

# Finance and restructuring



Second quarter 2021

July 2021

## CASES AND TRANSACTIONS

- > OHL: Restructuring
- > STANDARD PROFIL: First issuance of high-yield bonds
- > ATRESMEDIA: Refinancing and conversion to sustainable finance
- > ELSAMEX: Court-approved MBO by direct sale
- > BANCO CETELEM: Incorporation of “Autonoria Spain 2021, Fondo de Titulización”

## LEGISLATION

- > COVID-19. Key aspects for companies, financial institutions and funds
- > Sustainable finance: new EU initiatives

## CASE LAW

- > Clawback of payment made in performance of a contract subject to the law of a Member State other than the State of the opening of proceedings
- > Price deferral is an act with a purpose similar to that of loans
- > Termination of guarantees owing to closely related party and deposit
- > Lapse of the term to exercise the right to settle disputed debts
- > Requirements and consequences of being categorized as an accomplice in culpable insolvency
- > Subordination of claims and conditions precedent

## ADMINISTRATIVE DOCTRINE

- > Agreement on direct sale proceedings



## CASES AND TRANSACTIONS

### OHL: Restructuring

Cuatrecasas advised the *ad hoc* group of bondholders on the multijurisdictional restructuring of the debt and on OHL group's corporate structure.

The transaction involved refinancing a series of bond issues amounting to approximately €488,000,000 and a series of bank financings for approximately €447,000,000, as well as certain capital increases of the parent company of approximately €72,000,000. All were aimed at putting, one of the of the world's leading construction companies in a stronger financial position and securing its long-term viability.

To secure the refinancing transaction, OHL and the subsidiaries of its group have pledged the shares of some of the group's subsidiaries operating in Spain, as well as the credit rights resulting from intragroup loans, infrastructure construction agreements, and a number of bank accounts located in Spain, Colombia, Peru and Chile. Also, the company and the creditors have requested court approval of the restructuring plan. The restructuring transaction will also entail a corporate reorganization by means of a hive down of a substantial portion of the group's business.

A global team of Cuatrecasas lawyers has been involved in the transaction, covering five jurisdictions in which the firm operates (Spain, Mexico, Colombia, Peru and Chile). The Cuatrecasas team included over 30 lawyers from our offices in London, Madrid, Barcelona, Mexico City, Bogotá, Lima and Santiago.

### STANDARD PROFIL: First issuance of high-yield bonds

Cuatrecasas advised Standard Profil Automotive and its subsidiaries in Spain and Mexico on its debut issue, offer and placement of senior secured notes for a maximum of €275 million due in 2026.

A crossborder team including lawyers from Cuatrecasas and Mayer Brown advised the leading European manufacturer of automotive sealing systems.

The complexity of the transaction lay in the large number of jurisdictions affected (Bulgaria, Germany, Luxembourg, Mexico, Spain, Turkey, and the United States) and law firms involved. A pre-existing bank loan and its guarantees in different jurisdictions had to be canceled before the issuance. All of the work had to be done under tight deadlines.

### ATRESMEDIA: Refinancing and conversion to sustainable finance

Cuatrecasas has advised the Atresmedia Group on refinancing and converting its €250-million syndicated corporate loan to sustainable finance. This was the first sustainable finance transaction by a communications group in Spain and one of the first of the sector in Europe.

CaixaBank acted as the sustainability coordinator together with BBVA and Banco Santander, and also as agent, which involves administrative and accounts tasks, and validating the pre-set sustainability targets.

This syndicated financing is aligned with the Sustainability Linked Loan Principles (2019) and is linked to the performance of two social and one environmental indicator. In particular, Atresmedia linked the margin on the loan to the development of three indicators that will be reviewed annually: (i) advertising spaces granted for free to non-profit entities, (ii) accessibility to television content through subtitling, and rating in the climate change report by the Carbon Disclosure Project (CDP), and (iii) a world reference in performance measurement and disclosure in the fight against corporate global warming.



## ELSAMEX: Court-approved MBO by direct sale

Cuatrecasas, together with investment bank Houlihan Lokey, has advised the syndicate of financial institutions on restructuring Elsamex, a comprehensive services company related to infrastructures, operating in Spain, Portugal, and several countries in Latin America, Asia, the Middle East and Africa.

The restructuring was carried out as a management buyout (MBO) which was approved by the court as a direct sale. Cuatrecasas designed the structure of the transaction involving the purchase of the maintenance company's production unit, whereby the financial institutions backed the offer put forward by an SPV controlled by Elsamex's management team as a defensive strategy to maximize their credits.

This transaction allowed the maintenance company to become successfully segregated, providing it with a new sustainable financial structure and protecting it from certain contingencies, including a sanctioning proceeding by the Spanish Markets and Competition Commission (CNMC).

The agreement boosted the recovery of Spanish bank credits, which had no in rem guarantees.

We highlight the speed with which the proceedings were carried out. Moreover, this is a highly innovative transaction in Spain owing to many of the technical issues involved. It is worth noting that the SPV paid the acquisition price in full by assuming the debt, thus maximizing the purchase price and, therefore, the recovery of credits. Also, the production unit's aggregate assets and liabilities included tax credits deriving from negative tax bases on corporate income tax.

From a labor perspective, the binding offer of the SPV made up of the management team included the transfer of existing employment contracts, which received the backing of the employees' representatives and justified the request for a direct sale.

The production unit was transferred in a single step to avoid the risk of termination of contracts subject to public sector regulations. The SPV received classification for works and services contracts with the authorities.

## BANCO CETELEM: Incorporation of "Autonoría Spain 2021, Fondo de Titulización"

Cuatrecasas advised BNP Paribas Group (lead manager and sole arranger) and Banco Cetelem, S.A.U. (originator) on incorporating an asset-backed securities fund called "AUTONORIA SPAIN 2021, FONDO DE TITULIZACIÓN," whose underlying assets are made up of loans to individuals and legal entities to acquire new, used and recreational vehicles, for the amount of €1 billion, and which were admitted to trading on the Spanish Fixed Income Market AIAF. All of the bonds issued by the fund have been placed among qualified investors.

The fund was incorporated under the EU Prospectus Regulation and the EU Securitisation Regulation. Also, the securitization has been labeled "simple, transparent and standardised" in accordance with the EU Securitisation Regulation and the UK Securitisation Regulation. The interest rate swaps (French ISDA) and a first demand guarantee were subject to French law.

Banco Cetelem, S.A.U. is a credit institution supervised by the Bank of Spain, fully owned by BNP Paribas Personal Finance, which is a fully owned subsidiary of BNP Paribas, S.A., specializing in personal loans and consumer credit.

## LEGISLATION

### COVID-19: Key aspects for companies, financial institutions and funds

Since March 2020, we have been reporting on the main legal developments affecting companies regarding the measures approved as a result of



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

[COVID-19: Key aspects for companies, financial institutions and funds](#)

Exceptional measures have continued to be adopted in recent months, among which we highlight the following:

- > **Foreign investment.** RDL 12/2021 has extended until December 31, 2021 (previously until June 30, 2021), the requirement to seek prior authorization of foreign direct investments (involving the acquisition of at least 10% of the capital or controlling interest) in Spanish companies (whether listed or unlisted if the value of the investment exceeds €500 million) operating in specific strategic sectors if those investments are made by investors resident in countries outside the European Union and the European Free Trade Association.
- > **ICO-backed debt refinancing.** The Council of Ministers resolutions of May 11, 2021, have approved a set of measures, implemented under Royal Decree-Laws 34/2020 and 5/2021, enabling the renegotiation of financing with a public guarantee and approving a Code of Best Practices, which financial institutions can adhere to voluntarily. For further details on these measures, see our legal flash on "[New developments regarding ICO-backed debt refinancing.](#)"
- > **Company recapitalization fund** managed by the Spanish Development Finance Institution (COFIDES) for medium-sized enterprises, the functioning and requirements of which were established by the Resolution of the Council of Ministers of June 15, 2021.
- > **New restrictions on dividend distribution.** RDL 11/2021 (extending ERTE until September 30, 2021) maintains the restrictions on dividend distribution for companies that have benefited from an exemption on contributions within the framework of an ERTE. Previous regulations

also imposed restrictions or banned dividend distribution (e.g., in the case of companies benefiting from refinancing mechanisms for ICO-backed loans under RDL 5/2021), making it advisable to ensure no restrictions apply before distributing dividends.

## Sustainable finance: new EU initiatives

On July 6, 2021, the European Commission adopted the following measures:

- > A new Sustainable Finance Strategy.
- > A Delegated Act that (i) specifies the content and presentation of information to be disclosed by non-financial companies, asset managers, credit institutions, investment firms, and insurance and reinsurance companies, as provided under Article 8 of the EU Taxonomy (2020/852/EU); and (ii) sets out common rules for key performance indicators.
- > The European Green Bond Standard proposal, creating a voluntary standard available to all issuers (private and sovereign EU and non-EU issuers) to demonstrate that a debt instrument may qualify as a green bond. This will help reduce the risk of projects adopting the practice of greenwashing or social washing to make them seem more environmentally sound or socially conscious than they really are. Issuers of green bonds will have a tool at their disposal to show they are funding green projects aligned with the EU Taxonomy and investors buying the bonds will be able to more easily assess, compare and trust that their investments are sustainable.

In the coming days we will publish a legal flash analyzing the key aspects of these three initiatives. Click the following link to read the press release published by the European Commission and related documents:

[Strategy for financing the transition to a sustainable economy](#)





## CASE LAW

### Clawback of payment made in performance of a contract subject to the law of a Member State other than the State of the opening of proceedings

In the case *Oeltrans Befrachtungsgesellschaft* (ruling of April 22, case C-73/20), the CJEU concluded a request for a preliminary ruling lodged by the German Federal Court of Justice involving a clawback action of a third party payment made by company that later became insolvent. According to the Court's ruling, the payment made by a third party in performance of a contracting party's contractual payment obligation will be governed by the law applicable to contractual obligations (Rome I), even in cases where the paying party is subject to insolvency proceedings under another law and the payment is challenged in those proceedings.

In this specific case, a company resident in Germany (*Oeltrans*) paid a sum through another company belonging to its group under an agreement governed by Netherlands law concluded between the latter and a company resident in the Netherlands. In the subsequent German insolvency proceedings of *Oeltrans*, the insolvency administrator challenged the payment on the grounds that it was detrimental to all the creditors.

While the payment could be challenged under German law (*lex concursus*), it could not under Netherlands law (the law governing the agreement). Although the payment was made by a third party that was not part of the agreement, the CJEU concluded that the law governing the agreement also governs the performance of the obligations arising from the agreement by a party or third party, even after opening insolvency proceedings.

The CJEU also based its arguments on article 12.1.b) of the [Rome I Regulation](#), under which the law applicable to an agreement governs the performance of the obligations arising from it. Therefore, if a third party fulfills a contractual

payment obligation, this will be governed by the law applicable to the agreement from which that obligation arises.

### Price deferral is an act with a purpose similar to that of loans

In judgment no. 422/2021, of June 22 (ECLI:ES:TS:2021:2366), the Supreme Court analyzes the insolvency classification that should be attributed to the deferred payment agreed in a real estate purchase agreement executed by the insolvent company and one of its shareholders owning 30.6% of the company's share capital. The insolvency administration had included this credit in the list of creditors as a subordinated loan on the grounds that the creditor was a person closely related to the insolvent company, also assuming that because the debt arose from an act with a purpose similar to that of a loan, it did not fall within the exception provided under article 92.5 of the repealed Spanish Insolvency Act (currently article 281.2.3 of the consolidated text of the Spanish Insolvency Act).

The Supreme Court underlines that the exception to subordination set out under that provision encompasses agreements that, owing to their legal nature and business purpose being directly and specifically intended for financing (e.g., credit, discount, leasing) and agreements that serve the same financial purpose indirectly. Therefore, it is necessary ascertain whether the price deferral of the purchase fulfills that purpose.

In the case at hand, the high percentage of the deferred price, the long term granted to repay the price, and the acknowledgment of debt established after the expiry of the payment period set out in the agreement that led to refinancing (payment was not demanded on expiry) provide sufficient reasons, in the Supreme Court's opinion, to uphold the financial purpose of the financing of the deferral under consideration and, therefore, to classify the credit as subordinated given that it derives from an act with a purpose similar to that of a loan.



### Termination of guarantees owing to closely related party and deposit

Supreme Court judgment no. 363/2021, of May 26, 2021, (ECLI:ES:TS:2021:2128) examines whether the expiry of the mortgage guarantee entailing the mortgage creditor being considered a person closely related to the insolvent party would release the guarantor that personally guarantees that obligation as provided under article 1852 of the Spanish Civil Code. In this sense, the judgment acknowledges that this loss of guarantees significantly changes the legal situation of the guarantors, who not only become more liable with regard to creditors, but also lose subrogation rights with respect to the expired guarantee.

However, it considers that the fact determining the creditor's subrogation and the loss of its guarantees already existed at the time the guarantors gave their consent to the financing, given that they were already aware that the corporate link between the debtor and creditor could lead to the latter being considered a person closely related to the former.

Therefore, there was no later act of the creditor that sought to prevent the guarantors from being subrogated in the mortgage.

Finally, the Supreme Court states that the fact that the main debtor is undergoing insolvency and the creditor cannot demand payment of the credit from any other party does not detract from the guarantee's accessory and subsidiary nature. Therefore, the creditor can approach the guarantors given that it holds a due and payable credit that has been claimed from the main debtor through its notification and acknowledgment in the insolvency proceedings.

### Lapse of the term to exercise the right to settle disputed debts

In judgment no. 277/2021, of May 10, 2021, the Supreme Court has ruled on the nature of the expiry of the nine-day deadline to exercise the right to settle disputed debts that have been assigned under

article 1535 of the Spanish Civil Code (ECLI:ES:TS:2021:1700).

The Supreme Court dismissed the appeal by the debtor, whose mortgage loan had been granted by the Company Managing the Assets derived from the Banking Restructuring (SAREB), on the grounds that the action to settle the disputed debt had expired, without analyzing this right in depth.

In this case, the request to exercise the right to settle the disputed debt was made after the nine-day deadline, which was not interrupted or suspended through a notary deed granted within the term expressing the debtor's intention of exercising the right to settle it and issuing the checks with which it cover the price paid by the assignee, along with the expenses and interest; an intention that the assignee rejected within that nine-day term.

Likewise, the term was not interrupted in which the debtor and its two guarantors were able to submit a statement before the court processing the mortgage enforcement proceedings, stating their intention of exercising their right, the response to which was a measure of organization, pointing out that the right had to be exercised before the competent court and through the correct proceedings based on the appropriate claim.

### Requirements and consequences of being categorized as an accomplice in culpable insolvency

We refer to the Madrid Court of Appeals judgment no. 151/2021, of April 16 (ECLI:ES:APM:2021:4601). The court ratifies the first instance court judgment categorizing as culpable the insolvency of a real estate business, and considering as an accomplice the bank acting as counterparty to the insolvent company. As a result of this judgment, the bank has lost all rights as creditor of the insolvent company.

In this case, a company purchased a plot and reached an agreement with the seller to increase the price on the basis of a future reclassification of the real estate. The company applied for a loan



from a bank to pay for the plot, taking out a mortgage on the real estate in favor of the bank. It used part of the loan to pay for the real estate and it deposited the rest in the bank as a pledge for that potential price increase.

It was proved that the bank authorized the company to use those funds for the early repayment of the mortgage loan granted in favor of the company, being fully aware that the amount deposited was to be reserved to pay the additional price of the real estate, as the company had no other assets to fulfill its commitments. A year and a half after the bank had made the amount available and used it for the early repayment of the loan, the company was declared insolvent.

The company petitioned for insolvency proceedings and the first instance court qualified the insolvency as culpable on the grounds of the company's fraudulent removal of assets (as provided under article 164.2.5 of the Insolvency Act, currently article 443.2). The bank was declared an accomplice to the insolvency, losing all rights as creditor of the insolvent company. The Court of Appeals confirmed this categorization.

### Pledgee's exercise of rights over pledged shares: risk of subordination

Judgment no. 238/2021 of the Madrid Court of Appeals (sect. 28), of June 11, 2021, examines the possibility of subordination of the credit of a financial institution that had exercised the voting rights granted to it by the pledge of shares of the insolvent company awarded to secure the credit.

The pledge set out a requirement to assert those rights, whereby the creditor was obliged to notify its intention to exercise them. In this case, the notification was made after the declaration of insolvency.

The court of appeals considers that any potential control over the debtor only occurs when the creditor is able to exercise that control. However, this situation does not arise when exercising control depends on an event it has no power over. This case

therefore presents a situation of hypothetical control as it does not fulfill the condition precedent indicated above. Thus, as the creditor notified its intention to exercise its voting rights in the insolvent company after the credit was generated, it cannot be subordinated.

## ADMINISTRATIVE DOCTRINE

### Agreement on direct sale proceedings

The Resolution of the General Directorate of Legal Certainty and Public Registration, of March 15, 2021 (Official Gazette of the Spanish State published April 28, 2021), allows the agreement on direct sale proceedings, agreed as a purchase option over the mortgaged real estate, and which the creditor can exercise when the debtor defaults on at least three monthly payments of the loan secured by the mortgage.

This resolution considers that the procedure established in the purchase option deed to exercise this option is aligned with the parameters defined by scholars, case law and Spanish law (taking as an example RDL 5/2005), to accept the validity of the forfeiture agreement: (i) the fulfillment of the object offered as a guarantee is carried out having objectively set the value of the asset, and (ii) this does not result in an unfair situation of equity imbalance for the debtor.

This criterion also strengthens the fact that the deed foresees notarial involvement at several stages of the procedure agreed to carry out the purchase option, resulting in an additional guarantee owing to the generic obligation imposed on the notary to monitor the legality of the acts and business being authorized. It also makes it possible to prove the correct settlement of the debt, the exercise of the option and a fair valuation of the asset.

It also positively values the fact that the purchase option deed takes into account the potential rights of affected third parties, providing for the deposit with the notary of any remainder, which will be used, if applicable, for settling those debts.



---

For additional information, please contact  
Cuatrecasas.

©2021 CUATRECASAS

All rights reserved.

This document is a compilation of legal information prepared by Cuatrecasas. The information and comments in it do not constitute legal advice.

Cuatrecasas owns the intellectual property rights over this document. Any reproduction, distribution, assignment, or any other full or partial use of this document is prohibited, unless with the consent of Cuatrecasas.



IS 713573