Acquisition Finance 2021

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LEXOLOGY®
Getting The Deal Through

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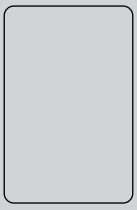

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Willkie Farr & Gallagher LLP

Lexology Getting The Deal Through is delighted to publish the ninth edition of *Acquisition Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Denmark.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Jeffrey Goldfarb, Viktor Okasmaa and David Tarr of Willkie Farr & Gallagher LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
March 2021

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Spain

Joaquín Sales and María Redondo
King & Wood Mallesons

GENERAL STRUCTURING OF FINANCING

Choice of law

1 What territory's law typically governs the transaction agreements? Will courts in your jurisdiction recognise a choice of foreign law or a judgment from a foreign jurisdiction?

Agreements whose purpose is the financing of the acquisition of Spanish companies when the borrower is also a Spanish company are usually governed by Spanish law. In the past, larger transactions were executed under English law, and although in recent years the use of English law has been extended to include smaller deals, Spanish law continues to be the norm.

Security agreements over assets located in Spain or shares of Spanish companies must be subject to Spanish law.

According to Regulation (EC) No. 593/2008 (Rome I) on the law applicable to contractual obligations, Spanish courts will recognise any foreign law governing financing agreements, owing to Rome I having erga omnes effects. This means that any foreign law is enforceable, irrespective of whether or not it corresponds to an EU member state and provided that validity of that foreign law is proved within the relevant judicial proceeding; nevertheless, any Spanish public policy mandatory provisions will apply.

The submission to a foreign jurisdiction is valid in Spain provided that the exclusive jurisdiction rules established either in the recast Brussels Regulation ((EC) No. 1215/2012) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or Spanish law (as applicable) are complied with.

Judgments given by a foreign court are enforceable in Spain in accordance with Regulation (EC) No. 1215/2012 (when referring to judgments issued by an EU member state court), or according to Spanish civil procedure regulation (when referring to final judgments issued by a non-EU member state), which establishes that any final judgment rendered outside of Spain may be enforced in Spain under the following conditions:

- it is in accordance with an applicable international treaty; and
- in the absence of any such treaty, provided that certain requirements are met (such as that the court that issued the judgment has jurisdiction, the judgment is final and does not contradict Spanish public policy nor previous Spanish resolutions).

In the case of judgments given by a non-EU member state (including, from 1 January 2021, the United Kingdom), Law No. 29/2015 on international judicial cooperation includes a 'general principle favourable for cooperation' in respect of the recognition and enforcement of foreign judgments.

In principle, foreign arbitral awards are also enforceable in Spain according to the 1958 New York Convention on recognition and enforcement of arbitral awards.

Restrictions on cross-border acquisitions and lending

2 Does the legal and regulatory regime in your jurisdiction restrict acquisitions by foreign entities? Are there any restrictions on cross-border lending?

The general rule is that acquisitions by foreign entities are not restricted. In some cases, acquisitions may be subject to administrative authorisation (for instance, where the target holds an administrative concession, or is subject to a special regulatory regime, as would be the case with banks and financial services companies), but these would apply to both Spanish and international acquirers.

Amid the covid-19 pandemic, Royal Decree 11/2020 of 31 March and Royal Decree 34/2020 of 17 November have restricted foreign investments (ie, non-resident EU or EFTA investors) in companies acting in sensitive sectors (eg, critical infrastructure, critical technologies and dual use items, supply of critical inputs¸ access to sensitive information or media). As a general rule, foreign direct investments exceeding €1 million are subject to prior authorisation of the board of ministers of the Spanish government when it comes to acquisitions exceeding 10 per cent of the target company stock or triggering a change of control.

In addition, Spanish companies engaging in transactions with non-residents in Spain must deliver information to the Bank of Spain on a regular basis concerning these transactions (eg, with foreign banks or foreign entities) and the corresponding balances of their foreign financial assets and liabilities.

Types of debt

3 What are the typical debt components of acquisition financing in your jurisdiction? Does acquisition financing typically include subordinated debt or just senior debt?

Both senior debt and subordinated debt are typically included in acquisition financing in Spain. Junior debt may be provided by mezzanine lenders or by sponsors through 'participative' loans that are legally subordinated or by both.

Certain funds

4 Are there rules requiring certainty of financing for acquisitions of public companies? Have 'certain funds' provisions become market practice in other transactions where not required?

In acquisitions of public companies where a tender offer is required, a tender bond is mandatory, so that there is certainty of funding. Acquisitions of shares in public companies that do not trigger a mandatory tender offer are not subject to this requirement.

While there is no legal requirement for private acquisitions, 'certain funds' provisions are the norm in acquisition finance agreements.

Restrictions on use of proceeds

5 | Are there any restrictions on the borrower's use of proceeds from loans or debt securities?

The only restrictions applicable are those agreed by the parties under the finance documentation. The parties usually agree on the purpose of the financing as:

- payment of the purchase price and related costs and taxes;
- repayment of existing debt of the target company; or
- attending to working capital needs.

Licensing requirements for financing

6 | What are the licensing requirements for financial institutions to provide financing to a company organised in your jurisdiction?

Lending money in Spain can be carried out in Spain without any prior requirement being met by the relevant lender; in particular, no prior authorisation from the Spanish banking authorities is required. This applies to both bilateral loans and syndicated facilities. However, additional banking activities, such as raising reimbursable deposits from the public, are subject to certain requirements being met with regard to the Spanish banking authorities.

Withholding tax on debt repayments

7 | Are principal or interest payments or other fees related to indebtedness subject to withholding tax? Is the borrower responsible for withholding tax? Must the borrower indemnify the lenders for such taxes?

A withholding tax may have to be paid by the borrower on interest paid to any foreign lender unless the lender is either a resident in an EU member state and the beneficial owner of the interest received, or, in the case of non-EU residents, resident in a jurisdiction that has signed a double tax treaty agreement with Spain that regulates a full exemption on Spanish-source interest and fully entitled to the benefits of such a treaty (ie, a 'qualifying' lender). Otherwise, any other non-resident (entity or individual) would be subject to a 19 per cent withholding tax or to the specific rate established by an applicable double tax treaty.

Furthermore, subject to compliance with certain requirements, the following exemptions are applicable with regard to interest payments made to a non-resident that does not act in Spain through a permanent establishment to which the interest is deemed allocated:

- Spanish public debt;
- non-resident bank accounts;
- preference shares and bonds issued by Spanish financial institutions;
- securitisation funds;
- preference shares issued by non-financial listed entities; and
- listed debt instruments issued by listed and unlisted Spanish companies and public entities.

Loan agreements typically include tax indemnity and gross-up provisions (Loan Market Association standard or similar) in favour of qualifying lenders. Also, debt transfers are usually restricted to other entities that are deemed qualifying lenders (otherwise, the indemnity and gross-up provisions generally do not apply in favour of the transferees).

Restrictions on interest

8 | Are there usury laws or other rules limiting the amount of interest that can be charged?

Under Spanish law, pursuant to the Spanish Usury Act of 23 July 1908, which remains in force, any financing agreement shall be null and void if the interest agreed under the agreement is substantially higher than the interest commonly agreed in similar transactions in the market and manifestly disproportionate to the circumstances applicable to the relevant transactions or leonine (provided that the borrower has most likely accepted such interest based on its lack of experience or its distressed situation).

Once the nullity and voidness of the relevant financing agreement has been declared, the borrower will not be obliged to pay any interest due under such an agreement.

Indemnities

9 | What kind of indemnities would customarily be provided by the borrower to lenders in connection with a financing?

Loan agreements typically include indemnities for currency conversion, taxes, payments not made on the due date, failure to make any prepayment following a prepayment notice, changes in any law or regulation after the execution of the agreement, etc.

Assigning debt interests among lenders

10 | Can interests in debt be freely assigned among lenders?

In principle, yes, subject to agreement by the parties. Assignability provisions are heavily negotiated in Spain and would usually include a definition of qualifying lenders that excludes potential lenders whose entering into of the finance documentation would involve additional costs or taxes for the borrower (in some cases 'vulture' funds are excluded as well) and a requirement for the assignor and the assignee to carry out such assignment following the required legal procedure and delivering the relevant notice of assignment to the borrower.

It must also be taken into account that some security interests can only be granted (or assigned) in favour of certain categories of finance parties. For example, financial collateral may only be granted in favour of banks or other types of financial lenders, but not special-purpose vehicles or corporate lenders. Floating mortgages may only be granted in favour of banks and certain other types of financial institutions.

Requirements to act as agent or trustee

11 | Do rules in your jurisdiction govern whether an entity can act as an administrative agent, trustee or collateral agent?

Spanish law does not recognise trusts and, although not expressly regulated, administrative agents and collateral agents are recognised in Spain based on the existence of Spanish regulations on mandates and similar legal figures.

Debt buy-backs

12 | May a borrower or financial sponsor conduct a debt buy-back?

Debt buy-back provisions are not standard under Spanish law unless financing is carried out as bonds or notes issuances or similar, in which case repurchase or amortisation of bonds and notes is usually agreed subject to certain conditions.

Disenfranchisement provisions are typically included in loan agreements where buy-backs are contemplated.

Exit consents

13 Is it permissible in a buy-back to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements?

Debt buy-back provisions are not standard under Spanish law. Nonetheless, it would be possible for the parties to include exit consents and similar clauses in loan agreements.

GUARANTEES AND COLLATERAL

Related company guarantees

14 Are there restrictions on the provision of related company guarantees? Are there any limitations on the ability of foreign-registered related companies to provide guarantees?

Provided that there is no prohibited financial assistance, no restrictions apply to the granting of downstream guarantees. Based on recent case law, upstream and cross-stream guarantees require a corporate benefit to be received by the guarantor. When referring to downstream guarantees, such corporate benefit may rely on the guarantor benefiting from its subsidiaries' value increase or on the guarantor receiving dividends. However, when referring to upstream or cross-stream guarantees, as this benefit is not that clear, the parties would normally agree on a consideration to be paid to the guarantor.

Assistance by the target

15 Are there specific restrictions on the target's provision of guarantees or collateral or financial assistance in an acquisition of its shares? What steps may be taken to permit such actions?

Under Spanish corporate law, Spanish companies shall not provide financial assistance to facilitate the acquisition of their own shares or the shares in their respective parent companies and, in case of private limited liability companies, also to facilitate the acquisition of shares in other group companies. Any financial assistance provided in breach of a prohibition is null and void. For these purposes, the term 'financial assistance' is understood to cover any kind of financial assistance, for example by means of issuance of a guarantee or granting of a loan, among others.

Within acquisition finance transactions, Spanish companies would normally guarantee or secure the payment obligations arising from any tranches of the acquisition facility or any additional facilities to the extent that they are granted to finance purposes other than the acquisition price and related costs and expenses, such as the refinancing of pre-existing indebtedness of the target or target group (to the extent that indebtedness does not qualify as acquisition debt), working capital requirements, future investments, etc.

In spite of the above, in general, with reference to leveraged mergers and other corporate transactions (eg, share capital reductions, segregations or dividends distributions), the Spanish legal community understands that Spanish corporate legislation applicable to such corporate processes sufficiently protects all interests that are ultimately protected by the financial assistance prohibition (mainly those of minority shareholders, creditors and employees), either by means of regulating information or objection rights for creditors, etc, as applicable, and that the risk of the corporate transactions being challenged is relatively low.

In particular, section 35 of Law No. 3/2009 of 3 April 2009 on structural modifications of companies regulates merger processes involving a company having received financing (within the preceding three years) to acquire the shares or assets of another company also involved in the merger process, and establishes certain requirements to be met, which may dilute the risk of breaching the rules on prohibited financial assistance.

Types of security

16 What kinds of security are available? Are floating and fixed charges permitted? Can a blanket lien be granted on all assets of a company? What are the typical exceptions to an all-assets grant?

The most common types of security are in rem security interests such as:

- mortgages over real estate;
- possessory pledges over shares and credit rights or bank accounts;
- chattel mortgage;
- non-possessory pledges; and
- personal guarantees.

Mortgages over real estate are rare in acquisition finance deals owing to their exorbitant cost, because they will attract an ad valorem stamp duty. Promissory mortgages are used in some cases as an alternative.

Spanish law neither recognises nor regulates floating and fixed charges (except for certain mortgages over real estate) or blanket liens. A security agreement is usually required in relation to each type of asset subject to security.

Requirements for perfecting a security interest

17 Are there specific bodies of law governing the perfection of certain types of collateral? What kinds of notification or other steps must be taken to perfect a security interest against collateral?

Each type of security is subject to a specific body of law:

- the Mortgage Act for real estate mortgages;
- the Chattel Mortgage and Non-Possessory Pledge Act for these types of security; and
- the Civil Code for other pledges (pledges over bank accounts, receivables or shares).

As a general rule, agreements of creation of security interests shall be executed before a public notary (except for agreements for the creation of financial pledges, where a private document, in principle, suffices). When referring to security over bank accounts, for it to qualify as financial collateral, the beneficiary must hold control over the moneys deposited in it, in the sense of their consent being mandatory for carrying out any action over such moneys.

Additionally, mortgages over real estate must be registered with the property registry and chattel mortgages, and non-possessory pledges must be registered with the movable assets registry.

When referring to a pledge over receivables, a notice to the relevant debtor is not mandatory for the perfection of the security, although such notice will be required before enforcement of the same.

Additionally, with reference to a pledge over a public limited liability company's shares represented by share certificates, such share certificates (duly endorsed in favour of the pledgee) must be delivered to the pledgee or to a third party acting as a custodian of the collateral (eg, the security agent). In such a case, or where a pledge is in the form of shares in a private company, it is standard market practice to annotate the creation of the pledge in the shareholders' registry of the issuing company, with the secretary of the board of directors certifying that the annotation has been made. The creation of the pledge must also be annotated in the ownership title.

Likewise, with reference to a pledge over a public limited liability company's shares represented by book entries, the pledge must be recorded in the special registry kept by the relevant entity in charge of bookkeeping entries for the relevant shares that are participating in the Spanish clearing and settlement system. This entity certifies the registration of the pledge.

Renewing a security interest

18 | Once a security interest is perfected, are there renewal procedures to keep the lien valid and recorded?

No. It is not required to keep the security in force. However, pledges over future receivables are usually updated on a periodic basis to include the proper identification of any receivables subject to the pledge by means of the execution of an additional notarial document.

Stakeholder consent for guarantees

19 | Are there 'works council' or other similar consents required to approve the provision of guarantees or security by a company?

No 'works council' or similar consents are required under Spanish law.

Granting collateral through an agent

20 | Can security be granted to an agent for the benefit of all lenders or must collateral be granted to lenders individually and then amendments executed upon any assignment?

Lenders tend to appoint an agent for the Spanish security, which would hold the Spanish security in its own name and on behalf of the other secured parties. However, when referring to security subject to registration with a public registry, all lenders would usually appear as beneficiaries of that security.

Under Spanish law, assignment of the secured obligations involves a proportional subrogation of the new lender into the existing security covering the same. Documentation of that assignment will normally include a reference to that subrogation, and when referring to a security subject to registration with the appropriate public registry (either the property registry or the movable assets registry) that documentation must be filed with the competent registry for the latter to reflect the assignment and to register the new lender as the new beneficiary under the security (provided that the assignee qualifies as a potential beneficiary of the relevant security).

Creditor protection before collateral release

21 | What protection is typically afforded to creditors before collateral can be released? Are there ways to structure around such protection?

Such protection is not typical in Spanish structures.

Fraudulent transfer

22 | Describe the fraudulent transfer laws in your jurisdiction.

Spanish law punishes any transactions made with a fraudulent purpose or intent. In particular, asset stripping is punished by the Spanish Criminal Code and may entail severe penalties (such as imprisonment), together with any penalty that may arise from an asset stripping leading to, or in the context of, an insolvency situation, which may also entail additional penalties as per the Spanish Insolvency Act. Likewise, it must be noted that, within an insolvency judicial proceeding, any transaction carried out within the two years preceding the declaration of insolvency that damages the insolvency's estate can be clawed back, regardless of whether it has been executed with fraudulent intent. If it is evidenced that as a result of a fraudulent transaction an asset stripping took place, severe liabilities may be imposed on the parties to the relevant transaction (mainly economic penalties and prohibition to manage companies in the future).

DEBT COMMITMENT LETTERS AND ACQUISITION AGREEMENTS

Types of documentation

23 | What documentation is typically used in your jurisdiction for acquisition financing? Are short-form or long-form debt commitment letters used and when is full documentation required?

A short-form debt commitment letter together with a term sheet (not necessarily well detailed) is the documentation usually required prior to the relevant bid. Full documentation is required for closing.

Level of commitment

24 | What levels of commitment are given by parties in debt commitment letters and acquisition agreements in your jurisdiction? Fully underwritten, best efforts or other types of commitments?

This depends on how strong the position of the sellers may be while negotiating with the potential purchasers. If they are in a very strong position, they usually require fully underwritten commitments or club deal structures with commitments by each of the members of the club deal.

Conditions precedent for funding

25 | What are the typical conditions precedent to funding contained in the commitment letter in your jurisdiction?

Typical precedent conditions are those included in the term sheet, which are usually, among others:

- executed finance documentation;
- delivery of copies of constitutional documentation, corporate resolutions and financial and know-your-customer information of the obligors (their accuracy being certified by authorised signatories of the obligors);
- accuracy of representations and warranties;
- issuance of power and capacity and validity and enforceability of legal opinions;
- acquisition documentation satisfactory to the lenders; and
- no material adverse event or breach of provisions under the finance documentation.

Flex provisions

26 | Are flex provisions used in commitment letters in your jurisdiction? Which provisions are usually subject to such flex?

Flex provisions are not very common in the current market under Spanish law. Margin and tenor were once the terms typically subject to such flex.

Securities demands

27 | Are securities demands a key feature in acquisition financing in your jurisdiction? Give details of the notable features of securities demands in your jurisdiction.

Securities demands are not a key feature in acquisition financing in Spain. However, some transactions subject to New York laws have included these commitments by the borrower.

Key terms for lenders

28 What are the key elements in the acquisition agreement that are relevant to the lenders in your jurisdiction? What liability protections are typically afforded to lenders in the acquisition agreement?

Lenders will typically look at conditions to closing being consistent with 'certain funds' conditions and at the assignability of any claims of the borrower in relation to the sellers.

Public filing of commitment papers

29 Are commitment letters and acquisition agreements publicly filed in your jurisdiction? At what point in the process are the commitment papers made public?

Commitment letters and acquisition agreements are not filed with any Spanish public registry, although they are normally formalised before a public notary, who would keep them in his or her files. The files are not accessible to the public, with the exception of parties or public authorities alleging and proving interest in their content.

In addition, when antitrust clearance is required, the acquisition agreements are filed with the antitrust authorities, who would make public the fact that the transaction is taking place, without giving information on the specific contents of the acquisition agreements. In public mergers and acquisitions, certain provisions of the acquisition agreements might need to be disclosed to the market, mainly if they include put or call options or restrictions on the sale of shares.

ENFORCEMENT OF CLAIMS AND INSOLVENCY

Restrictions on lenders' enforcement

30 What restrictions are there on the ability of lenders to enforce against collateral?

As a general rule, once insolvency is declared, no enforcement actions can be initiated and those already started will be stayed. With reference to enforcement of security, this general rule only applies if such security has been granted over assets that are necessary for the insolvent to continue its business activity, but it also extends to enforcement even if insolvency has not been declared and provided that the debtor has informed the relevant court that it is in the process of negotiating an agreement for the refinancing of its debts or an anticipated creditors' agreement (the latter to be finally executed in the context of a judicial insolvency proceeding and following the relevant declaration of insolvency).

Within an insolvency proceeding, security over necessary assets can only be enforced once a creditors' agreement is approved (provided that its content does not affect the exercise of these enforcement rights), or after the first anniversary of the declaration of the insolvency (provided that the insolvent is not in the process of being liquidated). Within the referred period, security over necessary assets cannot be enforced, so as not to jeopardise the achievement of solutions that may lead to the debtor leaving its insolvent status.

This general regime does not affect financial collateral.

Due to the covid-19 crisis, Royal Decree-Law 16/2020 of 28 April on procedural and organisational measures to address covid-19 in the area of Administration of Justice, introduced emergency legislation for insolvency proceedings on a temporary basis. Among other measures introduced:

- a debtor who is in a state of insolvency will not have to file for an insolvency declaration until 14 March 2021;
- debtors who are in a period of compliance with a refinancing or composition agreement or other type of agreement may present proposals for its modification and are not obliged to request liquidation when they are not able to comply until 14 March 2021; and
- applications for a declaration of non-fulfilment of these types of agreements will not be admitted, depending on certain circumstances.

Debtor-in-possession financing

31 Does your jurisdiction allow for debtor-in-possession (DIP) financing?

Yes. Once the insolvency has been declared, any fresh money granted in favour of the insolvent within a creditors' plan of reorganisation will rank senior to any other financial creditor unless otherwise agreed under such agreement. This will also generally apply to 50 per cent of fresh money granted under a refinancing agreement executed prior to the declaration of insolvency and provided that such insolvency has not been finally avoided, despite the execution of the refinancing agreement. In this case, the other 50 per cent will only rank senior to other financial creditors whose claims are unsecured.

Stays and adequate protection against creditors

32 During an insolvency proceeding is there a general stay enforceable against creditors? Is there a concept of adequate protection for existing lien holders who become subject to superior claims?

As a matter of fact, following a declaration of insolvency enforcement actions cannot be initiated, and those already started will be stayed so long as they refer to assets that are necessary for the insolvent to continue its business activity.

The concept of adequate protection is not applicable under Spanish law. Creditors with liens over assets necessary for the insolvent to continue its business activity will not be relieved from the stay, even though the value of the assets collateralised decreases during the stay. The stay will only be lifted when the insolvency proceedings court determines that the asset is not used for the debtor's professional or business activities or is not necessary for the survival of the debtor's business.

Clawbacks

33 In the course of an insolvency, describe preference periods or other reasons for which a court or other authority could claw back previous payments to lenders? What are the rules for such clawbacks and what period is covered?

Under Spanish law, acts detrimental to the insolvency estate carried out within two years prior to the declaration of insolvency can be clawed back, regardless of their fraudulent intention.

Any act or transaction will be presumed to be detrimental, without admitting evidence to the contrary, if it has been executed without consideration or if it involves payment of unsecured debts, the maturity of which was expected to take place after the declaration of the insolvency.

Other acts or transactions that may be presumed to be detrimental, if no evidence to the contrary is submitted, include:

- the granting of security covering pre-existing obligations, or of new obligations substituting pre-existing ones; and
- payment of secured debts, the maturity of which is expected to take place after the declaration of insolvency.

Ranking of creditors and voting on reorganisation

34 In an insolvency, are creditors ranked? What votes are required to approve a plan of reorganisation?

The Spanish Insolvency Act provides for the classification of claims into the following:

- special privileged claims (eg, secured claims with reference to the relevant secured assets) or general privileged claims (eg, labour, tax and social security claims);
- ordinary claims (eg, unsecured claims arising from financing agreements); and
- subordinated claims (eg, claims that qualify as subordinated by agreement of the parties and interest (the latter unless secured with an in rem security)).

The priority of payment directly depends on such classification.

Votes are allocated among the creditors depending on the amount of claims they hold. Affirmative votes required to approve a reorganisation plan directly depend on the content of the plan as follows:

- simple majority: if the agreement contemplates the payment in full of ordinary claims within a maximum of three years or the immediate payment of due and payable debts with no more than a 20 per cent reduction (haircut);
- creditors representing 50 per cent of the total debt: if the agreement includes haircuts of not more than 50 per cent of the total debt, or payment extensions of no more than five years, or both; or the conversion of claims into participative loans with a maturity of no more than five years; and
- creditors representing 65 per cent of the total debt: if the agreement contemplates haircuts of more than 50 per cent of the total debt, or payment extensions of between five and 10 years, or both; or the conversion of claims into participative loans with a maturity of between five and 10 years.

Due to the covid-19 crisis, certain emergency laws should be noted in relation to facility agreements from specially related persons to encourage business financing. Among others, it has been established that this type of claim will be considered as a claim against the insolvency estate (first in the ranking of claims). This will apply to cash revenues made from 14 March 2020 by persons specially related to the debtor. This measure may apply to insolvency proceedings declared up to 14 March 2022.

As a general rule, an agreement that involves the termination of the insolvency proceeding will not be binding on secured creditors, unless they vote in favour of the same (it is not mandatory for them to participate in the reorganisation agreement). The approval thresholds referred to above will take into account ordinary claims only (and those of secured creditors who decide to vote in favour of it).

However, the agreement can be binding on secured creditors (financial creditors being considered as a separate class of creditor) if approval majorities are reached within their class, as follows:

- 60 per cent:
  - if the agreement contemplates the payment in full of ordinary claims within a maximum of three years;
  - the immediate payment of due and payable debts with no more than a 20 per cent reduction;
  - haircuts not exceeding 50 per cent or extensions not exceeding five years, or both; or
  - the conversion of claims into participative loans with a maturity of no more than five years; and
- 75 per cent:
  - if the agreement contemplates haircuts higher than 50 per cent or extensions of between five and 10 years, or both; or
  - the conversion of claims into participative loans with a maturity of between five and 10 years.

These percentages will be calculated on the value of the security (of creditors voting in favour over the total value of the security).

Finally, it should be taken into account that creditors who benefit from a personal guarantee issued by a third party may lose their claim against that third party (or have it limited) if they vote in favour of the reorganisation agreement, depending on the terms of the guarantee. Therefore, in Spain, it is common to include a provision under which the creditors voting in favour of a reorganisation agreement with the insolvent debtor will not alter the liability of the guarantor in any way.

Intercreditor agreements on liens

35 Will courts recognise contractual agreements between creditors providing for lien subordination or otherwise addressing lien priorities?

Contractual subordination is expressly recognised by the Spanish Insolvency Act to the extent that it does not involve fraud against other creditors.

Discounted securities in insolvencies

36 How is the claim of an original issue discount (OID) or discount debt instrument treated in an insolvency proceeding in your jurisdiction?

These will be treated as any other claims, calculated on the face value of the corresponding instrument.

Liability of secured creditors after enforcement

37 Discuss potential liabilities for a secured creditor that enforces against collateral.

Two possible liabilities should be highlighted:

- if the security is constituted over necessary assets for the insolvent to continue its business activity, that security cannot be enforced until a creditors' agreement is approved (provided that its content does not affect the exercise of such enforcement rights), or after the first anniversary of the declaration of the insolvency (provided that the insolvent is not in the process of being liquidated); and
- the granting of security covering pre-existing obligations carried out within two years prior to the declaration of insolvency might be clawed back if no evidence that such granting of security is not detrimental to the insolvency estate is provided.

UPDATE AND TRENDS

Proposals and developments

38 Are there any proposals for new legislation or regulation, or to revise existing legislation or regulation? If so, please give a reference to any written material, whether official or press reports. Are there any other current developments or trends that should be noted?

As a result of financial aid allocated to Spain to boost recovery by means of the Next Generation EU plan, Royal Decree-Law 36/2020 of 30 December foresees a new type of Strategic Projects for Economic Recovery and Transformation (PERTE) entailing a public-private scheme formula that intends to have an impact in upcoming project finances, provided that the projects are strategic with a high capacity to drive economic growth, employment and competitiveness in the Spanish

economy. The creation of a register of entities interested in PERTEs is envisaged to articulate these strategic projects. Royal Decree-Law 36/2020 of 30 December is subject to further regulatory development.

Coronavirus

39 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Royal Decree-Law 8/2020 of 17 March and subsequent regulations created a line of public guarantees amounting to up to €100 billion for the benefit of entities or self-employed persons seeking financial relief on payments of salaries, invoices, working capital requirements or other liquidity needs, including those arising from maturities of financial obligations or taxes.

The line of public guarantees was managed and overseen by the Official Credit Institute in association with financial entities granting financial facilities. The line of public guarantees was divided into tranches covering from 60 to 80 per cent of the principal of the loan, depending on the tranche at hand and type of borrower (eg, self-employed persons, SMEs and large companies).

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