefore, it is very common to formalise the assignment agreement in a public deed before a Spanish notary public.

Spanish notarial documents are essentially (1) public deeds, which must be used, among others, for any transaction that requires registration with a land registry and (2) public policies, which can only be used to formalise contracts of a commercial and financial nature corresponding to the ordinary course of business of at least one of the parties.

While the creation and assignment of mortgages must be documented in a public deed, other types of security interests are usually documented in a public policy. The creation or assignment of a mortgage, when documented in a public deed, triggers stamp duty,[5] which must be paid and the mortgage registered for it to be able benefit from the advantages established under Spanish law (particularly, an expedite enforcement proceeding). In turn, pledges without displacement, which must be registered with the Moveable Assets Registry, may be documented in public policies (and thus no stamp duty accrues).

Moreover, some Spanish security interests cannot be assigned to every type of creditor. Floating mortgages can only be assigned to financial institutions and public authorities (and in the latter case, exclusively to guarantee tax or social security receivables) and financial security interests can only be assigned to:

a credit entities;

b investment services companies;

5 See Section III, *supra*. The Spanish tax authorities have recently issued two binding resolutions stating that the total amount secured should be understood as the outstanding amount of the facility as of the effective date of the assignment and not as its mortgage liability, as was the case beforehand. This may have an impact on transactions in which mortgage-secured facilities have been partially repaid by the debtors and on past transactions (the assignees may consider requesting a refund of any excess stamp duty paid).

c insurance companies;
d collective investment in transferable securities;
e mortgage securitisation funds, asset securitisation funds and their managing entities;
f pension funds; and
g financing institutions.

In practice, this constitutes an additional restriction to the Spanish debt trading market.

Syndicated facility agreements governed by Spanish law usually provide for a specific form of assignment agreement, which is used by lenders when carrying out any assignment of their participation in the loan. They also set out the conditions under which an assignment may be carried out without the debtor's consent. While the lenders' aim is to make the above-mentioned conditions more flexible, the borrower usually wishes to limit the concept of 'permitted assignee' or 'permitted assignment' in order for the financing to remain under the control of its banks, namely the banks with which it has a special relationship and is familiar.

It is not unusual for creditors to close the terms and conditions of the assignment pursuant to LMA Trade forms, but executing trade confirmations is generally supplemented with executing the form set out in the facility agreement or any other assignment agreement governed by Spanish law that is subsequently formalised in a public deed. It is particularly important to evidence the title to claim the assigned indebtedness and enforce the security interests and personal guarantees. This is especially relevant for moveable or immoveable mortgages and pledges without displacement, where the creditor must be a registered creditor.

The financial crisis has created a market from what was previously an ancillary practice to financing transactions. Spanish financial institutions are carrying out several competitive processes to transfer single names when they are not confident about a particular economic sector or about the debtor's ability to recover financially. Likewise, credit rights are sometimes grouped together (according to the type of security attached to them or the nature of the debtors) to allow purchasers to acquire groups of hotels, offices or shopping centres by enforcing the relevant mortgages.

Moreover, the financial crisis has left a significant number of debtors (both individuals and SMEs) who have been unable to repay their debts to the banks, thus impairing the banks' default rates and causing them to significantly increase their reserves. With the aim of remedying this situation, as from 2011 Spanish financial institutions have implemented several competitive processes to sell large portfolios of non-performing loans (NPLs), whether secured or unsecured, which have attracted large investment funds and have also brought out an ancillary industry comprised of servicers specialising in credit claims and foreclosed asset management.

VII OUTLOOK AND CONCLUSIONS

Spanish institutions are facing increasing challenges in 2017 owing to the situation of the financial markets, increasing consumer-friendly regulations and the existence of other sources of financing, which are becoming real competitors to traditional bank lending, not only for large multinational Spanish companies but also for SMEs. Banks will have to monitor very closely the effects that Brexit may have on their businesses and activities, and manage their response to new competition simultaneously with the completion of their own reorganisation

processes, focusing on their traditional business and continuing with the divestment of their non-core assets. Competitive processes for the sale of single names, NPLs and real estate portfolios are expected to continue during the second half of 2017.

The way that Spanish banks handle the current challenges and adapt to new regulatory requirements will determine lending and secured finance volumes for 2017. The Spanish banks will need to anticipate and manage potential risks and identify new opportunities that may arise in the near future.

Preventing the failure of solvent companies in situations of financial distress has become a priority for the Spanish government. There is a real intention to pay heed to the lessons learned during the financial crisis and to provide more effective restructuring tools going forward. Spanish insolvency law has been radically overhauled during the past few years, although the possibility of further changes and enhancements cannot be discounted.

Appendix 1

ABOUT THE AUTHORS

ÁNGEL PÉREZ LÓPEZ

Uría Menéndez Abogados, SLP

Ángel Pérez López is a partner in the banking and finance practice area of the Madrid office. Ángel joined Uría Menéndez in 2000 after working as a financial analyst for a leading Spanish corporate finance firm.

Ángel focuses his practice on corporate, acquisition and project finance. He has worked on some of the most important financing deals that have taken place in Spain in recent years. He advises lenders and borrowers on transactions in the energy, biofuel, waste treatment and telecommunications sectors. He has also advised creditors and debtors on restructuring the debt of some of Spain's biggest companies. Since 2011, Ángel has also participated in several sales and acquisitions of non-strategic assets of financial institutions, such as non-performing loans, real estate assets and property management platforms.

From September 2007 to March 2008, Ángel was seconded to the New York headquarters of the US firm Debevoise & Plimpton, LLP, where he worked in the Acquisition Finance Group as an international associate.

Over the past few years, Ángel's expertise in banking and finance, project finance and restructuring has been recognised by prestigious legal directories such as *Chambers Global*, *Chambers Europe*, *IFLR 1000*, *Who's Who Legal* and *Best Lawyers in Spain*. In the 2015 edition of *Iberian Lawyer* he was named one of the top 40 lawyers under the age of 40 in Spain and Portugal.

PEDRO RAVINA MARTÍN

Uría Menéndez Abogados, SLP

Pedro Ravina is a partner in the banking and finance practice area of the Madrid office. He joined the Madrid office of Uría Menéndez in 2004. In 2008 he was seconded to the in-house legal department of JP Morgan Securities Ltd in London for four months, and from October 2010 to October 2012 he was based in our London office. From October 2013 to April 2014, Pedro was seconded to the New York headquarters of Wachtell, Lipton, Rosen & Katz.

His practice is focused on banking and finance, M&A deals (in particular, with financial entities), capital markets and corporate restructuring transactions.

Pedro has been involved in a number of investment and divestment projects in listed and non-listed companies, as well as in corporate and project finance transactions and corporate restructuring processes, advising mainly financial entities and private equity firms.

He regularly advises on regulatory aspects concerning financial activities (e.g., banking, investment services and payment services) and undertakings for collective investment. Pedro has acted for Spanish management companies and international investment banks in bond and mortgage security issuances (mainly covered bonds), as well as mortgage-backed and asset-backed securitisations, and other domestic and multi-jurisdictional structured finance deals.

BLANCA ARLABÁN GABEIRAS

Uría Menéndez Abogados, SLP

Blanca Arlabán Gabeiras is a lawyer in the banking and finance practice area. She joined Uría Menéndez in 2007. Between March and September 2010, Blanca worked in the London office of Slaughter and May, where she was an international secondee in the banking and financing team. Blanca has worked in the London office of Uría since January 2014. In 2016, she was seconded to Goldman Sachs International in London for six months.

In her professional practice, Blanca focuses mainly on financing, restructuring, mergers and acquisitions and general commercial law.

Blanca has advised on some of the most complex and innovative financing and restructuring transactions in Spain in recent years, including the largest international restructuring (by value) completed in Spain, one of the largest of its kind in Europe. Blanca's experience of cross-border financing transactions is extensive, and she has recently advised on a number of asset and corporate financing transactions as well as various distressed debt and real estate portfolio acquisitions. She advises a wide range of clients, including corporates, financial institutions and funds and is highly accustomed to working with international as well as domestic clients.

Blanca has been an assistant professor at lectures on the master's degree programme at the Universidad Privada de Navarra and has spoken at various seminars in her field.

URÍA MENÉNDEZ ABOGADOS, SLP

Príncipe de Vergara, 187
Plaza de Rodrigo Uría
28002 Madrid
Spain
Tel: +34 91 5860 400
Fax: +34 915 860 403
angel.perez@uria.com
pedro.ravina@uria.com
blanca.arlaban@uria.com
www.uria.com