Loans & Secured Financing

Contributing editor
George E Zobitz

2018

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Loans & Secured Financing 2018

Contributing editor

George E Zobitz

Cravath, Swaine & Moore LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2015
Third edition
ISSN 2059-5476

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Spain

Toni Barios

Cases & Lacambra

Loans and secured financings

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

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

Traditionally only large Spanish companies have had either the interest and/or resources to comply with the level of regulation required to access debt capital markets. However as a result of the establishment of the Alternative Fixed Income Market, created in 2013 as an alternative debt market for small and medium-sized companies (SMEs), which have 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:

- the wide range of deal size (from small to large debt volumes);
- the terms of bank loans are more flexible and can be tailored to the specific needs of the 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, note that for certain types of corporates, for instance, companies with an investment grade rating (BBB- or higher), access to debt capital markets can be cheaper and more advantageous than incurring bank debt.

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 subfacilities to meet the specific needs of the borrower and 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), and ancillary banking products and services such as factoring and confirming.

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 players (mainly alternative investment funds) have initiated direct lending activities to Spanish borrowers. Notwithstanding, the offer of direct lending participants (currently focused on SMEs) is complementary in nature with the bank loan financings. An increase in the size of the amounts financed by direct lending participants and their specialisation is expected 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 such facility. 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 propose its standard transaction documents. If the bank loan facility is granted on a syndicated basis, banks will adopt transaction documents that will 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 Loan Market Assocation (LMA) standards (or even adopt 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).

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 our jurisdiction 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 those bridge financings implemented in other European jurisdictions, and therefore can consist of 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.

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

Spanish civil law does not recognise the institution of the trust, so it will not be possible to establish a trust in Spain.

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 of the bank loan, such role being administrative in nature, and shall at all times act on the instructions of the majority lenders.

The 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.

Note that 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 in our jurisdiction (as such they will hold the security granted in their own name and on behalf of the other syndicate members), Spanish banks do prefer to be direct beneficiaries of the security package (and undisputed secured creditors), despite the fact that enforcement will require the adoption of the relevant formal adoption of the agreement to do so.

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 will be 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 facility agent will receive on an annual basis 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); and
- a commitment fee can also be charged by each of the lenders on the undrawn or unutilised amount of the loan (representing a percentage on the respective commitments).

Other fees (such as prepayment, cancellation or waiver fees) can also be agreed on a case-by-case basis.

Fees can be set in the facilities agreement or documented in a separate fee letter (that will be considered for the relevant purposes as a financing document).

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 (specially in large cross-border transactions where the arrangers act from the United Kindgom or other from different 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 as per Regulation (EC) No. 593/2208 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. Notwithstanding, note that aside from the facilities agreement, certain bank loan documentation linked to 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 subjected to the lex rei sitae principle, which requires the application of Spanish common or regional law.

Regulation

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 EU, capital and liquidity requirements (and limits to large exposures) are governed by the Capital Requirements Directive IV (CRD IV) and the Capital Requirements Regulation (CRR). On the matters that the CRR 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, of the Bank of Spain.

The prudential regulation of credit institutions aims to ensure that they operate with sufficient own 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 their lack of control of solvency and liquidity. The Bank of Spain might 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 LMA, provisions of 'increased costs' allow lenders to demand borrowers to reimburse them for any additional costs incurred as a result of the implementation of Basel III and CRD IV. Borrowers may negotiate that such reimbursement obligation be subject to the relevant lender accrediting that such reimbursement is sought on a general basis from other borrowers in similar bank loan facilities.

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

No, 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, provided, however, that if they enter into such bank loan facilities, or there is any substantial change of the same or they are refinanced and such information may have an impact on the market value of the shares of the relevant public company, it should disclose such information to the market, in compliance with its general obligation to notify the market of any price-sensitive information.

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. Banks and other regulated lenders have a duty to prevent money laundering and terrorism financing. Spanish Royal Decree 84/2015 of 13 February establishes that banks shall set up adequate bodies and proceedings for internal control purposes in order to prevent and avoid any transaction that may trigger anti-money laundering provisions.

In recent years, Spanish banks have increasingly started to include specific language covering anti-corruption, anti-money laundering, counter-terrorist financing and sanctions rules and the relevant representations and obligations imposed on the borrowers, and nowadays this is common practice.

If a borrower uses the proceeds of the 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).

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 transfer of funds from or to such countries, where they will apply enhanced due diligence measures (including, in any case, 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 money laundering and terrorist financing;
- countries, territories or jurisdictions subject to sanctions, embargoes or similar measures adopted by the European Union, the United Nations or other international organisations;
- countries, territories or jurisdictions experiencing significant levels of corruption or other criminal activities;
- countries, territories or jurisdictions where the funding or support of terrorist activity is promoted;
- countries, territories or jurisdictions known to be significant offshore areas; and
- countries, territories or jurisdictions that are considered tax havens.

To be able to identify these risky jurisdictions, the obliged subjects shall 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 money laundering or terrorism financing risk involved 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, the obliged subjects may execute the transaction and thereafter immediately notify the SEPBLAC.

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 borrower'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). 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 (two years before declaration of bankruptcy).

In May 2017 the European Central Bank (ECB) published its guidance on leveraged transactions, which seeks to facilitate the identification of leveraged transactions by means of an overarching definition encompassing all business units and geographical areas, so as to give a bank's senior management a comprehensive overview of the bank's leveraged lending activities, and outlines expectations regarding the risk management and reporting requirements for leveraged transactions. The supervisory expectations expressed in the ECB 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.

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 occured 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). There is no legal limit for interest rates on bank loans.

In addition, pursuant to Law 1/2013 of 14 May on Measures to Protect Mortgagees, Debt Restructuring and Social Rents, for mortgages over primary residences and only if the purpose of the credit was to finance the acquisition of said primary home, the default interest rate is limited to three times the applicable legal interest rate, and can only accrue over the principal, not over capitalised, interests.

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 the local currency.

In respect of the European Systemic Risk Board (ESRB) Recommendation on lending in foreign currencies (ESRB/2011/1) that 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 (FC), which means that actions have been taken in the jurisdiction to fully implement the recommendation.

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

There are no other relevant regulatory requirements that would have a general impact on the structuring or the availability of bank loan facilities.

Security interests and guarantees

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 and relevant subsidiaries provide collateral and guarantee support. Often, the holding company's corporate purpose is the mere holding of shares in the group's operating companies. Thus, the only assets of the holding company are its shareholdings and its only income dividend distributions agreed by the investee companies. Once the holding company has signed the syndicated financing contract, it usually distributes the funds to the operating companies through intra-group loans, often in the form of participatory loans. On the other hand, in order to prevent risks arising from structural subordination, financial parties usually require that certain operating companies of the group provide a personal guarantee securing the obligations assumed by the holding company.

In relation to limitations, see question 28 for Spanish law 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 in order to secure a borrower's obligations under the bank loan financing are commonly shared and do 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.

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 moveable 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 shall be observed.

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, which requires notarisation and registration in the relevant land registry.

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

- Shares: in order to create an ordinary pledge over the shares of companies incorporated in Spain, the registered owner of the shares has to 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, if applicable, notice to the entity in charge of the book-entry registry should be given.
- 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 will be 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 (i) a non-possessory pledge of machinery or (ii) a chattel mortgage on the machinery, requiring both notarisation and registration in the relevant chattel registry.

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?

The steps necessary to perfect a security interest on the main categories of assets are described in question 20.

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

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

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 would recommend to amend and/or ratify the security and confirm on a case-by-case basis that the ranking of the security is maintained.

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 such 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).

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. Usually, however, these defences are requested to be waived. In the event of amendments to the underlying secured obligations, we would recommend obtaining confirmation from the relevant guarantors.

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 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 in order to coordinate enforcement of the security granted in favour of the lenders.

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 others, productivity and improve public procurement and some pledges over credit rights can be enforced by set-off), secured parties are not entitled to appropriate the mortgaged or pledged asset or dispose 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 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 Spanish Civil Procedure Law and if the secured parties agreed so in the establishment of the mortgage and fulfilled certain formal provisions, alternatively pursuant to notary proceedings.

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

Spanish Law 22/2003 on Insolvency (the Spanish Insolvency Act) provides for a clawback action with a reach-back period of two years preceding the declaration of insolvency. In case of actual fraud, pursuant to article 1299 of the Spanish Civil Code the reach-back period to bring a fraudulent conveyance action (*actio pauliana*) intended to rescind the contract or payment is four years. Note that, in accordance with article 1294 of the Spanish 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 in order to allow such

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 and therefore this needs to 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. Notwithstanding, note that directors of Spanish companies have a general duty to comply with the applicable laws in the best interests of the company and that in accordance with article 71.2 of the Spanish Insolvency Act, guarantees granted by a Spanish subsidiary in favour of its parent company might be challenged if no consideration is provided to such 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 the financing a consideration or benefits for the relevant guarantor need to be carefully analysed on a case-by-case basis.

Intercreditor matters

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. Note that intercreditor agreements do not bind the insolvency administrator and will only have effects between creditors that have executed or have adhered to the intercreditor agreement.

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 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, standstill periods, etc) will depend on the debt structure and the outcome of the negotiation between 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 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 Spanish 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 Spanish 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.

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 (in order to avoid one type of creditors – either bondholders or bank lenders – having full control).

Loan document terms

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

As set out in question 4, the terms of bank loan facilities granted in Spain depend on the type of investors participating in such facility. 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 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 LMA standards (or even adopt the Spanish LMA available forms).

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

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 rate using Euribor as the standard benchmark. In the event the facility includes tranches denominated in currencies other than the euro, the relevant benchmark rate is adjusted. The margin can be determined for the entire term of the facility or alternatively may vary in accordance with a ratchet according to pre-agreed criteria such as leverage or rating of the borrower.

36 What other bank loan yield determinants are commonly used?

Zero floors for Euribor (and also LIBOR) were initially introduced in Spain back 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 margin).

Note that in Spain pricing floors could be considered to be abusive, and therefore they must meet certain transparency requirements and need to be negotiated on an individual basis.

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

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 are frequently resisted by borrowers.

38 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 such 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 such additional debt.

39 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 such amounts are applied and the number of times that the equity cure right can be exercised during the entire term of the bank loan are negotiated on a case-by-case basis.

40 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 the Spanish bank loan documentation, although the scope of the relevant restrictions (and specific carveouts) are negotiated on a transaction-basis and tailored to the specifics of the financing.

Most common 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 (M&A, 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.

41 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, when included, illegality (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.

42 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, and also to the agent bank and to 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.

Cases & Lacambra

Toni Barios **toni.barios@caseslacambra.com**

Avenida Pau Casals 22
08021 Barcelona
Spain

Tel: +34 93 611 92 32
www.caseslacambra.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

Law Business Research

Loans & Secured Financing
ISSN 2059-5476

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law