Loans & Secured Financing 2021

Contributing editors
George E Zobitz and Christopher J Kelly

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Loans & Secured Financing*, 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 new chapters on Canada, Finland, Poland and Turkey.

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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, George E Zobitz and Christopher J Kelly of Cravath, Swaine & Moore LLP, for their continued assistance with this volume.

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GENERAL FRAMEWORK

Jurisdictional pros and cons

1 What are the primary advantages and disadvantages in your jurisdiction of incurring indebtedness in the form of bank loans versus debt securities?

The Spanish bank loan market is very stable with experienced banks and borrowers. Spanish companies have, in general, been more prone to incur debt in the form of bank loans rather than debt securities. The number of companies in Spain with direct access to bank debt is much broader than the number of potential issuers of debt securities.

Traditionally, only large Spanish companies had either the interest or the resources to comply with the level of regulation required to access the debt capital markets. However, as a result of the establishment of the Alternative Fixed Income Market, created in 2013 as a debt market for small and medium-sized companies (SMEs), which had traditionally almost exclusively relied on the banking system, the number of SMEs issuing debt securities has significantly increased.

The primary advantages of bank loans versus debt securities are:

- there is a wide range of deal sizes (from small to large debt volumes);
- the terms of bank loans are more flexible and can be tailored to the specific needs of borrowers or projects;
- bank loans are not subject to market conditions and opportunity windows of the debt capital markets;
- they are not subject to prospectus, registration and listing requirements;
- information undertakings tend to be lower and are less costly and time-consuming than the reporting obligations when issuing debt securities;
- it is easier to request and obtain waivers or amendments, or even to restructure the transaction;
- the time frames to achieve closing of the transaction are shorter; and
- bank loans are subject to confidentiality requirements.

Notwithstanding the foregoing, for certain types of corporates, for instance, companies with investment grade rating (ie, rated BBB- or higher by Standard & Poor's or Baa3 or higher by Moody's), access to debt capital markets can be cheaper and more advantageous than incurring bank debt.

Forms

2 What are the most common forms of bank loan facilities? Discuss any other types of facilities commonly made available to the debtor in addition to, or as part of, the bank loan facilities.

The most common forms of bank loan facilities are term loans and credit facilities (either revolving – permitting the borrower to reborrow amounts already prepaid – or not).

Depending on the transaction, bank loan facilities often include different tranches (subordinated or not) or sub-facilities to meet the specific needs of the borrower. Those can include term loans, credit facilities and issuance of letters of credit (normally issued, upon request from the debtor, to specified beneficiaries by one or more issuing banks lenders under the facility), as well as ancillary banking products and services, such as factoring and confirming.

Investors

3 Describe the types of investors that participate in bank loan financings and the overlap with the investors that participate in debt securities financings.

Investors participating in bank loan financings are mainly regulated banks and credit institutions.

In recent years, new private debt funds and firms have developed direct lending activities in Spain. Private debt funds and firms initiated their lending activities in Spain, focusing mainly on lending to SMEs and providing specific real estate bridge financings. These private debt funds and firms analyse, underwrite, structure and manage financing solutions through a wide range of instruments, such as senior secured and mezzanine debt, bridge loans, profit participating loans, subordinated debt, unitranche debt, payment-in-kind loans for real estate developments, acquisitions, growth and shareholder reorganisations.

The offer of private debt by direct lending participants is complementary with that offered by banks. The number of bespoke loans made by direct lending participants and their specialisation is expected to keep growing over the coming years.

The investors that participate in debt securities financings are typically institutional and private investors.

4 How are the terms of a bank loan facility affected by the type of investors participating in such facility?

The terms of bank loan facilities granted in Spain depend on the type of investors participating in the facility and the purpose and specifics of each transaction. If the bank loan facility is granted by a Spanish bank on a bilateral basis, depending on the size and specifics of the transaction, the Spanish bank will either propose its standard documents or provide bespoke documents that, in addition to certain fairly standard market provisions, will contain the provisions to adequately mitigate any specific risks involved in the transaction. If the bank loan facility is granted on a syndicated basis, banks will opt for bespoke documents that will include standardised provisions similar to those that one would expect in other European jurisdictions, including Loan Market Association (LMA) standards (subject to the specifics in the jurisdiction) or even adopting the available Spanish LMA forms.

Depending on the composition of the banking syndicate (ie, if it is composed mainly by foreign banks), it is not unusual to negotiate facility agreements (not the security package) governed by the laws of a foreign jurisdiction (most often the laws of England and Wales).

Bridge facilities

5 Are bank loan facilities used as 'bridges' to permanent debt security financings? How do the structure and terms of bridge facilities deviate from those of a typical bank loan facility?

Short-term bank loan facilities have been extensively used as bridges in committed acquisition financings and also in the context of project finance.

In recent years, some bank loan facilities have also been used as bridges to permanent debt security financings. The structures and terms of the bridge facilities are aligned with bridge financings implemented in other European jurisdictions and, therefore, can comprise a revolving credit facility or a term loan with a short term and with margin step-up features to encourage the issuance of the permanent debt security financings.

Role of agents and trustees

6 What role do agents or trustees play in administering bank loan facilities with multiple investors?

Spanish bank loan facilities with multiple investors invariably opt for the appointment of a facility agent who acts on behalf of the syndicate lenders in the ordinary administration and managerial duties of the bank loan, such role being administrative in nature, and must at all times act on the instructions of the majority lenders.

The agent role is usually assumed by one of the syndicate members. Nevertheless, in recent years, some firms have emerged as professional providers of agency-related functions, including loan management, monitoring of covenants, payment management and back office-related functions, especially in the context of large debt refinancing and restructuring processes where heavy additional agency-related workload is expected.

The borrower assumes the obligation to pay the annual agency fee, and the rest of the lenders will assume the obligation to indemnify, on a pro rata basis, the facility agent for costs and losses suffered by it in performing its functions.

Although collateral agents can be used, Spanish civil law does not recognise the institution of trusts. Spanish banks prefer to be the direct beneficiaries of security packages (and undisputed secured creditors), even when there are several beneficiaries of a specific security for which enforcement would require adopting the relevant formal adoption of the agreement, holding the security granted in its own name and contractually assuming the obligation to share results of relevant enforcement actions with the rest of the syndicate's members, rather than appoint an entity to act as a collateral agent (such an alternative adds the insolvency of the collateral agent as risk layer).

Role of lenders

7 Describe the primary roles and typical fees of the financial institutions that arrange and syndicate bank loan facilities.

As in other European jurisdictions, the primary roles and typical fees of the financial institutions that arrange and syndicate bank loan facilities are:

- the arranger's fee, which is paid to the arranger as consideration for structuring the bank loan facilities (typically a percentage of the total commitments in respect of the bank loan facilities);
- the agency fee (usually determined as a fixed amount depending on the size of the transaction, the number of obligors, jurisdictions and members of the syndicate and the expected administrative workload), which the facility agent receives on an annual basis; and
- a commitment fee, which may be charged by each of the lenders on the undrawn or unused amount of the loan (representing a percentage on the respective commitments).

Other fees, such as prepayment, cancellation or waiver fees, are also agreed on a case-by-case basis.

In terms of documentation, fees can be set in the facilities agreement or documented in a separate fee letter (which is considered a financing document for the relevant purposes).

Governing law

8 In cross-border transactions or secured transactions involving guarantees or collateral from entities organised in multiple jurisdictions, which jurisdiction's laws govern the bank loan documentation?

Parties are free to negotiate and choose the law applicable to the bank loan documentation. When Spanish law is not used, English law is often agreed upon (especially in large cross-border transactions where the arrangers act from the United Kingdom or from other European jurisdictions). Spanish banks will tend to agree on the law applicable to the facilities agreement if there is a material connection from a solvency standpoint between the borrower and the relevant jurisdiction.

From a legal perspective, Spanish courts would recognise a foreign governing law in contracts in accordance with Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008, on the law applicable to contractual obligations (Rome I), and, therefore, it would be enforceable.

Furthermore, the security package granted, especially with regard to obligors' personal guarantees (other than the borrower), will tend to be governed by the laws of the jurisdiction of the relevant obligor, and other securities (such as mortgages or pledges) are subject to the *lex rei sitae* principle, which requires the application of Spanish common or regional law.

REGULATION

Capital and liquidity requirements

9 Describe how capital and liquidity requirements impact the structure of bank loan facilities, including the availability of related facilities.

Since Spain is a member of the European Union, capital and liquidity requirements (and limits to large exposures) are governed by the Capital Requirements Directive V (Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 (CRD V)) and the Capital Requirements Regulation II (Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending the Capital Requirements Regulation (CRR II)). On the matters that the CRR I left to national discretion, the Bank of Spain, by mid-2014, issued a supplementary regulation, which was completed in 2016 by means of Circular 2/2016 of 2 February.

On 27 June 2019, the CRD V, amending the CRD IV (in respect of exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures) and the CRR II (in respect of the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements) entered into force, although the CRR II provisions, subject to certain exceptions, will apply from 28 June 2021.

The prudential regulation of credit institutions aims to ensure that they operate with sufficient resources to be able to assume the risks that derive from their financial activity, thus contributing to the stability of the financial system. These solvency requirements are applicable to consolidated groups of Spanish credit institutions and to individual credit institutions of Spanish nationality that are not integrated into a consolidated group.

The Bank of Spain ensures that the resources and the liquidity maintained by the credit institutions guarantee a solid management of its risk. In addition, it collaborates with authorities entrusted with similar functions in other countries and may communicate information regarding the management, administration and ownership of these entities, in addition to factors that may influence the systemic risk posed by the entity because of its lack of control of solvency and liquidity. The Bank of Spain may require credit institutions to immediately adopt the necessary measures to adhere to liquidity and equity obligations or impose the obligation to have a minimum number of liquid assets to manage the potential outflows of funds derived from liabilities and commitments. Accordingly, depending on the risks arising from certain bank loan facilities, Spanish banks may be required to hold more capital to cover or mitigate risks by asking for satisfactory collateral.

When Spanish bank loan facilities are based on the forms published by the Loan Market Association, provisions of 'increased costs' allow lenders to demand borrowers to reimburse them for any additional costs incurred as a result of the implementation of capital requirements regulations. Borrowers may negotiate that those reimbursement obligations be subject to the relevant lender accrediting that the reimbursement is sought on a general basis from other borrowers in similar bank loan facilities.

Disclosure requirements

10 | For public company debtors, are there disclosure requirements applicable to bank loan facilities?

There are no specific mandatory disclosure requirements other than in connection with regular financial reporting obligations or in the context of a capital market transaction (securities prospectus) of the public company; if it enters into those bank loan facilities, or there is any substantial change of those or they are refinanced and the information may have an impact on the market value of the shares of the relevant public company, it will disclose the information to the market, in compliance with its general obligation to notify the market of any price-sensitive information.

Use of loan proceeds

11 | How is the use of bank loan proceeds by the debtor regulated? What liability could investors be exposed to if the debtor uses the proceeds contrary to regulations? Can investors mitigate their liability?

The use of bank loan proceeds is agreed and specified in the bank loan documentation. If a borrower uses the proceeds of financing for any purpose other than that set out in the bank loan documentation, this would result in an event of default, allowing the lenders to accelerate any outstanding loans and terminate unused commitments (and, if necessary, to enforce any available collateral).

In addition, banks and other regulated lenders have a duty to prevent money laundering and terrorist financing. Royal Decree 84/2015 of 13 February establishes that banks must set up adequate bodies and proceedings for internal control purposes to prevent and avoid any transaction that may trigger anti-money laundering provisions.

Spanish banks' common practice is to include specific language covering anti-corruption, anti-money laundering, prevention of terrorist financing, sanctions rules, and the relevant representations and obligations imposed on the borrowers.

Cross-border lending

12 | Are there regulations that limit an investor's ability to extend credit to debtors organised or operating in particular jurisdictions? What liability are investors exposed to if they lend to such debtors? Can the investors mitigate their liability?

The Spanish regulations on money laundering (Law 10/2010 of 28 April on the prevention on money laundering and terrorist financing, and Royal Decree 304/2014 of 5 May on the regulation on the prevention of money laundering and terrorist financing) establish enhanced due diligence measures for subject parties, especially with regard to business relationships and transactions with clients in countries, territories or jurisdictions deemed risky, or that involve transfers of funds from or to those countries. In those cases, the relevant parties will apply enhanced due diligence measures (including, in any case, on those countries for which the Financial Action Task Force (FATF) requires the application of enhanced due diligence measures). Obliged subjects will consider as risky jurisdictions countries, territories or jurisdictions:

- that do not have appropriate systems for the prevention of money laundering and terrorist financing;
- that are subject to sanctions, embargoes or similar measures adopted by the European Union, the United Nations or other international organisations;
- that are experiencing significant levels of corruption or other criminal activities;
- where the funding or support of terrorist activity is promoted;
- that are known to be significant offshore areas; and
- that are considered as tax havens.

To be able to identify these risky jurisdictions, the obliged subjects must resort to credible sources, such as the mutual evaluation reports of the FATF or FATF-style regional bodies or reports from other international organisations.

The Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (SEPBLAC) is the Spanish financial intelligence unit that controls the application of anti-money laundering and terrorist financing prevention rules in accordance with FATF standards (to which banks are subject). It holds supervisory capacity of its own and may exercise disciplinary powers in its field. In reference to liability, the offences can be classified as very serious, serious and minor.

An investor can adopt measures to mitigate its liability, including relevant due diligence and monitoring obligations, and, when applicable, informing the SEPBLAC of any fact or transaction, including the mere attempt in respect of which, after the special examination mentioned above, there is evidence or certainty of a money laundering or terrorist financing risk in the transaction. The obliged subjects should not execute any risky transaction, but in the event that abstention is not possible or may impede the investigation, they may execute the transaction and immediately thereafter notify the SEPBLAC.

Debtor's leverage profile

13 | Are there limitations on an investor's ability to extend credit to a debtor based on the debtor's leverage profile?

Limitations may apply to the investor's ability to extend credit to a debtor if it is a regulated entity subject to specific supervision requirements (analysis should be done on a case-by-case basis).

Law 22/2014 of 26 June, on the regulation, supervision and solvency of financial institutions, was amended by means of the Royal Decree-Law 22/2018, of 14 December, establishing macro-prudential tools. The Bank of Spain can require credit institutions to limit their exposure to certain sectors of economic activity if it deems that exposure may involve an element of systemic risk, as well as set limits and conditions on bank lending.

In addition, on 16 November 2017, the European Central Bank (ECB) guidance on leveraged transactions became applicable. The guidance seeks to facilitate the identification of leveraged transactions by means of an overarching definition encompassing all business units and geographical areas to give a bank's senior management a comprehensive overview of the bank's leveraged lending activities, and it outlines expectations regarding the risk management and reporting requirements for leveraged transactions. Although the guidance is non-binding, the supervisory expectations expressed in the guidance should be implemented in line with the size and risk profile of banks' leveraged transaction activities relative to their assets, earnings and capital, and although the ECB has announced that it will apply the principle of proportionality, the ECB will monitor leveraged lending activities and may ask selected banks to regularly report their exposures to leveraged transactions as well as the evolution and riskiness of these exposures.

Finally, lenders should also consider the remoteness of the borrower's insolvency since certain transactions and security interests may involve a clawback risk if they are concluded within the 'suspect period' determined by the court in the judgment declaring the insolvency of the borrower (usually two years before declaration of bankruptcy).

Interest rates

14 | Do regulations limit the rate of interest that can be charged on bank loans?

Yes. Although parties to a bank loan agreement are free to agree the rate of interest applicable to the loan, Spanish law provides a prohibition on usury (that will ultimately depend on the circumstances and analysis on a case-by-case basis, such as an interest rate deemed substantially higher than the usual money rate at that time, or a distressed debtor accepting a disproportionate interest rate). If usury is considered to have occurred in a bank loan, the agreement would be declared null and void, and the debtor should only be obliged to repay the principal amount of the loan (no interest will have to be paid).

In addition, Law 5/2019 of March 15, regulating real estate credit agreements and incorporating Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property into Spanish law, provides that in cases of loans or credit facilities concluded by individuals and backed by a mortgage on real estate properties for residential use:

- the applicable interest rate may not be altered to the detriment of the borrower during the term of the contract, except by mutual written agreement;
- in case of floating interest rate agreements, a downward limit to the floating interest rate cannot be set out;
- the default interest will be calculated, in any case, by adding three percentage points to the ordinary interest; and
- that the default interest may only be accrued on the principal due and payable, and may not be capitalised under any circumstances.

Currency restrictions

15 | What limitations are there on investors funding bank loans in a currency other than the local currency?

There are no material specific limitations on investors funding bank loans in a currency other than their local currency.

In respect of the European Systemic Risk Board's recommendation on lending in foreign currencies (ESRB/2011/1), which was issued proposing a series of measures to tackle the significant systemic risks that foreign currency lending could pose, the follow-up report (overall assessment) dated November 2013 and updated in May 2015 upgraded Spain's overall compliance level to fully compliant, which means that actions have been taken in the jurisdiction to fully implement the recommendation.

Notwithstanding, in the case of loans or credit facilities concluded by individuals and backed by a mortgage on real estate properties for residential use, Law 5/2019 provides that the borrower, when considered as a consumer, has a right to convert loans denominated in foreign currency to an alternative currency, which may be the currency in which the borrower earns the most income or has the most assets, or a currency of the member state in which the borrower was resident on the date the loan agreement was granted or at the time the borrower requested the conversion. Only borrowers who are not considered as consumers may agree on limiting the exchange rate risk to which they are exposed instead of the right to request conversion.

Other regulations

16 | Describe any other regulatory requirements that have an impact on the structuring or the availability of bank loan facilities.

Royal Decree 11/2020 of 31 March amended Law 19/2003 of 4 July. It requires foreign investors (ie, those coming from outside the European Union, Switzerland, Norway, Iceland or Liechtenstein) to obtain a prior administrative authorisation to undertake some investments greater than 10 per cent or that allow an exercise of control over companies within certain sensitive sectors. This regime is transitional in nature; once the worst effects of the covid-19 pandemic have been overcome, it should be removed, restoring the former liberalisation regime. While in force, banks will require evidence of the issuance of the administrative authorisation to grant lending facilities since investments undertaken without the relevant authorisation will be null and void.

Although there are no other general regulatory requirements that would have a general impact on the structuring or the availability of bank loan facilities, we would recommend confirming, on a case-by-case basis, the potential regulatory implications before structuring any transaction.

SECURITY INTERESTS AND GUARANTEES

Collateral and guarantee support

17 | Which entities in the organisational structure typically provide collateral and guarantee support for bank loan financings? Are there limitations on which entities in the organisational structure are permitted to provide such support?

Despite the fact that it depends on the modality of the bank loan and the particulars of the transaction at hand, under a bank loan financing, usually the borrower itself, the parent company (the borrower's shareholders) and the relevant subsidiaries provide collateral and guarantee support. In corporate financings, lenders usually require that certain operating companies of the group provide a personal guarantee securing the obligations assumed by the holding company (usually those companies representing a relevant percentage of the aggregate EBITDA of the borrower's group).

Notwithstanding, it is necessary to analyse the organisational structure of the borrower, the purposes of the financing being secured and the nature and amount of the guarantees provided (and the direct or indirect consideration received by each guarantor) on a case-by-case basis to confirm that the envisaged collateral and guarantee support do not contravene the financial assistance prohibition and the applicable corporate benefit and conflict of interest restrictions.

18 | What types of obligations typically share with the bank loan obligations in the collateral and guarantee support? If so, are all such obligations equally and ratably covered by the collateral and guarantee support?

Although it will ultimately depend on the transaction at hand, collateral and guarantee support granted in favour of the lenders to secure a borrower's obligations under bank loan financing are commonly shared and also secure the obligations assumed by the borrower in favour of the hedging providers. How the security package is finally structured will depend on the banks and hedging providers participating in the deal, although it is usually structured on a pari passu basis.

Commonly pledged assets

19 | Which categories of assets are commonly pledged to secure bank loan financings? Describe any limitations on the pledge of assets.

The most common assets that are pledged or mortgaged to secure bank loan financings are real estate assets and movable assets (including shares, credit rights, bank accounts, machinery and equipment).

Since Spanish law does not provide for floating charges (other than in respect of a particular type of mortgage over real estate), separate security for each available collateral complying with the relevant regulations concerning the creation, perfection, registration and enforcement of each collateral must be observed.

Creating a security interest

20 | Describe the method of creating or attaching a security interest on the main categories of assets.

With regard to real estate assets, a security interest can be taken in the form of a real estate mortgage and requires notarisation (which triggers stamp duty) and registration in the relevant land registry.

With regard to movable assets, the method of creating the security interest will depend on the type of assets and the security interest being created.

- Shares: to create an ordinary pledge over the shares of companies incorporated in Spain:
  - the registered owner of the shares must grant a public deed of pledge;
  - the interest of the secured party should be noted in a share certificate (if such certificates have been issued) or the share;
  - the pledge should be noted in the shareholder's registry book;
  - the pledge should be registered in the deeds of acquisition of the relevant pledged shares; and
  - notice to the entity in charge of the book-entry registry should be given, if applicable.
- Credit rights: if the security interest takes the form of a possessory pledge, notarisation and notice of the creation of the pledge to the debtor is required. If the security interest takes the form of a non-possessory pledge, notarisation and registration in the relevant chattel registry is required.
- Bank accounts: there are formal requirements as in case of a possessory pledge over credit rights, with notice being served to the depository bank.
- Machinery and equipment: depending on the specifics of the assets, security may be created in the form of a non-possessory pledge of machinery or a chattel mortgage on the machinery, requiring both notarisation and registration in the relevant chattel registry.

Perfecting a security interest

21 | What steps are necessary to perfect a security interest on the main categories of assets? What are the consequences of failing to perfect a security interest?

With regard to real estate assets, a security interest can be taken in the form of a real estate mortgage, which requires notarisation (it triggers stamp duty) and registration in the relevant land registry.

With regard to movable assets, the method of creating the security interest will depend on the type of assets and the security interest being created.

If a security interest has not been validly perfected, the relevant secured creditor will rank pari passu with the rest of the ordinary (or subordinated) creditors.

Future-acquired assets

22 | Can security interests extend to future-acquired assets? Can security interests secure future-incurred obligations?

Security may be granted over future assets, subject to the fulfilment of certain conditions, such as the assets being sufficiently determinable. Security interests can secure future-incurred obligations and will benefit from protection in insolvency scenarios, provided that:

- the future credits arise from perfected agreements or legal relations that existed prior to the declaration of insolvency; or
- the pledge is established in a public document (notarised) or, in the case of a non-possessory pledge, has been registered in the relevant chattel registry.

Maintenance

23 | Describe any maintenance requirements to avoid the automatic termination or expiration of security interests.

Security interests automatically terminate by operation of law once the secured obligations are discharged in full. In case of amendment or novation of the secured obligations, we recommend amending or ratifying the security, and confirming on a case-by-case basis that the ranking of the security has been maintained.

Release

24 | Are security interests on an asset automatically released following its sale by the debtor? If so, are the releases mandated by law or contract?

Security interests on an asset are not automatically released following its sale by the debtor (the beneficiary of the pledge or mortgage has to agree on the release). However, in certain bank loan financings, the disposal of certain assets can be permitted without the prior lender's consent, although sometimes it is linked to mandatory prepayments (and if pledged or mortgaged, the borrower will still need the cooperation of the lenders to release the security interest).

Non-fulfilment of guarantee obligations

25 | What defences does a guarantor have against claims for non-fulfilment of guarantee obligations? Can such defences be waived?

The available defences of a guarantor will vary depending on whether the guarantee is independent or an accessory guarantee. If the guarantee is an independent guarantee, the guarantor will only have very limited defences (mainly restricted to abuse of law). If the guarantee is accessory in nature, the guarantor will be able to invoke all defences and objections of the main debtor from the underlying relationship and other benefits that the Spanish law foresees. However, the guarantor usually requests that these defences be waived. In the event of amendments to the underlying secured obligations, we recommend obtaining confirmation from the relevant guarantors.

Parallel debt requirements

26 Describe any parallel debt or similar requirements applicable in a secured bank loan financing where an agent acts for multiple investors.

The use of parallel debt in Spanish deals is uncommon, and there has been no court precedent confirming its validity (we deem it unlikely) and enforceability. Further, its registration may be complicated due to the registrar's lack of familiarity with the concept.

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; in cross-border transactions, in respect of the Spanish security package, usually a security agent is appointed who needs to receive powers of attorney from each relevant lender to coordinate enforcement of the security granted in favour of the lenders.

Enforcement

27 What are the most common methods of enforcing security interests? What are the limitations on enforcement?

In general, (other than in relation to financial collateral arrangements regulated by Royal Decree Law 5/2005 of 11 March, on urgent reforms to encourage, among other things, productivity and improve public procurement, as well as the possibility to enforce some pledges over credit rights by set-off), secured parties are not entitled to appropriate mortgaged or pledged assets or disposal of any collateral as they deem fit, and, therefore, secured parties will need to initiate enforcement of the security and use the proceeds obtained from the sale of the collateral in a public auction or certain other proceedings.

The most common methods of enforcing security interests are declaratory and executive proceedings (with the supervision of a court) or notarial proceedings (with the supervision of a Spanish notary public). If after the second auction there is no bidder willing to acquire the asset, the secured creditors will be able to acquire control of the asset, subject to the full discharge of the debtor's obligations. In the case of real estate mortgages, the security can be enforced by means of the mortgage enforcement proceedings foreseen in the Civil Procedure Law and if the secured parties agreed in the establishment of the mortgage and have fulfilled certain formal provisions, alternatively pursuant to notary proceedings.

Fraudulent conveyance and similar doctrines

28 Describe the impact of fraudulent conveyance, financial assistance, thin capitalisation, corporate benefit and similar doctrines on the structure of bank loan financings.

Fraudulent conveyance

Law 22/2003 of 9 July on insolvency (the Insolvency Law) and Royal Legislative Decree 1/2020 of 5 May approving the consolidated text of the Insolvency Law that will come into force on 1 September 2020 provide for a clawback action with a look-back period of two years preceding the declaration of insolvency. In case of actual fraud, pursuant to article 1299 of the Civil Code, the look-back period to bring a fraudulent conveyance action intended to rescind the contract or payment is four years. In accordance with article 1294 of the Civil Code, the action for rescission is subsidiary and cannot be exercised if there are other available recovery mechanisms.

Financial assistance

Financial assistance is generally prohibited under Spanish law, and breaching the prohibition could entail nullity of the transaction in which the financial assistance was provided and liability on directors. The prohibition covers funds being provided (either by way of loans, guarantees or any other kind of financial support before or after the acquisition) by a target company to third parties to allow the third parties to be able to acquire shares or quota shares issued by the target company or by any other company in the group of companies to which the target belongs (the scope of the prohibition depends on the corporate form of the company; therefore, this must be carefully analysed on a case-by-case basis).

Thin capitalisation

Thin capitalisation rules no longer apply; however, there are some restrictions on the deductibility of interest expenses.

Corporate benefit

Spanish law does not provide for a specific obligation to justify the granting of security interests or guarantees based on corporate benefit. That notwithstanding, directors of Spanish companies have a general duty to comply with the applicable laws in the best interests of the company, and in accordance with article 71(2) of the Insolvency Act, guarantees granted by a Spanish subsidiary in favour of its parent company may be challenged if no consideration is provided to the subsidiary.

Corporate benefit is especially relevant with regard to contextual guarantees (those granted to secure group financings), where the structure of the group, the nature and amount of the guarantees provided and the purposes of financing a consideration or benefits for the relevant guarantor must be carefully analysed on a case-by-case basis.

INTERCREDITOR MATTERS

Payment and lien subordination arrangements

29 What types of payment or lien subordination arrangements, or both, are common where the debtor has obligations owing to more than one class of creditors?

Subordination in bank loan transactions is typically effected by the use of structural and contractual subordination. The security package is typically structured in such a way that reflects the priority and ranking of the different class of creditors. Contractual subordination is generally achieved through the use of an intercreditor or subordination agreement. Intercreditor agreements do not bind the insolvency administrator and will only affect creditors that have executed or have adhered to the intercreditor agreement.

Creditor groups

30 What creditor groups are typically included as parties to the intercreditor agreement? Are all creditor groups treated the same under the intercreditor agreement?

In the case of bank loan financing, the creditor groups that are included as parties to the intercreditor agreement depend on the specifics of the transaction. Typically, we would expect all levels of lenders (senior, mezzanine and junior lenders, including, if any, intra-group lenders and shareholders if shareholder loans are granted) and other creditors, such as hedging counterparties. In the case of structured transactions where bank debt coexists with debt securities, representatives and the security agent (or trustee) of the bondholders are also expected to be party to the intercreditor agreement.

Although intercreditor arrangements usually replicate international standards, the ultimate treatment awarded to each creditor group (including voting rights, claims decisions, ability to enforce and standstill periods) will depend on the debt structure and the outcome of the negotiation between creditors.

Rights of junior creditors

31 Are junior creditors typically stayed from enforcing remedies until senior creditors have been repaid? What enforcement rights do junior creditors have prior to the repayment of senior debt?

Intercreditor agreements usually foresee that junior creditors should refrain from accelerating (or at least accelerate only under certain conditions) or taking enforcement action unless senior liabilities have been repaid, unless prior consent of senior creditors is obtained or, in case of insolvency, of the debtor. In the event that senior creditors decide to take enforcement actions, junior creditors will normally be able to take equivalent action. Intercreditor agreements can provide for a standstill period to allow the different types of creditors to assess alternatives to enforcement, such as a debt restructuring.

32 What rights do junior creditors have during a bankruptcy or insolvency proceeding involving the debtor?

In the case of an insolvency proceeding involving the debtor, the insolvency administrator will act in accordance with the Insolvency Act and will not be affected by the terms of the intercreditor agreement entered into by the creditors. In the context of an insolvency proceeding affecting a Spanish company, creditors are divided into two categories: bankruptcy creditors (whose claims will be classified as privileged, ordinary and subordinated) and creditors against the insolvency estate. Depending on how junior creditors are classified during the insolvency proceeding involving the debtor, the insolvency administrator will satisfy the claims of creditors as set forth in the Insolvency Act.

Since the internal relationship of the creditors is governed by the intercreditor agreement, junior creditors will release and receive any amounts received from the insolvency administrator in accordance with the terms and conditions agreed in the intercreditor agreement.

Pari passu creditors

33 How do the terms of the intercreditor arrangement change if creditor groups will be secured on a pari passu basis?

If creditor groups are secured on a pari passu basis, the intercreditor arrangement will not provide for priority payment regimes, priority of claims or enforcement rights for specific creditors. Notwithstanding, in structures where senior secured bank debt and debt securities coexist, the parties will emphasise the negotiation of the instructing group that is linked to required thresholds for enforcement actions (to avoid one type of creditors – either bondholders or bank lenders – having full control).

LOAN DOCUMENT TERMS

Standard forms and documentation

34 What forms or standardised terms are commonly used to prepare the bank loan documentation?

The terms of bank loan facilities granted in Spain depend on the type of investors participating in the facility. If a Spanish bank grants the bank loan facility on a bilateral basis, depending on the size and specifics of the transaction, the Spanish bank will propose its standard transaction documents. If the bank loan facility is granted on a syndicated basis, banks will adopt transaction documents that include standardised provisions following similar terms to those that one would expect in other European jurisdictions (subject to the specifics in the jurisdiction) including following the Loan Market Association (LMA) standards (or even adopting the available Spanish LMA forms).

In the case of renewals of existing financings, parties tend to use the previous documentation agreed by the parties as a starting point for negotiations.

Pricing and interest rate structures

35 What are the customary pricing or interest rate structures for bank loans? Do the pricing or interest rate structures change if the bank loan is denominated in a currency other than the domestic currency?

In the Spanish bank loan market, both fixed rate and floating rate structures are seen, although it is more frequent to see floating rates using Euribor as the standard benchmark. In the event that the facility includes tranches denominated in currencies other than euros, the relevant benchmark rate is adjusted. The margin can be determined for the entire term of the facility, or, alternatively, it may vary in accordance with a ratchet according to pre-agreed criteria, such as leverage or the rating of the borrower.

36 Have any procedures been adopted in bank loan documentation in your jurisdiction to replace LIBOR as a benchmark interest rate for loans?

In Spain, most bank loans are denominated in euros, and the benchmark interest rate most widely used is Euribor, the rate at which euro interbank term deposits are being offered by one prime bank to another within the Economic and Monetary Union zone. It is calculated at 11am (CET) for spot value (T+2).

Certain facilities provide for tranches denominated in US dollars and pound sterling, and those tranches incorporate LIBOR as the benchmark interest rate.

Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No. 596/2014 introduces a regime for benchmark index providers to ensure the accuracy and integrity of benchmarks across the European Union. This was completed by the Commission Delegated Regulation (EU) 2018/1637 of 13 July 2018.

Aligned with the trend that was initiated by the LMA at the end of 2014 with the introduction of the 'replacement of screen rate' clause, in Spain, bank loan documents provide fallbacks in case the relevant interest rate benchmark or its relevant tenor is discontinued or not available, without the need to amend the relevant clauses in the facilities agreement.

Other loan yield determinants

37 What other bank loan yield determinants are commonly used?

The most commonly used bank loan yield determinants are performance measurements, such as the borrower's leverage ratio or the rating (usually of the borrower although it could also be the rating of the loan).

In addition, zero floors for Euribor (as well as LIBOR) were first introduced in Spain in 2012 and are now usual practice in bank loan transactions. Accordingly, if the agreed benchmark is negative, it is deemed to be zero for the purposes of determining the interest rate applicable during the relevant interest period (preventing the negative benchmark eroding the lender's margin).

In Spain, pricing floors could be considered abusive; therefore, they must meet certain transparency requirements and must be negotiated on an individual basis. In cases of loans or credit facilities concluded by individuals and backed by a mortgage on real estate properties for residential use, pursuant to Law 5/2019 of 15 March regulating real estate credit agreements in floating interest rate agreements, a downward limit to the floating interest rate cannot be set out.

Yield protection provisions

38 Describe any yield protection provisions typically included in the bank loan documentation.

In addition to zero floors, and aligned with international standards, yield protection provisions typically included in Spanish bank loan documentation are break and prepayment cost provisions, tax gross-up and tax indemnity provisions. Increased costs provisions are agreed in certain transactions, although these are frequently resisted by borrowers.

Accordion provisions and side-car financings

39 Do bank loan agreements typically allow additional debt that is secured on a pari passu basis with the senior secured bank loans?

Bank loan agreements do not typically allow additional debt secured on a pari passu basis with senior secured bank loans. If there is certain additional or contingent debt, normally the loan agreement will provide for a specific revolving credit facility to cover those financial needs. Normally, other than certain permitted indebtedness (which is not material in the overall size of the transaction), additional debt is restricted by financial covenants and the granting of security to third parties is also restricted. If parties agree the possibility of incurring additional debt, we would expect parties to agree on a cap and set the terms and conditions of the security that can be granted to secure the additional debt.

Financial maintenance covenants

40 What types of financial maintenance covenants are commonly included in bank loan documentation, and how are such covenants calculated?

Financial maintenance covenants are commonly included in Spanish bank loan documentation. Depending on the type and purpose of the financing and the borrower's business and credit profile, parties agree on the specific covenants of the transaction (which, for investment grade companies, are less restrictive). Aligned with other European jurisdictions, the most common maintenance covenants used are:

- leverage ratio (total net debt to EBITDA);
- interest coverage ratio: EBITDA to interest expenses);
- debt service coverage ratio (net operating income to debt service); and
- annual limitations on Capex.

Some transactions also include a maintenance covenant regarding the cash flow coverage ratio and tests on net assets. Depending on the transaction, the covenants are calculated quarterly, semi-annually or on an annual basis, and the borrower will typically provide the agent with a written certificate. Coverage levels are usually set at acceptable levels of underperformance of the agreed base case. In many deals, the leverage covenant will progressively reduce pursuant to an agreed schedule.

Breaches of the financial maintenance covenants can be cured by equity capital contributions, although normally how those amounts are applied and the number of times the equity cure right can be exercised during the term of the bank loan are negotiated on a case-by-case basis.

Other covenants

41 Describe any other covenants restricting the operation of the debtor's business commonly included in the bank loan documentation.

Restrictive covenants are commonly included in Spanish bank loan documentation, although the scope of the relevant restrictions (and specific carve-outs) are negotiated on a transaction basis and tailored to the specifics of the financing.

Covenants restricting the operation of the debtor's business commonly included in Spanish bank loans are:

- restrictions on disposal of assets;
- restrictions on corporate transactions (merger and acquisitions, changes to the nature of business or entering into new businesses and joint ventures);
- restrictions on additional financial indebtedness;
- negative pledges; and
- restrictions on payments of dividends and capital reductions.

Mandatory prepayment

42 What types of events typically trigger mandatory prepayment requirements? May the debtor reinvest asset sale or casualty event proceeds in its business in lieu of prepaying the bank loans? Describe other common exceptions to the mandatory prepayment requirements.

The events that trigger mandatory prepayment obligations are negotiated on a transaction basis. Notwithstanding, most common triggering events include:

- change of control;
- disposal of assets;
- insurance proceeds;
- receipt of payments under warranties or price adjustments in share purchase agreements;
- excess cash flow; and
- illegality (ie, if it becomes unlawful for a lender to perform its obligations under the bank loan in its jurisdiction).

Parties usually negotiate the possibility of the borrower reinvesting proceeds arising from asset disposals or insurance proceeds subject to predefined reinvestment periods.

Debtor's indemnification and expense reimbursement

43 Describe generally the debtor's indemnification and expense reimbursement obligations, referencing any common exceptions to these obligations.

A borrower will usually provide indemnities and cost reimbursement to the lenders participating in the bank loan, as well as to the agent bank and the security agent. Costs indemnities cover finance parties' transaction costs and expenses and costs incurred by the lenders in connection with any amendments made to transaction documents and those related to claims and enforcement action. Tax and currency indemnities are also included in certain transactions.

UPDATE AND TRENDS

Key developments

44 Are there any current developments or emerging trends that should be noted?

A number of Spanish companies have been affected by the economic impact resulting from the covid-19 pandemic.

Royal Decree-Law 8/2020 of 17 March on urgent and extraordinary measures to confront the economic and social impact of the covid-19 pandemic provides a line of public guarantees on loans granted by financial institutions to Spanish companies and self-employed persons affected by the economic impact of the covid-19 pandemic to ensure liquidity and access to financing for a maximum amount of €100 billion. This maximum amount is divided in tranches. The line of guarantees is managed by the Official Credit Institute, a state-owned bank, in collaboration with financial institutions and covers:

- 80 per cent of the loan principal for new loans and refinancing granted in favour of small and medium-sized enterprises (SMEs) and the self-employed persons;
- 70 per cent of the loan principal for new loans granted in favour of large enterprises; and
- 60 per cent of the loan principal in cases of refinancing of large enterprises.

The determination of the loans eligible to be guaranteed is based on the borrower and the type of loan and lenders, as well as the amount and the maturity of the loan.

The line of guarantees has dynamised the financing sector during the covid-19 pandemic, and it has helped several SME and self-employed persons to try to overcome the financial strain resulting from the economic disruption.

In addition, Royal Decree-Law 16/2020 of 28 April on procedural and organisational measures for the administration of justice after covid-19 provides urgent insolvency measures to tackle further economic difficulties that may arise.

However, some businesses may not be able to overcome the negative impacts of the covid-19 pandemic, and it is reasonable to expect an increase in the number of insolvency proceedings. The year 2021 may be an active year in debt restructurings and distressed transactions.

CASES & LACAMBRA

Toni Barios
toni.barios@caseslacambra.com

Esteban Cuyás
esteban.cuyas@caseslacambra.com

Paseo de la Castellana 8
28046 Madrid
Spain
Tel: +34 91 061 24 50

Avenida Pau Casals 22
08021 Barcelona
Spain
Tel: +34 93 611 92 32

www.caseslacambra.com

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